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Racially Representative Juries:
Empowering People of Colour and Local Communities

by

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A Thesis Submitted to the Faculty of Graduate Studies and Research in Partial
Fulfilment of the Requirements for the Degree of Master of Arts

Department of Law, Carleton University, Ottawa, Ontario
April 1997

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in partial fulfilment of the requirements for
the degree of Master of Arts

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Abstract

Current jury selection procedures result in the under-representation of people of colour on criminal juries. As a result, jury verdicts do not accurately reflect the racial diversity and differing viewpoints of the entire population. This calls into question the legitimacy of the justice system and may result in denying defendants the right to a fair and impartial trial. This thesis argues that reform efforts should be concentrated on ensuring that people of colour are given every possible opportunity to participate on juries and that all barriers that directly or indirectly result in their exclusion be eliminated.

Acknowledgements

I wish to thank all those individuals whose encouragement and helpful advice have enabled me to complete this paper: Peter Swan, Renate Mohr, Diana Majury, Sandy Rochon and Barry Wright. Thank you to Kim Crosbie for her friendship and support. I am also grateful to Deborah McIntosh for her comments in reviewing drafts of this paper. Finally, a special thank you to Suzanne Hill for her patience and support throughout the completion of this thesis.

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INTRODUCTION

Since the release of the Report of the Royal Commission on Donald Marshall in 1989, Canadians have been bombarded with government reports and studies documenting the prevalence of systemic racism¹ within the criminal justice system and in Canadian society.² Awareness of the problem of racism has become so widespread that people within affected communities³ are quickly losing all

¹ The Commission on Systemic Racism in the Ontario Criminal Justice System (1996) defines systemic racism as:

...the values, practices, and procedures of decision-makers that result in [people of colour] receiving worse treatment than white people. Systemic racism does not necessarily depend on intention. Those with the power to make decisions may not consciously choose to treat white people better than [people of colour]. Even if there is no intention, however, the rules, values, and policies that shape decisions may have discriminatory consequences.

² See Report of the Royal Commission on Donald Marshall, Jr., Prosecution, Vol. 1, Province of Nova Scotia, 1989; Report of the Aboriginal Justice Inquiry of Manitoba, Province of Manitoba, 1991; Juries in Nova Scotia: Final Report, Law Reform Commission of Nova Scotia, 1994; Report on Race Relations in Ontario, Stephen Lewis, 1992; Discussion Document, Commission on Systemic Racism in the Ontario Criminal Justice System, 1993; Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, 1996.

³ I use the term "community" to mean groups of people who share the same culture, race or ethnicity rather than the more problematic term "minority." As a person of colour, I feel that the term "minority" holds a somewhat negative meaning when used to refer to people of colour and in addition, is totally inaccurate. The Ontario Commission on Systemic Racism recently pointed out that people of colour form 29% of the population of Toronto. Furthermore, immigrants comprised almost 40% of the total population of Toronto in 1991. As such, people of colour can hardly be considered to form a "minority." See Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, Province of Ontario, 1996, pp., 13 and 251.

Although this paper will examine ways in which the jury may empower people of colour, I will be leaving out a discussion of the under-representation of aboriginal peoples. The difficulty is that

confidence in the criminal justice system. In Ontario, this has prompted the creation of the Commission on Systemic Racism in the Ontario Criminal Justice System in 1994.⁴ In the U.S.A.,⁵ the intense frustration of people of colour was highlighted by the Los Angeles riots in the Spring of 1992 following the verdict in the Rodney King trial.⁶ Similar rioting and violence ensued in the streets of downtown Toronto.⁷ Although the verdict rendered by the jury and the riots that followed can be labelled as tragic, these incidents did succeed in raising the consciousness of the public to the racism in the criminal justice system endured by people of colour in both

some members of First Nations reside on-reserve while others live off-reserve in cities. This makes it harder to determine what group of individuals constitutes an aboriginal defendant's "peers." Furthermore, First Nations are currently demanding that they be entitled to govern themselves and set up their own system of justice. The issue of First Nations participation on juries is a complex one and cannot be adequately resolved within the context of this paper.

⁴ Racism Behind Bars: Interim Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, Province of Ontario, 1994. As the Commission points out in its interim report, its creation as well as the Stephen Lewis Report were prompted by intense lobbying and outcry on the part of affected communities. The Commission's final report was released in January of 1996. The issue of jury selection is one of the many items dealt with in its report.

⁵ Although I will be drawing on the work of American academics and authors in developing some of my arguments, I do acknowledge that there are differences between the U.S. and Canada in terms of history, culture, legal systems and the prevalence of jury trials.

⁶ All four of the officers charged with using excessive force in arresting Rodney King were acquitted by a Simi Valley jury. The jury was composed of six men and six women and included one Hispanic juror and one Asian -American. While there were no African -Americans on the jury, three of the jurors were relatives of police officers, three were members of the National Rifle Association and two had served in a law enforcement capacity during military service. Almost a year later in a federal trial, two of the four officers were found to have violated King's civil rights. Each of the convicted officers was sentenced to a 30 month prison term. See Steven Lowery, "Changing the California Venue Law After Rodney King," 23 *Southwestern University Law Review* 361, pp. 361, 365-66.

⁷ What had initially been intended as a peaceful anti-racist demonstration protesting the Rodney King verdict and the shooting of a Toronto black man by police erupted into looting and violence in the streets of downtown Toronto.

Canada and the United States.⁸

In the recent past, the judiciary in Ontario has finally begun to recognize that racism is an everyday occurrence within our society and that it has the potential to affect decision-making in criminal justice processes.⁹ However, up until now, the criminal justice system has done little to uphold and protect the interests and rights of people of colour. *Charter* guarantees of "life, liberty and security of the person" and "equality before the law" mean something completely different for people of colour than they do for whites. People of colour still remain outsiders looking in on a criminal justice system that discriminates against them, suppresses their voices and denies the existence and relevance of their histories and experiences.

The criminal law is the most coercive legal tool of the state and as a result, defendants of colour should have the right to be tried by jurors who have some understanding of their background, history and life circumstances. If people of

⁸ Some authors have commented that had it not been for the videotaped beating of Rodney King, the entire incident would have probably gone entirely unnoticed in the media as do many other racial incidents that occur each day. See Laird Blue, "Colloquy: Racism in the Wake of the Los Angeles Riots," *Denver University Law Review* Vol. 70, p. 187.

⁹ In the September 1993 case of *R. v. Parks* 15 O.R. (3d) 324, the Ontario Court of Appeal found that the trial judge erred in refusing to allow defence counsel to ask potential jurors whether their ability to judge evidence without partiality would be affected by the fact that the accused was black. The Court agreed with defence counsel's submission that wide-spread anti-black racism is a grim reality in Canada and particularly in Metropolitan Toronto. In his decision, Justice David Doherty quoted extensively from various studies and reports outlining the extent of racial prejudice in Canada and its potential to affect jury deliberation and selection procedures. The Court quashed the conviction and ordered a new trial. This case and its implications will be discussed in further detail in Chapter 3.

colour are subject to the criminal law of Canada then they should also be permitted to participate equally in decisions that will affect them and the communities in which they live. Brown and Neal point out that we already have too many "legal experts" dispensing production-line justice with little understanding and knowledge of the realities and lives of people of colour who come into contact with the criminal justice system.¹⁰ We need to view the jury as a vehicle that will help empower defendants of colour by ensuring that they receive a fair trial and people of colour in general by providing an opportunity to challenge liberal notions of formal equality.

Since the 1992 verdict in the Rodney King case was handed down and following the Los Angeles riots, the composition of juries has received extensive attention. In the United States and Canada and elsewhere, sustained media attention during the O.J. Simpson trial along with televised proceedings has brought the jury to the forefront of current discussions. The recent work of the Commission on Systemic Racism in the Ontario Criminal Justice System and the Nova Scotia Law Reform Commission highlight the under- representation of people of colour on criminal juries and provide recommendations which aim to make the jury selection process more representative of the general population. This lack of representation has promoted distrust of the criminal justice system among people of colour.¹¹

¹⁰ Brown and Neal, p.132.

¹¹ Ont. Com, p. 250.

Many legal professionals come from vastly different social backgrounds than the accused people of colour who they judge, counsel and advise. As a result, criminal justice professionals have little understanding of the context of their lives and social circumstances. By contrast, when jurors enter a courtroom, they bring with them a wealth of real life experience which provides an opportunity to challenge the view of the world reflected in notions of formal legal equality, the view held by most legal professionals.¹² This view of the world assumes that all individuals in society are equal, ignoring the influences of gender, race and class. The legal process forces people of colour to make their arguments in the neutral and empty constructs of liberal legal discourse. These neutral legal constructs succeed in masking racial oppression and making the histories and day to day struggles of people of colour irrelevant in a courtroom. While many of these problems with the criminal trial jury may seem difficult to overcome, I will make a case for the jury as a potential vehicle for social change which people of colour should embrace.

The value of the criminal jury lies in the fact that it provides a chance to counter the view of the world presented by formal legal equality and allows an

¹² This view is shared by a number of scholars. See P. Gabel and P. Harris, "Building Power and Breaking Images: Critical Legal Theory and The Practice of Law," (1982-83), 11 *New York Review of Law and Social Change* 369, A.C. Hutchinson and P.J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought," 36 *Stanford Law Review* 199, H.J. Glasbeek, "Some Strategies For An Unlikely Task: The Progressive Use of Law," 21 *Ottawa Law Review* 387, Michael Mandel, *The Charter of Rights and the Legalization of Politics* (2nd), 1994, Toronto: Thompson Educational Publishing, 1994.

opportunity to bring into the courtroom the perspectives of lay persons who might have personal experiences of racism, sexism or other forms of discrimination. The jury provides the potential for counter-hegemonic resistance¹³ within the legal process. It is this capacity of the jury that we need to encourage and develop in order that the previously marginalized perspectives of people of colour be permitted to inform the workings of the criminal justice system.

In order to take advantage of this potential of the jury, we need to first reform the current jury selection process to ensure that it is more representative of the general population and more specifically, inclusive of people of colour.¹⁴ In this paper, I will present a number of proposed reforms that I feel will help to increase the participation of people of colour on juries and provide them with the means to empower themselves and their communities.¹⁵ In order to return this decision-making power to local communities, I will argue that communities should be defined

¹³ By this I mean that the jury might be used as a tool to challenge the assumptions and practices of the very legal system which oppresses people of colour.

¹⁴ Other marginalized groups in society (the disabled, lesbians and gays) might also benefit from such representation in similar ways but this idea is beyond the scope of this paper.

¹⁵ In the context of this paper, I will be defining community on the basis of geographic location to identify the area from which prospective jurors should be chosen. I have done this in an attempt to ensure that the jury drawn from the immediate location of the offence accurately reflects the diversity of all of its residents. When jurors are drawn from large jury districts, the composition of the jury does not take into account the diversity of the many communities contained within that district. In addition, geographic definition takes into account the fluidity of communities. The overall identity of a community may change over the years as residents of varying races, languages, cultures and backgrounds come and go. In defining community on the basis of geography, I recognize that this definition may present certain limitations. I acknowledge that instances may arise where an offence may be committed in a community where there are no residents of the same race as the accused.

on the basis of geography. I use geography to define a community because I believe that when an offence is committed, it is an offence against that particular community and its residents. As a result, I think that the community in which the offence occurred has an interest in ensuring that the community's beliefs, morals and standards of behaviour are represented in court. I feel it is important to ensure that local community standards are reflected in criminal justice decision-making processes.

Some reform efforts propose more affirmative measures which contemplate a fixed percentage of a particular race.¹⁶ While I would agree with this more aggressive approach to ensure greater representation of people of colour on juries, I am not convinced that this option is viable or would ever be implemented. Given

¹⁶ In using the term "race" throughout this paper, I define race on the basis of culture rather than biology. The concept of race can have a broader meaning and encompass all aspects of "culture, community and consciousness." I agree with Neil Gotanda's idea that it can refer to "broadly shared beliefs and social practices," Jayne Chong-Soon Lee, "Navigating the Topology of Race," p. 447-448, in *Critical Race Theory: The Key Writings that Formed the Movement*, edited by Kimberle Crenshaw, Neil Gotanda et al., The New Press, New York, 1995. I believe that this conception of race and culture is what makes up a community. I also recognize that this definition of race as being cultural may raise difficulties in trying to distinguish between communities of colour. For instance, the issue becomes more complicated when attempting to differentiate between more established communities from those that are more recent such as immigrant communities. I acknowledge that this is a complex issue but one that is beyond the scope of this paper. Although race has historically been used to stereotype and discriminate against people, Chong-Soon Lee stresses that it can also be used as a form of racial solidarity. For example, the shared marginalized experiences of people of colour can be used to unite all people of colour and provide them with a common understanding to develop strategies for change. In using race to determine the composition of juries, I believe that extensive community consultation is required to enable people of colour and communities to define for themselves how they wish to have their communities categorized. See also generally, Jayne Chong-Soon Lee, "Navigating the Topology of Race," p. 447-448, in *Critical Race Theory: The Key Writings that Formed the Movement*, edited by Kimberle Crenshaw, Neil Gotanda et al., The New Press, New York, 1995.

the current political climate in Ontario and the Harris government's dismantling of affirmative action programs, any type of reform which favoured one group over another would most certainly fail and be rejected by the general public. Even the Rae government's attempts at trying to make public boards and institutions more representative were met with skepticism and termed "bobraecism"¹⁷ by one commentator. In light of this, I am proposing changes to the jury selection process that will make every attempt to be more inclusive of people of colour and will ensure that the process is seen to be fair by the public and does not favour one particular group over another. The reforms I will be advocating will involve changes to the way in which source lists are created and the way demographic information on particular communities is currently collected.

I believe that the current size of jury districts is much too large and that by decreasing their size, any potential jurors drawn from those smaller districts will be more representative of the immediate community in which the offence occurred.¹⁸ Districts are presently much too large to reflect the diversity and number of different communities and their residents. To take advantage of the potential of the criminal jury, we need to re-shape the jury into a form that more closely resembles the jury in its historical origins. In order to ensure that defendants of colour are judged by

¹⁷ See Rob Martin, "Ontario A.G. plays big part in 'bobraecism'," *Lawyers Weekly*, November 27, 1992.

¹⁸ See NSLRC, p. 36.

a jury of their peers, we need to implement changes to the selection process to facilitate the selection of jurors from the immediate community in which the offence occurred as well as select potential jurors from the defendant's home community.

In order to make selection procedures more equitable and fair for people of colour and the general public, I believe that there needs to be a balancing of the interests of both the defendant and the community in which the alleged offence took place. This balancing of interests is essential if reforms are to be accepted by the public. The changes proposed in this paper make efforts to fairly address the rights and needs of people of colour while acknowledging the need for a jury selection process that does not favour one particular group over another. Any reform that favoured the rights of people of colour over the rest of the population would no doubt be met with fierce opposition and distrust. I would contend that the fairest way to ensure that a jury is truly representative of the community in which an offence occurs in is to select that jury based on the racial composition of that particular community. For example, if 50% of the residents in the community are Black and 25% are Asian, then six of the jurors trying the defendant must be Black and three must be of Asian descent. I strongly believe that this is the most equitable way to ensure that defendants of colour are judged by their "peers."

In order to address the concerns of under-representation by people of

colour, we need to reform current jury selection procedures to make the process as inclusive as possible. One of the suggestions put forward by the Nova Scotia Law Reform Commission in its report on juries was to utilize postal codes to define jury districts.¹⁹ This is a valuable suggestion and one that I will explore further in this paper. By reducing the size of districts, we can better facilitate the selection of jurors who are members of the immediate community in which the alleged offence occurred. In addition, by changing the way in which we generate source lists of names of potential jurors, we can greatly improve the representation of people of colour on juries. To do this, I will argue that we need to select potential jurors from a community based on its racial composition. Later, in Chapter 5, I will elaborate on how we can assist the collection of this demographic information. In this fashion, the racial composition of a particular jury would depend upon the racial make-up of the community in which the offence occurred.

In the first chapter, I will provide a brief historical overview of the jury and discuss its significance. Although jury trials make up only 2% of all criminal cases that go to trial in Canada, this does not take away from their importance.²⁰ The jury developed as part of a long struggle against centralized power in Britain and later

¹⁹ NSLRC, p. 36.

²⁰ Granger et al., 1986, p.11.

in those countries that inherited British traditions of justice.²¹ Van Dyke considers juries to be very unusual institutions in democracies because most institutions of democratic governments draw their power from the people who elect their representatives to the decision-making bodies, but in a court of law, it is the people themselves, serving as jurors who make the decisions.²² The jury plays an important and unique role because many of the cases that are heard by a jury are the exceptional and serious ones such as murder or ones in which there is a genuine controversy about the facts.²³

Chapter 2 examines the problem of racism in Ontario and uncovers the ways in which racism is manifested against people of colour with respect to the criminal justice system. The chapter will be based on critical race theory combined with insights from the critical history of the jury. This chapter will also demonstrate that people of colour receive differential treatment in their dealings with the justice system. Reports in Ontario indicate that people of colour "are often unfairly charged, unjustly denied bail, unnecessarily prosecuted, wrongly convicted, harshly sentenced and mistreated in prisons."²⁴ In addition, people of colour are excluded

²¹ Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*, Cambridge, Massachusetts: Ballinger Publishing Company, 1977, p. 2.

²² *Ibid*, p.1.

²³ *Ibid*, p. xi.

²⁴ *Ibid*, p.2.

from the important decision-making processes of the criminal law because of their under-representation among justice personnel such as lawyers, judges, police officers and jurors.²⁵ As a result of this exclusion, the values, beliefs and histories of people of colour continue to remain absent from the criminal law. The problems of exclusion and racial discrimination are further compounded by the fact that formal equality does not provide people of colour with any substantive basis to challenge racial power and domination.²⁶ This is because the abstract and neutral language of rights isolates incidents of racism from their social context.²⁷ I will argue that people of colour should also focus reform efforts in other areas and will highlight why equality rights should only form one possible avenue of change. I will also attempt to highlight the symbolic importance of the criminal trial jury and its potential as a vehicle of change for people of colour. The symbolic significance of the jury should not be underestimated because much of legal ideology and popular understanding of the justice system is derived from criminal jury trials.²⁸ The large amount of public attention on the jury makes it a useful focus for change because the courtroom provides a public forum where lay participants can challenge liberal

²⁵ Ont. Commission, p. 249.

²⁶ Crenshaw and Peller, p. 285.

²⁷ See Kimberle Williams Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," 101 *Harvard Law Review* 1331, May 1988, p. 1341; also Mari Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method", *Women's Rights Law Reporter* Vol.11: 7 (1989).

²⁸ Brown and Neal, p. 128.

concepts of equality which mask the existence of racism. The jury enables representatives from the community to participate in the operation of the justice system and bring experiences of racism, oppression and poverty into the courtroom.

Chapter 3 will focus on the *Juries Act* in Ontario and the relevant sections of the *Criminal Code* that deal with jury selection procedures. A closer examination will reveal the in-court selection process for juries as a site for racist and discriminatory practices. Many prospective jurors are intentionally excluded by counsel at this stage of the selection process on the basis of their race. While the federal government has jurisdiction over in-court selection procedures, provincial statutes govern who may be eligible for jury service and stipulate the process and sources for the generation of jury rolls that are prepared annually by the sheriff of each judicial district. The preparation of jury lists and the sources used to generate them may result in the under representation of various segments of the population.²⁹ The Commission on Systemic Racism in the Ontario Criminal Justice System highlighted that the current citizenship requirement for jury service results in the exclusion of many people of colour from jury service.³⁰ This chapter will also provide a thorough review of existing case law and current judicial attitudes including a discussion of the Ontario Court of Appeal decision in the watershed

²⁹ Petersen, p. 151.

³⁰ Ont. Commission, p. 251.

case of *R.v. Parks* as well as the Bill C-70 amendments to the sections of the *Criminal Code* dealing with the jury selection process.³¹ An examination of the case law reveals that we cannot continue to rely on the judiciary to ensure that defendants of colour are given the opportunity to be judged by jurors who are impartial and free from racist attitudes and beliefs. While there are certain "safeguards" in place within the in-court jury selection process designed to weed out jurors who may be racially biased, they have proven to be ineffective and provide no opportunity to increase the participation of people of colour on juries.

Chapter 4 critically examines recent reform efforts, such as the Nova Scotia Law Reform Commission's 1994 Final Report on Juries, aimed at eliminating racial discrimination in the jury selection process and increasing the representation of people of colour on criminal trial juries. It will also review the January 1996 Report of the Commission on Systemic Racism in the Ontario Criminal Justice System. The difficulty with most attempts at reform is that while they acknowledge that racism is a problem and that people of colour are excluded from jury service, they do not propose measures that are aggressive enough to ensure that people of colour are provided with the opportunity to serve on criminal trial juries. Recent reform efforts have been disheartening in the face of extensive research

³¹ On January 23, 1992, the Supreme Court of Canada struck down the jury selection process in existence at the time which infringed an accused person's right to the presumption of innocence and to a fair and public hearing by an independent and impartial tribunal under section 11(d) of the *Charter*. This case and others will be discussed in further detail in Chapter 3.

documenting the lack of participation of people of colour in the jury process.

In the final chapter, I will demonstrate that it is inequitable to maintain the current jury selection process in the face of overwhelming evidence that specifically documents the level of racism within Canadian society. In order for any potential jury reforms to be meaningful for people of colour, I will argue that a number of changes need to occur. First, governments and criminal justice practitioners need to rethink the role and importance of the criminal jury. We must return to the model provided by the historical foundations of the jury where an accused was tried by "peers"³² who had some knowledge of the defendant's background, community and social circumstances.

In order to achieve this representation I would advocate a number of changes to the selection procedures currently employed. First, the source lists that are used to generate names for potential jurors should be more representative and inclusive of the entire population of the province. For instance, the lists used for health card numbers would tend to include a more accurate reflection of all the

³² Historically, the notion of "peers" referred to individuals from the community where the offence occurred who may have had personal knowledge of the facts and circumstances of the alleged offence or of the character of the accused. In defining "peers" in a modern context, I consider peers to be individuals drawn from the immediate location of the alleged offence who share with the accused a similar race, culture, beliefs and values and have an understanding of the dynamics of the community and its socioeconomic situation.

residents in the province of Ontario.³³ Second, the federal government should eliminate all sections of the *Criminal Code* pertaining to the jury selection process that are discriminatory or have the effect of eliminating potential jurors on the basis of their race. Third, the provincial legislatures should enact new legislation addressing the selection process to ensure that people of colour are adequately represented on criminal trial juries.

In the face of so much public distrust and evidence of racism in the Ontario criminal justice system, we cannot continue to rely on existing processes to empanel juries. We need to ensure that people of colour are able to fully participate in the criminal justice system and be permitted to sit in judgment of defendants who share a similar background, culture and social reality. Legislating the participation of people of colour on criminal juries would not only help to infuse the legal system with the values, morals and beliefs that have been missing from the common law but would also demonstrate to people of colour that Canada sees their participation as an important and integral part of the Canadian justice system.

³³ The use of provincial health insurance lists was recently recommended by the Commission on Systemic Racism in the Ontario Criminal Justice System as well as the Nova Scotia Law Reform Commission.

CHAPTER 1

AN OVERVIEW OF THE CRIMINAL JURY

In this chapter, I will discuss the origins of the criminal jury and trace its role through history as it evolved from an institution that provided information to the court to a modern day trier of fact. In addition, I will attempt to illustrate the importance of the jury's history and its relevance to race struggles.

A Brief History of The Jury

Juries were developed in England after the Norman Conquest of 1066. Even though there is no historical documentation that mentions juries prior to 1066, the roots of the jury system can be found in criminal and civil inquiries under old Anglo-Saxon law.³⁴ Where civil disputes arose, the parties would summon witnesses to testify about the validity of their claims. The process of resolving the dispute required each of the parties to provide a specified number of persons who

³⁴ Valerie P. Hans and Neil Vidmar, *Judging the Jury*, New York: Plenum Press, 1986, p. 23.

were willing and able to support their claims. This method of proof was called compurgation and the individuals who testified were known as compurgators. The compurgators had different roles depending on the nature of the case and as was mentioned earlier, one of their functions was to support the credibility of one of the parties by taking an oath. This is similar to the way in which today's character witnesses testify in trials. The number of compurgators that were needed for a trial was usually twelve or some multiple of twelve like forty-eight.

For criminal cases, people were also summoned to bear witness to facts and tell the court about any crimes that were committed in the community.³⁵ These witnesses, who were similar to compurgators, were forced to take an oath when revealing any information of criminal activity and the character of accused persons. The witnesses confirmed the validity of accusations but their testimony was not considered proof of guilt.

In criminal matters, guilt or innocence was determined by either compurgation or ordeal. If an accusation did not involve a violent crime or if there were no witnesses to the act, a number of relatives and neighbours of the accused would be selected to act as possible compurgators. From this number, the accused would be permitted to choose twelve individuals who would swear an oath about her

³⁵ Ibid, p. 24.

or his credibility. These compurgators were known as "equals" or "peers" of the accused. If an accused had a bad reputation, he or she required triple the number of peers. The accused was found not guilty and freed if the required number of peers verified their credibility.

The ordeal, a harsher method of proof, was used if the accused had been known to be a person of bad character, had been caught committing the crime, had committed a violent act or if compurgation had failed.³⁶ The ordeal could take one of several forms, "each of which was based upon an appeal to divine judgment and was administered in the course of solemn religious ceremony and ritual."³⁷ The accused might have to carry a hot iron for a certain distance or submerge their hand in boiling water and remove a stone attached to a piece of string.³⁸

Before 1219, trial by jury had occasionally been used in place of the ordeal as a method of proof. Even before the announcement by the Church in 1215, the King's judges would sometimes summon a jury to decide which form of ordeal was to be used or to decide whether a legal action had been brought maliciously.³⁹ This jury was still very different from the one we presently know. A justice or other

³⁶ Ibid.

³⁷ Christopher Granger et al., *Canadian Criminal Jury Trials*, Agincourt: Carswell, 1989, p. 16.

³⁸ Van Dyke, p. 24.

³⁹ Ibid, p. 26.

officer of the King would choose twelve people who would testify about the facts or the parties that were involved. At this period in time jurors were more like witnesses than judges of fact. Many times they were questioned about their personal knowledge of the case and usually their only role was to supply the court with information on which it could base a verdict.

As the Middle Ages came to a close, the role and function of the jury went through a number of dramatic changes. Initially juries only functioned to provide information to the court and these juries were known as "presenting" juries because they gave evidence which would lead to the indictment of the accused. As time went on, jurors began to be asked whether the facts of a case warranted a verdict of guilty or not guilty.⁴⁰ At first, these trial or petit juries were made up of witnesses from the "presenting" jury which had given testimony leading to the indictment of the defendant rather than other members who had no knowledge of the case. This resulted because it was believed that at least some members of the jury should be familiar with the people and facts of the case.⁴¹

Gradually, witnesses other than those on the jury were questioned at trials. Initially this practice was an informal part of a trial but slowly it became more

⁴⁰ Ibid, p. 27.

⁴¹ Ibid.

frequent and formal and "[e]ventually the jury's decision became based less and less on its own knowledge than on the evidence presented before it."⁴² Similarly to today, juries became finders of fact rather than providers of facts.

As the jury developed into a trier of fact, its judicial role became more apparent and elaborate rules of evidence were devised to guarantee its impartiality and security "so that it might approach a trial without prior knowledge or prejudice and render its verdict solely on the basis of the facts as proved by evidence properly admitted at the trial."⁴³

The abuses of the Court of Star Chamber, which by-passed jury trials, led to constitutional debates about the role of the jury as a popular guarantor of rights in the criminal trial process. *Bushell's* case in 1670 was an important precedent vindicating the jury's right to give a "verdict according to conscience" without fear of punishment. By the time of the Glorious Revolution, 1689, and the *Act of Settlement*, 1701, Star Chamber type proceedings were constitutionally prohibited. All persons charged with a criminal offence had the formal right to be tried by a "jury of peers."

⁴² Ibid, p. 28.

⁴³ Van Dyke, p. 26.

Trial by jury underwent a number of other refinements and changes and by the middle of the eighteenth century the jury was similar in basic structure and functions to the contemporary jury. The criminal jury trial became a part of Canadian law in 1758 and 1784 when it was received by the colonies of Nova Scotia and New Brunswick respectively.⁴⁴ The *Criminal Code* of 1892 preserved the right to trial by jury and this has been maintained up to the present day.⁴⁵ Section 11(f) of the *Charter of Rights and Freedoms* guarantees any person charged with an offence the right to trial by jury where the offence is punishable by imprisonment for five years or more.⁴⁶

Since the 19th century, however, utilitarian emphasis on efficiency has meant a steady reduction of jury trials, especially in Britain and Canada, to a lesser extent in the United States. Juries nonetheless are still important in the most serious and contentious cases and have wider symbolic significance because of their historical role.

⁴⁴ Granger et al., p. 28.

⁴⁵ Although the jury has had a long and varied history, a more detailed account is beyond the scope of this paper. For a more complete discussion of the jury's long history see Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800*, University of Chicago Press Ltd., London, 1985; *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, J.S. Cockburn and Thomas A. Green (eds.), Princeton University Press, 1988.

⁴⁶ *Constitution Act*, 1982.

The Historical Importance of Trial by Jury

The importance of the jury can be traced back to its role in the struggles between "governors and [the] governed over the power of life and death contained in the criminal law."⁴⁷ These were manifested on two basic issues. The first was freedom of the jury's verdict, the matter at issue in *Bushell's* case. The second was the issue of jury composition, an issue which most directly concerns us here. Various authors have commented that the defence of an individual against the state was a crucial function of the jury and considered the jury to be one of the defining institutions of a political democracy.⁴⁸ The jury is an instrument of democracy because it permits twelve ordinary residents of a community to weigh all of the competing interests and factors in a criminal case and come to a common decision. This is a more equitable method of determining the outcome of a case because judges are an unaccountable and unelected body and do not represent the interests of the immediate community where an offence may have occurred.⁴⁹ In fact, many proponents of the jury highlight the fact that historically it served as a protector from harsh and oppressive laws. During the 18th century in England, most crimes were capital offences and juries were very reluctant to send a defendant to death.

⁴⁷ Van Dyke, p. 127.

⁴⁸ Thompson, p. 6.

⁴⁹ See A.C. Hutchinson and P.J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought," *Stanford Law Review*, Volume 36: 199, p. 202.

Judges, juries and even complainants usually tried to find some reason to avoid the sanction of capital punishment which was regarded as too harsh.⁵⁰ The jury acted as a guardian against inhumanity and tyranny.⁵¹ Thomas Green points out that in the 18th century, juries very often identified with the perspective of the defendant.⁵² At times, the jury's historical role has been referred to as the "merciful application of the law" and as Green states:

Juries prevented the imposition of sanctions they deemed too harsh in light of the defendant's behaviour, reputation or the hardship he [sic] had already suffered.⁵³

Blackstone also commented that because much of criminal activity resulted from social conditions, juries very often extended mercy in cases of peculiar hardship.⁵⁴

During the late sixteenth century in England, most jurors were white, male and members of the upper class.⁵⁵ The ability to serve on a criminal court trial jury depended on one's qualifications as determined by law. The legal requirements for jury duty were found in a number of statutes as well as common law rulings. Until

⁵⁰ Green, p. 286.

⁵¹ Green, p. 296.

⁵² Green, p. 288.

⁵³ Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200 - 1800*, Chicago: University of Chicago Press, 1985, pp. 105, 357.

⁵⁴ Thomas Green, p.296.

⁵⁵ Law Reform Commission of Nova Scotia, *Juries in Nova Scotia*, Halifax: Law Reform Commission, 1994, p. 16.

the recent past,⁵⁶ property ownership was a requirement for serving on a jury and up until 1919 in England, being male was one of the necessary qualifications for jury service.⁵⁷

Although early juries may have been composed of propertied landowners, this should not detract from the important fact that the jury developed as part of a long struggle against centralized power in Britain.⁵⁸ E.P. Thompson points out that

the record of the "humanizing" role of the jury is incontestable... [and that] jury nullification or the mitigation of the offence...in criminal trials...must have saved tens of thousands from the gallows... Moreover, the uncertainty as to a jury's verdict must have prevented more thousands of oppressive prosecutions from ever being launched.⁵⁹

Brown and Neal feel that this history of struggle between the powerful and the powerless should not only lead us to call for the retention of trial by jury but for its further expansion.⁶⁰

There are currently many competing views held by legal historians surrounding the class composition of juries. For instance, Douglas Hay argues that

⁵⁶ It was not until 1972 in England that the requirement of property ownership was abolished.

⁵⁷ Douglas Hay, 1988, p. 348.

⁵⁸ Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*, Cambridge, Massachusetts: Ballinger Publishing Company, 1977, p. 2.

⁵⁹ E.P. Thompson, 1986, p.10.

⁶⁰ Brown and Neal, p. 127.

juries could not have been drawn from the lower, working classes due to the qualification that a juror own property.⁶¹ This may be contrasted with various historical commentaries and publications that attributed the large number of acquittals in the 1780s to the fact that trial juries were too often composed of "low and ignorant country people."⁶² Some historical accounts indicate that the property requirements for jury service were not enforced and that this may offer an explanation as to why jurors were not always drawn from the upper classes.⁶³ E.P. Thompson believes that the jury took on a critical role as a defender against the powers of the state during the 17th to 19th centuries.⁶⁴ Thompson argues that during this time period, especially in London, jurors were often chosen from a lower socioeconomic class:

[T]hey were empanelled from lesser gentry, shopkeepers, master tradesmen [sic], merchants and dealers - a social stratum which included many with some "independence" from the lines of interest and patronage.⁶⁵

Although there may be some disagreement among legal historians about the class composition of juries, I believe that the main point is the fact that juries at that time in history were composed of some individuals whose views and attitudes would

⁶¹ Cockburn and Green, p. 305.

⁶² Cockburn and Green, p. 307.

⁶³ Douglas Hay, p. 310.

⁶⁴ Thompson, p. 4

⁶⁵ Thompson, p. 4.

have differed from those held by the wealthy and propertied upper classes. In fact, in many instances, juries often did not convict where they felt the penalty was too harsh. It is this “alternate” view⁶⁶ which makes the jury an important vehicle for challenging the liberal view of the world shared by mainstream legal professionals and other jurors in the courtroom. Even if the property requirement prevented many of the working class from participating on a jury, this does not in any way take away from its potential to reveal inequality within society.

The power of the historical jury lies in the fact that jurors were able to decide upon an issue as they saw fit and did not always follow the strict letter of the law. Green characterizes the trial jury as a reflection of the limits of the power that authorities could bring to bear on those they ruled.⁶⁷ Throughout history, juries have often acted in defiance of the law or established norms:

...juries may and do infuse “non-legal values” into the trial process. They are the conscience of the community; they represent current ethical conventions. They are a restraint on legalism, arbitrariness and bureaucracy.⁶⁸

It is this aspect of the jury that provides people of colour with an opportunity for empowerment. It has the potential to enable people of colour to make important decisions and draw upon their own values, history and beliefs in determining the

⁶⁶ Bankowski, p. 20.

⁶⁷ Thomas Andrew Green, p. 313.

⁶⁸ Bankowski, p. 20.

guilt or innocence of an accused.

The important lesson to learn from history is that the jury has always offered a potential form of resistance within the criminal law. The essential point is that the decision-making power of the criminal law was placed in the hands of individuals who may have held views that were different from the legal profession and the ruling classes.

Kimberle Crenshaw highlights the need for people of colour to use the tools available to them and states that "the challenge...is to create a counter-hegemony by manoeuvring within and expanding the dominant ideology to embrace the potential for change."⁶⁹ I would contend that the criminal trial jury provides people of colour with an opportunity to challenge the very legal system which denies their histories of racism and oppression. The jury provides a perfect opportunity and public forum to educate everyone in a courtroom that the real life experiences of people of colour do not mirror the view of the world that all individuals are equal as presented by liberal ideas of formal equality. I believe that simply enabling defendants of colour to make arguments in a public forum which expose this view of the world as false is counter-hegemonic in itself.

⁶⁹ Crenshaw, p. 1386.

Historically, the jury reflected the interests of the local community as opposed to those of central authorities⁷⁰ and it is precisely this idea to which we should try to return. The notion of a local community has changed substantially. In modern day Canada, it is unrealistic to assume that all members of a particular geographic community⁷¹ are equals or hold similar values since we have a large and varied population. As a result, there are currently many different perspectives and values being judged by one set of laws.⁷²

Encouraging and facilitating the use of racially representative juries drawn from the vicinity of where an offence occurred would help to return decision-making power to local residents. Individuals from the local neighbourhood are well placed to determine whether a verdict is in the best interests of the community and whether it serves the interests of justice. In this way, verdicts would reflect all of the community's perspectives and diversity of experience.

⁷⁰ Van Dyke, p. 105.

⁷¹ Presently, there is a lot of literature and discussion debating the issue of what constitutes a "community." For the purposes of this discussion I will be referring to a community on the basis of geography.

⁷² Ibid, p. 22.

CHAPTER 2

THE JURY AS A VEHICLE FOR CHANGE

This chapter will outline how I envisage utilizing the jury as a vehicle of change, and will show how jury participation may help to empower people of colour in a number of ways. I will draw upon the work of critical race theorists which may offer insight into why the jury might be a useful vehicle to empower people of colour and will combine this with a discussion of the critical history of the jury to help provide a framework for how I think the jury might operate. A critical review of the history of the jury reveals that historically jurors held differing views from the legal profession and the ruling classes and had their own conceptions of what constituted justice. Applying this alternative conception of justice with the lessons of critical race theory may provide us with a model to use the jury to empower people of colour.

The chapter will first highlight the prevalence of racism in Ontario through a brief examination of the research of the Ontario Commission on Systemic Racism.⁷³

⁷³ Much of the work in this paper and that of my sources incorporate many of the assumptions of critical race theory. For instance, critical race theory seeks "to demonstrate that the experiences of people of colour are legitimate and appropriate bases for analysing the legal system and racial

The next section of the chapter will attempt to offer an explanation of how the legal system prevents people of colour from having their views and perspectives reflected in the criminal law. Finally, I will reveal why the increased participation of people of colour on juries may help to ensure that defendants of colour are given a fair trial. The presence of the jury helps to ensure that all defendants are accorded due process because the influence of public scrutiny may serve to ensure that criminal justice professionals deal with defendants of colour fairly and that defendants are able to exercise all of the rights and protections that the law affords them. This would include such protections as the right to be notified of the nature of the charges laid against an accused and the right to retain and instruct counsel without delay.

The jury not only offers the potential to aid individual defendants but may also act as a catalyst in bringing about social change to empower all people of colour. The courtroom provides a public forum in which to challenge liberal notions of formal legal equality and enables residents of the community to participate in the decision making processes of the justice system and bring real life experiences of

subordination," John Calmore, "Critical Race Theory, Archie Shepp, and Fire Music: Securing An Authentic Intellectual Life in a Multicultural World," p. 319, in Crenshaw et al., *Critical Race Theory: The Key Writings that Formed the Movement*, New York: The New Press, 1995. It tries to identify values and norms which have been subordinated in the law. The Ontario Commission on Systemic Racism incorporates these ideas in its evaluative assumptions and stresses the need to give priority to the experiences of marginalized groups. The Commission recognizes at the outset of its report that one of the best ways to determine the impact and effects of racism is to study the experiences and perceptions of people of colour. The Commission acknowledged that this approach is crucial to recognizing the full impact of racism.

poverty, racism and oppression into the courtroom. Brown and Neal believe that the jury "contains the potential for the cultivation of alternate realities in the courtroom" and might provide an opportunity to break away from the ordered and structured legal system.⁷⁴ The jury enables 12 individuals, some of whom may not share this view of the world, with a chance to demonstrate that liberal views of formal equality do not hold true in real life. The potential to highlight the world outside of the courtroom as a very different place is what makes the criminal jury so appealing.

Widespread Racial Discrimination

Recent surveys conducted in Ontario indicate that people of colour "are often unfairly charged, unjustly denied bail, unnecessarily prosecuted, wrongly convicted, harshly sentenced and mistreated in prisons."⁷⁵ There is also a growing lack of confidence in the criminal justice system in Ontario. This is particularly true in black communities in light of the number of police killings and woundings of black people in Ontario over the past 18 years.⁷⁶ The large collection of data and studies by the Commission on Systemic Racism in the Ontario Criminal Justice System has

⁷⁴ David Brown and David Neal, *Show Trials: The Media and the Gang of Twelve* in Peter Duff and Mark Findlay (eds.), *The Jury Under Attack*, Sydney: Butterworths, 1988, p. 133.

⁷⁵ Ont. Commission, p. 2.

⁷⁶ Ont. Commission, p. x, In nine of the shootings, criminal charges were laid against the officers, however, not one officer was convicted.

provided us with overwhelming evidence of the problem of racial discrimination in Ontario.⁷⁷ The study is wide-ranging and examines the history of racism in Canada, imprisonment, court dynamics, charging policies, sentencing, parole, policing and also explores strategies for equality. The report of the Commission highlights the extent to which people of colour are subject to racial discrimination in every area of the justice system. For instance, in its Interim Report, the Commission uncovered the racial hostility and inequality that occurs in Ontario prisons.⁷⁸ Furthermore, prison services and the rehabilitation programs available to people of colour are inadequate and the Commission pointed out that the "Ontario prison system principally caters to white, Euro-Canadian norms..." with the result that the needs of people of colour are dismissed.⁷⁹

The Commission also explored how skin colour results in the unnecessary harassment and humiliation of people of colour through police discretion to stop

⁷⁷ Much of the research and evidence of racism presented in this paper relies upon the data and evidence collected by the Ontario Commission on Systemic Racism. I believe this data to be accurate and reliable given the fact that the Commission conducted extensive surveys, interviews and community consultations with people of colour, judges, lawyers and other criminal justice professionals. Many detailed research projects were undertaken including public opinion surveys of Toronto residents, surveys of legal professionals, public forums and focus groups, surveys of police officers of colour, correctional studies, prison discipline studies, surveys of high school staff and students, historical reviews of the Ontario criminal justice system, studies on youth and street harassment, studies on sentencing and race, studies on jury representativeness and the participation of people of colour in criminal justice policy development.

⁷⁸ Interim Report, Ontario Commission on Systemic Racism, 1994, The commissioners highlighted the fact that prison staff stereotyped male black prisoners as being "noisy, aggressive and violent," p. 21.

⁷⁹ Ibid, p. iii.

and question motorists.⁸⁰ In surveys conducted for the Commission, approximately 43% of black males reported being stopped by police in the last two years.⁸¹ The Commission also received many complaints from all over Ontario describing excessive and demeaning police contacts with people of colour.⁸² Surveys indicated that 74% of blacks and 47% of white Toronto residents felt that black people receive differential treatment by police.⁸³

The Commission also revealed that people of colour felt further excluded from the justice system because of the "under-representation of persons from their communities among lawyers, judges, justices of the peace and jurors."⁸⁴ The commissioners outlined the dangers of this problem:

...Participants in Commission consultations spoke vividly of fears that white lawyers and decision-makers - even if well-intentioned - neither understand nor relate to the heritages, cultures and experiences of racialized persons...[I]mages of white justice convey subtle messages that the court system lacks respect for individuals who are not white. The Commission was told repeatedly that under-representation of racialized persons among judges and lawyers is seen as reflecting assumptions that these Ontarians are less worthy of working as justice system professionals. As such, under-representation repeats and reinforces an unspoken message that white skin is an indicator of competence.⁸⁵

Other surveys of criminal justice professionals as well as the general

⁸⁰ Ont. Commission, p. 349.

⁸¹ Ibid, p. ix.

⁸² Ibid, p. 350.

⁸³ Ibid, p. ix.

⁸⁴ Ibid, p. 249.

⁸⁵ Ibid, p. 249.

population uncovered that Black, Chinese and white residents of Toronto believe that judges discriminate on the basis of race.⁸⁶ Based on the results of all these findings, the Commission agreed that the fact that many Ontarians lack confidence in the justice system is reason enough "for grave concern and a call for action."⁸⁷

Historical Oppression

Our legal system presents a number of obstacles which make it difficult for people of colour to have their views represented in our criminal justice system. Many of the rules and components of our criminal justice system have historically reflected white views and perspectives and as a result, contain traces of many racist values and assumptions.⁸⁸ In its discussion of the origin of racial differences in Canada, the Ontario Commission on Systemic Racism identified imperialism as the major cause for the unequal treatment of people of colour.⁸⁹ As the Commission recounted,

European empires of the 16th and 17th centuries used racial difference to justify exploitation of the people, lands and resources of other societies. In this process the elites of England, France, Spain, Portugal and the Netherlands defined members of the societies they exploited as inferior, savage and strange, and themselves as superior, civilized and normal. They made

⁸⁶ Ibid, p. 12.

⁸⁷ Ibid, p. 17.

⁸⁸ Joanne St. Lewis, "Meeting at the Crossroads: Judicial Decision-Making in a Racially Sensitive Context," Background Paper for the Canadian Judicial Centre Conference, Halifax, Nova Scotia, June 1990, p.2.

⁸⁹ Ont. Commission, p. 43.

these meanings socially significant by organizing societies they colonized on the basis of these meanings... As well as justifying economic exploitation, these meanings of racial difference were incorporated into European societies through religion..., education, culture and politics. By imposing elements of their domestic systems on the societies they colonized, the European imperial powers spread the meanings of racial difference.⁹⁰

European history and thought “justified” an analysis that defined people of colour as inferior,⁹¹ and these attitudes and beliefs have been adopted by our legal system. Initially, Euro-centric attitudes were reflected in overtly racist statutes denying people of colour the right to vote or participate as jurors.⁹² These attitudes were also reflected in racist immigration policies in Canada at the turn of the century.⁹³ While racist distinctions between Euro-Canadians and others have been all but eliminated from provincial and federal legislation, racist attitudes and beliefs still remain and are demonstrated in the criminal justice system in the form of racial hostility towards people of colour, the use of racially abusive language, the imposition of harsher sentences and harassment by police and correctional officers.⁹⁴

The Ontario Commission on Systemic Racism provides an appropriate example of how ignorance and stereotypical beliefs can make their way into the

⁹⁰ Ont. Commission, p. 43.

⁹¹ St. Lewis, p. 3.

⁹² Petersen, p. 151.

⁹³ Ont. Commission, pp. 44-45.

⁹⁴ Ont. Commission, p.

courtroom.⁹⁵ The Commission's report highlights the 1993 trial of Dudley Laws⁹⁶, a well known member of Toronto's black community, and the reactions of the trial judge in response to two members of the audience who were wearing head coverings in accordance with their cultural beliefs. The trial judge asked the two people to either remove the head coverings or leave the courtroom. The judge remarked that:

Body clothing must not, in the view of the judge, be likely to attract attention away from proceedings. Nor should head coverings... A public trial does not include offensive or intrusive costumes.

The Commission commented on the troubling and racist nature of the trial judge's comments:

These reasons suggest that the judge neither understood nor respected the cultural and religious traditions of the two spectators. This ignorance of something important and personal to the black spectators caused offence, hurt and embarrassment. It also resulted in unequal treatment because the spectators were excluded from the courtroom unless they removed their head coverings... When white authority figures make such remarks about an expression of black persons' traditions, it suggests the system they represent lacks respect for those traditions or is ignorant of them... Because ignorance and disrespect are common features of historical and contemporary racialization, such remarks are understood as judgments about the strangeness and inferiority of... black persons' culture.⁹⁷

In the next section of this chapter I will examine how the legal system, through its structure, methods and discourse remains impervious to the views, histories and struggles of people of colour. I will demonstrate how notions of

⁹⁵ Ont. Commission, pp.48-49.

⁹⁶ *R. v. Laws*, unreported, November 15, 1993.

⁹⁷ Ont. Commission, p. 49.

neutrality and objectivity are utilized to deny the existence of racism and make it virtually impossible for people of colour to have their experience represented in a courtroom. I will also survey the work of critical race scholars, which offers useful insight into why the criminal jury might be a useful vehicle to empower people of colour.⁹⁸

Critical Race Theory: Understanding Racial Oppression

Traditional legal method does not take into account the historical discrimination and oppression faced by particular groups in society, with the result that certain values, experiences and beliefs are rendered invisible within the criminal justice system.⁹⁹ This problem is further compounded by the fact that pervasive notions of formal legal equality do not provide any substantive basis with which to challenge racial power and discrimination.¹⁰⁰ Critical race theorists have focused, in part, on the role of rights discourse in further abstracting and marginalizing the lived experience of people of colour.

⁹⁸ While there may presently be fundamental debates in current legal scholarship over the law's transformative potential, this paper will not be engaging with these debates in detail as they are beyond the scope of this study on the jury.

⁹⁹ See Joanne St. Lewis, "Meeting at the Crossroads: Judicial Decision-Making in a Racially Sensitive Context," Background Paper for the Canadian Judicial Centre Conference, Halifax, Nova Scotia, June 1990, p.2; Mari Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method", *Women's Rights Law Reporter* Vol.11: 7 (1989).

¹⁰⁰ Crenshaw and Peller, p.291.

Kimberle Crenshaw highlights a tension between what she terms the expansive and restrictive views of liberal legal discourse.¹⁰¹ The expansive view focuses on racial equality as an outcome and attempts to use anti-discrimination law and the courts to remove the conditions of racial subordination as well as to eradicate the effects of racial oppression.¹⁰² The restrictive view sees equality as a process and only attempts to deal with future wrongdoing rather than redress wrongs of the past.¹⁰³ The restrictive approach deals with racism as a series of isolated incidents "rather than as a societal policy against an entire group."¹⁰⁴

Crenshaw and Peller illustrate this restrictive view of equality by pointing out that interpretation, ideology and narrative are important factors in the production of racial domination.¹⁰⁵ Narrative¹⁰⁶ in particular provides a way of comprehending how formal legal equality fails to protect people of colour from racism.¹⁰⁷ They state that "[l]aw in general and the courtroom...are arenas where narratives are contested

¹⁰¹ Kimberle Williams Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," 101 *Harvard Law Review* 1331, May 1988, p. 1341.

¹⁰² Ibid.

¹⁰³ Ibid, p. 1342.

¹⁰⁴ Ibid.

¹⁰⁵ Kimberle Crenshaw and Gary Peller, "Reel Time/ Real Justice," *Denver University Law Review* Vol.70:2, 1993, p. 284.

¹⁰⁶ Narrative refers to the language used to describe and interpret events.

¹⁰⁷ Ibid, p. 285.

and the power of interpretation exercised."¹⁰⁸ Narratives are used to mediate power such that the exercise of power is made to appear as non-power and in this way, narratives shape what and how certain events are perceived in the first place.¹⁰⁹

In the 1993 case of *R v. Parks* the Ontario Court of Appeal acknowledged the difficulty in proving the existence of racism and stated that racial bias is something that cannot be established in the manner normally associated with the proof of adjudicative facts.¹¹⁰ In other words, the verdict in the Rodney King trial should be seen as a typical rather than extraordinary response from a legal system that subscribes to neutrality and abstraction.¹¹¹

Crenshaw and Peller refer to the practice of "disaggregation" as a way in which the exercise of racial power is diffused, minimalized and distorted.¹¹² "Disaggregation" is a "narrative technique that narrows the perception of the range of illegitimate racial power by divorcing particular episodes from their larger social

¹⁰⁸ Ibid, p. 286.

¹⁰⁹ Ibid, p. 286. To illustrate this, they use the example of the Rodney King beating and point out that his brutal beating was framed in such a way to appear as the "reasonable exercise of force to restrain a prisoner."

¹¹⁰ 15 O.R. (3d) 324.

¹¹¹ Crenshaw and Peller, p. 290.

¹¹² Ibid, p.291.

context."¹¹³ The beating of Rodney King by the Los Angeles Police Department in 1992 provides us with a useful example.¹¹⁴

Jerome Culp comments on the Rodney King trial and states that "[e]ven though our legal and political systems deal with the race question all the time, they consistently deny the importance of answering it."¹¹⁵ In discussing the importance of dealing with race and the need to acknowledge its relevance Culp says¹¹⁶

Only by denying the importance of the race question is it possible to create a police force that would beat a black man before a camera and despite the video record, call it justice. Only by denying the race question is it possible for twelve non-black jurors to conclude that no crime was committed by those four officers despite the neutral uninvolved video record.

In looking for an answer to eliminate the racism within our society and criminal justice system, Culp states that not looking at issues of race and promoting racial neutrality will only increase racial subordination.¹¹⁷ In re-examining the Rodney King case, he says that had the courts looked at the racial facts of Rodney King's experience things would have been much different. First, the case would

¹¹³ Ibid, p.291.

¹¹⁴ Although many observers thought that the videotaped beating of Rodney King would provide the "objective" proof needed to convict the Los Angeles Police Department of racist brutality, it only served as an example of how "objectivity" works as a discourse of power to marginalize victims of racism, Ibid, p.293.

¹¹⁵ Jerome McCristal Culp, Jr., "Notes from California: Rodney King and the Race Question," *Denver University Law Review* Vol.70:2, 1993, p. 200.

¹¹⁶ Ibid, p. 203.

¹¹⁷ Ibid, p. 211.

not have been moved to Simi Valley where the racial circumstances were unfair to his interests. Second, Rodney King would have been permitted to testify about his experiences with the L.A.P.D. before a jury composed of some jurors who could have understood those experiences. Culp highlights the fact that if we do not change our approach to race and law and continue to deny the racial truth that exists, we ultimately fail justice.¹¹⁸ He believes that up until now the legal response to racism has been to deny its importance and to seek a form of racial blindness that simply reinforces racial oppression.¹¹⁹ Similarly, Mari Matsuda stresses that the legal system's reliance on "[a]bstraction and detachment are ways out of the discomfort of direct confrontation with the ugliness of oppression."¹²⁰ Abstraction permits a discussion of concepts such as liberty and rights without any connection to what those concepts mean in real people's lives.¹²¹

Some critical legal scholars stress that engagement with rights discourse results in "ultimately legitimating the very racial inequality and oppression that...[the rights]...purport to remedy."¹²² Furthermore, the language of rights and equality

¹¹⁸ Ibid, p. 211.

¹¹⁹ Ibid, p. 211.

¹²⁰ Mari Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method," *Women's Rights Law Reporter* Vol.11: 7 (1989).

¹²¹ Ibid, p.9.

¹²² Ibid, p. 1334.

limits the potential for any radical change or “justice.” Even though formal equality may act as a barrier to achieving radical social change, this should not mean that people of colour should abandon using the law in their struggles. While Crenshaw agrees that engaging in equality rights discourse has resulted in deradicalizing struggles such that “racial oppression continues to flourish behind the screen of equality,” she also points out the benefits of engaging with the law of rights.¹²³

Even though legal ideology absorbs, redefines, and limits the language of protest, African-Americans cannot ignore the power of legal ideology to counter some of the most repressive aspects of racial domination.¹²⁴

Some critical race theorists point out that using the law in conjunction with other strategies for equality is a better alternative than abandoning the use of law and rights discourse altogether. Arguably, people of colour should still seek to employ the law to pursue equality rights litigation to ensure that they receive equal treatment and are afforded all of the protections of the law as are other residents of Canada. The jury gives people of colour a chance to present a different view of the world because jurors may bring with them real life experiences of oppression, racism and poverty which can paint a different view of the world from that presented in a courtroom.

¹²³ Ibid, p. 1370. Critical legal scholars caution against the use of law and rights discourse to bring about equality and question whether law is the best vehicle for achieving social change.

¹²⁴ Ibid, p. 1334.

A NEED FOR ACTION

The under-representation of people of colour in decision-making positions and positions of power in the criminal justice system only contributes to feelings of distrust, exclusion and alienation. The need to deal with charges of systemic racism and discrimination in the Ontario criminal justice system are crucial. The Ontario Commission on Systemic Racism stresses that a legal system that heralds its commitment to equality lacks credibility if the public do not believe that the system is actually committed to achieving it.¹²⁵ A lack of credibility in the justice system might result in the perception that the administration of criminal sanctions amounts to nothing more than oppression.¹²⁶

The exclusion of people of colour from participation on criminal juries not only adversely affects defendants of colour but harms people of colour in the community in which the alleged offence occurred. First, excluding jurors who share the same background as a defendant may have the effect of denying that person the right to a fair trial. Cynthia Petersen emphasizes that the equality rights of both the victim and accused are violated when members of their race are excluded from

¹²⁵ Ont. Commission, p. 3.

¹²⁶ Ibid.

the jury.¹²⁷ She states that "[t]he absence of jurors of their [the accused's] own race increases the likelihood that there will be barriers to their ability to convey their version of the facts."¹²⁸ This will also increase the possibility of racial stereotyping influencing the jury's consideration of the evidence in a case.¹²⁹ This view is shared by Hans and Vidmar who suggest that race-dependent context may sometimes play a crucial role in the way evidence is interpreted by a jury.¹³⁰ The economic and social conditions of a community may be best understood by persons who live there and as a result, defendants should only be judged by peers from that same community.¹³¹ Hans and Vidmar highlight that "what may appear to white jurors as a black defendant's implausible story may ring true to black jurors with greater knowledge of the context and norms of black experience."¹³² This is well illustrated by the experience of a black man who served as a juror in Los Angeles in 1973:

¹²⁷ Petersen, p. 164. In defining what equality means in the context of the justice system in Ontario, the Commission on Systemic Racism stated that "...equality requires the criminal justice system to adjust to diversity within the community it serves." See Ont. Commission, p. 3.

¹²⁸ Petersen, p. 164.

¹²⁹ Petersen, p. 164. Joanne St. Lewis states that racism is the

... manifestation of an attitude through the decision-making process which assumes the inherent superiority of the values of the dominant culture/ racial group and the inferiority of another cultural racial group... [R]acism is fundamentally about power. The power to shape reality in accordance with one's values. The power to give voice to or silence the diversity of others. See St. Lewis, p. 1.

¹³⁰ Hans and Vidmar, p. 50.

¹³¹ Van Dyke, 1977, p. 10. I would advocate that this does not mean each of the 12 jurors must be of the same cultural background as the accused but that potential jurors drawn from the area understand the community in which the offence occurred.

¹³² Hans and Vidmar, p. 50.

It seemed like the only reason that they arrested the [black] defendant [who was charged with auto theft] was that someone in the gas station across the street looking out into the light in the dark could identify the run-of-the-mill black man from 90 to 100 feet away. They arrested him in the area of York Boulevard [a white neighbourhood near Occidental College and Pasadena]. Well, we all know what being black is on York Boulevard. I was raised and born in Los Angeles so it is nothing new to me. If you are black and you're on York Boulevard at four o'clock in the morning, they are going to pick you up. They will pick me up on York Boulevard walking at four o'clock in the morning. This was the only thing that they seemed to have against the man, so we acquitted him.¹³³

Another consequence of excluding people of colour from participating on criminal juries is that they are denied an opportunity to participate in community decision-making. The Nova Scotia Law Reform Commission stressed the need for juries to be representative:

The jury is intended as a means of allowing the current values of the community to be reflected in the justice system. This is part of the on-going process of the renewal of the law in that behaviour is judged according to the changing standards of the community...[T]he justice system needs to ensure that everyone in the community is equally likely to serve as a juror to contribute their ideas about standards of behaviour to the legal system. This is the notion of representation.¹³⁴

Although up until this point, this chapter has presented evidence illustrating the legal system as a focal point for domination and racial oppression, this should not detract from its potential to act as a vehicle for social change. If people of colour are to have their views represented in the criminal justice system, they must embrace every possible opportunity, especially the very legal system that silences and discriminates against them. The jury provides a window of opportunity to bring

¹³³ Ibid, p. 50.

¹³⁴ NSLRC, p. 22

together jurors of various cultures and racial backgrounds and empowers them to make decisions that can have a profound effect on the communities in which they live. Critical race scholars call for the need to take control over legal and public institutions.¹³⁵ One of the overwhelming messages that was repeated in the Stephen Lewis Report¹³⁶ of 1992 was the idea of "community empowerment." The best way to empower people of colour is to give them the opportunity to become actively involved in a legal system which has historically excluded their values, morals and perspectives. The importance of the jury lies in the fact that it enables lay participation in a justice system which in most cases is dominated by legal professionals who continually reinforce the view of the world that all people are equal.

Empowering People of Colour

The criminal jury has the potential to be utilized as a vehicle of change and may help to empower people of colour in a number of ways. I will argue that there are two important benefits to increasing the participation of people of colour on criminal trial juries. First, an increased presence of people of colour on juries can play a crucial role in ensuring that defendants of colour are given a fair trial.

¹³⁵ Crenshaw and Peller, p. 296.

¹³⁶ Supra note 2.

Second, the jury can help to empower all people of colour because it permits an opportunity for lay participation¹³⁷ and enables jurors of colour to participate in the important decision-making processes of the criminal justice system. Participation enables people of colour to make decisions which are normally reserved for criminal justice professionals and politicians that directly impact upon the communities in which they live. It empowers them to individually convey their views on the standards of behaviour that they and the residents of their community find acceptable. This is an important consideration for people of colour because their views and perspectives have been historically absent from the criminal law.

There is another important reason why people of colour should concentrate on increasing their presence on criminal juries. We can draw some valuable insight here from the work of Kimberle Crenshaw who points out that the civil rights movement helped to aid in the removal of formal barriers for African-Americans.¹³⁸ She emphasizes that we cannot underestimate the effects of formal subordination. Exclusion and discrimination from many of the activities and privileges enjoyed by other citizens helped to reinforce a racist ideology that African-Americans were

¹³⁷ This form of participation permits ordinary residents from the community to participate in the decisions of the justice system. This is important because the judiciary are "an unelected and unaccountable institution lacking any basic democratic mandate," See A.C. Hutchinson and P.J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought," 36 *Stanford Law Review* 199, p. 202

¹³⁸ Crenshaw, p. 1378.

inferior to whites and were not considered equals.¹³⁹ While the removal of formal barriers to equality did not eradicate the material subordination of African-Americans, these reforms "were large achievements because much of what characterized Black oppression was symbolic and formal."¹⁴⁰ Similarly, the continued exclusion of people of colour from jury service implies that their perspectives are not worthy of consideration in the decision-making processes of the criminal justice system.

Ensuring a Fair Trial

i) Countering the Effects of Racist Stereotypes

The effects of racist stereotypes should be regarded with caution because negative stereotypes may influence a juror's decision on the guilt or innocence of a Black defendant or other person of colour. In fact, studies have been conducted demonstrating that the absence of Blacks from American juries has resulted in racially oppressive verdicts.¹⁴¹ Studies of southern U.S. states have demonstrated that African-Americans accused of committing serious crimes against whites were

¹³⁹ Ibid, p. 1377.

¹⁴⁰ Ibid, p. 1378.

¹⁴¹ "The Case for Black Juries," 1970, *Yale Law Journal*, p. 531. See also J. Greenberg, *Race Relations and American Law*, 1959, p. 336.

statistically more likely to suffer the death penalty.¹⁴² Furthermore, Black defendants are at a greater risk of being convicted than whites and Black witnesses were more likely to be disbelieved by a jury.¹⁴³ Simulated jury studies have also revealed that the race of the defendant affects determinations of guilt.¹⁴⁴ White jurors were more apt to find a person of colour guilty than they were to find an identically situated white person guilty.¹⁴⁵

Kimberle Crenshaw cautions that we should not underestimate the role that racist stereotypes have played throughout history to rationalize the oppression and subordination of Blacks and states that many scholars overlook the extent to which the use of racist stereotypes about Blacks serve a hegemonic function.¹⁴⁶ Stereotypes have been used to stigmatize Blacks and make them appear as subordinate outsiders opposed to the interests of the white majority. In this way, racist stereotypes have effectively created an oppositional dynamic in which positive human traits are characterized by white images such as industrious and law-abiding while Black traits become associated with laziness and criminal

¹⁴² Ibid, p. 533.

¹⁴³ Ibid.

¹⁴⁴ See Sherri Lynn Johnson, "Black Innocence and the White Jury," (1985) 83 *Michigan Law Review* 1611 at 1625-34.

¹⁴⁵ Ibid.

¹⁴⁶ Crenshaw, p.1371.

behaviour.¹⁴⁷ This is problematic because stereotypes can impact on jury deliberations and allow racial bias to creep into the decision-making process.

Madame Justice Beverly McLaughlin highlights the difficulties associated with this:

Anti-black attitudes may connect blacks with crime and acts of violence. A juror with such attitudes who hears evidence describing a black accused as a drug dealer involved in an act of violence may regard his attitudes as having been validated by the evidence. That juror may then readily give effect to his or her preconceived negative attitudes towards blacks without regard to the evidence and legal principles essential to a determination of the specific accused's liability for the crime charged.¹⁴⁸

This concern was also raised by Justice Doherty in the course of his decision in the *R. v. Parks* case:

A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.

Therefore, it is important for people of colour to continue to strive to ensure that they are fairly represented on criminal juries. Since many racist stereotypes are fuelled by ignorance and lack of understanding, having some jurors of the same race as an accused would provide an opportunity to debunk racial myths and educate other jurors about the reality and life circumstances encountered by the accused.

¹⁴⁷ Crenshaw, p. 1372-73.

¹⁴⁸ Justice Beverly McLaughlin, "Stereotypes: Their Uses and Misuses", Address to the McGill University Faculty of Law Human Rights Forum, November 25, 1992, p. 11.

ii) Safeguarding Due Process

Bankowski points out that much of legal process and courtroom procedure is "fixed" and more of a "stylized fight." He contends that much of what takes place in the courtroom is discussed and decided upon beforehand by the various lawyers and professionals involved.¹⁴⁹ He states that usually there is no "fight" and that what we often get "is a sort of mock fight, the contest being purely formal and the defendant a bemused spectator on the outside."¹⁵⁰ As a result, the various stages of the criminal process may have the result of denying a defendant the right to be dealt with according to due process.¹⁵¹ Due process insists upon basic rights which dictate that an accused be notified of the charges laid against him or her and that the individual be entitled to retain and instruct counsel without delay.¹⁵² The jury "constitutes one of the strongest guarantees of civil liberty and due process."¹⁵³

¹⁴⁹ Bankowski, p. 19

¹⁵⁰ Ibid.

¹⁵¹ One Ontario lawyer commented that:

"One never discusses racism but it is clear that issues of credibility, guilt beyond a reasonable doubt, and innocent till proven guilty become unclear if your client is black or yellow...." See Ont. Commission, p. 26.

An Ontario general division judge revealed in a survey that the criminal justice system "is set up to deal expeditiously with the caseload [and] little or no concern is given to fundamental basic rights which citizens have." In Ont. Commission, p. 180.

¹⁵² In the early stages of the criminal process, police and the prosecution often make quick decisions which are based on incomplete information and are hidden from public scrutiny. It is here that the jury can play a very important role in ensuring that defendants are given a fair trial; see Ont. Commission, p. 180.

¹⁵³ Granger, 1996, p. 8.

Bankowski goes on to describe the courtroom as a drama that "takes place in a social world characterized by highly formalized patterns of interaction between participants who mainly subscribe to the same legal view of things."¹⁵⁴ He emphasizes the role played by the jury in countering this aspect of the legal system:

...[I]n this sort of model people come together with a particular view of the world and recreate and reinforce it...The point of the jury is to guard against this stylized fight, to inject a "lay acid" into the system which helps to ensure that the "fight" does not always go its preordained way. It helps prevent the closed shop of the legal expert....¹⁵⁵

One of the difficulties with the criminal law is that defendants are usually bewildered spectators on the periphery of the discussion as legal experts speak to legal expert in complex legal and technical discourse. The language used in the courtroom and the complex technical rules usually result in a discourse which is different from day to day speech and is difficult to understand. This has a de-humanizing effect because it renders the defendant almost invisible and his or her role in the courtroom inconsequential. This can have the result of denying a defendant a fair trial because the courtroom players simply view the entire trial process as letting that particular defendant have his or her day in court. The defendant has become secondary to the legal process. The presence of juries within the courtroom makes it possible for cases to be viewed as unique human dramas rather than simply routine cases that are part of the state's bureaucracy.¹⁵⁶

¹⁵⁴ Ibid, p. 21.

¹⁵⁵ Ibid, p. 21.

¹⁵⁶ Freeman, p. 89.

This is important because for the most part, the criminal justice system operates in a bureaucratic and production-line fashion for the vast majority of cases with little or no interest on the part of the public or the media.¹⁵⁷ Thompson comments on the importance of the jury's role in the courtroom:

Because of the jury's presence, the mysteries of the law must be broken down into lay language - law must be made to appear rational and even, on occasion, humane.¹⁵⁸

When lawyers and other criminal justice professionals are addressing a jury, they are forced to speak in lay terms which jurors can understand. The jury plays an important role because it forces everyone in the courtroom to view the defendant as a real person rather than simply another case in a long assembly line of defendants to be processed by the system. The presence of the jury "is a check on the mystificatory tendencies and practices of lawyers and judges and a check on the form of language they would use if only addressing each other."¹⁵⁹ The mere presence of the jury in the courtroom helps to ensure that defendants are afforded all their rights and protections under the law and ensure that due process is complied with.

¹⁵⁷ McBarnet , p. 128.

¹⁵⁸ Thompson, p. 3.

¹⁵⁹ Brown and Neal, p. 130.

An Opportunity to Challenge Mainstream Legal Thinking

There are critics¹⁶⁰ who feel criminal trial juries are ill-equipped and too ignorant to perform their functions as finders of fact effectively yet believe that judges, lawyers and legal experts are able to sift through all the evidence of a case and come to the "right" decision or conclusion. We should be wary of calls for the elimination of trial by jury because having courtrooms dominated solely by legal experts and professionals may be something we want to avoid. This certainly limits and destroys any chance of having alternate constructions of reality represented in the courtroom. Most of the players in the courtroom subscribe to a view of the world which is ordered and rational and assumes that all individuals in society are on an equal footing and as such, it effectively denies the relevance of gender, race and class. Juries give people of colour an opportunity to challenge the legal and rational view of the world that is held by most criminal justice professionals.

The main focus of research and study on the jury has been to examine whether or not jury verdicts correspond to professional expectations.¹⁶¹ The authors of these studies seem to think that the sole function of the jury is to agree with the

¹⁶⁰ See Jerome Frank, *The Courts on Trial*, Princeton: Princeton University Press; Kenneth Conboy, "The Race Factor and Trial by Jury," *Fordham Urban Law Journal* 20: 551, 1993

¹⁶¹ Freeman, p. 85.

judge.¹⁶² Freeman points out that the debate about whether juror's verdicts are right or not is misconceived because they assume that lay participants should behave like experts.¹⁶³ Legal professionals consider a good juror to be one who acts as a good lawyer and "one who accepts the prevailing courtroom norms of legal rationality and who is willingly incorporated into the social order of the courtroom and the trial."¹⁶⁴ The difficulty with these types of studies is that they fail to give consideration to the importance of the role the jury plays in the legal process.¹⁶⁵

Freeman comments:

There is an assumption that somewhere out "there" there is a right answer, an objective truth almost. Further, that there is a uniquely correct method of ascertaining this truth. It would appear that in the eyes of many of the jury's critics, lawyers and other professionals are the guardians of this truth. On this model measuring jury verdicts against the decisions to which judges would come is a simple matter of common sense. The legal vision of the world is right; when a jury imposes its own vision its decision is perverse.¹⁶⁶

Why is there a need to try to determine which verdict is correct -- that reached by the jury or the decision reached by the judge? It is better to leave decisions to a random cross-section of the population rather than standards being imposed by a judge. If this leads to inconsistency, so be it. Jury participation is meaningful for people of colour because it enables them to actively take part in the

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Mungham and Bankowski, p. 210.

¹⁶⁵ Freeman, p. 88.

¹⁶⁶ Freeman, p. 95.

decision-making processes of the criminal justice system. It is also important because historically, their values, beliefs and histories have been excluded from the criminal justice system. The jury is significant because it gives people of colour an opportunity to decide upon important issues affecting their communities and enables them to utilize and draw upon their own moral viewpoints, beliefs and experience to reach a decision on the guilt or innocence of an accused:

The jury brings to the trial its own idea of how a certain situation is likely to come about and what constitutes reasonable or acceptable behaviour in that situation. The jury is asked not only to come to a decision regarding events, but also to consider the implications for the community of deciding one way as opposed to the other - both as the jury perceives community interest and as that interest is expressed in the form of law.¹⁶⁷

This not only benefits people of colour but all lay persons because it enables ordinary individuals to make decisions normally left up to judges who come from vastly different social and economic backgrounds:

Lay participation is a creative process by which community standards are injected to the legal system to guard against possible harshness, arbitrariness, or inaccuracy in the administration of justice.¹⁶⁸

Central to much of the research on juries is a false belief that a jury verdict represents a static, simplistic model of decision-making.¹⁶⁹ We should not underestimate a juror's ability to understand the facts of a case. While in the jury

¹⁶⁷ Yale Law Journal 79, p. 531.

¹⁶⁸ Yale law Journal, p. 531.

¹⁶⁹ Ibid, p. 97.

box, they are able to make sense of situations and construct a version of reality for themselves.¹⁷⁰ A jury compares the evidence it hears with its own common-sense, everyday understanding of situations.¹⁷¹

Jury verdicts that disagree with judges can be explained as different constructions of reality.¹⁷² Justice Douglas Campbell of the B.C. Provincial Court states that:

The big important feature is interpretation. The facts and the law are nothing more than what people decide they are. Nobody ever really truly knows what the truth is. It is a matter of interpretation. It depends on how you see it as to what you view as the truth...Who you are and where you came from has more to do with it than anything else with your interpretation of the facts and the law. Decision-makers cannot do a proper job unless they can empathize and understand the reality of other cultures.¹⁷³

Thomas Jefferson saw the jury as an anchor that would hold the government to the principles of the American Constitution. The jury is an institution where people help to administer themselves.¹⁷⁴ Freeman sums the situation up appropriately:

There are things wrong with the jury and some juries are stupid, prejudiced or bigoted. Some juries do come to decisions which are difficult to comprehend or justify. We are not talking about a perfect institution. But where does a perfect institution exist? With

¹⁷⁰ Ibid, p. 97.

¹⁷¹ Ibid, p. 96.

¹⁷² Ibid, p. 97.

¹⁷³ See "Discrimination in Judicial System Can be Attributed to Lack of Appreciation for Cultural Issues," *Lawyers Weekly*, December 17, 1993.

¹⁷⁴ Ibid, p. 98.

all its faults, I believe we should fight to preserve the jury, if only because the alternative is worse.¹⁷⁵

What needs to be stressed is that there is no definitive truth present which only judges and lawyers are qualified to discover. The idea that only legal experts are capable of performing this task implies that the discovery of truth is a technical and almost scientific endeavour. The difficulty with this view of the trial process is that it empowers only one group in the community, the dominant group, with the power to determine what the truth is.¹⁷⁶ Jurors find facts on the basis of their familiarity with similar situations.¹⁷⁷ If this holds true, then the best way to determine the "truth" is to employ a representative jury which is designed to choose among competing truths rather than a judge who is qualified to find only one truth.¹⁷⁸ That singular truth adopts the tenets of formal legal equality which assumes that all individuals in society are equal and ignores the influence of race, gender and class.

Brown and Neal stress the importance of trial juries:

If the criminal law has to stay in touch with community values, not just at the general level of legislation, but in particular cases, then the jury is especially well adapted and, importantly, well accepted for that purpose. It supplies an ingenious mechanism for the injection of popular, democratic correctives and supplements to the necessarily general provisions of legislatures. Parliaments cannot provide for the intricacies of every individual instance and the unforeseen, exceptional case. Neither can they be expected to gauge community values accurately on every issue. Neither, as the historical record shows, can government and the executive be trusted to refrain from abuse of power. These factors supply important political

¹⁷⁵ Ibid, p. 98.

¹⁷⁶ Yale Law Journal, 1970, Vol. 79, p. 532.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

justifications for the jury.¹⁷⁹

Van Dyke advocates that the jury is the fairest instrument of justice because there is a greater danger of bias and prejudice when "experts" are used.¹⁸⁰ Calling on a group of twelve ordinary people to decide a given case helps to counter the inevitably subjective view of a single person.¹⁸¹ Van Dyke states that:

...[a]lthough a governmental bureaucracy may be necessary to monitor the day to day affairs of the community, the sensitive decisions of justice are likely to be reached with greater wisdom by persons unconnected with the centres of power.¹⁸²

Mungham and Bankowski highlight the dangers of doing away with the criminal trial jury

...the expulsion of the jury from the legal system would constitute an affirmation of the idea that knowledge held by duly accredited experts is the only rational and sensible way of interpreting the world.¹⁸³

This would result in the liberal view of equality being continually reinforced if criminal justice were to be completely monopolized by legal experts.

The process of fact-finding in a courtroom is not one which lends itself to

¹⁷⁹ Brown and Neal, p. 132.

¹⁸⁰ Van Dyke, p. xii.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Mungham and Bankowski, The Jury in the Legal System, in *Sociology of Law*, Pat Carlen (ed.), University of Keele Sociological Review Monograph, 1976.

scientific analysis because there is no one single answer.¹⁸⁴ The process of determining a verdict is a political one in which the decision-maker must analyze and evaluate many competing interests and versions of reality. As such, judges and lawyers who are seen to be the guardians of this truth are not the best individuals to rationalize those competing interests. Since the process is political, the decision should be left up to a representative portion of the general population. Or, as I will argue later in this paper, a racially representative section of the community in which an alleged offence took place. In this way, the jury provides the process by which the law is applied according to the views and beliefs of the community from which it was chosen. The collective views of this representative jury will act as a safety net against arbitrariness, harshness or inaccuracy in the administration of justice.¹⁸⁵ Most legal professionals in a courtroom come from different social strata than many of the defendants and people of colour who come into conflict with the law. These professionals hold different views and beliefs from people of colour and as such, they have little understanding of the context of their lives and their social circumstances. However, when twelve jurors drawn from the community have considered the matter we can be assured that the final verdict is the product of individuals from different races, cultures, and socio-economic

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, p. 531.

backgrounds.¹⁸⁶

Bankowski succinctly captures the importance of jurors' experiences outside the courtroom:

...If the juror experiences the world outside the jurybox not as the calm, consensual and just one portrayed by liberal ideology, but as one which is full of conflict and injustice, then that experience is also brought into the court where it can counter the orderly legal consensual view of things.¹⁸⁷

Lay participation has the potential to empower people of colour but can only work if the jury drawn from a particular geographic community is truly representative of its racial make-up. In my view, a jury can only be representative if it is inclusive of all segments of a community. Community views on an issue before the court is a direct reflection of the experiences and attitudes of those sitting in the jurybox and as such, jury participation only legitimates the justice system when all segments of a particular community are represented.¹⁸⁸ I would define a representative jury as one which directly reflects the racial composition of the community in which an alleged offence took place. For example, if the residents of a particular community are 50% Black, then this should be reflected in the trial jury drawn from that community. I will elaborate further in chapters 4 and 5 on how I would propose to

¹⁸⁶ For this to hold true however, the jury must be truly representative of the community from which it was drawn. I will be discussing the issue of jury representativeness further in the remaining chapters of this paper.

¹⁸⁷ Bankowski, p. 20.

¹⁸⁸ *Yale Law Journal*, 1979, Vol. 79, p. 531.

reform the jury selection process to ensure that it is more inclusive of people of colour.

People of colour are provided with few opportunities to have their voices heard - the mere fact that a person of colour might be able to raise points such as racial oppression, and poverty in a public forum is empowering in itself. While this may not affect their guilt or innocence, it challenges the hollow claims of equality presented by liberal ideology and may educate judges, lawyers and jurors. I am not advocating that jurors of colour should find in favour of a defendant who is guilty, however, they may discover through the facts and evidence of a case that the prosecution of a particular defendant was motivated by racism or a police investigation was tainted by racism. When a defendant is permitted to address a jury of his or her peers which includes some members of the same racial background as the defendant, it enables that individual to contextualize the reasons for his or her involvement with the criminal justice system and permits an accused to make race struggles part of the courtroom discussion.

CHAPTER 3

THE CURRENT JURY SELECTION PROCESS

Jury practices and selection procedures are problematic in that they often eliminate people of colour from participation. This chapter will review current jury selection procedures and examine existing case law to point out how various provisions of the *Criminal Code* and courtroom procedures may prevent defendants of colour from having the opportunity to be judged by an impartial jury. In particular, the chapter will focus on the *Juries Act* in Ontario and the eligibility requirements for jury service which can contribute to the under-representation of people of colour on juries. The pre-trial selection process which involves the compilation of lists of names of prospective jurors is also identified as one stage in the selection process where individuals are excluded. In addition, in-court procedures will be examined. Within these the juror challenge provisions of the *Criminal Code* seem to be ineffective for ensuring that defendants of colour are given a chance to be tried by a racially representative jury. Finally, the chapter will present evidence of the Canadian judiciary's reluctance to interpret the selection provisions of the *Code* in a liberal manner to ensure that potentially racist jurors are eliminated during the

course of the selection process.

The Selection Process

Although there are no provincial or federal laws which exclude potential jurors on the basis of race, racism is unfortunately a part of the jury selection process.¹⁸⁹ In Canada, the federal government has jurisdiction over the in-court selection process for juries while provincial statutes govern pre-trial selection procedures and stipulate who may be eligible for jury service. Cynthia Petersen argues that there are many opportunities in the jury selection process where people of colour may be prevented from serving on a criminal jury. In some cases, the exclusion may be intentional such as the racist or discriminatory use of the challenge provisions of the *Criminal Code* by counsel during the in-court selection of jurors. In other instances, the exclusion is unintentional and may be the result of a compliance with the eligibility requirements of the *Juries Act*¹⁹⁰ which has the effect of excluding people of colour. Section 2 of the *Juries Act* of Ontario states that every person who resides in the province, is 18 years of age, and is a Canadian citizen is eligible to serve as a juror. This citizenship requirement has the

¹⁸⁹ Cynthia Petersen, 1993, p.149-150.

¹⁹⁰ R.S.O. 1990, c.J.3.

result of effectively excluding a large number of potential jurors.¹⁹¹ A large proportion of Ontarians are not Canadian citizens and in 1991, immigrants constituted nearly 40% of the total population of Toronto and more than 20% of the populations of Hamilton, Windsor and Kitchener.¹⁹² These statistics highlight the need to re-evaluate jury eligibility requirements to ensure that the selection process is as inclusive of the entire population as possible.¹⁹³ It should also be pointed out that immigrants are more likely to reside in large urban centres where most jury trials take place.¹⁹⁴ This fact indicates that a large proportion of juries currently trying cases in Ontario are racially unrepresentative and do not fairly represent all of the values and perspectives of the communities from which those juries are drawn. As a result, attempts at reform cannot ignore this large portion of Ontario's population.

Many provinces have specific language requirements which effectively

¹⁹¹ In *R. v. Church of Scientology of Toronto* (1992) 74 C.C.C. (3d) 327, the Court indicated that the exclusion of potential jurors who are non-citizens and permanent residents does not violate an individual's right to trial by jury under section 11(f) of the *Charter*. The Court emphasized that the role performed by the jury is a public one and is part of the function of government in Canada. As a result, the citizenship requirement was found to be a reasonable limit on the right to a representative jury.

¹⁹² Ont. Commission, p. 251.

¹⁹³ In the next two chapters, I will be discussing potential reforms seeking to make eligibility requirements more equitable to increase the presence of people of colour on criminal trial juries.

¹⁹⁴ Ont. Commission, p. 251.

reduce the number of people who may be eligible for jury service.¹⁹⁵ For instance, in Quebec the *Jurors Act* excludes anyone who does not speak English or French fluently with the exception that an Aboriginal person may serve as a juror if the accused is Aboriginal. Petersen also shows that the Jury Acts of a number of provinces such as Alberta, Saskatchewan, Manitoba and British Columbia provide for the disqualification of jurors who cannot comprehend the language in which the trial is to be conducted.¹⁹⁶ This reduces the likelihood that a person of colour will serve on a jury since recent immigrants or new citizens who have difficulty speaking English will be precluded from serving on a criminal trial jury.¹⁹⁷

¹⁹⁵ Section 530 of the *Criminal Code* provides that an accused be tried by a jury which speaks the official language of the accused or speaks both official languages. Section 48(4) of the *Juries Act* of Ontario states that jurors must be able to speak, read and understand either English or French.

¹⁹⁶ Petersen, 1993, p. 154.

¹⁹⁷ Unfortunately, I think that the current language requirements are something that one cannot get around. I would expect that after a number of years residence in Canada, most new citizens or immigrants would be quite fluent in either English or French and might then be eligible for jury service. Trying to accommodate potential jurors who speak many different languages is impractical and virtually impossible. The most important issue with respect to language and criminal trials is that adequate support and translation services be put in place for defendants who do not understand English. It is crucial for defendants of colour to have access to a court worker or someone who shares their culture and/or language to ensure that an accused correctly understands their rights when being tried for an offence. I think that any reform attempt to try to accommodate potential jurors who do not understand English or French would be an administrative nightmare and impossible to put in place. We have to start from the basic assumption that eligible jurors whatever their race or cultural background must have a firm grasp of the language that the trial will be carried out in. I do not think there is any realistic way to get around this. Many landed immigrants who have resided in Canada for at least 3 years and entitled to participate as jurors would probably have a competent grasp of either English or French.

Dawna Ring of the Nova Scotia Law Reform Commission recently expressed her views in the Commission's 1994 Final Report on Juries that First Nations language rights should be recognized in the Nova Scotia *Juries Act*. She contends that First Nations defendants are not able to be judged by their peers if Elders and other members of their Nation are unable to comprehend a trial in English. I think Commissioner Ring identifies an additional barrier which affects the ability of aboriginal people to participate on trial juries and denies the ability of aboriginal defendants to be judged by their peers. The difficulty is that some members of First Nations reside on-reserve while

One's position in the labour market is another indirect way people of colour are excluded from serving as jurors. Section 41 of the *Juries Act* states that an employer is required to grant an employee who is summoned for jury service a leave of absence, with or without pay.¹⁹⁸ Following the employee's return, the employer must reinstate the employee to their previous position or provide them with similar work at the same compensation level with no loss of seniority or benefits.¹⁹⁹ An employer who does not comply with these requirements is liable to an employee for any financial losses incurred.²⁰⁰ A potential juror who has just entered the job market or is employed in a less stable labour market is likely to be excused for reasons of economic hardship.²⁰¹ Thus, individuals who do not have sufficient economic resources or support from their employers may be prevented from serving.²⁰²

others live in cities off-reserve and the idea of what constitutes a defendant's "peers" becomes difficult to define. The issue of First Nations participation on criminal trial juries is a complex one and requires further analysis and cannot be resolved within the context of this discussion. I believe that Ring's point also raises the important issue of self-determination and the need for First Nations to have their own justice system. A detailed discussion of aboriginal justice issues is beyond the scope of this paper.

¹⁹⁸ Granger 1996, p. 121.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Fukurai, p. 22.

²⁰² I will discuss this problem further in subsequent chapters. I believe that there are various options that can be explored to make eligibility for jury service more equitable and to enable those of limited means to fully participate as potential jurors.

Another factor which contributes to the under representation of people of colour on juries are the jury rolls prepared each year by the sheriff of each judicial district from pre-existing lists.²⁰³ In the past, provincial voting lists were frequently utilized. This was unfortunate because the enumeration process often resulted in the under representation of various segments of the population.²⁰⁴ Section 5(1) of the *Juries Act* states that on September 15 of each year, the sheriff of every county and district in the province must determine the number of jurors that will be required for the upcoming year. After determining the number of jurors that will be required for the next year, the Sheriff must pass on that number to the Director of Data Services of the Assessment Programme at the Ministry of Revenue.²⁰⁵ The Director must then randomly select the number of persons specified by the sheriff to receive jury service notices.²⁰⁶ Individuals are selected from information collected by the most recent census of the residents of the county or district under the *Assessment Act*.²⁰⁷ Shortly thereafter, the Director will send a jury service notice to each individual that has been selected.²⁰⁸ Each jury notice is accompanied by a return which must be completed by the addressee and be returned to the Sheriff within five

²⁰³ Petersen, p. 151.

²⁰⁴ Petersen, p. 151.

²⁰⁵ Granger 1996, p. 115.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

days of receiving the notice.²⁰⁹ Presently, names of potential jurors are drawn from a Ministry of Revenue database that contains lists of all properties in the province.²¹⁰ This database does not provide an accurate representation of all Ontario residents because the list focuses solely on property ownership and any information about tenants usually tends to be inaccurate.²¹¹ The only way to track down the addresses of tenants is through municipal enumeration which only occurs every three years.²¹² Research has shown that residential mobility and socioeconomic status contribute to the under representation of people of colour on juries.²¹³ People of colour are more likely to be tenants rather than owners of property and more likely to move from residence to residence frequently for economic reasons.²¹⁴ As a result, many people of colour would not be fairly represented through the enumeration process. Furthermore, since jury summonses are usually sent by mail, anyone without a fixed address would be excluded.²¹⁵

Other sources include electoral lists for district school boards and municipal

²⁰⁹ Ibid, p. 116.

²¹⁰ Ont. Commission, p. 251.

²¹¹ Ont. Commission, p. 253.

²¹² Ont. Commission, p. 253.

²¹³ Hiroshi Fukurai, Edgar W. Butler and Richard Krooth, *Race and the Jury: Racial Disenfranchisement and the Search for Justice*, New York: Plenum Press, 1993, p. 21.

²¹⁴ Fukurai, p. 21.

²¹⁵ Fukurai, p. 21.

councils which are usually compiled from municipal assessment rolls.²¹⁶ The difficulty with municipal assessment rolls is that they only include the names of property owners and exclude people with lower incomes.²¹⁷ This affects the ability of people of colour to serve as potential jurors because they are often over-represented among the poor and working class with the result that they are under-represented on municipal property assessment rolls.²¹⁸ The problem of under-representation is further complicated by the fact that provincial laws do not require that the lists used to prepare jury rolls be representative of all segments of the population.²¹⁹ It should be pointed out that Ontario is the only province whose *Juries Act* requires the use of these kinds of lists from Aboriginal reserves.²²⁰ Any lists which over represent whites will necessarily result in their over representation on jury rolls.²²¹

The in-court selection process for juries is another site that has been targeted for its racist and discriminatory practices. Many potential jurors are excluded at this stage of the process on the basis of their race. As was mentioned

²¹⁶ Ibid.

²¹⁷ Petersen, p. 151.

²¹⁸ Petersen, p. 151.

²¹⁹ Ibid.

²²⁰ Ibid, p. 152.

²²¹ Ibid.

earlier, in-court selection processes for juries are under the jurisdiction of the federal government and as such are outlined in sections 629 to 644 of the *Criminal Code*. The *Code* outlines three types of challenge procedures available to both the prosecution and defence.²²² The first challenge is known as a challenge to the panel²²³ and is a challenge to the entire group of potential jurors selected by the Sheriff.²²⁴ The remaining two forms are known as peremptory challenges and challenges for cause. Both of these are used to challenge individuals who might be selected for jury service. Under section 629 of the *Code*, the Crown or defence may challenge the jury panel on the three grounds of partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.²²⁵ Under the authority of section 630, if a judge determines that the alleged ground of challenge is true, she/he may direct a new jury panel to be returned. This form of challenge is an attack on the jury panel as a whole and is

²²² Granger 1996, p. 144

²²³ Sometimes referred to as a challenge to the array.

²²⁴ Granger 1996, p. 144. See section 629 of the *Criminal Code*.

²²⁵ In the 1986 case of *R. v. Kent* (1986) 27 C.C.C. (3d) 405, the Manitoba Court of Appeal decided that an accused is not entitled to use subsection 15, 25 or 27 of the *Charter* to insist upon a jury composed entirely or proportionately of persons belonging to the same race as the defendant, or even that the jury include a member of the defendant's race. In considering section 629(1), courts have not been very liberal in their interpretation of whether unrepresentative jury panels constitute partiality on the part of the Sheriff. In the case of *R. v. Bradley & Martin* (No.1) (1973), 23 C.R.N.S. 33, the Court indicated that the fact that there were no Black individuals on the jury panel for a trial of two Black accused was not proof of partiality on the part of the Sheriff and the challenge was dismissed. The Court also found that the absence of any Black jurors on the panel was not a violation of the *Canadian Bill of Rights*, See *R. v. Bradley and Martin* (No.2) (1973), 23 C.R.N.S. 39.

not directed at any specific individual on the jury panel.²²⁶

Section 638(1) indicates that both the defence and prosecution are entitled to an unlimited number of challenges for cause. This section outlines the specific grounds upon which prospective jurors may be challenged for cause. Most frequently, jurors are challenged on the basis that they are not "indifferent between the Queen and the accused."²²⁷ Once a challenge for cause has been made, the other party may either admit it or may argue that the basis of the challenge is not recognized in law. If a challenge is admitted, the juror will not be sworn, but if the opposing party feels that the challenge is not recognized in law, the judge must rule on the propriety of the challenge.

Initially, members of the jury panel are called at random and are asked to come forward in the courtroom. At this point, the Crown and accused are each allowed to challenge every potential juror either peremptorily or for cause.²²⁸ According to section 634 of the *Criminal Code*, the accused and prosecution may

²²⁶ Granger 1996, p. 148.

²²⁷ Petersen, p. 175.

²²⁸ Following the January 23, 1992 Supreme Court decision in *R. v. Bain* [1992] 1 S.C.R. 91, the federal government introduced amendments to the *Criminal Code* provisions governing the jury selection process. The Supreme Court struck down sections 634(1) and (2) of the *Code* because they provided the Crown with a total number of peremptory challenges and stand asides which exceeded the number of peremptory challenges allowed for the defence. The court stated that this disadvantage infringed an accused person's right to the presumption of innocence and to a fair and public hearing by an impartial tribunal under section 11(d) of the *Charter*.

be entitled to four, twelve or twenty peremptory challenges depending on the seriousness of the offence. Section 635 outlines the order of the challenges and states that the accused is entitled to first declare whether they challenge the first prospective juror for cause or peremptorily. With respect to the second and all prospective jurors, the accused and Crown alternate in who will proceed first in declaring whether a juror is being challenged either for cause or peremptorily.

Since challenges for cause are not permitted on any ground other than those outlined in section 638(1) of the *Criminal Code*, it is more difficult for the challenge for cause procedure to be abused. On the other hand, peremptory challenges enable counsel to eliminate potential jurors without having to give any reason or justification. As a result, counsel may exclude a potential juror because of the colour of their skin without offering the court any explanation whatsoever. It is this type of discretion which opens the door to the potential for abuse. Petersen stresses that both the prosecution and defence have many opportunities to eliminate potential jurors on the basis of race.²²⁹ Although Bill C-70 has eliminated

²²⁹ In the United States, many criminal defendants have been successful in attacking the racially motivated use of peremptory challenges and jury panels which are unrepresentative of the population. On the other hand, in Canada, there have been no reported cases dealing with the misuse of peremptory challenges or stand asides. See Petersen, p. 175. See also "Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?," *Nebraska Law Review* 69: 230, 1990; "Batson v. Kentucky [106 S.Ct. 1712]: One Step Short of Halting the Discriminatory Use of Peremptory Challenges," 1989, *University of Toledo Law Review* 21: 267; J.A. Tanford, "Racism in the Adversary System: The Defendant's Use of Peremptory Challenges," *Southern California Law Review* 63: 1015, 1990; B.J. Serr and M. Maney, "Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance," *Journal of Criminal Law and Criminology* 79: 1, 1988; "Moving Closer to Eliminating Discrimination in Jury Selection: A Challenge to the Peremptory," *New York Law School Journal of Human Rights* 7: 204 1989.

the prosecution's ability to stand aside jurors and has given both the prosecution and defence an equal number of peremptory challenges, Petersen goes on to state that in-court selection processes may be easily manipulated or abused.²³⁰ Many of the lawyers who were surveyed by the Manitoba Aboriginal Justice Inquiry give us reason to believe that there is sufficient evidence highlighting that potential jurors are rejected on account of their race.

The Aboriginal Justice Inquiry demonstrated how frequently peremptory challenges are abused by counsel. For instance, in the Helen Betty Osborne case, a jury had been sworn with absolutely no Aboriginal members even though Aboriginal people represented over 50% of the general population.²³¹ Furthermore, defence counsel had peremptorily challenged six Aboriginal jurors during the selection process. The report of the Inquiry further illustrates the occurrence of racially motivated challenges:

On one day of the Thompson assizes in January 1989, 35 of the 41 Aboriginal people who were called to serve on three juries were rejected. In one case, the Crown rejected 16 Aboriginal jurors; in another, the defence rejected two and the Crown rejected 10; in the third and final case, the defence accepted all the proposed Aboriginal jurors while the Crown rejected nine. Two jurors were rejected twice.²³²

This type of racist use of peremptory challenges is problematic because it

²³⁰ Ibid, p. 173.

²³¹ Report of the Aboriginal Justice Inquiry of Manitoba, Province of Manitoba, 1991 p. 384.

²³² Ibid, p. 384.

can result in affecting the final outcome of a trial. If, for example, all prospective aboriginal jurors were prevented from serving, the community would be denied the opportunity of being represented in the courtroom. As such, an all-white jury might allow racist hostility or negative stereotypes to influence its decision and reach a verdict that was out of touch with the perspective of the community as a whole and standards of conduct that it finds acceptable.

In order for juries to be an effective means of empowering people of colour who have been historically disadvantaged, many of the problems outlined above have to be addressed. The next section of the chapter will look at the way in which courts have attempted to protect the rights of defendants of colour.

A Reluctant Judiciary

In the July 2nd, 1993 decision of the Ontario Court of Justice in *R. v. Griffis*,²³³ an accused was permitted to challenge potential jurors by asking them about their opinions regarding people of the accused's race and criminal behaviour involving drugs. The accused was an African-American from California whose jury trial was scheduled to take place in Toronto. The court accepted evidence that "16% of Torontonians were outright bigots and that 30-35% more were more subtly

²³³ *Lawyers Weekly*, November 5, 1993, p. 3.

prejudiced against black people."²³⁴ The court concluded that permitting defence counsel to ask such questions of potential jurors was in accordance with an accused's right to a fair trial and to the presumption of innocence.

Shortly thereafter, in the September 1993 watershed case²³⁵ of *R. v. Parks*,²³⁶ the Ontario Court of Appeal found that the trial judge erred in refusing to allow defence counsel to ask potential jurors whether their ability to judge evidence without partiality would be affected by the fact that the accused was black. In his decision, Justice David Doherty quoted extensively from various studies and reports outlining the extent of racial prejudice in Canada and its potential to affect jury deliberation and selection procedures. The Court quashed the conviction and ordered a new trial. The accused, a black drug dealer, had been convicted of manslaughter in the death of a white cocaine user. The trial judge had prevented defence counsel from asking potential jurors "whether their ability to judge the evidence without bias, prejudice or partiality would be affected by the fact that the accused was a black Jamaican and the deceased was a white man."

²³⁴ Ibid.

²³⁵ Toronto criminal lawyer Edwin Minden has hailed the *Parks* case as a watershed because "for the first time, the Ontario Court of Appeal recognized the realistic possibility of race-induced partiality in general," from Beverly Spencer, "Jury Selection: No Magic, No Science, Just Listen to Your Gut, Lawyers are Told," *Lawyers Weekly*, December 2, 1994.

²³⁶ *R. v. Parks* 15 O.R. (3d) 324. On April 8, 1994, the Supreme Court of Canada dismissed the Crown's application for leave to appeal.

The Ontario Court of Appeal found that there was a realistic possibility that potential jurors might be affected by racist attitudes and that the defence's question was essential to the fairness of the trial. Justice David Doherty stated that various studies and reports documenting racism in Canada lent support to the defendant's submission "that wide-spread anti-black racism was a grim reality in Canada and in particular in Metropolitan Toronto." The court was very astute in its analysis and recognized the great difficulty faced by people of colour in proving racism and prejudice. Justice Doherty indicated that "[t]he existence and the extent of racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts." He goes on to say:

...Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil...In my opinion, there existed a realistic possibility that one or more potential jurors drawn from the Metropolitan Toronto community would, consciously or subconsciously, come to court possessed of negative stereotypical attitudes about black persons.

It is unfortunate that this type of contextualized analysis which recognizes the struggles and racism endured by people of colour is almost entirely absent from most of the jurisprudence dealing with racism and jury selection. The reality is that the majority of the judiciary refuses to acknowledge the existence of racism and its capacity to affect criminal justice decision-making. Most judges feel that the judge's charge to the jury and the swearing of the oath constitute sufficient safeguards from

bias and prejudice in the consideration of evidence and the jury deliberation process. Again, Justice Doherty highlighted this problem in his reasons and stated that the availability of the right to challenge for cause based on partiality demonstrates that these trial safeguards are sometimes seen to be insufficient and must be supplemented by the challenge process.²³⁷ Doherty even goes so far as to point out how racism can affect the interpretation of evidence:

...Perceptions based on racial bias are particularly influential in the decision-making process because they tend to filter or even alter the information provided to the decision-maker. Bias shapes the information received to conform with those biases. In doing so, it gives the decision reached, at least in the eyes of the decider, an air of logic and rationality.

In concluding that the trial judge erred in refusing to permit the defendant to put the question to potential jurors, Justice Doherty emphasized that:

A refusal to allow a black accused to even raise the possibility of racial discrimination with prospective jurors can only enhance...[the] perception that the criminal justice system is inherently racist...By allowing the question, the court acknowledges that the accused's perception is worthy of consideration.

The decision in *R. v. Parks* was recently followed by the Ontario Court of Appeal in its May 14, 1996 decision in the case of *Regina v. Wilson*.²³⁸ *Wilson* involved a Black accused who had been charged with various narcotics offences in Whitby. The trial judge refused to permit the accused to challenge potential

²³⁷ However, the first section of this chapter has demonstrated that defendants of colour cannot solely rely on the challenge provisions of the *Criminal Code* to either guarantee them a representative jury or to ensure that racist jurors are excluded from jury service.

²³⁸ *Regina v. Wilson*, 29 O.R. (3d) 97.

jurors for cause on the basis of racial bias. The trial judge stated that the decision in *R. v. Parks* is restricted to Metropolitan Toronto and that the problem of racial prejudice is not as pronounced in Whitby as it is in Toronto. The trial judge also indicated that, based on his own personal experience in this particular jurisdiction, he had never known a jury to return with a verdict that was influenced by racial prejudice. The accused was convicted and he subsequently appealed.

Chief Justice McMurtry allowed the appeal and ordered a new trial. The Chief Justice agreed with the reasoning offered by Justice Doherty in the *R. v. Parks* decision and stated that while Doherty's comments on racism were focused on the Toronto area, there is no evidence to suggest that anti-black racism is less of a problem outside of the boundaries of Metro Toronto. McMurtry goes on to say:

There is no evidence before this court to explain the growth of anti-black racism in Canada, or to single out Metropolitan Toronto in particular. I take judicial notice of the fact that the principal concentration of Ontario's Black citizens is in Metropolitan Toronto, but that in my opinion does not lead to any rational conclusion that anti-black attitudes would therefore be less evident elsewhere in Ontario...The influence of negative stereotyping on all of the citizens of Ontario cannot therefore be underestimated.²³⁹

The reasoning adopted by the Chief Justice in interpreting the *Parks* decision is encouraging and demonstrates that some judges are willing to interpret *Parks* in a liberal manner to ensure that defendants of colour are given a fair trial and provided with every opportunity to be tried by an impartial jury. However, the arguments put forth by the trial judge in reaching his decision to refuse the accused

²³⁹ Ibid, p. 101-102.

the opportunity to challenge prospective jurors for cause on the basis of racial bias are quite problematic. The trial judge relied on his own personal experience and stated that in his 14 years experience as a judge, he had never known of a jury that had returned a verdict that had been tainted with racial prejudice. This type of one-sided view only reinforces the idea that judges are seen to be the only qualified “keepers of the truth” and highlights the need for the greater participation of people of colour on criminal trial juries to help counter this singular view of the world and to help educate their fellow jurors. The Supreme Court of Canada stressed the importance of an accused’s right to challenge a potential juror for cause in the 1991 decision of *R. v. Sheratt*:

The accused’s right to challenge for cause based on partiality is essential to both the constitutional right to a fair trial and the constitutional right, in cases where the accused is liable to five or more years’ imprisonment, to trial by jury. An impartial jury is a crucial first step in the conduct of a fair trial...The accused’s statutory right to challenge potential jurors for cause based on partiality is the only direct means an accused has to secure an impartial jury. The significance of the challenge process to both the appearance of fairness, and fairness itself, must not be underestimated.²⁴⁰

This case demonstrates the importance of the right to be tried by an impartial jury and the fact that this right is fundamental to an accused’s right to a fair trial.

In the July 1994 case of *R. v. Williams*,²⁴¹ the B.C. Supreme Court rejected a defence application to question potential jurors about racial prejudice and

²⁴⁰ [1991] 1 S.C.R. 509.

²⁴¹ (1994) 90 C.C.C. (3d) 194. In the recent case of *R. v. Cameron* (1995), 22 O.R. (3d) 65, the Ontario Court of Appeal stated that the *Parks* decision does not authorize the use of the challenge for cause to ask wide-ranging questions of potential jurors.

disagreed with the Ontario Court of Appeal ruling in *R. v. Parks*.²⁴² The case involved an aboriginal man who had been charged with robbing a white store owner. The accused's counsel had applied for permission to ask potential jurors whether they would be prejudiced by the fact that the victim was white and the accused was of native origin. Chief Justice Esson stated that this form of questioning would add a significant amount of time to criminal trials and felt that even the slightest amount of time was too much. The court was presented with overwhelming evidence to substantiate the accused's claims that prejudice and racism against aboriginal people was widespread. Although Chief Justice William Esson agreed with defence counsel that natives and non-natives are frequently prejudiced against one another, he stated that:

...[i]t does not follow, in the absence of anything more than the race of the accused, that there is a realistic possibility that a juror would be influenced by such bias in carrying out the solemn duty of deciding whether the accused is guilty of the crime charged.²⁴³

This comment clearly indicates the need for people of colour to concentrate reform strategies on legislative change to ensure that defendants of colour are given a fair trial.

In discussing the number of studies and reports presented by the defence on racism and the jury, Chief Justice Esson stated that

²⁴² *R. v. Parks* (1993), 84 C.C.C. (3d) 353.

²⁴³ (1994) 90 C.C.C. (3d) 194.

...the studies do not in any consistent way contradict the conventional wisdom which has guided us for centuries in accepting that the jury system by its nature, provides its own safeguards without the necessity for delving into the views of prospective jurors.

In summing up evidence given by witnesses and experts for the defence

Esson noted:

All three gave thoughtful and balanced evidence tending to support the view that Natives historically have been and continue to be the object of bias and prejudice which, in some respects has become more overt and widespread in recent years as the result of tensions created by developments in such areas as land claims and fishing rights. The written reports also tend to establish the existence of such prejudice.

Two paragraphs later Chief Justice Esson demonstrates a complete disregard for the evidence before him and does not even accept the possibility that racial prejudice could affect the ability of potential jurors to carry out their duties in a fair and impartial manner:

None of this evidence bears directly upon the question of the extent to which the existence of negative or biased attitudes will result in partiality on the part of jurors carrying out their duties.

Chief Justice Esson did not entirely agree with the reasoning offered by the majority of the Supreme Court in *R. v. Sheratt* regarding the challenge process. Madam Justice L'Heureux-Dube speaking for the court in *Sheratt* states that the "possible inconvenience to potential jurors or the possibility of slightly lengthening trials" caused by the challenge process should be considered a small price to pay to ensure that accused persons are tried in a fair and impartial manner.

Although Esson agreed that he accepted the above statement as binding, he felt that "the resulting inconvenience to jurors and lengthening of trials would go beyond being possible or slight." Esson's comment is extremely troubling and exemplifies the lack of commitment on the part of the judiciary to ensure that the harmful effects of racism are left out of the jurybox. It displays a complete lack of sensitivity to the evidence presented by the accused on the prevalence of racist attitudes against native peoples in Canada. Furthermore, this comment points to the ineffectiveness of the challenge provisions of the *Criminal Code* as an effective tool for empanelling impartial juries. Surely Chief Justice Esson must realize that his responsibilities and role in the courtroom go farther than ensuring that the costs of the criminal justice system are kept in check. I think that the Chief Justice owes a higher duty to ensure that the challenge provisions of the *Code* are interpreted in such a manner that the legitimacy and fairness of the criminal justice system are not called into question. Esson indicated that in allowing the challenge for cause application the court would be stepping outside of its role:

As I see it, the court is being asked to legislate a new procedure inconsistent with the language and rationale of the legislation. If such additional costs are to be imposed on the system, it should be by Parliament, not the court.

Chief Justice Esson also stated that there are a number of effective trial safeguards which help to ensure impartiality such as the juror's oath, the seriousness of the juror's task and solemnity of the trial process, the dynamics of jury deliberations and the warning given to the jury before the hearing of evidence

and in the course of the judge's final charge. In outlining such a long list of safeguards which Esson feels effectively protect a defendant's right to be tried by an impartial jury, the court seems to indicate that it is not prepared to accept the reasoning offered in the *Parks* decision nor accept the reality that the criminal justice system suffers from systemic discrimination. In his analysis, Esson confines the application of the *R. v. Parks* decision to "a particular set of conditions existing in Metropolitan Toronto, in particular the attitudes held by many regarding the link between black persons and serious crime." This interpretation shows a complete misreading of the *Parks* decision and an unwillingness to give defendants of colour the benefit of the doubt. In *Parks*, Justice David Doherty emphasized that in deciding whether to allow a challenge for cause application on the ground of racial prejudice, "...it would be the better course to permit that question in all such cases where the accused requests the inquiry because [t]hat right is essential to the appearance of fairness and the integrity of the trial."

This demonstrates an unwillingness to even entertain the possibility that racism may infect the jury process. Chief Justice Esson also stressed that once jury challenges become more commonplace, they will be more seriously contested and will take more time. I feel this is a small price to pay to ensure that a defendant receives a fair trial considering the punishment and infringement on that person's

freedom should they be convicted.²⁴⁴

In the Alberta Court of Queen's Bench decision of *R. v. Born With A Tooth*²⁴⁵, the Crown had filed an application to discharge the jury panel summoned by the Sheriff pursuant to s. 629(1) of the *Criminal Code* prior to the commencement of jury selection. The accused was an aboriginal man who had been charged with several offences alleged to have been committed on the Peigan Indian Reserve. The basis of the Crown's challenge was that the panel was not selected at random as required by section 7(2) of the *Jury Act* of Alberta. In assembling the panel, the Sheriff issued jury summonses to 252 individuals residing in the Judicial District of Calgary, 200 of which were selected at random from the list of voters for the City of Calgary. The remaining 52 people were aboriginals residing on the three reserves located within the judicial district. The prosecution argued that the Sheriff erred in selecting and including the 52 individuals of native origin on the panel because "the panel must be randomly selected from the community at large and no portion of it can legally be chosen or appointed from a particular segment of society."²⁴⁶ Counsel for the defendant supported the jury array as summoned and agreed that the panel had not been selected at random but stated that "the procedure used is a form of

²⁴⁴ This case sets a dangerous precedent and was recently followed in the case of *R. v. McPartlin* on November 28th, 1994.

²⁴⁵ Unreported decision, *R. v. Milton Born With A Tooth*, Alberta Court of Queen's Bench, Judicial District of Calgary, No. 9201-1583-CO, May 21, 1993.

²⁴⁶ *Ibid*, p. 3.

affirmative action which is justified in light of the conclusion reached in a number of recent studies that native Canadians have been and continue to be discriminated against by the justice system."²⁴⁷ It is interesting to note that several months earlier, Chief Justice Kenneth Moore of the Court of Queen's Bench had directed that 50% of the jurors in the trial of Milton Born With A Tooth be of native origin.²⁴⁸

In reaching his conclusions in *Born With A Tooth*, Justice Willis O'Leary quotes Justice L'Heureux-Dube, writing for the majority of the Supreme Court in the case of *R. v. Sheratt*²⁴⁹, who states that the two fundamental elements of the jury system are impartiality and representativeness. In her judgment she says

The perceived importance of the jury and the Charter right to jury trial is meaningless without some guarantee that it will perform its duties impartially and represent, as far as possible and appropriate in the circumstances, the larger community. Indeed, without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions which make its existence desirable in the first place.²⁵⁰

In his judgment, Justice O'Leary goes on to say that:

Artificially skewing the composition of jury panels to accommodate the demands of any of the numerous distinct segments of society would compromise the integrity of the jury system. The effectiveness of the criminal jury system is based on its widespread acceptance by the community as a fair and just method of deciding issues of criminal responsibility. That confidence, and thus the value of the system, would be seriously eroded if manipulation of the composition of juries were permitted,

²⁴⁷ Ibid.

²⁴⁸ See "Jury Dismissed After Sheriff Skews Panel With Natives," *The Lawyers Weekly*, July 16, 1993.

²⁴⁹ *R. v. Sheratt* (1991), 3 C.R. (4th) 129.

²⁵⁰ Ibid, p. 141.

regardless of how well - intentioned the practice might be.²⁵¹

He also seems to refuse to accept the idea that race and bias have the potential to affect the decision-making process and states that:

An unarticulated premise of the argument supporting affirmative action in the jury selection process is that some otherwise qualified members of Canadian society are incapable of judging the conduct of other members of the same community in a fair and impartial manner in accordance with the solemn oath taken by jurors. There is no justification for such an assumption.²⁵²

In making this statement, Justice O'Leary demonstrates his lack of understanding of the role played by race and culture in the courtroom and the interpretation of evidence and accords no importance to the need to address the historical absence of the participation of people of colour in the criminal justice system. Affirmative action in the selection process should not be interpreted as being a blanket condemnation of the ability of qualified white jurors to serve in an impartial and fair manner but should be understood as a defendant of colour's right to be judged by a jury of "peers" who have some understanding of that defendant's race and cultural background. People of colour need to be given the same opportunities as white defendants and be tried by jurors who share their race, culture and background. This form of affirmative action is also a reflection of the right of people of colour to participate equally in the decision-making processes of

²⁵¹ Supra note 250, p.6.

²⁵² Ibid.

the criminal justice system. Given the history of racism in Canada and the fact that the views and perspectives of people of colour have historically been absent from the criminal law, it is not unreasonable to expect that measures be taken to ensure that people of colour are fairly represented on criminal trial juries.

Justice O'Leary's remark that there is no justification to assume that potential jurors may not be able to conduct themselves in an impartial and fair manner is appalling in the face of so many studies and reports documenting the extent to which people of colour are currently discriminated against in this country.

In his concluding reasons Justice O'Leary makes the point that

There is no provision in the present law for jury panels which are "tailor-made" to suit the race, national or ethnic origin, colour, religion, sex, age, mental or physical disability or other discrete characteristics of accused persons. The ruling sought by the accused could not be made without rejecting a cardinal principle of the criminal trial jury system. Such a fundamental change should be made only by legislation.²⁵³

This demonstrates that judges seem to be unwilling to give a broad and liberal interpretation of the principles of impartiality and representativeness as enunciated by Madam Justice L'Heureux-Dube in the *R. v. Sheratt* decision in such a manner that provides defendants of colour with the same protections afforded white accused. In addition, courts seem to display an unwillingness to acknowledge the reality of racism in Canada and its ability to affect an accused's right to a fair and

²⁵³ Ibid, p. 6.

impartial trial.

Some judges, as was evidenced by the *R.v. Williams* case, are even unwilling to accept the idea that racial prejudice has the potential to affect the ability of prospective jurors in carrying out their duties in a fair and unbiased manner. This is contrasted with the position taken by the Ontario Court of Appeal in the *Parks* case in which Justice Doherty emphasized that refusing a defendant of colour the opportunity to challenge for cause based on racial prejudice demonstrates a lack of even "rudimentary race awareness." Doherty indicates that people of colour experience racism in all aspects of their lives and states that "it is unrealistic to assume that racism will not also be present in the jury room."

This inconsistency in the case law is problematic and sends out a strong message that defendants of colour cannot continue to rely solely upon the challenge provisions of the *Criminal Code* nor can they rely upon judges to interpret those provisions in a broad and liberal manner to ensure that they will be tried in a fair and impartial manner. With so many varying viewpoints among the judiciary on what constitutes a fair and impartial jury, people of colour need to look to the legislature to reform both the jury selection process and to increase the level of representation of people of colour on criminal trial juries. The ability of defendants of colour to challenge and question potential jurors on the grounds of racial bias

has also met with limited success. While the Ontario Court of Appeal in *R. v. Parks* accepted evidence documenting racism in Canada and the legal system, this decision has not necessarily been followed by courts in other provinces.

In order to give the principle of representativeness real meaning in modern society, we need to accept the reality that many people of colour are routinely excluded from participating in the important decisions of the criminal justice system on the basis of skin colour, socio-economic status and other factors. It seems from the jurisprudence on the subject of jury selection and representativeness that the courts are unwilling to take on what they feel is a role best left to Parliament and the legislature. In order to correct this imbalance and put people of colour on an equal footing with other citizens and potential jurors, some direct, definitive action needs to be taken. I will argue in the following chapters that legislation needs to be enacted that seeks to make the jury selection process more equitable and increases the participation of people of colour on criminal juries.

There needs to be some recognition of past discrimination and a realization by the criminal justice system that when defendants of colour walk into a courtroom, they do not walk on to a "level playing field" but enter a situation where the scales of justice have historically been tipped in favour of the white majority. In evaluating the potential for *Charter* arguments and case law to improve the representation of

people of colour on criminal juries, its analysts have suggested that arguments for jury representativeness are so decontextualized that they cannot respond to many of the inequities of the justice system.²⁵⁴ To be truly appreciated, a defendant of colour's concerns need to be evaluated within the context of a racist society and a white-dominated legal system.²⁵⁵

In addressing the need to deal with the problem of the exclusion of people of colour from criminal trial juries Petersen comments:

...[A]ll people should have equal access to jury duty in recognition of their equal worth as valued members of their community....The disproportionate over-representation of white people on jury panels implies that their values are more important, that their judgment is more respected, and that their perspectives are more legitimate than the values, judgment and perspectives of those who are under-represented. Jurors are invested with the power to make vital decisions which not only affect the outcome of individual trials but also contribute to the formation of community standards. The concentration of that power in the hands of white people constitutes institutionalized racism.²⁵⁶

The only way we can ensure that juries reflect a true representation of the community that an offence occurs in is to legislate that a jury accurately reflect the racial make-up of a community. For instance, if a community's residents are 60% black, then this should be reflected in the composition of the jury. Too many cases are still being decided by all white juries in communities where the population is

²⁵⁴ Cynthia Petersen, 1993, p. 164.

²⁵⁵ Ibid.

²⁵⁶ Ibid, p. 165.

racially mixed.²⁵⁷

The overwhelming message we can draw from a review of recent case law on the jury selection process is that the challenge provisions of the *Criminal Code* do not offer an effective means of ensuring that defendants of colour are judged by racially representative juries. Furthermore, we cannot expect to rely on the judiciary to ensure that the challenge provisions of the *Criminal Code* will be interpreted in a liberal fashion such that an accused person of colour can utilize those provisions to remove prospective jurors who may be racist or hold discriminatory views. As a result, more aggressive reform measures are required to increase the participation of people of colour on juries and to ensure that defendants are tried by an impartial and representative jury.

²⁵⁷ This was exemplified earlier in the Helen Betty Osborne case and the way in which counsel managed to exclude potential jurors in a community where Aboriginal people constituted 50% of the population. See Report of the Aboriginal Justice Inquiry, *Supra* note 2, p. 384.

CHAPTER 4

AN OVERVIEW OF REFORM EFFORTS

This chapter will review reform strategies in the area of jury selection and those attempting to increase the representation of people of colour on criminal trial juries. I will examine these reform attempts as a whole, highlight their limitations and will offer further recommendations for reform. First, I will review the amendments made to the jury selection provisions of the *Criminal Code* following the passage of Bill C-70 in 1992. Although the bill has eliminated the prosecutions's ability to stand aside prospective jurors and gives the prosecution and defence an equal number of peremptory challenges, I will point out that counsel may still utilize peremptory challenges to eliminate potential jurors on the basis of race. The most recent reform effort is the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System which was released in January of 1996. The report examines a variety of issues such as policing, sentencing, prison admissions, courtroom procedures and juries. As a whole, the Commission provided only a cursory review of the jury selection process and the main thrust of its recommendations dealt only with procedural and administrative aspects of juries. In June of 1994, the Nova Scotia Law Reform Commission (NSLRC) released its

final report on juries which represents one of the more comprehensive reform attempts in recent years. The NSLRC identified numerous ways in which people of colour are indirectly excluded from jury service as a result of systemic barriers such as unrepresentative source lists, eligibility requirements and inadequate levels of compensation paid to jurors. The Commission also made some useful recommendations to ensure that juries are more representative of the community in which an alleged offence occurs. The NSLRC was split on the issue of whether the process utilized in selecting potential jurors should be random or whether more aggressive measures are needed to ensure adequate representation of people of colour on juries. The work of the NSLRC is encouraging and provides invaluable recommendations for reform which will aid in increasing the participation of people of colour.

Bill C-70

On January 23, 1992, in the case of *R. v. Bain*,²⁵⁸ the Supreme Court of Canada struck down the jury selection process in existence at the time. The court stated that under section 11(d) of the *Charter* the process infringed an accused person's right to the presumption of innocence and to a fair and public hearing by an impartial tribunal. The Supreme Court struck down subsections 643(1) and (2)

²⁵⁸ [1992] 1 S.C.R. 91.

of the *Criminal Code* because these subsections gave the Crown a total number of peremptory challenges and stand asides which exceeded an accused's peremptory challenges. The Supreme Court gave Parliament six months to enact remedial legislation.

In response to the Supreme Court's ruling in *R. v. Bain*, the federal government introduced Bill C-70 in the summer of 1992 which gives the prosecution and defence an equal number of peremptory challenges and also eliminated the Crown's right to stand aside up to 48 potential jurors.²⁵⁹ Bill C-70 also provides for the accused to be called on first to decide whether he or she challenges the first prospective juror for cause or peremptorily. The prosecution and defence then alternate in being the first to indicate whether they challenge or are content with a potential juror. The Crown and defence are each entitled to twenty peremptory challenges if an accused is charged with murder or high treason; twelve peremptory challenges if the accused has been charged with any other offence punishable by more than five years imprisonment; and four peremptory challenges for any other offence. The prosecution and defence are entitled to challenge any number of potential jurors for cause under any of the grounds outlined in section 638(1) of the *Criminal Code*.

²⁵⁹ "Jury Selection Amendments Introduced in House of Commons," *Justice Communiqué*, Department of Justice Canada, April 6, 1992.

Although Bill C-70 abolished the Crown's use of stand asides in 1992, both Crown and defence counsel maintain the ability to challenge jurors peremptorily which leaves the in-court selection process open to abuse and manipulation because counsel still have plenty of opportunities to challenge potential jurors on racist and discriminatory grounds.²⁶⁰ Cynthia Petersen feels that Bill C-70 will only marginally increase the participation of people of colour on juries and argues for the elimination of peremptory challenges and suggests that challenges for cause be the sole means for rejecting potential jurors.²⁶¹ She states that challenges for cause are less susceptible to abuse because the grounds for such challenges are clearly outlined in section 638(1) of the *Criminal Code*.²⁶² While she points out the difficulty of using section 638(1) to remove prospective jurors based on their race, she also stresses that "it is equally difficult to use the procedure to exclude jurors who adhere to biased views which may jeopardize the impartiality of the trial."²⁶³ This last point was certainly emphasized in much of the case law of the past few years and exemplified the judiciary's unwillingness to permit an accused to ask questions of prospective jurors to determine whether a juror may hold racist views.

²⁶⁰ Petersen, p. 173.

²⁶¹ Petersen, pp. 172, 175.

²⁶² Petersen, p. 175. Section 638(1) of the *Criminal Code* outlines the specific grounds upon which prospective jurors may be challenged for cause. Since challenges for cause are not permitted on any ground other than those outlined in section 638, it is difficult for legal counsel to abuse the challenge for cause procedure. Peremptory challenges, on the other hand, enable counsel to eliminate potential jurors without having to give any reason or justification.

²⁶³ Petersen, p. 176.

In light of current narrow judicial attitudes towards the challenge provisions of the *Code*, I would be sceptical about any reforms which relied upon section 638.

In response to this problem, Petersen advocates a liberalization of the challenge for cause procedure to prevent the racially motivated exclusion of jurors and to facilitate the exclusion of jurors with racist views.²⁶⁴ She says that “[c]ounsel should be permitted to question prospective jurors in such a way to attempt to identify those whose racial prejudices would likely interfere with their ability to be fair.”²⁶⁵ Petersen stresses the importance of permitting counsel to ask questions of prospective jurors:

Liberalization of the challenge for cause procedure is a crucial element of the required reform of the Canadian jury selection process. A commitment to facilitate the participation of jurors of colour must be accompanied by a commitment to facilitate the exclusion of jurors with racist views. While racist views will not necessarily be discovered by questioning prospective jurors, they cannot be discovered without questioning.²⁶⁶

While I agree with Petersen that Bill C-70 has done little to bring about meaningful reforms in the jury selection process, I disagree with her hopeful optimism that a liberalization of the challenge for cause procedure will be enough to ensure that juries are racially representative and enable defendants of colour to eliminate prospective jurors who may hold racist views. Her trust in the judiciary may be misplaced. Although Petersen makes a number of invaluable

²⁶⁴ Petersen, p. 179.

²⁶⁵ Petersen, p. 178.

²⁶⁶ Petersen, pp. 178-79.

recommendations for reforming the jury selection process, they cannot be viewed as long term strategies designed to improve the participation of people of colour on criminal trial juries. The survey of recent case law in Chapter 3 has demonstrated that the Canadian judiciary has a poor track record in upholding the rights and interests of people of colour when it comes to jury selection. Historically, the legal system has been extremely slow to respond to changing values and morals within society and given the judiciary's record in the area of jury selection, I think reform efforts need to be focused elsewhere.

A report prepared for the Attorney General of Ontario in 1992 revealed the mistrust people of colour hold for judges and other criminal justice personnel. The report, entitled, "*A Community Consultation on the Perceptions of Racial Minorities*,"²⁶⁷ highlighted the prejudiced views and attitudes held by judges and other criminal justice professionals in Ontario. The report was based on interviews with 65 people of colour and questionnaires answered by 50 community organizations. The report states that:

Judges were perceived as believing black people were prone to criminal behaviour, Sikhs were "vicious and untrustworthy," and minorities were too stupid and lazy to learn English.²⁶⁸

Based on this evidence, it becomes clear that Petersen's proposal for a

²⁶⁷ "Minorities See Judges As Clearly Racist, Says Secret Report to Ontario's A.G.," *Lawyer's Weekly*, February 14, 1992, Tom Onyshko.

²⁶⁸ *Ibid*, p. 1.

liberalization of the challenge for cause procedure can only be viewed as one step in a larger strategy of reforming the jury selection process. The perceptions of individuals highlighted in this 1992 report clearly indicates that people of colour would probably be sceptical of any reforms to the in-court selection process which were entirely dependent on the exercise of judicial discretion and experience. The comments made by Ontario judges sends the strong message that members of the bench and other criminal justice staff are just as likely to hold racist attitudes and beliefs as the general public. As such, reform efforts should focus on all aspects and stages of the jury selection process for their potential to exclude people of colour. Given the judiciary's record, I think it would be unfair to expect people of colour to have to wait for the further "enlightenment" and "education" of judges to ensure that the jury selection is carried out in a fair manner. Educating and sensitizing judges and lawyers is only one potential strategy. Accordingly, Petersen's proposals should only be viewed as one area of focus for reform. I believe that strategies also need to concentrate on encouraging the enactment of legislation that will facilitate the greater representation of people of colour on juries as well as the removal of all direct and indirect barriers that currently result in their exclusion from jury service.²⁶⁹

Commission on Systemic Racism in the Ontario Criminal Justice System

²⁶⁹ I will be discussing this proposal in further detail in the following chapter.

In January of 1996, the Commission on Systemic Racism in the Ontario Criminal Justice System released its Final Report²⁷⁰ which examines a wide range of issues such as prison admissions, policing, parole, sentencing, courtroom procedures and criminal trial juries. The Commission was established in October of 1992 at the request of Stephen Lewis in his Report to the Premier of Ontario following civil disturbances in Toronto shortly after the Rodney King verdict was handed down in Los Angeles.

The Commission identified two major barriers which it felt contribute to the under representation of people of colour on juries. First, it indicated that the citizenship qualification under the *Juries Act* prevents many people from participating as jurors.²⁷¹ Section 2 of the *Juries Act* of Ontario states that in order to be eligible for jury service, one must be a Canadian citizen. The Commission cited evidence to support their belief that this qualification results in the exclusion of many people of colour. For instance, the Commission pointed out that immigrants made up almost 40% of the entire population of Toronto in 1991.²⁷² The Commission highlighted the fact that immigrants are just as integrated into our communities as Canadian citizens and stated that “[i]mmigrants pay taxes, rent or

²⁷⁰ Supra Note 1.

²⁷¹ Ont. Commission, p. 251.

²⁷² Ibid, p. 251.

buy homes, talk to their neighbours and go to work."²⁷³ The Commission agreed that immigrants who have resided in Canada for a period of at least three years should be able to qualify for jury duty because they will have some understanding of Canadian values, standards and customs.²⁷⁴ The exclusion of landed immigrants from jury service is clearly a big problem contributing to the overall under representation of people of colour on trial juries. In proposing recommendations for reform of the selection process, I will argue that any strategy for reform must take into account this large portion of the population of Ontario if it is to be fair and equitable for all.

The second systemic barrier the Commission identified was the source list used to generate the names of potential jurors. As was discussed in Chapter 3, lists are prepared annually from a Ministry of Revenue database of all properties in the province.²⁷⁵ This database does not provide an accurate representation of the entire population of the province because the list only focuses on property ownership and any information about tenants is usually inaccurate.²⁷⁶ Research has demonstrated that people of colour are more likely to be tenants rather than property owners and are also more likely to move frequently for economic

²⁷³ Ibid, p. 252.

²⁷⁴ Ibid.

²⁷⁵ Ibid, p. 253.

²⁷⁶ Ont. Commission, p. 253.

reasons.²⁷⁷ As such, utilizing this Ministry of Revenue database as a source list for names of potential jurors will only result in the further exclusion of people of colour from jury service. In response to this problem, the Commission recommended, as did the Nova Scotia Law Reform Commission, that the Health Insurance Plan database be used as the new source for jury pools²⁷⁸ The Commission pointed out that this database is likely to be more inclusive of the population of Ontario and cited the work of the Aboriginal Justice Inquiry in Manitoba who reported that health insurance lists have increased the presence of Aboriginal individuals on criminal trial juries.²⁷⁹ This is a positive suggestion for reform which will help to increase the presence of people of colour on criminal trial juries. However, I think that health insurance numbers should only be one source in creating a pool of potential names. Drawing from a number of sources of names will help to demonstrate that best efforts have been made to make sure that the names in the jury pool are as inclusive as possible.²⁸⁰

On the whole, the Commission provided only a very superficial review of the jury system in Ontario and did not go into any great depth in making any meaningful

²⁷⁷ Fukurai et al., p. 21.

²⁷⁸ Ibid, p. 253.

²⁷⁹ Ibid.

²⁸⁰ In Chapter 5, I will make recommendations for additional methods of collecting accurate and up to date information on the province's population.

recommendations for reform. The Commission made only a handful of recommendations which dealt with procedural and administrative aspects of the jury selection process. Unfortunately, the Commission did not, after examining extensive evidence of racism, suggest any reforms of a more affirmative nature such as the introduction of provincial legislation seeking to increase the presence of people of colour on juries. While the report acknowledged the prevalence of racism in the Ontario criminal justice system and emphasized the need to deal with this problem, it did not provide a thorough examination of the jury selection process. This was disappointing in light of the fact that many of the people of colour who participated in the Commission's studies repeatedly indicated that they felt that members of their communities were under represented on criminal trial juries.²⁸¹ All in all, given the extensive public consultations undertaken for this report and the delay in preparing its final recommendations, it is quite disheartening that the Commission only devoted 5 pages to the criminal jury selection process in an almost 450 page report.

The Nova Scotia Law Reform Commission

One of the more comprehensive reform attempts in the area of criminal trial juries in Canada was the June 1994 Final Report of the Nova Scotia Law Reform

²⁸¹ Ont. Commission, p. 250.

Commission (NSLRC).²⁸² In 1992, the Commission launched a study to examine how the jury system could be improved to ensure that juries were more representative of the entire population of the province.²⁸³ In its report, the Commission recommended that the provincial government adopt the draft *Juries Act* it prepared rather than attempt piecemeal reforms.²⁸⁴ The draft *Act* is aimed at ensuring the objectives of jury representativeness and impartiality.²⁸⁵ The NSLRC stressed the importance of ensuring jury representativeness and stated that jury decisions that do not reflect the full range of values in society "can lead to a lack of faith in the credibility of the justice system as a whole."²⁸⁶ It was the Commission's view that any proposed reforms to the jury be guided by the principles of fairness, inclusiveness and efficiency and recommended that the "jury selection process should be reformed to ensure that it is more reflective of a multicultural society."²⁸⁷

²⁸² Final Report on Juries in Nova Scotia, Law Reform Commission of Nova Scotia, 1994.

²⁸³ Ibid, p. 1. The work of the NSLRC draws upon some of the assumptions of critical race theory to inform its research. The Commission recognizes that the criminal law does not reflect the full range of values and perspectives of all members of society. The NSLRC also takes a critical view of history to inform its understanding of how historical discrimination has resulted in the under-representation of people of colour on juries and the under-representation of their values and beliefs from the criminal law. The Commission challenges the idea that white experience and judgment are the only ways to understand and perceive the world. See NSLRC, p. 22.

²⁸⁴ Ibid, p. 2.

²⁸⁵ Ibid, p. 17.

²⁸⁶ Ibid.

²⁸⁷ NSLRC, p. iii.

There were differing opinions among the commissioners on how to ensure that juries are representative of the community in which an offence occurs. The majority of the Commission concluded that random selection and the removal of systemic barriers such as unrepresentative source lists, economic discrimination and citizenship qualification constituted the best method for achieving representative juries.²⁸⁸ This majority recommended that the source lists used to generate lists of potential jurors need to be more inclusive of the provincial population. Rather than utilizing the voter's list, the commission suggested using the list of provincial health care numbers as an alternative that would be more inclusive of the general population.²⁸⁹ The Commission emphasized that the voter's list would become inaccurate shortly after an election and would tend to exclude tenants and those who move frequently. In order to further ensure that source lists do not exclude individuals from serving as potential jurors, the commissioners also suggested that the jury lists for any current year be made public in order to provide people with the opportunity to determine if their names have been omitted from the list and if so, permit them to register voluntarily with the court administrator.²⁹⁰ This recommendation is extremely useful and helps to provide a safety net to ensure that

²⁸⁸ NSLRC, p. 23.

²⁸⁹ NSLRC, p. 27. The Commission pointed out that the Provinces of Manitoba and Saskatchewan currently employ health care numbers as a way of ensuring a more inclusive source list. The Commission on Systemic Racism in the Ontario Criminal Justice System also recommended in its recent report that the Ontario government employ the listing of O.H.I.P. numbers in the province when generating lists of potential jurors.

²⁹⁰ NSLRC, p. 27.

any potential jurors who are excluded from the initial source list can still be eligible for jury service. I believe that this recommendation should be implemented in Ontario since this measure helps to overcome a systemic barrier and could only serve to increase the representation of people of colour on juries.

In the early stages of its inquiry, the Commission suggested that eligibility for jury service be extended to landed immigrants but in its Final Report, the majority of the commissioners decided that Canadian citizenship should remain as a prerequisite for jury service.²⁹¹ Commissioner William Charles disagreed with the majority on this point and indicated that since landed immigrants are subject to the laws of Canada and are receiving the benefits of the legal system, then they should be eligible to qualify for jury service.²⁹² I agree with Commissioner Charles' justification for waiving the citizenship requirement for jury service for landed immigrants. Considering the large immigrant population in Metropolitan Toronto and Southern Ontario,²⁹³ it would be inaccurate to assume that immigrants do not have an interest in criminal justice issues. Not only are they subject to the laws and penalties of our Canadian justice system but they are full participating members of our society. However, I partially disagree with the justification provided by

²⁹¹ NSLRC, p. 28. Section 2(b) of the *Juries Act* of Ontario states that Canadian citizenship is a requirement for eligibility as a juror.

²⁹² NSLRC, p. v, Appendix A.

²⁹³ Ont. Commission, p.

Commissioner Charles and would challenge his point that people of colour are receiving the full benefits of the law. I think an argument could be made that many people of colour residing in this country are not benefitting from all of the protections of the law that are afforded white residents.²⁹⁴

The Commission identified the reasons for the differing opinions among its commissioners on the issue of citizenship qualification as being different viewpoints on the nature of jury duty. Some felt that jury duty is a civic responsibility imposed by society. Commissioner Charles stated that "...each person owes this service to his or her community as part of their personal contribution to the legal system which provides a service to them."²⁹⁵ Other commissioners considered jury duty to be a privilege for which people must qualify. I would argue that jury duty has historically been a privilege and a right from which people of colour have been excluded from participating in. People of colour have a right to serve as jurors and a right to participate equally as white residents do in the decision-making processes of the criminal law. This is crucial if the criminal law is to be considered a reflection of the beliefs and perspectives of all individuals residing in Canada. It would be hard to classify jury service as a civic responsibility in the case of people of colour given the fact that they have historically been excluded from participating on criminal trial

²⁹⁴ The point I wish to make is that research has revealed that people of colour are discriminated against daily on the basis of race by judges, lawyers and police. See Ontario Commission on Systemic racism, p. 12.

²⁹⁵ NSLRC, p. iv, Appendix A.

juries.

In looking to reform the jury selection process and increase the participation of people of colour, I think that one has to start with the assumption that participation on juries is a privilege. While many citizens who receive a jury summons in the mail might find the idea of jury duty nothing more than an inconvenience and a nuisance, a person of colour may think otherwise. It would be presumptuous to assume that a person of colour might take the issue of jury duty so lightly as many white citizens do. In trying to justify a decision on whether to deny or extend jury service to landed immigrants, I think that one's conception of jury duty as either a duty or privilege is irrelevant. The important point to note is that the values and beliefs of a segment of the population are missing from the criminal law because they are being excluded from equal participation on juries. If a person is subject to the criminal law of Canada, I would contend that that person also has a right to participate equally in the decision-making processes of the criminal justice system and have the opportunity to serve as a juror.

The Nova Scotia Law Reform Commission (NSLRC) made some useful recommendations in order to ensure that juries are more representative of the community in which an offence occurs. The Commission emphasized the difficulty of trying to determine the proper community from which to draw potential jurors and

looked to the Alaska Supreme Court in the *Alvarado* case for some guidance:

[T]he traditional point for determining the community from which jurors are selected is the scene of the alleged offence. Hence, we feel that in determining whether the source from which a given jury is selected represents a fair cross-section of the community, we must adhere to a notion of community which at least encompasses the location of the alleged offence. It is the community in which the crime was committed that the jury must represent because of this focus...any narrowing of the area from which prospective jurors are drawn will have no effect on the impartiality of jury panels, so long as the area of selection continues to include the scene of the crime, and so long as it remains sufficiently broad to allow for the empanelment of a jury which is not prejudiced by knowledge of the events of the specific crime charged. Where, on the other hand, prospective jurors are selected from an area which does not encompass the scene of the alleged crime, there will always be a danger that significant elements of the community in which the crime occurred will be excluded from representation on the jury panel, and that panel will consequently fail to represent a fair cross-section of the community.²⁹⁶

I think that the important point to take from this passage is that decreasing the size of the jury pool from which names are drawn will not affect the impartiality of the final jury that is selected to hear a case. In fact, this reduction in the size of the jury district will only help to ensure that the panels returned by the Sheriff will reflect a more representative cross-section of the population residing closest to the scene of the alleged offence.

Currently, one of the difficulties is that provinces are divided into extremely large jury districts from which potential jurors are chosen. At present, the *Juries Act* in Nova Scotia provides for 18 separate jury districts such that every county forms a jury district. Current reforms in Nova Scotia aimed at improving the administrative efficiency of the court system propose to reduce the province to only four districts. In order for juries to be representative of the community in which an

²⁹⁶ *Alvarado v. State of Alaska* 486 P.2d 891 (1971) (Alaska Sup. Ct.) In NSLRC, p. 37.

offence occurs, jury districts need to be sufficiently smaller in order to take into consideration the diverse communities and neighbourhoods in any one district. To deal with this problem, the Commission recommended that postal codes be used to define the community within a particular jury district as the community in which the offence occurred.²⁹⁷ In this way, drawing a random list of jurors with postal codes from that area "would help to ensure a greater likelihood of more representation of people drawn from the community in which the offence occurred and a greater likelihood of representation of people who may be similar to the accused person in the case."²⁹⁸ This is an extremely useful recommendation and later, in chapter 5, I will argue that the proposal to use postal codes to define jury districts be adopted in Ontario. This is an effective way to narrow the size of a community to help ensure that potential jurors drawn from that area are a true representation of its racial make-up. The current size of jury districts is too large and we cannot expect jurors drawn from those pools to be representative of the residents in the immediate vicinity of where an alleged offence took place.

The NSLRC also recognized some of the indirect ways in which people of colour may be excluded from participating on criminal trial juries. It was emphasized that the current fee of \$15.00 per day paid to jurors results in systemic

²⁹⁷ NSLRC, p. 36.

²⁹⁸ Ibid.

economic discrimination and hardship.²⁹⁹ The problem is that inadequate compensation forces judges to grant excuses on the basis of economic hardship to many people who cannot afford to serve on a jury.³⁰⁰ This is especially true for people of colour who tend to get excused from jury service quite readily because they are more likely to hold part-time work or low-paying positions and cannot afford to lose their wages.³⁰¹ Many people of colour who do not hold steady jobs are forced to excuse themselves from jury service because they cannot afford to serve as jurors or because of the unstable nature of their employment makes it impossible for them to secure the necessary time off. The Commission also suggested that juror's fees should be variable depending on the demands made on a juror's time.

The NSLRC also proposed that employees who continue to receive salaries while serving as jurors should not receive a fee for jury service.³⁰² In this way, efficiencies could be gained such that juror fees could be raised to reduce the number of potential jurors who must be excused because of economic hardship.³⁰³ I will be touching on this problem further in formulating my own recommendations

²⁹⁹ NSLRC, p. 39.

³⁰⁰ In Ontario, section 23(2)(b) of the *Juries Act* states that "[a] person summoned for jury duty may be excused by a judge...[if]...serving as a juror may cause serious hardship or loss to the person or others..."

³⁰¹ Hiroshi Fukurai et al., p.22.

³⁰² NSLRC, p. 40.

³⁰³ NSLRC, p. 41.

for reform in the following chapter.

With respect to the issue of ensuring jury representativeness, the majority of the NSLRC was of the view that the elimination of all systemic barriers and random selection are the fairest methods of achieving representativeness rather than selective representation.³⁰⁴ Two of the commissioners disagreed with the recommendations of the majority on the best way to ensure that an accused be judged by a jury of their peers.³⁰⁵ The minority of the NSLRC felt that in a society where racism is commonplace, "peers must include people from the same racial and cultural group."³⁰⁶ In justifying their position, they further emphasized the findings of racism of the Donald Marshall, Jr. Inquiry and the considerable body of evidence pointing to the racism that exists in the Nova Scotia criminal justice system.³⁰⁷ Commissioners Ring and Johnson stressed the need for more aggressive reform efforts and expressed their concerns about relying solely on a random selection process to empanel juries:

We must acknowledge that discrimination and racism are prevalent in our community. We advocated that a jury selection process which will ensure representations of visible minorities on Jury Panels is necessary to achieve the goal of an accused person being judged by one's peers. We disagree with a majority of the commissioners who propose that pure random selection is the goal. Random selection is a process. That process should be utilized to the extent that it accomplishes the goal we wish to achieve. If it will not accomplish the goal of

³⁰⁴ NSLRC, p. 23.

³⁰⁵ NSLRC, Appendix A, p. i.

³⁰⁶ Ibid.

³⁰⁷ NSLRC, Appendix A, p.i-ii.

ensuring judgment by one's peers, then its use must be altered or modified...We agree with the majority of the commissioners that the process by which an individual is named to the jury should be done by a random selection process. What we disagree with is the method of creating the pool or group from which that selection should occur.³⁰⁸

The minority of the NSLRC contend that the only way to ensure jury representativeness is through a structured process ensuring that percentages of various groups are included.³⁰⁹ Ring and Johnson propose that the best way to ensure that people of colour are fairly represented on criminal trial juries would be to have a judge randomly select the names of prospective jurors for each trial from three separate pools: one for Black Nova Scotians, one for First Nations and a third for all other residents.³¹⁰ While I agree that this form of proportional representation is the fairest way to address the problem of past discrimination and the historical exclusion of people of colour from jury service, I am not certain that this type of approach would be readily accepted by mainstream criminal justice professionals and the general public. Any strategy for reform which attempted to favour one group over another would most certainly be met with public outcry and distrust. I do believe that the work of the Commission has provided us with a number of useful recommendations which could be further refined to develop a hybrid³¹¹ jury selection process which would be a dramatic improvement over existing processes

³⁰⁸ NSLRC, Appendix A, p. iii.

³⁰⁹ Ibid, p. 18.

³¹⁰ Ibid, Appendix A, p. iii.

³¹¹ In using the term "hybrid," I refer to a selection process that would combine and draw upon the most positive aspects of all of the NSLRC's recommendations for reform.

utilized in Ontario.

Both the majority and minority of the NSLRC formulated a number of interesting proposals and suggestions for reform in its final report. However, I feel that the Commission could have combined their proposals for reform together in such a manner that would have balanced the concerns of all the commissioners and yet still achieve their goals of efficiency, inclusiveness and fairness. I think that this disappointment is shared by Commissioners Ring and Johnson in indicating that they felt the NSLRC did not fully explore all of the research and options that were available to it in trying to determine how to best ensure that defendants of colour have members of their own race/culture represented on their juries.

While I fully agree with the reasons offered by the minority of the Commission on why random selection is not the most appropriate approach given the considerable evidence of racism in the Nova Scotia justice system, I also partly agree with the majority's recommendation that random selection helps to ensure that juries are empanelled in a fair manner. I do not believe that the approaches taken by the majority and minority of the NSLRC are that far apart and I think that all of the proposals for reform and concerns of the commissioners could have been accommodated.

In order to implement my proposals for reform and make them a viable strategy to increase the presence of people of colour on juries, we need to first eliminate systemic barriers such as economic discrimination, citizenship qualification, and unrepresentative source lists, all of which currently reduce the participation of jurors of colour. In addressing these barriers, we can draw upon many of the invaluable recommendations of the Nova Scotia Law Reform Commission. To make these reforms a reality, the provincial government in Ontario would have to pass legislation amending the current *Juries Act* and design a system to facilitate the collection of accurate information on the racial composition of each community. In the next chapter, I will outline in greater detail how this can be done and elaborate on how we can build on the work of the NSLRC to transform the jury selection process into one which is equitable and fair for all.

In evaluating the reform efforts of the last five years as a whole, I would characterize them as cautious and conservative. However, the Nova Scotia Law Reform Commission provided the most analysis and the most promising recommendations by far. Although useful recommendations can be found in all of the reform attempts, they need to be pushed further in order to be more meaningful to people of colour and to make a whole-hearted effort in increasing their participation on trial juries.

CHAPTER 5

BUILDING A NEW JURY OF PEERS

Developing A Framework for Racially Representative Juries

While many of the reform efforts of the last four years have had as their goal the elimination of racial discrimination from the jury selection process, they fail to more effectively address the ways people of colour are excluded from participation on juries. More ambitious measures are needed if we are to increase the representation of people of colour on juries. While historically jurors may have had knowledge of the accused and their background and the community in which the offence occurred, it is unrealistic for us to expect that this can be possible today. Such an idea would be impossible considering the size of modern urban centres and the communities in which we now live. However, this does not mean that a jury composed of representatives from the community in which an alleged offence occurred is of no value. Because jurors of colour experience the world differently than other courtroom players, their presence in the courtroom is important.

In order for people of colour to be able to tap the potential of the criminal trial jury to empower themselves, we need to eliminate the barriers that currently prevent them from fully participating in jury trials. We need to put in place a framework to provide people of colour with greater accessibility to jury service. But before examining the problem areas where people of colour are excluded and outlining my recommendations for reform, it would be useful to provide clear definitions of many of the terms and concepts I will be referring to in my proposals.

Defining “A Jury of Peers” and “Community”

In order to ensure that an accused is tried by a jury of their peers, we first need to define the term “peers.” I believe that in order to make the jury selection process more equitable and to take advantage of its potential, an accused should be judged by peers drawn from the immediate community in which an alleged offence occurred.³¹² As was outlined in the previous chapter, jury districts are currently very large and as such, it is unlikely that many of the jurors chosen will even reside in the vicinity of where the offence was committed. Later in this chapter, I will make a case for creating smaller jury districts and suggest adopting the recommendation of the Nova Scotia Law Reform Commission in using postal

³¹² My proposed reforms assume that “peers” of the same race as the accused can be found in the community in which the alleged offence took place.

codes to define districts.³¹³

I believe that when an offence is committed, it is an offence against that particular community and its residents. As a result, I would contend that a defendant has the right to be judged by his or her peers but that the community in which the offence occurred also has an interest in ensuring that the community's beliefs, morals and standards of behaviour are represented in court. I would disagree with the traditional argument that when a crime is committed, it is an offence against society in general. For this to hold true, one would have to assume that the criminal law is a direct reflection of the values and beliefs of all members of Canadian society. I think that much of the evidence presented in this paper has made it very clear that Canadian laws are not necessarily representative of the views and beliefs of all of this country's residents or of their communities. Historically, standards and laws governing the behaviour of individuals have not always taken into consideration the perspectives of people of colour. As a result, I feel that it would be inaccurate to state that when an offence occurs in a predominantly Black neighbourhood, it should be considered a transgression against society as a whole. The under-representation of people of colour on juries exemplifies that current community standards reflected in the verdicts of juries only represent the perspectives of the white population.

³¹³ NSLRC, p.36.

Racially representative juries help to ensure that the criminal law reflects the current values of the community and as a result, it is imperative that all members of a community have an equal opportunity of serving on a criminal jury.³¹⁴ The legitimacy of the law is called into question when only a small group of people (predominantly white) is setting the values and standards for the entire population.³¹⁵ Laws and standards that only reflect the interests of one segment of the population may be perceived to amount to nothing more than racial oppression.³¹⁶ The rights of the accused and the greater community have to be addressed to ensure that the jury system works for people of colour just as it does for whites.³¹⁷ Diversity amongst the members of the jury brings a greater breadth of knowledge to the decision-making process.³¹⁸ "Multi-racial juries are likely to possess the diversity of experiences and multiplicity of perspectives that are

³¹⁴ NSLRC, p.1.

³¹⁵ The Nova Scotia Law Reform Commission commented that currently in Canada, "there are many different perspectives and values which are being judged by one set of laws.", see NSLRC, p. 22.

³¹⁶ Ont. Commission, p. 3. One author states that as a result of slavery and contemporary oppression, Black communities in the U.S. have been "deprived of effective institutions by which to regulate behaviour within their borders. The only mechanism of social organization and control available at present to the Black community are those that oppress them. Hence life within the Black community remains chaotic.", see "The Case for Black Juries," 1970, *Yale Law Journal*, p. 534.

³¹⁷ When criminal defendants raise the issue of unrepresentative juries and challenge the jury panels that are returned by a Sheriff, they usually focus on the individual right to be tried by a fair and impartial jury. As a result, the issue of community representativeness is not necessarily raised. A number of authors feel that we should not only examine jury selection procedures with respect to the rights of the defendant but should also consider the rights of prospective jurors. One author suggests that juries must be structured to ensure that Blacks are trying cases which directly affect the interests of Black accused or of the Black community. Ibid, p. 537. See also Petersen, p. 165.

³¹⁸ Ibid, p. 549.

required for an enlightened deliberative process."³¹⁹

Kougasian refers to the work of Daniel Yankelowich and states that juries provide a form of "public judgments" which are value judgments derived from a "careful consideration of competing points of view."³²⁰ These judgments are the product of various perspectives "under conditions free from domination and coercion."³²¹ This form of public consensus is required where a jury is called upon to render judgment in a situation such as the reasonableness of police conduct.³²² The Nova Scotia Law Reform Commission demonstrates the role of representative juries:

³¹⁹ Petersen, p. 179.

³²⁰ Peter M. Kougasian, "Should Judges Consider the Demographics of the Jury Pool in Deciding Change of Venue Applications?," 20 *Fordham Urban Law Journal* 531, 1993, p. 545.

³²¹ Daniel Yankelowich, "Coming to Public Judgment: Making Democracy Work in a Complex World," 1991, p. 233.

³²² Kougasian, p. 546. In discussing the issue of police conduct, the Ontario Commission on Systemic Racism points out that in Ontario, police have considerable discretion in determining both whether to lay charges and the type of charge to be laid. Officers rely on their perceptions of an allegedly criminal incident in coming to a decision on whether or not charges are laid. As a result, the importance of a racially representative jury which is reflective of community standards and beliefs becomes more apparent. Take for example an incident where a number of 18 year old youths of colour are pulled over by a white police officer for joyriding in a car they have broken into. Depending on the discretion exercised by the arresting officer, these individuals could be charged with various offences such as theft over \$5000, possession of stolen property over \$5000, mischief to property over \$5000 or taking a vehicle without consent. The penalties for these alleged offences range from 6 months to 10 years of imprisonment. The other option open to the police officer would be to escort the youths home and inform their parents. The wide-ranging options open to police in this example hint at the importance of equal participation of people of colour on juries to ensure that a full community perspective is reflected in all jury verdicts. This particular illustration demonstrates how various interpretations and versions of reality can impact upon the fate of the youths. Because there will no doubt be competing versions of the facts presented by both the youths and the police, it is better to have this matter adjudicated by representatives from the immediate community who have an interest in ensuring that justice is served. See Ont. Commission, p. 182.

The jury is intended as a means of allowing the current values of the community to be reflected in the justice system. This is part of the on-going process of the renewal of the law in that behaviour is judged according to the changing standards of the community...[T]he justice system needs to ensure that everyone in the community is equally likely to serve as a juror to contribute their ideas about standards of behaviour to the legal system. This is the notion of representation.³²³

I think that any type of reform of the jury selection process cannot be one-sided and look only at the rights of the defendant or the rights of the community. I don't believe that defendants of colour are entitled to be judged by a jury composed entirely of individuals of the same race as the accused. However, I do believe that people of colour should have a right to participate equally in the decision-making processes of the criminal justice system. An accused person of colour should also be entitled to be judged by a jury of some individuals who share his or her racial background and are more likely to have an understanding of the specific context of the alleged crime. There are many different interests at stake and I think that the only type of strategy that would be tenable is one that carefully balanced all competing interests and is seen to be fair in the eyes of the public. Lynn Smith states that it is impractical to expect individual juries to reflect the demographic composition of the community.³²⁴ She states

If our continued use of juries reflects a belief that representatives of the community can and should decide certain matters, then it must be the case that arrays are drawn from the community as a whole at random, promiscuously and indiscriminately,

³²³ NSLRC, p. 22.

³²⁴ Lynn Smith, "Charter Equality Rights: Some General Issues and Specific Applications In British Columbia To Elections, Juries and Illegitimacy," (1984) 18 *University of British Columbia Law Review* 351.

otherwise juries in individual cases are not truly representative of the community.³²⁵

While I would agree with Smith on the need to keep the jury selection process random, I think her analysis fails to acknowledge that not all individuals living in Canadian society are equal and also ignores the history of racism in this country. The important point we can draw from her analysis is that the selection process must appear to be fair. I think that my proposals for reform of the selection process are able to maintain this image of fairness.

I would contend that the fairest way to ensure that a jury is truly representative of the community in which an offence occurs in is to select that jury based on the racial composition of that particular neighbourhood. For example, if 50% of the residents in the community are Black and 25% are Asian, then six of the jurors trying the defendant must be Black and three must be of Asian descent. I strongly believe that this is the most equitable way to ensure that defendants of colour are judged by their "peers." In addition, the selection system still maintains an image of fairness because the process can still be considered to be "partially random." Although the Sheriff of each jury district must return jury panels which are racially representative of the community in which the alleged offence occurred, the racial make-up of those panels will always be different. For example, a jury district in one area of Toronto may be 75% Black while another may be 80% Asian. In this

³²⁵ Ibid, p. 495.

way, the racial diversity of each particular community will determine the racial composition of the panels returned by the Sheriff of the district. The point I wish to make is that the sheriff of each district is not required to go out and selectively choose a certain number of jurors from a particular race to satisfy a quota. I am not advocating a situation where, for example, every jury chosen from a community must have 50% of its jurors drawn from a particular race.

My proposal for proportional representation tries to take into account the racial diversity of all communities. The idea is that as each community evolves, so will the racial composition of its residents and its beliefs and standards of conduct. The racial make-up of a jury drawn from a particular community in 1997 may be vastly different from a jury drawn from that same location in 1999. The racial composition of a neighbourhood is not static and will change over time and as a result, I feel that this stage of the selection process is left up to chance and is not something within the control of the Sheriff of the jury district. Perhaps it would be inaccurate to describe this first stage of the jury selection as "partially random." I think it may be more appropriately labelled a "jury of chance." A "jury of chance" would be more akin to a 6/49 lottery where the 49 possible numbers to be chosen are always changing. On one day, 39 of those numbers may represent a certain race of people while three years down the road, perhaps only 20 of those 49 numbers would represent that same race.

The next stage of the selection process will continue to remain completely random because every prospective juror whose name has been returned by the Sheriff from each of the racially representative panels will have the same chance of being chosen for jury service. For instance, if the community where the alleged offence took place is 60% Black, 20% Asian and 20% white, then the Sheriff would return three panels based on the racial composition of the community. In this way, 60% of the jurors would be randomly chosen from the panel of Black individuals, 20% of the jury from the Asian panel and the remaining 20% from the panel of white individuals.

I feel that this form of proportional representation is the most equitable manner for empanelling juries because the process continually adjusts to the changing diversity of each community. Not only does this approach ensure that a defendant is given an opportunity to be judged by their peers but it also enables the affected community to participate in the decision-making process and permits that community to have its values and standards of behaviour reflected in court. In addition, this approach avoids the heated debates that would likely result if a suggestion was made to employ a process of threshold representation whereby a certain percentage of jurors would be required to be of the same racial background as an accused. This type of approach becomes more difficult to justify and to

rationalize. Looking at the racial demographics of the community is a simpler method and would present less of a problem because the process for determining the racial composition of the jury would be left up to chance. Furthermore, it is easier for the process to maintain an image of fairness when the racial composition of a jury is contingent upon the unknown demographics of a local community rather than a form of selection in which the racial make-up of the jury is predetermined.

Jury selection procedures should ensure that the empanelling process is free from bias and interference and is seen to be fair in the eyes of the public and all the participants in the courtroom. The issue of public confidence in the justice system is important and cannot only take into account the confidence of people of colour but must also address the concerns of the entire population of the province. If justice is not seen to be done by all, then any proposed reforms will most certainly fail and will not be accepted by the public. Furthermore, given the current political climate in Ontario and the dismantling of affirmative action programs, any strategy which attempted to favour one group over another would most certainly be met with public outcry and distrust.

Reforms should be concentrated on ensuring that people of colour are given every possible opportunity to participate on criminal trial juries and that all barriers that directly or indirectly result in their exclusion be eliminated. To date, proposals

for reform have not gone far enough in their attempts to be more inclusive of people of colour. Many of the proposals have positive aspects which I feel can be incorporated into a more aggressive strategy. What is currently missing from these reforms is any outline of a concrete framework for increasing the participation of people of colour. I think that one of the biggest obstacles that affect the ability of people of colour to serve on juries is the size of current jury districts.

In the upcoming sections I will be outlining my proposed recommendations for reform of the jury selection process which I feel would make the empanelling of juries more equitable and increase the participation of people of colour. I will also explore how my recommendations might be implemented and will discuss some of the potential obstacles and difficulties in setting up a framework to put the proposed changes into action.

In-Court Selection Procedures

In order to ensure that potential jurors of colour are not eliminated during the selection process on racist or discriminatory grounds, I would advocate that the federal government eliminate the sections of the *Criminal Code* that might be used to exclude people of colour on the basis of their race. For example, I agree with Cynthia Petersen's proposal that the *Code* be amended to remove peremptory challenges which have the potential to be abused since counsel are not required

to give any reasons as to why they may be challenging a particular juror. I would agree with Petersen's proposal to keep the challenge for cause procedure to enable defendants of colour to identify and remove jurors who hold racist views. I further support her suggestion that the challenge for cause provisions need to be interpreted in a more liberal manner to enable defendants to question prospective jurors on their views and ascertain whether they may be biased. However, as I indicated earlier in this paper, this strategy can only be viewed as one step in the process of reforming jury selection procedures and that considerable pressure needs to be placed on the provincial government to enact legislation which seeks to more aggressively secure the participation of people of colour.

The Size of Jury Districts

The viability of my proposals for reform is dependent on reducing the current size of jury districts from which the names of potential jurors are drawn. How can we achieve shared community standards if jury districts are so large that they do not capture the racial diversity and varying viewpoints of the many communities contained within those districts? In order to reform our current jury into one that is representative of the "conscience of the community,"³²⁶ we need to narrow the size of jury districts to take into account the different local communities. Jury districts that try to be inclusive of many communities spread over a large area will only result

³²⁶ This term was used by the Law Reform Commission of Canada in its report on juries. See Law Reform Commission of Canada, *The Jury in Criminal Trials*, Working Paper No. 27, 1980.

in a jury that does not accurately represent the shared values and standards of the location of the alleged offence. In addition, jurors brought in who do not reside in the immediate vicinity of the alleged offence would not have a competent grasp of the socio-economic situation of the community, its racial dynamics or its collective views. Large jury districts makes it impossible to empanel juries that are representative of the "peers" of an accused.

If defendants are to be truly judged by their "peers," and those residing in the immediate community, we cannot expect large pools of names to be representative of the community where the alleged offence occurred. The NSLRC made some interesting suggestions for reform in this area and stated that jury districts should be divided up by postal codes. This would certainly help to narrow the focus of the available pool of potential jurors who reside in the immediate community. Each community or district would be made up of a number of different postal codes. In this manner, the current size of jury districts could be reduced to a more manageable size such that residents from that community could truly be considered to be "peers" of a defendant. A smaller community and a smaller pool of names would help to ensure that a jury chosen from that particular community would be an accurate reflection of its residents. Reducing the size of the pool would leave us with a group of prospective jurors who have closer ties to the affected community, a better understanding of its racial dynamics and knowledge of the community's

existing social and economic conditions.

In order to implement these proposals, additional demographic information would obviously need to be collected from each jury district. This would include the race and age of all residents eligible to qualify as potential jurors. This could be done through a province-wide census conducted every two years. An update of the database every two years would enable the province to maintain a more accurate list of potential names. As a safeguard, I would advocate implementing the recommendation of the NSLRC which suggested setting up publicly available lists in order that individuals could register voluntarily if their names had been omitted from the lists of potential jurors for a particular community. This would provide an adequate safety net to ensure that the lists were kept as current as possible. There is no doubt that a census and the maintenance of an accurate database of names is costly. Cost is an important factor to consider in implementing any proposed reform given the considerable pressure put on the criminal justice system to reduce both its costs and the increasing delays in processing cases. Although my suggestions for reform may not provide the most accurate lists of names, they do attempt to increase the current level of participation of people of colour on juries. While the implementation of these proposals may present the criminal justice system with additional costs, I believe that these costs are justified because they are necessary to ensure the equitable and fair treatment

of defendants of colour and recognize the importance of ensuring that people of colour are provided with an equal opportunity to participate on juries. The government of Ontario needs to implement these changes to demonstrate to people of colour that it values their views and perspectives and that their equal participation far outweighs the financial costs involved.

Source Lists :

Earlier chapters of this paper have identified the generation of source lists for the names of potential jurors as one of the key areas that need to be targeted for reform because many people of colour are excluded at this early stage of the selection process. The Nova Scotia Law Reform Commission and the Ontario Commission on Systemic Racism have provided us with a number of useful recommendations that could be implemented to improve the current selection system in Ontario. Presently in Ontario, source lists are generated annually from a Ministry of Revenue database of all properties in the province.³²⁷ Because this list only focuses on property ownership, the names of many potential jurors are excluded. Research has demonstrated that this may have an adverse affect on the participation of people of colour because they are more likely to be tenants and more likely to move frequently for economic reasons.³²⁸ To deal with this problem

³²⁷ Ont. Commission, p. 253.

³²⁸ Fukurai et al., p. 21.

in an effective manner, I would contend that the province of Ontario implement the recommendations to employ the Ontario Health Insurance Plan (OHIP) database as the source for a pool of potential names. The use of health insurance numbers has proven to be effective in increasing the presence of aboriginal individuals on juries in Manitoba.³²⁹ I believe that employing the OHIP database will be more inclusive of the entire provincial population and will help to increase the presence of people of colour on juries. However, it is only one step in a larger process of needed jury reforms.

As a further "back-up," to employing the OHIP database for potential names, I think that we should also strongly consider following through with the NSLRC's suggestion that jury lists be made public to provide people of colour with an opportunity to determine if their names have been omitted. In this way, any individual whose name does not appear on the list may register voluntarily to ensure that their name will be available for jury duty. This measure should only be seen as a safety net and is not intended as a long-term solution to remedy the under-representation of people of colour on juries. Again, representative source lists are only one step in the selection process and are not able to ensure that juries will be racially representative. As a result, this suggestion must be combined with others which are more effective at ensuring accurate racial representation from

³²⁹ Ont. Commission, p. 253.

local communities. The other important point I wish to clarify here is that this registration procedure is voluntary and one cannot assume that people will or will not voluntarily register if their names have been excluded from the list. It should be stressed that this is only an option, however, it still provides an additional avenue for participation which is presently unavailable to people of colour.

Citizenship Qualification

A related issue also impacting the representativeness of source lists is the citizenship requirement for serving as a juror. Through the work of the Ontario Commission on Systemic Racism, it became clear that continuing to exclude landed immigrants from jury service would result in the exclusion of large numbers of people of colour. The Commission cited extensive evidence highlighting the number of landed immigrants residing in Ontario and as a result, I would propose that jury duty should be extended to all landed immigrants who have resided in the province for at least three years and satisfy the language requirements.

In the 1992 case of *R. v. Church of Scientology of Toronto*,³³⁰ an Ontario court found that although the exclusion of non-citizens from serving on a jury may violate the *Charter*, this violation was a reasonable limit. The court stated that the function exercised by jurors is a public one and is a function of the government in

³³⁰ 74 C.C.C. (3d) 327.

Canada. In response, I would contend that since non-citizens residing in Canada are subject to the *Criminal Code*, there is no reason why they should not be able to participate as jurors. If anything, I would argue that the citizenship provision of the *Juries Act* of Ontario is unconstitutional because it results in the exclusion of large numbers of people of colour from jury service.

Levels of Compensation for Jury Service

As was demonstrated in Chapter 3, the current levels of compensation paid to jurors amounts to only \$15.00 per day. As a result, many potential jurors are excused from service for reasons of economic hardship. This is particularly problematic for people of colour because they tend to hold low paying jobs and are usually employed in a temporary and unstable labour market.³³¹ The Nova Scotia Law Reform Commission (NSLRC) drew attention to the fact that in many instances, jurors were in fact being paid twice. For some jurors with stable employment, they are continued to be paid their regular salary by their employers while also receiving their fee of \$15.00 per day. The NSLRC recommended that this procedure be amended in order that the compensation process be made more equitable and ensure that selection procedures be more inclusive of potential jurors who would normally be excused for economic reasons. This is an extremely valuable suggestion that should be implemented here in Ontario however, I believe that

³³¹ Fukurai et al., p. 22.

further work and analysis is necessary to examine ways in which savings could be put to more effective use to increase the daily fees paid to jurors.

Study needs to be directed at the potential savings that could be had if all jurors who were normally paid their salaries during jury service by their employers were required to waive their daily fees paid by the court. The extra money saved from utilizing this strategy could be used to increase the level of jury pay for individuals who would otherwise be excused from jury service on the basis of economic hardship. In terms of the amount to be paid to jurors, I am not sure what should be considered an equitable figure. Perhaps surveys of prospective jurors could be conducted to determine the average salary that a person would be foregoing if they were required to serve on a jury. I think that something in the range of \$75 - \$100 per day would help to increase the participation of people of colour on juries and result in fewer individuals being forced to excuse themselves from jury service. Furthermore, given the fact that jury trials only arise in 2%³³² of all criminal cases that go to trial, this would hopefully not be too burdensome on the coffers of the justice system. Either way, I do not think that we can justify denying people of colour the opportunity to serve on juries and passively tolerate their exclusion due to systemic barriers.

³³² Granger et al., 1989, p. 11.

CONCLUSION

In closing this discussion, I feel it would be appropriate to end with a real life example that demonstrates the need for racially representative juries and the importance of community knowledge and local perspective.³³³ In many instances, people of colour (mainly Blacks) report of being harassed and unfairly charged when it comes to the problem of drugs. The findings of the Ontario Commission on Systemic Racism reveal and support the fact that Black Ontarians seem to be more closely scrutinized by police and selected for processing by the criminal justice system.³³⁴ One account demonstrates a situation where undercover police officers nagged a Black youth for information on where to purchase drugs and later charged him with trafficking drugs.³³⁵ Similar incidents resulted in youths being subjected to illegal searches which yielded drugs of suspicious origin being found on the

³³³ The examples are based on a number of accounts of police charging practices that were provided to the Ontario Commission on Systemic Racism. See pp.181-89. The Commission's report uncovered that in a study of 248 police files involving youths that Black youths were over-represented among individuals whose charges were initiated solely by the police rather than in response to a complaint. Approximately 52% of the youths charged through proactive policing were Black while 29% were white.

³³⁴ Ibid, p. 185.

³³⁵ Ibid, p. 184.

individuals.³³⁶

These examples stress the value of a jury drawn from within the local community where the alleged incidents occurred. A defendant of colour who was charged with trafficking drugs under these circumstances would benefit from jurors who could bring the neighbourhood perspective to bear on the final verdict. A juror from that community would probably have a good understanding of the racial dynamics of the neighbourhood and any existing tensions between police and racial groups. In addition, the juror would draw on their own values and beliefs to make a determination of whether the accused youth was guilty of drug trafficking. That particular juror might weigh the facts of the case and decide that the evidence presented by the prosecution and the police was “manufactured” and that the accused was not guilty of the offence. In the alternative, the juror has the option to decide that applying the law in this instance would be harsh or unfair even if she/he believed that the accused was guilty. The juror might feel that because the accused is a young individual, it would be in the best interests of the community and the accused to render a verdict of not guilty rather than have the accused face the possibility of a sentence of incarceration. It is this ability of the jury to exercise its discretion in the application of the criminal law which underlines its importance. The jury enables people of colour to determine for themselves and their

³³⁶ Ibid.

communities how the interests of justice and fairness would be best served in a particular case.

Although jury trials occur in only 2% of criminal cases that go to trial in Canada, we cannot underestimate the symbolic importance of the jury. Its long history of being a “defender of liberties” and a “protector from harsh and oppressive laws” makes it an important institution worth preserving. Returning this type of decision-making power to local communities would be a step in the right direction for the justice system to ensuring that the criminal law reflects the views and perspectives of all the residents of the province. It will also help to calm the fears and feelings of helplessness on the part of people of colour by making them feel that they are truly a part of the criminal justice process and assure them that their views and perspectives are relevant to justice in Ontario.

I think that the issue of public acceptance and persuading mainstream criminal justice professionals of the soundness of my reforms are certainly important factors to consider in ensuring the viability of my suggestions for jury reform. There is little doubt that the jury selection process that is proposed in this paper would likely result in public outcry, however, we need to come to terms with the fact that the face of Canadian society is rapidly changing and that with the influx of new cultures and races, we need to reconsider the assumptions and workings of

our criminal justice system if it is to remain legitimate in the eyes of people of colour. A system of criminal justice that only upholds the law for whites is no justice at all. In defining what equality means in the context of the justice system in Ontario, the Commission on Systemic Racism stated that "...equality requires the criminal justice system to adjust to diversity within the community it serves."³³⁷

The Rae government's previous attempts at trying to make public boards and institutions racially representative were met with opposition and criticism.³³⁸ The current political climate in Ontario will certainly provide a roadblock for people of colour. The Harris government's abolition of affirmative action programs in this province was a major setback and if this trend continues, it has the potential to turn back the clock and erode away the few protections and rights people of colour have managed to secure through their struggles during the past few decades. This is a slap in the face for people of colour and demonstrates a total lack of sensitivity to their histories, struggles and the racism they face in their lives.

It is difficult to predict whether reforms such as these will ever be instituted here in Ontario. However, I do believe that the proposals presented in this paper go sufficiently farther than recent reform attempts to increase the participation of

³³⁷ Ont. Commission, p. 3.

³³⁸ One author went so far as to term the proposal "bobraecism". See Rob Martin, "Ontario A.G. plays big part in 'bobraecism'," *Lawyers Weekly*, November 27, 1992.

people of colour on criminal trial juries. As such, I believe that they do however, make a sincere attempt at improving the current situation of people of colour with respect to juries. Any efforts which improve upon the status quo should be considered a step towards ensuring that people of colour are treated as fully participating members of Canadian society. Hopefully, my proposals will be viewed as a step towards repairing the damaged relationship between the Ontario criminal justice system and people of colour.

REFERENCES

- Bankowski, Z.
1981 The Value of Truth. *Legal Studies* 1: 257.
- Bankowski, Z. and G. Mungham
1976 The Jury as Process. In Pat Carlen (ed.), *The Sociology of Law*.
- Barber, D. and G. Gordon
1976 *Members of the Jury*.
- Bell, D.
1991 Racism is Here to Stay: Now What? *Howard Law Journal* 35: 79.
- Bennet, W. and M. Feldman
1981 *Reconstructing Reality in the Courtroom*. London: Tavistock.
- Berger, P. and M. Luckman
1966 *The Social Construction of Reality*. London: Penguin.
- Beyler, K.
1984 Improving the Jury Selection Process. *Illinois Bar Journal* 73: 150.
- Brown, David and David Neal, *Show Trials: The Media and the Gang of Twelve* in
1988 Peter Duff and Mark Findlay (eds.), *The Jury Under Attack*, Sydney:
Butterworths.
- Butler, E.W. et al.
1991 Organization, Labour Force, and Jury Representation: Economic Excuses
and Jury Participation. *Jurimetrics* 32:49.
- Buxton, R.
1990 Challenging and Discharging Jurors. *Criminal Law Review* 1990: 225,284.
- Casper, J.D. et al.
1989 Juror Decision Making, Attitudes, and the Hindsight Bias. *Law and Human
Behaviour* 13: 291.
- Clark, S.
1993 When "Wait" Means Never: American Tolerance of Racial Injustice.
National Black Law Journal 13: 123.

Cobb, P.L.

1988 Race Discrimination and Jury Selection. Annual Survey of American Law 1987: 67.

Colbert, D.L.

1990 Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges. Cornell Law Review 76: 1.

Conboy, K.

1993 The Race Factor and Trial by Jury. Fordham Urban Law Journal 20: 551.

Krenshaw, K. and G. Peller

1993 Cultural Racism and the Limits of Rationality in the Saga of Rodney King.

Cross, R.

1967 The Behaviour of the Jury. Criminal L.R. 1967: 575.

Darbyshire, P.

1991 The Lamp that Shows that Freedom Lives - Is it Worth the Candle? Criminal Law Review 1991: 740.

Deosaran, R.

1981 The Jury System in a Post-Colonial, Multi-Racial Society: Problems of Bias. The British Journal of Criminology 21:305.

Devine, F.R.

1988 What Goes on in the Jury Room? Trial Law Quarterly 19: 7.

DiPerna, P.

1984 Juries on Trial: Faces of American Justice. New York: Dembner.

Doob, A.

1979 The Public's View of Criminal Jury Trial. Law Reform Commission of Canada.

Duff, P. and M. Findlay

1985 The Jury in England and the Criminal Justice System - False Dichotomies or a Paradox of Justice.

Enright, S.

1991 Race, Justice and Trial by Jury. Solicitor's Journal 135:1238.

Enright, S. and J. Morton

1990 Taking Liberties: The Criminal Jury In the 1990s.

Findlay, Mark and Peter Duff

1988 The Jury Under Attack. Sydney: Butterworths.

Finkelman, P.

1993 The Color of Law. Northwestern University Law Review 87:937.

Fitzpatrick, P.

1987 Racism and the Innocence of Law. Journal of Law and Society 14: 119.

Flagg, B.J.

1993 "Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent. Michigan Law Review 91: 953.

Frank, J.

1973 The Courts on Trial. Princeton: Princeton University Press.

Freeman, M.D.A.

1978 The Social Construction of Truth: Some Thoughts on Jury Trials and Current Research into Juries. Preston Law Review 1: 3.

1981 The Jury on Trial. Current Legal Problems 1981: 65.

Gobert, J.J.

1989 The Peremptory Challenge - An Obituary. Criminal Law Review 1989: 528.

1988 In Search of the Impartial Jury. Journal of Criminal Law and Criminology 79: 269.

Gold, A.D.

1984 Juries. Ottawa Law Review 16: 352.

1982 The Jury in the Criminal Trial. Criminal Procedure 1982: 381.

Goldman, L.

1990 Toward a Colorblind Jury Selection Process: Applying the "Batson [Batson v. Kentucky, 106 S. Ct. 1712] function" to Peremptory Challenges in Civil Trials. Santa Clara Law Review 31: 147.

Goldwasser, K.

1989 Discussion of Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial. *Harvard Law Review* 102: 808.

Gordon, C.

1985 Justice Ignored: The Discriminatory Use of Peremptory Challenges. *University of Missouri, Kansas City Law Review*. 53: 446.

Granger, Christopher et al.

1996 *The Criminal Jury Trial in Canada*. Agincourt: Carswell

1989 *Canadian Criminal Jury Trials*. Agincourt: Carswell.

Green, T.A.

1985 *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800*. Chicago: University of Chicago Press.

Hans, Valerie P. and Neil Vidmar

1986 *Judging the Jury*. New York: Plenum Press.

1982 Jury Selection. In N.L. Kerr and R.M. Bray (eds.), *The Psychology of the Courtroom*. New York: Academic Press.

Hastie, R. et al.

1983 *Inside the Jury*. Cambridge, Mass.: Harvard University Press.

Jacobson, M.A.

1987 Reducing the Impact of Juror Discrimination in Interracial Crimes: An Analysis of *Turner v. Murray*. *Law and Inequality* 5: 135.

Johnson, G.T.

1983 The Use of Peremptory Challenges to Exclude Blacks from Juries: An Overview. *S.U.L. Review* 10: 35.

Johnson, S. L.

1984 Black Innocence and the White Jury. *Michigan Law Review* 83: 1611.

Levine, J.P.

1992 The Impact of Local Political Cultures on Jury Verdicts. *Criminal Justice Journal* 14: 163.

Lewis, D.L.

1993 The Urban Criminal Justice System and the Juror's Perception. Fordham Urban Law Journal 20: 561.

Lowery, S.

1994 Changing the California Venue Law After Rodney King. Southwestern University Law Review 23: 361.

Kaine, T.

1990 Race, Trial Strategy and Legal Ethics. University of Richmond Law Review 24: 361.

Kairys, D. et al.

1977 Jury Representativeness: A Mandate for Multiple Source Lists. California Law Review 65: 776.

Kougasian, M.

1993 Should Judges Consider the Demographics of the Jury Pool in Deciding Change of Venue Applications? Fordham Urban Law Journal 20: 531.

Law Reform Commission of Canada

1982 Report on the Jury (Report 16). Ottawa: Supply and Services Canada.

Lustgarten, L.

1980 Legal Control of Racial Discrimination. London: MacMillan Press

Macdougall, D.V.

1981 Jury Vetting by the Prosecution. Criminal Law Quarterly 24: 244.

Mayfield, B.L.

1988 Batson [Batson v. Kentucky, 106 S.Ct. 1712] and Groups Other than Blacks: A Strict Scrutiny Analysis. American Journal of Trial Advocacy 11: 377.

McCabe, S.

1975 Discussions in the Jury Room: Are they like this? In The British Jury. University of Cambridge Institute of Criminology.

McCain, T.L.

1992 The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System. Columbia Journal of Law and Social Problems 25: 601.

Munstermann, G.T. et al.

1990 The Best Method of Selecting Jurors. Judges' Journal 29: 8.

Normandeau, A.

1993 Does the Justice System Discriminate Against Black People? Justice Reporter 9: 3: 6.

Nova Scotia, Law Reform Commission of Nova Scotia

1994 Juries in Nova Scotia. Halifax: Law Reform Commission.

Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution

1989 The Mi'kmaq and Criminal Justice in Nova Scotia: Research Study by S. Clark, vol. 3. Halifax: Province of Nova Scotia.

1989 Consultative Conference on Discrimination Against Natives and Blacks in the Criminal Justice System and the Role of the Attorney General: Edited Transcript of Proceedings, vol. 7. Halifax: Province of Nova Scotia.

Penrod, S.D. and S.M. Fulero

1990 The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works? Ohio N.U.L. Review 17: 229.

Perdue, J.M.

1991 Defusing Jury Bias. Trial 27: 50.

Phillips, J.

1985 Jury Room Disclosures Erode the System. Law Institute Journal 59: 1330.

Richardson, H. J.

1993 Race, Riots and the Rule of Law. Denver University Law Review 70: 187.

Sabel, M.

1993 Racing Away From Georgia v. McCollum [112 S. Ct. 2348 (1992)]: The Case for an All-Black System of Criminal Justice. National Black Law Journal 13: 83.

Saks, Michael J.

1977 Jury Verdicts: The Role of Group Size and Social Decision Rule. D.C. Heath and Company: Lexington, Massachusetts.

Serr, B.J. and M. Maney

1988 Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance. *Journal of Criminal Law and Criminology* 79: 1.

Steinberg, M.B.

1991 The Case for Eliminating Peremptory Challenges. *Criminal Law Bulletin* 27: 216.

Stortini, R.

1982 The Role of the Canadian Jury. *Criminal Law Quarterly* 24: 244.

Stuesser, L.

1990 Lawyers Judge the Jury. *Manitoba Law Journal* 19: 52.

Swift, J.H.

1991 Defendants, Racism and the Peremptory Challenge: A Reply to Professor Goldwasser. *Columbia Human Rights Law Review* 22: 177.

Tanford, J.A.

1990 Racism in the Adversary System: The Defendant's Use of Peremptory Challenges. *Southern California Law Review* 63: 1015.

Tarnopolsky, W. and W. Pentney

1985 *Discrimination and the Law in Canada*. Toronto: Richard DeBoo).

Thompson, P.N.

1987 Fair and Impartial Jury - Catch as Catch Can. *St. Louis University Law Journal* 31: 191.

Van Dyke, Jon M.

1977 *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*. Cambridge, Massachusetts: Ballinger Publishing Company.

Vidmar, Neil and J. Melnitzer

1984 Juror Prejudice: An Empirical Study of a Challenge for Cause. *Osgoode Hall Law Journal* 22: 487.

Vinson, D.

1982 The Shadow Jury: An Experiment in Litigation Science. *American Bar Association Journal* 68: 1242.

Vizkelely, B.

1987 Proving Discrimination in Canada. Toronto: Carswell.

Wildsmith, Bruce H.

1991 Getting at Racism: The Marshall Inquiry. Saskatchewan Law Review 55: 97.

Wishman, S.

1986 Anatomy of a Jury: The System on Trial. New York: Times Books.

Zeisel, H.

1987 Affirmative Peremptory Juror Selection. Stanford Law Review 39: 1165.

Zeisel, H. and Diamond

1978 The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court. Stanford Law Review 30: 491.

1993 Out of the Frying Pan or Into the Fire: Race and Choice of Venue after Rodney King. Harvard Law Review 106: 705.

1991 The Elimination of Racism from Jury Selection: Challenging the Peremptory Challenge. B.C.L. Review 32: 433.

1991 The Discriminatory Use of Peremptory Challenges After Holland [Holland v. Illinois, 110 S.Ct. 803]. Seton Hall Law Review 22: 58.

1990 Holland v. Illinois [110 S.Ct. 803]: Sixth Amendment Fair Cross-Section Requirement Does Not Preclude Racially-Based Peremptory Challenges. Akron Law Review 24: 177.

1990 Race-Based Peremptory Challenges and the Sixth Amendment: Holland v. Illinois, 110 S.Ct. 803. Harvard Journal of Law and Public Policy 13: 1061.

1990 Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings? Nebraska Law Review 69: 230.

1989 Batson v. Kentucky [106 S.Ct. 1712]: One Step Short of Halting the Discriminatory Use of Peremptory Challenges. University of Toledo Law Review 21: 267.

1989 Moving Closer to Eliminating Discrimination in Jury Selection: A Challenge to the Peremptory. New York Law School Journal of Human Rights 7: 204.

1989 Restricting the Discriminatory Use of Peremptory Challenges. Loy. U. Chi. Law Journal 20: 1113.

1989 Race Discrimination and the Use of Peremptory Challenges: Is Batson v. Kentucky [106 S.Ct. 1712] the Sole Motivating Factor for Texas Law? Baylor Law Review 41: 161.

1989 Unrestricted Use of Peremptory Challenges by Criminal Defendants and Their Counsel: The Other Side of the One Color Jury. New York Law School Law Review 34: 227.

1989 Challenging the Peremptory Challenge : Sixth Amendment Implications of the Discriminatory Use of Peremptory Challenges. Washington University Law Quarterly 67: 547.

1989 Due Process Limits on Prosecutorial Peremptory Challenges. Harvard Law Review 102: 1013.

1988 Batson v. Kentucky [106 S.Ct. 1712]: Equal Protection, The Fair Cross-Section Requirement, and the Discriminatory Use of Peremptory Challenges. Emory Law Journal 37: 755.

1988 The Continued Use of Discriminatory Peremptory Challenges After Batson v. Kentucky [106 S.Ct. 1712]: Is the Only Alternative to Eliminate the Peremptory Challenge Itself? New England Law Review 23: 221.

1987 Reducing the Impact of Juror Discrimination. Law and Inequality 5: 135.

1986 Sixth Amendment - Right to Inquire into Juror's Racial Prejudices. Turner v. Murray, 106 S. Ct. 1683. Journal of Criminal Law and Criminology 77: 713.

1986 Skin Colour Doesn't Reason: Closing the Door on the Discriminatory Use of Peremptory Challenges. University of Detroit Law Review 64: 171.