REVISITING JURY INSTRUCTIONS ON RACIAL PREJUDICE TOWARDS INDIGENOUS PEOPLES IN CANADIAN CRIMINAL TRIALS

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This article examines the Supreme Court of Canada's assumptions in Barton and Chouhan on racial bias in Canadian criminal jury trials. Jury research offers important insights related to the differential impact of jury instructions for racialized and Indigenous persons, and for accused and victims. If jurors cannot understand jury instructions, or if jury instructions, or victim or defendant race, do not predict sentencing or conviction outcomes, then we might have little confidence in reducing anti-Indigenous prejudice through jury instructions. Worse yet, if jury instructions prime, rather than suppress, prejudicial reasoning, then we may want to entirely rethink the use of specialized instructions for this purpose; our reforms might instead focus on jury diversification. I argue that the Canadian jury research casts doubt on the Supreme Court of Canada's jurisprudence on a juror's capacity to control racial bias against Indigenous persons in criminal trials.

Cet article porte sur les présomptions appliquées par la Cour suprême du Canada dans les arrêts Barton et Chouhan concernant les préjugés raciaux présents dans les procès criminels avec jury. La recherche sur les jurés nous donne beaucoup d'information sur les répercussions différentes qu'ont les directives au jury sur les personnes autochtones ou racialisées ainsi que sur les accusés et les victimes. Si les jurés ne comprennent pas ces directives, ou encore si ces directives ou la race de la victime ou du défendeur ne permettent pas de prédire le prononcé de la sentence ou la déclaration de culpabilité, alors il n'y a guère matière à espérer combattre les préjugés anti-autochtones par les directives au jury. Pire encore, si ces directives favorisent le raisonnement préjudiciable au lieu de le supprimer alors il y aurait lieu de repenser complètement le recours aux directives spécialisées à cette fin; nos réformes pourraient plutôt être axées sur la diversification des jurys. L'auteur est d'avis que la recherche sur les jurés au Canada jette le doute sur la jurisprudence de la Cour suprême concernant la capacité des jurés de contrôler leurs préjugés raciaux à l'encontre des Autochtones lors d'un procès criminel.

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1. Introduction[1]

In *R v Barton* and *R v Chouhan*, the Supreme Court of Canada questioned the adequacy of the Canadian Judicial Council's (CJC) standard instructions (2019) on prejudice and sympathy.[2] The CJC's standard preliminary jury instruction (2019) cautions jurors to "[k]eep an open mind as the evidence is being presented" and to "not be influenced by sympathy for or prejudice against anyone."[3] In slightly more detail, the CJC's final instruction (2019) states that a juror must: "[…] consider the evidence and make your decision on a rational and fair consideration of all the evidence, and not on passion, or sympathy, or prejudice against the accused, the Crown, or anyone else connected with the case. In addition, you must not be influenced by public opinion. Your duty as jurors is to assess the evidence impartially."[4] Neither of these instructions contained cautions related to racial prejudice or bias.

Barton and *Chouhan* mark the Court's turn towards addressing the effect of racial bias on juror deliberations in criminal trials and, more broadly, on the criminal trial process. In *Barton*, a majority of the Supreme Court of Canada recommended specialized jury instructions in sexual assault trials involving Indigenous women or girls. Unlike standard jury instructions on "prejudice and sympathy," these instructions would address colonialism, systemic racism, and stereotypes about Indigenous

1 The idea for this paper arose out of conversations that I had with Eleanor Sunchild, the lawyer for Debbie Baptiste and the Boushie/Baptiste family. I am grateful to Eleanor for her time and interest in this project. I would also like to thank Evelyn Maeder, Susan Yamamoto, Jeffery Hewitt, Sari Graben, Benjamin Hognestad, and two anonymous reviewers for their comments on earlier drafts of this paper.

2 2019 SCC 33 [*Barton* SCC]; 2021 SCC 26 [*Chouhan*].

3 Canadian Judicial Council's National Committee on Jury Instructions, "Model Jury Instructions" (2019), s 3.6(1), online: *National Judicial Institute* <www.nji-inm.ca> [perma.cc/S9J3-WS32].

4 *Ibid*, s 8.3.

women who perform sex work. In *Chouhan*, a majority of the Court affirmed the need to tailor jury instructions to reduce racial bias, prejudice and stereotyping against Indigenous and racialized persons. However, in both *Barton* and *Chouhan*, the Court placed its faith in jurors to apply the law without racial prejudice when instructed to do so.

This article examines the Court's assumptions about juror reasoning in light of the Canadian jury research on racial bias against Indigenous persons. In *Barton,* the Court did not receive any evidence on whether references to Indigenous peoples' race or gender at trial predicts different conviction or sentencing outcomes or how best to revise jury instructions to reduce or eliminate racial or gender bias against Indigenous persons in Canadian criminal trials. In *Chouhan,* two interveners submitted two articles in jury research, neither of which addressed jury instructions.[5] Jury research offers important insights related to the differential impact of jury instructions for racialized and Indigenous persons, and for accused and victims.

In the first part of this article, I comment on the cases of *Barton* and, to a lesser extent, *Chouhan*, drawing attention to the appellate courts' discussion of jury instructions and racial bias. I challenge the Supreme Court of Canada's trust in the common sense of ordinary jurors, the weight it places on tradition and precedent, and its belief that jury research threatens to invalidate or undermine the criminal law. In the second part, I argue for the relevance of jury research in discussions related to jury instruction reform. Here, I respond to the argument that jury research is methodologically limited and inconclusive. In the third part, I consider whether specialized jury instructions might reduce, eliminate, or prime racial bias against Indigenous persons in Canadian criminal trials. To answer this question, I first identify the persistence of anti-Indigenous prejudice in Canadian society and in the legal system and review the jury research on racial bias, which supports the proposition that some jurors reason according to Indigenous peoples' race in criminal jury trials. I then consider whether jury instructions or references to Indigenous peoples' race at trial may either prime or suppress prejudicial reasoning. Here, I note that the effectiveness of jury instructions depends on whether such instructions motivate some jurors to suppress anti-Indigenous prejudice. Finally, I consider whether jurors even understand standard instructions at all.

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5 *Chouhan*, *supra* note 2 (Factum of the Intervener the David Asper Centre for Constitutional Rights at paras 3, 6, 28; Factum of the Intervener the British Columbia Civil Liberties Association at paras 10, 16).

If jurors cannot understand jury instructions, or if victim or defendant race and specialized instructions do not predict sentencing or conviction outcomes, then we might have little confidence in reducing anti-Indigenous prejudice through jury instructions. Worse yet, if specialized instructions prime, rather than suppress, prejudicial reasoning, then we may want to entirely rethink the use of specialized instructions for this purpose; our reforms might instead focus on jury diversification. Although I express considerable doubt on whether this is achievable through jury instructions, I offer these reflections from a stance of pragmatism. A second article extends this research to consider how jury instructions may be revised to best reduce racial bias in criminal jury trials involving Indigenous victims and defendants.

I argue that the Canadian jury research casts doubt on the Supreme Court of Canada's jurisprudence on a juror's capacity to control racial bias against Indigenous persons in criminal trials. Canadian jury research, for example, suggests that jury instructions on racial bias might paradoxically prime racial prejudice against Indigenous persons in criminal jury trials, rather than motivate jurors to suppress prejudicial reasoning. This research challenges the doctrinal foundations—and the empirical assumptions underlying that foundation—of the Supreme Court of Canada's jurisprudence on juror and jury reasoning and racial bias. It challenges the Court's repeated declaration of faith in the common sense of jurors and the ability for jurors to control racial bias when simply instructed to do so. This research also cautions us against interventions that make race salient at trial for Indigenous victims or defendants, such as jury instructions or challenges.

I use the language of anti-Indigenous prejudice to describe bias, prejudice, stereotyping and racism against Indigenous people, except where the empirical research uses a specific term. Anti-Indigenous prejudice may manifest as beliefs, such as stereotypes, behaviours, such as discrimination, or emotions or attitudes, such as disgust or fear.[6] What we might call "prejudice" is vast and contextual; its content depends on situational and interpersonal context, including dynamics related to social, political, or legal power.[7] Bias, in its empirical sense, refers to the tendency

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[6] Arthur S Reber, Rhiannon Allen & Emily S Reber, *The Penguin Dictionary of Psychology*, 4th ed (London, UK: Penguin Books, 2009) at 773. I refer to the Penguin dictionary definitions because they are accessible to lawyers and judges who are not trained in social psychology.

[7] Katherine J Reynolds, S Alexander Haslam & John C Turner, "Prejudice, Social Identity and Social Change: Resolving the Prejudice Problematic" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge, UK: Cambridge University Press, 2012) 48 at 62.

for one thing or another to be preferred. Mainstream conversations about bias and prejudice often centre around implicit compared to explicit bias, or unintentional or subconscious compared to intentional or conscious, prejudice.[8] Whether someone intends to be "biased" (or is self-aware of their bias) or not is interesting because it might suggest different sorts of interventions.[9] But for the purposes of trial fairness, effect matters more. So, I use "prejudice" in an inclusive sense. It is also important to note that the focus of this article and of most of the empirical literature discussed in it is on the *racialization* of Indigenous peoples.[10] *Indigeneity*, Indigenous peoples' understanding of themselves as *Indigenous*, is distinct from the racialization of Indigenous persons within Canadian society. Although this distinction does not appear often in the literature on racial bias, this distinction is important and is discussed in the third part of this article.

The *Barton* case engages the intersection of race and gender. However, I focus on race-related bias for four reasons. First, I am interested in the application of this research to cases involving Indigenous persons of either gender. The treatment of Cindy Gladue by counsel was coloured by misogyny but it was also grounded in processes of racialization. Second, gender-related bias may be addressed through specialized instructions that do not consider Indigenous women and girls' racialization. For example, the Court of Appeal of Alberta in *Barton* appeared to be concerned first and foremost with gender-related bias, owing to its focus on the admission of prior sexual activity evidence in sexual assault trials. Third, gender and race are separate variables in empirical jury research. There is a greater volume of literature addressing the effects of Indigenous peoples' race, rather than gender, on the criminal trial process. Insights drawn from defendant or victim gender, particularly in the American context, may not adequately reflect the experiences of either Indigenous men or women in Canadian criminal trials. Thus, while noting the importance of an intersectional account of gender and race, I focus on the empirical

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8 For a critique of the implicit bias approach, see Jonathan Kahn, *Race on the Brain: What Implicit Bias Gets Wrong About the Struggle for Racial Justice* (New York: Columbia University Press, 2017); for a collection of essays challenging the focus on individual-focused interventions, see John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge, UK: Cambridge University Press, 2012).

9 For example, certain models based on motivation to control prejudice vary in effectiveness depending on the type of prejudice held by the participant, see Patrick S Forscher et al, "Breaking the Prejudice Habit: Mechanisms, Timecourse, and Longevity" (2017) 72 J Experimental Soc Psychology 133.

10 Michael Omi & Howard Winant, *Racial Formation in the United States: from the 1960s to the 1990s*, 2nd ed (New York: Routledge, 1994) at 55–56; Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) at 149–200.

research on defendant and victim race. Finally, a focus on race reflects the motivation for this article. The idea for this article originated in the context of the trial of Gerald Stanley in the killing of Colten Boushie and through discussions with Eleanore Sunchild, the lawyer for Boushie's family. Since the Crown did not appeal Gerald Stanley's acquittal, there was no appellate commentary on the adequacy of the jury instructions in that case. The appellate courts' discussions of jury instructions in *Barton* and *Chouhan*, however, offer an opportunity to evaluate the Court's reasons for reform in this area.

As this article is anchored in *Barton,* I focus solely on jury instructions as an intervention for reducing or eliminating anti-Indigenous prejudice in criminal trials. Specialized jury instructions are a pre- and post-trial intervention for reducing or eliminating bias in the trial process. Other interventions can be distinguished based on whether they are deployed before, during or after trial. Jury selection is a pre-trial intervention that has received significant and recent legislative and judicial attention.[11] Pre-trial interventions also include publication and media bans, and judicial training. During trial, judicial interventions may arise when counsel make impermissible arguments. Although I focus on jury instructions, some of the literature I review may also be applicable to other interventions. My focus, however, is on jury instructions.

This article has two audiences. The first audience is criminal law scholars, legal counsel, courts, and justice-level actors, including the Canadian Judicial Council. For these audiences, the purpose of the article is to synthesize the empirical research on jury instructions related to racial bias against Indigenous persons in criminal jury trials in conversation with the Supreme Court of Canada's doctrine on juror reasoning. Thus, this article sustains a doctrinal critique of the Supreme Court of Canada's jurisprudence on jury instructions and racial bias that is supported by the empirical scholarship. After all, the Supreme Court of Canada's jurisprudence on juror reasoning is based, in part, on certain assumptions about human behaviour. The sort of contribution I am making can be located within the scholarship on Critical Race Theory and Legal Realism.[12] As an interdisciplinary contribution, this article also intends to widen the awareness of criminal law scholars to the literature on law and psychology, inform the submissions of legal counsel—both Crown and defence—in cases where racial bias may be at issue in criminal jury trials by providing a synthesis of the empirical literature, inform the Court's

[11] The constitutionality of Parliament's abolition of peremptory challenges and the adequacy of challenges for cause for ensuring jury impartiality and representativeness was the core issue in *Chouhan, supra* note 2.

[12] Gregory Parks, Shayne Edward Jones & W Jonathan Cardi, eds, *Critical Race Realism: Intersections of Psychology, Race and the Law* (New York: New Press, 2008).

consideration of the empirical evidence submitted by legal counsel (or on its own accord), and inform the activities of the Canadian Judicial Council in its reform of the standard jury instructions on racial prejudice in light of the empirical research and the Supreme Court of Canada's directions in *Barton* and *Chouhan*.

Social psychologists who study racial bias against Indigenous persons in criminal jury trials are a second audience for this article. Social psychologists may benefit from a greater awareness of the Supreme Court of Canada's doctrinal justifications for jury instructions and the instrumental purposes to which psychologists research may be put. The doctrinal and procedural context of the criminal law is important for experimental design and the interpretation and application of research. Thus, this article has a clear interdisciplinary purpose, which is to engage these audiences in conversation and generate a discussion for the reconsideration of judicial doctrine or future reform efforts—efforts that will necessarily require further empirical investigation.

Although I describe racial prejudice and discrimination towards Indigenous peoples, my intent is not to advance a damage-centred narrative.[13] Rather, I would like to draw attention to how non-Indigenous peoples' racial stereotypes, prejudices, and discriminatory behaviours in the justice system are damaging to Indigenous peoples. I have restricted my description of the facts in *Barton* to the proximate cause of Gladue's death because it is necessary for understanding the Court's disagreement on Barton's murder charge. I hope that this reduces the amount of potentially traumatic material for readers who are interested primarily in my analysis of the appellate courts' reasons on jury instructions in *Barton*. However, where necessary to describe the effects of racial bias at trial, I have included the language used by the courts, counsel, and accused. I should note that this article does not contribute directly to the literature on the dehumanization of, and violence towards, Indigenous women and girls, though it is my intention to support that discussion.[14]

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[13] See Eve Tuck, "Suspending Damage: A Letter to Communities" (2009) 79:3 Harvard Education Rev 409.

[14] For a description of historical cases of sexual assault of Indigenous women, see the Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Vancouver: Privy Council Office, 2019) at 255–258, online (pdf): <publications.gc.ca> [perma.cc/H7Q2-8NBX]. See also Sherene H Razack, "Gendering Disposability" (2016) 28:2 CJWL 285; Josephine L Savarese, "Challenging Colonial Norms and Attending to Presencing in Stories of Missing and Murdered Indigenous Women" (2017) 29:1 CJWL 157.

Finally, it is important to note that the CJC has since revised its preliminary and opening jury instructions to include a general instruction on anti-bias. As far as I am aware, [t]hese general anti-bias instructions have not been empirically tested. However, some insights into the CJC's general anti-bias instruction can be drawn from the empirical literature on unconscious bias interventions, more generally. Unconscious bias interventions include models such as Patricia Devine's "Breaking the Prejudice Habit" or the cognitive interventions suggested by Daniel Kahneman.[15] For example, the CJC's preliminary general anti-bias instruction instructs jurors that

> [2] We all have beliefs and assumptions that affect our perception of the world. These perceptions can create a bias for or against others based on their personal characteristics [such as gender, race, ethnicity, sexual orientation, or employment status]. We may be aware of some of these biases, but unaware of others.
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> [3] No matter how unbiased we think we are, we look at others and filter what they say through the lens of our own personal background and experiences. Unconscious biases may be based on stereotypes or feelings that one has about a particular group, namely, traits that one associates with that group.[16] All human beings experience unconscious biases, but these biases can be overcome through self-reflection and introspection.

The CJC's emphasis on self-reflection and introspection is consistent with Devine's "Breaking the Prejudice Habit" model and interventions that intend to reduce bias through increasing a decision-maker's conscious awareness of unconscious bias processes and with the majority's reasons in *Chouhan*.

This article does not assess the CJC's revised (2021) instructions against either the court's directions in *Barton* or *Chouhan* or against the current literature on unconscious bias interventions. Rather, this article problematizes the Supreme Court of Canada's assertion that jurors can be instructed to set aside racial bias when instructed to do so. For this purpose, it is sufficient to consider the empirical literature on the effects of race in juror decision-making with and without the standard instructions on prejudice and sympathy. The second part of this study will empirically investigate the effectiveness of the CJC's general instructions on racial bias and the Supreme Court of Canada's recommended specialized instructions on racial prejudice against Indigenous persons for the reduction of racial

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[15] Patricia G Devine et al, "Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention" (2012) 48:6 J Experimental Soc Psychology 1267; Daniel Kahneman, *Thinking, Fast and Slow* (London, UK: Penguin Books, 2012).

[16] See *Chouhan*, *supra* note 2 at para 53 citing A Roberts, "(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias" (2012) 44 Conn L Rev 827 at 833.

bias in criminal jury trials involving Indigenous victims and defendants. In the meantime, this article is intended to initiate a critical reflection of some of the common law assumptions regarding juror reasoning in light of the existing empirical literature.

2. Jury Instructions and Anti-Indigenous Prejudice in *R v Barton*

Barton raises important questions about the effectiveness of post-jury selection interventions for reducing or eliminating anti-Indigenous prejudice in the criminal trial process. Although the Supreme Court of Canada recommended revisions to the standard jury instructions in sexual assault trials, the Court split in its characterisation of prejudice as intentional or unintentional and of the effect of this prejudice in Barton's trial. Despite the Court's internal disagreement on the nature of prejudice, however, the Court appears unified in the faith it places in jurors to reason according to common sense and without racial bias when instructed to do so. This faith is founded, in part, on assumptions about human behaviour. Thus, this case, alongside *Chouhan*, invites us to interrogate our understanding of the nature of anti-Indigenous prejudice as individual or systemic, intentional or unintentional, and of the assumptions we hold about juror reasoning, particularly our understanding of a juror's "common sense" and of their ability to understand and follow instructions. Most importantly, these cases ask us to consider whether there is an empirical basis for assuming that jurors are able to set aside racial prejudice when instructed to do so.

The *Barton* case concerned the killing of Cindy Gladue by Bradley Barton. Cindy Gladue was an Indigenous woman and mother of three children with connections to Nehiyaw and Métis communities in Treaty 8 and 6 territories. She was thirty-six years old when she died on June 21, 2011 from a perforation more than 11 centimeters in length in her vaginal wall. Barton, a long-haul mover, admitted to having sex with Gladue before her death. At his first trial, a jury acquitted Barton of both murder and the included charge of manslaughter. The Crown appealed Barton's acquittal on both charges on grounds related to the trial judge's instruction to the jury and his failure to hold a *voir dire* on the admissibility of Gladue's prior sexual conduct.[17]

The Court of Appeal of Alberta held that the trial judge erred in his instructions to the jury and in his failure to conduct an admissibility hearing on the prior sexual conduct evidence. Taking note of the jury instruction, the Court commented that Barton's trial had "exposed the flaws in the legal

17 *R v Barton*, 2017 ABCA 216 at para 45 [*Barton* ABCA].

infrastructure used for instructing juries on sexual offences in Canada."[18] According to the Court, the trial judge's instructions on after-the-fact conduct, motive, the improper use of prior sexual conduct evidence, the meaning of "consent" and "sexual activity" in law, and the requirements for manslaughter "negatively compromised the jury's ability to properly assess the evidence and apply the law correctly."[19] Not only did the trial judge fail to properly instruct the jury, the Court reasoned, but his caution on "prejudice and sympathy" was "inadequate to counter the stigma and potential bias and prejudice" that was introduced through counsel and the court's repeated references to Gladue's race, gender and occupation.[20] The Court emphasized that trial judges have an obligation to counteract the impermissible effects of racial and gender prejudice.[21] In response, the Court recommended revisions to the standard jury instructions that would bring those instructions in line with Parliament's intention with respect to the law of sexual assault and consent.[22]

On further appeal, a majority of the Supreme Court of Canada recognized the need to counter anti-Indigenous prejudice in the criminal trial process, in part through jury instructions, noting that "[t]rials do not take place in a historical, cultural, or social vacuum."[23] The majority noted that the Court has long recognized the persistence of anti-indigenous prejudice in the legal system. Earlier, in *Williams*, the Court went so far as to recognize that "there is evidence that … widespread racism [against Aboriginal peoples] has translated into systemic discrimination in the criminal justice system."[24] Similarly, in *Ewert*, the Court acknowledged that "discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice systems".[25] In *Gladue* and *Ipeelee*, the Court drew a connection between the effects.[26] In *Barton,* the majority extended this recognition to the fact that Indigenous women and girls "have endured serious injustices, including high rates of sexual violence."[27]

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18 *Ibid* at para 7.

19 *Ibid* at para 6.

20 *Ibid* at para 128. The Court noted that the admission of otherwise permissible references or evidence may, through repetition, have an impermissible effect on a jury.

21 *Ibid* at para 126.

22 *Ibid* at paras 155–159.

23 *Barton* SCC, *supra* note 2 at para 198.

24 *R v Williams*, [1998] 1 SCR 1128 at para 58, 159 DLR (4th) 493 [*Williams*].

25 *Ewert v Canada*, 2018 SCC 30 at para 57 [*Ewert*].

26 *R v Gladue*, [1999] 1 SCR 688 at para 65, 171 DLR (4th) 385 [*Gladue*]; *R v Ipeelee*, 2012 SCC 13 at paras 61, 67.

27 *Barton* SCC, *supra* note 2 at para 198.

In response to the prevalence of anti-Indigenous prejudice in the criminal trial process in that case, the majority in *Barton* mandated that trial judges provide specialized instructions "in sexual assault cases where the complainant is an Indigenous woman or girl."[28] These instructions would inform jurors "that Indigenous people in Canada—and in particular Indigenous women and girls—have been subjected to a long history of colonization and systemic racism, the effects of which continue to be felt" and warn jurors against "a number of stereotypical assumptions about Indigenous women who perform sex work."[29] Although the majority recognized the limits of judicial instructions on systemic change—"by no means a perfect solution to ridding our courts of biases, prejudices, and stereotypes against Indigenous women and girls"—it saw such an approach as a "step forward."[30]

The Court split, however, on whether the trial judge's failure to correctly instruct the jury tainted its deliberations on both the manslaughter and murder charges. The Court's internal disagreement indicates a division in its understanding of intentional and unintentional racial prejudice and in its understanding of the ability of jurors to suppress racial bias and follow the law. Despite the majority's lengthy discussion on the need for specialized jury instructions, the majority rejected the argument that the trial judge's instruction resulted in a "significant risk that the jurors would make impermissible inferences based on prejudicial reasoning" on the murder charge.[31] At trial, the Crown had advanced the argument that Barton cut Gladue with a sharp object along her vaginal wall. Crown and defence experts disagreed on the cause of the perforation and no sharp object was recovered in the investigation. As a result, the majority concluded that "this was by no means a case in which we are left wondering how 12 independent jurors could have acquitted Mr. Barton of murder without resorting to reasoning based on conscious or unconscious bias", "[t]o the contrary, […] the Crown's theory simply did not hold up under scrutiny."[32] In short, the Crown simply lost to a battle of experts.[33] In contrast, the dissent reasoned that the trial judge's failure to comply with s 276 "caused a cascade of prejudice and errors warranting a new trial on murder as well as manslaughter"[34] and that his failure to address racial stereotypes and prejudices against Indigenous women and sex-workers "permeated the whole of the trial and the jury's deliberations

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28 *Ibid* at para 200.

29 *Ibid* at para 201.

30 *Ibid* at para 204.

31 *Ibid* at para 220. See also *ibid* at paras 173, 231.

32 *Ibid* at para 175.

33 *Ibid* at para 168.

34 *Ibid* at para 220.

on both murder and manslaughter."[35] According to the dissent, the trial judge failed to warn the jury against the impermissible use of prior sexual activity evidence and therefore biased the jury in favour of the accused by permitting the use of after-the-fact evidence for exculpatory, but not inculpatory, purposes.[36] Moreover, counsel and the trial judge's repeated reference to Gladue's race and occupation "introduced a risk that the jury's reasoning might be tainted by conscious or *unconscious* racial prejudice or reliance on stereotypes."[37] The result of these failures, the dissent reasoned, was to bias the jury in favour of the accused's narrative of events and "to taint the jury's view of Ms. Gladue."[38] Justices Abella and Karakatsanis rejected the majority's "compartmentalization" of these errors and its assumption that the jury simply acquitted Barton of murder because it preferred the defence's evidence over that of the Crown.[39]

The Court's disagreement over the appeal, however, goes much deeper than whether, or to what extent, prejudice may have affected Barton's acquittal. *Barton* also discloses the Court's inconsistent characterisation of racial bias or prejudice as either intentional or unintentional, or systemic or individual. Despite the repeated, dehumanizing references of counsel and the Court to Gladue's race and occupation, Justice Moldaver reasoned that "there is nothing to suggest that it was anyone's *deliberate intention* in this case to invoke [biases and prejudice] against Indigenous women…"[40] In this way, the majority emphasizes the importance of *intent* and *explicit* prejudice in its characterisation of prejudicial reasoning. The majority does not consider, for example, defence counsel's motivation to humanize their clients and dehumanize their client's alleged victims, and the implicit prejudice that may have armed defence counsel's abstraction of Ms. Gladue as a "native woman" and "prostitute."[41] What makes the majority's insistence on the intentional-character of prejudice puzzling is its later invocation and acknowledgement of systemic discrimination against Indigenous persons in the criminal justice system.[42] In this way, the majority struggles to place an instance of potentially implicit, unconscious

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35 *Ibid* at para 214.

36 *Ibid* at paras 242–245.

37 *Ibid* at paras 223, 231 [emphasis added].

38 *Ibid* at paras 226, 228.

39 *Ibid* at para 215.

40 *Ibid* at para 207 [emphasis added].

41 National Inquiry into Missing and Murdered Indigenous Women and Girls, *supra* note 14 at 73. Reviewing *Barton* SCC, *supra* note 2, Sherene Razack argues that the Court language of consent and contract hid the "the sexual brutalization and attempted annihilation" and "disposability" of Indigenous women: Razack, *supra* note 14 at 300, 304.

42 *Barton* SCC, *supra* note 2 at paras 200–201. Furthermore, the Court has previously recognized the effect of subconscious or unintentional racism on the trial process, see *Williams*, *supra* note 24 at para 28.

prejudice within a broader ideology that facilitates that prejudice. The majority textually isolates this part of its reasons, where it comments on the language used to describe Gladue and its recommended instructions, from its discussion of the prejudicial effect of the trial judge's failure to properly instruct the jurors on prior sexual activity evidence.[43] This textual compartmentalization of these two discussions is an important rhetorical move by the majority; had it juxtaposed its discussion of the trial judge and counsels' conduct against its reasons for reform, it may have been more difficult for them to reject the dissent's argument that the entire trial was tainted by prejudice.[44]

In addition to the majority's focus on intentional prejudice, their reasons emphasize the legal system's trust in the common sense of ordinary jurors, and the weight of tradition and precedent, and express a belief that to recognize the effects of unconscious prejudice on the jury is to threaten the foundation of the criminal law.[45] The tension between juror common sense and lawful compliance can be seen in the majority's rejection of the Court of Appeal of Alberta's holding that the trial judge's instructions on after-the-fact conduct were defective. Although the trial judge incorrectly instructed jurors to consider only exculpatory after-the-fact conduct, Justice Moldaver reasoned that jurors would "recognize, as a matter of common sense, that the fact that Mr. Barton told a string of lies following Ms. Gladue's death could be considered in assessing his overall credibility."[46] Justices Abella and Karakatsanis, however, note that the trial judge's instructions on after-the-fact conduct were confusing and misleading: "[j]uries, although expected to apply common sense, are above all expected to follow the instructions given by the trial judge. Where those instructions are confusing and contradictory, there is no roadmap for common sense to follow."[47] One cannot have it both ways; either jurors follow the law as explained to them—regardless of correctness—or they do not. There is no space for common sense when it contradicts the legal rule.

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43 *Barton* SCC, *supra* note 2 at paras 55–85, 205–207.

44 In *Chouhan*, Justices Moldaver and Brown, writing for Chief Justice Wagner, emphasised the severity of unconscious or unintentional bias on the trial process, writing that "participants in the justice system must remain vigilant in identifying and addressing the unconscious biases that might taint the integrity of jury deliberations.": *supra* note 2 at para 50. Had Justice Moldaver had the benefit of his reasoning in *Chouhan*, would he have concluded in *Barton* that "there is nothing to suggest that it was anyone's deliberate intention in this case to invoke the kind of biases and prejudices against Indigenous women …"?

45 *Barton* SCC, *supra* note 2 at paras 176–177.

46 *Ibid* at para 154.

47 *Ibid* at para 247.

The tension between common sense and lawful compliance rests on two assumptions about juror reasoning, first, that common sense is rational,[48] and second, that jurors both comprehend and, sometimes against their own "common sense", apply the law dutifully.[49] Both assumptions relate to human behaviour, judgment, and reasoning. However, the Court often views these assumptions through a lens of "faith" or the "soil of common sense" rather than empiricism.[50] Taking a defensive position, the majority explains that:

> […] we should not be too quick to assume that they [standard jury instructions on sympathy or prejudice] play no role in fostering impartial and unbiased reasoning. To conclude otherwise would be to assume that such instructions, which have been repeated to juries through the ages, were of no value and amounted to little more than lip service. I refuse to go there. To do so would be to lose sight of the well-established jurisprudence of this Court expressing our strong faith in the institution of the jury and our firmly held belief that juries perform their duties according to the law and the instructions they are given. *This is not a form of blind faith; rather, it is a reflection of the well-earned trust and confidence that has been built up over centuries of experience in courtrooms throughout the Commonwealth. The institution of the jury is a fundamental pillar of our criminal justice system. We erode our confidence in this bedrock institution at our own peril.*[51]

In this way, the majority provides a jurisprudential rationale for denying plausible racial prejudice where seemingly legitimate explanations are also available. A tension emerges between the majority's proposed specialized instructions—its "step forward"—and its confidence in the common-sense juror, a look backward to tradition. The dissent points out, however, that the fact of racial prejudice should not be seen as an "insult to the jury system, it is a wake-up call to trial judges to be acutely attentive to the undisputed reality of pervasive prejudice and to provide the jury

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48 See Justice Côté, dissenting, in *Chouhan*, *supra* note 2 at paras 277–278.

49 The history of the jury trial has never been neat and tidy. At various points in history, jurors were assumed to bring pre-existing community knowledge and personal experience to their deliberations: Christopher Granger, *The Criminal Jury Trial in Canada*, 2nd ed (Toronto: Carswell, 1996) at 23 (though juries could be interrogated by a judge until the 14th century and punished for inappropriate verdicts until the 17th century); Sanjeev Anand, "The Origins, Early History and Evolution of the English Criminal Trial Jury" (2005) 43:2 Alta L Rev 407 at 418, 420. See also the reasons of Justices Moldaver and Brown for a description of the history of peremptory challenges in the English common law in *Chouhan*, *supra* note 2 at paras 14–17.

50 *R v Corbett*, [1988] 1 SCR 670 at 694, 28 BCLR (2d) 145 [*Corbett*].

51 *Barton* SCC, *supra* note 2 at para 177 [emphasis added].

instructions required by law."[52] Unfortunately, the majority appears to take this "wake-up call" as a threat to the jury trial as a whole.[53]

A majority of the Court in both *Barton* and *Chouhan* recommended jury instructions as an important intervention for reducing racial prejudice and bias in criminal jury trials.[54] In *Chouhan*, the majority noted that jury instructions "have a critical role to play in ensuring that jurors approach their deliberations free from bias."[55] Extending their reasons in *Barton*, Justices Moldaver and Brown recommended two types of jury instructions: "(i) general instructions on biases and stereotypes; and (ii) instructions on specific biases and stereotypes that arise on the facts of the case."[56] Such instructions may be offered "early, before the presentation of evidence, and at any other time that the trial judge deems appropriate," not just at the start and closing of the trial.[57] General instructions on racial bias would "point out that as members of society, each juror brings a variety of beliefs, assumptions, and perceptions to the court room" and that "unconscious biases may be based on implicit attitudes … or stereotypes."[58] Trial judges should instruct jurors to "approach their task with a heavy dose of self-consciousness and introspection."[59] In certain cases, trial judges may also provide specialized instructions, much like the recommended instructions set out in *Barton*. Specialized instructions consider "the relevance of context and the harmful nature of stereotypical assumptions or myths" on a racialized accused or victim.[60] As Justice Martin explains, a contextualized approach to jury instructions "looks beyond overt and intentional discrimination to structural and unconscious bias that may undermine trial fairness, juror impartiality and equality for accused persons and victims."[61] In short, what distinguishes

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52 *Ibid* at para 233.

53 In *Chouhan*, Justices Moldaver and Brown appear to temper their concerns about undermining the criminal law, noting that jury instructions on racial bias "should not be taken as criticizing past or future jurors. They merely recognize that the benefit of human experience which the jury brings to the criminal process can also be tainted by prejudices and stereotypes": *supra* note 2 at para 59.

54 Justice Côté, dissenting in *Chouhan*, criticized the effectiveness of jury instructions for remedying unconscious biases: "since such beliefs are buried deep in the human psyche and cannot be easily identified, it is unlikely that a juror holding them will benefit from instructions by the trial judge.": *ibid* at para 263.

55 *Ibid* at para 49 (Justices Brown and Moldaver).

56 *Ibid* at para 52. Justices Moldaver and Brown, writing for Chief Justice Wagner, with Justices Abella, Karakatsanis, Martin and Kasirer concurring on this point.

57 *Ibid* at para 53.

58 *Ibid*.

59 *Ibid* at para 54. Justice Martin's reasons add that jurors must also be instructed to be "accountable" for their reasons: *ibid* at para 110.

60 *Chouhan*, *supra* note 2 at para 56.

61 *Ibid* at para 110.

general from specialized instructions is the proximity of the discussion of racial prejudice to the context and position of the accused or victim.

The majority's endorsement of jury instructions related to racial bias in *Chouhan* is welcome. However, there is a continuing need to assess the effectiveness of jury instructions. Instructions that accord with our "common sense" of racial and gender prejudice, but which are ineffective for actually reducing anti-Indigenous prejudice, are dangerous. If instructions do not predict sentencing or conviction outcomes, or if jurors cannot understand jury instructions, then we should have little confidence in reducing racial bias through jury instructions. Worse yet, specialized instructions may prime rather than suppress prejudicial reasoning. If courts use ineffective but legally "correct" instructions, then there is a risk that such instructions might insulate prejudicial reasoning from appellate review. When the majority in *Barton* decided to go further than the Court of Appeal of Alberta's recommended instructions and address anti-Indigenous prejudice, it entered an area where it should have received submissions from interveners and experts. This is not to say that the majority was wrong in crafting such instructions, but that the effectiveness of those instructions must also be considered in light of what we know about juror psychology.

3. Applying Jury Research to Jury Instruction Reform

Jury research can assist judges in understanding how jurors might reason when race or gender is involved at trial.[62] Jury simulation research (mock jury) is a small-group experimental method that allows for multi-variate research and control as well as direct observation of the individual and group decision-making process.[63] It is also accessible for meta-analyses, which can help determine the strength of relationships over data sets.[64] Because actual jurors are criminally prohibited from discussing their

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62 Two excellent texts on psycho-legal research include: Curt R Bartol & Anne M Bartol, *Psychology and Law: Research and Practice*, 2nd ed (Los Angeles, CA: SAGE Publications, 2019); Andreas Kapardis, *Psychology and Law: A Critical Introduction*, 4th ed (Cambridge, UK: Cambridge University Press, 2014). For a review of the experimental literature on jury and juror decision-making, see Dennis J Devine, *Jury Decision Making: The State of the Science* (New York: University Press, 2012).

63 Other methodologies include archival and field research, and shadow juries composed of dismissed jurors. For a review of jury study methodologies and their respective benefits and trade-offs, see Devine, *supra* note 62 at 8–14. See also Kapardis, *supra* note 62 at 149–150; Bartol & Bartol, *supra* note 62 at 136–137.

64 Devine, *supra* note 62 at 13–14.

experiences, mock jury research is perhaps one of the best sources of information about juror psychology.[65]

At times, courts have resisted the findings of jury research on racial bias. In addition to the courts' trust in the common sense of ordinary jurors,[66] its faith in the weight of tradition and precedent,[67] and its perception of reform as a threat to the criminal law and past verdicts,[68] courts express doubts about both the methodology and findings of jury research.[69] Courts may also implicitly reject research that challenges their common sense understanding of racial prejudice as overt antipathy, in contrast to contemporary forms, which may be subtle, aversive, and even paternalistic.[70] In *Corbett*, a case involving the admissibility of an accused's prior criminal history and its impact on juror prejudice, Justice LaForest, dissenting, highlighted the majority's misleading prioritization of "common sense" over jury research: "I think it self-evident that the law cannot profess to learn from common sense and experience and yet selectively ignore such lessons [from the experimental literature]."[71]

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65 Section 649 of the *Criminal Code of Canada* prohibits jurors from disclosing any information related to the proceedings: RSC 1985, c C-46, s 649 [*Criminal Code*]. The intent of jury secrecy laws was to ensure that verdicts were final and to limit "retribution or invasive post-verdict inquiries": Marie Comiskey, "Initiating Dialogue about Jury Comprehension of Legal Concepts: Can the "Stagnant Pool" be Revitalized" (2010) 35:2 Queen's LJ 625 at 660–665. This prohibition also removes a juror's motivation to serve on a jury for the purpose of selling their post-verdict reasoning for money, as happens in the United States: Regina Schuller & Neil Vidmar, "The Canadian Criminal Jury" (2011) 86:2 Chicago-Kent L Rev 497 at 511. However, this prohibition makes most field research nearly impossible to ethically and legally conduct, see: Michelle I Bertrand & Richard Jochelson, "Mock-Jurors' Self-Reported Understanding of Canadian Judicial Instructions (is not very good)" (2018) 66:1/2 Crim LQ 137 (arguing in favour of legislative reforms and public funding to encourage jury research in Canada); see also Comiskey, *supra* at 663–665.

66 *Corbett*, *supra* note 50 at 691, 693-694. See also *R v Spence*, 2005 SCC 71 at paras 21–22 [*Spence*].

67 *Barton* SCC, *supra* note 2 at para 177.

68 *Corbett*, *supra* note 50 at 692. See also *Spence*, *supra* note 66 at para 6; *Barton* SCC, *supra* note 2 at para 177.

69 *Corbett*, *supra* note 50 at 693 (Chief Justice Dickson and Justices Beetz and Lamer, for the majority). See also See also *Spence*, *supra* note 66 at para 39.

70 In *Barton,* Justice Moldaver, for the majority, relies on a distinction between intentional and unintentional bias when he describes counsel and the court's use of prejudicial language: SCC, *supra* note 2 at para 207. Courts may be particularly oppositional to the sweeping doctrinal changes required to respond to changing social reality: Faye J Crosby & John F Dovidio, "Discrimination in America and Legal Strategies for Reducing It" in Eugene Borgida & Susan T Fiske, eds, *Beyond Common Sense: Psychological Science in the Courtroom* (Malden: Blackwell, 2008) 23 at 37–38.

71 *Corbett*, *supra* note 50 at 727.

He rejected the majority's perfunctory dismissal of the psychological evidence, noting that the law cannot "assert away [the problem identified in the psychological literature] by reflexively invoking the virtues of the jury system, and in particular the time-honoured and obviously practical and necessary assumption that jurors are eminently capable of following […]" jury instructions.[72] Rather than undermine the criminal justice system, jury research may assist courts in mitigating the effects of extralegal bias "[h]owever vulnerable to methodological or other criticism these results may be, […]."[73] This is true even where such insights disclose the ineffectiveness of jury instructions for reducing racial bias.[74]

Early mock jury research—brought to the courts' attentions in *Corbett, Parks,* and *Williams*—was inconsistent and often too short, unrealistic in its materials, unrepresentative in its participants, and too focused on individual juror decision-making.[75] Some researchers displayed naivety to the substantive and procedural law and a narrow focus on American criminal justice and on Black defendants and victims.[76] Since *Corbett*, *Parks*, and *Williams*, mock jury research has improved in its verisimilitude to the trial process and external validity.[77] Although more work is required to integrate legal expertise into jury research,[78] psychologists now incorporate substantive and procedural criminal law considerations in research design and theorization.[79] Of course, one of the continuing critiques of mock jury research is that jurors participate with an awareness that their decisions will have no impact on any living person.[80] Despite its methodological limitations, mock jury research is an accepted and important methodology in juror psychology.[81]

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72 *Ibid*.

73 *Ibid* at 729.

74 *Williams*, *supra* note 24 at para 22.

75 *R v Parks* (1993), 15 OR (3d) 324, 84 CCC (3d) 353 (CA); For a history of the development of mock jury research, see Devine, *supra* note 62 at 14–20; For challenges related to early jury research, see Bartol & Bartol, *supra* note 62 at 136–137.

76 Kapardis, *supra* note 62 at 15.

77 Bartol & Bartol, *supra* note 62 at 136–137.

78 Krystia Reed et al, "An Empirical Analysis of Law-Psychology Journals: Who's Publishing and on What?" in *Advances in Psychology and Law* (Cham, Switzerland: Springer International, 2020) 285 (noting that most psycho-legal research is published by psychologists and arguing for greater participation from non-psychology disciplines).

79 The works of James Ogloff and Evelyn Maeder are cited in this article. These authors are graduates of the Law-Psychology Program at the University of Nebraska-Lincoln. Graduates of this program receiving training in both law and psychology.

80 Brian Manarin, *Canadian Indigenous Peoples and Criminal Jury Trials: Remediating Inequities* (Toronto: LexisNexis Canada, 2019) at 17.

81 For a review of the methodological trade-offs of jury simulation research, see Norbert L Kerr & Robert M Bray, "Simulation, Realism, and the Study of the Jury" in Neil

Though judges may resist jury research, to say that it has no place in the law, either because of its disciplinary separation or inconclusiveness, is naïve.[82] As Krieger notes "a social science-trained eye can readily identify several 'common-sense' psychological theories, running like rebar through the opinions' analytical foundations, and over time, giving shape to the doctrinal 'universals' that will govern the adjudication of the particulars in future cases."[83] Dovidio and Crosby suggest that social psychology "calls attention to the limitations of intuition—even when the intuition exists in the minds of legal scholars and practitioners."[84] In short, jury research is valuable because it helps us understand and assess our strongly held assumptions about juror reasoning—assumptions such as the Court's faith in the common sense of jurors and their ability to follow the law when instructed to do so.

Although courts might resist these insights, they *do* have experience in applying them towards procedural reform. As Devine notes, American courts have instituted a variety of reforms to improve juror comprehension and deliberation, including juror aids such as note-taking, pre and post-trial instructions, simplified jury instructions, juror questions, and pre-deliberation communication.[85] Moreover, many of these changes have been implemented with negligible impact on courtroom efficiency.[86] Thus, courts *can*, as a practical matter, revise jury instructions related to race so that they are more effective at reducing racial bias in juror and jury decision-making.

By "sharpening" our understanding of race in the criminal justice system, experimental research can also dispel the ambiguity that individuals and institutions rely on to justify bias. As Parks, Jones and Cardi write, "… when individuals or institutions can no longer employ empirical uncertainty to continue to engage in conscious or unconscious racist conduct, they must ultimately state their normative preferences."[87] At the end of the day, a court's decision to apply research to a particular

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Brewer & Kipling D Williams, eds, *Psychology and Law: An Empirical Perspective* (New York: The Guilford Press, 2005) 322; Bartol & Bartol, *supra* note 62 at 136–137.

82 Linda Hamilton Krieger, "Behavioral Realism in Law" in Eugene Borgida & Susan T Fiske, eds, *Beyond Common Sense: Psychological Science in the Courtroom* (Malden: Blackwell, 2008) 383 at 388.

83 *Ibid* at 385.

84 Crosby & Dovidio, *supra* note 70 at 29, see also 23-29.

85 Devine, *supra* note 62 at 63.

86 *Ibid* at 158.

87 Gregory Parks, Shayne Edward Jones & W Jonathan Cardi, eds, "Introduction" in *Critical Race Realism: Intersections of Psychology, Race and the Law* (New York: New Press, 2008) at 5.

case or to the development of the law is a value-laden judgment call.[88] As Daum Shanks cautions, "[n]ot recognizing the anti-Indigenous racism that permeates our justice system and society is a choice."[89] If the jury research does anything at all, at the very least it may make these normative commitments explicit.

4. The Effect of Race in Criminal Trials involving Indigenous Defendants and Victims

Before even considering the adequacy of jury instructions, one needs to establish that anti-Indigenous prejudice is a problem within the criminal justice system. In *Williams*, the Supreme Court of Canada acknowledged that anti-Indigenous prejudice is "widespread" and "systemic" within the criminal justice system.[90] Citing the Canadian Bar Association's report, "Locking Up Natives", the Court identified stereotypes related to intoxication and criminality as particularly damaging for Indigenous defendants.[91] In its final report, the Inquiry into Missing and Murdered Indigenous Women and Girls reported the pervasiveness of "racist and sexist stereotypes … that ultimately blame Indigenous Peoples… for the violence and difficulties they face, and/or see them as guilty of committing violence or other crimes themselves."[92] More recently, the Truth and Reconciliation Commission found that the "intense racism some people harbour against Aboriginal people" is a legacy of Canada's colonial project.[93] As the Court noted in *Gladue*, such findings "cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it."[94] In addition, Canadian empirical research supports the proposition that anti-Indigenous prejudice remains prevalent throughout Canada.[95]

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88 Kapardis, *supra* note 62 at 146.

89 Signa A Daum Shanks, "Legal and systemic issues left unexamined in Stanley trial" (24 September 2018), online: *Policy Options* <policyoptions.irpp.org> [perma.cc/FKW8-NDFT].

90 *Supra* note 24 at para 58. See also *Gladue*, *supra* note 26 at para 61.

91 Canadian Bar Association Committee on Imprisonment and Release & Michael Jackson, *Locking Up Natives in Canada: A Report* (Ottawa: Canadian Bar Association, 1988) at 5.

92 National Inquiry into Missing and Murdered Indigenous Women and Girls, *supra* note 14 at 627.

93 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 135, online (pdf) <publications.gc.ca> [perma.cc/9BHY-YUU4].

94 *Supra* note 26 at paras 61, 64.

95 For a review of the literature, see Cherie D Werhun & April J Penner, "The Effects of Stereotyping and Implicit Theory on Benevolent Prejudice Toward Aboriginal Canadians" (2010) 40:4 J Applied Soc Psychology 899 at 899–900. For a description of old-fashioned and modern prejudice towards Indigenous peoples in Canada, see Melanie A Morrison et al, "Old-

The Court's concerns in *Gladue*, *Williams* and *Ewert* are also supported by American jury research on racial bias.[96] Although early meta-analyses described the effect of race on participant-juror decision-making as either small[97] or non-existent,[98] subsequent meta-analyses observed a small, yet statistically significant, effect of racial bias on sentencing decisions and findings of guilt by white participant-jurors in cases involving Black defendants, which was strengthened by certain moderators such as victim race.[99] Some field research supports this experimental finding.[100]

Canadian jury research further supports the proposition that some jurors may be affected by the race of an Indigenous defendant or victim in

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fashioned and modern prejudice toward aboriginals in Canada" in Melanie A Morrison & Todd G Morrison, eds, *The psychology of modern prejudice* (Hauppauge, NY: Nova Science, 2008) 277 at 298; Todd G Morrison, Melanie A Morrison & Tomas Borsa, "A Legacy of Derogation: Prejudice toward Aboriginal Persons in Canada" (2014) 5:9 Psychology 1001.

96 Devine, *supra* note 62 at 113–121.

97 Laura T Sweeney & Craig Haney, "The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies" (1992) 10:2 Behav Sci & L 179 at 179.

98 Ronald Mazzella & Alan Feingold, "The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis" (1994) 24:15 J Applied Soc Psychology 1315 at 1315. This meta-analysis did not account for participant race.

99 Tara L Mitchell et al, "Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment" (2005) 29:6 L & Human Behavior 621; Dennis J Devine & David E Caughlin, "Do They Matter? A Meta-Analytic Investigation of Individual Characteristics and Guilt Judgments" (2014) 20:2 Psychol Pub Pol'y & L 109 at 120; Samuel R Sommers & Omoniyi O Adekanmbi, "Race and Juries: An Experimental Psychology Perspective" in Gregory Parks, Shayne Edward Jones & W Jonathan Cardi, eds, *Critical Race Realism: Intersections of Psychology, Race and the Law* (New York: New Press, 2008) 78 at 80. Earlier inconsistent findings may be explained, in part, by an absence of a shared theoretical paradigm, differing definitions of racial bias, a lack of ecological validity found in earlier experimental research or as a result of the conspicuous nature of race in mock studies: Mitchell et al, *supra* at 624–625; see also Devine, *supra* note 62 at 120–121.

100 For the most part, field research suggests that defendant and victim race are relevant in capital sentencing decisions involving black defendants: Devine, *supra* note 62; Jennifer Eberhardt et al, "Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes" (2006) 17:5 Cornell L Faculty Publications; Mona Lynch & Craig Haney, "Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination" (2009) 33:6 L & Human Behavior 481; Mona Lynch & Craig Haney, "Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the 'Empathic Divide'" (2011) 45:1 Law & Society Rev 69. However, see Dennis J Devine & Christopher E Kelly, "Life or Death: An Examination of Jury Sentencing with the Capital Jury Project Database" (2015) 21:4 Psychol Pub Pol'y & L 393. Research on judicial decision-making also suggests that black defendants are likely to receive a harsher sentence than white defendants: Jeffrey J Rachlinski et al, "Does Unconscious Racial Bias Affect Trial Judges" (2009) 84:3 Notre Dame L Rev 1195.

their reasoning or decision-making. Some studies show that participant-jurors are more likely to assign harsher sentences[101] and express greater certainty in guilty (dichotomous) verdicts or in the evidence leading to guilt (continuous verdicts) in cases involving Indigenous, compared to white, defendants.[102] Although some studies have found that participant-jurors' dichotomous verdicts (guilty or not guilty) are not significantly associated with an Indigenous defendant's race[103] or that participant-jurors who hold positive racial stereotypes about Indigenous peoples are less likely to find an Indigenous defendant guilty,[104] three studies found that Indigenous defendants received more guilty verdicts than white

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[101] In Canada, jurors do not make sentence recommendations except under s 745 of the *Criminal Code*. In any case, sentence recommendations are a helpful experimental measure of racial bias since it allows for ambiguity, an important situational variable in the suppression or expression of racial prejudice: *Criminal Code, supra* note 65, s 745.

[102] Kimberley A Clow, James M Lant & Brian L Cutler, "Perceptions of Defendant Culpability in Pretrial Publicity: The Effects of Defendant Ethnicity and Participant Gender" (2013) 5:4 Race & Soc Problems 250 at 254, 256; Evelyn M Maeder, Susan Yamamoto & Laura A McManus, "Race Salience in Canada: Testing Multiple Manipulations and Target Races" (2015) 21:4 Psychol Pub Pol'y & L 442 at 445, 447 [Maeder, Yamamoto & McManus, "Race Salience in Canada"]; Jeffrey E Pfeifer & James R P Ogloff, "Mock Juror Ratings of Guilt in Canada: Modern Racism and Ethnic Heritage" (2003) 31:3 J Soc Behavior & Personality 301 at 305, 308; Evelyn M Maeder, Susan Yamamoto & Paula Saliba, "The Influence of Defendant Race and Victim Physical Attractiveness on Juror Decision-Making in a Sexual Assault Trial" (2015) 21:1 Psychology Crime & L 62 at 71–74 [Maeder, Yamamoto & Saliba, "Influence of Defendant Race"]; Laura McManus, Evelyn Maeder & Susan Yamamoto, "The Role of Defendant Race and Racially Charged Media in Canadian Mock Juror Decision Making" (2018) 60:2 Can J Criminology & Crim Justice 266 at 282 [McManus, Maeder & Yamamoto, "Racially Charged Media"]; Evelyn M Maeder & Susan Yamamoto, "Social Identity in the Canadian Courtroom: Effects of Juror and Defendant Race" (2019) 61:4 Can J Criminology & Crim Justice 24 at 36 [Maeder & Yamamoto, "Social Identity"]; however, see Evelyn M Maeder & Joel Burdett, "The Combined Effect of Defendant Race and Alleged Gang Affiliation on Mock Juror Decision-Making" (2013) 20:2 Psychiatry, Psychology & L 188 at 194, 197 [Maeder & Burdett, "The Combined Effect"]; Cindy Struckman-Johnson, Michael G Miller & David Struckman-Johnson, "Effects of Native American Race, Intoxication, and Crime Severity on Judgments of Guilt" (2008) 38:8 J Applied Soc Psychology 1981.

[103] Logan Ewanation & Evelyn Maeder, "The Influence of Witness Intoxication, Witness Race, and Defendant Race on Mock Juror Decision Making" (2018) 60:4 Can J Criminology & Crim Justice 505 at 522 [Ewanation & Maeder, "The Influence of Witness Intoxication"]; Maeder, Yamamoto & McManus, "Race Salience in Canada", *supra* note 102 at 445–447; Maeder, Yamamoto & Saliba, "The Influence of Defendant Race", *supra* note 102 at 71, 74; McManus, Maeder & Yamamoto, "Racially Charged Media", *supra* note 102 at 280; Evelyn M Maeder & Laura A McManus, "Mosaic or Melting Pot? Race and Juror Decision Making in Canada and the United States" (2022) 37:1/2 J Interpersonal Violence NP991 at NP1004-NP1005 [Maeder & McManus, "Mosaic or Melting Pot?"].

[104] Maeder & Yamamoto, "Social Identity", *supra* note 102 at 34.

defendants on a dichotomous measure of guilt.[105] In one study involving Indigenous victims, Pfeifer and Ogloff observed that participant-jurors were less likely, on a subjective scale, to find a white defendant guilty of sexual assault when the victim was Indigenous compared to white and were more likely to find an Indigenous defendant, compared to an English Canadian, guilty when the victim was white.[106] Moreover, in an archival analysis of capital sentencing decisions between 1926 and 1957, albeit during a period of intense, government-endorsed racism, Avio also found that Indigenous defendants were six times more likely to be sentenced to death than white defendants.[107] These results support a finding that the race of an Indigenous person may be related to juror decision-making in Canada.

In a recent non-peer-reviewed study, Knoop investigated participant-jurors' verdicts and reasoning in an experiment based, in part, on trial materials in *Barton*.[108] Knoop examined the relationship between victim and defendant race, and victim participation in sex work, with dichotomous and continuous measures of guilt as well as victim blaming.

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105 Maeder, Yamamoto & McManus, "Race Salience in Canada", *supra* note 102 at 448; Maeder & Burdett, "The Combined Effect", *supra* note 102 at 194, 197, 199; Janelle Christine Knoop, *Compounding Prejudice? Investigating Canadian Mock Juror Perceptions of Victim Race and Work in the Sex Trade* (Master of Arts in Psychology, Carleton University, 2019) at 63 [unpublished]. These inconsistent findings on dichotomous (guilty or not guilty) and continuous verdict (certainty in guilt or evidence) and sentencing as a function of Indigenous defendant or victim race, may reflect the extent or nature of participant-jurors' awareness of racial stereotypes and their motivation to appear non-prejudiced. Since continuous scales are ambiguous, participant-jurors may be less likely to suppress their implicit biases in those cases compared to their responses on dichotomous measures of guilt: Ewanation & Maeder, "The Influence of Witness Intoxication", *supra* note 103 at 522; see also Maeder & Yamamoto, "Social Identity", *supra* note 102 at 36–39. In addition, inconsistent findings may reflect issues related to research design, including verisimilitude, the geographic location of the study, the participant type (community or student participants), the type of crime being investigated, the length of the prompt (often a trial transcript), and the presence or absence of variables between studies.

106 Pfeifer & Ogloff, *supra* note 102 at 305–308. However, these relationships were not observed when jurors were provided jury instructions and were asked to provide a dichotomous guilty verdict. The effect of jury instructions on the suppression of racial prejudice is discussed later in this article.

107 K L Avio, "Capital Punishment in Canada: Statistical Evidence and Constitutional Issues" (1988) 30:4 Can J Criminology 331 at 340–341.

108 Although Knoops' research was published in her master's thesis, she is working with Dr. Evelyn Maeder on the preparation of two articles based on this research to be submitted to a peer reviewed journal. Knoop, *supra* note 105 at 33–34. The mock trial transcript was based on *Barton* SCC*, supra* note 2, and two other cases involving the killing of a sex worker: *R v Butorac*, 2013 BCCA 421; *R v Ryczak*, 2007 CarswellOnt 9255, [2007] OJ No 3408 (SC).

Uniquely, the study also involved a content analysis component, in which jurors were asked how they might persuade undecided or opposing jurors to change their verdict.[109] Knoop found that neither victim race nor victim participation in sex work directly affected verdict or victim blame, though verdict and victim blame were associated (defendants were less likely to receive a guilty verdict where victims were blamed).[110] However, some jurors did consider victim participation in sex work and negative stereotypes about Indigenous women in their efforts to persuade other jurors.[111] In addition, the race of the victim was considered indirectly by jurors through stereotypes, victim blame, and identification with the victim.[112] Knoop concludes that, although victim race and participation in sex work did not predict verdict, negative stereotypes about Indigenous women and sex workers affected jurors' attribution of blame as between the victim and defendant.[113]

Knoop's conclusions would seem to suggest that victim-race and sex-work status do not predict individual juror verdicts. However, Knoop's content analysis suggests that victim race and participation in sex work was relevant to some jurors' verdict deliberation and their persuasion of other jurors. Although no statistically significant relationship was found between race-verdict and sex-work and verdict, it is possible that these variables may be important in a real-world context, particularly where jurors receive incorrect or misleading statements of law or fact from the court or from counsel during examination or argument, or where counsel or the court repeatedly prime jurors to think about race or gender. This was, of course, the case in *Barton,* where the trial judge not only failed to properly instruct but misled and confused the jury on prior sexual activity evidence. Moreover, it is possible that the jurors in Knoop's study were aware of the Inquiry into Missing and Murdered Indigenous Women and Girls and were therefore motivated to suppress any bias or prejudice that might arise. In my view, even an indirect relationship between racial stereotypes about Indigenous women and victim blame, as found by Knoop, is concerning enough to require further research and a response from the criminal justice system.

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109 Mock jury research may focus on either jury decision-making, that is, conclusions as to guilt or sentence length, or jury reasoning, which includes a deliberative component. Knoop's research is unique as it includes both a consideration of juror decision-making and juror reasoning.

110 Knoop, *supra* note 105 at 64–68.

111 *Ibid* at 65.

112 *Ibid* at 68–71.

113 *Ibid* at 75.

Ultimately, the Canadian jury research, though preliminary, suggests that the race of an Indigenous defendant or victim may be associated with juror and jury deliberation in certain situations. The social-psychological literature on the ubiquity of anti-Indigenous prejudice in Canada lends additional support to the proposition that Indigenous persons' race may influence Canadian criminal jury trials. This research supports the Court's repeated acknowledgement of anti-Indigenous prejudice within the criminal justice system. Given that this appears to be a risk in Canadian criminal jury trials, can jury instructions reduce or eliminate this risk?

One risk of jury instructions related to race is that such instructions may inadvertently prime, rather than suppress, racial stereotypes or prejudices. Implicit or explicit race references—whether through defence or prosecutor's evidence or arguments, jury instructions, or pre-trial publicity—have the potential to make race salient during a trial, thus activating racial stereotypes or engaging prejudices among jurors. Therefore, it is important to consider how standard jury instructions and explicit or implicit race references affect juror decision-making. If jury instructions prime, rather than suppress, racial prejudice against Indigenous persons, then we might want to seriously reconsider both the Court's commitment to its common-sense juror and its directions in *Chouhan* and *Barton* for trial judges to provide specialized instructions on racial bias in cases involving Indigenous persons in criminal jury trials.

One view—observable in the majority's reasons in *Barton*—is that standard jury instructions may constrain the application of stereotypes and prejudices by invoking a juror's sworn duties and clearly bounding legal from extralegal factors in decision-making. At least one Canadian study involving Indigenous persons supports this proposition. In a mock sexual assault trial, Pfeifer and Ogloff found no relationship between participant-jurors' dichotomous verdicts of guilt and the race of the Indigenous defendant or victim when jurors were provided a standard jury instruction.[114] Pfeifer and Ogloff hypothesized that "participants were unable (or unwilling) to express their prejudicial attitudes when specifically asked to evaluate the defendant's guilt based on the legal standard because of the lack of situational ambiguity."[115] As one participant-juror in Pfeifer and Ogloff's study commented, "He [the defendant] is Indian therefore I am 99% sure he is a liar and is guilty—but I can't find him legally guilty

[114] Pfeifer & Ogloff, *supra* note 102 at 308. However, Pfeifer and Ogloff did not test a condition without any jury instructions. Therefore, it cannot be determined whether the relationship observed was as a result of the jury instruction or some other factor, such as the fact that jurors had to provide a dichotomous verdict.

[115] *Ibid* at 309. Maeder and McManus similarly observed a correlation between the inclusion of judicial instructions and the absence of a racial bias effect on verdict: Maeder & McManus, "Mosaic or Melting Pot?", *supra* note 103 at NP1004.

according to the judge's instructions."[116] However, in a mock assault and robbery trial investigating the effect of gang affiliation on juror decision-making, Maeder and Burdett observed that participant-jurors were more likely to find an Indigenous defendant guilty on a dichotomous measure than a white defendant despite the inclusion of standard jury instructions.[117]

One possible explanation for Pfeifer and Ogloff's findings is that the research design itself, not the instructions, reduced situational ambiguity for participant-jurors. Situational ambiguity describes a phenomenon where individuals are more likely to express a prejudicial belief where a non-prejudicial (ie., legal) interpretation is also available. Ambiguity may arise where instructions are not sufficiently specific to caution against racial bias, prejudice, or stereotyping. In such cases, a juror may justify his or her reasons according to a "perfectly legitimate explanation" while remaining motivated by racial prejudice. In Pfeifer and Ogloff's study, jurors knew that they had to explain their reasoning to an observer. It is possible that participant-jurors in such a case, knowing that they must explain their reasoning to researchers, are more likely to follow the law. Though actual jurors are told they must apply the law, their reasons are not subject to review. In essence, actual jurors may experience a greater degree of situational ambiguity than their participant-juror counterparts.

Although it is possible that standard jury instructions remove situational ambiguity and motivate participant-jurors to provide legally rationalizable verdicts, more direction might be required for them to be effective in a real-world context.[118] As Justice Martin suggests in *Chouhan*, jurors may also need to feel that they are accountable for their decisions, something that our current procedure does not easily provide for.[119] As limited as the Canadian jury research is, there are also practical reasons why we should doubt whether standard post-trial instructions are adequate for motivating jurors to suppress racial prejudice. By the time the trial is complete, jurors may have been exposed to implicit or explicit references to race in media (if a media ban was not present), counsels' examination of witnesses, witnesses' testimony and evidence, and closing arguments. It is unclear whether an instruction given after the fact is sufficient for untangling a jurors' reasoning, which has developed over the course of a trial.

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116 Pfeifer & Ogloff, *supra* note 102 at 309.

117 Maeder & Burdett, "The Combined Effect", *supra* note 102 at 194, 197, 199.

118 Pfeifer & Ogloff, *supra* note 102 at 308.

119 *Supra* note 2 at para 110. Justice Martin refers to the importance of juror "accountability", though she does not explain how jurors may be held accountable.

Another view is that the salience of racially charged issues at trial motivates jurors to suppress their racial bias.[120] In *Williams,* Chief Justice McLachlin reasoned that challenges for cause may "sensitize" jurors on the "need to confront racial prejudice."[121] The proposition that some references to race might sensitize jurors points to the rationality-enhancing nature of some race references. Whereas rationality-enhancing race references challenge decision-makers to confront their racial biases and enhance the rationality of the fact-finding process, rationality-subverting race references "exploit, exacerbate, or play on the prevailing stereotypes that fact finders carry with them into the jury box" and subvert the rationality of the fact-finding process.[122] The Supreme Court of Canada's recommended jury instructions in *Barton* are arguably intended to enhance the rationality of the jury decision-making process by making the reality of anti-Indigenous prejudice against Indigenous women and girls salient to the jury. In contrast, the repeated stereotypical references to Gladue's race and occupation (as well as the treatment of her physical remains) at trial and in the pre-trial media dehumanized her and may have subverted the rationality of the jury decision-making process.[123]

However, it is unclear whether instructions that make race salient for Indigenous accused and victims actually reduce racial bias. Writing in the American context, Sommers and Ellsworth found that white participant-jurors are more likely to be biased against Black defendants when race is not salient.[124] However, their research suggests that when strong norms

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120 Sommers and Ellsworth define race salience as the salience of racially charged issues at trial, not merely a juror's awareness of a defendant or victim's race: Samuel R Sommers & Phoebe C Ellsworth, "'Race Salience' in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions" (2009) 27:4 Behav Sci & L 599 at 603–604 [Sommers & Ellsworth, "Race Salience"].

121 *Supra* note 24 at para 50.

122 Jody Armour, "Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit" in Gregory Parks, Shayne Edward Jones & W Jonathan Cardi, eds, *Critical Race Realism: Intersections of Psychology, Race and the Law* (New York: New Press, 2008) 11 at 30. Armour proposes a procedure for dealing with race references at trial. For another approach, see David M Tanovich, "Safeguarding trials from racial bias" (2 October 2018), online: *Policy Options* <policyoptions.irpp.org> [perma.cc/9XX8-UJF6].

123 It is also possible that jurors were impacted by the extensive pre-trial publicity before Barton's trial. As Cripps notes, counsel were the among the most reported informants in media representations of the case. In addition, media representations of Gladue often noted her gender, race, and occupation: Kyllie Cripps, "Media Constructions of Indigenous Women in Sexual Assault Cases: Reflections from Australia and Canada" (2021) 33:3 Current Issues in Crim Justice 300.

124 Samuel R Sommers & Phoebe C Ellsworth, "White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom" (2001) 7:1 Psychol Pub Pol'y & L 201 at 203, 220 [Sommers & Ellsworth, "White Juror Bias"].

against racial bias are present and race is perceived as salient at trial, white participant-jurors may self-regulate in order to appear nonprejudiced.[125] This appears to hold true even for those individuals who report high levels of old-fashioned, or overt and hostile, racism.[126] For this reason, Sommers and Ellsworth advocate making race salient in trials involving Black defendants.

Although Sommers' and Ellsworth's studies demonstrate a relationship between race salience and bias in the American context, it is unclear whether making race salient is effective for Indigenous defendants or victims. Recall that Knoop observed no statistically significant relationship between verdict and victim race or sex-work occupation in her study based on the trial materials in *Barton*. Knoop hypothesized that the Final Report into Missing and Murdered Indigenous Women and Girls, which was released one week before she conducted data collection, might have affected participant-jurors' verdicts.[127] In short, the Final Report might have rendered Indigenous sex workers' race salient to participant-jurors. As a result, the Final Report might have motivated participant-jurors to suppress their prejudicial reasoning or reduced the degree of situational ambiguity present for jurors. Knoop's hypothesis would tend to support Sommers and Ellsworth's argument that race salience may motivate some jurors to suppress prejudicial reasoning.

However, in two studies, Maeder, Yamamoto and McManus found that race salience operated uniquely and negatively for Indigenous, compared to Black, defendants.[128] In a first study involving a mock robbery trial in which the white victim recalled a racial slur, participant-jurors were more likely to perceive race to be a salient aspect of the trial for the Indigenous, compared to white, defendant but, regardless of defendant race, were less likely to convict.[129] In short, it appeared that racially charged issues encouraged participant-jurors to be more lenient in their convictions of

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Sommers and Ellsworth's research is also relevant to understanding the effect of race on jury deliberation more broadly, see Devine, *supra* note 62 at 117.

[125] However, these results are probabilistic, not deterministic: Sommers & Ellsworth, "Race Salience", *supra* note 120 at 605–606; For a summary of the experimental literature on race salience, see Ellen S Cohn et al, "Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes" (2009) 39:8 J Applied Soc Psychology 1953 at 1953-1958.

[126] Cohn et al, *supra* note 125 at 1965–1966.

[127] Knoop, *supra* note 105 at 64–68.

[128] Maeder, Yamamoto & McManus, "Race Salience in Canada", *supra* note 102. In the context of gang-affiliations, see also: Maeder & Burdett, "The Combined Effect", *supra* note 102 at 198–199.

[129] Maeder, Yamamoto & McManus, "Race Salience in Canada", *supra* note 102 at 445.

any defendant. In contrast, in a second study involving a mock theft of a motor vehicle, participant-jurors were not more likely to perceive race to be salient for the Indigenous than the white defendant when defence counsel argued that the prosecution was racially motivated.[130] In this case, it appeared that jurors refused to accept defence counsel's race-salience argument for Indigenous defendants, a phenomenon known as reactance or more colloquially known as "backlash".[131] Uniquely, however, jurors perceived race to be salient where the defendant was Black and his defence counsel argued that race was salient at trial.[132] In short, efforts to encourage participant-jurors to consider how race was relevant at trial did not work any better for Indigenous defendants than it did for white defendants when it came through defence counsel's argument, but *it did work better* for Black defendants. Thus, it seems to matter whether the racialized defendant is Indigenous or not.[133] Maeder, Yamamoto and McManus' study also suggests that *how* race is made salient matters; some references to race—such as arguments from defence counsel—may result in resistance or reactance from white jurors.[134]

What accounts for the differences observed in mock jury research involving Black and Indigenous defendants? Explaining their second study's findings, Maeder, Yamamoto and McManus hypothesize that, due to stereotypes against Indigenous peoples as receiving special privileges or unfair advantage, participant-jurors may have refused to accept defence counsel's argument.[135] In a subsequent study involving a mock robbery trial, Maeder and Yamamoto found that a defence counsel's argument that the prosecution was racially motivated did not appear to affect the likelihood of an Indigenous defendant's conviction among white participant-jurors, casting further doubt on the American literature which suggests that race-salience manipulations decrease the likelihood of conviction.[136] However, for non-white participant-jurors, defence

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130 *Ibid* at 446.

131 *Ibid* at 448.

132 *Ibid*.

133 It is possible that this differential result for Black and Indigenous accused may also be reflected in the contrasting positions of the interveners that represented non-Indigenous racialized and Indigenous populations in *Chouhan.* Compare, for example, the submissions of Debbie Baptiste and Aboriginal Legal Services to the Canadian Association of Black Lawyers: *Chouhan*, *supra* note 2 (Factum of the Intervener Debbie Baptiste; Factum of the Intervener the Canadian Association of Black Lawyers).

134 Sommers & Ellsworth, "Race Salience", *supra* note 120 at 606–607.

135 Maeder, Yamamoto & McManus, "Race Salience in Canada", *supra* note 102 at 448–450.

136 Evelyn M Maeder & Susan Yamamoto, "Investigating Race Salience, Defendant Race, and Victim Race Effects on Mock Juror Decision-Making in Canada" (2019) 36:5 Justice Q 929 at 945–946 [Maeder & Yamamoto, "Investigating Race Salience"].

counsel's arguments appeared to result in a greater than expected number of guilty verdicts.[137] Maeder, Yamamoto and McManus suggest that the results from their 2015 study "paint a picture of potential hostility toward Aboriginal Canadian defendants."[138]

American jury research proposes that American norms related to egalitarianism may motivate jurors to suppress racial prejudice against Black defendants. However, Maeder, Yamamoto and McManus' findings cast doubt on the effectiveness of American egalitarianism *and* Canadian multiculturalism as motivations for jurors to suppress anti-Indigenous prejudice.[139] Maeder and Yamamoto suggest that narratives of Canadian multiculturalism may explain why Black defendants receive the benefits of race-salience interventions while Indigenous defendants do not.[140] In the Canadian and American context, individuals are motivated by norms of egalitarianism to see and treat Black persons equally as individuals. In Canada, multiculturalism supports the integration of many racialized groups within a more diverse Canadian identity. However, American egalitarianism and Canadian multiculturalism appear to be inconsistent with Indigenous peoples' *difference as Indigenous peoples* to their territories and their unique place in Canada's constitution.[141] As Indigenous peoples further secure their rights and constitutional role, some Canadians reject these perceived "special advantages" through narratives of egalitarianism or multiculturalism.[142] As Denis explains, "[t]his tension between equality

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137 *Ibid* at 947. These results also suggest that racialized jurors who are not Indigenous may harbour unique stereotypes of or prejudicial attitudes towards Indigenous peoples.

138 Maeder, Yamamoto & McManus, "Race Salience in Canada", *supra* note 102 at 449.

139 Maeder & McManus, "Mosaic or Melting Pot?", *supra* note 103 at NP1007.

140 Maeder & Yamamoto, "Investigating Race Salience", *supra* note 136 at 390–391; see also Cohn et al, *supra* note 125 at 1967.

141 *The Constitution Act, 1867*, 30 & 31 Vict, c 3; *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, s 35. Maeder & Yamamoto, "Investigating Race Salience", *supra* note 136 at 390–391; See also Cohn et al, *supra* note 125 at 1967.

142 See Jeffrey S Denis, "Contact Theory in a Small-Town Settler-Colonial Context: The Reproduction of Laissez-Faire Racism in Indigenous-White Canadian Relations" (2015) 80:1 American Sociological Rev 218 at 224; Jeffrey S Denis & Kerry A Bailey, "'You Can't Have Reconciliation Without Justice': How Non-Indigenous Participants in Canada's Truth and Reconciliation Process Understand Their Roles and Goals" in Sarah Maddison, Tom Clark & Ravindra de Costa, eds, *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Singapore: Springer, 2016) 137 at 155; see also B Corenblum & Walter G Stephan, "White Fears and Native Apprehensions: An Integrated Threat Theory Approach to Intergroup Attitudes" (2001) 33:4 Can J Behavioural Science 251; Melanie A Brockman & Todd G Morrison,

and equity, or different understandings of justice … is perhaps one of the greatest barriers to reconciliation."[143] In *Williams,* Chief Justice McLachlin recognized this reality when she noted that "the potential of racist jurors siding with the Crown as the perceived representative of the majority's interests" may increase as "tensions between Aboriginals and non-Aboriginals" rise over resources.[144] Furthermore, Canada's colonial policies and laws fostered a legacy of violence towards Indigenous peoples and their communities *because of their political difference.*[145] Egalitarianism and multiculturalism do not conflict with stereotypes of Indigenous peoples as lazy, uneducated, or as the beneficiaries of special, and unearned, advantages.[146] Although "reconciliation" could have been a motivation for controlling bias, it now appears much too ambiguous, too ambivalent, and too legally and culturally slanted in favor of the state to be of much use.[147] Thus, it appears that race salience, alone, might be insufficient to motivate some jurors to self-regulate against racial bias, and that American egalitarianism and Canadian multiculturalism may be insufficient as norms for this purpose.

Could jury instructions—rather than counsels' references to race—motivate jurors to suppress racial prejudice by making race salient? Pfieffer and Ogloff's study was limited in its use of a standard jury instruction, rather than a specialized instruction on racial bias. Maeder and Yamamoto's research was limited to counsels' references to race and racial prejudice. Could a greater emphasis on the context and history of anti-Indigenous prejudice in specialized jury instructions, as suggested by the majority in

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"Exploring the Roots of Prejudice Toward Aboriginal Peoples in Canada" (2016) 36:2 Can J Native Studies 13 at 23–26.

143 Denis & Bailey, *supra* note 142 at 154.

144 *Supra* note 24 at para 58.

145 See Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 41; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 199–201 (arguing for the recognition of Indigenous peoples political jurisdiction in Canadian federalism).

146 For a survey of common stereotypes of Indigenous persons, see Morrison et al, *supra* note 95.

147 Hannah Wyile, "Unpacking Reconciliation: Contested Meanings of a Constitutional Norm" (2017) 22:3 Rev Const Stud 379; Mark Walters, "The Jurisprudence of Reconciliation" in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2010) 165; Mollie C McGuire & Jeffrey S Denis, "Unsettling Pathways: How Some Settlers Come to Seek Reconciliation with Indigenous Peoples" (2019) 9:4 Settler Colonial Studies 505 (describing non-Indigenous participants' perceptions of reconciliation in the context of the Truth and Reconciliation events); Denis & Bailey, *supra* note 142 at 138, 155 (discussing non-Indigenous participants' narrow characterisation of reconciliation in the context of egalitarianism and multiculturalism).

Chouhan, motivate some jurors to suppress anti-Indigenous prejudice? In *Chouhan,* the Court contemplated that specialized instructions might include a description of "the relevance of context and the harmful nature of stereotypical assumptions or myths" on a racialized accused or victim.[148] In *Barton*, the Court directed that specialized instructions in cases involving Indigenous women and girls should inform jurors "that Indigenous people in Canada—and in particular Indigenous women and girls—have been subjected to a long history of colonization and systemic racism, the effects of which continue to be felt."[149] Some legal scholars support specialized instructions that contextualize racial prejudice. Kahn argues that courts may need to instruct jurors on "the history and ongoing ubiquity of structurally biased practices and procedures in the criminal justice system."[150] As Signa Daum Shanks also argues, jurors (and the Court) cannot fairly interpret evidence without learning "where the victim came from and how that placement ultimately influenced where he was and the attitudes of others" and receiving "a deeper understanding of the land and the space" in which the event occurred.[151] If egalitarianism or multiculturalism cannot motivate some jurors to suppress racial bias, then perhaps a greater description of the context and history of anti-Indigenous prejudice may motivate some jurors to control for racial bias. This is one area where further empirical research may be helpful and is the objective of the second part of this study, of which this article is the first.[152]

5. Conclusion

The purpose of this article was to evaluate the empirical basis for the Supreme Court of Canada's assumptions about racial bias against Indigenous persons in criminal jury trials. The second part of this study is to empirically investigate the effectiveness of general and specialized

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148 *Supra* note 2 at para 56.

149 *Barton* SCC, *supra* note 2 at para 201.

150 Kahn, *supra* note 8 at 119.

151 Shanks, *supra* note 89. See also the reasons of Justice Côté, dissenting: *Chouhan*, *supra* note 2 at para 276.

152 In the American context, Elek and Hannaford-Agor experimentally tested a specialized jury instructions on racial bias for the National Centre for State Courts. Jury instructions that include instructions on race are, to some extent, "race salient" manipulations. Unfortunately, Elek and Hannaford-Agor did not observe a significant effect between the specialized and standard instruction on "white juror bias": Jennifer K Elek & Paula Hannaford-Agor, "Implicit Bias and the American Juror" (2015) 51:3 Court Rev 116 at 120. Elek and Hannaford-Agor's specialized instruction, however, is worth reviewing as a model of specialized instructions in Canada. For an overview of a potential research agenda, see Jennifer S Hunt, "Studying the Effects of Race, Ethnicity, and Culture on Jury Behavior" in Margaret Bull Kovera, ed, *The Psychology of Juries* (Washington, DC: American Psychological Association, 2017) 83 at 88–98.

jury instructions for reducing bias against Indigenous persons in criminal jury trials. Canadian jury research supports the proposition that race is associated with juror decision-making in cases involving Indigenous defendants and victims. This should not come as a surprise. Racial prejudice towards Indigenous peoples persists throughout Canada, in universities, cities, small-towns, and workplaces. Its persistence may be surprising to some given the constitutional role of Indigenous peoples in Canada and the numerous opportunities for positive intergroup encounters in churches, clinics, schools, grocery stores and hockey rinks. As the Court notes in *Williams* and *Gladue*, racism against Indigenous peoples is systemic in society and the justice system. The Canadian jury research also suggests that racial bias or prejudice against Indigenous persons operates differently from racial bias or prejudice against other racialized persons. Thus, we should approach specialized jury instructions with caution. If explicit references to race inadvertently prime, rather than suppress, prejudicial reasoning, then the use of "correct" specialized instructions might inoculate harmful jury instructions from appellate review. These insights also suggest that courts should approach challenges for cause with caution. If race references prime, rather than suppress, prejudicial reasoning, then such challenges for cause will be ill-suited to reducing juror prejudice. In *Barton* and *Chouhan*, specialized jury instructions on racial bias are presented as a step forward. However, the literature on racial salience in jury trials with Indigenous persons questions whether this step forward is on a solid foundation and casts further doubt on the capacity for jurors to control for racial prejudice against Indigenous persons.