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"Silly Anecdotes": From White Baselines to White Juries in *R. v. Chouhan*

Joshua Sealy-Harrington*

[Y]ou can't cast aside the experiences of racialized accused and racialized lawyers and the importance of peremptory challenges based on *silly anecdotes* about how lawyers used to use their peremptory challenges back in a time when almost all the lawyers were white and society was insensitive to issues of race.

Intervener Submissions of the South Asian Bar Association in *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (oral hearing), online: https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=39062&id=2020/2020-10-07--39062-38861&date=2020-10-07 at 3:06:15 [emphasis added]

I. Introduction

This article elaborates on my oral remarks at the "Osgoode Constitutional Cases Conference" earlier this year.[1] At the conference, I presented on the Supreme Court of Canada's judgment in *R. v. Chouhan*, an appeal concerning the constitutional meaning of jury impartiality.[2] And my thesis was that *Chouhan* demonstrates how a formalist conception of legal reasoning provides, at best, an incomplete, and at worst, a wildly misleading picture of how judges actually interpret legal meaning.

In particular, the *Chouhan* appeal is, in my view, a productive case study of constitutional baselines. In his text *The Legal Analyst*,[3] Ward Farnsworth describes "baselines" as the implicit starting point from which legal analysis follows.[4] For

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[1] Osgoode Constitutional Cases Conference, "Constituting Courts – Principles from the Criminal Cases" (2022), online: https://digitalcommons.osgoode.yorku.ca/constitutional_cases/7/ at 21:34.

[2] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) [hereinafter "*Chouhan*"]. My argument focusses on the issue of jury impartiality canvassed by the Court, though other issues were also present and disputed. See paras. 85-103.

[3] Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (Chicago: University of Chicago Press, 2007).

[4] Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (Chicago: University of Chicago Press, 2007) at 198.

example, if police only conduct a "search" when they invade a "reasonable expectation of privacy," a baseline emerges: which privacy expectations are reasonable?[5] In my view, shifting those baselines from *implicit* to *explicit* enables a much better appreciation for the unavoidably political character of legal interpretation that can be obscured by jurists who consider their baselines innate rather than chosen.

In *Chouhan*, there is no apolitical perspective from which to designate the legal meaning of impartiality — only different perspectives that are more or less sensitive to the ways in which race is a significant idea to account for in one's understanding of objectivity. Is a process that consistently produces all-white juries in a society as racially diverse as Canada sufficiently impartial? To some, the answer is: obviously, no. To others, merely raising the issue of race itself belies objectivity. These contradictory perspectives are reflected in the Court's five distinct opinions in *Chouhan*, and thus, furnish an opportunity for direct engagement with the persisting salience of baselines in constitutional analysis.

Farnsworth explains how the law's various binaries — action vs. inaction, public vs. private — are a specific device used to naturalize hegemonic baseline positions covertly held by the judiciary.[6] Indeed, the Court's failure to grapple with racial inequality is often defended on the basis of that inequality residing in the private realm, as if the Canadian state in no way constructed the racial inequality we see today.[7] And, in my view, the Court's reliance on a firm distinction of "law" vs. "fact" is a binary it uses to obscure the inevitability of grappling with law *and* fact in determining socio-legal meaning, such as the meaning of an "impartial" jury under the *Canadian Charter of Rights and Freedoms*.[8]

My argument is structured as follows:

I begin with background on *Chouhan*: the issue before the Court and how the judgment resolved that issue by constitutionally vindicating the impartiality of systemically white juries (an unfortunate continuation of the Court's widely critiqued judgment in *R. v. Kokopenace*.)[9] Then, I analyze *Chouhan* through the lens of baselines.

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[5] Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (Chicago: University of Chicago Press, 2007) at 203.

[6] Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (Chicago: University of Chicago Press, 2007) at 199.

[7] See Joshua Sealy-Harrington, "The Charter of Whites: Systemic Racism and Critical Race Equality in Canada" in Emmett Macfarlane & Kate Puddister, eds., *Constitutional Crossroads: Reflections on Charter Rights, Reconciliation, and Change* (Vancouver: University of British Columbia Press, forthcoming in 2022) at 238-240.

[8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[9] *R. v. Kokopenace*, [2015] S.C.J. No. 28, 2015 SCC 28 (S.C.C.) [hereinafter "*Kokopenace*"].

First, I use *Chouhan* to describe what baselines *are* — that is, by examining both the judgment and hearing, I reveal how implicit political positions significantly drove the legal analysis in the case. Given the political character of that baseline reasoning, I briefly critique the Court in two ways: (1) I critique Moldaver and Brown JJ. for relying on weak baseline positions, like juries already being diverse (they are not) or Canada not having intractable racial inequality (it does); and (2) I critique the Court's recent notice limiting intervention submissions to "legal" issues insofar as that limitation can, perversely, prevent interveners from challenging those weak baselines from which the Court may conduct its analysis.

Second, I use *Chouhan* to describe what baselines *do* — that is, by examining the first opinion in *Chouhan*, I demonstrate how judges' baseline commitments can motivate their reasoning and lead them to make analytical errors. In their opinion, Moldaver and Brown JJ. purport to defer to Parliament while nakedly legislating from the bench — indeed, they rule that their policy preference of ignoring race in jury selection should, as "a matter of law,"[10] take precedence over Parliament's preference for race conscious processes. Further, Moldaver and Brown JJ. strawman both jury diversity and peremptory challenges in order to bolster their position. Specifically, they invoke fallacious "all or nothing" reasoning, where no one actually argues "all," Moldaver and Brown JJ. retort with "nothing," and everyone's argument of "something" — that is, that *something* should be done to promote jury diversity — goes completely unaddressed.

I conclude by noting how the continuing relevance of baselines in constitutional interpretation demands ongoing and critical reflection on how Canadian jurisprudence is routinely produced from a baseline of white subjectivity masquerading as universal objectivity, thereby institutionalizing white supremacy in law.

II. *CHOUHAN* BACKGROUND

Before critiquing *Chouhan*, an overview of its core issue (peremptory challenges) and judgment (five separate opinions) provides essential context.

1. The Issue: Peremptory Challenges

The *Chouhan* appeal concerned the trial of Singh Chouhan, who was charged with first-degree murder.[11] On the same day that jury selection was scheduled to begin, *Criminal Code*[12] amendments abolished peremptory challenges — a tool which permitted both Crown and defence counsel to remove a set number of jurors without justification (that is, peremptorily).[13] Given the amendments, Mr. Chouhan lost his ability to use peremptory challenges and had a jury trial without their

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[10] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 74 (S.C.C.).

[11] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 1 (S.C.C.).

[12] *Criminal Code*, R.S.C. 1985, c. C-46.

[13] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 1 (S.C.C.).

benefit,[14] where he was ultimately convicted on "entirely circumstantial" evidence.[15] He then appealed his conviction, in part, on the basis that the abolition of peremptory challenges violated his Charter right to an impartial jury (under section 11(d)) and his right to a trial by jury (under section 11(f)).[16] My analysis focusses on the question of jury impartiality under section 11(d), though the two provisions are closely related.[17]

Peremptory challenges are polarizing given the multiple ways in which they can be used. In some circumstances, they could be used to *enhance* impartiality. For example, a Black accused could strike a twelfth white juror to seek at least one non-white juror on their panel. But peremptory challenges could also be used to *undermine* impartiality. For example, a white accused could strike several Indigenous jurors to ensure that their panel is entirely white. Indeed, this latter example is precisely what happened in the prosecution of Gerald Stanley for his killing of Colten Boushie, a young Cree man. In that case, the defence struck five Indigenous jurors peremptorily, resulting in an all-white jury even though the adult population in the judicial district for that trial was estimated to be 30% Indigenous.[18] Such uses of peremptory challenges are, in my view, plainly discriminatory.[19] And the dilemma of peremptory challenges' contradictory uses in jury selection — that is, *for* and *against* discrimination — underscores the complex political terrain on which *Chouhan* was fought.[20] For the sake of my analysis here, though, I want to focus not on what peremptory challenges *objectively did* but on how one's *subjective view* of their operation — that is, one's baseline — is translated into law.

2. The Judgment: Five Opinions, Two Topics

The Court's judgment included five different opinions, none of which represented a majority of the Court. With respect to jury impartiality, the Court discussed two topics: (1) peremptory challenges; and (2) other supplementary protections for jury

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[14] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 5 (S.C.C.).

[15] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 212 (S.C.C.).

[16] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 3–5 (S.C.C.).

[17] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 284 (S.C.C.).

[18] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26, Factum of Aboriginal Legal Services at para. 20 (S.C.C.). See also StereoDecisis (podcast), "Joshua Sealy-Harrington on Jury Selection, Diversity and Equality" (2020), online: https://blubrry.com/stereodecisis/69362374/joshua-sealy-harrington-on-jury-selection-diversity-and-equality/ at 8:27 [StereoDecisis].

[19] Or, in Kent Roach's words, "miscarriages of justice." See Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98:2 Can Bar Rev 315 at 319, 326–329.

[20] StereoDecisis (podcast), "Joshua Sealy-Harrington on Jury Selection, Diversity and Equality" (2020), online: https://blubrry.com/stereodecisis/69362374/joshua-sealy-harrington-on-jury-selection-diversity-and-equality/ at 11:28.

impartiality (that is, jury instructions, challenges for cause, and stand asides). These two topics are a helpful lens through which to juxtapose the different opinions and will, therefore, guide my summary of each opinion.

(a) First Opinion by Moldaver and Brown JJ.: Bad Peremptory, Narrow Supplements

The first opinion — written by Moldaver and Brown JJ., with Wagner C.J.C. concurring — found the abolition of peremptory challenges constitutional.[21]

On topic one, Moldaver and Brown JJ. held that the abolition of peremptory challenges did not infringe the right to an impartial jury because it advanced rather than undermined that impartiality.[22]

On topic two — which was *obiter dicta* in the first opinion[23] — Moldaver and Brown JJ. held that supplementary protections, likewise, "protect" jury impartiality,[24] but interpreted those supplementary protections narrowly, forbidding their use, for example, in diversifying juries.[25]

(b) Second Opinion by Martin J.: Bad Peremptory, Silent Supplements

The second opinion — written by Martin J., with Karakatsanis and Kasirer JJ. concurring — also found the abolition of peremptory challenges constitutional.[26]

On topic one, Martin J. agreed with Moldaver and Brown JJ. that the abolition of peremptory challenges did not infringe the right to an impartial jury. She reasoned — at least implicitly[27] — that the isolated abolition of peremptory challenges enhanced, rather than undermined, jury impartiality, and so could not itself infringe the right to an impartial jury.

On topic two, however, Martin J. disagreed with Moldaver and Brown JJ.'s

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[21] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 104 (S.C.C.).

[22] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 41, 43, 46 (S.C.C.).

[23] See *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 105, 112, 231 (S.C.C.). *Contra* at para. 47. Given that Moldaver and Brown JJ. hold that "the abolition of peremptory challenges will go far to minimizing the occurrence of homogenous juries" (at para. 41), their supplemental analysis of other safeguards is, by definition, *obiter*.

[24] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 83 (S.C.C.).

[25] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 74 (S.C.C.).

[26] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 105, 109 (S.C.C.).

[27] I say implicitly because Martin J.'s reasons never expressly take a position on the net effect of peremptory challenges on jury impartiality — the most she says is that "Parliament was entitled to act on persistent concerns about the discriminatory use of peremptory challenges by abolishing them" (para. 109). But given her endorsement of the reasons of Moldaver and Brown JJ. on this point (see paras. 105, 109) — and given their express position that the net effect of peremptory challenges was undermining jury impartiality (see paras. 41, 43, 46) — Martin J. appears to implicitly take this view as well.

narrow construction of supplementary protections for jury impartiality. She reasoned that it was neither necessary nor wise for the Court to prematurely curtail other supplementary protections,[28] the interpretation of which was immaterial to the resolution of the appeal and given the limited submissions and jurisprudence on these "recently-amended" protections.[29] Justice Martin did, though, signal an appetite for the use of these supplementary protections in broader terms than those contemplated by the first opinion, including for diversifying juries.[30]

(c) Third Opinion by Rowe J.: Strawman

The third opinion was written by Rowe J. He agreed with the first opinion's analysis on both topics, and thus, likewise upheld the constitutionality of abolishing peremptory challenges.[31]

However, Rowe J. nevertheless wrote separately to "explain why courts should not constitutionalize statutory provisions."[32] This responds exclusively to a strawman. Justice Rowe, without a single citation, claims that "various parties" in the appeal "expressed indirectly" that statutory provisions concerning constitutional rights are themselves constitutional.[33] Yet, on my review of the submissions, not a single party made this claim, indirectly or otherwise — indeed, certain parties expressly disclaimed this position.[34] To argue, as many interveners did, that removing a statutory protection concerning jury impartiality can, in turn, infringe the Charter right to an impartial jury, is not the same as constitutionalizing that statutory protection; rather, it is acknowledging that, as Rowe J. himself admits, "a

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[28] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 122–123 (S.C.C.).

[29] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 122 (S.C.C.). See also para. 112.

[30] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 113-123 (S.C.C.).

[31] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 124 (S.C.C.).

[32] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 127 (S.C.C.).

[33] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 126 (S.C.C.). The closest I could find to this claim was Côté J.'s dissenting opinion, which held that "peremptory challenges are essential to have an impartial jury" (at para. 266). But insofar as she suggested that peremptory challenges are an "irreducible attribute" of trial juries (at para. 256), her argument is not that statutory provisions may, *in general*, be constitutionalized, but that *this particular provision* (peremptory challenges) is contained within the Charter right of jury trials, and thus, simply mirrors that right in legislative form. In any event, other passages in Côté J.'s opinion make clear that she is not constitutionalizing peremptory challenges, but rather, scrutinizing whether the consequences of their abolition "are so significant as to as to deprive Mr. Chouhan of the benefit of the trial by jury" (at para. 280). So, viewed in its entirety, her opinion does not appear to advance the strawman position that Rowe J. critiques in his opinion.

[34] See, for example, *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26, Factum of the British Columbia Civil Liberties Association, at para. 17 (S.C.C.).

right to a fair and public jury trial, as a practical matter, calls for certain positive measures by Parliament."[35] If those positive measures are repealed, constitutional scrutiny is, necessarily — on Rowe J.'s own logic — warranted. That, in my view, is all that needs to be said with respect to Rowe J.'s concurrence.

(d) Fourth Opinion by Abella J.: Good Peremptory, Broad Supplements

The fourth opinion — written by Abella J. — also found the abolition of peremptory challenges constitutional.[36]

On topic one, Abella J. parted company with the first three opinions, which all held that peremptory challenges undermined jury impartiality. She acknowledged that peremptory challenges had been used to discriminate against Indigenous and Black jurors, thereby undermining jury impartiality.[37] But she ultimately held that, on balance, peremptory challenges enhanced jury impartiality.[38] Their abolition, therefore, threatened the constitutional right to an impartial jury.

However, on topic two, Abella J. held that this constitutional threat was abated by other supplementary protections — in her words, because Parliament "introduced a regime to replace peremptory challenges that addresses the goals of those challenges and minimizes their frailties by empowering trial judges to protect the impartiality of the jury and counteract the reality of discrimination."[39] In this sense, Abella J. inverted Moldaver and Brown JJ.'s analysis of topic two: they held that the supplementary protections, *narrowly interpreted*, protected jury impartiality;[40] she, in contrast, held that those protections only preserved jury impartiality if they were *broadly interpreted* — that is, only if they were "vigorously exercise[d]"[41] and "robust[ly]"[42] enforced.[43]

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[35] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 143 (S.C.C.).

[36] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 153 (S.C.C.).

[37] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 201-203 (S.C.C.).

[38] Justice Abella never explicitly refers to her views on peremptory challenges "on balance." But, in my view, such an interpretation is the strongest reading of her reasons because (1) she describes the discriminatory use of peremptory challenges as a "subversion" or "abuse" (paras. 201, 203); (2) she calls them "one of the core safeguards that ensured the impartiality of the jury," "an important trial safeguard for an accused to try to secure representativeness," and "an imperfect, but significant tool for the accused to try to weed out . . . potential bias" (paras. 211, 187, 194); and (3) she suggests that their value is "ineffable" (para. 197).

[39] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 153 (S.C.C.).

[40] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 60-82 (S.C.C.).

[41] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 159 (S.C.C.).

[42] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 160 (S.C.C.).

[43] For example, regarding challenges for cause she prescribed "more probing questions . . . to properly screen for subconscious stereotypes and assumptions" (para. 160). And

(e) Fifth Opinion by Côté J.: Good Peremptory, Narrow Supplements

Finally, the fifth opinion — written by Côté J.[44] — is the only opinion that finds the abolition of peremptory challenges unconstitutional.[45]

Technically speaking, Côté J. only found this constitutional infringement under section 11(f) of the Charter (the right to a *trial by jury*), not under section 11(d) (the right to an *impartial jury*), which she expressly declined to rule on.[46] That said, her analysis — as she herself noted[47] — gave dedicated consideration to the consequences for jury impartiality that follow from this infringement of the right to a trial by jury. As such, her analysis is relevant to my focus on impartiality here.

On topic one, Côté J., first, explained that peremptory challenges were unique amongst jury selection procedures in targeting *implicit* bias on juries[48] because challenges for cause target *explicit* bias[49] and jury instructions are unlikely to address implicit bias "buried deep in the human psyche."[50] Second, Côté J. observes that so-called randomness in jury selection is insufficient to preserve impartiality[51] because of systemic racism:[52] for example, the under-representation of marginalized groups on jury rolls,[53] the exclusion of many people with criminal records — who are disproportionately racialized — from jury duty,[54] the exclusion of permanent residents — who are disproportionately racialized — from jury duty,[55] and the

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regarding the supplementary protections in general she prescribed "actively promot[ing] jury diversity on a case by case basis" (para. 164).

[44] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 221-317 (S.C.C.).

[45] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 229 (S.C.C.).

[46] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 230, 284 (S.C.C.).

[47] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 284 (S.C.C.).

[48] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 260 (S.C.C.). This was, likewise, the focus of the BCCLA's intervener submissions at the oral hearing. See *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (oral hearing), Intervener Submissions of the British Columbia Civil Liberties Association, online: https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=39062&id=2020/2020-10-07--39062-38861&date=2020-10-07 at 2:32:02.

[49] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 262 (S.C.C.). See also Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98:2 Can Bar Rev 315 at 349–351.

[50] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 263 (S.C.C.).

[51] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 261 (S.C.C.).

[52] Kent Roach likewise makes this connection between systemic racism and jury underrepresentation. See Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98:2 Can Bar Rev 315 at 328, 333-35, 337, and 356.

[53] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 272 (S.C.C.).

[54] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 272 (S.C.C.).

[55] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 272 (S.C.C.).

exclusion of people for personal hardship, which is typically applied to low-income individuals, again, who are disproportionately racialized.[56] Justice Côté concluded that this constitutional infringement cannot be justified under section 1 because the abolition of peremptory challenges was irrational. The purpose behind their abolition was reducing discrimination and improving diversity on juries.[57] Yet abolishing peremptory challenges, in net effect, did the opposite.[58]

On topic two, Côté J. provided an odd piece of *obiter*. She concluded her reasons by agreeing with Moldaver and Brown JJ. on their narrow interpretation of the stand aside power, forbidding its use in diversifying juries.[59] In other words, after describing at length how jury rolls are insufficiently diverse, and after holding that this insufficient diversity was exacerbated by the abolition of peremptory challenges, Côté J. nevertheless held that the stand aside power cannot be used to mitigate against this condition of unconstitutionality, despite being expressly designed to that end (the Minister of Justice herself said the stand aside power would enable judges to "make room for a more diverse jury.")[60] All of this, as I have said, was in *obiter*. But it is a peculiar tension in her opinion. And her insistence that Moldaver and Brown JJ. "speak for a majority of the Court"[61] on this issue, despite clearly writing in *obiter*, reads as compensatory — an attempt to exaggerate the jurisprudential significance of their *obiter* consensus.

III. *Chouhan* Analysis

With that background addressed, I will now use the *Chouhan* appeal as a case study in baselines.

First, I will describe what baselines *are*. As discussed earlier, baselines are the implicit starting point from which legal analysis follows. And the *Chouhan* judgment and hearing are both instructive opportunities for seeing and critiquing baselines in action. In the judgment, distinct baselines concerning jury rolls and peremptory challenges significantly drive the legal analysis. And in the hearing, one exchange with a racialized intervener in particular, and the Court's policy with respect to intervention submissions in general, both reveal the incoherence of forbidding submissions on the social context that shapes the very baselines from which judicial reasoning follows.

Second, I will discuss what baselines *do*. When baselines go unexamined, judges risk motivated reasoning that reinforces their (perhaps subconscious) baseline

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[56] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 272 (S.C.C.).

[57] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 287 (S.C.C.).

[58] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 228 (S.C.C.). See also paras. 264 and 288.

[59] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 316 (S.C.C.).

[60] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 27 (S.C.C.).

[61] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 316 (S.C.C.).

commitments. And that is, in my view, precisely what happened in the first opinion by Moldaver and Brown JJ. They committed to the baseline of demonstrably non-diverse juries being adequately diverse and then made two overt reasoning errors in their pursuit of upholding that commitment: selective deference to Parliament and strawman reasoning with respect to jury diversity and peremptory challenges.

Armed with what baselines are and with what baselines do, we can then confront how a failure to interrogate (majority white) baselines institutionalizes white supremacy in jurisprudence and reinforces racial inequality in society. Greater appreciation of social context in judging, then, is prerequisite to ensuring that courts promote, rather than oppose, racial justice. And greater appetite for (non-white) intervener submissions on social context, accordingly, is necessary to disrupt the (white) baselines that pervade Canadian jurisprudence.

1. What Baselines Are: Implicit Origins

Baselines are the implicit origin from which legal reasoning follows — the "normal" from which "deviation" is scrutinized. Often, such baselines go unacknowledged (precisely because, as *subjective* origins of reasoning, they operate in tension with the fiction of *objectivity* that legal institutions purport to enact). When a controversial racial justice judgment generates several conflicting opinions, though, an instructive opportunity for revealing baselines emerges.

To explore what baselines are, I will, first, examine them in the context of the *Chouhan* judgment. Simply put, where the five opinions diverged distills to baseline disagreements about jury rolls and peremptory challenges. Second, I will examine baselines in the *Chouhan* hearing to reveal how, at bottom, all reasoning involves baselines, such that the question is not *whether* social context should inform judging, but *which* social context. Given the inevitability of social context influencing legal analysis — and the majority white Canadian judiciary — I argue that it is absurd to prevent interveners from making submissions on "facts" when those facts constitute the very baselines from which judges invariably argue.

(a) Baselines in the Chouhan *Judgment*

(i) Jury Rolls: Whether They Are Diverse Enough

While there are five distinct opinions in *Chouhan*, two camps emerge with differing baseline perceptions on whether jury rolls are sufficiently diverse in the status quo.

Some judges described jury rolls as sufficiently diverse in the status quo. Those judges were Moldaver and Brown JJ.[62] and Rowe J.[63] And they, predictably, held that no more needs to be done to preserve jury impartiality. For example, consider

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[62] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 4 (S.C.C.).

[63] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 124 (S.C.C.).

the following praise of the jury roll system provided in the first opinion by Moldaver and Brown JJ. (and affirmed by Rowe J.): "Provincial authorities are constantly at work, compiling a representative jury roll of eligible jurors, as part of a process that provides a fair opportunity for a broad cross section of society to serve as a juror . . . ."[64]

Other judges, instead, described jury rolls as insufficiently diverse in the status quo. Those judges were Martin,[65] Abella[66] and Côté JJ.[67] And, in contrast, they predictably held that more needed to be done. What that "more" looked like, as discussed above, differed between the opinions. But, fundamentally, their *legal* analysis of jury impartiality followed from their *baseline* on the state of diversity in current jury rolls — on what, in their view, the "normal" of jury diversity was and should be. For example, Martin J. explains how "[m]any systemic factors distort the composition of the [jury] roll",[68] while Côté J. notes how these factors translate into "jury rolls that are under-representative of racialized and other marginalized persons."[69]

The baseline adopted by Martin, Abella and Côté JJ. is far more defensible,[70] which the Court's leading decision on jury rolls — *Kokopenace* — exemplifies. In that case, a constitutionally adequate selection process left Mr. Kokopenace with a jury that had *0%* on-reserve representation, despite *21-32%* of the adult population in his district living on reserve.[71] Some of the opinions in *Chouhan* were shaped by seeing that social reality as unacceptable and agreeing with the monumental critique it has generated,[72] while others were shaped by disregarding it.

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[64] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 33 (S.C.C.) [emphasis added].

[65] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 114 (S.C.C.).

[66] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 163 (S.C.C.).

[67] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 272 (S.C.C.).

[68] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 114 (S.C.C.).

[69] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 272 (S.C.C.).

[70] See, for example, Justice Giovanna Toscano Roccamo, *Report to the Canadian Judicial Council on Jury Selection in Ontario* (June 2018), online: https://cjc-ccm.ca/cmslib/general/Study%20Leave%20Report%202018%20June.pdf at 11–12.

[71] *R. v. Kokopenace*, [2015] S.C.J. No. 28, 2015 SCC 28 at paras. 17, 28 (S.C.C.).

[72] Criminal Lawyers' Association, "Submissions on Behalf of the Criminal Lawyers' Association (Ontario) to the House of Commons' Standing Committee on Justice and Human Rights Studying Bill C-75" (2018), online: https://criminallawyers.ca/wp-content/uploads/2018/09/CLA-submission-Bill-C75-August-2018.pdf at 5 and 7; Julian Falconer, "The Kokopenace Judgment: A Case of Mistaken Identity" (2015) 36:2 For the Defence 18 at 20, online: https://www.falconers.ca/wp-content/uploads/2015/11/The-Kokopenace-Judgment-A-Case-of-Mistaken-Identity.pdf; Tim Quigley, "Kokopenace: Charter Rights to Jury Representation for Aboriginal Accused are Obliterated for Expediency" (2015) Criminal Reports

Indeed, Moldaver J.'s tolerance for an indefensible baseline of jury homogeneity characterizes the through line from *Kokopenace* (2015) to *Chouhan* (2021). Justice Moldaver authored the majority opinion in *Kokopenace* and co-authored the first opinion in *Chouhan*. In *Kokopenace*, he significantly narrowed the meaning of a representative jury roll. And in *Chouhan*, he criticized an accused's last-ditch attempt at seeking a modicum of jury diversity through peremptory challenges as "guess work" and "speculating."[73] There is, of course, *some* subjectivity and uncertainty in how peremptory challenges may be used. But once Moldaver J. held that demonstrably non-diverse jury rolls were constitutional, peremptory challenges, despite their flaws, were all the accused had left. *White juries are good enough* — that is the baseline from which Moldaver J.'s reasoning in *Kokopenace* and *Chouhan* emerges.

Is this baseline justified? Justices Moldaver and Brown effectively call systemic underrepresentation of racialized communities "fair" and label consistently homogenous juries "a broad cross-section of society." But these baselines are not inevitable; they are chosen. And they are baselines, with respect, that reveal political indifference to entrenched racial inequality. Indeed, the Court's equality reasoning in *Fraser v. Canada (Attorney General)*[74] seems impossible to reconcile with its equality reasoning in *Kokopenace*. In *Fraser*, the Court explained that, in the context of section 15 of the Charter, "clear and consistent statistical disparities can show a disproportionate impact on members of protected groups, even if the precise reason for that impact is unknown."[75] Yet in *Kokopenace*, despite the presence of such disparities in jury rolls — and plenty knowledge about the cause of those disparities — the Court casually dismissed the section 15 claim in a single paragraph of analysis.[76] This is not a coherent line of jurisprudence. Rather, it is a substantive equality analysis in *Fraser*, but a formal equality analysis in *Kokopenace*.[77] It is the kind of flawed motivated reasoning that, as I explain below, baselines can produce.

(Articles) 99; Vanessa MacDonnell, "The Right to a Representative Jury: Beyond Kokopenace" (2017) 64 Crim. L.Q. 334; "Indigenous Bar Association Calls for the Inclusion of First Nations on the Jury Rolls in Ontario" Nation Talk (June 16, 2015), online: http://nationtalkdev1.com/story/indigenous-bar-association-calls-for-the-inclusion-of-first-nations-on-the-jury-rolls-in-ontario; Amar Bhatia *et al.*, "Reconciliation and the Constitution: A Transcript of the Roundtable" (2017) 81 S.C.L.R. 273 at 298-299.

[73] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 19 (S.C.C.).

[74] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.) [hereinafter "*Fraser*"].

[75] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 at para. 62 (S.C.C.).

[76] *R. v. Kokopenace*, [2015] S.C.J. No. 28, 2015 SCC 28 at para. 128 (S.C.C.).

[77] See e.g. Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98:2 Can Bar Rev 315 at 332.

(ii) Peremptory Challenges: Whether They Enhance Jury Diversity

A similar analysis applies to peremptory challenges, with two camps likewise emerging from distinct baselines.

Some judges described peremptory challenges as, in net effect, undermining jury diversity. Those judges were Moldaver, Brown,[78] Martin[79] and Rowe JJ.[80] And they held, predictably, that the abolition of peremptory challenges, in isolation, complied with the Charter.

In contrast, other judges described peremptory challenges as, in net effect, advancing jury diversity. Those judges were Abella[81] and Côté JJ.[82] And they, in contrast, held that the abolition of peremptory challenges left a constitutional gap to be filled. How they filled that gap, of course, differed. But, again, their legal analysis of jury impartiality followed necessarily from their baseline on how peremptory challenges tend to operate systematically.

On this point, the work of baselines in the first opinion is particularly notable, specifically, Moldaver and Brown JJ.'s perspective on inequality in criminal punishment and its relevance to procedural safeguards. They refer to the "16th and 17th centuries in England"[83] and explain how "[a]t the time, the trial process retained a marked power imbalance as between the Crown and the accused."[84] It is in the context of this "turmoil and injustice in 17th century England . . . that Parliament acted as it did to secure a place for peremptory challenges."[85] Accordingly, the issue to Moldaver and Brown JJ. is not simply trusting the system in general, just trusting it now in its apparently post-injustice form. All of which begs the question as to whether our current criminal punishment system is not simply *more just* than in the 17th century, but *just enough* to jettison certain protections for the accused.

In the midst of catastrophically underfunded legal aid programs,[86] prisons

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[78] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 41, 43, 46 (S.C.C.).

[79] As noted above, this is implicit in Martin J.'s reasons when paras. 41, 43, 46, 105, and 109 are read together.

[80] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 124 (S.C.C.).

[81] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 211 (S.C.C.).

[82] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 266 (S.C.C.).

[83] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 12 (S.C.C.).

[84] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 16 (S.C.C.).

[85] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 16 (S.C.C.).

[86] See, for example, Michael Spratt, "The Alberta government is ripping apart legal aid" *Canadian Lawyer* (August 5, 2022), online: https://www.canadianlawyermag.com/news/opinion/the-alberta-government-is-ripping-apart-legal-aid/368785; Jacques Gallant, "How the underfunding of legal aid is clogging up the justice system" *Toronto Star* (July 9, 2018),

overflowing with Indigenous and Black people,[87] and "the all-too-common incidence of all-white juries in trials involving Indigenous and racialized accused persons or victims,"[88] to imply that injustice is a relic of the past not "especially germane" to "the modern criminal trial"[89] speaks volumes about how one's baselines influence their legal interpretations. Justices Moldaver and Brown's passing acknowledgment "of heightened public awareness of the role of racial prejudice in the criminal justice system,"[90] in light of their post-injustice perspective, rings hollow. Fundamentally, they view the criminal punishment system as working properly, and thus, not warranting protections for the accused like peremptory challenges — they see "a host of practical problems"[91] in promoting jury diversity, yet seem to have no concern, practical or otherwise, with all-white juries.

Consistent with this baseline trust in criminal punishment, Moldaver and Brown JJ. misrepresent a Supreme Court decision from 16 years earlier to quietly diminish the prevalence of racial prejudice in society already acknowledged by the Court — that is, to quietly shift the baseline in their favour. In *R. v. Spence*, Binnie J. broadly observed how "[t]he administration of justice has faced up to the fact that racial prejudice and discrimination are *intractable features of our society* . . . ."[92] And then, in purported reliance on this same passage, Moldaver and Brown JJ. narrowly concede that "[t]his Court has 'faced up to' the fact that racial prejudice and discrimination are *present in society*."[93] Facing up to the *intractability* of racial prejudice is not the same as facing up to its mere *presence* — as if systemic racism were a lone child in grade school responding to the teacher's call for attendance. And their perhaps unconscious need to subtly shift this baseline to fit their reasons illustrates the significance of baselines to the interpretive process.

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online: https://www.thestar.com/news/gta/2018/07/09/how-the-underfunding-of-legal-aid-is-clogging-up-the-justice-system.html.

[87] See, for example, Jacques Gallant, "Too many Indigenous and Black people are in Canada's prisons. Here's how the parties will — or won't — fix that" *Toronto Star* (September 4, 2021), online: https://www.thestar.com/politics/federal-election/2021/09/04/too-many-indigenous-and-black-people-are-in-canadas-prisons-heres-how-the-parties-will-or-wont-fix-that.html.

[88] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 117 (S.C.C.), *per* Martin J.

[89] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 17 (S.C.C.), *per* Moldaver and Brown JJ.

[90] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 37 (S.C.C.).

[91] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 77 (S.C.C.).

[92] *R. v. Spence*, [2005] S.C.J. No. 74, [2005] 3 S.C.R. 458 at para. 1 (S.C.C.) [hereinafter "*Spence*"] [emphasis added]..

[93] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 61 (S.C.C.) [emphasis added].

(b) Baselines in the Chouhan *Hearing*

The *Chouhan* hearing, like the *Chouhan* judgment, reveals baselines in action. I discuss the hearing in two parts: first, the specific intervention of the South Asian Bar Association; and second, the general policy of the Supreme Court of Canada on intervener submissions.

(i) The SABA Intervention: "Silly Anecdotes" and Social Context

During the South Asian Bar Association's intervener submissions, a heated exchange occurred between two judges (Moldaver and Brown JJ.) and counsel to the intervener, Janani Shanmuganathan. Earlier in the hearing, Moldaver J. critiqued the arbitrary use of peremptory challenges, noting that, *in his experience*, they were used to remove "law and order" men with "well-shined" shoes[94] — or, as Rowe J. noted, how they were used to remove "church ladies."[95] Ms. Shanuganathan responded *with her experience*, resulting in the following exchange about "silly anecdotes" between her and the authors of the first opinion:

> **Ms. Shanmuganathan**: Justice Moldaver, I want to respond to your comment earlier: that you remember a time as a defence lawyer when challenges were used because you didn't want people who had shined their shoes because they were "law and order". With respect, you can't cast aside the experiences of racialized accused and racialized lawyers and the importance of peremptory challenges based on silly anecdotes about how lawyers used to use their peremptory challenges back in a time when almost all the lawyers were white and society was insensitive to issues of race.
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> **Justice Brown**: I think, in fairness to Justice Moldaver, the issue is that peremptories were being used based on baseless and arbitrary suppositions about the potential juror, and that that's a concern that persists today. I, I don't want to put words into Justice Moldaver's mouth but I —
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> **Justice Moldaver**: Go ahead Justice Brown.
>
> **Justice Brown**: That's certainly how I took what he was saying.
>
> **Ms. Shanmuganathan**: Absolutely. And what I want to emphasize —
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> **Justice Brown**: Which isn't silly.[96]

This exchange is telling. As I have argued, Moldaver and Brown JJ.'s opinion

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[94] Appellant's Submissions in *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (oral hearing), online: https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=39062&id=2020/2020-10-07--39062-38861&date=2020-10-07 at 13:03.

[95] Appellant's Submissions in *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (oral hearing), online: https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=39062&id=2020/2020-10-07--39062-38861&date=2020-10-07 at 18:21.

[96] Intervener Submissions of the South Asian Bar Association in *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (oral hearing), online: https://www.scc-csc.ca/case-

follows from two baselines: that jury rolls are sufficiently diverse and that peremptory challenges do not diversify juries in any event. And in this brief exchange, the significance of the second position to their ultimate opinion is brought into sharp focus.

Justices Moldaver and Brown dispute that peremptory challenges enhance diversity, whereas Ms. Shanmuganathan thinks that they do. Who is correct? Justice Moldaver draws on his past experience as a defence lawyer to claim that peremptory challenges are used arbitrarily. Ms. Shanmuganathan draws on her present experience as a defence lawyer to claim, rather, that they are used conscientiously. Regardless of who is correct, it is clear that this baseline dispute *matters*. Indeed, the substance of this exchange is reflected in the first opinion's legal analysis:

> As aptly recognized by the Court of Appeal, peremptory challenges were "*by nature arbitrary and subjective*," requiring the accused and counsel to rely on "*guess work and uncertain mythologies*" to predict the prospective juror's beliefs and attitudes. The Court of Appeal rightly acknowledged the difficulties inherent in *speculating* — let alone accurately predicting — how jurors would react to the case based solely on characteristics like "race, gender, age, ethnic origin, demeanour, or manner of dress".[97]

My point, here, is not that either Ms. Shanmuganathan or Moldaver and Brown JJ. are correct. Rather, my point is that this exchange illustrates how the social context of peremptory challenges — that is, the typical ways in which peremptory challenges tend to be used — is material to the appeal's resolution. It is a baseline present not only in the judgment, but, as one might expect, at the hearing as well. Will such baselines continue to be interrogated in Supreme Court hearings, though, given the Court's latest notice limiting intervention submissions? This brings us from a specific intervention in *Chouhan* to the Court's general policy on intervener submissions and the stakes of that policy for interrogating judicial baselines.

(ii) The SCC Notice: Limiting Interveners to "Law"

Four months after the Court published its reasons in *Chouhan*, it also released a *Notice to the Profession* concerning appropriate interventions before the Court.[98] Specifically, that notice instructs interveners that their submissions must analyze a "legal issue before the Court" and "must not challenge findings of fact, introduce new issues, or try to expand the case."[99]

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dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=39062&id=2020/2020-10-07--39062-38861&date=2020-10-07 at 3:05:58-3:07:10.

[97] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 19 (S.C.C.) (internal pinpoints removed) [emphasis added].

[98] Supreme Court of Canada, "November 2021 – Interventions" (2021), online: https://www.scc-csc.ca/ar-lr/notices-avis/21-11-eng.aspx.

[99] Supreme Court of Canada, "November 2021 – Interventions" (2021), online: https://www.scc-csc.ca/ar-lr/notices-avis/21-11-eng.aspx at paras. 2-3.

While superficially uncontroversial, this notice risks insulating the Court from engagement with the baselines that drive its analysis. Again, *Chouhan* is illustrative. For example, if an intervener wanted to highlight systemic racism in the jury roll system, would that merely explore a "legal issue before the Court" or go beyond it? One could certainly imagine a judge objecting to such submissions on the basis that they are factual, not legal, or because they expand the case. Yet there lies the issue: on close examination, it is *precisely* those baselines that drove the legal analysis in *Chouhan*. Indeed, how systemic racism undermines jury diversity was mentioned in all five opinions.[100]

Conceptually speaking, one person's essential context for "law" is another's "new issue" or "expanded case." Worse, issues like systemic discrimination are particularly vulnerable to being evaded or minimized by such misleading distinctions.[101] By the Court's own admission, systemic discrimination can require economic, social, political, physical, cultural, psychological, historical and sociological analysis.[102] It follows, then, that procedures which limit social context are liable to complicating proof of systemic discrimination. Simply put, such limitations rely on a dichotomy between "fact" and "law" which the Court's own conception of systemic discrimination rejects — it is, thus, a binary which, as Farnsworth explains, naturalizes the judiciary's hegemonic baseline positions.[103]

A further consequence, though, of limiting social context submissions is that it will not actually exclude *all* social context to guarantee some platonic form of apolitical judging (as some conservative jurists claim),[104] but rather, exclude only *minority* contexts that are unfamiliar to the (majority white) judiciary. If, as Moldaver and Brown JJ. explain in their opinion, context "matters,"[105] is "necessary,"[106] and is "vital,"[107] to legal reasoning, and Parliament does not legislate

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[100] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at paras. 42, 114, 124, 162, 272 (S.C.C.).

[101] Credit to Kent Roach for raising this important point.

[102] See Joshua Sealy-Harrington, "The Charter of Whites: Systemic Racism and Critical Race Equality in Canada" in Emmett Macfarlane & Kate Puddister, eds., *Constitutional Crossroads: Reflections on Charter Rights, Reconciliation, and Change* (Vancouver: University of British Columbia Press, forthcoming in 2022) at 244 citing various paragraphs in *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.).

[103] Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (Chicago: University of Chicago Press, 2007) at 199.

[104] See, for example, *Canada (Attorney General) v. Kattenburg*, [2020] F.C.J. No. 965, 2020 FCA 164 at paras. 40-46 (F.C.A.).

[105] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 50 (S.C.C.).

[106] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 9 (S.C.C.).

[107] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 16 (S.C.C.).

"within a historical or social vacuum,"[108] then the representation of minority contexts is essential to the democratic operation of our judiciary.

In sum, the underlying premise of limiting interveners to "law" — that is, the tidy dichotomy between law and fact — does not withstand critical interrogation. And, here, where all five legal opinions essentially turn on baseline inquiries inextricable from the judges' perspectives on jury rolls and peremptory challenges, the Court's notice arguably prescribes an absurdity: that interveners should not speak to the very things upon which the Court will ultimately base its opinion. Who is such an intervention serving, other than judicial theatre — the image of a Court openly consulting a diversity of perspectives while ruling on the basis of inquiries about which those perspectives are forbidden to engage.

2. What Baselines Do: Motivate Reasoning

With the *meaning* of baselines clarified, I will now turn to their *consequence*, namely motivated reasoning. Two errors in the first opinion — selective deference and strawman reasoning — illustrate this consequence.

(a) Selective Deference: Text and Intent, Unless

One example of motivated reasoning in the first opinion is its selective deference to statutory text and Parliamentary intent. This selectivity reveals that Moldaver and Brown JJ. are concerned, less with consistent legal method, and more with fidelity to the jury roll — even where *Parliament itself* lacks that fidelity.

When justifying the constitutionality of abolishing peremptory challenges, Moldaver and Brown JJ. *defer to* Parliament, and, in particular, Hansard. They observe that "Parliament chose outright abolition"[109] and quote the Minister of Justice who criticized the "discriminatory manner"[110] in which peremptory challenges have been used.

However, when narrowly interpreting the amended judicial stand-aside power, Moldaver and Brown JJ. do just the opposite. The Minister of Justice explicitly stated that the stand-aside power was meant to "make room for a more diverse jury."[111] But Moldaver and Brown JJ. claim that, as "a matter of law," such a use of the power is unacceptable.[112] They defend this position by noting the absence of explicit reference to jury diversity in the statutory text. But this is a spectacularly narrow reading.

First, the statutory text chosen by Parliament — that the power can be used for

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[108] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 9 (S.C.C.). See also para. 50.

[109] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 26 (S.C.C.).

[110] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 26 (S.C.C.).

[111] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 27 (S.C.C.).

[112] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 74 (S.C.C.).

"maintaining public confidence in the administration of justice or any other reasonable cause"[113] — is expressly drafted to leave judges with broad discretion, in direct contradiction with Moldaver and Brown JJ.'s demand for an express reference to jury diversity. Could a more diverse jury *ever* maintain public confidence in the administration of justice? Could a more diverse jury *ever* be a "reasonable cause" for setting aside a juror? Undoubtedly, yes.

Second, the social context and history of systemic racism in jury selection makes Moldaver and Brown JJ.'s holding not just indefensibly narrow, but profoundly activist. One of the most well-documented and long-standing injustices with respect to juries is their homogeneity.[114] Indeed, a "widespread perception" that "predominantly white juries" create a system that "serves the exclusive interests of white victims and white defendants" was documented decades ago.[115] Further, homogeneity is not simply a weakness in a jury. Rather, it overrides all of the core benefits constitutive of the benefit of a trial by jury, that is, "superior fact-finding,"[116] representing the "conscience of the community,"[117] protesting "oppressive laws,"[118] and "public education and legitimization"[119] — in other words, all those traits that enable juries to act as the "little parliament" which they are meant to represent.[120] In this context, to deny *any* relationship between jury diversity and public confidence in the administration of justice is, frankly, astounding.

Even their own language subtly reveals a latent appreciation for how narrowly

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[113] *Criminal Code*, R.S.C. 1985, c. C-46, s. 633.

[114] See, generally, Nova Scotia, Royal Commission on the Donald Marshall, Jr., Prosecution, Volume 4: *Discrimination Against Blacks in Nova Scotia, A Research Study* (Halifax, 1989), online: https://archives.novascotia.ca/pdf/marshall/4-1-BlacksStudy.pdf; Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38:1 McGill L.J. 147; Frank Iacobucci, First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci (Toronto: Ontario Ministry of the Attorney General, 2013), online: https://wayback.archive-it.org/16312/20210402055517/http://www.attorney.general.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html; Ebyan Abdigir *et al.*, "How a broken jury list makes Ontario justice whiter, richer and less like your community" *The Star* (February 16, 2018), online: https://www.thestar.com/news/investigations/2018/02/16/how-a-broken-jury-list-makes-ontario-justice-whiter-richer-and-less-like-your-community.html.

[115] Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill L.J. 147 at 149.

[116] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 250 (S.C.C.).

[117] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 251 (S.C.C.).

[118] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 252 (S.C.C.).

[119] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 253 (S.C.C.).

[120] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.), Factum of Defence Counsel Association of Ottawa at para. 1, citing Lord Devlin, Trial by Jury, Hamlyn Lecture (1956) at 164.

Moldaver and Brown JJ. construe the *Criminal Code*, contrary to the statutory text they usually display close fidelity to.[121] They claim that, "generally," public confidence is "lost only where something egregious has occurred"[122] — like, for example, if the juror who had given Mr. Chouhan the middle finger during the selection process[123] had been permitted to join the jury. But what can result in the *loss of* confidence does not logically circumscribe what can *maintain* confidence, especially given the explicit link made by the Minister of Justice: not just that stand-asides will "make room for a more diverse jury," but how that room "will in turn promote confidence in the administration of justice."[124]

Indeed — and perhaps inadvertently — Moldaver and Brown JJ. at multiple points make their policy preference clear. They do not simply opine on what a proper interpretation of the *Criminal Code* or Charter requires. Rather, they claim that "it is these structural measures [concerning the jury roll], and not the isolated discretionary decisions of trial judges, that *should be* relied upon."[125] Yet, when the Minister of Justice herself has said that those "isolated discretionary decisions" should be relied upon to "make room for a more diverse jury," Moldaver and Brown JJ. are nakedly legislating their own policy preferences from the bench and second-guessing a policy decision, in direct contradiction with their own stated commitment to judicial humility.[126] In their *political* view: "Reductionist premises, racial or otherwise, have no place in jury selection. This, in turn, calls into question the statement of the then-Minister of Justice that the amended stand aside power would enable judges to 'make room for a more diverse jury'."[127]

The contradiction is clear. This is not an opinion predicated on deference to Parliament, but rather, *selective* deference where suited to certain baseline suppo-

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[121] See, for example, *R. v. H. (A.D.)*, [2013] S.C.J. No. 28, 2013 SCC 28 at paras. 123-126 (S.C.C.); *R. v. Barton*, [2019] S.C.J. No. 33, 2019 SCC 33 at paras. 72-73 (S.C.C.); *R. v. J. (J.)*, [2022] S.C.J. No. 28, 2022 SCC 28 at paras. 228, 230 (S.C.C.); *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21 at para. 127 (S.C.C.); *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, [2015] S.C.J. No. 47, 2015 SCC 47 at para. 27 (S.C.C.); *R. v. Paterson*, [2017] S.C.J. No. 15, 2017 SCC 15 at para. 31 (S.C.C.). Credit to Marie-Michèle Simard from Power Law for her research assistance on this point.

[122] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 73 (S.C.C.).

[123] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 216 (S.C.C.).

[124] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 108 (S.C.C.), *per* Martin J., citing *House of Commons Debates*, Vol. 148, No. 300 at 19605.

[125] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 43 (S.C.C.) [emphasis added].

[126] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 84 (S.C.C.): "The role of the courts in the *Charter* analysis 'is to protect against incursions on fundamental values, not to second guess policy decisions . . .' ."

[127] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 81 (S.C.C.).

sitions, namely the singularity of the jury roll in fulfilling the needs of an impartial jury — which is, as explained, counterfactual when viewed through the lens of racial inequality. Jury homogeneity is perhaps the single-most significant attribute of juries that has undermined their perception by the public.[128] And Moldaver and Brown JJ. jurisprudentially vetoed a quite frankly modest attempt at mitigating this pervasive imbalance. Given the demonstrated whiteness of the jury roll — a whiteness identified *by Parliament itself* — Moldaver and Brown JJ.'s opinion does not display deference, but defiance.

(b) Strawman Reasoning: All or Nothing

A second example of motivated reasoning in the first opinion is its reliance on a strawman critique, which can be seen both with respect to its analysis of jury diversity as an *end* and peremptory challenges as a *means*. Both at the hearing and in their opinion, Moldaver and Brown JJ. used a flawed rhetorical device: that, if peremptory challenges — or, jury diversity — constitutionally matter *at all*, then they must matter *infinitely*. This, of course, exaggerates the burden on their opponents, a logical fallacy which is "unfortunately typical"[129] in the context of law and racial justice.

(i) Strawmanning Jury Diversity

First, Moldaver and Brown JJ. strawman jury diversity.

Consider their response to Abella J.'s opinion. When holding that trial judges can use the open-ended tools given to them by Parliament to "actively promote jury diversity"[130] — to make "a jury that looks more like Canada"[131] — Abella J. admits that "Canada's kaleidoscope of human diversity *cannot realistically* be mirrored on every jury."[132] How Moldaver and Brown JJ. respond to this reasoning is telling: "It follows that we respectfully reject our colleague Abella J.'s suggestion that trial judges use the stand aside power . . . to approximate 'Canada's kaleidoscope of human diversity.'"[133]

Recall that Abella J.'s position is *not* that every jury should be perfectly diverse, but that judges *can* promote diversity. Yet her position is distorted in Moldaver and Brown JJ.'s opinion. According to them, she makes the "suggestion" that trial judges use the stand aside power "to *approximate* 'Canada's kaleidoscope of human

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[128] See e.g. Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98:2 Can Bar Rev 315 at 327.

[129] Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98:2 Can Bar Rev 315 at 331.

[130] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 164 (S.C.C.).

[131] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 200 (S.C.C.).

[132] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 164 (S.C.C.) [emphasis added].

[133] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 74 (S.C.C.).

diversity.'"[134] This, on close examination, exaggerates her reasoning. She holds that judges can *do something*, and Moldaver and Brown JJ. critique the impracticality of judges *doing everything*. Specifically, they allege she holds that trial judges can "approximate" Canadian diversity on juries. Yet look at the placement of quotations in their passage above. The word "approximate" is outside the quotations precisely because Abella J. *never* claims this — in fact, she expressly *disclaims* it as something that "cannot realistically" be achieved. Consequently, when Moldaver and Brown JJ. opine that "absolute diversity on a jury is unattainable,"[135] they are not *responding* to Abella J., but *repeating* her.[136]

The mistaken reasoning here is straightforward. Various judges reasoned, various interveners argued, and Parliament itself explained,[137] that *some* promotion of diversity is important for *sufficient* impartiality on juries — an entirely reasonable proposition. And Moldaver and Brown JJ. held, in non-response, that diversity is all or nothing: either we attain "a mythical perfectly proportionate jury"[138] (which is, of course, impossible), or jury diversity is constitutionally irrelevant (which is indefensible on a liberal and purposive reading of "impartial"). If drawing jurors from "a broad cross-section of society"[139] is constitutionally required, there is no logical basis to forbid similar "reasonable efforts"[140] — not at *perfect* diversity, but *partial* — later in the jury selection process.

This mistaken reasoning follows from Moldaver and Brown JJ.'s unwavering commitment to a baseline — in this case, the unimpeachable virtue of the jury roll. To call *ever* introducing a single racialized juror to a jury categorically *less representative* (as Moldaver and Brown JJ. do) is to fetishize the jury roll beyond recognition. Specifically, they write that "as a matter of logic, any departure from randomness will necessarily lead to *lesser, not greater*, representativeness on the jury."[141] But this is not, in fact, logical. Rather, it is based on a set of probabilistic

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[134] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 74 (S.C.C.) [emphasis added].

[135] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 40 (S.C.C.).

[136] Likewise, Martin J. rejects this strawman: "It is obvious that Parliament had no intention of requiring judges to guarantee that every jury represents a 'national ideal of Canadian diversity . . . irrespective of the particular diversity of the local community' (reasons of Moldaver and Brown JJ., at para. 75)." *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 117 (S.C.C.).

[137] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 162 (S.C.C.).

[138] Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98:2 Can Bar Rev 315 at 355.

[139] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 33 (S.C.C.).

[140] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 43 (S.C.C.).

[141] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 80 (S.C.C.).

conditions which are demonstrably absent in jury roll selection.[142] Randomness only meaningfully ensures representativeness if the pool drawn from is itself representative — otherwise, a "random" selection process will merely replicate the lack of representation in the initial pool. Simply put, "when random selection routinely results in all-white juries,"[143] that process is not random; it is biased. And to call a *factually* biased process *legally* random perfectly illustrates how the fact/law dichotomy is an unsustainable premise from which to interpret constitutional law.[144]

Justices Moldaver and Brown's rhetorical flourish — that to, for example, seek a single non-white juror on an all-white jury, is to "sacrifice the vital principle of randomness on the altar of diversity"[145] — is confused. *The whole point* of randomness is to secure representativeness — a near-synonym for diversity.[146] When that representativeness has been corrupted by demonstrated systemic barriers,[147] remedying those barriers does not *weaken* representation, but *strengthen* it.

(ii) Strawmanning Peremptory Challenges

Second, Moldaver and Brown JJ. strawman peremptory challenges.

For example, at the hearing, both Moldaver and Brown JJ. invoked "all-or-nothing" reasoning after their "silly anecdotes" exchange with Ms. Shanmuganathan:

> **Ms. Shanmuganathan**: As a result of this Court's decision in *Kokopenace*, we know that there is no constitutional right to a certain racial composition of the jury. I don't get a jury that looks like me. So it is perfectly acceptable, and it is very often the case, to have a jury that is all white. But we say that when a racialized person can use their peremptory challenge to get someone who isn't white on the jury, we say: that's a better jury, a more diverse jury, a fairer jury, and not a jury that is just partial to the accused.
>
> **Justice Moldaver**: *There should be, there should be no limits, then*, to peremptory challenges.

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[142] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 186 (S.C.C.).

[143] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 163 (S.C.C.), *per* Abella J.

[144] Credit to Kent Roach for pointing out this link.

[145] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 81 (S.C.C.).

[146] Indeed, Côté J. seemingly recognizes this similarity in her opinion when she observes how peremptory challenges "give accused persons the opportunity to try to obtain more representative and diverse juries." *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 226 (S.C.C.).

[147] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 114 (S.C.C.), *per* Martin J. "Many systemic factors distort the composition of the roll, the composition of those who show up for jury duty, and the composition of those ultimately selected for the petit jury, leading to underrepresentation of certain groups at all stages."

> **Ms. Shanmuganathan**: No. We're not saying there should be no limits —
>
> **Justice Moldaver**: Yes you are. You have to be. Because otherwise, for example, when you only get four, how are you going to account for all these concerns that you just raised?
>
> **Ms. Shanmuganathan**: Because the question in this case is about the complete abolition of peremptory challenges. We're not here to decide whether four is sufficient, six is sufficient, or eight is sufficient. The question here today is the abolition of all peremptory challenges — is that constitutional?
>
> **Justice Brown**: So the abolition of one peremptory — if you had one peremptory challenge you'd be satisfied. I mean, with Justice Moldaver, it follows from your argument that, your argument supporting the constitutionality, the unconstitutionality of the abolition of peremptories, *that they must in fact be limitless*.[148]

But, of course, a device that promotes a constitutional right need not be infinite to be constitutionally material — a basic fact the jury roll jurisprudence itself illustrates. As Moldaver and Brown JJ. note, the legal test concerns the perspective of a "*reasonable* person" and their "*reasonable* apprehension of bias" in relation to jury selection processes.[149] And reasonableness is, of course, a graded inquiry — not about whether the state is doing *everything*, but rather, *enough*.

This fallacious reasoning extended into Moldaver and Brown JJ.'s opinion as well. As noted at the outset, peremptory challenges are not without controversy, particularly given the ways in which they can be used discriminatorily. But rather than engage with that controversy — that is, the good and bad ways that peremptory challenges can be used — Moldaver and Brown JJ. simply caricature peremptory challenges to reinforce their baseline position.

For example, they call the use of peremptory challenges to diversify juries "uncertain,"[150] "speculating . . . based solely on characteristics like . . . race."[151] But there is nothing arbitrary — that is, random — about striking white jurors in the hope of having one racialized juror on the jury. Indeed, given well-documented patterns along racial lines with respect to various beliefs relevant to factual and legal determinations,[152] it is, rather, sensible to seek racial diversity on a jury. At the *individual* level, one is hypothesizing (speculating, in my view, sells it short). But

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[148] Intervener Submissions of the South Asian Bar Association in *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (oral hearing), online: https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=39062&id=2020/2020-10-07--39062-38861&date=2020-10-07 at 3:09:12-3:10:47 [emphasis added].

[149] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 31 (S.C.C.) [emphasis added].

[150] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 19 (S.C.C.).

[151] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 19 (S.C.C.).

[152] See, generally, Russell Robinson, "Perceptual Segregation" (2008) 108:5 Colum. L. Rev. 1093.

at the *systemic* level, one is acting in response to demonstrated patterns of belief, which is not "[r]eductionist"[153] in the slightest — and, even if it were, Parliament has affirmed the importance of diverse juries, so there is some audacity in two judges simply disagreeing with that value on principle. (Though Moldaver and Brown JJ. appear comfortable with Indigenous people volunteering for jury service to improve "Indigenous representation on jury rolls"[154] — how that is any less "reductionist" is unclear to me.)

There is a subtle irony in the "silly anecdotes" exchange described earlier. During the hearing, Moldaver J. critiqued peremptory challenges as "arbitrary." Specifically, he described how, in his experience, they were used to challenge, for example, people with "shined shoes" (or, to use Rowe J.'s example, "church ladies"). Yet these are not entirely random judgments; rather, they can be seen as imperfect attempts at proxy reasoning that seek, however ineffectively, to correct for an already imbalanced jury pool. Indeed, one's manner of dress — *e.g.*, "shined shoes" — can be a proxy for class, which *systemically* influences, as Moldaver J. intimates, perspectives on "law and order."[155] And one's religious affiliation — *e.g.*, "church ladies" — likewise *systemically* influences one's political sympathies.[156] The irony, therefore, is that Moldaver and Rowe JJ.'s own examples illustrate, not how peremptory challenges have always been arbitrary, but instead, how they have long been used, by some, to try and correct for imbalanced juries. When, as we know, Canadian jury selection processes systemically favour "white, higher income earners, property owners, reporting English as their mother tongue,"[157] it is misleading to describe peremptory challenges as simply prejudicial.

IV. Conclusion

Both the opening of the *Chouhan* hearing,[158] and the opening of the *Chouhan* judgment,[159] alluded to the spectre of the trial that is *too fair* to the accused: that

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[153] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 81 (S.C.C.).

[154] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 42 (S.C.C.).

[155] See, for example, Ekos Research Associates, "National Justice Survey: Canada's Criminal Justice System" (2017), online: https://publications.gc.ca/collections/collection_2018/jus/J4-52-2017-eng.pdf.

[156] See, for example, Sarah Wilkins-Laflamme & Sam Reimer, "Religion and Grassroots Social Conservatism in Canada" (2019) 52:4 Can. J. of Pol. Sci. 865.

[157] Justice Giovanna Toscano Roccamo, Report to the Canadian Judicial Council on Jury Selection in Ontario (June 2018), online: https://cjc-ccm.ca/cmslib/general/Study%20Leave%20Report%202018%20June.pdf at 11.

[158] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 (S.C.C.) (oral hearing), online: https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=39062&id=2020/2020-10-07--39062-38861&date=2020-10-07 at 10:14.

[159] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 2 (S.C.C.). See also para. 20.

peremptory challenges were used "to secure *not* an *impartial* jury, but a *favourable* jury."

The idea of baselines is essential here. On what logic is, for example, seeking a *single non-white member* on your jury the pursuit of a "favourable" jury — or, to use Moldaver and Brown JJ.'s racially provocative word choice, a "gerrymandered" jury?[160] The implicit baseline, in my opinion, must be made explicit. Justices Moldaver and Brown believe that the jury roll already provides an impartial jury; consequently, peremptory challenges, by definition, compromise that impartiality. Indeed, Moldaver and Brown JJ. even invoke the past tense in their reasons to refer to former eras when "jurors *were* generally of a higher social status than the accused"[161] — as if class is no longer relevant to criminal punishment and jury selection. With the various systemic disparities documented in the jury roll, however, this claim is simply an extension of their weakly supported baseline. In contrast, the opinions of Martin,[162] Abella[163] and Côté JJ.[164] extended on a different baseline — one that sought to grapple with the systemic disparities apparent in jury selection and to advance true randomness in juries. This is, fundamentally, a baseline dispute.

Since baselines are essential here, subjectivity is unavoidable. In their reasons, Moldaver and Brown JJ. dismiss the relevance of "the subjective perceptions of the accused."[165] But when a racialized — or, even just a racially conscious — accused would likely consider an all-white jury biased, Moldaver and Brown JJ.'s tolerance of that jury is not "objective" or "reasonable" — it is simply their own hidden subjectivity. That is why their exchange with Ms. Shanmuganthan is so striking — indeed, *defining* of the *Chouhan* appeal. A racialized lawyer pleaded with an

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[160] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 79 (S.C.C.).

[161] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 15 (S.C.C.) [emphasis added].

[162] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 114 (S.C.C.), *per* Martin J.: "Many systemic factors distort the composition of the roll, the composition of those who show up for jury duty, and the composition of those ultimately selected for the petit jury, leading to underrepresentation of certain groups at all stages."

[163] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 187 (S.C.C.), *per* Abella J.: "peremptory challenges were an important trial safeguard for an accused to try to secure representativeness from what can be unrepresentative random selections."

[164] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 272 (S.C.C.), *per* Côté J.:

> Although the processes established in compliance with *Kokopenace* aim to deliver a representative jury, they are not results-focused and do not guarantee that a jury roll's composition will be in any way proportionate to that of the general population (para. 39). In practice, this leads to jury rolls that are under representative of racialized and other marginalized persons.

[165] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 39 (S.C.C.).

all-white Court to understand that, from the perspective of a racialized accused, an all-white jury appears biased. And two white judges responded that such subjectivity has no place in our constitutional law. In effect, they were not rejecting subjectivity — just embracing their own. These two white judges would tolerate an all-white jury. And so that is, in their view, what a "reasonable" (read: white) person would tolerate as well — a contemporary jurisprudential instance of Patricia Williams' astute critique of so-called "neutrality" in law: that "much of what is spoken in so-called objective, unmediated voices is in fact mired in hidden subjectivities."[166]

This hidden subjectivity is the *white baseline* from which the first opinion in *Chouhan* is written, an unsurprising fact given "the racialized origins of the criminal legal system and the legal profession."[167] Justices Moldaver and Brown (purport to) recognize that "[j]urors are human beings, whose life experiences inform their deliberations,"[168] yet devalue the experiences of racialized people — experiences that differ in many ways, but especially in the context of criminal punishment.[169] They claim that "the reasonable, informed observer would lose confidence in a jury selection process," not when a judge *accepts* an all-white jury, but when a judge *rejects* an all-white jury and ensures that there is even just one racialized jury member present[170] — as if the public, like them, fetishizes process to the complete exclusion of what that process actually provides.

In contrast, what might a *non-white baseline* say about our jury selection regime? At one point, Moldaver and Brown JJ. quote from the Court's opinion in *R. v. Yumnu*, where it held that "jury selection is not a game and it should not be approached as though it were. Winning and losing are concepts that ought not to be associated with it."[171] But when Indigenous and Black accused keep losing, it is one thing to not want jury selection *to be a game*, and quite another to not see jury selection *for the game it already is* — one that is rigged against non-white accused. These are crucial insights that minority perspectives can bring to the judicial process — but only if that process is sophisticated enough to acknowledge the fiction of legal objectivity and the urgency of minority social context, especially to a majority-white judiciary.

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[166] Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press, 1991) at 11.

[167] Alexis Hoag-Fordjour, "White is Right: The Racial Construction of Effective Assistance of Counsel" NYU L. Rev. (Forthcoming 2023).

[168] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 48 (S.C.C.), citing *R. v. Find*, [2001] S.C.J. No. 34, 2001 SCC 32 at para. 43 (S.C.C.).

[169] See, for example, Scot Wortley, "Justice for all? Race and perceptions of bias in the Ontario criminal justice system – A Toronto survey" (1996) 38:4 Can. J. of Crim. 439.

[170] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 81 (S.C.C.).

[171] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 20 (S.C.C.), citing *R. v. Yumnu*, [2012] S.C.J. No. 73, 2012 SCC 73 at para. 71 (S.C.C.).

To be fair, Moldaver and Brown JJ. do cite leading critical race scholar Charles Lawrence III in their opinion — specifically, his pathbreaking Stanford Law Review article "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism." They draw on his powerful critical race analysis to note the significance of unconscious racism.[172] But this is, like their statutory interpretation, a selective reading. I conclude with some other passages from his article which, I believe, aptly distill the flaws of their first opinion. That is, I meet *their white baseline* with *our black baseline*.

First, Lawrence III describes "ideology as a consciously wielded weapon, an intellectual tool that a group uses to enhance its political power by institutionalizing a particular view of reality."[173] That is precisely what the first opinion in *Chouhan* reflects — the institutionalization of white subjectivity as universal objectivity. To many racialized people, the questionable impartiality of an all-white jury for a racialized accused is obvious, not unreasonable, and certainly not prejudicial. In this way, Moldaver and Brown JJ.'s fidelity is, at one level, to the jury roll (procedure), but most fundamentally, to resisting structural change to the status quo (ideology). Their "particular view of reality" — that juries are already diverse enough — is precisely what their opinion seeks to institutionalize. And it is a view of reality, I must emphasize, which serves their white interests.

Second, Lawrence III explains in the very same paragraph Moldaver and Brown JJ. cite from that racism is, though irrational, "normal"[174] — what the Court itself has referred to as "intractable features of our society."[175] And it is the normal character of racial domination that makes Farnsworth's baselines analysis so instructive here — because, as he explains, we must "know what the natural or normal state of affairs is"[176] before any baseline can be designated. Acknowledging *the fact* of racial domination must precede *the law* of racial emancipation. And by misquoting the Court's prior admission of racial inequality's intractable character in *Spence*,[177] Moldaver and Brown JJ. display their unwillingness to grapple with

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[172] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 49 (S.C.C.), citing Charles Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39:2 Stan. L. Rev. 317 at 331.

[173] Charles Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 Stan. L. Rev. 317 at 326.

[174] Charles Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 Stan. L. Rev. 317 at 331.

[175] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 193 (S.C.C.), *per* Abella J., citing *R. v. Spence*, [2005] S.C.J. No. 74, [2005] 3 S.C.R. 458 at para. 1 (S.C.C.).

[176] Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (Chicago: University of Chicago Press, 2007) at 198.

[177] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 61 (S.C.C.).

persisting systemic racism in criminal punishment — a "power imbalance"[178] which they admit is constitutionally salient, but deny the existence of.

Third, Lawrence III argues that law is a "hegemonic tool of domination."[179] And *Chouhan*, in neglecting the constitutional significance of systemically white juries, continues that domination — yet another example of courts "reinforc[ing] existing racial and social ordering under the guise of race neutrality."[180] In her dissenting opinion, Abella J. notes how, "for hundreds of years, juries composed only of men were accepted as impartial."[181] For how many more years will we accept juries composed only of whites as impartial? Perhaps the issue is not simply bias in our juries, but in our courts.

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[178] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 16 (S.C.C.).

[179] Charles Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 Stan. L. Rev. 317 at 326.

[180] Alexis Hoag-Fordjour, "White is Right: The Racial Construction of Effective Assistance of Counsel" NYU L. Rev. (Forthcoming 2023). See also Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms" (2020) 98:2 Can Bar Rev 315 at 319: "the legal community should confront the reality that our jury system is not immune to colonialism and discrimination."

[181] *R. v. Chouhan*, [2020] S.C.J. No. 101, 2021 SCC 26 at para. 198 (S.C.C.), *per* Abella J.