Challenges for Cause, Stand-Asides, and Peremptory Challenges in the Nineteenth Century

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Abstract
This article examines the substantial differences that emerged during the nineteenth century between the law of England, the United States, and Canada regarding challenges for cause, stand-asides, and peremptory challenges in the jury selection process. The author argues that these differences stemmed from the unique social conditions of each country. The emergence of legal formalism—with its emphasis on certainty and predictability in the law—affected the development of jury challenges, though the result of formalist thinking had very different effects in all three jurisdictions. In addition, Canadian law regarding jury challenges reveals the influence of both American and English legal trends.
CHALLENGES FOR CAUSE, STAND-ASIDES, AND PEREMPTORY CHALLENGES IN THE NINETEENTH CENTURY©

BY R. BLAKE BROWN*

This article examines the substantial differences that emerged during the nineteenth century between the law of England, the United States, and Canada regarding challenges for cause, stand-asides, and peremptory challenges in the jury selection process. The author argues that these differences stemmed from the unique social conditions of each country. The emergence of legal formalism—with its emphasis on certainty and predictability in the law—affected the development of jury challenges, though the result of formalist thinking had very different effects in all three jurisdictions. In addition, Canadian law regarding jury challenges reveals the influence of both American and English legal trends.

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I. INTRODUCTION

The issue of jury challenges has recently gained increased prominence in Canada. In R. v. Parks,¹ the Ontario Court of Appeal held that potential jurors could be asked whether the fact that the accused was a Black Jamaican immigrant would affect their ability to decide the case without bias. In R. v. Bain,² the Supreme Court of Canada struck down as unconstitutional the Criminal Code provision permitting the Crown to stand-aside jurors. In R. v. Williams,³ the Supreme Court considered whether the defendant could inquire into whether jurors might be racially biased against Aboriginal Canadians. In making these decisions, Canadian courts have shifted Canadian jury selection practices toward American forms of criminal procedure. Interestingly, however, courts have made these important decisions with relatively little knowledge of the forces that led to the divergence of challenging laws in Canada, England, and the United States.

Modern legal historians have given scant attention to the historical development of jury challenges and stand-asides. John McEldowney’s work is a useful starting point for examining the

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developments in England and Ireland, particularly when combined with E.P. Thompson’s brief account of the decline of challenges in England. The American and Canadian literature on challenges is even more scarce. Only a few short historical accounts found in studies concerning modern criminal procedure illustrate the American law of challenging. Even this poorly formed American literature, however, is superior to the existing work on the history of Canadian challenges. The lack of inquiry is partly explained by the difficulties of researching the role and importance of challenges. Historical records typically note challenges only in high-profile cases—usually involving murder or treason—that attracted substantial attention from the community and media. Further, available evidence often fails to record what form the challenges took, and in some cases does not reflect whether it was the defendant or the prosecutor who initiated the challenge. Despite these difficulties, this article will piece together nineteenth-century developments in challenges through an examination of statute and case law in Canada, the United States, and England, in addition to nineteenth-century legal treatises and practice manuals on criminal procedure.

This article begins with an exploration of nineteenth-century jury selection practices in England and the United States, and proceeds to explain their influence on Canadian developments. It focuses, in particular, on the changing law of criminal procedure concerning 1) challenges for cause, 2) peremptory challenges, and 3) stand-asides. Three themes emerge from the examination of nineteenth-century developments in the law of challenges. First, the unique social conditions in the United States, England, and Canada affected each country’s challenging laws. In England, a bench concerned about class unrest prevented the ancient custom of jury challenges from expanding in the early nineteenth century. Judges precluded potential jurors who had a relationship with one of the litigants from sitting on juries, and prevented jurors from being asked about their personal views. Similarly, Canadian developments concerning jury selection procedures hint at oligarchical desires to ensure guilty verdicts in certain cases. In comparison, American experience with jury-packing in the years


preceding the War of Independence led to the establishment of broad challenging rules that would prevent the government from packing juries against defendants.

Second, the emergence of legal formalism in the latter half of the nineteenth century had a very different effect on the development of jury challenges in the United States than in England or Canada. Legal formalism emphasized certainty and predictability in the law. Lawyers and judges on both sides of the Atlantic who understood the law in formalist terms targeted juries because the presumed biases of jurors were thought to lead to unpredictable decisions. In the United States, courts tried to stamp out bias by permitting lawyers to identify biased jurors in *voir dire* and remove them through challenges. Formalism had the opposite effect in England and Canada; preventing the investigation of challenges hid the jury's partiality.

Third, I examine how Canadian law regarding jury challenges reveals the influence of both American and English legal trends. Canadian legislators demonstrated considerable awareness of American peremptory challenge law, and several Canadian statutes of the mid-nineteenth century copied peremptory challenge trends in the United States. On the other hand, while Canadian judges also indicated an awareness of American challenges-for-cause doctrines, they refused to give latitude to lawyers seeking to interrogate potential jurors. Thus, nineteenth-century Canadian criminal procedure borrowed substantially from American law in one area of challenge doctrine, but in other aspects followed the English law that limited jury challenges. By the end of the nineteenth century, Canadian courts accepted the English position regarding challenges for cause without question, but the American peremptory challenge laws imported in the earlier part of the century remained a part of Canadian law, as they do today.

II. THE COMMON LAW TO 1800

Before discussing the doctrinal changes in jury challenges during the nineteenth century, I will provide a basic understanding of the criminal procedures at issue (peremptory challenges, stand-asides, and challenges for cause) as they stood in 1800. In general, a "challenge" was, and is, a means by which a party to a case could prevent potential jurors from sitting on the jury. Challenges were divided into two broad groups. A challenge to the array was a challenge to the entire panel of summoned jurors, motivated by the perceived bias of the person
responsible for calling the jurors, typically the sheriff. For the sake of simplicity, this article will not discuss challenges to the array.\(^6\)

The second type of challenge was "to the poll"—that is to an individual panel member. A limited number of challenges to the poll were "peremptory" and did not require the challenging party to give a reason. Peremptory challenges were generally reserved for defendants. Prosecutors had at their disposal "stand-asides," also known as "standbys." This permitted prosecutors to ask a potential juror to stand aside until the entire panel of jurors was called once, or "gone through." At that point, the court again called the first potential juror who had been stood aside, and the prosecutor was required to demonstrate a challenge for cause. Stand-asides, unlike peremptory challenges, were only limited by the size of the panel.

Challenges to the poll could also be "for cause"—that is, where the opinions or personal characteristics of the juror could preempt their membership on the jury. Challenges to the poll for cause were in turn subdivided into "principle challenges for cause" and "challenges to the favour." A principle challenge for cause, if proven, led to a manifest presumption of the juror's ineligibility. The presiding judge determined the validity of such challenges. There were four grounds of principle challenges to the poll:

- \textit{Propter honoris respectum}: When a noble person was sworn on a jury for the trial of a commoner.
- \textit{Propter defectum}: When the potential juror was an alien, an infant, was of old age, or lacked some other relevant qualification.
- \textit{Propter affectum}: Instances of presumed or actual partiality.
- \textit{Propter delictum}: When a juror was "infamous." For example, if a juror had been convicted of any crime that was infamous.

The principle challenge for \textit{propter affectum} was the most contentious challenge in the nineteenth century, and will receive the most attention in this article. The clearest example of a principle challenge for \textit{propter affectum} was kinship, although it was also a sufficient reason for challenge if a potential juror had stated an opinion as to the trial's proper result.

The bases of challenges to the poll for favour were similar to the \textit{propter affectum} ground of principle challenge. The issue at stake in a

\(^6\) Challenges to the array were generally less frequent than challenges to individual jurors.
challenge to the favour was whether the potential juror was altogether indifferent about the outcome of the case. However, unlike principle challenges for cause, in which evidence of a principle challenge led to a presumption against a juror's eligibility, challenges to the poll for favour dictated that evidence supporting a challenge for favour would not necessarily demonstrate a challengeable cause; rather, a potential juror's eligibility fell to the discretion of "triers." Courts appointed two triers to determine challenges for favour. Triers were generally jurors already under oath to hear the case, though elaborate rules existed in the treatise literature for alterations of this basic rule if no jurors had yet been sworn.

The jury's origins are clouded in mystery, but the use of juries was generally established in England by the twelfth century. Although no research has focused exclusively on the use of challenges in England before 1800, some tentative observations are nevertheless possible. It appears that the practice existed during the early development of English juries, though challenges were not commonly employed in the late medieval period. Jurors were drawn from the local community and thus brought to the trial their own knowledge of the parties and events at issue. Challenges, therefore, were not intended to limit "partiality" in the modern American sense of having jurors without prior knowledge of events. Rather, challenges for cause sought to prevent several understandable situations by ensuring that jurors possessed the proper residence and property qualifications, and did not have a relationship with one of the parties.

The common law permitted the accused charged with a felony thirty-five peremptory challenges. The number of peremptories was

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7 The similarity between a challenge for favour and a principal challenge based on partiality eventually led to the decline of this distinction. For a further discussion, see infra note 106 and accompanying text.

8 See M. Bacon, *A New Abridgement of the Law*, vol. 3 (Dublin: John Exshaw, 1786) at 252; and M. Bacon, *A New Abridgement of the Law* (London: A. Strahan, 1832) at 552.


12 See J.B. Post, "Jury Lists and Juries in the Late Fourteenth Century" in Cockburn & Green, eds., supra note 11, 65 at 71.
decreased to twenty in the 1540s, though it was increased to thirty-five for treason trials in 1555.\textsuperscript{13} English courts did not traditionally permit accused charged with misdemeanours to employ peremptory challenges.\textsuperscript{14}

By common law, the King was given the great advantage of having an infinite number of peremptory challenges, though a 1305 statute eliminated the Crown's right to peremptorily challenge jurors by requiring the Crown to show cause when challenging a juror.\textsuperscript{15} Courts, however, interpreted this statute such that the Crown was allowed to wait until the entire panel had been gone through before showing cause.\textsuperscript{16} Stand-asides were thus born. A large jury pool provided the prosecution with a more powerful method of excluding jurors than the peremptory challenge.

The literature suggests that jury challenges were uncommon in English courtrooms.\textsuperscript{17} Several factors may have influenced the limited

\textsuperscript{13} Bacon (1786), supra note 8 at 264.


Note that special juries were available in misdemeanor upon the application of the prosecution or defence. Special juries were composed of jurors of a higher social rank, and employed selection processes different than those used in ordinary felonies. Before 1825, the sheriff and the secondary prepared a panel of forty-eight names for the special jury, and legislation did not regulate how the special jury was chosen from this list of prospective jurors. Charges of jury packing, however, led to 1825 legislation that instituted a system of balloting whereby forty-eight jurors were randomly selected from a ballot box: An Act for consolidating and amending the Laws relative to Jurors and Juries, 6 Geo. IV, c. 50, ss. 31, 32. On special juries see J.C. Oldham, "Special Juries in England: Nineteenth Century Usage and Reform" (1987) 8 J. Legal Hist. 148; and J.C. Oldham, "The Origins of the Special Jury" (1983) 50 U. Chicago L.R. 137.

\textsuperscript{15} 33 Edw. I. stat. 4, 1305 (U.K.) 33 Edw. I, c. 1; McEldowney, "Stand By For the Crown," supra note 4 at 274; Bacon (1832), supra note 8 at 571-572.

\textsuperscript{16} See "Stand By for the Crown," supra note 4 at 275; Trial of Lord Grey and others, [1682] 9 Howell's State Trials 127 at 128-29; Trial of Count Coningsmark, [1682] 9 Howell's State Trials 1 at 12; Trial of Spencer Cowper and others, [1699] 13 Howell's State Trials 1105 at 1108-9; and Trial of Christopher Layer, [1722] 16 Howell's State Trials 93 at 134-35.

use of jury challenges. First, as England urbanized, the likelihood that a person with whom the accused had a relationship would be called to sit on his or her jury decreased, and, thus, so did the use of challenges. Second, the average criminal trial in the eighteenth century took approximately thirty minutes to complete. The brevity of the proceedings undoubtedly worked against the use of jury challenges. While parties were informed of their right to challenge by the clerk of the court, there appears to have been an assumption that no challenge would be issued. Third, relatively few lawyers took part in criminal trials until the latter part of the eighteenth century. Lacking an advocate schooled in the nuances of criminal law, many accused would not have appreciated the meaning of their right to a procedural challenge, or may have felt unwilling to exercise it in the rather disempowering environment of the eighteenth-century English courtroom. The requirement that the accused personally had to challenge potential jurors accentuated this feeling of disempowerment. William Hawkins wrote only in 1724 that courts required prisoners to make all peremptory challenges, “even in such Cases wherein he may have Counsel.”

Fourth, the non-disclosure of the venire—the list of prospective jurors—meant that the accused was unaware of the identity of his or her potential jurors. Without this knowledge, the accused had difficulty in determining before trial which panelists ought to be challenged. Last,


21 See J.H. Langbein, “The Historical Origins of the Privilege Against Self-Incrimination at Common Law” (1994) 92 Mich. L. Rev. 1047 at 1058, n. 51. Important differences existed between treason trials and ordinary felony trials on this issue. Following the political turmoil in England during the seventeenth century, there was a general perception that English state trials had become unfair to the accused. The Act for regulating the Tyials in Cases of Treason and Misprison of Treason, 1696 (U.K.), 7 & 8 Gul., c. 3 [hereinafter Treason Act] recognized this, and thus section 1 of the Treason Act permitted the accused to retain counsel in treason trials. Section 7 of the Treason Act also ensured the disclosure of the venire to the defendant, and thus gave the accused a better opportunity to challenge potential jurors. For a discussion of the Treason Act, see S. Rezneck, “The Statute of 1696: A Pioneer Measure in the Reform of Judicial Procedure in England” (1930) 2 J. Mod. Hist. 5; and J.R. Phifer, “Law, Politics, and Violence: The Treason Trials Act of 1696” (1980)
John Langbein writes that challenges were uncommon prior to 1800 because of the social standing of most jurors *vis-a-vis* the accused; thus, "the exercise of challenge rights by the ordinary felony defendant was regarded as an affront to the challenged jurors, who were commonly the social superiors of the accused, and ... the defendant understood that he ought not to risk offending the remaining jurors by striking some of their peers." 22  

There appears to have been some flexibility to the procedure for challenging jurors, though eighteenth-century law books suggest some general rules of practice. The court conducted challenges when a full jury panel was assembled but before jurors were sworn. 23 The defendant could bring a peremptory challenge or a challenge for cause, and if a prospective juror was unsuccessfully challenged for cause, the accused could subsequently challenge peremptorily. If the issue before the court was a challenge to the favour, the court appointed two triers to consider the challenged juror’s indifference. 24 A challenge to the poll could be demonstrated in two ways. One method was to offer witnesses substantiating the juror’s partiality or lack of another relevant qualification. Corroboration was not required—only one witness was necessary. 25 A second way to make out a challenge was to question the juror in *voir dire*. By the late eighteenth century, however, there were limitations on such questioning. Jurors could not be asked any question that might cause the juror to “discover that of himself which tends to his Shame, Infamy and Disgrace.” 26 Courts did not permit defendants to inquire whether the potential juror had declared an opinion as to the correct outcome of the case prior to trial. 27 The rationale for this rule was articulated by Lord Chief Justice Treby in the *Trial of Peter Cooke*: “I think it is a very shameful discovery of a man’s weakness and rashness,  

12 Albion 235. For an example of the defendant’s difficulties in challenging jurors without knowledge of the potential jurors, see the *Trial of Stephen Colledge*, [1681] 8 Howell’s State Trials 549 at 587-88.  


23 Bacon (1786), *supra* note 8 at 265-66; and *Trial of Titus Oates*, [1685] 10 Howell’s State Trials 1079 at 1081.  

24 See Bacon (1786), *supra* note 8 at 266-67; Chitty, *supra* note 9 at 549; Bacon (1832), *supra* note 8 at 573-74.  

25 Bacon (1786), *supra* note 8 at 267.  

26 Ibid.  

27 Ibid.
if not malice, to judge before he hears the cause, and before the party that is accused could be tried."

Due to this limitation, the most common eighteenth-century method of demonstrating a juror’s partiality was through the production of witnesses. A successful challenge in the 1753 *Trial of John Barbot* illustrated this tendency. Charged with murder, Barbot successfully challenged a juror on the ground that the juror had expressed an opinion hostile to the accused:

- **Prisoner**
  
  May it please your honours, I challenge Mr. Armour for cause: My cause of challenge is this:—Mr. Armour lately at Montserrat was heard to say, that, if he was upon my jury, he would hang me.

- **Mr. President**
  
  Can you prove this declaration of Mr. Armour’s?

- **Prisoner**
  
  Yes, I pray that Mr. Frye may be sworn to prove it.

- **Mr. President**
  
  Swear Mr. Frye. (Which was done.)

- **Mr. Frye**
  
  I heard Mr. Armour say at Montserrat, that, if he was to be on Mr. Barbot’s jury, he would condemn him.

- **Solicitor General**
  
  This is abundant cause, to be sure.  

Three elements of this exchange are noteworthy for the purposes of this article: the requirement that extrinsic evidence be brought forward to demonstrate the challenge; the failure to use the potential juror as a source of obtaining information for a challenge; and the court’s willingness to accept the challenge simply because of the juror’s previous expression as to the proper outcome of the case.

### III. NINETEENTH-CENTURY DEVELOPMENTS

#### A. English Jurisprudence

1. Jury challenges in England

The fundamental elements of the English doctrine of jury challenges received substantial judicial attention in the first half of the nineteenth century. Two explanations for this trend seem plausible.

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28 *Trial of Peter Cook*, [1696] 13 Howell’s State Trials 311 at 335.

29 [1753] 18 Howell’s State Trials 1229.

First, the increased lawyerization of the English courtroom in the late eighteenth and early nineteenth centuries saw lawyers attempt to take advantage of any procedural rules that might assist their clients. For example, the emergence of criminal trial lawyers helped to establish and clarify the laws of evidence.\(^3\) Second, there was an increase in prosecutions in which political and social conflict put defendants in peril, thus leading to claims that jurors were biased because of their political or social views. During the eighteenth century, the jurors in the "common" jury were typically of a higher social standing than the accused.\(^3\) Standing before potential trial juries composed of citizens with social views fundamentally opposed to the accused's actions, defendants assisted by counsel may have increasingly attempted to exercise their right of challenge. It appears, however, that English defendants and their lawyers lost the legal battle over challenges. In a series of cases, courts limited the accused's use of challenges for cause. The Crown, meanwhile, strengthened its ability to select a jury of its choice through the use of stand-asides. The latter development will be discussed first.

2. Stand-asides by the Crown

The Crown's right to stand-aside jurors became a more powerful tool as the size of state trial jury pools increased during the eighteenth and nineteenth century. With larger numbers of jurors summoned, the Crown could stand-aside a greater number of potential jurors before having to demonstrate cause.\(^3\) In several cases, defendants argued that the large jury pools were unfair, but in the late eighteenth century courts settled the debate in favour of the Crown. In 1722, a defendant raised the issue of jury pools,\(^3\) and the question gained increased prominence


\(^{32}\) See Hay, supra note 11 at 311.

\(^{33}\) State trials were cases relating to affairs of the state; many state trials involved treason offences. Sheriffs had discretion to determine the number of jurors to be returned, and often selected jurors very carefully to ensure convictions. For discussions of state trials, see J.H. Langbein, "The Criminal Trial before the Lawyers" (1978) 45 U. Chi. L. Rev. 263 at 264-67; and J.C. Oldham, "Origins of the Special Jury," U. Chi. L. Rev. 137 at 153-59.

\(^{34}\) See Trial of Christopher Layer, [1722] 16 Howell's State Trials 93 at 134-35.
in the 1794 treason trial of John Horne Tooke. Tooke argued against Crown stand-asides on two grounds. First, he argued that the act of 1305 had eliminated the Crown’s right to challenge peremptorily, and thus the Crown could not stand-aside jurors. Tooke pleaded with the judges: “My Lords, stop, turn back, you must be in the wrong road.” This argument was easily disposed of: “As far as our legal history affords us any information upon the subject,” began the Lord Chief Justice,

the course is a clear one; the crown has no peremptory challenge, but the course is, that the crown may challenge as the names are called over, and is not bound to show the cause of the challenge until the panel is gone through; that is the course of proceeding, which is now so established that we must take it as the law of the land.

Tooke’s second argument was that the greater number of summoned jurors had altered the balance of the courtroom in favour of the Crown. This argument failed because the Crown had stood-aside just seven jurors, although the Lord Chief Justice felt:

that the circumstance, which is become absolutely necessary, of making the panels vastly more numerous than they were in ancient times, might give to the crown an improper advantage, arising out of that rule; and whenever we shall see that improper advantage attempted to be taken, it will be for the serious consideration of the Court, whether they will not put it into some course to prevent that advantage being taken.

The opportunity for English courts to fashion such a safeguard against the improper use of stand-asides slipped away in the 1798 case R. v. O’Coigly in which eight men were tried for high treason. After the Crown stood aside eleven jurors, defence counsel argued that the Crown’s use of stand-asides should not be permitted, claiming, as in Tooke, that the increased size of jury pools had unfairly increased the Crown’s stand-aside power. Justice Buller swept this argument aside, concluding that the law “is as firmly and as fully settled on this point, as any one question that can arise on the law of England,” while Justice Lawrence reasoned that a uniform number of people in the jury pool could not be judicially regulated. The O’Coigly decision dictated the Crown’s ability to stand-aside jurors would remain a powerful tool for the Crown throughout the nineteenth century. Despite occasional

35 Trial of John Horne Tooke, [1794] 25 Howell’s State Trials 1 [hereinafter Tooke].
36 Ibid. at 24.
37 Ibid. at 25.
38 Ibid.
39 [1798] 26 Howell’s State Trials 1191 [hereinafter O’Coigly].
40 Ibid. at 1240.
complaints following O'Coigly, the courts refused to reconsider the law. For example, a defendant unsuccessfully raised the issue of jury pool size in 1817, and in 1839 Frederick Pollock unsuccessfully argued against the Crown's right to stand-aside jurors in R. v. John Frost, despite a panel consisting of over three hundred potential jurors. In the 1857 case Mansell v. R., the English judiciary was again unwilling to consider the problematic expansion of jury pools. These decisions effectively awarded an unlimited number of peremptory challenges to the Crown.

In comparison, the defendant in the first half of the nineteenth century had a right to twenty peremptory challenges in felony and thirty-five in treason, after which he or she could only challenge for cause. The only positive development for the accused may have been a trend that emerged in the mid-nineteenth century to permit defendants some peremptory challenges in misdemeanor, though the extent of this trend is unknown.

Prosecutors in the nineteenth century often made substantial use of stand-asides in state trials. McEldowney has difficulty determining the extent to which stand-asides were employed in England and Ireland, but he concludes that stand-asides were probably common in political state trials, particularly in Ireland, where prosecutors purged Catholic jurors

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41 See Trial of Jeremiah Brandreth, [1817] 32 Howell's State Trials 755 at 772.
43 "In Defence of the Jury," supra note 5 at 163-64. Pollock argued that the consolidation of jury laws in 1825 required the Crown to show cause: see An Act for consolidating and amending the Laws relative to Jurors and Juries, 1825 (U.K.), 6 Geo. IV, c. 50, s. 29. The court in Frost, supra note 42, reasoned that this was merely a reenactment of the 1305 statute that had been the basis of stand-asides: ibid. at 776. But see Sawdon's Case, [1838] 168 E.R. 1099, in which the court required the Crown to show cause because of the 1825 statute.
45 See Thompson, supra note 5 at 159.
46 See D. Bentley, English Criminal Justice in the Nineteenth Century (London: Hambledon Press, 1998) at 95. In Creed v. Fisher, [1854] 156 E.R. 202, a civil case in which the defendant had not been permitted a peremptory challenge, Baron Parke commented that in "practice it has been usual, as a matter of courtesy, to allow peremptory challenges in civil cases and misdemeanours, but it is not a matter of right": ibid. at 202. See also R. v. Blakeman, [1850] 175 E.R. 479 at 479.
from juries. In state trials it was not unusual for jury pools of over two hundred jurors to be formed. In such circumstances it was possible for the Crown to pick a jury very carefully. There is no evidence that jury pools increased in size for ordinary felony cases prior to 1820, suggesting that the law of stand-asides was formed in the particular societal context surrounding many state trials.

3. Defence challenges for cause

In comparison to the Crown’s ability to shape a jury’s composition to its liking, defendants’ capacity to remove jurors for cause was limited during the early nineteenth century. The 1821 case of R. v. Edmonds was of particular importance. The court held that jurors could form and express opinions about the proper outcome of the trial, as long as that belief was not based on “ill will” towards the defendant. Chief Justice Abbott reasoned that

expressions used by a juryman are not a cause of challenge, unless they are to be referred to something of personal ill-will towards the party challenging; and also, that the juryman himself is not to be sworn, where the cause of challenge tends to his dishonour; and, to be sure, it is a very dishonourable thing for a man to express ill-will towards a person accused of a crime, in regard to the matter of his accusation.

The requirement that ill will be demonstrated broke with eighteenth-century law, which required only that the juror form and express an opinion to be disqualified. How, then, was the defendant to show that the potential juror had formed and expressed a view of the trial’s outcome based on ill will towards the accused? Chief Justice Abbott continued the eighteenth-century practice and held that an accused must provide extrinsic evidence for a challenge of partiality. Thus, the court required the defendant to locate prima facie evidence demonstrating that the juror had formed and expressed an opinion of the accused’s guilt out of ill-will prior to the trial. In Chitty’s The Practice of the Law in All its Departments, practitioners were thus encouraged to research the

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50 Ibid. at 250.

51 See also R. v. Dowling (1848), 3 Cox C.C. 509 at 510 [hereinafter Dowling]; and Sir P. Devlin, Trial by Jury (London: Methuen, 1966) at 32.
partiality of jurors outside of the courtroom.\textsuperscript{52} The cost of such research prevented most defendants from following this advice, and, not surprisingly, the provision of extrinsic evidence of partiality born out of ill will was a burden that few defendants were able to meet.

What motivated the court in \textit{Edmonds} to determine that potential jurors could only be excluded if their comments had been motivated by ill will? E.P. Thompson suggests that the \textit{Edmonds} decision was politically motivated.\textsuperscript{53} The defendants in \textit{Edmonds} were some of the most important leaders in English Radicalism, and the defence, according to Thompson, knew there "was no way in which Warwickshire jurors in 1820 could express hostility towards Radicalism without also expressing a particular hostility against these notorious leaders of the cause of Reform."\textsuperscript{54} Only by limiting the ability of the defence to eliminate jurors could the court ensure that socially conservative juries would be selected. Chief Justice Abbott thus permitted jurors even if they had uttered a belief in the accused's guilt. Despite having been decided in a period of acute political and class strife, in which the state attempted to repress most democratic claims, \textit{Edmonds} continues to be cited in English criminal cases.\textsuperscript{55}

Courts also disallowed attempts by defendants to draw other evidence out of jurors during \textit{voir dire} examinations. For example, in \textit{Dowling} the defendant wished to ask whether the potential juror was one of the constables who had helped to end a Chartist plot for which the accused was charged.\textsuperscript{56} The court refused to permit this question.\textsuperscript{57} Similarly, in 1845 the courts prevented an accused charged with fraudulently obtaining food from asking jurors whether they were members of an association for prosecuting people who committed frauds on tradespeople. The court refused this questioning, stating that it "is

\textsuperscript{52} See J. Chitty, \textit{The Practice of the Law in All its Departments} (London: Stevens and Son, 1836) at 795. See also J. Chitty, \textit{The Practice of the Law in All its Departments} (London: Stevens and Son, 1842) at 670.

\textsuperscript{53} "In Defence of the Jury," \textit{supra} note 5.

\textsuperscript{54} \textit{Ibid.} at 160.

\textsuperscript{55} \textit{Ibid.} at 161-62.

\textsuperscript{56} \textit{Supra} note 51.

\textsuperscript{57} \textit{Ibid.}
quite a new course to catechise [ask a series of questions to] a jury in this way." The restrictions on voir dire were thus strengthened.

4. England: conclusions

The nineteenth-century English jurisprudence concerning jury challenges limited the accused's ability to obtain an impartial jury. Defendants retained peremptory challenges, but the courts strengthened the Crown's ability to sift through jurors by approving of stand-asides even when jury pools increased in size. The courts made it difficult for defendants to challenge by continuing to enforce the rule that extrinsic evidence, and not juror questioning in voir dire, was normally the only viable method to demonstrate partiality. More importantly, judges required defendants to demonstrate that expressions of opinion as to guilt be based upon ill-will. As a result of these developments challenges remained uncommon in English courtrooms. Many nineteenth-century English legal writers commented on the rarity of challenges in normal practice, and in his 1966 study of the English jury system, Sir Patrick Devlin declared that challenges for cause in England were obsolete, as the last reported case dealing with challenges for cause was ninety years old.

Two reasons can be posited to explain this trend. The first relates to class unrest in England. The Crown, through its ability to stand-aside jurors, could prohibit social critics from sitting on juries, while defendants found it increasingly difficult to demonstrate a sufficient challenge for cause against jurors biased in favour of the Crown.

A second explanation relates to the nineteenth-century attempt to make the law more "scientific," a trend which encouraged the legal profession

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58 R. v. Stewart (1845), 1 Cox C.C. 174 at 175. But see Swain and others' Case, [1838] 168 E.R. 1098 where the Crown was permitted to inquire whether jurors had taken part in the riot over a poor law amendment for which the accused were to be tried. Justice Coleridge determined that "a person, who had taken an active part on either side, with respect to a measure that had caused so much excitement as was known to have occurred at Bradford [the location of the riot], could not be regarded as a indifferent juror; he should, therefore, allow the challenge, provided the prosecutor could prove the fact": Ibid. at 1098.


60 Devlin, supra note 51 at 29.

61 See "In Defence of the Jury," supra note 5 at 156-57.
to hide juror bias. Juries were criticized by proponents of legal formalism, an intellectual movement that gained strength as the nineteenth century progressed, and the decisions limiting the right of challenge can be seen as part of the greater movement in England to make the law more scientific and certain. By reducing the apparent partiality in the administration of the law, there would be a concurrent increase in the perceived fairness of the law. Jury bias was a hindrance to this goal, but the solution was intriguing; by limiting the right of challenge, courts hid the bias of jurors, particularly in urban centres where little was known of the panel members. The courts thus created the appearance of impartiality, and the law looked more scientific and reasonable even if juries were, in fact, still unpredictable.

B. American Jurisprudence

1. Jury challenges in the United States

The rise of legal formalism was also an important factor in American developments concerning jury challenges during the nineteenth century. However, owing to the unique societal conditions in America, this intellectual trend had the opposite effect: the youthful United States' concern with controlling tyrannical state power led to the opening up of jury challenges.

Historical research into nineteenth-century American juries has been very limited. This is at least partly a result of the structure of American federalism, in which federal and state courts developed different rules concerning jury selection. While the potential for historical research in American jury challenge developments is vast, this article attempts only to outline the general trends in practice and doctrine during the nineteenth century. The developments in New York and Massachusetts in particular will be discussed, as these jurisdictions offer insight into the reasons behind changing Canadian legal practices.


63 Alschuler and Deiss describe the lack of research on the American jury as an example of "astonishing scholarly neglect": A.W. Alschuler & A.G. Deiss, "A Brief History of the Criminal Jury in the United States" (1994) 61 U. Chi. L. Rev. 867 at 868.

The jury system in the American colonies was similar to that of England prior to the War of Independence. American jury trials before the nineteenth century, like their English counterparts, tended to be relatively quick affairs. The jury was nevertheless celebrated in the early republic, as that period was marked by a significant concern with due process rights. Americans regarded the jury as a limitation on despotism, a feeling that was accentuated in the United States by the struggle against England, the Crown’s use of packed juries in the pre-Revolutionary period, and the nationalism of the early republic. The jury was a powerful ideological institution, and many American legal professionals during the early nineteenth century believed that juries possessed the power to determine questions of law as well as fact. The dominant legal discourse substantiated this view. Natural rights theory stood for the proposition that natural justice was a better source of authority than black-letter maxims. Since “natural law was thought to be accessible to the ordinary man, the theory invited each juror to inquire for himself whether a particular rule of law was consonant with principles of higher law.” The importance attributed to juries helps explain the early nineteenth-century American effort to limit juror bias. Parties were given increased rein to ask jurors about their views, a trend that was strengthened by the increased lawyerization of the American courtroom and the American Sixth Amendment, which guarantees an impartial jury.

Four major differences emerged between the English and American law of challenges in the nineteenth century. First, the English practice of stand-asides (recall that the Crown was not provided with any

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66 See Alschuler & Deiss, *supra* note 63 at 869-75.


68 “The Changing Role of the Jury in the Nineteenth Century” (1964) 74 Yale L.J. 170 at 171 [hereinafter “Changing Role”].


70 “Changing Role,” *supra* note 68 at 172.


peremptory challenges) was gradually replaced in the United States by peremptory challenges for the prosecution. Following the Revolution the issue of stand-asides was controversial, but American jurisdictions nevertheless accepted the practice during the early decades of the nineteenth century. In 1827, Justice Story of the United States Supreme Court approved the practice of standing-asides, but as the nineteenth century progressed most American states passed statutes permitting the prosecution to use peremptory challenges. This trend gradually resulted in the requirement that the government employ peremptory challenges rather than stand-asides. By 1836, Massachusetts permitted the prosecution the same number of peremptory challenges as parties in civil actions, and in 1869 the government’s common law right to stand-aside potential jurors was ended in favour of prosecution peremptories. By 1836, New York also permitted the government the same number of peremptories as parties in civil actions, and in 1873 the New York legislature ended the prosecution’s use of stand-asides in all felonies and misdemeanours. The legislation provided the prosecution with the same number of peremptories as it permitted the defence.

The second difference to emerge between American and English practice in the nineteenth century related to the number of peremptories permitted to defendants. Several American states altered the number of peremptories allowed to the defendant. An 1801 New York statute followed the common law entitlement, providing thirty five challenges to those charged with treason and twenty challenges to those facing capital punishment or


75 See Van Dyke, *supra* note 72 at 150.

76 See Beck, *supra* note 3. Thompson noted that in some states stand-asides continued to be used even after the prosecution was granted peremptory challenges, but noted that “its retention cannot be defended upon principle”: *Law of Trials*, *supra* note 73 at 46. See also Van Dyke, *supra* note 72 at 150.

77 See R.S.M. 1836, c. 137, s. 4.

78 R.S.N.Y. 1836, c. 2, Tit. 5, §11.

79 Laws of N.Y. 1873, c. 427, §2.

80 Laws of N.Y. 1802, c. 29, s. 5.
life imprisonment.\textsuperscript{81} By 1881, defendants in a capital case were allowed thirty peremptories, while defendants facing ten or more years in prison could employ twenty. Such statutory alterations to the common law were common in many states. A summary of American jurisdictions in 1880 found that the majority of states permitted twenty peremptories for the accused in felony cases, but that in some states the exact number varied between six and thirty-five.\textsuperscript{82} Michigan, for example, permitted thirty peremptories to the accused in a capital case.\textsuperscript{83} An 1836 Massachusetts statute permitted twenty peremptories.\textsuperscript{84} Kentucky was more ingenious in its legislative alteration to the common law. Kentucky law dictated that both the state and the accused could peremptorily challenge one-fourth of the jury pool summoned.\textsuperscript{85}

A third difference between American and English practice was the extension of challenges to the accused in misdemeanor. As early as 1834, Pennsylvania, for example, permitted four peremptories for those charged with a misdemeanor.\textsuperscript{86} New York was relatively slow to develop such a rule; it was not until 1881 that New York permitted five peremptories to defendants accused of a misdemeanor. While states instituted misdemeanor peremptories at various times during the nineteenth century, by 1889 most states permitted such challenges.\textsuperscript{87}

The fourth difference to emerge between American and English practice was the expansion in the United States of the grounds and procedures by which a juror could be challenged for partiality. As we have seen, the eighteenth-century common law rule was that potential jurors could be challenged on the ground that they had formed and expressed an opinion as to the guilt or innocence of the accused. Unlike in England, American courts did not limit this ground with a requirement that such statements be made out of ill will towards the defendant. Rather, American law retained and expanded the rule to require only that the juror admit the existence of an opinion to support a good cause of challenge.\textsuperscript{88}

\textsuperscript{81} Laws of N.Y. 1802, c. 60, s. 9.
\textsuperscript{82} See J. Proffat, \textit{A Treatise on Trial by Jury} (San Francisco: Sumner Whitney & Co., 1880) at 209.
\textsuperscript{83} Mich. Comp. Laws, § 7951 (1871).
\textsuperscript{84} R.S.M., \textit{supra} note 77, s. 5.
\textsuperscript{86} Act of 14th April, 1834, s. 140, Purdon's Digest. 6th ed. 620.
\textsuperscript{87} See \textit{Law of Trials}, \textit{supra} note 73 at 37, n. 3.
\textsuperscript{88} \textit{Ibid.} at 67-68.
The break from English tradition was the treason trial of Aaron Burr in 1807.89 Burr, who was Vice President under Thomas Jefferson from 1801 to 1805, killed Alexander Hamilton in a duel, and then raised a small army in Kentucky. Burr was tried for treason, but the highly-publicized nature of the case made it difficult to find jurors without knowledge or an opinion of the events in question. Chief Justice Marshall of the United States Supreme Court, who sat as trial judge for the case, ruled that preconceived notions of the dispute constituted a valid challenge for cause, and that jurors should be questioned to determine their views.90 Preconceived notions, Marshall C.J. reasoned, were similar to a relationship with one of the parties. "It would be strange," he stated, "if the law would be so solicitous to secure a fair trial as to exclude a distant, unknown relative from the jury, and yet to be totally regardless of those in whose minds feelings existed much more unfavourable to an impartial decision of the case."91 Chief Justice Marshall voiced his concern that jurors "will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case."92 While this test broke with English tradition, Marshall C.J. still recognized that a completely impartial jury was impossible to achieve:

The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him.93

This rule was applied in Burr, however, such that any juror who had formed and expressed an opinion as to Burr’s guilt or innocence was excluded from the jury regardless of whether or not it was a “light impression.” The voir dire examination of John Horace Upshaw provides an example of how far the court was willing to go to exclude those with any opinions of the case. Upshaw initially stated that he

conceived himself to stand there as an unprejudiced juryman, for he was ready to attend to the evidence; but that as he had formed opinions hostile to the prisoner, (if opinions

90 Van Dyke, supra note 72 at 142.
91 Burr, supra note 89 at 50.
92 Ibid.
93 Ibid. at 50-51.
they can be called which are formed from newspaper testimony,) and had, he believed,
frequently expressed them, [but] that he was unwilling to subject himself to the
imputation of having prejudged the cause. 44

Burr challenged Upshaw for cause. The prosecutor howled protest,
declaring that Upshaw was an intelligent and upright man, and that the
court "might as well enter at once a nolle prosequi, if he is to be
rejected." 45 Counsel then debated Upshaw's impartiality, followed by an
interrogation of Upshaw in voir dire, when Upshaw admitted that he had
argued in conversations that Burr was guilty and had expressed his belief
that Burr was dangerous to the community. He was thus found
unqualified to sit on the jury.

The Burr decision was a landmark in the American law of
challenges, leading almost all American state courts to permit
questioning of jurors to determine bias. 46 By the end of the nineteenth
century, the most common ground of challenge in criminal cases
stemmed from jurors' opinions concerning the particular merits of the
case. 47 Opinions formed and expressed from newspaper accounts of a
case were often found to be a sufficient cause of challenge, questioning
during the voir dire poked and prodded at the prejudices of the jurors,
and courts strictly adhered to the common law rule that prevented the
swearing of jurors who had formed and expressed an opinion regarding
the accused's guilt or innocence.

Throughout the nineteenth century, judges wrestled with the
vague test for challenges for cause as articulated in Burr. In Francis
Wharton's 1852 criminal law treatise, which summarized the various
tests employed in American states, the author noted that "some conflict
exists as to the degree of bias necessary to exclude a juror." 48 Wharton
suggested that in New York, Iowa, and perhaps Massachusetts the
formation of an opinion founded entirely on the assumption of a
particular state of facts based on rumour was sufficient to be excluded
from a jury. However, in Connecticut, Virginia, North Carolina,
Georgia, Alabama, Mississippi, Tennessee, Indiana, and Illinois the
formation of a hypothetical opinion, based upon assumed facts for which
the juror had not evaluated the truth was an insufficient ground for

44 Ibid. at 78.
45 Ibid.
46 See Van Dyke, supra note 72 at 143.
47 Law of Trials, supra note 73 at 66.
exclusion, provided that the hypothetical opinion was rebuttable in the juror's mind.99 New York's low threshold to successfully challenge a juror for cause was evident as early as 1830. In People v. Mather the court held that a successful challenge could be made out if the juror had formed, though not expressed, an opinion as to the guilt of the accused. However, New York brought its test into line with the majority of states in 1872 when it enacted legislation providing that the previous formation or expression of an opinion would not preclude a potential juror's membership on the panel, as so long as the juror "verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial," and that both the prospective juror and the court were satisfied that the previous opinion would not shape the final verdict.100

Despite such legislative efforts, however, the case law pertaining to challenges was still said to be in a state of confusion in 1889.101 The jurisprudence suggested that a juror was acceptable as long as they did not have views that could be described as fixed, settled, absolute, positive, decided, deliberate, or unconditional.102 On the other hand, a potential juror seeming to side with the accused—for example, hoping that the accused would be found innocent—was generally a successful ground for challenge by the prosecutor.103 Although jurors were not to be disqualified for simply possessing knowledge of the case, there were many instances in which information gained through the press disqualified a juror.104 Several famous cases in which the voir dire became an extremely lengthy procedure demonstrate that knowledge of the events in question often led to successful challenges. For instance, in the 1886 New York trial of Jacob Sharp, the court summoned 2,100 panelists, examined 1,196, and spent twenty-two days in jury selection.105

While challenges became more common in American courtrooms, the distinction between principle challenges and challenges for favour in the context of claims of partiality broke down.106 Attempts

99 Ibid.
100 Laws of N.Y. 1872, c. 475.
101 Law of Trials, supra note 73 at 66.
102 Ibid. at 69.
103 Ibid. at 63-64.
104 Ibid. at 72-77.
105 See "In Defence of the Jury," supra note 5 at 162.
106 See C. La Rue Munson, "Selecting the Jury" (1894-1895) 4 Yale L.J. 173 at 178.
to differentiate between the two breeds of challenges troubled nineteenth-century American jurists. For instance, in *State v. Benton* the court reasoned that an opinion fully formed and expressed was a good cause of principle challenge. On the other hand, "an opinion imperfectly formed, or an opinion merely hypothetical, that is to say, founded on the supposition that facts are as though they have been represented or assumed to be" could constitute a challenge to the favour "which is to be allowed or disallowed as the triers may find the fact of favour or indifferency."107 Distinguishing between a "perfectly" and "imperfectly" formed opinion was problematic. John Proffat discussed a possible solution in 1880. Asserting that the distinction between challenges for favour and principle challenges "was not founded on any philosophical distinction,"108 Proffat suggested that the

two divisions of a challenge for cause have existed for a long time, and have on many occasions been confounded; for the dividing line between them is very indistinct, and sometimes purely arbitrary; so that one would be puzzled often to distinguish one from the other. So unsatisfactory is the separation and boundary line between them, that of late the distinction is in many places abandoned, and in others practically disregarded.109

The failure of American courts to fashion suitable, scientific tests for the common law framework led to the declining use of triers in the United States during the nineteenth century. The use of triers was likely also undermined by the increasingly technical design of the law propounded by the American judiciary, which often led judges to take control of the law's application at the expense of juries.110 The decision in *People v. Bodine*111 exemplified the potential for arbitrariness of triers given the discretionary nature of their roles. The court commented on the difficulty of laying down clear rules for the method of evaluation to be employed by triers; rather, triers' decisions "must be determined upon their conscience and discretion."112 To the legal formalists of the nineteenth century such discretion was highly problematic.

An examination of legal treatises and cases of this period demonstrates a gradual decrease in the use of triers. An 1834 Massachusetts treatise concerning the role of triers in the state's courts

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108 Proffat, *supra* note 82 at 221.
109 Ibid. at 220.
111 (1845) N.Y.S.C.R. 281.
112 Ibid.
argue that the judge was most suited to determining the partiality of
jurors, and concluded that "it is understood, that in all cases, the court
act as triers."113 The use of triers could be waived in favour of judicial
determinations in New York by 1830, provided that there was agreement
among the parties involved.114 By 1867 this consent was assumed in the
absence of an objection,115 and six years later the state officially ended
the use of triers.116 Federal legislation eliminated the use of triers for
determining challenges to the poll in 1872.117 Most states were said to
have ceased employing triers by 1880,118 and in 1895 it was asserted to be
"ordinary American practice" that judges determined all challenges to
the poll.119

As grounds for challenge broadened in the United States, rules
for what questions were allowed of potential jurors in *voir dire* deviated
substantially from English practice. In 1889, Seymour Thompson wrote
that, as a general rule, "a party has no right to examine the venire-man
by way of fishing for some ground of challenge."120 This was the English
practice, but Thompson also noted that this rule should be accepted with
cautions.121 While questions were supposed to be pertinent, and, as in
England, were not to degrade the juror, several examples illustrate the
breadth of questions American jurors could face. For instance,
questioning could try to elicit facts that would enable a party to
effectively use his or her peremptory challenges.122 Some courts
permitted questions pertaining to bias, and the result was often a wide
range of inquiry.123 Questions could even be directed at religious,
political, or racial opinions. For example, in a trial of persons involved in

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113 P.O. Thacher, *Observations on Some of the Methods Known in the Law of Massachusetts, to
Secure the Selection and Appointment of an Impartial Jury, In Cases Civil and Criminal* (Boston:
Russell, Odiorne & Co., 1834) at 21, n. *.

114 See *People v. Mather*, 4 N.Y.S.C.R. 229 (1830).


117 U.S. Rev. Stat. § 819 (1873-1874). See also Proffat, supra note 82 at 209.

118 See Proffat, supra note 82 at 221-22.

119 J.P. Bishop, *New Criminal Procedure or New Commentaries on the Law of Pleading and
See also Munson, supra note 106 at 187.

120 *Law of Trials*, supra note 73 at 99.

121 Ibid.

122 Ibid. at 99-100. See also Devlin, supra note 51 at 32.

123 See *Law of Trials*, supra note 73 at 103.
a riot between immigrant Roman Catholics and native-born Americans, it was held acceptable to ask jurors whether they had any bias against Roman Catholics. A Texas court provides a further illustration. It permitted jurors to be asked whether they would return the same verdict against a white man for killing a black man as they would if a white man killed another white.

2. United States: Conclusions

This brief outline of American challenges in the nineteenth century shows that the prosecutor’s right to stand-aside was statutorily replaced by peremptory challenges, while courts and legislatures loosened the restrictions that, in England, prevented challenges for cause. Three factors help to explain these developments. First, the United States’ revolutionary past created a preoccupation with the attainment of unbiased juries supported in turn by a belief in natural rights. Second, the questioning and investigation of jurors’ partiality likely expanded as counsel took a greater role in the voir dire during the nineteenth century. As the use of triers declined in favour of judicial determinations of challenges for favour, courts permitted lawyers to directly question potential jurors. While English lawyers were prevented from aggressively questioning jurors, American judges permitted lawyers to test whether the juror’s views could be challenged on the basis of the vague test set out in Burr. The third factor shaping the development of American jury selection procedures was the changing ideological perception of the jury during the late nineteenth century. Instead of focusing on the juror’s role


125 See Lester v. State, 2 Tex. App. 432 (1877). While this article does not explore the racial controversy surrounding jury selection in the United States, the issue undoubtedly played an important role during the nineteenth century. For example, the flexible test permitting jurors to be sworn who had previously voiced an opinion regarding the accused’s guilt dictated that some courts allowed racially-biased citizens to become jurors: see A.E.K. Nash, “Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South” in W. Holt, ed., Essays in Nineteenth-Century American Legal History (Westport, Conn.: Greenwood Press, 1976) 500 at 517-19. For a more general discussion of racial issues regarding nineteenth-century American juries, see Hyman & Tarrant, supra note 64 at 36-40.


127 Law of Trials, supra note 73 at 100.

128 Supra note 89.
in defending individual liberty, critics claimed that the jury was an expression of oppressive public opinion. Motivating this view was a shift in legal analysis more generally. Proponents of formalist legal analysis argued that the application of precedent and strict adherence to legal doctrine would prevent charges of legal bias. The aim was to "import into the processes of legal reasoning the qualities of certainty and logical inexorability." This intellectual trend clearly affected American juries as well. Opponents of juries focused on the positive law as a system leading to predictable results. The notion that the positive law could be set aside by any perverse juror was incompatible with their view of the law as a coherent set of principles by which men could order their lives and predict the consequences of their actions.

This intellectual trend resulted in substantial changes in American jury practices, most of which attempted to control the jury and make it more predictable. For example, special and directed verdicts were instituted. In this context, the judiciary expanded its ability to identify and remove biased jurors. Given legal formalism's requirement that only an impartial decisionmaker could make the law certain, this trend is unsurprising. Unlike the English practice that assumed indifference, however, the American doctrine attempted to open up jury challenges to expose and eliminate any biases that would affect the trial.

C. Canadian Jurisprudence

1. Jury challenges in Canada

As in the United States, Canada's jury laws closely mirrored English trends prior to the nineteenth century. Given the different paths taken by England and the United States, the question arises what effect these divergent paths had on Canadian law during the nineteenth century. Several historians have demonstrated that the legal profession in British North America employed an eclectic form of legal thought during the nineteenth century that drew from both English and American legal traditions. Blaine Baker's study of Upper Canadian legal

129 "Changing Role," supra note 68 at 179.
131 "Changing Role," supra note 68 at 179.
132 Ibid. at 184-86.
thought has demonstrated the existence of a unique Canadian legal ideology that relied heavily on both American and English precedents until the closing decades of the nineteenth century. As the century came to a close, however, improvements in communications and the growth of imperialistic fervour led many Canadian legal professionals to brand the hybrid Upper Canadian legal thought a bastardized form of legal analysis. Canadians disparaged American legal traditions, and there was a shift away from doctrines tainted by American precedents. The quality and availability of English case reporters improved, and the doctrine of *stare decisis* became more important.

The available evidence regarding jury challenges in Ontario, Nova Scotia, New Brunswick, and Prince Edward Island demonstrates an awareness of the path American jury challenges took after 1800, and, particularly with regard to peremptory challenges, reflects a willingness to incorporate American practices. In other respects, however, particularly in relation to challenges for cause, Canadian courts continued to look to English law as the dominant source for substantive and procedural authority.

Though challenges in Upper Canada during the nineteenth century are poorly documented, there is evidence of their use. Upper Canadian legislators copied the colony's early jury laws from England. In 1792, *An Act to establish Trials by Jury* provided that "Jurors shall be summoned and taken conformably to the Law and Custom of England." In 1794, William Osgoode framed a more comprehensive jury act for Upper Canada. This act contemplated that jurors could be "challenged and set aside." Defendants employed challenges in treason cases following the War of 1812, including several who challenged more than twenty prospective jurors, and one who challenged

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134 This article does not examine jury challenges in Quebec. Quebec jury selection procedure was complicated by the occasional use of the "mixed jury"—that is, a jury composed of one-half French and one-half English.


as many as thirty-five prospective jurors.\textsuperscript{138} The 1794 jury act remained virtually unchanged until 1850,\textsuperscript{139} at which time the colony promulgated a comprehensive act to consolidate and amend its jury laws.\textsuperscript{140}

Following the founding of Halifax in 1749, the basic principles of English criminal law were imposed in Nova Scotia.\textsuperscript{141} Research material collected by Jim Phillips reveals evidence of challenges in Nova Scotia between 1749 and 1840,\textsuperscript{142} although the available evidence generally fails to record the form of the challenge, and, in some cases, whether it was the defendant or the prosecution who issued the challenge. A Royal Navy sailor challenged nine jurors peremptorily in his 1754 murder trial, while the attorney general challenged an additional two.\textsuperscript{143} In a 1791 trial in Lunenburg one juror was challenged.\textsuperscript{144} Nineteen jurors were challenged in an 1812 murder trial in Guysborough,\textsuperscript{145} and two years later twelve jurors were peremptorily challenged in Liverpool.\textsuperscript{146} In the murder case of \textit{R. v. Rufus Fawcett} in 1832, the solicitor general stood-
aside three potential jurors, while the defendant challenged eleven.\textsuperscript{147} While these examples indicate that challenges were known in Nova Scotia during this period, the fact that courts did not deal with the doctrinal issues suggests that emerging American doctrines did not immediately affect Nova Scotia law. Beamish Murdoch's 1833 treatise on the law of Nova Scotia substantiates the conclusion that Nova Scotia's challenging laws remained very similar to those of England—Murdoch's description of the law of challenges does not deviate from the law in England.\textsuperscript{148}

Newspaper reports of two high-profile cases suggest that the relatively infrequent use of challenges in Nova Scotia may have resulted from the perception that challenging was a procedural safeguard of the guilty.\textsuperscript{149} This perception is reflected in the reports of the trial of Richard Uniake. On trial for murder following an 1819 duel, Uniake had a high profile in Nova Scotia society, and he was reluctant to challenge the potential jurors in front of the spectators who packed the courtroom without explaining his reasons for doing so: "My Lords, as I am now about to enter upon my trial, wherein my life, my honor, and my character are at stake; in the name of my friend, and in my own name, I ask for the indulgence which is shewn to others when placed in a similar situation."\textsuperscript{150} Uniake then challenged several jurors, but felt it necessary to explain the invocation of his common law right. Uniake stated to the Court the reason he was induced to do so—His wish was to be tried by an impartial Jury—by men who were not present in the Court upon the trial of cause, which had led to this unfortunate event; and he was anxious that persons who had not heard any thing that passed on one side or the other, should decide upon his conduct, in a transaction in which his life and his honour were depending.\textsuperscript{151}

The perception that challenges were a sure sign of guilt can also be discerned in a newspaper report of the 1840 trial of Smith Clarke and John Elexon, the former for murder and the latter as an accessory before the fact. Just as the defendants' appearance and unwillingness to talk to

\textsuperscript{147} Novascotian (3 October 1832).


\textsuperscript{149} A second practical consideration was likely the concern that challenging jurors' partiality, if unsuccessful, might raise the ire of a potential juror. Blackstone commented upon this possibility, suggesting that "perhaps the bare questioning his indifference may sometimes provoke a resentment": W. Blackstone, \textit{Commentaries on the Laws of England}, 1st ed., vol. 4, (Oxford: Clarendon Press, 1769) at 347.

\textsuperscript{150} Acadian Recorder (31 July 1819).

\textsuperscript{151} Ibid.
counsel were thought to suggest guilt, their use of challenges foreshadowed their ultimate conviction:

There was a look of deep dejection on the countenances of both the prisoners, but particularly that of Clarke. They occasionally held a few moment’s conversation with their legal advisors, but never spoke nor indeed approached, to each other. As the names of the Jury were called over (the Jurymen being in full view) the prisoners cast eager glances upon each other as they were severally called. They were evidently extremely anxious that certain individuals should not be upon the Jury. Clarke only made two challenges, one separately and the other jointly with Elexon. Elexon made seven separate challenges, when at last a Jury was satisfactorily collected and sworn.\footnote{152}

It is therefore plausible that the value of challenging jurors had to be weighed against the manifest appearance of guilt challenges created.

Peremptory challenges also received the attention of Canadian legislators. American trends were apparent in three important ways in the development of Canadian law regarding peremptory challenges. First, statutory enactments provided defendants charged with a misdemeanour a small number of peremptory challenges. Though peremptory challenges were never officially provided to those accused of a misdemeanour in England, Canadian legislators followed the American practice during the mid-nineteenth century. Nova Scotia became the first province to offer peremptories for misdemeanours. In 1838, the government provided three peremptory challenges “in all cases of the trial of any Issues, Actions or Prosecutions, Civil or Criminal” in which parties did not already possess a right of peremptory challenge.\footnote{153} In 1848, parties in Halifax County had the number of peremptories raised to four, though three peremptories remained the norm in other parts of the colony.\footnote{154} New Brunswick passed a provision in 1848 similar to Nova Scotia’s 1838 Act, again providing for three peremptory challenges for defendants in proceedings in which there had not previously been a right of peremptory challenge.\footnote{155} Upper Canada followed in 1850, granting defendants charged with a misdemeanour two peremptory challenges,\footnote{156} and increasing the number of defence peremptories in misdemeanour to three in 1858.\footnote{157}

\footnote{152}{*Trial of Clarke & Elexon,* *Acadian Recorder* (25 January 1840).

153 *An Act for the Regulation of Juries,* S.N.S. 1838, c. 6, s. 16. A similar bill had been suggested in 1825. See also “Jury Bill,” *Novascotian* (9 March 1825).

154 *An Act for the regulation of Juries,* S.N.S. 1848, c. 34, s. 13.

155 See *An Act in addition to the Law relating to Juries,* S.N.B. 1848, c. 15, s. 3.

156 See *Jury Act, 1850,* supra note 140, s. 58.

157 *An Act to amend and consolidate the Jury Laws of Upper Canada,* 1859 (Prov. C.) 22 Vic., c. 100, s. 98.
Island was the last province to create such a right, waiting until 1861 to provide three peremptories in civil cases and misdemeanours.158

In contrast to the granting of peremptory challenges to defendants in misdemeanour, legislators generally reduced the number of such challenges for other offenders. Again, the timing of these developments suggests that American trends served as the model. An 1854 New Brunswick statute limited those charged with treason or other capital offences to twelve peremptory challenges. For other felonies only six peremptory challenges were permitted.159 Upper Canada’s Jury Act, 1850 dictated that defendants had a right to twenty peremptory challenges in felony and murder cases, but neglected to mention whether thirty five peremptories were permitted to the defendant in treason cases, as in England.160 Nova Scotia decreased peremptories for felonies, stipulating in 1864 that in all criminal trials the defendant could peremptorily challenge only eight jurors.161

A third indication of an American influence on Canadian law was the granting of peremptory challenges to the prosecution. No such right ever existed in English practice, though as we have seen a number of American jurisdictions replaced the prosecution’s right to stand-aside jurors in favour of state peremptories. The timing of the amendments in Canada suggests an attempt to copy American procedures. Nova Scotia was first to adopt prosecution peremptories. The 1838 Act that provided three peremptories to any defendant also applied to prosecutors. It was the right of defendants, and also of “Plaintiff or Plaintiffs, Prosecutor or Prosecutors.”162 Nova Scotia increased the number of Crown peremptories to four in 1859.163 The law of New Brunswick developed similarly. An act of 1848164 mirrored Nova Scotia’s 1838 provision, and New Brunswick also increased the Crown’s right to four peremptories a year after Nova Scotia’s 1859 enactment.165 Interestingly, there seems to

158 See An Act to consolidate and amend the Laws relating to Grand and Petit Jurors in this Island, R.S.P.E.I. 1861, c. 10, s. 20.

159 R.S.N.B. 1854, c. 159, s. 10.

160 Jury Act, 1850, supra note 140, s. 58.

161 R.S.N.S. 1864, c. 136, s. 51.

162 Act for the regulation of Juries, supra note 153, s. 16.

163 R.S.N.S. 1859, c. 136, s. 49.

164 Act in addition to the Law relating to Juries, supra note 155, s. 3.

165 An Act relating to Procedure in Criminal Cases, S.N.B. 1860, c. 32, s. 3.
be no evidence that the Crown received the right of peremptory challenge in Upper Canada prior to Confederation.\footnote{See R. v. Patteson, (1875) 36 U.C.Q.B. 129 at 136.}

An explanation for the lack of Crown peremptories in Upper Canada might be discerned from the controversy over the Crown's right to stand-aside jurors created by section 59 of Upper Canada's Jury Act, 1850. Section 59 suggested that the Crown had no right to stand-aside jurors. The resulting controversy over the meaning of this section led to a strong judicial assertion of such a right for the Crown. This assertion may have prevented any move toward American-style prosecutorial peremptory challenges. The Jury Act, 1850 stated that "in cases in which the Queen shall be a party, those who sue for the Queen shall not be allowed a challenge to any Juror who may be called to serve upon the Jury in any such case, except for cause to be assigned, tried and disposed of according to the custom of the Court."\footnote{Jury Act, 1850, supra note 140, s. 59.} As has been shown, many American jurisdictions replaced prosecutorial stand-asides in the 1850s with peremptory challenges. It would appear in this instance, however, that the government did not intend to alter the law, despite section 59's margin note proclaiming "Crown to challenge for cause only."\footnote{Ibid.} There are three clear indications that the colonial government did not intend to eliminate stand-asides. First, legislators did not give the Crown peremptory challenges, and it seems unlikely that the legislature would prevent the Crown from using stand-asides without providing peremptories to the prosecution. Second, an 1853 amendment repealed the section in the 1850 statute that appeared to require the Crown to show cause. This new section was almost identical to an 1825 English act pertaining to challenges that had been judicially interpreted to permit stand-asides.\footnote{An Act to amend the Upper Canada Jurors' Act of one thousand eight hundred and fifty, and to repeal certain parts thereof, 1853 (Prov. C.) 16 Vic., c. 120, s. 7.} In fact, the amending statute of 1853 was more explicit than its English counterpart in permitting stand-asides, stating that "nothing herein contained shall affect or be construed to affect the power of any Court in Upper Canada, to order any Juror to stand by until the panel shall be gone through, at the prayer of them that prosecute for the Queen, as has been heretofore accustomed."\footnote{Ibid.}

Criminal cases in which defendants unsuccessfully argued that the Crown did not have the right to stand-aside jurors are the third

\footnote{166 See R. v. Patteson, (1875) 36 U.C.Q.B. 129 at 136.}
\footnote{167 Jury Act, 1850, supra note 140, s. 59.}
\footnote{168 Ibid.}
\footnote{169 An Act to amend the Upper Canada Jurors' Act of one thousand eight hundred and fifty, and to repeal certain parts thereof, 1853 (Prov. C.) 16 Vic., c. 120, s. 7.}
\footnote{170 Ibid.}
indication that the legislature did not intend to eliminate stand-asides in the *Jury Act, 1850*. The Crown’s right to stand-aside jurors in Upper Canada was first substantiated in the 1854 case of *R. v. Benjamin*.171 George and Emanuel Benjamin were charged with a misdemeanour for neglecting their duty as the registrars of Hastings County. At trial, the defendants claimed that the Crown did not possess the right to stand-aside jurors because of section 59 of the *Jury Act, 1850*. The Crown argued that the 1853 jury act amended the apparent limitation on stand-asides.172 A unanimous court held that the Crown had the right to stand-aside jurors until the whole panel was gone through, reasoning that since the 1853 Act was nearly the same as the English act, the same construction should be applied. Moreover, the court asserted that it had been well understood that the Crown could stand-aside jurors “in indictments for misdemeanour as well as for felony, without shewing cause, until the panel was exhausted.”173 The court thus adopted the English decisions providing for stand-asides, and held that, despite the 1850 statutory change, the Crown had always possessed a right to stand-side jurors. Chief Justice James Buchanan Macaulay explained that it has always been my impression that the rights of the Crown since the passing of the 13 & 14 Vic., ch. 55, sec. 59, [the 1850 act] were the same as before; and consequently, that even before the late act jurors might be requested to stand aside until the panel was exhausted, according to the custom of the court previously.174

The Queen’s Bench confirmed this finding in 1859 in *R. v. Fellowes*.175 By the mid-nineteenth century, therefore, the Upper Canadian practice regarding stand-asides had been shaped in the form of its English parent, and not in that of many American jurisdictions where stand-asides had been replaced by peremptory challenges.

By 1868 Upper Canadian doctrine concerning challenges for cause was also similar to that of England. Jury challenges were discussed at length in the appeal of *Whelan v. R.* to the Court of Queen’s Bench, and subsequently to the Ontario Court of Error and Appeal.176 The defendant was charged with the murder of Thomas D’Arcy McGee, and at trial had wished to challenge a juror for cause. The trial judge,

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171 (1854) 4 U.C.C.P. 179.
172 Ibid. at 183.
173 Ibid. at 185.
174 Ibid. at 187.
175 (1859) 19 U.C.Q.B. 48.
176 (1868) 29 U.C.Q.B. 2 (Q.B.), aff’d (1868), 29 U.C.Q.B. 108 (C.A.) [hereinafter *Whelan*].
however, required the defendant to exhaust all of his peremptories before challenging for cause. The defendant acquiesced, challenging the juror peremptorily. Upon exhausting his twenty peremptory challenges, the defendant claimed that he should be permitted an additional peremptory challenge since he had been forced to use up such a challenge earlier. The trial court did not permit this. On appeal, the defendant argued that this error required a new trial. The Queen’s Bench and then the Court of Error and Appeal held that the defendant clearly possessed the right to challenge for cause prior to exhausting his peremptory challenges. The more troubling question, though, was whether this judicial oversight required a new trial. The Queen’s Bench decided that a new trial was unnecessary, a finding affirmed by the Court of Appeal.

What is interesting about Whelan, however, is not the reasoning utilized in this rather unusual case, but the precedents employed. Decided prior to the apparent shift in legal analysis suggested by Baker, Whelan is particularly valuable because it provides evidence that Canadians were aware of American doctrines concerning challenges for cause, and yet were inclined to apply English law. The judges in Whelan demonstrated a wary stance towards American challenges for cause doctrine. At the Queen’s Bench, for example, after counsel cited many American cases, Justice Morrison stated that American cases are not uniform or consistent, either with respect to the practice in such cases or the principles upon which they are decided; and although such decisions are not authoritatively binding on us, yet being the judgment of able and learned Judges, expounding laws based on principles derived from our own as well as the decisions of English Courts, they are entitled to every respect and great weight, and I have found them on many occasions very instructive and valuable. But, unfortunately, the decisions cited to us as applicable to the question under discussion, are, as I have remarked, not uniform, but very diverse.

Similarly, Chief Justice Draper of the Court of Error and Appeal disregarded American challenge for cause practice. “I acknowledge, with great satisfaction, the valuable aid I have frequently derived from the decisions of eminent jurists who have presided in the American Courts,” Draper C.J.A. asserted,

and in cases arising out of incidents and circumstances peculiar to a newly-settled country like this Province, I have found help from their judgments which I could not obtain from any English authorities. But on the questions now under our consideration, it has

177 Ibid. at 118 (C.A.).
178 Baker, supra note 133.
179 Whelan, supra note 176 at 69. (Q.B.)
Chief Justice Draper thus chose not to make use of the American case law on this issue.\textsuperscript{181}

An 1876 New Brunswick case, \textit{R. v. Chasson},\textsuperscript{182} also demonstrates the reluctance to follow American challenge for cause practices. Joseph Chasson, a Roman Catholic, was accused of an 1875 murder. A large number of citizens—150—were called for the jury pool. The Crown used its ability to stand-aside jurors to remove any Catholics from the pool. The defendant argued, first, that the Crown did not have the right to stand-aside jurors, and, second, that the court should permit him to question the jurors as to whether they had formed and expressed an opinion as to the proper outcome of the case. Neither argument proved successful.

The defendant issued a series of challenges for cause against prospective jurors in \textit{voir dire}. The resulting exchanges are evidence that New Brunswick tolerated a greater level of jury questioning than in England, but that the \textit{Edmonds} requirement that a juror’s opinion be formed out of ill will was still a requirement to demonstrate challengeable partiality. For example, the defendant challenged Sylvanus Payne on the ground that he did not stand indifferent. Payne testified in \textit{voir dire} that he had probably expressed an opinion about the case from what he had read in newspapers, but that he had not expressed any opinion as to what the outcome of trial ought to be, or of the guilt or innocence of the prisoner. The defence counsel then attempted to ask Payne whether, “if the result of the trial should agree with the opinion he had formed as to it, that result, in his opinion, would be justice or injustice.”\textsuperscript{183} The judge refused to allow this question, and the triers deemed Payne indifferent. The defence continued in its attempt to inquire into the jurors’ hostile opinions, but the judge refused to allow such questioning. Thomas Hodnett, for instance, stated that he had

\begin{footnotes}
\item \textsuperscript{180} \textit{Ibid.} at 138 (C.A.).
\item \textsuperscript{181} \textit{Ibid. Whelan} also hints that challenges were not common in Upper Canada prior to 1868. One indication of this is simply the difficulty that the court had in deciding the case. The two appeal judgments totalled 186 pages in length, the majority of which focused on the failure to allow the challenge for cause. Chief Justice Hagarty also suggested that challenges were uncommon in Upper Canada: “In this country we have had but little if any experience in such matters. I have no recollection, during a connection of nearly thirty years with the Canadian Courts, of any question concerning a challenge of jurors in criminal cases having arisen”: \textit{ibid.} at 143 (C.A.).
\item \textsuperscript{182} (1876) 16 N.B.R. 546 [hereinafter \textit{Chasson}].
\item \textsuperscript{183} \textit{Ibid.} at 548.
\end{footnotes}
previously formed an opinion as to the guilt or innocence of the prisoner, but the trial judge rejected the defence counsel's question: "Did you not express an opinion that these prisoners ought all to be hanged?" The attorney general then questioned Hodnett, eliciting testimony that he would decide on the evidence, and refuting the suggestion that he had said the accused should be hanged or punished. Hodnett was found indifferent.

On appeal to the New Brunswick Supreme Court, the defendant argued that he should have been permitted to question the jurors more extensively regarding their partiality. The court found that no error had occurred. The response of the Crown and reasoning of the bench suggest a concern that American challenging for cause practices might creep into Canadian courtrooms. The Crown, in fact, specifically commented that this had already occurred to a limited extent in some Canadian cases. There had been, according to the Crown, "few decisions in this country" in which challenges had been at issue, but a "practice has grown up, induced no doubt by the course of procedure in the United States, and we have, to a certain extent, departed from the well settled practice in England." The Crown warned that the challenge issue was the most important aspect of the case, because

a practice has been growing up in our Courts, based upon the doctrines of some of the American Courts and in violation of the settled doctrines of the English law. We contend that opinions formed from knowledge of the cause, and in the absence of anything denoting ill-feeling or affection, is not a ground for challenge.

The Court heeded the Crown's plea. Citing Frost, the court found that the Crown could stand-aside jurors even if the jury pool was much larger than usual. The bench similarly favoured the Crown's position regarding what questions could be asked of jurors. Relying exclusively on English jurisprudence, Chief Justice Allen noted that "Not much authority is to be found as to the extent to which jurors can be interrogated on challenges for unindifferency; but so far as the authorities go, they are generally opposed to the contention of the prisoner's counsel in this case." Chief Justice Allen, citing Edmonds,

184 Ibid.
185 Ibid. at 548-49.
186 Ibid. at 572.
187 Ibid. at 573.
188 Supra note 42.
189 Chasson, supra note 182 at 579.
concluded that defendants could not ask potential jurors whether they possessed ill-will toward the accused because that would dishonour the juror. The juror "cannot be interrogated as to matters which tend to his own discredit, as, whether he has been convicted of felony, etc., nor, as it seems, whether he has expressed a hostile opinion as to the guilt of the defendant." 190 Justice Weldon took a similarly narrow view of jury questioning during the voir dire. 191 Justice Weldon followed English precedent in requiring that the defence provide extrinsic evidence of a juror's bias, and indicated that courts were to avoid American-style voir dire examinations:

> It is certainly not allowable from any decided cases that I can discover, that a juror has to be subjected to a rigorous cross-examination, as was attempted by counsel for the prisoner. Several cases were cited from the American Courts in favor of the course pursued by the counsel for the prisoner, and, however highly such authorities are valued, I am of the opinion it would not be desirable to extend the right of examining a juror challenged further than is allowed in the English Courts, and that the mode of examination is that hitherto allowed to a witness on his voir dire. 192

2. Canada: conclusions

The evidence suggests that challenges for cause during the nineteenth century were never as widespread and contentious in Canada as in the United States. Several appellate level decisions indicate that Canadian legal professionals were aware of American practices, but that Canadian jurists appeared reluctant to draw upon this jurisprudence, choosing instead to apply English doctrine. American influences did, however, creep into Canadian statute law regarding peremptory challenges. The colonies retained stand-asides, as in England, but in both New Brunswick and Nova Scotia legislators gave the Crown the additional advantage of peremptory challenges. At the same time, the number of defence peremptories was generally decreased for serious offences, though individuals charged with misdemeanours gained peremptory challenges. The acts of the Dominion after 1867 incorporated these trends in the statute law of the pre-Confederation colonies. In 1869, the Dominion government consolidated the criminal acts of the provinces. 193

In doing so, the federal government adopted the number of peremptory

190 Ibid. at 580.
191 Ibid. at 586.
192 Ibid. at 587.
193 See An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law, 1869 (Can.), 32 & 33 Vict., c. 29, Preamble [hereinafter Criminal Procedure].
challenges permitted defendants from the law of pre-Confederation Upper Canada. The 1869 act provided for twenty defence peremptories in treason or capital felonies, twelve in other felonies, and four in misdemeanours. However, the Crown's right to four peremptories was also included, seemingly as an insertion from the law of New Brunswick and Nova Scotia. These provisions remained the same in a 1886 Dominion criminal procedure act. Six years later, the first Canadian criminal code generally remained faithful to these earlier statutes, though only defendants accused of non-capital felonies for which there was a risk of more than five years of imprisonment were permitted twelve, as opposed to four, peremptories.

There are at least four explanations that account for developments in the law of challenges in Ontario, Nova Scotia, New Brunswick, and Prince Edward Island. First, Canadian courts' refusal to follow American challenges for cause trends may reflect an adherence to "British justice." Legal professionals in nineteenth-century Canada clearly applied the eclectic form of legal analysis described by Blaine Baker in some areas of the law. The acceptance of American peremptory challenge rules demonstrated this approach. But, the development of Canadian criminal law indicates the limits to which nineteenth-century legal professionals would deviate from English practices. Concerns about altering selection rules for one of the greatest symbols of British justice—the jury—may therefore have overcome legal pluralism in the case of challenges for cause doctrine.

Second, as the nineteenth century came to a close, there was a broad movement in Canadian law toward English practices at the expense of the more eclectic legal doctrines which had developed in the colonies earlier in the century. For example, legislators incorporated American peremptory challenge rules prior to this shift towards strictly English forms of legal analysis. On the other hand, given that the American law concerning challenges for cause was one of the most obvious differences between American and English jury selection procedures by the late 1860s, the fact that Canadian courts perceived the

194 Ibid., s. 37.
195 Ibid., s. 38.
196 See An Act respecting Procedure in Criminal Cases, R.S.C. 1887, c. 174, ss. 163, 164.
197 See Criminal Code, S.C. 1892, c. 29, s. 668.
interrogation of jurors as an “American practice” is unsurprising. The trend away from American law is substantiated by the 1890 case of Morin v. R. in which the Supreme Court of Canada did not cite a single precedent from the United States in its sixty-four page judgment concerning stand-asides. 199

Third, Canadian legislators and courts likely followed English precedents regarding challenges for cause and stand-asides out of a desire to increase the state’s control over the criminal justice system. As in England, political reformers in Upper Canada often criticized government officials for packing juries. 200 Canadian legal historians have not yet satisfactorily assessed the accuracy of these claims, but the existence of calls for jury reform suggest that the English doctrines regarding challenges, particularly rules limiting opportunities to challenge for cause and permitting stand-asides, assisted colonial officials attempting to ensure convictions.

Lastly, as in England and the United States, the developments in jury challenges can partly be explained in terms of trying to make jury selection procedures more scientific. Paul Romney has commented on the post-1850 Upper Canadian trend in which the reliability of juries was questioned:

Juries were an affront to the rationalizing spirit of the age, with its emphasis on establishing law as a science administered by trained professionals whose skilled operations would achieve predictable results. As long as juries formed part of the judicial process, law could be no more a science than bridge or poker, games in which even the fullest mastery of principle still left the player subject to the uncertainty of the deal or the luck of the draw. 201

After the 1850 jury act Upper Canadian legal professionals attacked the jury. “Forgotten was its reputedly age-old role as guardian of individual liberty,” Romney tells us, for suddenly “it was a medieval relic, costly and inefficient, that continued to clog the machinery of justice only through inertia of the public will.” 202 As in England and the United States, legislators had two options to increase the perceived partiality of


201 Romney, supra note 139 at 291.

202 Ibid. at 296.
the jury—they could hide bias, or increase the opportunities to expose partiality. Given some of the social factors specific to British North America, Canadian courts followed the English example and presumed jurors' indifferency, rather than copy American attempts to weed out all partial jurors.

IV. CONCLUSION

Critics have attacked both American and English practices concerning challenges, stand-asides, and peremptory challenges. Lord Devlin, for instance, criticized English doctrines, suggesting that the disappearance of challenges for cause discouraged lawyers from closely examining who sat on their clients' juries. E.P. Thompson also critiqued the English system of challenges. "Our jury systems are like a tree with a strong common trunk," argued Thompson, "but on one side a bough has been lopped off, so that today only a vestigial challenge for cause is allowed to the English defence, while on the other side is a flourishing American branch, heavily laden with challenges on voir dire examinations." However, for every critic of the English system, there is an equally vocal critic of American practices.

The differing histories of challenges in Canada, the United States, and England demonstrates how one small area of criminal procedure has been an intersection point for both social and legal trends. Challenges were an ancient tradition born in medieval England, but the doctrine was never widely employed in English courts. After 1800 the doctrine of challenges became an important issue in two very different environments. The post-Revolutionary United States was concerned with using the jury as a bulwark against state oppression and, thus, expanded the use of challenges for cause, while ending the prosecutor's right to stand jurors aside. In England, on the other hand, a concern with class unrest led the judiciary to limit challenges for cause and expand stand-asides. Within these social contexts, changing intellectual trends also had a role. The law was to be more scientific and rationale, but the effect of this stream of thought was profoundly

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203 Devlin, supra note 51 at 35-37.


different in England and the United States. In England, it encouraged judges to make the challenging of jurors more difficult such that juries would appear unbiased, while in the United States judges permitted increased questioning of jurors to achieve the same end. The approach in England was thus to not ask the juror about their bias and assume there is no partiality; Americans assumed that the bias could be rooted out, and therefore encouraged extensive questioning. In Canada, a concern with making the law scientific was also important, as was the influence of American ideas on Canadian peremptory challenge laws in the mid-nineteenth century, and a subsequent attempt to remove American influences from the law of challenges for cause.