Lifting the Veil: The Need for an Exception to the Jury Secrecy Rule for the Purpose of Academic Inquiry

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ABSTRACT:

Kent Roach, when attempting to explain how Tammy Marquardt could have been wrongfully convicted for the death of her son, stated that "it remains illegal in Canada to question jurors about why they reached their verdict, so we will never know for sure why they convicted Marquardt of murder." The reality of the Canadian jury system is that we simply do not know whether jurors are able to set aside their biases, and therefore whether individuals are being convicted based on evidence or based on reasons that are not justifiable at law. Given the long-standing history of the jury, and the right to a jury being enshrined in our *Charter,* it is of utmost importance that we seek to ensure it is functioning properly. I argue for the need to create an exception to Section 649 of the *Criminal Code* to allow for academic inquiry as a first step to understanding what is happening in the jury room, as mock juror research can only bring us so far. Through looking at Bill S-206, which introduced the exception allowing for jurors to speak of deliberations when seeking mental health care, I demonstrate that narrow exceptions are possible. I also show how academic research can be

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conducted in a way that maintains all the protections used to justify the stringency of the jury secrecy rule, particularly through anonymization of the collected data.

Keywords: Jury Secrecy, Wrongful Conviction, Jury Decision-Making, Juror Bias, Juror Research

INTRODUCTION

On October 24th, 1995, Tammy Marquardt was found guilty of the murder of her 2-and-a-half-year-old son, Kenneth. What is known now, however, is that no crime was ever committed and young Kenneth died of natural causes.[1] While Tammy maintained her innocence throughout her trial and imprisonment, the testimony of Charles Smith, who at the time was considered an "expert" on suspicious child deaths, was seemingly accepted by the jury, who handed down her guilty verdict.

The problems associated with the now disgraced Charles Smith, whose expert testimony led to numerous wrongful convictions because of his biases that had him "thinking dirty" about the cause of a child's death, can spread to jurors who hear from these experts.[2] Kent Roach, in his book on wrongful convictions, noted that jurors are often shown graphic photos that can impact their decision making. In Marquardt's case, jurors were shown photos of her dirty apartment and pictures from Kenneth's autopsy. Kent Roach goes on to state that "it remains illegal in Canada to question jurors about why they reached their verdict, so we will never know for sure why they convicted Marquardt of murder."[3]

It is cases like Tammy's, and this truth pointed out by Kent Roach, that led me to add another voice calling for an exception to the jury secrecy rule for the purpose of academic inquiry into the decision-making process of the jury. Specifically, I suggest the recording and transcribing of real jury deliberations, to be anonymized prior to being analyzed by researchers.

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1 "Tammy Marquardt" (Accessed 6 December 2024), online: *Innocence Canada* <innocencecanada.com/the-latest/exoneration/tammy-marquardt> [perma.cc/86GZ-YHQA] [Innocence Canada, "Marquardt"].

2 Kent Roach, *Wrongfully Convicted: Guilty Pleas, Imagined Crimes, and What Canada Must Do to Safeguard Justice* (Toronto: Simon & Schuster Canada, 2023) at 76.

3 *Ibid.*

Through this paper, I will argue that, for reasons such as the wrongful conviction of individuals like Tammy, and because of the numerous concerns about juror bias and inaccuracies in following juror instructions, an exception for academic inquiry is necessary as a first step to truly understanding if Canadian juries are accurately applying law to fact. This first step will bring to light any problems that exist within Canadian jury deliberation processes, which will then allow us to ask the follow-up question: What next?

This paper will be broken into four parts. First, I will discuss the historical development of juries, as well as the control that is exercised over juries. Second, I will explain the jury secrecy rule, and the role it plays in our current jury system, as well as the justifications put forth for its existence and their relevant criticisms. Third, I will explain the seriousness of the issue that exists when we don't know how juries come to their decisions, with a deeper examination of problems concerning eyewitness identification and credibility analyses. This section will also detail concerns about the efficacy of jury instructions in mitigating these concerns. Fourth, I will argue that we need to create an exception to Section 649 of the *Criminal Code* to allow for academic inquiry as a first step to understanding what is happening in the jury room, as mock juror research can only bring us so far. A look at Bill S-206 will demonstrate that narrow exceptions are possible. I will also show how academic research can be conducted in a way that maintains all the protections used to justify the stringency of the jury secrecy rule, particularly through anonymization of the collected data.

I. The Jury as an Institution

The jury is considered an important component of our justice system. Not only is the right to a jury trial enshrined in the *Canadian Charter of Rights and Freedoms*,[4] but in *R v Barton*, the Canadian jury system was described as the "most familiar symbol and manifestation of the Rule of Law in this country".[5] Being a juror is also considered one way in which Canadian citizens can participate in ensuring that the law is working

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4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(f) [*Charter*].

5 *R v Barton*, 2017 ABCA 216 at 1.

properly,[6] and these citizens are presumed able to "set…aside their views and prejudices and act…impartially between the prosecution and the accused upon proper instruction by the trial judge on their duties."[7]

The reality of the Canadian jury system is that we simply do not know whether jurors are able to set aside their biases. While the jury system is a fundamental institution with a long history, there are also many concerns about how jurors arrive at their decisions, given the fact that jury deliberations are shrouded in a legally mandated veil of secrecy. Given the long-standing history of the jury, and it being enshrined in our *Charter*, it is of utmost importance that we seek to ensure it is functioning properly. In this section, I will examine the history of the jury and how its control is currently managed, to illustrate the institution's significance in our justice system and to highlight the current mechanisms of control being used. From there, the following sections will demonstrate how the jury secrecy rule impedes our ability to gauge how well the control of juries is working to ensure just verdicts.

A. *History of juries*

The use of juries has a long history, with origins dating back to at least the Frankish royals. The evolution of trial by jury is connected to an inquisition process instituted by Charlemagne, a King and Emperor of the 8th and 9th centuries AD. It was a jury of 12 individuals charged with determining royal rights.[8] The history of the English criminal trial jury itself has been traced back to the early 13th century with the end of the "ordeals",[9] where guilt was determined by subjecting the accused to an experience that was often dangerous, with the belief that God would perform a miracle on their behalf. [10] From a system where jurors were self-informed men who were

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6 Government of Canada, "The Role of the Public - About Canada's System of Justice" (2021) online: *About Canada's System of Justice* <www.justice.gc.ca/eng/csj-sjc/just/12.html>.

7 *R v Find*, 2001 SCC 32 at para 26 [*Find*].

8 Chas T Coleman, "Origin and Development of Trial By Jury" (Nov 1919) 6:2 Va L Rev 77 at 78-79.

9 Sanjeev Anand, "The origins, early history and evolution of the English criminal trial jury" (2020) 43:2 407 at 410.

10 F Allan Hanson, *Testing Testing: Social Consequences of the Examined Life* (Berkley: University of California Press, 1993) at 35-36.

often from the neighbourhoods in which the crime occurred, to one where jurors are strangers to the accused or others involved in the case, the use of juries has evolved and become an integral part of legal systems around the globe.[11]

It is not without its issues, however. Some scholars have suggested that the sacrosanct nature of the jury has led lawyers and others within the justice system to resist any changes to it.[12] Another has suggested instead that the historical development of the jury demonstrates that it can, in fact, adapt to reflect the changing society in which it operates.[13] A common thread from these two standpoints is this: the jury system is an important element of our justice system. This importance necessitates ensuring that it is doing what we want it to do.

B. *Controlling the Jury*

The historical control over juries, which is exercised in the use of strict rules regarding how juries are to handle evidence, is demonstrative of a need for appropriate oversight on the jury deliberation process. The jury-control theory suggests that evidence law is to be used to deal with the shortcomings in a jurist's ability to understand facts and evaluate evidence.[14] The work of various theorists support this position: John Henry Wigmore suggested that judicial instruction on how jurists should approach evidence can remedy juror misunderstanding.[15] John Langbein argued that evidence law as a means of jury control has resulted from the deceased control of the judge over jurists and the increased adversarial nature of the judicial process.[16] Dufraimont also points to various evidence rules as means of controlling the jury, including rules such as the exclusion of bad character evidence or

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11 Jason Donnelly, *Decisions without Reasons – Rethinking Jury Secrecy*, 1st ed, (Coopers Plane: Book Pal, 2008) at 77-84.

12 Coleman, *supra* note 8 at 86.

13 Anand, *supra* note 9 at 432.

14 Lisa Dufraimont, "Evidence Law and the Jury: A reassessment" (2008) 53:2 McGill LJ 221 [Dufraimont, "Reassessment"].

15 John Henry Wigmore, "A Program for the Trial of Jury Trial" (1929) 12:6 J Am Judicature Society 166 at 169.

16 Dufraimont, "Reassessment", *supra* note 14 at 221-22.

criminal history,[17] the rule excluding involuntary confessions,[18] or the caution regarding eyewitness identification evidence.[19]

The existence of jury instructions, and the fact that cases can be appealed based on improper, incomplete, or incorrect jury instructions, also support the idea that jury control is fundamental to justice in a court case. Jury instructions are intended to provide lay persons, who form the jury, with the information needed to arrive at a verdict in a way that conforms with the applicable law.[20] This is substantiated in SCC discussions on screening information put to the jury:

> This requirement is essentially rooted in a concern not to confuse jurors by putting to them a defence that lacks an evidential foundation. This premise gives rise to two principles: On the one hand, a trial judge must put to the jury all defences that arise on the facts, regardless of whether they have been specifically raised by the accused. On the other hand, the judge must withhold from the jury any defences that lack an air of reality.[21]

Thus, it is clear that evidence laws are, in part, a means by which to control the jury. A problem arises, however, from the fact that the jury is almost completely protected from oversight regarding how it applies these evidentiary rules, as mandated by judicial instruction. Even if evidence laws are intended to control the jury, we do not know whether they are effectively doing so. The next section will detail the veil that exists over the jury, which prevents us from knowing whether the laws are working.

II. THE JURY SECRECY RULE

The current ability to examine whether juries are following the rules set out to control them is limited by the fact that juror deliberations are conducted in secret, and no reasons need to be given by them to justify their decision. The necessity of an exception for academic inquiry into the deliberation process is due to the long-standing rule of juror secrecy. This section of the paper will outline the historical development of the jury

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17 *Ibid* at 224.

18 *Ibid* at 225.

19 *Ibid* at 226.

20 "Jury Instructions" (2024) *online:* Canadian Judicial Council <cjc-ccm.ca/en/what-we-do/jury-instructions> [perma.cc/7SJQ-GMJL].

21 *R v Gauthier*, 2013 SCC 32 at para 24.

secrecy rule, and will then address four justifications for the rule, including both arguments in favour of them and in critique.

A. *The Historical Development of the Jury Secrecy Rule*

As noted above, the jury trial was in some ways a replacement for trial by ordeal, wherein the result was treated like an act of God. In a similar manner, the verdict of the jury has long been considered sacrosanct.[22] While this has been the position since medieval times,[23] it was the 1785 decision of Lord Mansfield in *Vaise v Delaval* that set the precedent for the jury secrecy rule at common law.[24] In that case, two jurors brought evidence that the verdict had been decided by a coin flip.[25] Lord Mansfield held that jurors could not bring evidence of their own misconduct in order to impeach a verdict.[26] This was a movement away from the precedent at that time, wherein that type of evidence was admissible.[27] The result was the "Lord Mansfield Rule," which would become known as the jury secrecy rule.

The Lord Mansfield Rule in *Valse v Delaval* was officially adopted by the SCC in 1956 in the civil trial of *Danis v Saumure*,[28] and was first codified in the *Criminal Law Amendment Act* of 1972.[29] The case accredited for its codification is *R v Gannon*.[30] In *Gannon*, after a mistrial was declared as a result of a deadlocked jury, dismissed jurors gave interviews that were published in La Presse. The case led to a response from the Deputy Ministers of Justice following a meeting of the Uniformity Conference,

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22 Anand, *supra* note 9 at 411; Sonia R Chopra & James R P Ogloff, "Evaluating Jury Secrecy: Implications for Academic Research and Juror Stress" (2000) 44:2 Crim LQ 190 at 194.

23 Coleman, *supra* note 8 at 78-79.

24 Chopra & Ogloff, *supra* note 22 at 199.

25 *Ibid* at 194.

26 William E Johnston, "Evidence: The Power of a Juror to Impeach His Own Verdict" (1959) 10:3 Hastings LJ 319 at 319.

27 R J Nordstrom, "New Trial – Use of Testimony of Jurors to Set Aside Verdict" (1948) 47 Mich L Rev 261 at 263.

28 *R v Pan; R v Sawyer,* 2001 SCC 42 at para 48 [*Pan* SCC], discussing *Danis v Saumure*, 1956 CanLII 9 (SCC), [1956] SCR 403.

29 Chopra & Ogloff, *supra* note 22 at 200; *Criminal Code*, RSC 1985, c C-46, s 649 [*Criminal Code*].

30 Chopra & Ogloff, *supra* note 22 at 200.

resulting in a resolution enacting s. 576.2 (now s. 649) of the *Criminal Code*.[31]

The jury secrecy rule is outlined in s. 649(1) of the *Criminal Code*:

> 649(1) Every member of a jury, and every person providing technical, personal, interpretative or other support services to a juror with a physical disability, who discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction.[32]

The jury secrecy rule is absolute, save for two exceptions, which are laid out in Sections 649(2) and (3). Subsection 2 allows jurors to speak about the deliberation process in relation to an obstruction of justice charge under s. 139(2), and subsection 3 allows jurors to speak of deliberations when seeking treatment from a health professional.[33] The rule is not without criticism, but the highly veiled nature of jury deliberations was affirmed by the SCC in *Pan; Sawyer* as both constitutional and fundamental to the effectiveness of the justice system.[34] Justice Arbour defined the scope of the rule as follows:

> "[S]tatements made, opinions expressed, arguments advanced and votes cast by members of a jury in the course of their deliberations are inadmissible in any legal proceedings. In particular, jurors may not testify about the effect of anything on their or other jurors' minds, emotions or ultimate decision. On the other hand, the common law rule does not render inadmissible evidence of facts, statements or events extrinsic to the deliberation process, whether originating from a juror or from a third party, that may have tainted the verdict."[35]

As this quote demonstrates, there are areas of juror communications that do not fall under the restrictions of the jury secrecy rule. It does not cover juror conduct outside the deliberation room. It also does not cover communications between jurors and third parties. The intention of the rule is to protect the internal aspects of the jury deliberation process. Potential external influences on the jury decision making process will not be covered

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31 *Ibid.*

32 *Criminal Code*, *supra* note 29, s 649.

33 *Ibid*, ss (2)-(3).

34 *Supra* note 28 at para 53.

35 *Ibid* at para 60.

by the rule and, indeed, have been used by Canadian courts to demonstrate that the sanctity of the jury process has been compromised.[36]

Despite recognizing that research on the jury deliberation process might be beneficial, Justice Arbour upheld the strict stance on the jury secrecy rule.[37] The SCC deferred to Parliament as responsible for developing changes.[38] Thus far, the legislature has not created an exception to allow for academic inquiry.

There are four main justifications for the continued existence of the jury secrecy rule, which will be explored now.

B. *Justifications for the Jury Secrecy Rule*

There have been multiple reasons put forth to justify the continuation of the jury secrecy rule. As is often the case in the evolving common law, the justifications have changed throughout time. The rule, at first, was intended to avoid self-incrimination of jurors, as a result of having taken an oath that would then be broken if they purported there to be an issue with deliberations.[39] This justification became less popular, and in its place, others have arisen. As articulated in *Pan; Sawyer*, there are a few justifications for the continued existence of the jury secrecy rule.[40] These include: protecting the finality of verdicts,[41] protecting full and frank debate in the deliberation room,[42] protecting jurors from harassment,[43] and protecting public confidence in the jury system.[44] These four factors have also been identified in other common law jurisdictions as the reason behind the jury secrecy rule, including Australia.[45]

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36 *R v Pan*, 44 OR (3d) 415 at 132-133, 1999 CanLII 3720 (ONCA) [*Pan* ONCA].

37 *Pan* SCC, *supra* note 28 at paras 102, 107.

38 *Ibid* at para 107.

39 *Ibid* at para 49.

40 *Ibid* at paras 49-53.

41 Chopra & Ogloff, *supra* note 22 at 212; Joseph Jaconelli, *Open Justice: A Critique of the Public Trial*, (Oxford: Oxford University Press, 2002) at 246.

42 Chopra & Ogloff, *supra* note 22 at 214.

43 *Ibid* at 215.

44 *Ibid* at 216.

45 Donnelly, *supra* note 11 at 11.

1. Protecting the finality of verdicts

The protection of the finality of verdicts is intended to protect the health of the criminal justice system.[46] It stems from the belief that the verdict has been arrived at following a lengthy legal process, and that this should hold weight.[47] Put another way, "All legal systems have need of a line beyond which issues of liability, guilt or innocence, are to be treated – at any rate, as far as the court structure is concerned – as conclusively determined".[48] This justification seeks to quell the fear that increased access to deliberations could lead to an increase in appeals and the overturning of verdicts.[49]

There are various criticisms of this justification, including that of Justice Arbour in the *Pan; Sawyer* decision. Justice Arbour stated that the finality of verdicts, on its own, is not convincing as a rationale for the jury secrecy rule.[50] Others have suggested that the rationale is meant to preserve the jury system "at all costs, regardless of how well it is operating."[51] Fears of a "fishing expedition" being created by a more transparent deliberation process are seemingly unfounded, as this has not occurred in jury systems where jurors are allowed to speak about their experience, such as that of the United States.[52]

Indeed, if we look back to *Valse v Delaval* and jurors admitting that the verdict was decided by the flipping of a coin,[53] and focus only on the finality of the verdict as a justification, we can see how finality on its own is a perilous justification in relation to the potential outcome of an unfair trial process. In fact, the Section 11(d) *Charter* right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"[54] would undoubtedly call this justification into question. As such, criticisms rightly question whether this

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46 Jaconelli, *supra* note 41 at 246.

47 *Pan* SCC, *supra* note 28 at para 51.

48 Jaconelli, *supra* note 41 at 247.

49 Chopra & Ogloff, *supra* note 22 at 212.

50 *Supra* note 28 at para 51.

51 Chopra & Ogloff, *supra* note 22 at 212.

52 *Ibid.*

53 *Ibid* at 194.

54 *Charter*, *supra* note 3, s 11(d).

"hear-no-evil"[55] position can ever justify the potential pitfalls of a problematic jury deliberation process.

2. Protecting full and frank debate

This justification is premised on the idea that, if jurors know they are being recorded and/or that their conversations may become public, they may withhold opinions and refuse to be fully honest.[56] According to Justice Arbour, secrecy allows jurors to expound on their thoughts and ideas without fear of being ridiculed. This is especially important when the case in question deals with an unpopular accused, or where a crime is especially abhorrent.[57] Further, jurors are meant to bring their life experiences into the deliberation process, and that information would likely be too abstract to be effectively explained and disclosed.[58] According to this justification, secrecy promotes speaking freely because there is no fear of having to publicly explain the "why" of a verdict.[59]

This justification faces criticism as well. First, the justification falls apart when we compare common law jurisdictions with the jury secrecy rule to those without. In the United States, the anonymity required under the jury secrecy rule is not afforded to jurors, and the jury system is still functioning.[60] Second, in mock juror research and research in jurisdictions without the secrecy rule, jurors have been found to struggle with understanding expert and confession evidence, which raises question about the accuracy of the decisions made.[61] Given these concerns, the justification has been considered overbroad, as it does not take into consideration the ability to maintain anonymity while also addressing concerns regarding the misapplication of the law or the poor reasoning of jurors. [62] Indeed, in the context of academic research, anonymity is both a common component of

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55 Chopra & Ogloff, *supra* note 22 at 13.

56 *Ibid* at 214.

57 *Pan* SCC, *supra* note 28 at para 50.

58 Nik Khakhar, "'Reviewing Our Peers': Evaluating the Legitimacy of the Canadian Jury Verdict in Criminal Trials'" (2022) 80:1 U Toronto Fac L Rev 42 at 59 [Khakhar, "Reviewing Our Peers"].

59 Chopra & Ogloff, *supra* note 22 at 214.

60 *Ibid* at 214-15.

61 Khakhar, "Reviewing Our Peers", *supra* note 58 at 58.

62 *Ibid* at 60.

the methodology and even legally protected. There is thus no reason that anonymity cannot be applied in the context of academic research on real juries.[63]

3. Protecting jurors from harassment

A further justification for the jury secrecy rule is to protect jurors from harassment. In *Pan; Sawyer,* Arbour J articulated that central to this justification is the belief that the privacy interest of jurors is integral to the jury system, as it promotes the willingness of jurors to participate in the process by protecting their anonymity. [64] Its protective function has further been justified as preventing harassment by defeated parties who may try to get jurors to provide information to impeach the verdict.[65] Moreover, the protection of jurors from harassment in present cases is said to ensure future participation of jurors, as cases of harassment may cause hesitancy in future participants.[66]

There is little disagreement that protecting jurors from harassment and harm is a legitimate concern.[67] There is no doubt that "jurors should be entitled to return to the community free from harassment, be it from press, the public or the defeated litigant."[68] As a result, it is possible to see how anonymity can provide jurors with the confidence that their participation will never negatively impact their lives.[69] This can foster "full and frank debate," as noted above, which shows how these justifications intertwine.

There is little about this justification that can be critiqued from the perspective of its importance. It is important that any individual participating in the jury system feels safe to do so and does not suffer negative repercussions due to their anonymity being infringed upon. Instead, the critique of this justification is that it is too broad and that these privacy concerns can be fully realized without fully barring access to the deliberation process.

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63 Chopra & Ogloff, *supra* note 22 at 214.

64 *Supra* note 28 at para 52.

65 Alison Markovitz, "Jury Secrecy During Deliberations" (2001) 110:1493 Yale LJ 1493 at 1506; Daniel S Harawa, "Sacrificing secrecy" (2021) 55:2 Georgia L Rev 593 at 624.

66 Markovitz, *supra* note 65 at 1507.

67 Chopra & Ogloff, *supra* note 22 at 215.

68 *Pan* ONCA, *supra* note 36 at para 91.

69 *Ibid.*

I suggest, and other scholars have argued, that it is entirely possible to maintain the anonymity of jurors while also leaving room for appropriate academic inquiry.[70] There are existing ethical guidelines for lawyers that could be applied to the treatment of jurors,[71] or other measures less extreme than full secrecy that could protect anonymity while providing access to transcripts or reasons.[72] Another relevant consideration in creating an exception for academic inquiry is that there are already ethical research requirements and guidelines related to anonymity and informed consent in the research context.[73] These requirements can be transplanted to the jury deliberation process to ensure that jurors are protected, both as justified under this reason for the jury secrecy rule, and as required by ethical research standards.

4. Protecting public confidence in the jury system

The justification of protecting public confidence in the jury system is premised on the idea that confidence in the jury system is promoted by jury secrecy. The concern is that lessening the scope of the jury secrecy rule would lead to a reduction in public confidence in the system.[74] In *Pan; Sawyer*, Justice Arbour stated that "erosions of the guarantees of jury secrecy beyond the existing boundaries would also result in the eventual erosion of the integrity of the jury as decision maker in criminal cases."[75] Quoted in *Pan; Sawyer* are the words of Lord Hewart in *R v Armstrong*, [1922] A11 E.R 153 (C.A.),

> "If one juryman might communicate with the public upon the evidence and the verdict, so might his colleagues also, and if they all took this dangerous course, differences of individual opinion might be made manifest which, at the least, could not fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts."76

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70 Khakhar, "Reviewing Our Peers", *supra* note 58 at 59-60.

71 Chopra & Ogloff, *supra* note 22 at 215.

72 Khakhar, "Reviewing Our Peers", *supra* note 58 at 59.

73 Chopra & Ogloff, *supra* note 22 at 215.

74 *Ibid* at 216.

75 *Supra* note 28 at para 83.

76 *Ibid* at para 89.

Scholars have argued that this is a "head in the sand"[77] approach to justice, and that it is the most irrational justification for the rule.[78] In fact, scholars have argued that the jury secrecy rule is an impediment to the integrity of the juror process.[79]

Instead of veiling the jury deliberation process, scholars argue that academic inquiry and publication of findings will provide the public and the justice system with information that demonstrates the functionality of the jury system. In that way, academic inquiry would increase confidence in the effectiveness of the process.[80] As a matter of logic, the only time in which the confidence in the jury system will be negatively impacted is if the research demonstrates that there is a significant problem in the way jurors reach verdicts that impacts the fairness of the trial. If that is the case, then the importance of secrecy should be set aside in favour of ensuring the accused's *Charter* 11(d) right to a fair trial.

Now that we have outlined the justifications for the jury secrecy rule, the next section will demonstrate why, even if justified, the jury secrecy rule is too broad considering the multiple problems that have been identified in jury decision making, both in real-jury research in other jurisdictions and mock trial research.

III. ISSUES IDENTIFIED IN JURY DECISION-MAKING

In the SCC case *R v Davey*, Karakatsanis J writes that "the jury reflects the common sense, the values, and the conscience of the community. (emphasis added)"[81] The sentiment concerning the use of common sense by the jury is reiterated in *R v Goforth*, where the SCC noted that "jurors do not check their common sense at the door of the deliberation room."[82] In the same paragraph, Cote J quotes Dickson CJ's stance from *R v Corbett*:

> "We should maintain our strong faith in juries which have, in the words of Sir William Holdsworth, "for some hundreds of years been constantly bringing the

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77 Chopra & Ogloff, *supra* note 22 at 216.

78 *Ibid.*

79 Khakhar, "Reviewing Our Peers", *supra* note 58 at 60.

80 Chopra & Ogloff, *supra* note 22 at 216.

81 2012 SCC 75 at para 30.

82 2022 SCC 25 at para 58 [*Goforth*].

> rules of law to the touchstone of contemporary common sense" (Holdsworth, A History of English Law (7th ed. 1956), vol. I, at p. 349).[83]

What can be garnered from these statements is the important weight placed on the "common sense" of jurors by the Courts. Indeed, common sense being discussed as a "touchstone" demonstrates that it is seen as something pivotal to the trial process.

The importance placed on the "common sense" of juries has also been deemed important in reviewing decisions. In *R v H(W)*, the SCC states that "the reviewing court must be deferential to the collective good judgment and common sense of the jury."[84] Appellate Courts need to cite a source of error, be it factual or legal, in order to overturn a jury verdict. As a result, and because of the jury secrecy rule as reaffirmed in *Pan; Sawyer,* Appellate Courts have the difficult task of finding a factual or legal error without being able to ask jurors their reasons for the verdict.[85] This is an incredibly difficult standard, especially when considered in relation to a judge-only trial, where a judge is required to provide reasons, and these reasons can be combed through to examine the application of law and the facts being considered.

Further, and perhaps most significantly, there is ample evidence demonstrating that the "common sense" of jurors is simply not enough to ensure that applicable evidence laws are followed, and that biases are left out of the decision-making process. Research has consistently demonstrated that a juror's "common sense" is not free from the influence of the normal psychological processes that make humans notoriously poor at making some types of decisions.[86] Specific examples will be provided in this section.

Social science research concerning the jury and their ability to evaluate evidence demonstrates that there are areas in which the jury struggles to

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83 *Ibid.*

84 *R v W(H),* 2013 SCC 22.

85 Nik Khakhar, "'Unlocking Pandora's Box?': Resolving the Clash of Infrastructure Amidst the Risks of Jury Secrecy" (2023) 81:2 UT Fac L Rev 191 at 204 [Khakhar, "Unlocking"].

86 See e.g. Khakhar, "Reviewing Our Peers", *supra* note 58 at 50; Roach, *supra* note 2 at 76, 150, 167, 203 and 292-93; Lauren Chancellor, "Public Contempt and Compassion: Media Biases and Their Effect on Juror Impartiality and Wrongful Convictions" (2019) 42 Man LJ 427 at 438.

accurately do so.[87] There have been serious miscarriages of justice as a result.[88] While courts do try to mitigate the risks related to biases and misunderstandings that may impact juror decisions, the list remains extensive. Some of the known issues concern types of evidence such as media coverage influence,[89] racial bias[90] the overemphasis placed on confession evidence[91] and jailhouse informant evidence,[92] and witness credibility,[93] to name only a few.

In this paper, I will address the concerns pertaining to: (1) the treatment of eyewitness identification, (2) the jurors' ability to effectively perform a credibility analysis, and (3) whether jury instructions can help.

A. *The treatment of eyewitness identification*

It is a well-established fact, both in psychological research and in the legal system, that eyewitness identification is notoriously unreliable.[94] Multiple wrongful convictions have been linked to inaccurate eyewitness

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87 Lewis Ross, "The curious case of the jury-shaped hole: A plea for real jury research" (2023) 27:2 Intl J Evidence & Proof 107 at 109 [Ross, "Curious Case"].

88 Khakhar, "Reviewing Our Peers", *supra* note 58 at 50; Kent Roach, *supra* note 2 at 76, 150, 167, 203 and 292-93.

89 Chancellor, *supra* note 86 at 438.

90 Robert McKechney, "Transparency around Jurors and Verdicts Would Help Trial Fairness" (2019) 43 LAWNOW 20 at 21; Ellen S Cohn et al, "Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes" (2009) 39:8 J Applied Social Psychology 1953 at 1954; Logan Ewanation & Evelyn M Maeder, "Let's (not) talk about race: comparing mock jurors' verdicts and deliberation content in a case of lethal police use of force with a White or Indigenous victim" (01 June 2023), online: *Psychology, Crime & Law* <doi.org/10.1080/1068316X.2023.2219814> at 3-4.

91 Lisa Dufraimont, "Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions" (2008) 33 Queen's LJ 261 at 270-74 [Dufraimont, "Regulating Unreliable Evidence"].

92 *Ibid* at 274-77.

93 James Chalmers et al, "Handle with care: Jury deliberation and demeanour-based assessments of witness credibility" (2022) 26(4) Intl J Evidence & Proof 381 at 385-87.

94 See *R v Hibbert* 2002 SCC 39 at para 51 [*Hibbert*].

identifications, including Thomas Sophonow,[95] Ronald Cotton,[96] Romeo Phillion,[97] and many others. A study of 25 wrongful convictions in Brooklyn, New York demonstrated that five of those exonerated were convicted based, in part, on unreliable eyewitness identification.[98] As discovered by the Innocence Project in the United States, of the first 225 individuals who had been wrongfully convicted and subsequently exonerated, 77% of them had been convicted based on mistaken eyewitness identification.[99]

The current state of evidence law in Canada makes it so that identification evidence, no matter how unreliable, is often admitted and then put to the jury for the assessment of its value.[100] While multiple safeguards have been studied, including best practices for identification methods,[101] judicial instruction,[102] eyewitness expert testimony,[103] and stronger exclusionary rules for eyewitness evidence,[104] Canada has primarily used judicial instruction to the jury.[105]

Given the problematic nature of eyewitness identification, the Courts in Canada use jury instructions to minimize the risks of jurors misinterpreting evidence and to decrease the likelihood of wrongful convictions. Indeed, in *Pan*; *Sawyer*, Arbour J stated that "The interaction

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95 Sarah Harland-Logon, "Thomas Sophonow" (Accessed 26 February 2024), online: Innocence Canada <www.innocencecanada.com/exonerations/thomas-sophonow> [perma.cc/7W9N -PVKX].

96 David A Sonenshein & Robin Nilon, "Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance" (2010) 89:1 Or L Rev 263.

97 "Romeo Phillion" (Accessed 26 February 2024), online: *Innocence Canada* <www.innocencecanada.com/exonerations/romeo-phillion> [perma.cc/9LZE-RADZ].

98 Eric Gonzalez, "Reckoning with Wrongful Convictions" (2021) 35:4 Crim Just 4.

99 Shermer et al, "Perceptions and Credibility: Understanding the Nuances of Eyewitness Testimony" (2011) 27:2 J Contemp Crim Just 183 at 183.

100 *Ibid*; *Hibbert, supra* note 94 at para 49.

101 Andrew M Smith & Lisa Dufraimont, "Safeguards Against Wrongful Conviction in Eyewitness Identification Cases: Insights from Empirical Research" (2014) 18 Can Crim L Rev 199 at 203-13.

102 *Ibid* at 213; *Hibbert, supra* note 94; *R v Clark* 2022 SCC 49.

103 Smith & Dufraimont, *supra* note 101 at 213.

104 *Ibid.*

105 Dufraimont, "Regulating Unreliable Evidence". *supra* note 91 at 270.

between the judge and the jury is a most important safeguard of the integrity of the jury system. The judge's instructions provide a vital prophylactic measure against jury misconduct and wrongful verdicts".[106] Mock juror research, however, has demonstrated that jury instructions on eyewitness testimony may not be effective in reducing incorrect weighting of unreliable evidence.[107] This raises the concern that eyewitness evidence may still be misused in jury deliberations and may lead to further wrongful convictions. Due to the jury secrecy rule, there exists a veil over how judicial instructions are actually functioning as a safeguard – it is simply unknown whether they are working. If we continue to create new rules, such as the Hibbert instructions concerning the unreliability of eyewitness testimony,[108] without examining how those instructions are used and applied, it cannot be known that those instructions are doing what is intended.

B. *The juror's ability to effectively perform a credibility analysis*

For the purpose of clarification, I will quickly differentiate between the credibility and reliability assessments made by jurors. A juror's assessment of credibility involves evaluating the witness's truthfulness in recounting the information for which they are testifying. This is distinct from reliability, which considers whether the information being provided is accurate, even if the witness believes they are being truthful, rather than whether the witness is being intentionally deceitful. In this section, I will be discussing credibility.

In *R v Marquard*, McLachlin J (as she then was) stated that "credibility is a matter within the competence of lay people. Ordinary people draw conclusions about whether someone is lying or telling the truth on a daily basis."[109] The focus on a witness's demeanour, including attention to "not

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106 *Supra* note 28 at para 98.

107 Dufraimont, "Regulating Unreliable Evidence". *supra* note 91 at 306.

108 Kai Tanveer, "*R v Clark*: The Supreme Court upholds specialized jury instructions for eyewitness identification" (15 March 2023) online: *TheCourt.ca* <www.thecourt.ca/in-r-v-clark-the-scc-examines-what-the-standard-of-jury-instructions-should-be-in-the-case-of-eyewitness-identifica/ > [perma.cc/ M3ZJ-5M3F].

109 1993 CanLII 37 (SCC) at 4, [1993] 4 SCR 223.

just 'what was said, but to how it was said'"[110] is a tool that the SCC has affirmed as being part of our adversary system:

> "Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence." (emphasis added)[111]

However, research has consistently demonstrated that, even when individuals are confident in their abilities, humans are often very poor at determining if someone is lying.[112] This is often because the factors that people look for to determine if someone is lying are not great indicators.[113]

Research suggests that individuals across various cultures believe that there are universal physical signs that indicate deception, such as fidgeting, hesitation, or averting one's gaze. These "signs", however, are not consistently linked to deception.[114] In fact, multiple reasons exist as to why individuals may respond in different ways:

(1) Trauma: The cognitive processes that correspond with experiences of trauma can negatively impact an individual's ability to properly encode the information, which may lead to inconsistent statements or an inability to remember the entirety of a traumatic event.[115] Inconsistency is one of the features jurors are told to look for in assessing credibility.[116] Further, the demeanour of witnesses who have experienced trauma can also replicate some of the "signs" of deceit, such as having a flat affect, acting avoidant or evasive, being irritable or aggressive, or acting nervous.[117]

(2) Culture: Across cultures, there exist behaviours that differ from those on which our justice system was built and our rules were created, which were the invention of predominantly white males.

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110 Thor Paulson et al, "Toward a Trauma-Informed Approach to Evidence Law: Witness Credibility and Reliability" (2023) 101:3 Can L Rev 496 at 530.

111 *R v Khelawon*, 2006 SCC 57.

112 Chalmers et al, *supra* note 112 at 383-384.

113 *Ibid* at 384.

114 The Honourable Justice Lynn Smith, "The ring of truth, the clang of lies: Assessing credibility in the courtroom" (2012) 63 UNBLJ 10 at 15.

115 Paulson et al, *supra* note 110 at 514-519.

116 *Ibid* at 511-519.

117 *Ibid* at 534-536.

> This system has therefore been attempting to "catch-up" with a diversifying population, while also seeking to reconcile with the cultural differences of the Indigenous peoples who have been in Canada since time immemorial. One such example of a difference is in relation to making eye contact. What is often seen as evasiveness, or as an indicator of deceit, is actually a sign of respect in some Indigenous cultures.[118]

(3) Neurodivergence: Neurodivergence is a broad term that describes the diversity of how people interact with and experience the world, and is used more specifically to refer to individuals who are autistic or have other developmental or neurological conditions.[119] Just as culture can influence how an individual behaves in certain situations, a neurodivergent person may exhibit actions that are often perceived as signs of deception. These can include avoiding eye contact, fidgeting as a means of self-soothing, or overexplaining.[120] This has been noted as a "difficulty" of the experience of neurodivergent persons in the Criminal Justice System.[121]

As these examples demonstrate, multiple factors can influence an individual's behaviour within a courtroom. And while the Court is aware of the problem of overemphasizing the importance of demeanor evidence when accessing credibility,[122] the effectiveness of judicial safeguards is again questionable.

Judicial warnings on placing too much weight on demeanour evidence are now fairly commonplace in Canadian courts. It is an error of law to over-

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118 The Right Honourable Beverley McLachlin, "Judging in a Democratic State: Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada" (Sixth Templeton Lecture delivered at University of Manitoba on Democracy, 3 June 2004) <scc-csc.ca/judges-juges/spe-dis/bm-2004-06-03-eng.aspx#fnb6> [perma.cc/72MQ-EHM4].

119 Nicole Baumer & Julia Frueh, "What is neurodiversity?" (23 November 2021), online (blog): *Harvard Health Publishing* <health.harvard.edu/blog/what-is-neurodiversity-202111232645> [perma.cc/NW7D-FCS5].

120 Anna Isernia Dahlgren, "Between Accuracy and Credibility: The Problem with the Witness" (2022) 4:2 ITA in Rev 133 at 142.

121 Charlie Taylor et al, "Neurodiversity in the criminal justice system: A review of evidence" (2021) Criminal Justice Joint Inspection 1 at 9.

122 Paulson et al, *supra* note 110 at 521-532.

rely on demeanour evidence when assessing credibility.[123] However, there are few limits placed on what can be considered, given that triers of fact are entitled to use "common sense and wisdom gained from personal experience."[124] As noted above regarding issues related to racial bias, cultural difference, neurodivergence, or trauma, decisions that allow for a "common sense" or "personal experience" approach are necessarily engrained with the same biases that have been demonstrably dangerous in assessing credibility. It is incredibly problematic that an individual who has experienced trauma, or who is from a different culture, or who is neurodivergent, may be treated as less credible than someone without those traits, and experience differential "justice."

Further, in a judge-only trial where reasons must be provided, it is possible to assess, based on those reasons, the amount of focus placed on demeanour evidence. This is not the case in relation to juries due to the jury secrecy rule. There are no reasons provided to assess for over-reliance on demeanour evidence.

The Canadian Judicial Council provides model jury instructions that discuss the importance of recognizing the issues of putting too much reliance on the manner of a witness's testimony:

> What was the witness's manner when he or she testified? Do not jump to conclusions, however, based entirely on how a witness has testified. Looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values and life experiences. There are simply too many variables to make the manner in which a witness testifies the only or most important factor in your decision.[125]

Researchers have critiqued these instructions as ambiguous and insufficient.[126] Moreover, without knowing the extent to which jurors focus on a witness's demeanour, and without having reasons to review after the fact, it is impossible to determine whether the instructions work, and whether jurors are approaching demeanour evidence appropriately.

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123 *R v Bourgeois*, 2017 ABCA 32 at para 21, aff'd 2017 SCC 49.

124 *R v S (R D)*, 1997 CanLII 324 (SCC) at para 39.

125 "9.4 Assessment of Evidence" (June 2018), online: *National Judicial Institute* <nji-inm.ca/index.cfm/publications/model-jury-instructions/final-instructions/general-principles/assessment-of-evidence> [perma.cc/AKK5-7KRH].

126 Paulson et al, *supra* note 110 at 540.

C. *Can jury instructions help?*

In *R v Yebes*, the test for appellate review for a jury's verdict was reiterated as "whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered".[127] Some argue that jury instructions can guide the jury in how to make their decisions, and that this "check" on the deliberation process will ensure that jurors focus on the appropriate factors when reaching a verdict.[128]

However, research demonstrates that jury instructions may not have the impact that is intended. While jury instructions, as noted above, are meant to serve as a check on the jury to ensure that the deliberations are properly conducted, the jury secrecy rule continues to impede our ability to assess their effectiveness. Without knowing how well these instructions are understood, followed, or even how effectively they are written to achieve their purpose, it is impossible to evaluate them. To determine whether jury instructions work, we would need to be able to conduct research on this.

In *Pan; Sawyer*, Arbour J states:

> While the jury, unlike a judge, does not provide reasons for its ultimate decision, the jury's deliberations can nevertheless be likened to the reasoning process in which a judge would engage prior to releasing oral or written reasons explaining his or her decision. A judge's written reasons only reveal the judge's ultimate rationale for deciding the case as he or she did. They do not necessarily reveal all the thought processes, the hesitations, the quaeres and the revisions leading up to those final written reasons. Likewise, the thoughts and discussions of the jurors that occur in the course of their deliberations are not revealed – only the jury's ultimate verdict is made public.[129]

With respect, and with my mind turned to the multiple concerns raised throughout this paper (and others beyond its scope), I must disagree with this logic. The judge may not have to disclose their own internal deliberations, but they do have to provide succinct reasons that demonstrate the appropriate use of facts and law when coming to their decisions. There are appeals of decisions in judge-only trials based on an error in fact or law demonstrated in those reasons. While an appeal can be grounded on an inappropriately instructed jury, there is no way to determine whether jurors

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127 1987 CanLII 17 (SCC) at para 16.

128 Scott Franks, "Revisiting Jury Instructions on Racial Prejudice Towards Indigenous Peoples in Canadian Criminal Trials", (2022) 100 Can Bar Rev 406 at 419.

129 *Supra* note 28 at para 44.

understood or followed those instructions in the first place, even when the instructions are deemed to be appropriate. In fact, the standard for jury instruction as per the SCC is that "[a]n accused is entitled to a jury that is properly — and not necessarily perfectly — instructed."[130] There is also no account that is ever made public on how those instructions impacted the deliberation and led to a reason for a decision being made. In short, there is no way to determine whether a jury, even properly instructed, misused or misunderstood what the judge asked of them. It is therefore not accurate to compare a judge's reasons, which outline the result of their deliberations, with a jury verdict, where no such outline is permitted.

Once again, we return to the conclusion that being able to access the juror deliberation process will provide essential information about how jurors use the information they are required to, and how they use the facts and law to decide on a verdict. The jury secrecy rule is a barrier to properly understanding how justice is being done in jury trials. Next, I will turn to the solution that can begin to address the concerns that have been consistently outlined in the social science and legal research: a narrow exception to the jury secrecy rule to allow for academic inquiry into the jury deliberation process.

IV. A Narrow Exception: Possible, Necessary, and Safe

In a lecture given at the University of Saskatchewan College of Law in 2021, while discussing the state of juries today, Martin J of the Supreme Court of Canada acknowledged how "[j]ury secrecy makes it extremely difficult to research how biases and stereotypes might impact jury decision making."[131] While mock juror research exists, as noted above in *R v Williams*, McLachlin J (as she then was) noted that "studies of mock juries run into external validity problems because they cannot recreate an authentic trial experience".[132]A serious consequence of the jury secrecy rule, as articulated by Arbour J in *Pan; Sawyer,* is that "we cannot measure in any

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130 *Goforth*, *supra* note 82 at para 3.

131 Justice Sheilah Martin, "Juries Today" (2022) 85:1 Sask L Rev 119 at 133.

132 1998 CanLII 782 (SCC) at para 35.

meaningful way whether the procedures that we have in place to ensure that it does function properly are effective."[133]

It is this problem that this paper seeks to address. Given the problems outlined above and the concerns raised by the Court itself about our inability to really know how the jury system is functioning, the legislating of a narrow exception for academic inquiry is needed. It is necessary as a first step to better measure how effectively the jury is doing what they are charged to do. It is also possible to implement this exception while maintaining the safeguards that have justified the continued existence of the jury secrecy rule.

This section will first provide an overview of what a narrow exception should look like, which I suggest should be an exception to allow the study of transcribed and anonymized jury deliberations. Then, it will demonstrate how the creation of a narrow exception is possible, how it will continue to safeguard jurors and the deliberation process, and how it is a necessary step that has been recommended for at least four decades by multiple groups within the legal profession.[134] This section will discuss the recent exception made to the jury secrecy rule through Bill S-206 and will provide multiple examples over the last few decades where government inquiries, courts, and researchers have called for an exception for academic inquiry because of the need to study how jurors are making their decisions. Given the significant support for said exception, as well as the example of Parliament recognizing the necessity of an exception in important instances, I believe the time is now to once again call on our government to create an exception for academic inquiry in our *Criminal Code*.

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133 *Supra* note 28 at 102.

134 See e.g. Canada, Law Reform Commission of Canada, *The Jury: Report of the jury* (Ottawa: Law Reform Commission of Canada, 1982) at 82; Saskatchewan, Commission of the Inquiry Into the Wrongful Conviction of David Milgaard, Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard (Regina: Commission of Inquiry Into the Wrongful Conviction of David Milgaard, 2008 at 413 (Chapter 7, Recommendation 5); Steering Committee on Justice Efficiencies and Access to the Justice System, "3.5 Issues related to jury deliberations" (25 August 2022) online: *Department of Justice* <justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/scje-cdej/p8.html> [perma.cc/6E93-URMM], Recommendation 14; *Pan* SCC, *supra* note 28 at para 107.

A. *What should the narrow exception look like?*

Current research into jury deliberations is lacking. Mock juror research cannot replicate the stakes involved in a real jury trial, and those high stakes may play a role in how jurors make their decisions.[135] This difference between a mock trial and a high-stakes situation suggests that real juror research would provide a clearer picture of how jurors function than mock juror studies can offer. On the other hand, it is imperative that jurors remain protected and that we do not compromise the justice system. Therefore, any exception for academic research must be as narrow as possible. I suggest that an exception for academic research should allow for the recording and transcribing of real jury deliberations, with all identifying information removed prior to being analyzed by researchers. This would help discover how well jurors are following instructions and how well they are applying the provided law to the facts before them. This is in line with other calls for academic research on juries.[136] It is also in line with suggestions that jurors provide reasons.[137]

B. *A narrow exception as possible: Bill S-206.*

In 2022, Bill S-206 received royal assent and was codified in an amendment to Section 649 of the *Criminal Code*.[138] It allows jurors to disclose information about the deliberation process to health professionals for the purpose of seeking treatment.[139] It arose as a result of research into the supports needed by jurors after trial. The existence of this amendment has been identified as a demonstration that it is possible to create a narrow exception in response to an identified need.[140] This exception shows that, where the benefit outweighs the prejudicial effect, a narrow exception can and should be created. In this case, the health of the jurors is a benefit outweighing any potential prejudice to the accused or the justice system

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135 Ross, "Curious Case, *supra* note 87 at 112.

136 *Ibid* at 108; Lewis Ross, "Jury Reform and Live Deliberation Research"(2023) 5:1 Amicus Curie (Series 2) 64 at 67.

137 Khakhar, "Reviewing Our Peers", *supra* note 58 at 99; Khakhar, "Unlocking", *supra* note 85 at 193.

138 *Criminal Code*, *supra* note 29, s 649(3).

139 Bill S-206, *An Act to Amend the Criminal Code (Disclosure of Information by Jurors)*, 1st Sess, 44th Parl, 2022 (assented to 18 October 2022) [*Bill S-206*].

140 Khakhar, "Unlocking", *supra* note 85 at 196-97.

arising from the exception. This same logic can be applied to the exception for academic inquiry.[141]

C. *A narrow exception as safe.*

The justifications for the jury secrecy rule demonstrate that there are strong reasons for maintaining it. As noted above, these justifications include protecting the finality of verdicts, protecting full and frank debate, protecting jurors from harassment, and protecting public confidence in the jury system.[142] While this paper has also addressed criticisms of those justifications, they continue to be important considerations. Thus, any exception for academic inquiry should seek to safeguard the deliberation process in a similar manner to the jury secrecy rule.

The existence of Bill S-206, and the exception codified in Section 649(3) of the *Criminal Code*, demonstrates that exceptions can be made, and those safeguards can be maintained. During the third reading of Bill S-206, Sitting 85 on June 9th, 2022, the following statement was made by Mr. Rhéal Fortin:

> "This is a small loophole in the absolutely essential integrity of the confidentiality of jury deliberations. However, the loophole is closed by the confidentiality obligation in the rules of ethical conduct that professional associations impose on their members."[143]

This quote shows that the legislature was attuned to the importance of confidentiality surrounding the jury in creating the exception for the health needs of jurors. It demonstrates that where this protection can be maintained, the problems associated with an exception to the rule are no longer a concern. For instance, academics note that there exists ethical research requirements and guidelines in academic research,[144] and this safeguard acts similarly to those noted by Mr. Rhéal Fortin above in the rules of ethical conduct of health professionals in the context of jurors seeking treatment.

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141 Chopra & Ogloff, *supra* note 22; *Bill S-206, supra* note 139; *Pan* SCC, *supra* note 28 at para 101.

142 Chopra & Ogloff, *supra* note 22 at 212-216.

143 "Bill S-206, An Act to amend the Criminal Code (disclosure of information by jurors)", Report Stage, House of Commons Debates, 44-1, No. 085 at 18:00 (Mr. Rhéal Fortin).

144 Chopra & Ogloff, *supra* note 22 at 215.

D. *A narrow exception as necessary.*

An exception to the jury secrecy rule to allow for academic inquiry has been called for multiple times over, at least, the last four decades.[145] In the face of an abundance of evidence suggesting there may be serious issues with juror decision making,[146] it is time to listen and implement an exception. In the 1982 Report on the Jury, the Law Reform Commission suggested the following amendment to section 576.2 (now section 649.1) of the *Criminal Code*:

> Under the proposed section, jurors could disclose information relating to their deliberations if it is in furtherance of scientific research about juries which has been approved by the Chief Justice of the Province. There is a dearth of scientific information about jury decision-making. If we are to continue to learn about the jury, and how it reaches its verdict, such information might be important. The exception will be used only to assist valid, scientific research and only with the permission of the Chief Justice of the relevant province.[147]

In *Pan; Sawyer*, Arbour J noted that there could be a form of research that both maintains the integrity of the jury, while also allowing for this type of research:

> Parliament, after input from the social science community, the judiciary and the bar, could design appropriate parameters for this type of research to ensure respect for the concerns that inform the present jury secrecy rules, as well as most other rules governing jury trials. Such research would add to the legitimacy of the existing rules and, if need be, would trigger judicial or legislative modifications.[148]

In the *Commission of Inquiry Into the Wrongful Conviction of David Milgaard*, one of the recommendations made was "that the *Criminal Code* be amended to permit academic inquiry into jury deliberations with a view to gathering evidence of the extent to which jurors accept and apply instructions on the

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[145] See e.g. Law Reform Commission of Canada, *supra* note 145 at 82; Commission of the Inquiry Into the Wrongful Conviction of David Milgaard, *supra* note 134 at 413 (Chapter 7, Recommendation 5); Steering Committee on Justice Efficiencies and Access to the Justice System, *supra* note 134 at recommendation 14; *R v Pan; R v Sawyer*, 2001 SCC 42 at para 107.

[146] See e.g. Dahlgren, *supra* note 120 at 142; Smith & Dufraimont, *supra* note 101; Franks, *supra* note 128.

[147] Law Reform Commission of Canada, *supra* note 134 at 82.

[148] *Supra* note 28 at para 107.

admissibility of evidence."[149] And finally, the Steering Committee on Justice Efficiencies and Access to the Justice System recommended that Parliament consider a legislative amendment "to amend the rule of secrecy of jury deliberations to permit studies of how juries work by providing the necessary framework without compromising the principles underlying the rule."[150]

As can be seen, there is consistent agreement that an exception for academic inquiry is a positive choice that could benefit our criminal justice system. It is an important way to ensure our evidence laws are being effectively used by jurors. It is a small change that can be made to ensure we don't have "our heads in the sand."[151] The stakes can also not be overstated – they include the forever-changed lives of individuals such as David Milgaard,[152] Tammy Marquardt,[153] and Anthony Hanemaayer,[154] along with many others we have heard of, and others we may never know.

V. CONCLUSION

In *R v Find*, the SCC said the following:

> The attempt of Vidmar and others to conduct scientific research on jury behaviour is commendable. Unfortunately, research into the effect of juror attitudes on deliberations and verdicts is constrained by the almost absolute prohibition in s. 649 of the *Criminal Code* against the disclosure by jury members of information relating to the jury's proceedings. More comprehensive and scientific assessment of this and other aspects of the criminal law and criminal process would be welcome. Should Parliament reconsider this prohibition, it may be that more helpful research into the Canadian experience would emerge.[155]

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149 Commission of the Inquiry Into the Wrongful Conviction of David Milgaard, *supra* note 134 at 413 (Chapter 7, Recommendation 5).

150 Steering Committee on Justice Efficiencies and Access to the Justice System, *supra* note 134 at recommendation 14.

151 Chopra & Ogloff, *supra* note 22 at 216.

152 "David Milgaard" (Accessed 7 December 2024), online: *Innocence Canada* <innocencecanada.com/the-latest/exoneration/david-milgaard> [perma.cc/3UGS-TMSL]

153 Innocence Canada, "Marquardt", *supra* note 1.

154 "Anthony Hanemaayer" (Accessed 26 February 2024), online: *Innocence Canada* <innocencecanada.com/exonerations/anthony-hanemaayer> [perma.cc/6ZA2-RYCQ].

155 *Find*, *supra* note 7 at para 87.

There is no better time to consider finally implementing an exception for academic research on the decision-making process of juries. While the history of juries demonstrates that it has long been considered a sacrosanct institution, and as evidence law continued to develop as a means of ensuring that evidence given to juries was appropriately considered, there is no question that the jury, as part of the justice system, is a tradition that has been given much deference. This is true when considering the four justifications for the jury secrecy rule, which aim to protect the individuals involved in the jury as well as their decision concerning the case they are deciding.

It is my belief that the best way to protect the institution of the jury is to ensure its effectiveness, and that the first step to improving its effectiveness is to examine how it works. In the face of significant research demonstrating that jurors are susceptible to biases and that they may not be effectively understanding or implementing juror instructions, it is essential that we understand what is occurring within the jury deliberation room so that we can effectively respond to any issues that may be leading to injustice. With a number of wrongful convictions resulting from poor evidence, and the jury's acceptance of poor evidence, the significance of the problem is clear. I suggest that we can both protect jurors in all the ways that the jury secrecy rule allows, while also researching the effectiveness of the jury, by allowing a narrow exception for academic research through the analysis of transcribed and anonymized jury deliberations.

Future research should look at exactly how this type of jury research may be conducted. As someone interested in being part of the solution to this issue, and as is clear from the numerous times this form of research has been suggested, I believe there are likely many individuals who would be interested in this type of research should it become possible.