**THE REDUCTION OF CRIMINAL TRIAL JURIES IN
NINETEENTH CENTURY CANADA**

By James Clifford Lingwood, Bachelor of Arts (Honours)

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- ABSTRACT -

The right to face a criminal charge before a jury of peers was a celebrated British constitutional right following late 17th century concessions by the Crown. Yet Canada's grand jury has been eliminated and less than 10% of criminal trials are decided by juries. This study examines historical reasons for the reduction of jury trials in Canada. It surveys justifications for trial by jury and factors that reduced its role in nineteenth century England. The study examines the relative influence of these same factors in Canada as well as distinctly Canadian reasons for the decline of the criminal jury. While there was a manifest tendency for Canadian politicians and legal professions to look to England for law reform, this work shows the erosion of the role of the jury had uniquely Canadian roots as well.

- ACKNOWLEDGEMENTS -

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- INTRODUCTION -

Historically the institution of the jury was conceived in significant part as a safeguard against tyranny of the state and abuses of the bench in criminal trials. Many eighteenth century English reformers believed that the state was corrupt and ruled by an elite few and that the criminal justice system could be manipulated by these elite interests.¹ The jury served as a bulwark against this encroachment on justice. Not only were all persons charged with a criminal offence entitled to trial by jury, but jurors arguably gained the right to acquit an accused regardless of the facts.² This power over the verdict was contested by the bench, but gained support as a means to denounce oppressive laws and prosecution. It legitimised the political and ideological influence of jurors over criminal proceedings. Likewise, criminal trial juries in nineteenth century Canada could prevent overzealous governments from criminalising popularly accepted political activities.³ This conceptualisation of the jury ignores the practical role of the jury in providing a source of local knowledge of the accused and witnesses to the state in the trial, but it is the political and institutional role of the jury that has inspired the study. Indeed, given this powerful image of a democratic institution, the removal of jury trials seems like a power grab by the state.

Despite the historic significance of criminal trial juries, modern Canada has little to do with them. The Law Reform Commission of Ontario determined that in 1993 no more than ten per cent of all criminal charges in that province were heard before a judge

¹ W. Wesley Pue, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the 18th to Twentieth Centuries* (Oxford: Clarendon Press, 1997), 180.

² Leonard Levy, *The Palladium of Justice* (Chicago: Ivan Dee, 1999), 61-67.

³ Eric Tucker, "That Indefinite Area of Toleration: Criminal Conspiracy and Trade Unions in Ontario, 1837 – 77", *Labour/Le Travail*, 15-54.

and jury.⁴ By comparison, between one-third and one-half of criminal trials in the United States are heard before a judge and jury.⁵ The historic importance of juries and the near absence of them in modern Canadian criminal proceedings raise questions about the factors that led to their reduced role.

A study of the decline in criminal trial juries is a challenging venture as no real survey has been made of the changing role of the jury in nineteenth century Canada or the public and professional responses to these changes. A number of historical studies, notably the *Canadian State Trials* series, offer insight into the early Canadian context with regards to the state's use of criminal law to combat perceived or real threats to the security of the state. These cases highlight how political power was expressed through state control over criminal proceedings and how juries sometimes acted as a check on this power. However, it must be acknowledged that juries could also serve to legitimate state oppression where popular opinions coincided with state interests.

Desmond H. Brown's work, *The Genesis of the Canadian Criminal Code of 1892* focuses on the political history and deal making that was required for Canada to enact its first criminal code shortly after England's failed attempt to do so. Enacted in 1892, Canada's first criminal code came into force the following year. This legislation was a major factor in the demise of the criminal jury. Until this point an accused person always had the option for trial before a jury unless statute law specifically created a different procedure for the trial. With the introduction of section 533 of the Criminal Code, all accusations were to proceed uniformly in the manner of the trial depending on whether

⁴ Cited in Neil Vidmar, "The Canadian Criminal Jury: Searching for a Middle Ground", *Law and Contemporary Problems*, Vol. 62, No. 2 (Spring 1999) 141-172 at 147.

⁵ Cited in John Baldwin and Michael McConville, "Criminal Juries", *Crime and Justice*, Vol. 2 (1980), 269-319 at 305.

the alleged offence was summary or indictable.⁶ All summary offences were to be tried by a judge or justice of the peace alone. No longer was jury nullification (verdict according to conscience) available for these offences. This section eliminated the old categories of misdemeanour and felony and replaced them by categorising all offences by procedure (summary and indictable).⁷ Summary procedure provided no option for an accused to elect to be tried before a jury as had persons accused of committing misdemeanours. Instead, these suspects now had to be tried before a judge alone.

As a consequence of this reclassification, a person charged with a summary offence was in a substantially different position. For example, the crime of forgery was previously classified as a misdemeanour. A “defendant” accused of forgery had the right to sit with counsel, the right to bail and the right to be tried before a jury.⁸ After the introduction of the Code in 1892, the person was labelled a “prisoner at bar”. He or she was required to stand in the dock, to apply for bail and was not afforded the right to be tried by a jury. The prisoner was tried by a judge or magistrate sitting alone.⁹

The enactment of the 1892 Criminal Code was the central means by which jury trials were reduced in Canada. Although codification was a process which differentiated Canada from England, the reduction of jury trials was a development common to both.¹⁰ In England, this was accomplished by various acts that applied summary proceedings to

⁶ Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (University of Toronto Press: Toronto, 1989), 124.

⁷ Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (University of Toronto Press: Toronto, 1989), 124.

⁸ RSC 1886, c. 174, s. 81.

⁹ DC 1891, s. 597.

¹⁰ Martin J. Wiener, “Judges v. Jurors: Courtroom Tensions in Murder trials and the Law of Criminal Responsibility in Nineteenth-Century England”, *Law and History Review* Vol. 17, No 3 (Fall 1999), 467-468 at 472.

misdemeanours and felonies. By the last quarter of the nineteenth century, the number of offences offering trial by jury was significantly reduced in England.¹¹

The central question that this thesis poses is: was jury reduction in Canada in consequence of uniquely Canadian concerns, or was it an uncritical adoption of English reform? This thesis focuses on the second half of the nineteenth century as the period in which jury trials were significantly reduced in both countries.

As a former colony of Britain, Canada's laws were inspired by English legal developments. Like other British colonies, British North America developed criminal laws from received English law prior to Confederation.¹² Even Lower Canada, whose brief tenure under English law was ended by the reinstatement of civil law in 1774, maintained English criminal substantive and procedural law.¹³ In 1856, the English *Law Times* published a letter from a Torontonion correspondent that emphasised the influence of English law in Upper Canada:

The laws of the two countries are almost identical. The practice or administration of the law is the same in each country... I do not invite an emigration of English lawyers, for in Upper Canada the profession is well supplied from native sources. But it will be a consolation to such members of the English Bar as may resolve to enter into competition in the colonies to know that they will labour under no disadvantage.¹⁴

This reliance upon English criminal law continued after Confederation. Under the *British North America Act, 1867*, the Dominion of Canada assumed jurisdiction over criminal law which the British North American legislatures had previously developed from

¹¹ Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberty* (Cincinnati: W.H. Anderson Company, 1973), 187; Levy, 209.

¹² F. Murray Greenwood and Barry Wright, "Introduction: State Trials, the Rule of Law and Executive Powers in Early Canada" in F. Murray Greenwood and Barry Wright eds. *Canadian State Trials Vol. 1: Law, Politics and Security Measures, 1608-1837* (Toronto: University of Toronto Press, 1996), 11-22.

¹³ *Quebec Act*, S.C. 1774, c. 83.

¹⁴ *Law Times*, vol. 28, no. 85 (1856).

received English law.¹⁵ Assertion of effective Dominion legislation was important to Prime Minister Macdonald and his new government for establishing the strength of the federal legislature.¹⁶ Therefore, the Dominion quickly passed legislation that adopted Greaves' consolidated English criminal acts directly with minor amendments. The legislation reflected the desire of the Dominion government to unite the country and assert supremacy over criminal law. Preambles to specific offences expressed desire for unity and centralisation. For example, the preamble to "An Act respecting forgery" read:

Whereas it is expedient to assimilate, amend and consolidate the Statute Law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, respecting indictable offences by Forgery and to extend the same so as to consolidate all Canada: Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows...¹⁷

Like England, the legislation addressed criminal law in an offence-by-offence manner. The English approach was evidenced not only in style but also in Canada's 1869 act regarding criminal procedure. The schedule at the end of the act identified the different forms of indictment that needed to be laid, while sections 13 through 27 dealt with the specific indictments and procedures for them.¹⁸ Like English law, offences were unique and distinct enactments with unique and distinct procedures for the individual charges. High Canadian regard for the English legal tradition was demonstrated in 1869 during a speech by Macdonald to the House of Commons. He stated that "It would be of incalculable advantage that every decision of the Imperial Courts at Westminster should be law in the Dominion."¹⁹ In a more critical vein, Senator McCully underscored the

¹⁵ *Constitution Act, 1867* (U.K.), Vict. 30 & 31, c. 3, s. 91(27).

¹⁶ Brown, *The Genesis*, 92-93.

¹⁷ *An Act respecting forgery*, S.C. 1869, c. 19.

¹⁸ *An Act respecting Procedure in Criminal Cases and other matters relating to Criminal Law*, S.C. 1869, c. 24, Schedule A, ss. 13-27.

¹⁹ *Ibid*, 92-93; 96.

prominence of English law in Canada. Citing an adopted English law for the protection of pigeons, he complained that “under a clause of this bill every man who touched one of those pigeons, which [are] a nuisance to the neighbourhood, would [bring] down upon himself this penal law.”²⁰ The suggestion was that legislators in Canada were willing to take English law because it was English – regardless of whether it was appropriate or not.

The impact of English law was also expressed in the drafting of substantive criminal law. In fact, many criminal statutes were taken verbatim from laws in England and were re-enacted by the Dominion Parliament as Canadian laws.²¹ Canadian statutes also directly cited English legal and political offices and institutions as models for the political and legal systems of the new country. For example, in describing the duties of the new Attorney General of Canada, the empowering statute stated “He shall be instructed with the powers and charged with the duties which belong to the Attorney General of England by law or usage so far as the same powers and duties are applicable to Canada...”²²

It is also clear from Brown’s history that the first Canadian Criminal Code was heavily influenced by English law. George Wheelock Burbidge produced a *Digest* of Canadian criminal law in 1889 and modelled it after Sir James Fitzjames Stephen’s English criminal law *Digest* of 1877. Over sixty per cent of the work was written by Burbidge and the product was certainly more than an edit of Stephen’s work, but the extent to which English law influenced this and subsequent work is apparent. In the same year that the *Digest* was published, Minister of Justice John Thompson asked Burbidge, Charles Masters and Deputy Minister of Justice Robert Sedgwick to draft Canada’s first

²⁰ Senate *Debates* 15 May 1868, 264.

²¹ Brown, *The Genesis*, 66-67.

²² *An Act respecting the Department of Justice*, S.C. 1869, c. 39, s. 3.

criminal code. The work they produced resembled Sir James Fitzjames Stephen's draft criminal code of 1880 and much of the substantive law was borrowed from English jurisprudence. The new criminal code, as finally enacted, contained 983 sections; 736 of those were new sections, or sections based upon previous Canadian statutes (although many of these originated in English legislation). The remaining 25 percent of sections were directly derived from contemporary English sources, while 81 of the 394 procedural titles were lifted from English legislation.²³

Given that Canadian criminal reform took its lead from England, the goal of the first chapter of this thesis is to understand why changes to trial by jury occurred there. Primary sources considered in this chapter include period newspaper editorials, parliamentary speeches and legal treatises. This chapter suggests that the reduction of the English trial jury in the nineteenth century was facilitated by six factors. First, utilitarian thought was important to law-makers in England. This philosophy favoured certainty, predictability and efficiency. Thinkers argued that the law should be complete and should not have to rely on judges or juries to adapt the law to specific cases. This focus on universal legislative reform was antithetical to the case-by-case approach of the jury. Second, an independent bench in England meant that juries were no longer necessary to prevent the Crown interfering with judges in political trials. Third, the growth of the English bar meant more people were getting representation and better representation. With strong counsel, the jury was no longer as important in protecting unrepresented prisoners from a strong prosecution. Fourth, the creation of professional police forces and the rise of anonymity in cities reduced the importance of juries in identifying and characterising witnesses and criminals for the benefit of the state. Fifth, England

²³Brown, *The Genesis*, 121-124, 142.

significantly reduced the number of capital crimes in the nineteenth century. This undermined the role of the jury in mitigating overly harsh penalties. Sixth and lastly, the press both criticised the jury and assumed one of its major functions as a watchdog of the court.

The second chapter of this thesis turns to an examination of the degree to which Canada's jury reform was modelled on England's and a consideration of whether the same factors that gave rise to the reduction of criminal jury trials in England were present in Canada. For the most part, the answer is that the same factors were not present. First, newspapers in Canada were less able to criticise the jury, the state and to monitor court actors than English papers. Second, Canadian police were not the equal of their English counterparts in the nineteenth century. Lack of oversight and extra-legal actions by the police may have actually increased the need for jury oversight. Third, despite the availability of right counsel, lawyers in the Dominion were less educated and less specialised than in England. Furthermore, the Crown attorney system in Canada created greater potential for state interests to reach the courtroom and created greater need for juries to protect the accused. Fourth, the Canadian bench suffered from potential government interference, poor training in lower courts and were better able to resist oversight from the press – creating greater need for jury supervision of the courtroom. The conclusion of this chapter is that the factors supporting a reduced number of jury trials in England were not as relevant to the Canadian context and that in many respects Canada still had need for a criminal trial jury.

Although Canada may have relied heavily on English legislation, there were some distinct reasons for Canada to reduce its jury trials. The third chapter offers a

consideration of the factors that supported the reduction of the criminal trial jury in Canada. Two of the factors militating the reduction of criminal jury trial in England were applicable in Canada as well. Canada followed England in decreasing the number of capital crimes. With fewer capital offences, there was less need for juries to mitigate harsh sentences. Related to this was the fact that juries remained for all indictable offences. It was only summary offences, which carried lighter penalties, for which trial by jury was no longer an option. Another factor that Canada and England shared in common was the influence of utilitarian thought, which provided a philosophical basis for jury reform.

There were also purely Canadian circumstances that made jury reform desirable. The first of these was the problem of distance. Canada did not have the population density and urbanisation that England experienced in the nineteenth century. Moving prisoners and judges long distances for trials already cost ratepayers huge sums.²⁴ The cost involved in collecting a jury for the trial could be exorbitant. The problem of distance also presented difficulties for potential jurors and led to unhappiness with jury service, not to mention the cost to the prisoner awaiting trial. Second, Canadian legislation had already limited trial by jury with no public backlash. Reports from the summary courts provided human interest stories in the newspapers rather than calls for a return to juries. Third, public criticism of the grand jury, much of which also applied to criminal trial juries, may have created toleration for their reduction. Finally, the act of codification did much to reduce the need for juries because it rationalised procedure. It made the job of defence counsel easier in researching the law it reduced the power of the

²⁴ Letter from E.F.B. Johnston to George Sedgwick, Esq. *Difficulties with the Speedy Trials Act* (14 February 1889), Ottawa, National Archives of Canada (RG 13, vol. 72, file 168).

judge to rely on common law and made criminal law subject to scrutiny by the public and by the Official Opposition in debate over the statute and proposed reforms. Despite Canada's importation of jury reforms based on conditions in England, those reforms were, in some respects, appropriate based on conditions in Canada. Although the jury was historically an important bulwark against state oppression, by the late nineteenth century Canada had reasons for limiting it. This limitation was appropriate to some degree because Canadian factors had made it less necessary, or more costly.

The significance of this development is evidenced through contrasting the writings of Jurgen Habermas and Max Weber. Habermas's theory on the advancement of deliberative democracy and public control of the state rests upon the creation of public spheres. These spheres are not a public/private distinction as understood by law, but are public spaces where dialogue and discussion are permitted and incited in order to develop public, or common, goals for the people. The concept of public autonomy as a realm of political communication free from political intervention is the principal characteristic of public spheres.

The jury can be seen as such. The jurors are involved in considering criminal edicts of the state and in arriving at unanimous decisions based upon private argument and discussion. Furthermore, jury decisions can be both the product of public discussions in other sphere – giving an outlet to public demands – and as a source of public discussion – providing fuel for discussion in other public spheres – such as the press, coffeehouses, taverns and other public forums.²⁵ As an outlet and source of public engagement, Habermas's concepts confirm nineteenth century Whig concerns with the

²⁵ Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, transl. Thomas Burger and Frederick Lawrence. (The MIT Press: Cambridge, 1991).

power of an elite state and the need to preserve juries as a watchdog for state manipulation of courts.

The contrasting arguments of Weber support the reduction of trial by jury. Weber's theories view legal developments in a progressive and linear fashion towards formal legal rationality. Weber notes that laws can be either rational or irrational and that their application is either subjective, or objective. Rationality refers to the goals of laws and the desire to have the goal mirror the effects of the law. A jury may confound this goal when it refuses to apply a law as directed by a judge. Subjectivity refers to the standards by which a law is applied. Given that no two people are alike, no two juries will be alike. This means that where one jury may apply a law, another may not. Further, a jury may adjust a law (by refusing to apply it) to various situations based on contextual factors not considered in the legislation. This case-by-case approach destroys the predictability of law, making the law less certain for its subjects as well as reducing the ability of a law to achieve the aims of its drafters.²⁶ Weber's concerns with subjectivity are also mirrored in nineteenth century politics. Utilitarian thought, important to English and Canadian reformers, stressed the need for legislatures to be the sole source of law. Utilitarian Jeremy Bentham argued that laws from these legislatures should be capable of addressing all scenarios and should be directed towards achieving the greatest common good with the least consequential unhappiness.

The methodology for this project is broad in scope, one designed to consider the variety of factors that facilitated reduction of criminal jury trials in Canada. The search for factors begins with England. Secondary sources, coupled with some primary evidence

²⁶ Duncan Kennedy, "The Disenchantment of Logically Formal Legal Rationality: or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought" in *Hastings Law Journal*, Vol. 55 (2004), 1031-1076 at 1047-1056.

from the press provide a survey of possible factors for reform in that context, which create a starting point for the Canadian study. Next, key texts such as the *Canadian State Trials* series, *The Genesis of the Canadian Criminal Code*, McNairn's work on the press in Upper Canada and some work on summary proceedings provided a platform for a Canadian comparison.²⁷ The first Canadian Criminal Code enabled the reduction of trial juries across the country and was the centrepiece for primary research. This legislation is supplemented by earlier legislation impacting juries, a primary study on the *Globe*, letters and references to jury reform and summary procedure held by Library and Archives Canada and demographic surveys from Statistics Canada. However, studies specifically on nineteenth century jury reform in Canada were absent. As a result, this work attempts to make a broad study of potential factors facilitating this reform. The individual factors are not scrutinised individually for their actual influence, but are considered as potential factors supporting either the maintenance or the devolution of the criminal trial jury.

The historic principles behind the jury trial were ones that reflected concerns with a tyrannical state, prejudice within the criminal courtroom and a concern for the accused. For the most part, Canadian society did not experience the changes that facilitated the limitation of jury trial in nineteenth-century England. However, developments in Canada reduced the need for those principles to be addressed by a jury and permitted other institutions – like the vote – to adopt some of its roles. Furthermore, the costs of trial by jury were highlighted by conditions particular to Canada. These contextual factors suggest that the jury may have been a burden whose worth became limited to serving only those functions that other institutions in Canadian society had not already assumed.

²⁷ Jeffrey L. McNairn, *The Capacity to Judge: Public Opinion and Deliberative Democracy in Upper Canada, 1791-1854* (Toronto: University of Toronto Press, 2000).

- CHAPTER 1: ENGLAND & JURY REFORM-

During the nineteenth century, the British Parliament instituted several reforms that reduced the availability of trial by jury for those accused of criminal activity. These reforms were accomplished through piecemeal reclassification of offences from felonies and misdemeanours to indictable and summary offences. Many offences, which had previously entitled accused persons to the option of trial by jury, were reconstituted as summary offences, entitling the accused only to trial before a local magistrate.

Despite the effect of removing public input from trial decisions, it is argued that the changes in England's jury system were not the result of a concerted effort by the government to eliminate democratic input. Rather, they were part of a broader movement concerned with extending the rule of law and reducing discretionary authority. They were facilitated by growing anonymity in British society, the extension of utilitarian philosophy into public policy and reform, the professionalisation of judges, lawyers and law enforcement (police) and through the reaction to these changes in the press, popular literature and general public attitudes. While criticism of the jury increased in the nineteenth century, reasons for its existence were arguably disappearing.

HISTORICAL BACKGROUND

Early justifications for the jury viewed it as a necessary protection from state power through its control of the judiciary. According to W. Wesley Pue, "Eighteenth century reformers believed that the legal system and the state at large had been captured by oligarchy and corruption, to the detriment of free-born Englishmen."²⁸ Blackstone posited that judges might have inherent bias toward parties from a similar class. He

²⁸ W. Wesley Pue, 180.

argued that the English jury responded to this concern by acting as a safeguard to ensure that law, rather than rank, was upheld.²⁹

Edmund Burke stated “the magistracy included men of infamous character and others who could scarcely write their own names.”³⁰ This comment supports the inference that judges received their positions through patronage, rather than on their legal qualifications. David Lemmings finds that the executive used its power of patronage to build a corps of legal actors loyal to the government. Between 1689 and 1714, 84.6 percent of the senior judiciary had been parliamentarians and 92.3 percent had prior Crown service. Between 1715 and 1760, 76.9 percent were former parliamentarians and 96.1 percent had been servants to the Crown.³¹ These numbers suggest the upper judiciary had strong ties and obligations to the governing and legislative bodies of England in the eighteenth century.

The importance of the jury in resisting state control of the courts is evidenced in Fox’s Libel Act, 1792. This bill affirmed English juries’ right to deliver a general verdict in seditious libel trials and prevented judges from forcing a special verdict on a jury.³² This act helped to protect the press, critical of the government, from retaliatory prosecutions. The need for such a statute highlights the inadequate judicial independence of the British legal system in the late eighteenth century.

The strong support for the jury in the eighteenth century did not entirely disappear in the following century. Indeed, many of the same arguments that prevailed in

²⁹ Sir William Blackstone, *Commentaries on the Laws of England*, vol. 3, Oxford, 1768, reprinted with an introduction by John H. Langbein (Chicago: University of Chicago Press, 1979), 379.

³⁰ Edmund Burke, “Speech in Parliament”, reproduced in Moore, 86.

³¹ David Lemmings, “The Independence of the Judiciary in eighteenth Century England” in Peter Birks, ed. *The Life of the Law: Proceedings of the 10th British Legal History Conference*, (London: 1993), 126, 131-134.

³² Moore, 126. (A general verdict is the pronouncement of guilty or innocent. A special verdict is a finding on the facts, leaving verdict to the judge)

the eighteenth century continued into the next one, even amongst utilitarian reformers who were generally resistant to the jury. As late as 1863, James Fitzjames Stephen (whose draft English code would later become the model for the Canadian Criminal Code) commented that the jury was still “the most popular of all our institutions.”³³ Self-proclaimed utilitarian, and active reformer, Henry Brougham, wrote in 1828 that the jury is “a most wholesome, wise and almost perfect invention for the purposes of judicial inquiry” because it protects against biased judges and injects community values.³⁴

However, despite the persistence of pre-modern rhetoric, attitudes towards the jury changed substantially in the nineteenth century. After Brougham was made Lord Chancellor and appointed a Criminal Law Commission in 1833, he openly argued against the civil jury and made codification of the criminal law a goal.³⁵ The recommendations of Brougham’s commissioners were not adopted, but his codification project was renewed when J.F. Stephen drafted the English Criminal Code bill during 1878-1880 and became one of the leading reformers in replacing the felony/misdemeanour criminal offence categories with the indictable/summary ones. Despite the failure to enact this legislation, nineteenth-century English law dramatically reduced the number of crimes for which a jury could be assembled.³⁶ Various individual acts adopted summary procedure for specific offences.³⁷ By dealing with a crime summarily, the accused was no longer afforded an option to choose trial by a jury and had to submit to the verdict of a judge.

³³ James F. Stephen, *A General View of the Criminal Law*, (London: 1863) reproduced in Weiner, 457.

³⁴ Henry Brougham, *The Present State of Law*. (London: 1828), 84-85. in Conor Hanly, “The Decline of Civil Jury Trial in nineteenth-Century England”, *The Journal of Legal History*, Vol. 26, No. 3, 254.

³⁵ Conor Hanly, “The Decline of Civil Jury Trial in nineteenth-Century England”, *The Journal of Legal History*, Vol. 26, No. 3, 255.

³⁶ Wiener, 472.

³⁷ Moore, 187.

One such act that had broad impact was an 1855 statute that permitted summary trials for theft under five shillings. This statute was subsequently updated to increase the value of the theft for which an accused would lose the right to a jury trial.³⁸ The act passed in parliament on the grounds that to proceed by way of summary procedure would relieve the state of an enormous fiscal burden and would quicken the court process. Other misdemeanour offences were also changed in this piecemeal fashion and with the same administrative justification. The *Juries Act*, 1870, sought to address some of the administrative backlog created by rules of evidence and procedure surrounding jury deliberations.³⁹ Later, the *Juries Act*, 1892, continued to eliminate some of the administrative difficulties that slowed down the trial process.⁴⁰ This was a significant break from Blackstone who reminded readers “let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty...”⁴¹ Clearly, the nineteenth century jury had lost pride of place in the minds of the English lawmakers and theorists.

ANONYMITY

One of the changes that affected the reduction of the jury in the nineteenth century was the rise of anonymity in Britain as greater population densities led to the decline of personal knowledge of one’s neighbours. The inability to identify one’s neighbours reduced the utility of juries in identifying suspects for the benefit of the state.

With the dawn of the Industrial Revolution, England progressed from a relatively small agrarian population to an increasingly large population engaged in urban-industrial

³⁸ *Ibid.*, 190.

³⁹ *The Juries Act*, 1870.

⁴⁰ *The Juries Act*, 1892.

⁴¹ Blackstone, 349.

society. Between 1680 and 1820 the number of people living in England grew from 4.0 million to 11.5 million – an increase of 133 percent.⁴² This growth was most acute in the cities. In 1800 the population of London was 1,117,000. By 1850, it had increased to 2,685,000 while the populations of both Manchester and Liverpool more than quadrupled in size.⁴³ The increases in urban population created new problems that were not experienced in small villages or scattered farms. Housing was in short supply, overcrowding was common and sanitation services were minimal at best. In fact, cholera, typhoid and tuberculoses were common and spread rapidly in the polluted working-class neighbourhoods of the large European cities. These urban slums were un-policed, unregulated and unknown to the authorities.⁴⁴

In addition to the new demography, the country was developing new and faster ways to transport people and goods. The first British railroad opened in 1825; from 1830 to 1900, Great Britain increased the length of its open rail lines from 157 to 30,079 kilometres, with an increasing carrying capacity from 620,000 to 1,290,000 horsepower over the ten years between 1840 and 1850.⁴⁵ The railroads, canal systems and eventual road improvements of this industrial age support Ignatieff's assumptions that the modern age helped to develop a fragmented society, where the movement of populations in search of work created communities of people with little knowledge of one another.⁴⁶ Corresponding to England's rapidly growing, urbanising and migrating populations was an increase in the lack of knowledge of those with whom one came into contact. The

⁴² Robin W. Winks and Joan Neuberger, *Europe and the Making of Modernity, 1815-1914*. (New York. Oxford University Press, 2005), 70.

⁴³ *Ibid*, 107.

⁴⁴ *Ibid*, 105-106.

⁴⁵ *Ibid*. 75-77.

⁴⁶ Michael Ignatieff, *The Needs of Strangers: An essay on privacy, solidarity and the politics of being human*. (Markham: Penguin Books, 1986), 113 – 116.

impact for justice was that juries were increasingly unable to identify and provide subjective knowledge of the accused to the state.

The contention that anonymity and identity were real concerns of the state in nineteenth-century England is supported by Simon Cole in his examination of fingerprinting and anthropometry in his work *Suspect Identities*. During the nineteenth century, Great Britain, Western Europe and the United States of America saw a rise in individual's anonymity.⁴⁷ In societies that were predominantly rural and agrarian, people had a personal knowledge of those around them; with the demands of industrialism and large-scale farming, this arrangement was disrupted and large numbers of people moved to cities, creating what Michael Ignatieff referred to as a "society of strangers".⁴⁸

Increased urbanisation and industrialisation led to increased physical and social mobility, while wage-labour replaced older agrarian arrangements where people were permanent tenants of the land.⁴⁹ This increase in the growth of cities and in short-term employment disrupted families and communities and reduced the amount authorities could rely on interpersonal knowledge of subjects for establishing identity. This isolation also bred distrust. "From London to Moscow and Rome to Stockholm" middle-class and upper-class citizens came to see the poor of their cities as both unclean and criminal.⁵⁰ Winks and Neuberger make reference to the "newspapers...crime chronicles, serial potboilers, heart-tugging melodramas and muckraking exposés... that described the poor denizens of the city as foreigners with alien customs."⁵¹

⁴⁷ Simon A. Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (Boston: Harvard University Press, 2001), 19.

⁴⁸ Ignatieff, 12.

⁴⁹ Bruun, 25-28.

⁵⁰ *Ibid*, 107.

⁵¹ Winks, 17.

Cole describes the public and political concern with anonymity as one of the factors that necessitated the development of fingerprinting and anthropometry. He suggests that these tools enabled the state to connect a person's body with a paper record held by the state.⁵² The importance of these tools as a response to the rise of anonymity in the nineteenth century is explained by Cole when he poses the question:

Why...didn't they consider using fingerprints, which were already known in Europe by the sixteenth century, for identification? In general, premodern societies already had an effective method of personal and criminal, identification: the network of personal acquaintance through which persons were "known" in the memories and perceptions of their neighbors...⁵³

As evidence of the state's concern with anonymity, Cole presents details of vagrancy panics and strikes, police gazettes and posters attempting to identify criminals and con-artists to the public, rising philosophical and political concern with recidivism and attempts to identify biological signifiers of criminality and new punishment tailored specifically to those who repeat offending.⁵⁴ Thus, anonymity was certainly a relevant concern of the governments of the nineteenth century.

Not only is this important for the development of identification techniques, but it has direct relevance to the development of the jury. According to Leonard Levy, the early English juries had significant personal and subjective knowledge of the accused and the supposed crime. This was due to the fact that early juries were selected by judges from the very same groups that were used in civil trials to determine value of damage to property (where a subjective knowledge of local values and markets would be an asset).⁵⁵ This same subjective knowledge of the accused was also noted in eighteenth-century

⁵² Cole, 19.

⁵³ *Ibid*, 8.

⁵⁴ Cole, 17-21, 30, 53-54, 57.

⁵⁵ Levy, 55, 58, 61-63.

juries by Douglas Hay.⁵⁶ Personal knowledge fulfilled the state's desire for knowledge as recognised by Simon Cole. However, the increase meant juries, which, even though drawn from the same community as the accused, were far less likely to have personal knowledge of him or her than would a jury in an earlier century. Thus, while anonymity created the desire for the state to identify accused persons, juries became less able to fulfill that role and therefore became less useful to the state. This is a potential factor that facilitated its demise.

UTILITARIANISM AND NINETEENTH CENTURY PUBLIC POLICY

Utilitarian though favours predictability, objectivity and rationality. The principles of this philosophy are at odds with jury systems and constitute a potential factor facilitating a reduced role for the criminal trial jury. Although the precise influence of utilitarians on politics is unclear, most Whigs and many Tories were drawn to its critique of the jury by the 1830s. Stefan Collini describes the mid-eighteenth century political attitudes as containing a dichotomy “between... the temper of rational science, leaning to positivism, receptive to Utilitarianism and political economy... and the temper of essentially Romantic critique, uneasy with modernity...hostile to the soulless reasonings of political economy...”⁵⁷

During the late eighteenth and early nineteenth centuries, Britain saw the development of a new philosophical critique of the criminal law. According to Keith Smith, “for the bulk of substantive criminal law the process of principled exposition and theoretical refinement did not commence until after 1800 [and] more systematic reporting

⁵⁶ Douglas Hay, “Crime in eighteenth- and nineteenth-Century England” *Crime and Justice*, Vol. 2. (1980), 48.

⁵⁷ Stefan Collini, *Public Moralists: Political Thought and Intellectual Life in Britain, 1850-1930* (Oxford University Press: Oxford, 1991) 185-186.

and the establishing of a relatively formalized notion of precedent did not get under way until after 1800.”⁵⁸ The philosophy that would inform these theoretical refinements was Utilitarianism. This theoretical approach, most often characterised by the writings of Jeremy Bentham, emphasised the principle of social utility. Smith informs his readers of the achievements of Bentham and his positivistic understanding of utility:

By 1800 Bentham had offered a ‘scientific method’ of jurisprudence, a science of legislation, built on the fundamental political principle of utility which ‘approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question’. Bentham’s conception of the proper nature and shape of law rested on the view of individuals as rational, calculating, self-directing beings, capable of motivation towards socially desirable goals...⁵⁹

This approach was a radical departure from previous theorists such as Blackstone, who had highlighted the common law’s organic development of law based on customs that already existed in society. The philosophy, espoused by Bentham, condemned the mystery of common law as ‘anti-rational’ and saw its salvation in parliamentary statutes. Bentham believed law makers could use his principles to achieve objectively determined, legislated solutions. Instead of unaccountable, unpredictable judges, Bentham saw legislators as monopolising law making and developing rational legal solutions to societal ills.⁶⁰

The incarnations of utilitarian philosophy in criminal law were varied, but generally focused on the criminal as a rational-actor, who should be deterred from

⁵⁸ K.J.M. Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957*. (Clarendon Press, Oxford: 1998), 3-4.

⁵⁹ *Ibid.* 12.

⁶⁰ *Ibid.* 10-17.

engaging in criminal activity by certainty of punishment and a degree of punishment proportionate to the severity of the crime.⁶¹

The jury stood in a position to violate both of those utilitarian demands. First, juries were much less likely to convict accused persons and were therefore likely to reduce the certainty of punishment. Second, law idiosyncratically developed by judges violated the certainty and the appropriate nature of punishment because it was not developed rationally by legislators. If this is true for a judge, then it is doubly true for juries, who are not even bound to consider precedent. Furthermore, utilitarians were concerned with the degree of punishment. The large number of reprieves and instances of clemency given to convicted felons eliminated certainty of punishment and made crime a game of chance. This was strongly (although unsuccessfully) argued by utilitarian MP Romilly who demanded reform of punishment to reflect certainty rather than severity or discretion.⁶² The jury, with its tendency to request mercy, pardon, or to treat the accused according to subjective standards contradicted the certainty of punishments to be meted out according to some scientifically determined ratio of harm to society and severity of punishment. In terms of Bentham's 'science of punishment', there was no room for the jury's subjective compassion that could not be predicted and provided for by legislation.⁶³

This highlights the conflict between those advocating rule of law and those libertarians who felt that discretion should not be limited by Parliamentarians. This conflict is understood and represented in Weber's models of justice which argue that a modern justice system should be rational (based on goal-oriented solutions i.e. crime

⁶¹ *Ibid.* 23-25.

⁶² *Ibid.* 56-60.

⁶³ *Ibid.* 40-42.

prevention) and objective (based on rules, regardless of circumstance). Common law and juries were seen as archaic holdovers that emphasised irrationality and subjectivity.

The impact of utilitarian thought on legislation is still debated and contested. However, K.J.M. Smith suggests that Lord Chancellor Henry Brougham's criminal law commissions and Thomas Macaulay's Draft Indian Penal Code, along with reform campaigns such as those of Romilly created bridges between legislative and theorists and constituted real attempts to construct general principles of criminal responsibility from a synthesis of case-law and theoretical works of utilitarians.⁶⁴

Beyond the utilitarian calls theoretical framework and development of criminal law by a rational legislative body, utilitarian reformers had practical concerns with the speed of trials. Bentham was determined to create systems that would be efficient, expedient and inexpensive.⁶⁵ This concern with avoiding expense in time and money was characteristic of the utilitarian movement and a concern for British government.⁶⁶

The nineteenth century jury was comparatively slow, both to the alternative trial by judge alone and to eighteenth century jury trials. Even Blackstone admitted its more ponderous approach to justice when he commented "let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters."⁶⁷ If this difference was true at the end of the eighteenth century, it was even more so into the nineteenth century. During the 1700s, one jury would see scores of cases in the same day, devoting about half an hour to

⁶⁴ *Ibid*, 4-5, 54-60.

⁶⁵ H.L.A. Hart, *Essays on Bentham: Jurisprudence and Legal Theory*, (Oxford: Oxford University Press, 1982), 21-39.

⁶⁶ *Ibid*, 28.

⁶⁷ Sir William Blackstone, 349-350.

the average case and delivering verdicts on all cases together.⁶⁸ In contrast, by the end of the nineteenth century juries were assembled for individual cases and could take days, weeks or months to hear an average criminal case.⁶⁹ Thus, the nineteenth century jury was surely a problem for utilitarian reformers, looking to increase the efficiency and reduce the subjectivity of the legal system.

INDEPENDENCE OF THE BENCH

One pressure that had historically acted in favour of the preservation of trial by jury was bias of the Bench towards the Crown. Until the Glorious Revolution of 1688, judges held their offices at the King's pleasure and were regarded as Crown servants.⁷⁰ In fact, judges acted first as legal advisors to the King prior to the eighteenth century and then as advisors to the House of Lords until the nineteenth century.⁷¹ Lemmings' study adds support to arguments that the judiciary was not independent of government will. Indeed, of the twelve Lord Chancellors and Chief Justices of the King's Bench and Common Pleas who sat between 1715 and 1760, eleven were former parliamentarians and the twelfth was Robert Walpole who was a Whig politician, friendly to Parliament.⁷² Such evidence of judicial collegiality with government necessitated juries. The fear of judges subservient to the state was at the base of his defence of the jury.⁷³

Throughout the eighteenth century, concern with a partial judiciary not only influenced legal scholarship's support of the jury; it also inspired Acts of Parliament. The

⁶⁸ Jan-Melissa Schramm, "'The Anatomy of a Barrister's Tongue': Rhetoric, Satire and the Victorian Bar in England," *Victorian Literature and Culture* vol. 32, (2004), 285-303 at 286.

⁶⁹ John Langbein, "The Criminal Trial before the Lawyers" *University of Chicago Law Review* 45 (1978), 275.

⁷⁰ Stewart Jay, "Servants of Monarchs and Lords: The Advisory Role of Early English Judges", *American Journal of Legal History* Vol. 38, (1994), 117-196, at 122.

⁷¹ *Ibid.*, 122-141.

⁷² Lemmings, 141.

⁷³ Blackstone, 379-381.

Act of Settlement in 1701 provided that judges hold their commissions based on Parliament's determination of good behaviour rather than royal patronage. The act also allowed for the removal of judges following an address to the Crown from both Houses of Parliament and provided that judicial salaries be ascertained and established.⁷⁴ Later legislation enacted in 1760 affirmed that judicial appointments would remain valid "notwithstanding the demise of his Majesty." In addition, it maintained that a judge's salary could not be reduced for the duration of his appointment.⁷⁵

These changes helped insulate the judiciary from the influence of the Crown. However, there were still fears in the eighteenth century that the state could subvert its judges and the jury remained important. In 1783, the Duke of Richmond told the House of Lords that the Act of Settlement had failed to eliminate the more subtle influences of the Crown on the Bench.⁷⁶ This was true of pensions, which were granted at the pleasure of the Crown until 1799 when 39 Geo. III, c. 110 guaranteed judicial pensions for all judges.⁷⁷ Further, the Crown still had the right to promote and appoint members of the judiciary without outside review.⁷⁸ Finally the Libel Act of 1792, mentioned earlier, also highlighted real concern over the partiality of the judiciary. Parliamentary concerns over the independence of judges mirrored Blackstone's call for a strong jury. However, these same enactments would also precipitate a new view of the judiciary.

Eighteenth century limitations on government influence helped to foster nineteenth century respect for the judiciary. This view was articulated by the editors of

⁷⁴ C. McIlwain, "The Tenure of English Judges", *American Political Science Review* Vol. 7, 1913, 217-229, at 222-223.

⁷⁵ 1760, 1 Geo. III, c. 23.

⁷⁶ Lemmings, 126.

⁷⁷ *Ibid*, 16, 127.

⁷⁸ Hanly, 256.

the *Law Times*, who claimed that Blackstone's admiration for the jury was based on a recollection of the 'Stuart Bench' that was still felt in Blackstone's day. They continued, the "nearer a writer lives to the period when a great boon has been wrested from arbitrary and irresponsible power by the people from whence he has sprung and of which he forms a member, the higher will be the consideration wherewith he regards the triumph achieved."⁷⁹ This suggests that, at least within the legal academia, there was a belief that the historic concerns regarding judicial independence were no longer as relevant.

Nineteenth century faith in judicial independence was confirmed in countless pieces from both academic journals, commissions and from the popular press. This diminished valuation of the jury allowed critiques to gain more headway in the press. One government commission noted that "[t]he natural tendency of the professional judge, to look only to the strict letter of the law, is corrected and tempered by the opposite tendency of the jury to take a more enlarged and liberal view."⁸⁰ While this does not represent an attack on the jury, it suggests that the judiciary was no longer suspected of corruption but merely of heavy-handedness. More tellingly the essay Langbein wrote to introduce Sir William Blackstone's work included a passage stating that in the generations after Blackstone, the judiciary "would win the trust that Blackstone reserved for the jury."⁸¹ Hanly, citing nineteenth century sources also notes that "[b]y the middle of the nineteenth century, judicial independence was entrenched, the judges were highly respected and thus the need for protection from a subservient Bench had receded."⁸² Not only was the threat of a Bench biased towards the Crown seemingly removed, but it

⁷⁹ Editorial, "Trial by Jury", *Law Times*, Vol. 11, September 2, 1848, 485-486.

⁸⁰ *Commissioners on the Process, Practice and System in the Superior Courts of Common Law, First Report* (1851) reproduced in Hanly (above), 275.

⁸¹ John H. Langbein, "Introduction" in William Blackstone, viii.

⁸² Hanly, 257.

appears that there was some fear of bias against the Crown due to the influence of public opinion. Indeed, the editor of *The Jurist* expressed concern that in political trials the judge might be more likely to favour the defendant in order to gain popularity!⁸³ The nineteenth century belief in an independent Bench removed an important justification for the jury from the public discourse evidenced in popular and academic press.

Another historic fear was that the Bench tended to rule in favour of those with the same background. Blackstone was concerned that judges having an “involuntary bias towards those of their own rank and dignity” would be likely to sympathise with interests that mirrored their own. He continued “it is not to be expected from human nature, that the few should be always attentive to the interests and good of the many.” He felt that while judges could be trusted to decide issues of law which flow from abstracted reason, in issues of fact, “partiality and injustice have an ample field to range in.”⁸⁴

This argument also became moot during the nineteenth century. Daniel Duman’s study concludes that the socio-economic background of the ‘judge class’ changed dramatically. During the eighteenth century, the practice of law was a pursuit of the rich. Between 1770 and 1790, 40 percent of the judiciary were from the landed gentry. But, between 1855 and 1875, only 15 percent were from the landed gentry while men from professional backgrounds accounted for 52 percent of judges.⁸⁵ Without representation of the landed gentry, the Crown could no longer rely on the bias of a related class. *The Jurist* observed, “[t]hen, with respect to the supposed protection to the subject, arising from the independence and fairness of juries, it should be remembered that the periods in our

⁸³ Editorial, *The Jurist*, vol. 13, August 11, 1849, 294.

⁸⁴ Blackstone, 379-380.

⁸⁵ Daniel Duman, “A Social and Occupational Analysis of the English Judiciary: 1770-1790 and 1855-1875”, *American Journal of Legal History* 1973, Vol. 17, 353-364, at 360.

history when public benefit has most resulted from these qualities of juries have been periods when the judges were not independent and when, therefore, there was need of some such intermediate body independent of the Crown.”⁸⁶

Finally, some suggested that regardless of the judge’s independence or bias, juries will take its cue from the judge. Thus the abolition of the jury would not be of great use. An 1850 article in *The Times* claimed that “99 times out of 100, the judgement turned on the judge not the jury...the mere pantomimical expression of disgust or incredulity on the part of the presiding magistrate will be sufficient to neutralize the hypothesis of an advocate, or to shake the testimony of a witness.”⁸⁷ These suppositions are supported by evidentiary rules judges had available to help control courtrooms in the nineteenth century.⁸⁸ According to Langbein, “the formation of the law of evidence from the middle of the eighteenth century is more or less contemporaneous with the onset of lawyerization of the criminal trial.”⁸⁹ This is markedly different from the proceedings of earlier centuries in which:

Counsel seldom participated... few, if any, rules of evidence constrained enquiry, judges routinely examined witnesses and defendants in the most vigorous and at times ruthless, manner, only prosecution witnesses were allowed to swear testimonial oaths [until an act of parliament in 1702]⁹⁰ ...jurors were free to utilize private knowledge gained outside the confines of the courtroom, judges frequently introduced their political views into proceedings and there was virtually no appellate procedure.⁹¹

The nineteenth century jurist James Thayer argued towards the end of that century that the evidentiary rules developed to limit the amount of information juries could

⁸⁶ *The Jurist*, vol. 14, May 25, 1850, 184.

⁸⁷ *The Times*, March 29, 1850.

⁸⁸ Wiener, 53-54.

⁸⁹ Lemmings, 306.

⁹⁰ 1 Ann st. 2, c. 9.

⁹¹ Stephan Landsman, “The Rise of the Contentious Spirit: Adversary Procedure in eighteenth Century England” *Cornell Law Review* 75 (1990), 498.

consider for their decisions.⁹² This is made clear in Dickens' recordings of the judge's summation to the jury in the adultery trial, *Norton v. Melbourne*. Dickens explained the judge's summation as follows:

The question turned upon the evidence and upon the evidence alone, whether the jury were satisfied of the guilt of the defendant. It was perfectly clear that there was no direct evidence of the fact of adultery; it was also perfectly clear that the law did not require direct evidence of the fact, but that it merely required evidence of such circumstances as would lead by fair and just inference to it.⁹³

This reporting clearly shows the judge's attempt to use the law to suggest to the jury how it should find the accused based on the available facts. William Cornish furthers this argument in his handbook for jurors on the history of juries.

Cornish suggests that there was a conflict between the Bench and jurors during the nineteenth century that was carried out through procedural reforms. He refers to these procedural attacks on the jury as 'exclusion rules' and 'instruction rules'.⁹⁴ Exclusion rules Cornish defines as those rules that determine what evidence or witness are available to the jury. Instruction rules are procedures that permit the judge to direct juries as to how they should interpret evidence. An example of such a rule is the judge's power to sum up the law for the jurors at the end of proceedings. The judge had the potential to cow a radical jury by rephrasing the legal issues case as he saw them before the jury began its deliberations. Martin Weiner supports Cornish's suppositions and suggests that there was an ongoing conflict between jurors and judges during the late nineteenth century. He argues that the judge's power to sum up the case was an invaluable tool in manipulating

⁹² James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (London: Sweet & Maxwell, 1898), 509.

⁹³ As quoted in Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology*. (Cambridge: Cambridge University Press, 2000), 112.

⁹⁴ W. R. Cornish, *The Jury* (London: The Penguin Press, 1968), 82-99.

the findings of juries.⁹⁵ Thus, the jurors, even if they were in court, did not have the same role to fill, or degree of influence that they did in the eighteenth century and earlier. This reduced the difference between trial by judge and trial by jury.

THE GROWTH OF THE ENGLISH BAR

The growth of lawyers as court actors also helped to reduce the effectiveness and need for a jury. Before the nineteenth century and the Prisoner's Counsel Act of 1836, lawyers played a role in helping to reform the justice system. A key example of this role is exemplified by Thomas Erskine's call for freedom of the press and his corresponding support of the Fox's Libel Act. His impassioned and persuasive pleas for a society of freedom and debate were reiterated in Parliamentary debates over the act. This use of court language in Parliament to justify reform would be repeated in 1820 by Henry Brougham during the defence of Queen Caroline.

However, the ability of lawyers to influence legislation in the eighteenth century would be overshadowed by developments in the nineteenth century. The Prisoner's Counsel Act was an important English development which had indirect impact on the jury. Before this legislation, lawyers could only speak to points of law and direct defence. They could not address the jury and could not present a defence.⁹⁶ However, despite the limited role for defence counsel, the number of prisoners represented by counsel at the Old Bailey climbed from 0.5 percent in 1700, to 27.9 percent in 1800.⁹⁷ This increase,

⁹⁵ Wiener, 141.

⁹⁶ J.M. Beattie, "Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries" in *Law and History Review*, Vol. 9, No. 2 (Autumn 1991), 221-267 at 250.

⁹⁷ *Ibid*, 227.

combined with increasing popularity with counsel generated by figures such as Erskine and Garrow helped to explain impetus for this act.⁹⁸

In 1833, William Ewart, the MP from Liverpool, proposed three reforms to grant an accused right to counsel. Two of these were accepted but held up in the House of Lords. Finally, in 1836, his proposed legislation granting those charged with felonies the right to counsel was passed.⁹⁹ In order to pass the act, proponents borrowed from utilitarian thinkers of the time and used the same arguments that condemned juries. Beattie suggests this argument professionalised the administration of justice “to adapt the legal system to the needs of a more urban and industrial world in which informal justice and personal administration were no longer effective.”¹⁰⁰

This explains the increase in lawyers between 1835 and 1885, when there was a rapid increase in admissions to the four Inns of Court.¹⁰¹ The result was an increase of technical legal expertise and legal language. Professionalisation was also furthered by an overhaul of the examination for attorneys in 1836. The new test, it was noted by the *Legal Observer*, was much tougher than prior requirements.¹⁰² After 1852, student barristers were required to attend lectures presented by the four Inns of Court which had formed the Council of Legal Education to help educate the legal professionals.¹⁰³ Finally

⁹⁸ *Ibid*, 247-249.

⁹⁹ *Ibid*, 251-252.

¹⁰⁰ *Ibid*, 257-258.

¹⁰¹ Pue, 167.

¹⁰² *Legal Observer*, Vol. 11, February 2, 1836, 255.

¹⁰³ Christopher W. Brooks and Michael Lobban, “Apprenticeship or Academy? The Idea of a Law University, 1830-1860”, in Jonathan Bush and Alain Wiffels, eds., *Learning the Law: Teaching and Transmission of the Law in England, 150-1900*, (London: Continuum International Publishing Group, 1999), 368-369.

in 1872 a mandatory examination was made a pre-requisite for call to the bar.¹⁰⁴ These changes created a more educated bar and increased the legitimacy of law as a profession.

Jan-Melissa Schramm explains that the impact of this legislation was to silence the accused while affording him or her representation. “The exclusion of the prisoner’s own voice from the court-room and its subsequent replacement by the evasive rhetoric of lawyers was to create tremendous controversial criticized as an institutional defence of villainy, it was seen to taint legal discourse with the vicarious guilt of the criminal.”¹⁰⁵ This allusion to popular reactions will be addressed later. However, the immediate concern for the jury is that it no longer had access to the accused. Just as the rise of police brought about the public (or Crown) prosecution and hid the accuser from the jury, the Prisoner’s Counsel Act obscured the accused behind the defence counsel who could act as his mouthpiece. The jury was now limited to observing the facts as presented by a lawyer. Langbein characterises this development as move from the ‘accused speaks’ theory of the trial to the ‘testing the prosecution’ theory.¹⁰⁶ In the method, a criminal would have to speak his own case. While this was the mode of trial:

The defendant’s refusal to respond to the incriminating evidence against him would have been suicidal. Without counsel, the testimonial and defensive functions were inextricably merged and refusing to speak would have amounted to a forfeiture of all defence. The sources show that criminal defendants did no in fact claim any such self-destructive right.¹⁰⁷

¹⁰⁴ Hanly, 264.

¹⁰⁵ Schramm, *Testimony*, 287.

¹⁰⁶ *Ibid*, 24.

¹⁰⁷ John Langbein, “Historical Origins of the Privilege Against Self-Incrimination at Common Law” *Michigan Law Review* 92 (1993-1994), 1047.

Under this trial the accused speaks “either to clear himself or hang himself”.¹⁰⁸ However, under the new mode of trial, the accused was not required to speak. While, the accused listened to the trial, his lawyer could postulate theories as to the facts and could attack the credibility of the evidence brought forward in a way that the accused could not do without appearing desperate. This understanding of the new relationship between accused and counsel was expressed by Justice Patterson in *R v. Rider* in 1838:

The general rule certainly ought to be, that a prisoner defended by counsel should be entirely in the hands of his counsel and that rule should not be infringed on, except in very special cases indeed. If the prisoner were allowed to make a statement and stated as a fact anything which could not be proved by evidence, the jury should dismiss that statement from their minds; but if what the prisoner states is merely a comment on what is already in evidence, his counsel can do that much better than he can.

The ideological position of the lawyer was stated by Henry Brougham in 1820 during his defence of Queen Caroline over accusations of her supposed adultery.¹⁰⁹

An advocate, in the discharge of his duty, knows but one person in all the world and that person is his client. To save that client by all means and expedients and at all hazards and costs to other persons and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.¹¹⁰

This romantic speech concerning the duty of the lawyer highlights the encroachment of the defence lawyer into the realm of the jury. The jury was considered the “glory of English law” because of its ability to protect the subject from the brutality of the state.¹¹¹ However, Brougham’s formulation of the role of the lawyer makes no mention of the jury

¹⁰⁸ *Ibid*, 1053.

¹⁰⁹ Smith, 83-84, 127-129.

¹¹⁰ Henry Brougham, *Speeches* reproduced in Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology*. (Cambridge: Cambridge University Press, 2000).

¹¹¹ Blackstone, 379.

and suggests that lawyers provide the accused with all the protection they need. The nineteenth century ideology of the lawyer threatened future of the jury.

As Brougham's statement suggests, lawyers (at least some of the more poetic ones) had a strong command of the English language. Jan-Melissa's Schramm's study into the intersection of literature and law provides a useful insight into the use of language in manipulating juries, a claim best presented in the trial of Courvoisier.

Francois Benjamin Courvoisier was charged with the murder of Lord William Russell in June 1840. His counsel was Charles Phillips, an Irish barrister practising at the English Bar since 1821.¹¹² Borrowing from the tradition of Brougham's goal of "saving his client at all hazards and costs to all others", Phillips engaged in a voracious defence of his client, invoking emotional and poetic appeals, as well as attacking the credibility of evidence and his client's accusers (even after his client confessed his guilt).

The 'rhetorical excess' of Phillips in his defence did not stop at the use of poetry and sentimentality involving justification of murder. In the 1816 case of *Guthrie v. Sterne*, Phillips, delivering a speech for the petitioner (Guthrie), used the court time to espouse what Schramm called "models of female propriety worthy of the eighteenth-century novels of sensibility."¹¹³

But here is an ambition – base and barbarous and illegitimate; with all the grossness of the vice, with none of the grandeur of the virtue; a mean, muffled, dastard incendiary, who, in the silence of sleep and in the shades of midnight, steals his Ephesian torch in to the fane, which it was virtue to adore and worse than sacrilege to have violated!¹¹⁴

Following these remarks, the whole bar and viewing gallery delivered a spontaneous burst of applause. Schramm claims that the jury was reduced to tears by the romantic

¹¹² Schramm, 113-115.

¹¹³ Schramm, 290.

¹¹⁴ *Ibid*, 291.

rhetoric.¹¹⁵ Schramm's observations show how the efficacy of the jury was further demolished by the oratory skills of the prosecution and the defence attorneys.

Another way the rise of the lawyers threatened the jury was through the rise of technical language. The legal press and legal academics were forceful in condemning the jury as threatening the principle of *stare decisis*. The jury's privilege to deliver a verdict according to its own conscience created unpredictable applications of law. The language constructed by the legal profession was therefore used tautologically to evidence the jury's inability to contend with modern law. In 1849, *The Jurist* printed "[juries are comprised of] persons with scarcely sufficient education to understand the ordinary conversational language of educated men and quite incapable of a close or accurate reasoning."¹¹⁶ The argument that juries were too ignorant to carry the burden of trier of fact was successful and permeated both the legal and the popular press. In 1847, an editorial in *The Jurist* stated that juries were "the exponents and instruments of popular ignorance and popular vindictiveness, in spite of the better counsels of an enlightened judge."¹¹⁷ In contrast with the skill and technical expertise of lawyers, jurors were seen as amateurish. This opinion was expressed in the *Law Times*' comparison of the jury to a quack doctor.¹¹⁸ Another editor complained of the "blunder-headed stupidity" of juries "which alternates with pertinacious malevolence to produce perverse results."¹¹⁹ The editor of the *Legal Observer* predicted that the dominance of jury trials could have disastrous results for the rule of law. He claimed that "[i]nstead of cases being decided on a uniform principle, by persons who have the opportunity of communicating with each

¹¹⁵ *Ibid.*

¹¹⁶ *The Jurist*, Vol. 13, (11 August 1849), 294.

¹¹⁷ Editorial, *The Jurist*, Vol. 11, (27 February 1847), 58.

¹¹⁸ Editorial, *Law Times*, Vol. 11, (16 September 1848), 523-524.

¹¹⁹ Editorial, *The Times*, (20 March 20 1844) 5, col. B.

other and of knowing the most approved rule on all subjects, a class of small judges will spring up all over the country, who will each superinduce his own notions on the existing system and render the knowledge of law as a science next to impossible.”¹²⁰

The popular press echoed this criticism. One article complained that a jury might not be able to separate its function from that of the judge that they might not understand their oaths and that procedure was beyond the capacity of many of the individuals who served.¹²¹ Even in the United States, the President of the Board of Trade in Maryland reported of the jury: “once the boast bulwark of human rights, now conspicuous in its degeneracy, which might be regard as a jest if the solemnity of the subject did not forbid it....the jury-box is often filled from the ranks of indolence and incapacity.”¹²² The rise of lawyers thus detracted from juries’ ability to understand the trial and reduced respect for the institution, helping to facilitate its reduction.

PROFESSIONAL LAW ENFORCEMENT

The development of professional police forces also helped to reduce the need for a jury. Douglas Hay notes that “at the beginning of the eighteenth century the only police were parish householders who took turns as constables.”¹²³ This system was based on the Statue of Winchester, an ancient system that required the victim to engage the wheels of the criminal justice system by bringing a complaint before the parish constable or by obtaining a writ or a warrant from the Justice of the Peace. Notable exceptions to this system were the gangs of bounty hunters, or ‘thief-takers’, such as the one operated by the notorious Jonathan Wild. Wild was particularly damaging to the cause of professional

¹²⁰ Editorial, *Legal Observer*, Vol. 23, (2 April 1842), 449.

¹²¹ “Society for Promoting the Amendment of the Law”, *The Times*, (4 July 1850). 6f.

¹²² “Trial by Jury in Maryland”, *The Times*, (10 May 1892) 10.

¹²³ Douglas Hay, 48.

police as he was a crook himself and used his position to threaten thieves into stealing for him.¹²⁴ In the mid-eighteenth century, Henry Fielding established his “Bow Street Runners” who operated policing out of his house on Bow Street, London. His pamphlets and enquiries into the conditions of the poor in London led him to the conclusion that a professional police would be in the best interests of all citizens.¹²⁵ John Fielding presented these sentiments in a report to Parliament:

The Watch is insufficient; their Duty too hard and Pay too small... That as they are paid Monthly, they borrow their Money of a Userer once a Week... That the Watch in Westminster is in every Parish under the Direction of a separate Commission:- That Commissioners of the respective Parishes appoint the Beats of their Watchmen without conferring together, which leaves the Frontiers of each Parish in a confused State¹²⁶

This system was criticised by libertarian Whigs and many Tories who argued that a professional police would be little more than a watchdog for an authoritarian state. The old system was thought to protect the accused from surveillance and disruption from state interests.

However, the transformation from the ancient system of law enforcement was rapid and created new pressures on the jury. Under Wellington’s Tory government, Home Secretary Sir Robert Peel created the London Metropolitan Police Force in 1829. By 1835, all English cities had professional police forces.¹²⁷ The implications for the jury were many. First, the evidence-gathering capacity of the police encroached on the role of the grand jury gathering and evaluating of evidence. The police were able to give

¹²⁴ William Robert Irwin, “An Attack on John Fielding”, *Modern Language Notes*, Vol. 56, No. 7. (November 1941), 523-525.

¹²⁵ Malvin R. Zirker, “Fielding and Reform in the 1750’s” Jr. *Studies in English Literature, 1500-1900*, Vol. 7, No. 3, Restoration and Eighteenth Century. (Summer, 1967), 453-465.

¹²⁶ Journal of the House of Commons, XXXII, 1770, 879.

¹²⁷ Lemmings, 58.

credibility to evidence without the input of a grand jury. This claim to special knowledge impacted the jury's evaluation of evidence and even its availability, within the trial itself.

Second, the creation of professional police changed the way the state approached political dissent. Thomas Green suggests that the eighteenth century English state was quite alarmist in its policy towards public gatherings. In order to ensure that public gatherings were not political threats the state cast a wide net - prosecuting all those whom the state had any reason to suspect of seditious activity.¹²⁸ Juries historically served to counter this paranoid persecution by excusing accused persons such as those in the famous Quaker trials of the late seventeenth century. These trials recognised the right of a jury to deliver a verdict of not guilty based on conscience, rather than on facts.¹²⁹ However, the creation of a modern police force provided a degree of official state surveillance. Green argues that police allowed the state to better monitor its subjects and to prosecute specific perceived enemies with offences that could be easily established.¹³⁰ This allowed the state to conduct what would normally be state-trials in summary courts. This meant that juries were avoided and that the few felony offences that were brought before juries would be brought forward on well established facts.¹³¹ With the state's paranoia over dissidence subsiding, the jury was no longer required to stand between the citizen/subject and the rapacious state.

¹²⁸ TA Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985), 249.

¹²⁹ Levy, 61-67 (In the late 1600s the state religion, Anglicanism, was threatened by The Society of Friends, whose preachers sought to convert people from the monopoly encouraged by the state. The state acted by prosecuting some of the most vocal evangelisers under the causes of sedition and disturbance of the peace. John Lilburn and Penn and Mead were some of the most high-profile cases that affected the jury and were cases that would help to foster the notion of the jury as the defender of English liberties.¹²⁹)

¹³⁰ Green, 241-249.

¹³¹ Stephen, 357-360, 364.

Another impact of the police on the jury was the method by which accused persons were brought to trial. Prior to the nineteenth century, the vast majority of charges were laid by the male victim (women were represented by husbands or fathers). If he wanted reparation or revenge he would need to seek the aid of the parish constable, arrest the person in question and then personally accuse the person in court or hire a barrister to accuse the person on his behalf.¹³² Under private prosecution, the jury evaluated the claim of the accuser as well as the veracity of the accused prisoner's response. This arrangement resembled trial by strength of oaths as the character of both the accused and the accuser were often presented on the stage of the courtroom. The strength of oaths, used for lesser offences in the medieval period, became a fundamental aspect of the jury's attempt to determine the facts after the sixteenth century.¹³³ Juries determined the credibility of the claims of the witness, the accused and the prosecutor based on their countenance. However, the development of a professional police force in the nineteenth century dramatically changed this function of the jury. With police constables naming accused persons, it was up to the state to bring these people to trial. Public prosecution became dominant as private prosecutions diminished.¹³⁴ The jury was no longer expected to consider the demeanour of the accuser; only the facts presented by an officer of the court. In some sense, this meant that all criminal trials were state trials because of the representation of the state in the prosecutor. However, with a greater claim to impartiality in trials where the prosecutor was not the victim, the need for a jury became less clear.

CAPITAL PUNISHMENT

¹³² Blackstone, 45-50.

¹³³ *Ibid*, 45.

¹³⁴ Lemmings, 49.

In England, Robert Peel's reforms of 1828-31 reduced the number of capital offences to less than one dozen.¹³⁵ Historically, the jury was essential to mitigate the overzealous trend of the state to execute convicted criminals. Thomas Green tells us that with the creation of less severe sanctions and the creation of penitentiaries, the role of the jury in protecting the citizen from the severe actions of the state were muted.¹³⁶

This position is supported by Douglas Hay, who notes that while juries in the eighteenth century were unlikely to convict common criminals for moderate offences, juries in the nineteenth century were much more likely to convict. Hay attributes this change to changing penalties, as well as the ideology of the penitentiary. The focus of punishment changed from the public spectacle of state execution to the less theatrical objective of reform. This ideology was to shape good people out of weak people and was epitomised by the introduction of education into the penal system.¹³⁷ For juries, concern with reforming offenders was undoubtedly more palatable than execution. Thus, the jury ceased to buffer individuals from a bloodthirsty state, thereby further reducing its importance.

THE PRESS

The importance of popular literature for criminal law rests partially on its availability. The removal of heavy taxes and censure of newspapers combined with the application of the steam press created a virtual explosion in circulation of newsprint.¹³⁸

¹³⁵ TA Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985), 356.

¹³⁶ *Ibid.*, 360.

¹³⁷ Hay, 52.

¹³⁸ Virginia Berridge, "Popular Sunday Papers and Mid-Victorian Society" in *Newspaper History*, ed. George Boyce, James Curran and Pauline Wingate (London: Constable, 1978).

The development of a politically engaged public and the vindication of the jury's freedom of verdict¹³⁹ allowed print culture to flourish and to criticise the actions or workings of government. Thus, despite the government's use of seditious libel charges during the war against revolutionary France and during the disorder between 1817 and 1820, rising rates of literacy and widespread publication and criticism of the government's attempts to use this offence to gag the press helped ensure a decline in charges of sedition. The impact of this explosion in freedom and availability print media was paradoxically more effective in reducing the role of the jury as juries became involved in fewer trials. Weimer notes that,

Those more serious criminal trials that remained the province of juries were receiving rapidly expanding newspaper coverage...juries, though participating in an ever-smaller proportion of criminal prosecutions, were actually more visible, bulking larger in the public mind and doing more significant 'cultural work' than ever before.¹⁴⁰

Even in British labour papers, plenty of space was held for reporting of major crimes.¹⁴¹ English society was also becoming more literate, further increasing the impact of such reporting. Francis Place, who was the son of a baker and who became a member of the London Corresponding Society wrote:

The moral effects of the Society were considerable. It induced men to read books... The discussions in the divisions, in the Sunday evenings readings and in the small debating meetings, opened to them views which they had never before taken.¹⁴²

The importance this debate and the role of the press would have for British Parliament is addressed by social theorist Jurgen Habermas. His concept of the public

¹³⁹ Fox's Libel Act (see above).

¹⁴⁰ Weiner, 472-473.

¹⁴¹ Weiner, 472.

¹⁴² "The Autobiography of Francis Place" (1824) reproduced in Paul Keen, *Revolutions in Romantic Literature: An Anthology of Print Culture, 1780-1832* (Toronto: Broadview Press, 2004).

sphere is developed from a growing bourgeois need to communicate in order to further business, to formulate class needs and to contest state regulation of the economy; these help to establish a free press.¹⁴³ Universal access is an essential component of the public sphere,¹⁴⁴ and therefore the development of a free press is also essential. The public sphere, with the press as one of its key institutions, is Habermas' vehicle for expressing the needs of civil society.¹⁴⁵

The public sphere as a functional element in the political realm was given the normative status of an organ for the self-articulation of civil society with a state authority corresponding to its needs. The social precondition for this 'developed' bourgeois public sphere was a market that, tending to be liberalized, made affairs in the sphere of social reproduction as much as possible a matter of private people left to themselves and so finally completed the privatization of civil society.¹⁴⁶

The press, in reproducing and critiquing parliamentary debate provided a way in which the public could respond to and exert control over government decisions. A public (or the public represented in the press) hostile to the jury could exert significant pressure on Parliament to diminish the availability of trial by jury. As is shown, the press was frequently critical of juries in nineteenth century England.

Max Weber's concept of formal legal rationality (FLR) helps to explain negative reporting by the press on the decisions of juries. Formal legal rationality is an ideal type of system envisaged by Weber. It assumes that rules of conduct are then impartially applied. This impartial system was important for calculability and also for liberal values

¹⁴³ Jurgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, transl. Thomas Burger and Frederick Lawrence. (Cambridge: The MIT Press, 1991).

¹⁴⁴ *Ibid*, 85.

¹⁴⁵ *Ibid*, 14-31.

¹⁴⁶ *Ibid*, 74.

such as equality, democracy and due process.¹⁴⁷ The temperamental nature of juries in their application of law conflicts with these values. Indeed, common law itself suffered from some of these issues; the failure of juries to apply even this case-based law in all instances meant there was little objectivity in criminal jury trials.

The coverage and evaluation of criminal trials was justified by the critical response the press took to the successful actions of barristers in assisting their supposedly guilty clients (in the minds of the press) from avoiding sentence. This is expressed in William Thackeray's 1845 ruminations over the actions of the English Bar.

If an honest man is to be bullied in a witness-box, the barrister is instructed to bully him. If a murder is to be rescued from the gallows, the barrister blubbers over him, as in TAWELL'S case, or accuses a wrong person, as in COURVOISIER'S case. If a naughty woman is to be screened, a barrister will bring Heaven itself into Court...Let the Press be warned and suffer, as best it may, this separation from the Bar...See all these things O Press! Send your commissioners in the train of these spotless men of law.¹⁴⁸

The importance of this statement for the jury lies in the fact that it was the jury that was traditionally responsible for injecting public sentiment and raising public awareness of problems within the trial. The press, with its critical approach to law and with its willingness to confront court actors, now took this role for itself. Furthermore, the publications suggest the jury was susceptible to the influences of persuasive barristers, while the press claimed to be beyond the reach of this type of emotional appeal. This is clearly expressed in Professor Plodder's 1845 article "The Anatomy of a Barrister's Tongue":

...The Suggestor Falsi muscle; by means of which he could insinuate a fallacy when necessary, into the minds of jurymen.

¹⁴⁷ Duncan Kennedy, at 1050-1052.

¹⁴⁸ William Thackeray, "War between the Bar and the Press: Mr. Punch to the Gentlemen of the Press" *Punch* 9 (1845): 128, reproduced in Schramm, 296.

...The Patheticus Linguae, or pathetic muscle of the tongue; used in making clap-trap appeals to British juries.¹⁴⁹

The political commentary of the press is emphasised by authors such as Walter Scott, Melville and Charles Dickens (in particular) who engaged in political debate through open letters to Parliament or Judges printed in the free press.¹⁵⁰ Often public debates between those in the justice system and public intellectuals would occur through several issues of a newspaper. For example, Charles Dickens responded to the 1840's Courvoisier trial. Despite Courvoisier's admissions of guilt, his counsel, Charles Phillips continued to attack the police for planting evidence and maintained the line of defence he would have provided had his client claimed innocence. The performance of the defence throughout the trial outraged Dickens, who wrote in *The Morning Chronicle*,

...the impression made upon me (and if it be made upon me, I have a right to assume it is made on many other practical men also), by the perusal of these proceedings, is – firstly, that I would never stretch out my hand to arrest a murderer, with these pains and penalties before me; and secondly, that no earthly consideration should induce me to permit my wife or daughter to give evidence at the Old Bailey, if any effort of mine could shield her from such a trial.¹⁵¹

This shows that the press felt that it was no longer the obligation of the jury to respond to these concerns in the court – or worse, that it was unable to do so – and that the press had picked up the gauntlet. This co-opting of the jury's role in expressing and vocalising criticism was supported by conflict within the courtroom.

Martin Wiener's work focuses on the conflict between judges and jurors in nineteenth century homicide trials over legal terms such as 'provocation', 'intention' and

¹⁴⁹ Professor Plodder, "The Anatomy of a Barrister's Tongue" *Punch* 9 (1845): 238 reproduced in Schramm, *The Anatomy*, 288-299.

¹⁵⁰ Schramm, 106.

¹⁵¹ Scchramm, 115-116.

‘insanity’.¹⁵² He argues that juries tended to weaken the judge’s position by challenging evidentiary rules and the legal instructions that judges gave to juries.¹⁵³ Part of the judges’ response to this was the increased use of their power to sum up the law and the facts of a case. As mentioned, summation of a case could obscure language to confuse a jury. Additionally, it also could be used to destroy a defence attorney’s arguments. Lord Russell of Killowen wrote of one case where the judge had summed up forcefully “in a few telling sentences he demolishes the flimsy case for the prisoner, which [defence counsel] has striven so hard to set up.”¹⁵⁴

While differences between judges and juries rarely revolved around the finding of guilt, juries continually called for mercy and for light sentences that judges refused to respect. The jury also attempted to expand the defences of provocation, lack of intent to kill and insanity, while judges gradually grew less sympathetic to any justification or excuse for violence.¹⁵⁵ The antagonism was sometimes so great that statements from some trials were from the jury alone, unsupported by the judge and “sometimes even in direct opposition to judicial summations and directions.”¹⁵⁶ This courtroom battle spilled into the popular consciousness and helped to evoke more popular criticism of the jury.

One of the most publicised forms of murder identified by Wiener was the act of spousal homicide. He ties this with Victorian values which had a “[r]ising legal intolerance of violence [that was] particularly opposed to that perpetrated against those not able to defend themselves – women, children, or the elderly – and to that taking place

¹⁵² Wiener, 467.

¹⁵³ Wiener, 474.

¹⁵⁴ Chares Russell, *Briefs and Papers: Sketches of the Bar and the Press by Two Idle Apprentices*, in Wiener, 475.

¹⁵⁵ Wiener, 467-506.

¹⁵⁶ *Ibid*, 480.

in previously unpoliced areas.”¹⁵⁷ There are many examples of how judicial intolerance of violence was approved by the press and conversely, of how the jury’s continuing sympathy towards those convicted of violence crimes was met with criticism. Weiner provides his own example of the popular press’s opposition to the leniency of the jury. He documents the comments made in a provincial newspaper in reference to a jury’s recommendation of mercy for a man who had killed his wife after she had struck him.

It is necessary that helpless women should be preserved, as far as the law can preserve them, from the sudden fury of passionate husbands; and the provocation involved in the administration of a ‘smack’, in retaliation for being forcibly dragged from the street into the house, is no excuse or even palliation for so ruthless a murder.¹⁵⁸

Other writers were more directly concerned with the leniency of juries toward those who caused violence against their wives. Dickens wrote, “the fact of a woman being the lawful wife of a man, appears to impress certain preposterous juries with some notion of a kind of right in the man to maltreat her brutally, even when this causes her death.”¹⁵⁹ In another case, Tomas Edwards, a butcher, stabbed a prostitute with whom he had been living to death. The jury argued that mercy should be granted on grounds of provocation due to their intimacy. The judge, who berated the jury, was commended by *The Times* while the jury was criticised for failing to recognise the importance of a strong sentence against such a violent person.¹⁶⁰

In addition to popular intolerance of violence, the temperance movement also created antagonism towards the jury in the popular press. Judges in the nineteenth century were increasingly less willing to permit the defence of drunkenness to negate intent. *The*

¹⁵⁷ *Ibid*, 477.

¹⁵⁸ *Newcastle Daily Journal*, reproduced in Weiner, 489.

¹⁵⁹ Charles Dickens, “Cain in the Fields”, *Household Words*, (10 May 1851) in Wiener, 478.

¹⁶⁰ *The Times*, (18 December 1862). reproduced in Wiener, 489.

Times published Mr. Justice Mellor as saying, “to have one law for drunken or angry and another for sober or quiet people would be subversive of all justice and order in this country.”¹⁶¹ This hard-line approach by judges contrasted with the jury, who seemed less willing to support the stronger sentencing advocated by the popular press.¹⁶²

CONCLUSION

We believe...that the vitality of trial by jury is thoroughly exhausted; that it is ripe for destruction; and that when it has been destroyed, men will marvel, as they have done in regard to many other worn-out institutions, that they should so long have thought the welfare of the state depended on a thing so utterly without force¹⁶³

While this 1865 statement now looks like hyperbole, it symbolises the strong attitudes that developed in the nineteenth century against trial by jury. It identifies how public and state fears with criminal identity and anonymity reduced demands for juries and highlighted their inability to provide knowledge of the accused to the court. Utilitarian thought and concern for rational, efficient and predictable decisions subverted traditional progressive support for the jury as a democratic element in the administration of justice. Concerns with a biased bench were less important than the fear that juries could be manipulated and boxed out by a growing cadre of professional lawyers. The police now took on the role of ‘fact-checker’ and further made juries redundant. Finally, the quote reminds readers how juries were no longer needed to protect accused from malicious prosecutions or severe punishments of a paranoid or bloodthirsty state. This complex array of factors helped to facilitate the legislative reforms that acted to reduce the role of the jury – primarily the shift to indictable/summary offence distinction and the

¹⁶¹ “*R v. Atkinson*”, *The Times*, (6 March 1865).

¹⁶² Berridge, 98.

¹⁶³ Editorial, *The Jurist*, vol. 13, (11 August 1849), 294.

procedures associated with the new offences. We now turn to see how these factors changed not only England, but nineteenth century Canada.

- CHAPTER 2: ENGLISH FACTORS FOR REFORM IN CANADA -

Given the influence English legislation had over Canadian changes in criminal law and procedure, it is reasonable to assume that Canadian reductions in jury trials were influenced by the reduced role of juries in England. This is certainly the case with criminal procedure for offences that were based directly on English legislation. If Canada's jury reduction was more than an uncritical adoption of English reform, was this due to the presence of the factors surveyed in the previous chapter in the Canadian context? This chapter considers the factors identified in the previous chapter as giving rise to English changes namely, the press, the police, the bench, the bar, and the urbanisation of society and whether those English factors were relevant to nineteenth century Canada.

CRIMINAL LAW REFORM AND THE PRESS

In England, criminal trials were regularly the subject of public interest and knowledge, covered in newspapers read by a growing literate public. Consequentially, the cost to the state in making martyrs out of political enemies by subjecting them to criminal trials could be enormous. Literary figures such as Charles Dickens commented on the state of the justice system as well as specific trials. Under such scrutiny, the state or a judge faced criticism for the initiation or proceedings of trials. By enabling expanding numbers of people to respond to actions of the state, the press facilitated a degree of public control over state action.¹⁶⁴ It was no longer necessary for a jury to be in the courtroom to ensure public debate and democratic input. Instead, the press became a public watchdog and opened the courtroom to the community. Criticism of the conduct of

¹⁶⁴ Habermas, 13-41.

court officers and of the jury itself created a great impetus for justice – public accountability and credibility.

The press in British North America was not uncritical of state power either. Illustrations of this are found in Upper Canada and Ontario. The growth of a popular public sphere and the press there has been examined by McNairn. His findings provide insight into whether the press was capable of assuming functions of the jury. “From the 1820s [colonial newspapers’] nature, number, distribution and regular report of parliamentary intelligence reflected their centrality to the emergent public sphere.”¹⁶⁵ By 1840, thirty-nine communities in Upper Canada alone supported at least one local newspaper and from the 1820s politics preoccupied most newspapers.¹⁶⁶ While papers like the *Patriot*, argued strongly in favour of the government, others were critical. William Lyon Mackenzie used his newspaper, *The Colonial Advocate*, to both criticise and get elected to the assembly of Upper Canada. His paper criticised the government of Governor Bond Head and published the Toronto Declaration of 1837 – declaring an independent state.¹⁶⁷ As McNairn comments in detail, opposition newspapers existed before Mackenzie’s famous paper. For example, the *Upper Canadian Guardian* was prosecuted in 1808 for opposition to the government.¹⁶⁸ Also, the *Niagara Spectator* published the controversial ideas of Robert Gourlay who proposed meetings and conventions to raise grievances against the government. One address by Gourlay published in the *Spectator* denounced the government and openly called for a general

¹⁶⁵ McNairn, 116.

¹⁶⁶ *Ibid*, 120; 135.

¹⁶⁷ Susan E Houston, “Politics, Schools and Social Change in Upper Canada” in *Canadian Historical Review*, 1972. Volume 53, Number 3. 249 – 271.

¹⁶⁸ McNairn, 135.

commission of inquiry into its actions.¹⁶⁹ Another example of early 19th century press resistance to the state was the writing of Francis Collins. This journalist was a critic of the administration of justice in Upper Canada and criticised the influence sheriffs had over the selection of jurors for jury trials.¹⁷⁰

Newspapers like Mackenzie's advocated liberal reform within the British system rather than revolutionary change. Most papers advocating radical reform foundered within a few years.¹⁷¹ These instances of press criticism of the government and judicial administration occurred in the context of re-settlement following the American Revolution. Some Loyalist settlers understood British law in the light of their American experiences and were supporters of progressive British and Irish Whig reform, which encouraged the press to be critical of the state.¹⁷² Migrants from Ireland after the 1798 Rebellion also encouraged critique of colonial departures from the British Constitution. The War of 1812 and demographic changes reduced criticism of British institutions but did not curb mounting criticism of the colonial administration of justice. In 1812, 60 percent of Upper Canadians were from the United States and the United Empire Loyalist made up another 20 percent. By the 1850s, the population was ten times larger due to three waves of British immigration and Irish famine migration.¹⁷³ The war of 1812 and American invasions in 1838 and 1866, reinforced loyalist tendencies of English Canadian

¹⁶⁹ Barry Wright, "The Gourlay Affair: Seditious Libel and the Sedition Act in Upper Canada, 1818-19" in Greenwood, *Canadian State Trials*, 487-504.

¹⁷⁰ Paul Romney, "Upper Canada in the 1820s: Criminal Prosecutions and the Case of Francis Collins" in Greenwood, *Canadian State Trials*, 505-521.

¹⁷¹ WS Wallace, "The Periodical Literature of Upper Canada" *Canadian Historical Review*. (University of Toronto Press: Toronto, 1931). Volume 12, Number 1. 4-22.

¹⁷² Greenwood, *Canadian State Trials*, 37-39.

¹⁷³ McNairn, 18.

political elites, an outlook that had broad popular support so long as Canadian institutions were capable of change and response to public concerns.¹⁷⁴

If McNairn's findings can be extended to the rest of Canada, there was wide readership and a thriving independent press by the mid-nineteenth century. However, issues of criminal justice received substantially less attention than in England.¹⁷⁵ There was very little reporting of proceedings in particular and only limited reporting of crime in general. Press coverage of trials provided public oversight of criminal proceedings in England. Juries were no longer as essential to ensuring the fairness of court proceedings. As Weiner indicated, judges themselves were sometimes swayed by the presence of the press out of a concern to maintain a positive public image.¹⁷⁶ Canadian newspapers did not provide the same coverage or exercise such influence over criminal trials.

The lack of crime reporting was partly due to the fact that crime was not a serious problem, at least not in Upper Canada. J.M. Beattie cites the editor of the *Toronto Star Transcript and General Advertiser* (26 October 1844) who reflected on how much safer Upper Canada was than England. He also cites a judge who, in 1850, claimed that burglary was a virtually unknown offence in the Province of Canada.¹⁷⁷ Beattie suggests that this led to reporting on principled responses to crime, rather than crime itself. Crime articles in Upper Canadian newspapers focused on greater social harmony and root causes of crime such as "idleness", "drinking", "innate corruption", and "lack of education".¹⁷⁸

¹⁷⁴ Houston, 251.

¹⁷⁵ There were exceptions to this such as Francis Collin's *Canadian Freeman* and Hugh Thomson's *Upper Canada Herald* and problems of the administration of justice see McNairn, 139; Romney, 505-521.

¹⁷⁶ Wiener, 468.

¹⁷⁷ J.M. Beattie, *Attitudes Towards Crime and Punishment in Upper Canada, 1830-1850: A Documentary Study* (Toronto: Centre of Criminology, University of Toronto, 1977), 1-2.

¹⁷⁸ *Ibid*, 5-9.

McNairn's findings for Upper Canada in the mid-nineteenth century are reflected in a survey of *The Globe* on criminal law content below. Drawing on the concepts of public sphere described by Habermas, McNairn describes the importance of the press in creating both an outlet for public expression and thought and for the sharing of ideas – often times critical of the government.¹⁷⁹ McNairn's work shows that newspapers were a key to the development of public thoughts and opinions that ultimately shaped the rule of the colony.¹⁸⁰ The press focused on the type of government and the actions of its ministers and agents. By contrast, the influence of the press on jury reform in England was not in editorial comment but in reporting of particular trials. The investigation of criminal proceedings provided a basis for criticism of juries and oversight of judges.

McNairn shows that personal experience and direct confrontation with government created powerful messages within the Canadian press.¹⁸¹ The press was not the diligent reporter of everyday actions, but the cradle of public intellectual discussion and the platform for public outrage.¹⁸² Beattie's work notes that crime was addressed in a philosophical manner, rather than in reporting of actual crimes or criminal proceedings. McNairn points to the importance of the press in public debate and advancement of large philosophical discussion on the nature of government. These two books confirm that, while the press wielded great power for reform, it was not directed towards the specific but towards a broader discussion of how society should proceed and address its problems.

Paul Craven's work on the Toronto Police Court, explored later, supports this finding. He points out that the creation of police courts was partly due to public and

¹⁷⁹ McNairn, 118-140.

¹⁸⁰ *Ibid.* 184-210.

¹⁸¹ *Ibid.* 116-120.

¹⁸² *Ibid.* 3-5.

political pressure to reduce the costs caused by the poor's "overuse" of criminal courts in urban areas. His work points out that subsequent newspaper reporting of summary proceedings was designed to appeal to readers as human interest stories and to satisfy voyeuristic needs, rather than to provide critical reporting of trial processes.¹⁸³ Thus, while there was potential for press-led oversight and reform, there was not sustained interest.

English newspapers reported on criminal proceedings and were often critical of jury decisions, helping to create public antipathy to the institution as well as to guard against abuse and partial decisions. The work of Beattie and Craven suggests that the press in Upper Canada was not largely engaged in serving these functions. Juries were still essential for public surveillance of proceedings. By delivering a verdict according to conscience they could hold the courtroom accountable to the public. The lack of reporting in Upper Canada also suggests that the decisions of juries were not provoking the same levels of public outrage or distain directed towards the decisions by juries in England.

An examination of the Upper Canada/Ontario newspaper *The Globe* confirms Beattie's observations about the focus of the press. This study is limited as both Beattie's work and this research focuses entirely on Upper Canada. One cannot assume that the situation was the same in the rest of British North America. However, Upper Canada is a useful example for several reasons. First, Ontario became the home of the capital of the Dominion, putting the press in a strong position to influence federal government. Second, Ontario was the largest province at Confederation and therefore the largest single

¹⁸³ Paul Craven, "Law and ideology: the Toronto Police Court, 1850-80," in D.H. Flaherty, ed., *Essays in the History of Canadian Law II*, (Toronto: University of Toronto Press, 1983), 287-230.

provincial area on which to concentrate.¹⁸⁴ Third, Canada's first Prime Minister began his private and political careers in Upper Canada (Kingston). His impressions of the press and its relationship to criminal law were likely informed by the Upper Canadian context.

Further, the applicability of Upper Canadian studies to the rest of the country is supported by R.C. Macleod and Heather Rollason. Between 1877 and 1885, the North West Territories had four newspapers: the *Edmonton Bulletin*, the *Calgary Herald*, the *Saskatchewan Herald* and the *Ft. Macleod Gazette*. Macleod and Rollason characterise this as an active and independent press and note that all four of these papers reported on every sitting of criminal courts between these years. However, like Upper Canada, the human interest side of crime received far greater attention than the proceedings. General interest articles ran from one paragraph to several pages, while mention of cases and proceedings generally ran only two to four lines of print.¹⁸⁵ Here as well, critical review of trials was absent in the press.

The *Globe* was founded in Toronto in 1844 and continues to this day as *The Globe and Mail* following its merger with the *Mail and Empire* in 1936. In 1853, it was a daily paper with a readership of 6,000. A sample of 192 articles assembled for this research, identified using the search terms "criminal" and "trial," provides a selection of criminal trial reports. The first range used corresponds to the beginning of the newspaper, 1844-1859. The second range is from 1889-1891 and immediately precedes the enactment of the first Criminal Code. The research suggests that where crime was

¹⁸⁴ In 1871, more than 1.6 million of Canada's roughly 3.7 million residents were in Ontario, see Statistics Canada, "Censuses of Population, 1851 – 2001", online: www40.statcan.ca/101/cst01/demo62a.htm (10 June 2008).

¹⁸⁵ R.C. Macleod and Heather Rollason, "'Restrain the Lawless Savages': Native Defendants in the Criminal Courts of the North West Territories, 1878-1885" in *Journal of Historical Sociology*, Vol. 10, No. 2 (1997), 157-183 at 162-163.

reported, it was the crime itself, not the trial, which was the primary subject of interest in the surveyed articles.

The articles were categorised by five variables relevant to juries. If the story was foreign, it was marked as it was irrelevant to the supervision of Canadian courts by the press. If the story was about a specific crime or having to do with criminal justice in general, it was noted. If the story was about or included court proceedings it was marked as it potentially provided an example of press supervision and criticism of the courts. If the story devoted more than a column of print to these proceedings, then it was important because it really did provide such an example.

As the table indicates, very little *Globe* coverage was devoted to trial proceedings. *The Globe* tended to emphasise more administrative or legislative matters with respect to crime – supporting Beattie’s findings. When the paper did deal with actual criminal events, it generally focused on the circumstances surrounding the crime itself, rather than the trial – supporting Craven’s study. At best, only fifty percent of crime-related coverage actually addressed a specific crime; of those, less than half addressed issues in the trial; and of those that discussed the trial, less than one-third did so in detail. Thus, poor or biased decision-making from the bench could go unreported by the press and juries were still needed to perform a watchdog function. Additionally, juries went largely un-criticised and there was not the same impetus to eliminate trial by jury as in England.

Coverage of Crime and Criminal Trials in *The Globe*: 1844-59, 1889-91¹⁸⁶

¹⁸⁶ Search of all instances where “criminal” and “trial” appeared on the same page, online: *The Globe and Mail: Canada’s Heritage from 1844*

Years of Publication (Total Instances)	Foreign Content	Domestic Content	Reporting of Actual Crime	Reporting of Trial Proceedings	In-Depth Reporting of Proceedings**
1844-1859 (85)	3.53percent (3)	96.47percent (82)	22.35percent (19)	10.59percent (9)	3.53percent (3)
1889-1891 (107)	17.76percent (19)	82.24percent (88)	50.48percent (54)	17.76percent (19)	5.61percent (6)

The weakness of the Canadian press was not limited to democratic oversight of judges. Despite a large number of articles in *The Globe* on Parliamentary proceedings, the discussion of Canada's first criminal codification was surprisingly terse. The reporting of the bill in *The Globe* read as follows:

The Criminal law bill introduced by the Minister of Justice will not, we believe, become law this session.... should it become law, reference to it will obviate the necessity of search through thousands of pages of statutes. That ignorance of the law is no excuse is an old principle... it is obvious that this role is more in accordance with reason and justice when the law is to be found in a compact and orderly code than when it may lurk in some forgotten statute or decision of a court. The law of bills and notes was codified two years ago and the more work of this kind is done the better for the legal profession and for the public. Some amendments will probably be made in the criminal law before the code comes into affect...¹⁸⁷

The press did not discuss the reduced availability of trial by jury proposed in the code, nor the abrogation of the power of judges to use (or manipulate) common law to define or limit an offence. Desmond Brown also highlights the limited press devoted to codification. He writes of the reporting of the debates surrounding the bill the following year: "From their coverage it is obvious that parliamentary correspondents were bored to tears by the proceedings in committee and they conveyed their ennui to their readers.

<http://heritage.theglobeandmail.com.proxy.library.carleton.ca/default.asp?sessionID=526124741> (June 2008).

¹⁸⁷ "Notes and Comments" *The Globe* (31 July 1891), 4, col 4-5.

Several ignored the debates entirely...”¹⁸⁸ He cites three papers which ranged from ignoring the debate entirely to reporting that “A few groups are trading funny stories in voices that drown the feeble tones in which Sir John Thompson addresses the House.”¹⁸⁹

The lack of critical reporting of political crimes was perhaps related to a history of repression of the press in early nineteenth century British North America. There were over thirty seditious prosecutions in Upper Canada between 1794 and 1829 and even more summary deportations under the Sedition Act. In Nova Scotia, there were two seditious libel proceedings, one of which resulted in William Wilkie’s 1820 conviction of seditious libel for his attack on civil authorities in the *Acadian Recorder*. In Prince Edward Island, a private prosecution was carried out for the reprinting of a petition for the recall of the Lieutenant Governor in the *Prince Edward Island Register* even though it was without editorial comment.¹⁹⁰

Attorney Generals in Upper Canada attempted to subdue opposition journalists by instituting libel proceedings against them. One such proceeding was brought against Francis Collins, who received the incredibly harsh sentence of one year imprisonment, with a fine of 50 pounds. Upon completion of this sentence, Collins had to provide personal bail of 400 pounds and two sureties totalling 200 pounds for three years, or he would face imprisonment.¹⁹¹ Truth of the printed words was no defence; the impact of those words on society was the basis for conviction.¹⁹² Ferguson, who was the editor of the *Niagara Spectator*, was found guilty of sedition for his publication of Gourlay’s

¹⁸⁸ Brown, *The Genesis*, 141.

¹⁸⁹ *Ibid.*

¹⁹⁰ J.M. Bumsted, “Liberty of the Press in Early Prince Edward Island, 1823-9” in Greenwood, *Canadian State Trials*, 522-542.

¹⁹¹ Romney, 514-515

¹⁹² *Ibid.*, 515-518.

criticisms in 1819. His sentence was “imprisonment, the pillory and fines which proved ruinous for his newspaper”.¹⁹³ There were also extra-legal consequences for perceived anti-loyalist sentiment. Anonymous mobs were employed in Newfoundland and Upper Canada to influence the press. In Newfoundland, Henry Winton lost his ears to such a mob in 1835 for his writing in the *Public Leger and Newfoundland General Advertiser*.¹⁹⁴

The poor reporting of criminal trial proceedings and criminal law reforms – including those which threatened the jury – suggest that there was still a need for the jury in Canada. Canada’s press was not like England’s. It was not so critically concerned with judges and their decisions. This meant that court actors were free from the public scrutiny that the press facilitated in England, a situation in which juries still provided an important check on the judge’s power over his courtroom. Furthermore, neither the primary research on *The Globe*, nor Craven or Beattie’s work revealed criticism of the jury as was found in England. The press at the seat of the British Empire condemned poor jury decisions and their leniency towards behaviour that was no longer socially tolerated. Popular support for the reduction of jury trials in England was likely enhanced by this reporting. In the absence of reporting on jury actions, there seemed to be little reason for the public to abandon juries or for reformers to call for change, regardless of whether or not juries were making good decisions in Upper Canada.

However, while the press did not do a good job of reporting criminal proceedings, it occasionally highlighted a poor decision made by a jury. A letter to the editor of *The Toronto Globe* from a law student in 1847 complained of the unpredictable nature of

¹⁹³ Wright, 494-495.

¹⁹⁴ Bumsted, 525.

juries given their personal knowledge of the facts.¹⁹⁵ Reporting on an 1858 trial, a journalist observed how easily distracted one particular jury was, despite the importance of the trial and the tension in the courtroom.¹⁹⁶ Another *Globe* article directly ridiculed two juries for their verdicts,¹⁹⁷ while a later article merely questioned the jury's interpretation of evidence and whether it had understood the importance of that evidence.¹⁹⁸ These examples suggest there may have been some limited support for reducing trial by jury.

The sentiment towards eliminating juries was stronger in the professional journals. The *Canada Law Journal*, discussed in greater depth in the next chapter, was highly critical of the jury. Although this publication was not indicative of popular values, it was representative of professional attitudes – being the first and only law periodical at Confederation. The influence of British utilitarian reform ideas favouring efficiency and objectivity influenced both practitioners and law-makers as is later shown through Senator Gowan's petitioning of Parliament.

PROFESSIONAL POLICING

The development of a professional police force created greater certainty in the law, provided a means of state surveillance and furnished a source of sophisticated evidence that ultimately reduced the need for jury trials. As mentioned earlier, by 1835 all English cities had professional police forces.¹⁹⁹ Prior to their creation, the English state was quick to prosecute those at public meetings to ensure that there was no threat to political stability. Juries historically served to counter these over-reaching prosecutions

¹⁹⁵ A Student, "Letter to From a Student" *The Globe* (17 April 1847), 3.

¹⁹⁶ "The Townsend Trial" *The Globe* (6 April 1858), 3.

¹⁹⁷ "Justice at a Discount" *The Globe* (1 March 1856), 2.

¹⁹⁸ "Owen E. Murphy's Evidence" *The Globe* (27 June 1891), 5.

¹⁹⁹ Lemmings, 58.

by acquitting prisoners like those involved in the famous Quaker trials of the late seventeenth century.²⁰⁰ The creation of modern police forces allowed the state to better monitor its subjects and to prosecute perceived enemies with easily established offences in summary courts. The few felony offences that were brought before juries would be brought forward on well established facts.²⁰¹ Indeed, there were very few sedition prosecutions in British North America after the 1830s.²⁰² With the state's paranoia over dissidence subsiding, the jury was no longer required to stand between a citizen/subject and a rapacious state. Furthermore, the police in England were able to reduce the importance of juries in their capacity to weigh evidence. Professional policing and new technology increased the quality of evidence before the courts and reduced reliance on juries' subjective insights into identification and character assessment.

Significant work has been done on the police in nineteenth century Canada.²⁰³ For the purposes of this thesis, it is necessary only to make a few basic points with reference to juries. First, rural Canadian police forces were poorly supervised and lacked formal training and an independent bureaucratic-institutional structure. The enabling legislation, passed in 1867, permitted the government to appoint Commissioners of Police within any provincial district. There was no further oversight and commissioners were to be paid out of the fines they were to collect.²⁰⁴ Clearly, a commissioner whose pay was partially determined by the amount of fines collected would be partial to abuse. This suggests that

²⁰⁰ Levy, 61-67.

²⁰¹ Stephen, 357-360, 364.

²⁰² See Greenwood and Wright

²⁰³ For example, see Greg Marquis, "The 'Irish Model' and Nineteenth-Century Canadian Policing," *Journal of Imperial & Commonwealth History* Vol. 25, No. 2 (1997): 193-218; Hereward Senior, *Constabulary: The Rise of Police Institutions in Britain, the Commonwealth and the United States* (Toronto: Dundurn Press, 1997); and Allan Greer, "The Birth of the Police in Canada," in *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada*, ed. Allan Greer and Ian Radforth (Toronto: University of Toronto Press, 1992), 17-49.

²⁰⁴ *An Act respecting Police of Canada*, S.C. 1867 c. 73, ss.1-7.

juries could be important to keep police in check and to hold them accountable when bringing an accused to justice.

Second, frontier police often acted as agents of political power. Graybill argues that the North-West Mounted Police were preoccupied subjugating indigenous groups, denying those groups access to areas, holding lands and resources for syndicates and strike-breaking at Alberta coal mines.²⁰⁵ Historians like Graybill suggest that the NWMP were agents of Ottawa's attempt to assert more effective sovereignty in the North West and pacify the frontier in order to facilitate Ottawa's economic development priorities.

Third, police forces introduced summary proceedings without jury trials. The next chapter shows that Police Courts in Toronto, and the North West Mounted Police in the Territories, brought summary proceedings to the different regions. This highlights the importance of the police in implementing the reduction of trial by jury before the reforms of the 1892 Criminal Code.

Juries were not rendered unnecessary because of police surveillance but because of the limitations of criminal justice resources and frontier conditions. Yet, the jury in Canada continued to have an important role in supervising the actions of police forces, especially given the developing public sphere in nineteenth century Canada. It should be noted, however, that both in England and Canada, police were engaged in evidence-gathering, which limited the importance of juries in their capacity to provide subjective opinions on witnesses and accused. This made the grand jury partially redundant, as its powers of investigation and information-gathering were only activated on request. A power that was outgunned by the police services, which were continuously active.

²⁰⁵ Andrew R Graybill, *Policing the Great Plains: Rangers, Mounties and the North American Frontier, 1875-1910* (Lincoln: University of Nebraska Press, 2007), 23-48.

Furthermore, the credibility of evidence was heightened because it utilised a growing number of professional investigative techniques – a change that would further embarrass the grand jury’s comparatively humble abilities, and that would reduce the importance of the trial jury in accepting evidence as relevant.

THE GROWTH OF THE BAR

As did changes to the police force in England, the rising quality and number of lawyers decreased the need for trial by jury in that country. The right to legal counsel and the increasing standards in practices elevated the importance of questions of law, unaddressed by juries which were relegated to facts. Dolin observes that “the bulk of substantive criminal law, the process of principled exposition and theoretical refinement, did not commence until after 1800; the same is true of the regular appearance of lawyers for both prosecution and defence – thereby enlarging the opportunities for conceptual discourse between opposing counsel.”²⁰⁶ By providing a defence for clients in legal doctrine, prisoners no longer had the same need for a sympathetic jury. Like England, the Canadian colonies quickly adopted similar statutes to the Prisoner’s Counsel Act, 1836 and the profession grew. However, most Canadian lawyers were not equal to their English counterparts and were less able to engage the court in questions of legal doctrine. This suggests that prisoners’ may still have had need for sympathetic juries to provide an impartial examination of the facts. This was due to poor education, lack of specialisation and the instance of lay persons as counsel.

Benjamin Russell, a Member of Parliament and puisne judge of the early twentieth century Nova Scotia Supreme Court, described the education system as very poor during his legal training. Articling was unrewarding due to the poor quality of the

²⁰⁶ Dolin, 3.

barristers. Russell suggested that a law student of 1918 would likely find bar exams of the mid-nineteenth trivial.²⁰⁷

The colonies of British North America shared similar strong qualifications for legal professionals in the mid-nineteenth century. It was the lack of legal textbooks that reduced the quality of lawyers, rather than regulations. The Law Library of Nova Scotia in Halifax had only 1,182 legal volumes in 1835. The New Brunswick Law Society held only 348 volumes in 1834. Upper Canada's Law Society had 380 that same year, but by 1842 had boosted their catalogue to 850 volumes.²⁰⁸ Prince Edward Island was in even worse shape. Peter Stewart, who served as the colony's only salaried judge from 1774 to 1799, lost all of his books at sea and therefore had to rely on Nova Scotian law.²⁰⁹

Lawyers also suffered from a lack of professional schooling. King's College, in Toronto, had lectures in law starting in 1843, while Queen's College in Kingston and Victoria College in Cobourg started offering courses a few years later.²¹⁰ Professional degrees took longer to develop. Dalhousie Law School was the first to offer a law degree in 1883.²¹¹ Osgoode Hall followed suit in 1889.²¹² There was still significant variation in the quality of education offered by the provinces thirty years after Confederation.²¹³

There was a corresponding lack of legal talent. Beamish Murdoch, a Nova Scotian barrister, noted that "One day [a lawyer] is pleading at the Chancery Bar, the next

²⁰⁷ Benjamin Russell, "Legal Education" *Proceedings of the Canadian Bar Association* vol. 3 (1918), 118-119.

²⁰⁸ Brown, *The Genesis*, 42, 50, 53.

²⁰⁹ J.M. Bumstead, "Peter Stewart", *Dictionary of Canadian Biography*, vol. 5 (Toronto: University of Toronto Press, 1983), 1801-1820.

²¹⁰ Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1791-1997* (Toronto: University of Toronto Press, 1997) 114-115.

²¹¹ John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979) 7, 20-1.

²¹² James M. Young, "The Faculty of Law" in *The University of Toronto and Its Colleges 1827-1906* (Toronto: University of Toronto Library 1906), 149-67.

²¹³ Newman W. Hoyles, "Legal Education in Canada" *Canadian Law Times* vol. 19, no. 1 (1899), 261-73.

probably at that of the Vice Admiralty, or before the Commissioner of Escheats. This is not all, for his practice also embraces Conveyancing and he even acts in the capacity of a Notary Public.”²¹⁴ Furthermore, lawyers did not have a monopoly over the practice of law in Canada. As late as 1881, unlicensed laymen in Ontario handled much of the real estate conveyancing, will drafting and lower-court advocacy in rural areas. This situation was not eliminated until the turn of the century.²¹⁵

Poor training of Canadian lawyers and the persistence of lay representation in Ontario meant that defences were unlikely to be the equivalent of English ones. Without a thorough understanding of legal doctrine, cases and lawyers likely relied more on facts. An impartial jury determining the facts may thus still have had importance for prisoners.

Despite this deficiency, there are two qualifications that should be made regarding the calibre of the Canadian legal profession. First, in 1857 the Province of Canada introduced the Crown attorney system – a Canadian innovation.²¹⁶ All prosecutions at the assizes were henceforth conducted by state salaried members of the bar. This system was expanded by the Canadian Criminal Code of 1892, which forbade grand juries and lay persons from conducting investigations and required that all bills of indictment be prepared by Crown attorneys.²¹⁷ However, this did little to undermine arguments for a jury. Christopher Moore notes “state power over prosecution became almost total.”²¹⁸ In England, publicly funded prosecutors were not in regular use until 1879, when Parliament created the office of the Director of Public Prosecutions.²¹⁹ Thus, while the English state

²¹⁴ Beamish Murdoch, *Epitome of the Laws of Nova Scotia*, vol. 1 (Halifax: Joseph Howe, 1832) 6.

²¹⁵ *Ibid.*, 147-149.

²¹⁶ *Crown Attorney Act 1857*, 20 Vict., c. 59 (Can.).

²¹⁷ Brown, *The Genesis*, 125.

²¹⁸ Moore, 108.

²¹⁹ George F. Cole and Andrew Sanders, “Criminal Prosecution in England: Evolution and Change” in *Connecticut Law Review*, Vol. 14 (1981), 23-40 at 28.

remained absent from regular prosecutions, the Canadian one held virtual monopoly over them. This suggests that prosecutors had an advantage in questions of law and that there was a continued need for the jury to provide an unbiased finding of fact.

Second, Canadian prisoners were entitled to a right to counsel. An act of 1836 based on England's *Prisoner's Counsel Act* guaranteed the right to defence counsel in all legal cases in Upper Canada.²²⁰ With the act of union, this extended to the Province of Canada. In Nova Scotia the right of counsel was granted in 1840.²²¹ By the time of codification, this right was part of Dominion criminal procedure.²²² The right to counsel was available to summary and indictable proceedings, as the *Speedy Trials Act* governing summary proceedings for certain felonies and misdemeanours permitted the use of "barristers-at-law" for use as counsel for prisoners electing to be tried under this act.²²³

Despite exceptions, nineteenth century Canadian lawyers were limited in their ability to protect accused through legal techniques such as cross-examination, interpretation of offences and other legal techniques. Lack of education, specialisation and monopoly of representation suggests that Canadian defence counsel were less capable of arguing the law than were the professional Crown attorneys. This situation had the potential to reduce the efficacy of a legal-based defence and maintained the need for juries to provide impartial decisions based upon the facts. It seems that there was need for juries in Canada to protect the interests and integrity of the accused.

THE CANADIAN BENCH

²²⁰ *Ibid.*, 107.

²²¹ Jim Phillips, "The Criminal Trial in Nova Scotia, 1749-1815" in *Essays in the History of Canadian Law: In Honour of R.C.B. Risk*, Jim Phillips and G. Blaine Baker eds. (Toronto, University of Toronto Press, 1999), 469-511 at 481.

²²² RSC 1886, c. 174, s. 81.

²²³ "The New Law for the More Speedy Trial of Persons Charged with Crime" in *Canada Law Journal*, Vol. V, N.S. (1869), 281-285 at 283.

Issues of professionalism plagued the Canadian bench as well as the bar. An 1889 letter from an Ontario barrister to his brother, a Member of Parliament, highlighted the problem of poor quality lower court appointments.

... I wish you would press upon [the Minister of Justice] the necessity of depriving Police and District Magistrates of the very large powers conferred upon them by the Speedy Trials Act. Can 176.

...[I]n every instance in this District [this position] has been confirmed upon men who have no previous legal training. Let me illustrate. Police Magistrate J. E. Mitchell in Pembroke, District Magistrate Doran of Nipissing, The District Magistrate McNaughton of Sudbury and Thompson at Port Arthur – not one of whom ever had any legal training whatever...

I am strongly of the opinion that such men... If Mr. Mowat will persist in appointing men like those I have named whose training for the station has been behind a counter selling newspapers and potions like Mitchell (who by the way still carries on his business) in a backwoods sawmill like Doran, on a farm like McNaughton or in a jewellers shop like Thompson: Then the Dominion Government should take away from these powers that should only be exercised by a person of the highest legal training...²²⁴

This letter is a damning criticism of lower court judges' qualifications. The *Speedy Trials Act*, discussed in the next chapter, allowed an accused person to be tried immediately by a local magistrate. This stripped the accused of many procedural benefits, including right to trial by jury in return for a shorter waiting time before trial and therefore less time in custody in a local jail. The consequence, of course, was that one would have to take one's chances with a judge like one of those mentioned above.

The historical lead up to Confederation also demonstrated a lack of independence of the Canadian bench. Senior colonial judges could serve on governing executive councils and routinely gave extra-judicial opinions before cases came to trial, calling into question a separation of powers that had been established in England. Additionally, pre-Confederation colonial judges but held their appointments according to royal pleasure.

²²⁴ R. White Attorney to Peter White MP *Police and District Magistrates* (21 February 1889), Ottawa, National Archives of Canada (RG 13, vol. 73, file 583).

Judicial tenure according to good behaviour as determined by British Parliament was part of the *Act of Settlement*, 1701 but was not adopted in Canada until the British North America Act, 1867.²²⁵ Without secure tenure, judges were at the mercy of the current government, which could hold a judge's salary and position ransom in return for a desired outcome. Juries could counter this influence and refuse to convict where they found interference or biased decision-making.

Without trial by jury, the importance of an independent bench is critical. This was recently recognised by the Supreme Court of Canada in the *Provincial Judges Reference*. Lamer C.J., for the majority, made reference to *The Constitution Act, 1867* and its guarantees of superior court judicial independence established in sections 96 through 100.²²⁶ The concepts of security of tenure, financial security and administrative control over the docket reflect the importance of elevating the bench beyond government and other outside influence. The constitutional guarantees provide that while courts of inherent jurisdiction are administered by the provinces, judges are selected and salaried by the federal government. Furthermore, salaries, pensions and tenures are fixed, judges can only be removed upon a joint resolution of both houses of Parliament and judges are selected from their respective provincial bar associations. The division of responsibility and the fixing of salaries and pensions limit the ability of government to extort a decision from a judge. The jury was a potential alternative to these guarantees of judicial independence. It could insure that the judge acted fairly and acquit an accused when it

²²⁵ McNairn, *The Capacity to Judge*, 117.

²²⁶ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3; 1997 CanLII 317 (S.C.C.).

perceived a bias. Indeed, in the first half of the nineteenth century juries in Upper Canada acquit many charged with sedition due to public disapproval with the prosecutions.²²⁷

Despite the importance of constitutional guarantees, post-Confederation judges did not have the same level of independence or professionalism that existed in England. Political patronage was facilitated through an unsupervised and secretive appointment processes and early tenure was granted to secure loyalty to the federal executive, rather than the provincial government. Further, lower court judges and magistrates were poorly trained for their important roles in the court system. Finally, judges could be antagonistic to public reporting on trial proceedings and could check the ability of the press to bring public pressure to bear on politically motivated decisions of the courts.

The power to appoint judges was set out in the *British North America Act, 1867* now renamed the *Constitution Act, 1867*.²²⁸ The constitution gave the Governor General (federal position) the power to appoint judges to all courts of inherent jurisdiction, while Lieutenant Governors (provincial positions) were able to create lower courts and appoint judges to them. The selection process for judges remained shrouded in secrecy into the last quarter of the twentieth century. The first public disclosure of the appointment process was not until 1976. Judges could be appointed purely on discretion and there was no oversight to appointments by the Minister of Justice of Canada.²²⁹ Furthermore, while the *British North America Act* created security of tenure under s. 96, the clause was not so much a victory for those wanting an independent judiciary, as it was for the Dominion Government. The inclusion of this clause allowed federal, rather than provincial, government to influence judges. This argument is supported by the large number of early

²²⁷ See Greenwood, *Canadian State Trials*

²²⁸ *The Constitution Act, 1867* 30 & 31 Vict., c. 3, ss. 96-101, s. 92(4), s. 92(14). (U.K.).

²²⁹ Gerald Gall, *The Canadian Legal System*, 5th edition (Toronto: Thomson Carswell, 2004), 340-344.

constitutional cases heard by the Supreme Court of Canada that found subjects to be under federal rather than provincial authority.²³⁰ A jury was, thus, important for ensuring that government priorities did not encroach on individual rights in court.

In addition to the questionable independence of the bench, judges in Canada were often unfriendly to the press. An example of such resistance is found in a *Globe* editorial that complained of a suit against one of its reporters who was successfully sued for libel for his reporting of a criminal trial.²³¹ The writer reported that a Col. Prince was found “drunk” by the court, whereas in fact he had only actually been “tipsy”. Willingness to find libel for such a frivolous distinction and requirement for literal transcription of court proceedings is one example of how judges limited the press – thereby necessitating a jury to provide democratic oversight to proceedings when the press shied away.

Lack of training and experience were critical problems in the lower courts of nineteenth century Canada. The poor quality of judges suggested a role for juries in overseeing their decisions. In addition, despite constitutional safeguards, the potential for political influence of judges was maintained through a secret appointment process. This potential for political interference suggested an ongoing need the jury to acquit those accused for political reasons. Finally, the ability of judges to censure the press undermined the ability of the press to publicise proceedings and reiterated the importance of the jury in its supervisor role *vis a vis* the judge.

CANADIAN DEMOGRAPHICS

²³⁰ JG Snell and F Vaughan, *The Supreme Court of Canada: History of the Institution*, (Toronto: University of Toronto Press, 1985); despite this pro-federal government stance, appeals to the Judicial Committee of the Privy Counsel almost uniformly overturned these decisions.

²³¹ “The Liberty of the Press” *The Globe* (30 July 1849), 2.

Urbanisation in England diminished the utility of the jury in identification. To this day, identification of the criminal as the accused is an essential part of a criminal trial. Historically the jury was better positioned than the state to know the character and identity of accused persons and witnesses. However, as submitted in the previous chapter, rising population created greater anonymity and juries were less capable of serving this traditional function. This eliminated one of the few state interests in the jury.

Nineteenth century Canada, although rapidly urbanising, was still largely rural. In 1891 (the year before the elimination of trial by jury for all summary offences) sixty-nine percent of Canada's 4,932,206 people lived in rural communities. The entire North West Territories was considered rural, while roughly three quarters of Manitobans were living in rural communities. Ten years later, sixty-three percent of the entire population was living in rural communities.²³² Despite an urbanising trend, almost two thirds of the population resided in rural areas at the turn of the twentieth century. This suggests that in most cases juries were able to play a role in identifying witnesses and accused persons.

However, the composition of juries qualifies their ability to perform the function of criminal identification and character assessment. In 1838, to be eligible for a Nova Scotian trial jury one needed to own a freehold estate with an income of forty shillings, or a personal estate worth one hundred pounds.²³³ This selection of jurors from privilege casts doubt on the jury's ability to serve the interests of the accused, rather than class interests. However, Nova Scotia does not define the pre-Confederation experience of jury qualifications. Upper Canada developed a much more flexible property requirement in

²³² Statistics Canada, "Censuses of Population, 1851 – 2001", online: <http://www40.statcan.ca/101/cst01/demo62a.htm> (10 June 2008).

²³³ R. Blake Brown, "Jury, Politics and the State in British North America: Reforms to Jury Systems in Nova Scotia and Upper Canada, 1825-1867" (Halifax: Dalhousie University, 2005), 127.

1850, one stipulating only that trial juries should be selected from the wealthiest three quarters of the city, town or village or township.²³⁴ Therefore, at least in Upper Canada, it is likely that jurors were capable of providing impartial oversight.

Additionally, immigration and population growth might seem to foster anonymity. However, social isolation is not physical isolation. While people may not have formed a social communities, rural people were likely to be aware of one another to a degree sufficient to provide identification. While greater anonymity as a result of urbanisation removed a central function of the English jury – identification, juries in late nineteenth century Canada were more likely to continue to identify and provide character assessments of suspects and witnesses due to the still largely rural base of the population.

CONCLUSION

The same factors that supported the reduction of trial by jury in England were not operative in the Canadian context. The Canadian press, when it reported crime, preferred to focus on crime stories, rather than judicial proceedings. Press coverage of legislative changes to criminal law was limited; the passing of the first criminal code drew very little attention. The press in Canada did not provide the same democratic oversight of criminal trials that the English press delivered in the motherland.

The Canadian police forces also failed to match their English counterparts. Rural police did not enable governments to watch their subjects and reduce their paranoia as in England. Nineteenth century Canada was not nearly as urbanised and while the English police model was adopted in cities, frontier policing was a means for westward expansion and immigrant assimilation. They were often unregulated and police commissioners in rural districts had personal financial incentives to fine persons for offences. Trial by jury

²³⁴ *Ibid*, 186-187.

was not made redundant. Juries were needed to check the abuse of authority in by rural police and to provide persons untutored in the law a fair trial as justice spread to parts of the country previously outside the scope of Canadian law.

The bar in Canada was less qualified than its English equivalent. A lack of legal texts and formal education in the mid- to late-nineteenth century impaired the ability of lawyers to provide a strong defence on questions of law. There were not enough lawyers to do the work in provinces like Ontario, where laypersons were often employed to do their work in rural areas. In the Maritime provinces, there was not enough pay and employment for lawyers to specialise in a particular field, requiring lawyers to perform all sorts of law. Without effective representation to contend with the professional Crown attorney system in questions of law, juries would be essential in guaranteeing a fair trial to an accused through control of the facts.

Magistrates in the police and local courts of the nineteenth century were also frequently poorly educated in the law. In addition, they and judges of superior courts were subject to political influence. Juries were still arguably useful therefore in insuring political interests did not direct trials. Finally, Canada remained a primarily rural society through the nineteenth century. Juries could still perform identification functions in Canada while English juries failed to do so due to the growing anonymity offered by large urban centres. Despite the deference to English initiatives, the factors that led to the reduction of criminal jury trials in England were not as pressing in nineteenth century Canada. Taken by itself, this suggests that Canadian legislation reducing trial by jury was an automatic, and unjustified adoption of English legal reform.

- CHAPTER 3: DOMESTIC FACTORS FOR REFORM -

The previous chapter highlighted the difference between England and Canada contexts and argued that the factors that gave rise to English jury reform were less prevalent in Canada. This suggests that the reduced availability of trial by jury may not have been appropriate for nineteenth century Canada and that it arguably entailed a removal of important safeguards from the judicial system (although Weber and Utilitarians saw institutions like the jury as biased and parochial interferences in the administration of regular justice). However, there were also factors compelling the reduction of jury trials in Canada, suggesting that Canadian reforms were directed towards Canadian needs, and were therefore a critical and reasoned use of English reforms.

Indeed, despite the differences between Canada and England, there were two reasons common to both countries for reducing trial by jury. First, both England and Canada dramatically reduced the number of capital offences. Upper Canada, Nova Scotia and New Brunswick all followed Peel's reforms in the reduction of capital offences. This reduced one of the important functions of the jury, that of mitigating the severity of the law through their power over verdicts and recommendations for mercy. Second, utilitarian thought, while less pronounced than in England, strongly influenced the writings of Judge Gowan and criticisms of the jury in Canada's professional law publication, the *Canada Law Journal*. This approach informed criticisms of the grand jury, but these criticisms were often applicable to trial juries and may have contributed to public and professional antipathy or resistance to the trial jury. As the first such publication in Canada, Gowan's journal certainly influenced public policy makers and

politicians concerned about law reform. Critically, utilitarianism also inspired codification and comprehensive criminal law reform. This support facilitated the wide-scale changes to criminal procedure.

Furthermore, Canada had other unique domestic conditions that reduced the justifications for maintaining trial by jury. The first of these was the geography and demography of Canada. Huge distances that juries could be required to travel Canada created costs that were reflected in early legislation. The distances represented significant costs to the state in terms of both time and money as trials could be delayed, prisoners were detained and transportation costs levied. In addition, there were the legal and democratic benefits brought by the unique Canadian experience of codification. Centralised federal jurisdiction, consolidation and modern legislative drafting made engaging in law reforms simpler than in England. These changes also reduced the power of judges to define an offence and made it easier for lawyers to argue questions of law. By defining law in statute, Parliament effectively abrogated the common law with regard to defining offences. No longer could judges modify definitions to fit circumstances before them. This codification also increased professional competence by increasing access and knowledge of the law. These developments reduced the need for juries to protect prisoners from judge bias and reduced the reliance of defence counsel on arguing matters of fact, further reducing the importance of juries.

CAPITAL PUNISHMENT & SUMMARY TRIALS

The humanitarian change to Canadian criminal punishment created toleration for a reduced number of jury trials. In both England and Canada, eighteenth century penalties

for criminal behaviour were severe and there were more than one hundred offences punishable by death in both England and her North American colonies.

As Green noted, British Parliament reduced the number of capital offences to eleven. The five colonies that first confederated and joined Confederation also dramatically reduced the number of offences for which capital punishment was the penalty during the first half of the nineteenth century. Nova Scotia had the fewest number of capital felonies. Only seven acts were punishable by a death sentence by 1841.²³⁵ Prince Edward Island had 12 such offences by 1836,²³⁶ New Brunswick had 10 capital offences in 1831;²³⁷ Upper Canada had 11 such offences by 1833.²³⁸

Lower Canada was slower to follow this trend in the criminal law. Change for Lower Canada came during the unification of Upper and Lower Canada in 1841 when the new Province of Canada adopted criminal law based on Peel's Acts.²³⁹ Upper Canada had received English law in 1792 but had adopted Peel's consolidations in 1833. This reduction of more than 200 capital offences to 11 was essentially the substance of the Province of Canada's new criminal law.²⁴⁰ Like the Province of Canada, the Dominion quickly passed criminal consolidations based on English reforms. The federal legislature passed legislation that adopted Greave's English criminal consolidations.²⁴¹ This further reduced capital offences and ended public executions.²⁴²

Under the Canadian Criminal Code of 1892, there were only five capital offences. The reduction in capital offences undercut one of the classic *raison d'être* for the jury.

²³⁵ 1841, 4 Vict., cc. 5, 6, 9 (NS).

²³⁶ 1829, 10 Geo. IV, c. 11 (PEI); 1836, 6 Will. IV, c. 22 (PEI).

²³⁷ 1829, 9 & 10 Geo. IV, c. 21 (NB); 1831, 1 Will. IV, cc. 4, 5 (NB).

²³⁸ 1833, 3 Will. IV, c. 3 (UC).

²³⁹ 1841, 4 & 5 Vict., cc. 25, 26, 27 (Can.); Brown *The Genesis*, 57.

²⁴⁰ Greenwood, *Canadian State Trials*, 18-21.

²⁴¹ Brown, *The Genesis*, 92-93.

²⁴² Brown, *The Genesis*, Appendix 2.

The reduction of capital offences in England meant that juries were no longer as important in mitigating the severity of the law in punishing more minor offences.²⁴³ Thus, like in England, Canada less often required a jury to nullify verdicts of guilty in order to protect the unfortunate from undue harshness of the law. Furthermore, juries in Canada maintained the power to resist unduly severe penalties despite the reduction of trial by jury. Legislation permitting prisoners to elect summary procedures, like the *Speedy Trials Act* and police courts, were not available for capital offences. Capital crimes maintained their own criminal procedures and were not affected by these developments.²⁴⁴ Thus, persons charged with a capital crime could not opt to be tried by a local magistrate as provided under the act. Trial by jury remained available as an option for all those charged with a capital crime.

The reductions in jury trials established by the first criminal code did not affect indictable offences. The reduction of jury trials was accomplished by standardising trial procedure for two categories of offences: summary offences and indictable offences.²⁴⁵ All summary offences were subsequently tried by a judge or justice of the peace sitting alone. Trial by jury was preserved for all indictable offences unless the Crown and accused agreed to forgo this mode of trial. Not only did this mean that the crimes with the most serious punishments, such as murder and rape, retained the right to trial by jury, but also the political crimes of treason and sedition gave prisoners the procedural right to a trial before a jury.

In limiting jury trial reductions to summary offences the jury retained its function as a form of public constraint on state abuse of politically motivated criminal charges.

²⁴³ TA Green, 356.

²⁴⁴ 1875, 38 Vict., cc. 45, 47 (Can.); Craven, 300.

²⁴⁵ *The Criminal Code*, 1892, S.C. 1892, Vol. 1-2, c. 29, ss. 65-73, 533.

The offences of treason and seditious libel are the two classic offences that a government can bring to bear on those opposed to government policy.²⁴⁶ Both of these offences were indictable offences – meaning that juries would always be available to a person charged with either of these offences thanks to the provisions of the Criminal Code.²⁴⁷ The fact that these political crimes remained untouched by jury reform is important for not overstating the impact of changes to Canada's jury. The jury was still available to thwart any attempts of the state to use criminal law to deal with dissent. This was also the case in England. There, libertarian Whigs argued that juries were essential to guard against state abuse of trials. However, crimes that evoked state interests, such as the political offences mentioned, still retained trial by jury. Smaller, public order offences that no longer had trial by jury were less useful for state control of dissent. Therefore, the elimination of jury trials for these offences did not offend this libertarian sentiment – either in Canada, or in England.

The reduction of capital offences and the preservation of jury trials for indictable offences reveal a reduced need for trial by jury in nineteenth century Canada. With less harsh penalties, juries were no longer critical to mitigating a brutal criminal system. Also, by confining the elimination of jury trials to summary offences, the state was still constrained by a jury for the political offences of treason and sedition, as well as for the more severe penalties attached to indictable offences. This limited reduction of the jury did not violate the libertarian Whig rationale for trial by jury and preserved the watchdog function of the jury over state use of criminal law for political ends.

UTILITARIANISM

²⁴⁶ Greenwood, *Canadian State Trials*, 27-31.

²⁴⁷ *The Criminal Code*, 1892, S.C. 1892, Vol. 1-2, c. 29, ss. 65-73, 126.

Utilitarianism was another English factor at play in the reduction of the jury that was also at work in Canada. Although utilitarian thought was less prevalent and persuasive in Canada than it was in England, Canada adopted the important utilitarian project of codification while England did not after the failure to enact James Fitzjames Stephen's draft code of 1880. Utilitarian thought may also have inspired reforms reducing the jury before 1892. What limited published criticism there was of the jury came from professional journals in Canada. Judge James Robert Gowan (1815-1909) was a strong advocate of utilitarian thought. He continually argued for codification of criminal law, the rationalisation of law and the elimination of various juries. He carried on great correspondence with Prime Minister Sir John A. Macdonald and Minister of Justice (and later Prime Minister) Sir John Thompson and was Macdonald's personal legal draftsman for more than three decades. In 1843, he became the youngest judge ever commissioned in British North America, at the age of 27, a position he held until 1883. He was then called to the Senate in 1885 where he continued to advocate for the adoption of a criminal code.²⁴⁸ He established the *Upper Canada Law Journal* (later named the *Canada Law Journal*). This was the most influential legal periodical in British North America. The *Canada Law Journal* paid close attention to English developments. It dismissed American legal innovations as unrealistic and while strongly advocating codification, it did so without great professional criticism of the common law.²⁴⁹ Gowan's utilitarian approach advocated in his journal drew on Bentham's concerns with making the law knowable and predictable. The unpredictability of trial by jury made punishment less certain and upset the utilitarian approach to crime control based on certainty of capture

²⁴⁸ Mark W. Fisher "Sir James Robert Gowan" *MA Thesis* (Fredericton, University of New Brunswick, 1971).

²⁴⁹ Parker, 235-5; Brown, *The Genesis*, 70.

and punishment. It was consequentially a target in the journal. Even an article favouring jury trials noted, “Bad management, irregularity and uncertainty have created dislike to the system...”²⁵⁰ A more critical article suggested that the jury existed due solely to its place in history, rather than out of any contemporary need.²⁵¹ Just as in England, utilitarian thinkers argued for the primacy of the legislature in creating ultimate law that could address all scenarios, rather than emphasising the subjective application and management of law by judges and juries. An 1873 article in the *Canada Law Journal* suggested that the elimination of all jury trials would be publicly possible and that at the very least, a reduction of jurors from 12 to 7 or 8 would be beneficial for reducing costs and indecision associated with juries.²⁵² Another article reflected utilitarian aspirations towards the elimination of juries stating: “modern enlightenment and the clamour for economy and speed in administration, if not the steady tide of human progress has opened to us sounder and better ways of dealing with legal procedure... the Benthamite idea of a single seated justice will supercede the jury.”²⁵³

These concerns contrast with Habermas’ ideas of public spaces and an exercise of collective reasoning. They do not cast the jury as a subject for public debate or as a public space where public values can be synthesised. Instead, these criticisms highlight Weberian notions of rationality, objectivity and certainty. Juries, when cast in this light, could be viewed as refusing to serve the desired ends of criminal law, instead using their subjective approach to make a certain law less knowable and only applicable to a specific set of facts. The objectives of formal legal rationality (goal-oriented laws, with

²⁵⁰ “An Essay On the Importance of he Preservation and Amendement of Trial by Jury” in *Upper Canada Law Journal*, Vol. III, N.S. (1867) 255-261; 283-288 at 286.

²⁵¹ “Trial By Jury On Its Trial” in *Upper Canada Law Journal*, Vol. IV, O.S. (1858).

²⁵² “Juries” *The Canada Law Journal*, Vol. IX (1873), 150-152.

²⁵³ “The New Law For the More Speedy Trial”, 281-282, *supra* note 223.

objectively-determined outcomes) were compelling to law reformers in the Canadian context as a way of reinforcing effective authority. In the wake of the rebellions, and the perceived security threats and challenges to the Dominion's sovereignty and development priorities in the North West, government needed to assert its control. In this context, juries frustrated Canada's goals of legal order. The subjectivity of juries could frustrate this goal, and policy-makers would thus complain about the irrational nature of the institution, rather than highlight its capacity to engage the public in the administration of the country.

REFORM OF THE GRAND JURY

It was not only the trial jury that was in question in nineteenth century Canada. There were strong attempts to reform and eliminate the grand jury system. As well as limiting trial by jury, the Criminal Code of 1892 significantly restricted the power of the grand jury. Jurors were no longer able to initiate an investigation as they had done in the past; instead that power was given to justices of the peace and magistrates who could delegate this responsibility to police forces.²⁵⁴ This shift in responsibility reflected another similarity with England's reasons for reform. In both countries, state-employed police officers were employed in investigations and evidence-gathering, rather than parish constables or lay persons empowered by grand juries. Not only did this limit the scope of grand juries, but it limited the importance of jury fact-finding. Previously, trial juries had been responsible for assessing evidence so as to identity and character-traits of persons accused or on the stand. However, with professional police, fingerprinting and photography presented more sophisticated means of identification and fact-finding than trial juries could offer. In 1874, Toronto became the first police force in Canada to use

²⁵⁴ *The Criminal Code, 1892*, S.C. 1892, Vol. 1-2, c. 29, s. 557.

photography to catalogue criminals and arrested persons.²⁵⁵ With positive identification techniques like this, the jury's limited ability to provide information to the state, based on subjective knowledge of the person, became outdated.

Further, at common law grand jurors had the power to present themselves with a bill of indictment, or to receive one from any person. The new criminal code vested that power in the bench and in Crown officers so that only these parties could present bills of indictment.²⁵⁶ The only criminal power left to grand juries was to endorse or reject bills of indictment sent to them by those officers.²⁵⁷

These changes were distinct from changes to criminal trial juries. Grand juries were classically important for investigating government misconduct and preventing the initiation of proceedings, but it was the trial jury that could both supervise the government and the judge in criminal trials by virtue of their place in the courtroom. Despite their distinct functions, criticisms of the grand jury which led to the reductions in its power were frequently applicable to trial juries as well.

Justice Gwynne of the Ontario Court of Common Pleas was the first jurist to directly criticise a grand jury in Canada when he questioned the ability of grand jurors in an investigation it had conducted.²⁵⁸ However, the most vocal critic of the grand jury was Gowan. Criticisms of the grand jury from Gowan were both broad in scope and public audience. He argued that with the 1857 *Crown Attorney Act* grand juries were made redundant and were creating unnecessary delays in justice.²⁵⁹ This act created publicly-

²⁵⁵ H.S. Cooper, "The Evolution of the Canadian Police" in W.T. McGrath and M.P. Michell, eds. *The Police Function in Canada* (Toronto: Methuen, 1981) 37-52 at 39.

²⁵⁶ *The Criminal Code, 1892*, S.C. 1892, Vol. 1-2, c. 29, ss. 636, 637.

²⁵⁷ Blackstone, vol. 4, 299-305.

²⁵⁸ John Kains *How Say You* (St. Thomas, Ontario, 1893) Vol. 11.

²⁵⁹ Brown, *The Genesis*, 62.

funded prosecutors and eliminated the need for private prosecutions. Gowan suggested that, with tenure, this group of civil servants was outside the influence of government and could judge independently whether an action was worthy of prosecution. In support of this argument, Gowan noted that in 1877, at the request of accused prisoners, 80 percent of indictments in Ontario were not even presented before a grand jury.²⁶⁰ It seems even the accused had little interest in the grand jury.

In a speech to the senate in 1889 Gowan quoted several senior judges who advocated the abolition of the grand jury. As Brown relates, Gowan complained that the deliberations of the jury were secretive, that the accused had no opportunity to address the jury, that the process was inefficient and expensive and that the functions of this body could be performed more cheaply and efficiently by appointed officials.²⁶¹ Following this speech, the Minister of Justice, Sir John Thompson, expressed his desire to abolish the Grand Jury system with the Criminal Code.²⁶² He wrote a circular to judges asking for their opinions. Supreme Court Justice John Wellington Gwynne responded, “The idea that the grand jury system constitutes in the present day the palladium of British liberties... partakes altogether of too medieval a character to justify its receiving a moment’s attention”.²⁶³ This suggests that Gowan had support in his criticism and that legal professionals were open to cost-inspired calls for grand jury reform.

As a result of these calls for reform and Sir John Thompson’s support, the grand jury was weakened by the Criminal Code of 1892. This legislation stripped grand jurors

²⁶⁰ *Ibid*, 63.

²⁶¹ Brown, *The Genesis*, 64.

²⁶² “Canada’s Grand Jury System: The Minister of Justice in Favor of Abolishing it” *The New York Times* (28 November 1890), 3.

²⁶³ “Paul Romney, From Constitutionalism to Legalism: Trial by Jury, Responsible Government and the Rule of Law in the Canadian Political Culture” in *Law and History Review*, Vol. 7, No. 1 (Spring, 1989), 121-174 at 139-140.

of the powers to initiate investigations and to hear accusations from citizens who wished to report a crime. Instead, the power to initiate investigations and present an indictment could only be made by members of the bench and by Crown attorneys. A private citizen wishing to present a crime had to first gain permission from a judge or the Crown in order to proceed with an accusation. The sole remaining power of grand jurors was to endorse or reject bills of indictment sent to them by officials or by a private citizen with official approval.²⁶⁴ In this way, public prosecutions had reduced the need for grand juries. Now state officials (the prosecutors) could vet files and weed out malicious or unsubstantiated charges. Additionally, new policing strategies made Grand Juries less useful in the weighing of evidence. Photography and fingerprinting provided the police with scientific tools for weighing the validity of evidence.

However, the call for abolition was complicated by the division of federal and provincial responsibilities in Canada: as part of the administration of justice, the grand jury fell partially within the provincial powers guaranteed in the Constitution and could not be abolished by federal fiat.²⁶⁵ Justice Gowan acknowledged this difficulty in his comments to Sir John Thompson regarding the bill that would become Canada's criminal code when he said "...there are unmistakable indications that the Grand Jury system is tottering at its base. All the same I quite see that to have dealt with the subject in your bill would have been most inexpedient."²⁶⁶

Indeed, Sir Thompson had posted a circular to judges across the country seeking recommendations for the abolition or retention of the grand jury. The 101 responses were

²⁶⁴ Brown, *The Genesis*, 125.

²⁶⁵ *The Constitution Act, 1867* 30 & 31 Vict., c. 3, s. 92(14). (U.K.).

²⁶⁶ J.R. Gowan to Sir John Thompson, "The Criminal Law Bill" (21 April 1892) in Desmond Brown, ed., *The Birth of a Criminal Code: The Evolution of Canada's Justice System* (Toronto: University of Toronto Press, 1995), 202-205.

mixed, but most directly to the point of legislative competence was the letter of the Premier and Attorney General of Ontario, Oliver Mowat. He stated that it was “...not with the authority of the dominion parliament; that the grand jury is part of the constitution of the court...”²⁶⁷ The grand jury in Canada thus retained a limited power of endorsing bills of indictment until its abolition by the various provinces. Nova Scotia was the last to abolish the institution in 1984. The following year the federal government passed an act stating, “No criminal information shall be laid or granted and no bill of indictment shall be preferred before a grand jury”.²⁶⁸ Thus, while the grand jury persisted for almost a century after codification, it was forever limited by criticism and reform of in the nineteenth century.

Criticisms of the grand jury described here were often equally applicable to the trial jury. Chief among those criticisms is the uncertainty of result. Even today, jury deliberations remain the subject of academic inquiry and anxiety.²⁶⁹ Furthermore, the process was, and remains, longer than a non-jury trial and the costs of a trial by judge alone were significantly less.²⁷⁰ The applicability of Grand Jury criticisms to petty juries was highlighted in a letter from Laurent Genest, a lawyer and historian from Quebec, to Sir John Thompson. He described a pair of private prosecutions before a judge and jury: “These two trials took up several days of the time of the Court and twelve jury men to hear them with the fiery and flourished speech of counsels which a single judge, with good nerves, could have disposed of the whole in ten minutes.”²⁷¹

²⁶⁷ Oliver Mowat to Sir John Thompson, “Grand Juries” (14 November 1890) in Brown, *The Birth*, 163.

²⁶⁸ R.S., 1985, c. C-46, s. 576(2).

²⁶⁹ For example see Reid Hastie, Steven D. Penrod and Nancy Pennington. *Inside the Jury*. (Cambridge: Harvard University Press, 1983).

²⁷⁰ Hon. C.J. St. John, “The Delays in Criminal Procedure” *The American Lawyer* vol. 12, no. 1 (1904) 393.

²⁷¹ L.U.A. Genests to Sir John Thompson, “Amendments to the Bill relating to the Criminal Law of Canada” (24 February 1892) in Brown, *The Birth*, 223-229 at 227.

Clearly, concerns with the Grand Jury were not limited to that institution.

Additionally, the public may not have always distinguished between the grand jury and the criminal trial jury when reading criticisms of either institution. Arguments such as Gowan's may have contributed to less public support not only for the grand jury, but of the petite jury (the trial jury) as well.

THE PROBLEM OF DISTANCE

In addition to the sway of utilitarian thought and the reduction of capital punishment, which Canada held in common with England, the Dominion also possessed distinct reasons for the reduction of jury trials. Notably, Canada was unique from nineteenth century England in that assizes had to travel large distances to cover the entire country. There were corresponding economic and administrative burdens that were only increased by the maintenance of a trial by jury system. The poor conditions of travel in the colony and the demands of life in the country provided strong disincentives towards jury service.²⁷²

In his doctoral thesis, R. Blake Brown highlights the problem of distances in pre-Confederation Nova Scotia respecting the gathering of jurors. He uses "petitions, newspaper articles and legislative materials to give voice to the various practical concerns felt by citizens about jury service."²⁷³ Brown describes the townspeople of Halifax as irritated with the inconvenience of jury duty, specifically concerned about the lost revenues from their businesses. This is nothing unique to the Canadian experience as the people of England were no doubt also inconvenienced in this manner. However, what was unique to the Canadian context was the difficulty of travel for those located in rural

²⁷² R. Blake Brown, "Storms, Roads and Harvest Time: Criticisms of Jury Service in Pre-Confederation Nova Scotia" *Acadiensis: Journal of the History of the Atlantic Region* vol. 36, no. 1 (2006).

²⁷³ R. Blake Brown, 28.

districts rather than townships. R.B. Brown highlights the problems voiced by the public relating to the huge personal costs in jury duty in terms of days or months lost through travel and court time. Although, he focuses on pre-Confederation Nova Scotia, it is likely that similar conditions and attitudes persisted in the rest of Canada which was still primarily rural at the time of Confederation and through the end of the nineteenth century.²⁷⁴

Brown notes that the complaints against the jury reflected the interests of the class of person from which the complaint arose. People of the “upper rank”, as he describes them, tended to fill the seats on special juries and wrote to Nova Scotia newspapers, like the *Novascotian* and *Acadian Recorder* complaining of the lack of remuneration and the costs to their businesses. They called for payment and reduction in the size of juries so as not to inconvenience their business or trade.²⁷⁵ People called to petit juries for trials were frequently from outside Halifax and their complaints reflected more of the concerns of the labouring classes. Most of these complaints concerned the large travel times mentioned above and the amount of service expected of them. Indeed, so onerous was the amount of service required of juries that Nova Scotian assemblyman Charles Rufus Fairbanks claimed that in extreme cases some persons were asked to serve close to one hundred days a year on juries (at that time grand jurors might be expected to sit for both the Supreme Court and the General Sessions).²⁷⁶

EARLY LEGISLATIVE REDUCTION OF TRIAL BY JURY

²⁷⁴ 81 percent of Canada was rural in 1871 – four years after Confederation, 69 percent of Canada was described as rural by the 1891 census. Statistics Canada, “Censuses of Population, 1851 – 2001”, online: <http://www40.statcan.ca/101/cst01/demo62a.htm?searchstrdisabled=1871&filename=demo62a.htm&lan=en> g (10 June 2008).

²⁷⁵ R. Blake Brown, 38-39.

²⁷⁶ *Ibid.*, 39-40.

The costs in terms of distance and time contributed to public disenchantment with a trial by jury system of justice. These concerns were compounded by popular and elite criticism of grand juries. However, the issue of distance as it related to juries was not limited to popular criticism. The state too had an interest in reducing the number of jury trials due to the problems of distance in the large Canadian countryside and other costs related to delay of trial. Legislation in Canada emphasised the importance of efficiency to the state and addressed the concern of distances and time before the criminal law was codified. The need for efficiency was expressed in terms of time and money. The *Speedy Trials Act*²⁷⁷ was enacted in 1875 and drafted by Justice Gowan. According to the *Canada Law Journal*, the design of this act was to “secure the trial of persons charged with crime with the least possible delay and the least possible expense.”²⁷⁸ The concern with efficiency was also found in Upper Canada’s police courts. These lower courts were established to replace the lowest courts overseen by single justices of the peace. They tried petty offences, commonly dealing with the poorest of society, in order to expedite the trial process.²⁷⁹ Both of these developments were designed to bring about the speedy resolution of criminal matters without calling jurors to try the facts of the case. Their focus on reducing procedural requirements suggests a concern with efficiency.

Writing on the Canadian criminal justice system for American observers in 1902, Norman Hoyes (the principal of Osgoode Hall Law School) wrote that the system by which one could elect to avoid trial by jury in Canada allowed one to be tried by the

²⁷⁷ 1875, 38 Vict., cc. 45, 47 (Can).

²⁷⁸ “The New Law For the More Speedy Trial”, 282, *supra* note 223.

²⁷⁹ Craven, 286.

presiding magistrate at the initial hearing.²⁸⁰ This was the effect of the *Speedy Trials Act*. A person charged with certain offences in either Ontario or Quebec could elect to be tried immediately when the sheriff laid his charges before a magistrate in a preliminary hearing. The magistrate then tried the prisoner at once or within a few days. Persons charged with a capital offence did not have the option of being tried before a magistrate and had to face their charges in the provincial superior courts, but virtually every other felony and misdemeanour could be addressed under the *Speedy Trials Act*.²⁸¹ This method of avoiding the jury was, as the name of the act suggests, enacted for reasons of expediency. The legislation resolved the problem of prisoners who were waiting trial having to the hardships of jail at great cost to the state (at least in the case of those who could not afford bail or were charged with a non-bailable offence). Additionally, the legislation avoided the problems of transporting juries, judges, prisoners and court officials. It instead reduced the type of persons needing transportation to prisoners and magistrates – and the latter were far more common than were judges of higher courts and travel times could therefore be greatly reduced.

Nevertheless, the *Speedy Trials Act* was not a perfect solution to the problem of distance in Canada and this remained a concern in the rural districts. In a letter to George Sedgwick, the Deputy Minister of Justice in Ottawa, dated February 14th, 1889, Attorney General for Ontario E.F.B. Johnston expressed concern at the delay, expense and inconvenience experienced by judges, law enforcement and prisoners in bringing the accused to a courthouse. In particular, he cited a case known to him in Burk's Falls, Ontario, in which the prisoner had to travel to Parry Sound for a trial, while the judge had

²⁸⁰ Norman W. Hoyes, "Criminal Law of Canada" *Canadian Law Times*. vol. 13, no. 1. (1902) 225-60 at 245.

²⁸¹ "The New Law for the More Speedy Trial", 282, *supra* note 223.

to travel from Bracebridge to hold court (journeys which each amount to about 80 kilometres each way on today's roads).²⁸² The concern expressed in this letter was not for the right to trial of the accused, but on improving efficiency and reducing. The complaint in this letter emphasises how difficult the situation would be if a jury were expected to cover the same distance. Clearly, distance was an obstacle to trial by jury and was a reason for reducing trial by jury in early Canada.

Costs in terms of time and money were also reflected in the creation of police courts. Paul Craven's study of the Toronto Police Court examines the bench in relation to its social function and the public perceptions of the court. He describes police courts as being designed to offload some of the work of regular courts onto these petty tribunals and to reduce the costs lower classes created in their use of criminal justice. These courts, presided over by police magistrates, addressed small crimes involving the lower classes and served to distract citizens from the larger concerns that industrialisation presented to the working class in Toronto. They tried these offences without a jury and served to expedite the process of coming before a judge for trial and sentencing. Despite allowing for the circumvention of the jury, these courts (like the *Speedy Trials Act*) allowed prisoners to have their day in court without lengthy imprisonments in local jails while awaiting trial.²⁸³

However, like the *Speedy Trials Act*, police courts were not a perfect solution to the delays and other costs entailed in jury trials. There was a practical cost to the accused in the likelihood of conviction. In Ontario's three largest counties in 1871, 80 percent of the 936 persons committed for trial opted for a judge alone in a summary court such as

²⁸² Letter from E.F.B. Johnston to George Sedgwick, Esq. *Difficulties with the Speedy Trials Act* (14 February 1889), Ottawa, National Archives of Canada (RG 13, vol. 72, file 168).

²⁸³ Craven, 278.

the Toronto Police Court. However, in choosing a summary procedure, a prisoner faced a 77 percent chance of conviction, as opposed to a trial by jury where the chance was only 50 percent.²⁸⁴ This may lead some to the conclusion that jury trials were still of importance; however it should be remembered that many of those who elected for jury trials were wealthy persons who could afford bail. They would be able to afford their own counsel and likely had other resources that contributed to lower conviction rates.

These two developments indeed presented costs, but they paled when compared with the vast distances of the North West Territories (NWT). In 1873, the Dominion Parliament passed legislation creating a court system and the North West Mounted Police (NWMP). Macleod and Rollason submit that the purpose of these creations was to reduce native-white conflict and to prevent a costly military engagement in the Territories.²⁸⁵ By 1877, the NWT had 300 officers to police the region. For the administration of justice, the Commissioner and Assistant Commissioner of the NWMP were made *ex officio* stipendiary magistrates. To assist them, a growing number of citizens were made stipendiary magistrates (there were only 3 in 1877 though). Additionally, the six superintendents and the 12 inspectors of the police force were appointed as justices of the peace.²⁸⁶ These justices and magistrates were given the power to try minor cases summarily, with magistrates able to give maximum sentences of seven years imprisonment. Major cases would be tried before a justice of the peace with a half-sized jury of six jurors.²⁸⁷

²⁸⁴ "Single Seated Justice in Criminal Cases" in *Canada Law Journal*, Vol. IX, N.S. (1873), 140-142 at 141.

²⁸⁵ Macleod and Rollason, "Restrain the Lawless Savages: Native Defendants in the Criminal Courts of the North West Territories, 1878-1885" in *Journal of Historical Sociology* Vol. 10, No. 2, (June 1997), 157-183 at 159.

²⁸⁶ *Ibid.*, 159-160.

²⁸⁷ *Ibid.*, 160.

These summary proceedings also evidenced the Dominion's desire to save on expenses and address concerns of distance. Indeed, the fact that there was no formal court system before 1873 suggested that the cost was contradictory to the state's interests. Further, the combined duties of police and adjudication reflected the shortage of qualified persons and would certainly have resulted in shorter travel times than would have been necessitated by the separation of these offices. Finally, the empanelling of only six jurors halved the number of persons required to make a journey and lowered the amount of jury service an average Canadian subject would be required to serve and reduced the number of people that would need to travel to the proceedings.

The enactment of the *Speedy Trials Act*, the creation of police courts and the creation of a combined police-court system in the NWT reflected government anxiety with the administrative costs of providing a full trial to persons in the rural districts and with "the expense of supporting persons in the common gaol."²⁸⁸ This suggests that even if reducing trial by jury did not further democratic or libertarian ends, it was at least tolerated and promoted by the state for financial and practical ones. Indeed, as Craven's work noted, police courts provided social drama and interest stories for the middle class as well as serving as a distraction for the working class. Coverage in the newspapers was less concerned with the nature of the reforms than with the stories of the parties.²⁸⁹ Lack of trial by jury for minor offences provoked little reaction.

CODIFICATION AND THE JURY

Codification reduced the importance of the jury as a democratic institution and as a means of protecting poorly represented accused persons. As noted in the introduction,

²⁸⁸ "The New Law For the More Speedy Trial", 283, *supra* note 223.

²⁸⁹ *Ibid*, 289.

the 1892 Code was critical in reducing jury trials. It did so by adopting a comprehensive procedure for all summary offences that did not include a right to trial by jury. However, despite the reduction of trial by jury, the code also limited the powers of judges and facilitated the better representation of clients by their lawyers. These two developments therefore reduced some of the need for a jury.

Under the common law, judges make decisions based on precedent and adapt law to address new situations. The power of judges to thus define the law is a quasi-legislative exercise. Judges are able to create law in their development, or discovery, of common law. While criminal law included common law, a judge could choose to hear (or reject) arguments that define an offence to encompass the behaviour of the accused. If a government exerted pressure upon a judge to convict a person, the judge might be able to do so by drawing on obscure case law that provided an expanded definition of an offence.²⁹⁰ In this context, jury nullification was a traditional check to the power of the judge. If the judge had moved too far from common standards of fairness or justice, a jury could follow its conscience and refuse to convict an accused.

The codification of Canada's criminal law had the effect of eliminating this quasi-legislative power wielded by the bench. An example of the importance of abrogating common law definitions of offences was provided by the failure of the 1892 Criminal Code to define sedition. Thus, when strikers were charged with seditious conspiracy in 1919 under section 132 of the code, the trial judge was able to secure a conviction.²⁹¹ While this may look like a failure of the code, it actually reflects the situation in Canada for most offences before codification. In creating a comprehensive criminal law bill, most

²⁹⁰ Gall, 42-43; 456-458.

²⁹¹ Brown, *The Genesis*, 153-154.

offences were defined and the common law regarding the scope of offences was abrogated. The abrogated of common law definitions for many offences enabled parliament to assert legislative authority over judges. Consequently, the battle between the state and the individual facing political charges was removed from the courtroom to the ballot box and with Parliament being obliged to draft criminal legislation that encompassed the behaviour it sought to prevent. The government's ability to develop criminal law that would target anti-government activities was hereafter contingent upon its willingness to deal with the corresponding fallout from the public and from the opposition party. Brown cites R.C. Macleod who expressed this change in the following way: "A new source of change in the law was becoming increasingly important. This was lobbying by a whole range of pressure groups. One of the theoretical advantages of codification of the law is that it provides a more visible target for the reformer."²⁹²

The electorate and the principle of responsible government (which requires ministers to face questions in Parliament from the opposition) effectively replaced the jury in its ability to inject popular views into the law. The democratic function of the jury in ensuring definitions of crimes matched popular expectations was exported to the franchise, lobbyists and to the Official Opposition.

The importance of codification extended beyond abrogation of the common law and the removal of legislative power from the courtroom. In the first chapter I submit that the rise in quality of English lawyers and the *Prisoner's Counsel Act* reduced the need of juries to safeguard accused persons unable to speak adequately for their own defence. While it is true that the Canadian bar was not as well educated, experienced or specialised as the English bar, the criminal code mitigated these differences and allowed Canadian

²⁹² R.C. Macleod in Brown, *The Genesis*, 151.

lawyers to better match their English counterparts. Canada's codification of criminal law in 1892 made research for a successful defence a simple process. It was no longer necessary to scour case histories for various definitions of crimes or for the elements of offences. Instead, all the elements of an offence were defined in the code and the format was organised to facilitate research. At the beginning of the nineteenth century, statute books in the Canadian colonies were published in large folio volumes. Every section was one continuous, run-on sentence and began with a phrase of enactment. There were no internal divisions such as sub-paragraphs or separate clauses. This was very difficult to read, and personal experience with the law was essential to a full understanding of its meaning. However, this format was changed in 1805 when Nova Scotia produced a collection of its statutes which was the first authorised collection of statutes in any jurisdiction of the British Empire. By 1851, the colonies combined procedural and substantive criminal law into one text with one of the four parts of the publication being dedicated to penal law.²⁹³ Canada's criminal code followed this trend. The various enactments were arranged topically. There was a table of contents, clauses and sub-clauses were used to break up long paragraphs, and multiple sentences were used. All substantive and procedural criminal law was contained in the single text and words of enactment were relegated to the beginning. Additionally, the code was tersely written. The Revised Statutes of Canada had reduced more than 700 pages of criminal law to 444 pages. The 1892 Criminal Code further reduced this number to 331.²⁹⁴ Thus, codification made research and reading of the law simpler, and improved the likelihood of an accused having a qualified defence. This mirrored the rise of quality in lawyers in England.

²⁹³ *Ibid*, 70-83.

²⁹⁴ *Ibid*, 118 - 148.

Coupled with the reduced power of judges to define offences following statutory enactment of all criminal law, this reduced the need for juries. A jury was no longer as important for protecting individuals with limited means of representation due to the increased ability of lawyers to provide an adequate defence.

Additionally, juries no longer had to monitor judges' interpretations of the scope of offences. Instead, this duty was passed to the larger society, which could hold the government accountable at election time, and to the opposition, which could question the Minister of Justice in Parliament, for any overly broad criminal laws.

This oversight was clear as early as the drafting of the Criminal Code. Justice Gowan was zealous in his advice to the Minister of Justice when the bill that would become Canada's first criminal code was past its first reading. In a series of letters throughout 1892, Gowan made critiques and suggestions for specific sections and legal principles. He discussed definitions, organisation, predicted potential problems and suggested changes that even involved suggesting new subsections to the act.²⁹⁵ For example, Gowan suggested that section 748, subsection 2 be altered to prevent Justices of the Peace from partisan manipulation of applications for new trials.²⁹⁶ Several months later Laurent Genest made similar recommendations. One example was the need to distinguish between murder and manslaughter so as not to rely on the common law distinction.²⁹⁷

Finally, beyond justifications for reduction in jury reform the 1892 Code also facilitated the reduction of trial by jury. Of particular importance to the criminal jury trial

²⁹⁵ Brown, *The Birth*, 196 – 218.

²⁹⁶ *Ibi.d.*, 212.

²⁹⁷ L.U.A. Genest to Sir John Thompson, "Bill relating to the Criminal Law of Canada" (24 February 1892) in Brown, *The Birth*, 223-229.

was section 533. This section reclassified all offences as summary or indictable, and eliminated the old categories of misdemeanour and felony.²⁹⁸ The former charge of misdemeanour did not necessarily correspond to a summary offence. Instead, offences were classified by procedure, and summary procedure provided no option for an accused to elect to be tried before a jury as had persons accused of committing misdemeanours. Instead, these suspects now had to be tried before a judge alone.

Commenting on this section Justice Gowan said: “The criminal law in general, applies to every part of Canada, it is important that it should be uniform all over the Dominion.” He further proposed an additional subsection directed towards the expanding the procedure of the *Speedy Trials Act*. This subsection defined the purpose of this uniformity and trial by judge alone as “expedient for the better attaining the ends of justice and carrying the provisions of the Act for the speedy trial of indictable offences into effect.”²⁹⁹

However, the government did not pursue uniformity and reduced expenses in an unprincipled manner. Ed McMahon, a clerk of the Peace in Montreal, sought to expand the ability to dispense with preliminary investigations by allowing judges of the Sessions of the Peace in Quebec to dispense with a pre-trial investigation and to allow prisoners to go free pending trial. Although this letter was forwarded to Sir John Thompson, its recommendations were not followed, perhaps with a concern of public reactions to such rights to the accused. Indeed, when Mr. Oument, MP, reiterated this suggestion on the third reading of the bill and Mr. Mills, MP voiced this very concern of popular criticism, stating: “I think there will be a great objection to introduce a system leaving it optional to

²⁹⁸ Brown, *The Genesis*, 124.

²⁹⁹ J.R. Gowan to Sir John Thompson, “Notes on the Criminal Law Bill 1892 for Sir John Thompson” (25 April 1892) in Brown, *The Birth*, 208-214 at 210.

an accused whether he shall be tried by a jury.”³⁰⁰ This suggests that the political need for juries to evaluate law and procedure was replaced by the public forum offered by scrutiny of public statutes and question period. Thus, Canada’s first criminal code reduced the number of jury trials at the same time it reduced the need for them.

CONCLUSION

Although many English reasons for reducing trial by jury were not relevant to nineteenth century Canada, the reduction of capital punishments and the impact of utilitarian thought were two shared factors that greatly influenced the limitations of jury trials. The perceived need for summary procedure, not only in the urban context, but also in the North West Territories was another important factor in facilitating and encouraging a transition away from trial by jury. The reduction of capital offences in the nineteenth century meant juries were less needed to mitigate unduly harsh penalties in both countries. Trial by jury was retained for indictable offences, so that juries remained available to all persons facing penalty of death for their crimes – they could continue to mitigate these sentences through acquittal or recommendations for mercy.

Utilitarian thought was also a reason shared by both countries for reducing trial by jury. This philosophy cherished rational, all-encompassing legislation. The subjectivity of the jury violated this principle as well as the utilitarian goal of efficiency in expense and time. Utilitarianism influenced Gowan, the *Canada Law Journal* and its readers. It provided a philosophical basis for critiques of trial by jury in Canada. As a corollary of this, Gowan and the journal were quick to point out the flaws of the grand jury. The applicability of arguments against grand juries to trial juries meant that the public was certainly aware of some of the criticisms of juries, including lack of

³⁰⁰ *House of Commons Debates*, (28 June 1892) in Brown, *The Birth*, 397-403 at 403.

supervision/accountability, lack of experience, occasions of poor decisions and the costs to the state. Senator Gowan also advocated for the codification of criminal law and encouraged its adoption in the Upper House. Thereby utilitarian thought also supported the means by which reduction was ultimately accomplished.

However, despite the importance of English factors leading to jury reform, Canada had its own reasons for reducing the availability of trial by jury. The rural demography of Canada meant that juries were sometimes required to travel great distances to reach the court or the local assize. This created potential problems for both the jurors and the state. The Canadian state was faced with greater costs in time and expense for trials, while jurors experienced the personal loss of their time and the consequential costs to their livelihood – a problem less pronounced in Britain where distance and road conditions made travel less onerous.

Finally, the legal and democratic benefits brought by codification and the shift to modern legislative drafting eliminated some of the principal reasons for supporting a jury trial. First, juries were no longer necessary as a democratic tool to monitor overzealous judges defining offences so as to convict the accused. The reduction of all criminal law to statute form meant that this function was assumed by parliament and all democratic supervision could occur through elections, petitions and questions for the opposition party in response to legislative changes. Second, the collection of criminal law in one location and its simplified format made the completion of a successful defence a more manageable project for a lawyer. Despite a comparative lack of education, training and experience, Canadian lawyers were placed on a more equal footing with their English counterparts thanks to the ease of legal research in the new Dominion. This factor along

with modern investigative techniques and expert evidence weakened the institutional role of the jury in trying facts. Juries no longer had the same significance in criminal procedure as these developments took greater prominence.

These factors contradict assumptions that English-inspired reform was blindly incorporated in Canadian law. Although, Canada did not have the same reasons for reducing trial by jury as England, it had its own compelling reasons for doing so. This perhaps distinguishes it from earlier reforms where English enlightened thought provided the sole basis for legal reform and contributes to the argument that Canadian reforms were not an uncritical adoption of English legislation.

- CONCLUSION -

This exploration of changes in Canada's criminal jury trials has been framed in terms of whether English-style jury reforms in nineteenth century Canada were blindly adopted or well-reasoned. Implicit in this approach is an assumption that juries protect individual and democratic interests. Habermas' understanding of the public sphere contributes to this ideology. The jury can be seen as an essential space for the creation of public conscience. Jury members are able to negotiate values in the context of a trial. Furthermore, members of the public who gather in other parts of the public sphere can engage in discussion of juries and jurors as well as the aspects of the larger trial. Thus juries can be seen as a component in deliberative democracy, fostering critical engagement in the governing of the country.

This perspective suggests that this study of jury reductions is an accusation against the Canadian state. However, the role of the jury in democracy is not certain. Max Weber's concern with formal rational legalism also reflects some of the needs of democracy. An objective, systematic and impartial judicial system produces values of equality and certainty in the law. An objective and rational system of law creates a system that is equally applied to all members of society and responsibility rests solely with legislators. Juries, however, subjectively address concerns. Their unprofessional character is a function of their inexperience with the law and no two juries will be alike. This means that less objective factors such as appearance, race, accent and demeanour may affect the outcome of a case. Judgements based on these characteristics do not serve a rational goal of the legislation and may counter the will of society expressed through legislation. Furthermore, even if juries do serve democracy in the trial, this does not mean

that other institutions cannot replace or improve upon this role. Jeremy Bentham argued for the primacy of the legislator. Statute-based governance of criminal matters take power from judges and give it to legislatures which then must bear up to the scrutiny of the public. It is thus, not a foregone conclusion that trial juries are essentially good for democracy.

An examination of legislative history shows early Canada looked to England as a source for reforming legislation. Peel's reforms to criminal procedure were imported in the colonies and Greave's English consolidations were adopted by the first Dominion Parliament. Most critically for the jury, Stephen's 1880 draft code as a model for Canada's *criminal code*. This history justifies research into English reasons for jury reform that preceded Canadian reforms.

The beginning of the first chapter outlined some of the classic justifications for jury trials. However, an exploration of nineteenth century English developments concluded that the reduction of the jury was popularly desired in that country. The English context provided many examples of the problems created by juries – problems of bigoted juries and leniency towards unacceptable social attitudes displayed in crimes, unpredictability in judgements and costs in time and money. Furthermore, institutions, such as the press, were able to assume functions of the jury and reduce its importance. These findings provided the basis for the second and third chapters. If Canada's reforms were more than a blind adoption of English reforms, those factors giving rise to English reforms should also be present the Canadian experience.

The second chapter examined English factors that were not operative in the Canadian context and did not serve as justification for reducing trial by jury. The basis

for this approach was that adoption of jury reform was only appropriate and reasoned if the same factors that gave rise to jury reductions in England were present in nineteenth century Canada. This chapter concluded that the reform of juries was inappropriate, and was merely emulation of English reform. Canada suffered from a less independent bench and more poorly trained lower court judges than in England, creating a greater need for democratic oversight within the trial. Canada's bar was also less educated and specialised than the English bar. Without comparable representation the jury was more essential for protecting accused from unfair prosecutions. Furthermore, Canada also could not boast the same critical press or professional law enforcement as England. This furthered the justification for maintaining a trial jury. England had unique factors that supported the reduction of trials. The weakness of them in Canada suggested an increased need for juries than in England.

The final chapter reconsidered the justification for jury reform in Canada on a new basis. This chapter explored shared and uniquely domestic reasons supporting reduced jury trials. In this analysis, Canada's jury reforms could be seen as an appropriate and well reasoned manifestation of Canadian interests. Canada had a number of reasons for eliminating the jury. Large distances in Canada increased travel times, jail periods and court delays. It cost the accused time and the state money while he awaited trial in jail. Also both the state and jurors suffered expense and time to travel the great distances required in a largely rural Canada. Legislation to address this was well received. Reduced capital crimes and the regulation of reforms to minor offence reduced the need for juries to mitigate penalties. Popular criticism of the grand jury spilled over to the trial jury. Codification also eliminated some of the key justification for jury trials. Finally,

some of the jury's responsibilities were offloaded to the public and the Official Opposition while other developments reduced the need for mitigation of penalties and supervision of judges. The combination of these pressures for reform suggest that Canadian politicians were not blindly incorporating English legislation, but were taking a reasoned and principled approach to Canadian concerns.

The study is confined to the nineteenth century, however, the implications of the study raise questions for future research that are not confined to that period. Based on the statistics in the introduction, Canada and the United States have very different criminal trials with respect to juries. Americans have a constitutional right to trial by jury (interpreted not to extend to offences with a 6 month jail penalty or less).³⁰¹ What difference does the right to jury provide to subjects of US law? Are there even fewer factors for encouraging trial by jury today? Does Canada (and other Commonwealth common law jurisdictions) offer a less just system by comparison, or is the US system weaker for its incorporation of jury trials? Have subsequent developments highlighted reasons (or created new ones) for eliminating the jury or are those reasons less applicable in modern Canada and the US? Certainly the modern jury trial is removed from the ideal of the eighteenth century. Modern juries take far longer to arrive at decisions and can compromise efficient justice. They are potentially more subject to legal rhetoric than judges, and can be a source of excess and abuse. However, the jury can also be regarded as a site of Habermas' engaged popular public sphere, which suggests that jury may continue to be a viable democratic check on the administration of justice, or a site of participation and source of information for a deliberative democracy.

³⁰¹ *Baldwin v. New York*, 399 US 66C (1970).

There is also room for additional research in the nineteenth century.

Federal/Provincial constitutional arguments for authority are factors that affected the reform of juries. Provincial power over the administration of justice suggests strong arguments for provincial control over investigations and constitution of the courts. These arguments figured large in the reduction of grand juries but were left largely unexplored here but nonetheless warrant further study. Additionally, cultural attitudes toward English reforms; toward Continental reforms (like codification); and towards the jury generally, were absent from this study.

There are also questions as to why this subject has received little attention.

Despite the strong historical writings of a few books on codification, political trials and pre-Confederation development of law, there is very little written on the Canadian jury, or on the degree to which it was reduced in the nineteenth century. Canadian historians may find jury decisions and reforms provide insight into cultural attitudes and may highlight conflicts between the state and citizens.

This study highlights a field for greater attention. The conclusions are limited to the adoption of reforms based on the 1892 Code with reference to some earlier summary procedures. It focuses on English and Canadian reasons for keeping and eliminating criminal jury trials at this specific period. However, it does not consider the question of civil trials, or the subsequent reactions to reductions – although no strong reactions were evident. Professional attitudes towards the criminal law were likely changed by the adoption of a code and by the use of modern legislative drafting. These issues however were not central to prior justifications for trial without juries. As mentioned, the federal-provincial debate was not included and there is room for a more cultural examination of

this development. Furthermore, the role of the jury as a source of information and fact for the trial process was generally left out of this study. Although this was explored in the English context, research revealed little insight as to the efficacy of the jury in providing subjective knowledge to the state. Criticisms of the jury in nineteenth century Canada were generally limited to efficiency and intelligence of the jurors and the study merely inferred this ability from the demographics of Canada and the prominence of rural communities in the nineteenth century. These are some of the issues suggested by the thesis that may provide future topics for consideration.

The final consideration of this work, however, is whether the jury reductions were appropriate for nineteenth century Canada. The answer to this question is a qualified one. The first method of assessment was based on determining whether factors for reducing English criminal juries were present in nineteenth century Canada. In this sense the changes may have been inappropriate. A press less involved in criminal trial reporting, less professional policing, partisan and under-qualified judges and other Canadian conditions suggested a continuing need for trial by jury.

However, these English factors were not the only ones relevant to jury reform in Canada. Canadian concerns regarding distance, costs, pre-trial detention were domestic reasons for reducing jury trials. Furthermore, Canadian developments such as the reduction of capital penalties, the abrogation of common law offence definitions and the rise of public prosecutions reduced the continuing need for juries. Additionally, codification itself created a new focus for democratic input and scrutiny of the criminal law – reducing the political need to have a jury monitor state trials. The conclusion is that while there is room for both arguments, there was a qualified advantage in reducing trial

by jury. Consequential cases have shown that juries are not essential for the maintenance of an effective democracy or a just system of criminal justice.

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1812, 52 Geo. III, c. 3 (LC)

1824, 4 Geo. IV, CC. 4, 5, 6 (LC)

1829, 10 Geo. IV, c. 11 (PEI)

1829, 9 & 10 Geo. IV, c. 21 (NB)

1831, 1 Will. IV, cc, 4, 5 (NB)

1833, 3 Will. IV, c. 3 (UC)

1836, 6 Will. IV, c. 22 (PEI)

1841, 4 Vict., cc. 5, 6, 9 (NS)

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