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Commission de réforme du droit du Canada

the jury

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STUDIES ON THE JURY

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Public's view of the criminal jury trial:

Report to the Law Reform Commission of Canada on the results of the public opinion poll conducted on matters related to the criminal jury in Canada

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Synopsis

What does the public think about criminal jury trials? The Commission had a poll conducted in April, 1977 to discover the Canadian public's views about various aspects of the criminal jury system.

Data obtained from approximately one thousand respondents indicated that Canadians generally are very favourable to the jury system. Other findings were:

- one third of the population has had direct or indirect contact with the criminal jury;

- those who have served on a jury believe a jury verdict more just and fair than verdicts by judges. Generally, half the population thinks both verdicts equally fair and just while the remaining half are overwhelmingly in favour of jury verdicts;

- almost all Canadians believe the accused should have the option of a jury trial for some offences and one third think the accused should have the option for all offences.

Generally, the right to jury trial should increase with the severity of the offence;

- a great majority feel that jurors should be encouraged to come to a just and fair verdict even though it means they would not be strictly applying the law.

Introduction

In April 1977, the Canadian Institute of Public Opinion, the organization which conducts the Gallup public opinion polls in Canada, was commissioned to conduct a study of the jury by the Law Reform Commission of Canada. The general purpose of the study was to obtain some basic information about the public's view of a number of different aspects of the jury. Because of the cost of such surveys, the Law Reform Commission decided to limit its involvement to six "fixed alternative" questions. As indicated in Appendix 1, the Gallup Poll sample in Canada is designed to be representative of adult Canadians 18 years and older who are not in the military, institutions, Labrador, the Yukon, or the Northwest Territories. For all normal purposes, then, we can assume that the overall figures are representative answers for "Canadians".

As with any survey data, one question that has to be dealt with is the problem of "exactitude". It is important to differentiate a number of different ways in which this problem can be dealt with. In the first place, we have to deal with the questions themselves. It is possible that if

the questions were asked in somewhat different ways, we would have found somewhat different answers. However, we have no reason to believe this to be the case here. The second matter is that these data have to be accepted for what they are: the responses of approximately 1000 people in April 1977. Given that the questions were asked only this one time, however, it seems unlikely that there would be any dramatic changes in any of the response patterns.

The final form of "accuracy" that has to be dealt with has to do with the statistical reliability of the sample (given the constraints already described). This question can be divided up into two separate questions:

(1) What is the likely range, or confidence interval, for any of the responses? For example, 89.9% of the respondents feel that the accused should have the option of a jury trial for the offence of murder. We can be 99% certain that the true percentage for Canadians actually lies between 86.9% and 92.9% (89.9 $\pm$ 3%). Generally speaking, for the sample as a whole, a fair summary of the "confidence intervals" would be that we can be 99% certain that the "true value" is within three (or at most four) percentage points of the values obtained from this sample. It should be pointed out, however, that the "confidence intervals" for

sub-samples are considerably wider: only when we are looking at the responses for the full sample can we be reasonably certain of being within three or four points of the "truth".

(2) At times in this report there will be comparisons made between different parts of the sample. In these cases, statistical tests will be provided which will tell the reader whether the apparent difference between two groups of people (e.g., those who have served on juries as compared to those who have not) is statistically meaningful. By statistically meaningful (or in the statistician's language "statistically significant") we will mean that the result has a very low likelihood of having occurred "just by chance". The statistician's way of presenting such a finding would be to indicate the probability of having obtained a given result by chance alone. The normal notation for this might be something like "p is less than .01" which would indicate to the reader that the likelihood of the result happening purely by chance would be less than one in one hundred. In an attempt to avoid confusion, results that are not "statistically significant" will not be presented. It should be pointed out, of course, that "statistically significant" and "significant for policy" are quite different concepts.

1. Incidence of serving on a jury in a criminal trial

One function of jury service is that it brings a portion of the law-abiding population into contact with the criminal justice system. Other than jury service, it seems likely that the closest contact that most members of the public have with the criminal justice system is through the newspapers or television. Overall, in Canada, it would appear that about 5.3% of the adult population has served on a jury in a criminal trial. An additional 29.1% of the population knows at least one other person who has been on a jury. One could conclude, then, that about a third of the population has had some direct or indirect contact with the criminal jury.

As indicated below, there was some regional variation on the amount of contact citizens had had with the criminal jury.

Region	% reporting having served	% who have not but who know someone who has	% who have some contact with jury
Atlantic	8.9%	43.3%	52.2%
Quebec	3.1%	13.1%	16.2%
Ontario	5.8%	38.5%	44.3%
Prairies	5.2%	32.7%	37.9%
B.C.	7.0%	21.8%	28.8%
TOTAL	5.3%	29.1%	34.4%

-- Chi Square (test of significance) on % having some contact = 75.33 df=4, p is less than .001.

Not surprisingly, older people were more likely to have served on a jury than were younger people. However, they were not more likely to have known at least one other person who had served on a jury.

Age	% reporting having served	% who have not served but know someone who has
18-29	1.2%	26.1%
30-49	4.9%	33.1%
50 and over	9.9%	27.9%

Males were more likely to report having served on a jury, but, once again, males and females were approximately equally likely to know someone else who had served.

Sex	% reporting having served	% who had not served but know someone who has
Male	8.2%	28.8%
Female	2.4%	29.4%

There did not seem to be appreciable differences in the proportion of people who had served when broken down by community size, education, or family income.

2. Awareness of unanimity rule

One of the more salient rules about criminal juries in Canada is that their decision must be unanimous. There has been a lot of interest in this rule recently particularly

because of activity in the United States directed at relaxing the rule. In this context, then, we decided to ask the sample whether they knew about this rule. We felt that asking the question could serve two purposes: (a) to find out about peoples' knowledge about the system, and (b) to get an indication about possible feelings within the community concerning the rule. Specifically, if a substantial portion of the population did not know that the rule existed, it could hardly be argued that the public feels that it is a cornerstone of the jury system. On the other hand, if people were aware of the rule (and, if it turns out they are in favour of it), then it would appear that more serious objections to the present rule would have to be found before it should be changed.

In any case, across the country, 74.7% of the respondents answered "yes" to the question, "Before finding an accused person guilty of a criminal offence in Canada, must all 12 people on a jury agree that he is guilty?" There were some interesting regional variations in the answers that were given. They are contained in the table below.

Must the jury be unanimous to convict:

Region	Yes	No	Don't know, not stated
Atlantic	78.9%	12.2%	8.9%
Quebec	79.0%	13.1%	7.9%
Ontario	67.8%	15.3%	16.9%
Prairies	83.0%	11.8%	5.2%
B.C.	71.3%	18.8%	9.9%
TOTAL	74.7%	14.2%	11.1%

Chi Square = 26.85, df=8, p is less than .001.

Clearly, there are two regions that stand out. Ontario residents were least likely to be correct and most likely not to venture a guess as to the correct answer. Residents of the three prairie provinces, on the other hand, were the most likely to be correct and the least likely to be either incorrect or unable to answer the question. There were no substantial differences when the results were broken down by sex, occupation, age, community size, education or family income. Those who had served on a criminal jury were more likely to be correct.

Must the jury be unanimous to convict:

	Yes	No	Don't know, not stated
Have served	88.9%	9.3%	1.8%
Haven't served	73.9%	14.4%	11.7%

Chi square = 6.89, df=2, p is less than .05.

3. Fairness of verdicts by jury versus judge

In an attempt to determine whether members of the Canadian public believed jury verdicts to be fair and just, we asked them to compare how just and fair they thought jury verdicts were compared to verdicts by judges. About half of the sample thought that they were equally fair and just. However, of those who thought that one form of the trial was more just and fair, about four times as many people favoured the jury trial. In addition, there was some regional variation as well as some variation by the sex of the respondent. The tables below are a breakdown of the responses from those 952 respondents (93.9% of the total sample) who expressed an opinion on this question.

Which is more likely to arrive at a just and fair verdict?

Region	Judge	Jury	Both equally
Atlantic	10.7%	57.1%	32.1%
Quebec	5.0%	18.1%	76.9%
Ontario	12.3%	39.4%	48.3%
Prairies	7.0%	49.0%	44.0%
B.C.	12.8%	44.7%	42.5%
TOTAL	9.2%	36.7%	54.1%

Chi square with df=8, p is less than .001.

Which is more likely to arrive at a just and fair verdict?

	Judge	Jury	Both equally
Males	10.7%	41.9%	47.4%
Females	7.8%	31.4%	60.8%
TOTAL	9.2%	36.7%	54.1%

Chi square with df=2 of 17.33; p is less than .001.

Interestingly enough, those who had served on a jury were most in favour of the jury (in that they were most likely to feel that it would come up with a just and fair verdict) whereas those who had had no contact with the jury were least likely to favour the jury. It would appear, then, that service on the jury does make people more favourable to the jury system.

Which is more likely to arrive at a just and fair verdict?

	Judge	Jury	Both equally
Those who have served	11.1%	55.6%	33.3%
Haven't served but know someone who has	11.3%	44.2%	44.5%
No direct or indirect contact with jury	8.2%	31.6%	60.2%

Chi square = 26.62, df=4, p is less than .001.

4. Offences for which an accused should have the option of trial by jury

Almost all respondents thought that an accused should have the option of a jury trial for at least some offences. The overall percentage (95.1%) did not vary substantially by region, age, sex, etc. Slightly over a third of the total population thought than an accused should have the option of a jury trial for all criminal offences. As shown in the table below, there were some regional differences on this question, with respondents in Quebec being most likely and respondents in Ontario being least likely to favour the option of a jury trial for all criminal offences.

Region	Accused should have the option of trial by jury for all offences
Atlantic	32.2%
Quebec	46.4%
Ontario	30.6%
Prairies	37.3%
B.C.	32.7%
TOTAL	36.5%

Chi square = 19.49, df=4, p is less than .001.

People living in larger cities were also more likely to feel that an accused should have the option of trial by jury for all criminal offences.

Size of community	% feeling that accused should have the option of trial by jury for all offences
Over 100,000	41.6%
10,000 to 100,000	38.5%
Under 10,000	28.5%

Chi square = 15.02, df=2, p is less than .001.

Interestingly enough, there were no significant differences on this question between those who had served on juries and those who had not.

Part of the question requested respondents to indicate which offences they thought it would be appropriate to allow an accused person the option of trial by jury. As can be seen in the table below, it would appear that the more serious the crime, the more likely respondents were to feel that an accused should have the option of a trial by jury.

	% feeling that the accused should have the option of trial by jury for this offence
Murder	89.9%
Rape	80.8%
Robbery	65.7%
Common assault	53.6%
Theft under $200	44.4%
Impaired driving	46.4%

5. Unanimous verdicts

As we have already seen, about three quarters of adult Canadians are aware of the unanimity rule for criminal juries. Very few people (3.7%) were against unanimity (i.e., for majority verdicts) for all criminal cases. About a third of the respondents (33.1%) thought that a jury should be unanimous for all criminal offences. As with other questions, there were some regional differences on this question. Residents of Quebec are most in favour of unanimity for all criminal jury trials, and residents of Ontario are least in favour of unanimity.

Region	% in favour of unanimity in jury trials for all criminal offences
Atlantic	33.3%
Quebec	39.2%
Ontario	27.2%
Prairies	36.6%
B.C.	32.7%
TOTAL	33.1%

Chi square = 11.72, df=4, p is less than .02%

In addition, there were some differences that related to the age of the respondent. Citizens over 50 years of age were most in favour of unanimity for all offences and those

between the ages of thirty and forty-nine were least in favour of unanimity for all offences.

	% in favour of unanimity in jury trials for all criminal offences
Age	
18 - 29	32.2%
30 - 49	28.4%
50 and over	39.9%

Chi square = 10.18, df=2, p is less than .01.

The larger the community size, the more the respondents favoured unanimous verdicts for juries.

	% in favour of unanimity in jury trials for all criminal offences
Size of community	
Over 100,000	37.8%
10,000 to 100,000	32.0%
Under 10,000	27.3%

Service on the jury did not appear to affect peoples' feelings about unanimity.

As with the previous question, respondents were asked to indicate on which offences they felt the jury should be unanimous before convicting an accused person. Once again, it would appear that the more serious the crime, the more

likely it is that Canadians feel that a jury should be required to come to a unanimous verdict before convicting an accused.

Offence	% in favour of unanimity requirement for jury trials involving this offence
Murder	91.6%
Rape	76.0%
Robbery	55.9%
Common assault	47.2%
Theft under $200	38.8%
Impaired driving	40.1%

6. Jury equity

One of the functions of the jury that is emphasized by many writers (e.g., Kalven and Zeisel The American Jury) is that the jurors, because they do not have to justify their decisions, can come to a just and equitable decision even though it might not be the decision that would be arrived at strictly on the facts. In this way, various writers suggest, community values can be brought into the judicial system in a manner that would be impossible to legislate. In an attempt to find out whether Canadian citizens feel that this is a proper function for the criminal jury, we asked

the respondents if they were in favour of giving jurors in all criminal cases the following instruction: "It is difficult to write laws that are just for all conceivable circumstances. Therefore, you are entitled to follow your own conscience instead of strictly applying the law if it is necessary to do so to reach a just result." We felt that if people felt that a function of the jury was to establish equity, then they would favour this instruction; on the other hand, if they felt that an overriding value of juries was strict fact finding, they would oppose this instruction. As indicated below, there was a good deal of support in all parts of the country for this view of the jury's function.

	The "instruction" should:				
	Definitely be given	Probably be given	Undecided, not stated	Probably not be given	Definitely not be given
Region					
Atlantic	60.0%	21.1%	5.6%	6.7%	6.7%
Quebec	67.4%	13.4%	11.0%	3.8%	4.5%
Ontario	49.3%	22.4%	7.9%	8.7%	11.6%
Prairies	60.8%	11.8%	5.9%	6.5%	15.0%
B.C.	61.4%	21.8%	6.9%	6.9%	3.0%
TOTAL	58.4%	18.0%	8.2%	6.6%	8.8%

As can be seen in this table, there was significant (p is less than .001) variation across provinces on the proportion of people who thought that the instruction should

definitely be given. More residents of Quebec were strongly in favour of the instruction being given than were residents of any other region. Ontario residents were least likely to strongly endorse the instructions. However, in all regions at least 70% of adult citizens over 18 would appear to be in favour of encouraging the jury to come to an "equitable" decision even though this decision might not follow a strict interpretation of the law.

Those who had served on juries were more strongly in favour of the instruction being given than were those who had never served on juries. As shown in the table below, 83.3% of those who had served thought that the instruction should definitely be given, whereas only 56.9% of those who had not served gave this as their response.

	The "instruction" should:				
	Definitely be given	Probably be given	Undecided not stated	Probably not be given	Definitely not be given
Jury service					
Those who have served on a jury	83.3%	9.3%	---	1.9%	5.5%
Those who have not served on a jury	56.9%	18.5%	8.7%	6.9%	9.0%

Chi square (definitely should be given) = 14.67, df=1, p is less than .001.
(Note: also, when converted to a 5-point scale, the two distributions are significantly different by t-test, p is less than .01).

7. Summary of the major findings

Although only a small proportion of Canadians have actually served on a jury in a criminal case, about a third know someone who has served. They seem to be generally aware of at least one aspect of the criminal jury -- jury unanimity -- and generally are in favour of that aspect of it, particularly for the most serious offences.

General support for the jury system can be inferred from a number of different results. First of all, of those people who think that verdicts by judges and juries are likely to be different with respect to how fair and just they are, about four times as many people favour the jury as favour the judge. Juries, it turns out, are preferred most in Atlantic Canada (where, incidentally, more people have served on juries and where people are most likely to know someone else who has served on a jury). Indeed, serving on a jury anywhere appears to make people more likely to believe that a jury verdict is most likely to be fair and just.

Almost all Canadians think that accused people should be given the option of trial by jury for a least some

offences. About a third of the people want the option of trial by jury for all criminal offences. Support for the idea of the option of trial by jury for all offences was strongest in Quebec and weakest in Ontario. Residents of large cities were more likely to feel that an accused should always have the option of trial by jury than were residents of smaller cities and towns. Generally speaking, it would appear that Canadians feel that it is most important for accused people to be given the option of trial by jury in the most serious offences.

Almost everyone wants unanimous verdicts for the most serious offences. Support for the unanimity requirement drops off with less serious offences, although about a third of Canadians want it for all offences. The desire for unanimity for all offences is strongest in Quebec and weakest in Ontario. Older people and those who are residents of large cities are most likely to want the unanimity requirement maintained for all jury trials.

Canadians seem to want the jury to be flexible in the application of the law. Most people feel that jurors should be encouraged to come to a just and fair verdict even if it

means that they are not strictly applying the law. This belief was strongest in Quebec and weakest in Ontario. Those who had served on juries were even more likely to accept this view of the jury's role than were those who had not served.

APPENDIX 1

The Design of the Sample

The Canadian Gallup Poll maintains a national probability sample in all centres over 1,000 in population. A quota sample is used in rural farm and rural non-farm areas. An independent sample of individuals is selected for each survey.

The sampling procedure is designed to produce an approximation of the adult civilian population, 18 years and older, living in Canada except for those persons in institutions such as prisons or hospitals, or those residing in Labrador, the Yukon or the Northwest Territories. Survey data can be applied to this population for the purpose of projecting percentages into numbers of people.

The sample design included stratification by six community size groups, based on the 1971 Census data: cities of 500,000 population and over; those between 100,000 and 500,000; 30,000 to 100,000; 10,000 to 30,000; 1,000 to 10,000 and rural farm and rural non-farm areas.

Within each of these classifications a further stratification was done by five geographic regions: Atlantic, Quebec, Ontario, the Prairie Provinces, and British Columbia. Within each regional stratum, the population was arrayed in geographic order by community size and within those classifications, by census enumeration areas. Enumeration areas, on the average, contain about 500 to 600 people.

The total of 105 enumeration areas were selected randomly from this array. Within urban centres, a random block sampling procedure was used to select starting points for interviewers. The interviewer is provided with a map of the enumeration area, showing the location of the starting point. From each starting point, the interviewer is required to follow a specified route in the selection of households. The choice of urban respondents within urban households is automatically made through a listing of all adults, 18 years of age and over, and the application of a random pre-selection method.

The selection of rural farm and rural non-farm interviewing locations followed the sample design established for urban centers in terms of geographic dispersion and random selection of enumeration areas. Because of the low population density and wide dispersion of households, the random block sampling procedure was replaced by quota sampling based on sex and age.

The design of the Gallup Poll sample has been based on population statistics of the Census of Canada, 1971.

CHARACTERISTICS OF THE SAMPLE

APRIL, 1977		NUMBER	PERCENT
TOTAL NUMBER OF INTERVIEWS		1014	100%
Region	Atlantic	90	9
	Quebec	291	29
	Ontario	379	37
	Prairies	153	15
	British Columbia	101	10
Age	18 to 29 years	314	31
	30 to 49 years	366	36
	50 years & over	323	32
	Did not state	11	1
Sex	Male	514	51
	Female	500	49
Occupation of Head of Household			
	Professional/Executive	180	18
	Sales/Clerical	138	14
	Labor	397	39
	Other	293	29
	Did not state	6	1
Education	Public School, None	218	22
	High School, Technical	666	66
	University	126	12
	Did not state	4	*
Community size	Over 100,000	490	48
	30,000 - 100,000	80	8
	10,000 - 30,000	79	8
	1,000 - 10,000	111	11
	Rural, Non-Farm	173	17
	Farm	71	7

APPENDIX 2

1. Have you ever served on a jury in a criminal trial?

   a. yes, and in addition, I know at least one other person who has been on a jury
   b. yes, and I don't know anyone else who has been on a jury
   c. no, but I know at least one other person who has been on a jury
   d. no, and I don't know anyone else who has been on a jury

2. Before finding an accused person guilty of a criminal offence in Canada, must all 12 people on a jury agree that he is guilty?

   a. yes
   b. no
   c. don't know

3. In a criminal trial, which do you think is more likely to arrive at a just and fair verdict - a judge, a jury or are both equally likely?

   a. a judge
   b. a jury
   c. both equally
   d. don't know

4. In which of the following should an accused person have the option of a trial by jury, as opposed to being tried by a judge alone? Choose as many as apply.

   a. murder
   b. rape
   c. robbery
   d. common assault
   e. theft under $200 (for example, shoplifting)
   f. impaired driving (driving while intoxicated)
   g. all criminal offences
   h. no criminal offences

5. If it were to be tried before a jury, in which of the following offences do you feel the jury should be unanimous before convicting an accused person? Choose as many as apply.
A UNANIMOUS VERDICT IS ONE WHERE ALL 12 MEMBERS OF THE JURY AGREE.

   a. murder
   b. rape
   c. robbery
   d. common assault
   e. theft under $200 (for example, shoplifting)
   f. impaired driving (driving while intoxicated)
   g. all criminal offences
   h. no criminal offenscs

6. Do you think that jurors in all criminal cases should be instructed that "it is difficult to write laws that are just for all conceivable circumstances. Therefore, you are entitled to follow your own conscience instead of strictly applying the law if it is necessary to do so to reach a just result"?

   a. this instruction should definitely be given
   b. this instruction should probably be given
   c. this instruction should probably not be given
   d. this instruction should definitely not be given
   e. undecided

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Canadian juror's view of the criminal jury trial: A report to the Law Reform Commission of Canada

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Synopsis

In the folklore surrounding the institution of the jury there are many presumptions as to how jury service affects jurors, how they understand their role and how they view the other actors in the trial process. Indeed, one reason often advanced for maintaining jury trials is the educative effect that jury service has on people. But are such assumptions sound? What do jurors think about the usefulness of jury service? To provide answers to these and similar questions, a survey of actual Canadian jurors was undertaken.

A 10-question pre-service and a 45-question post-service questionnaire was designed and tested. It then was completed by approximately 500 jurors at seven Canadian jurisdictions. The survey, unique in jury research, provided much and sometimes surprising information on jurors' attitudes. The following outlines some of the results.

On their attitudes towards jury service generally, the survey indicates:

- That jury service has a positive effect on attitudes towards the criminal justice system.

- That jury service does have the effect of informing those who take part about the criminal justice system.

- That jurors view their role as a social one rather than that of legal finders of fact.

- That jurors' confidence in the legal system generally and preference for jury trials over trial by judge alone increases with jury service.

The Jury survey also provided interesting insights into juror attitudes toward the fairness of selection procedures, the quality of juror orientation, the clarity of the instructions given them, whether juror duty was a hardship, and many other things.

The results of the survey proved very useful in formulating the Commission's recommendations in the Working Paper on the jury.

Introduction

Jurors - what they think, how they react, who they are, what they learn, - these are of central importance to any comprehensive reassessment of jury trials. For example, many of the present rules concerning what jurors may be told and how they may be treated are based on assumptions rather than any solid information. Much is also said about the relative merits or inconvenience of jury service to some jurors. Some writers argue for the retention of jury service because it educates jurors about the legal process and improves their appreciation of our system of criminal justice. Others suggest that jurors find service to be extremely onerous, uninteresting and a waste of time. Both arguments are largely based on intuition rather than empirical evidence. For these and other reasons, the Commission decided to collect data on the opinions of actual jurors.

An initial legal problem

Reaction to the usefulness of collecting information on the opinions of jurors was generally positive, but there was some concern that the data collection itself might be

illegal. This concern stemmed from section 576.2 of the Criminal Code which reads:

> "Every member of a jury who, ... discloses any information relating to the proceedings of the jury when it was absent from the court room that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction".

This section might be interpreted so as to make it a criminal offence for jurors to fill out a Law Reform Commission questionnaire. It became necessary, therefore, to ensure that our proposed questionnaire did not violate the letter or the spirit of section 576.2.

In this regard, the origin of the section was very informative. The section was introduced into the Code in 1972 in response to a general concern which was triggered by a particular incident in the Province of Quebec. On August 10th, 1969, the jury in The Queen vs. Gagnon after sixty-seven hours of deliberation informed the court that it could not reach a verdict and was discharged. Thirteen days later, and ten days before the date set for selection of a new jury, an article appeared in La Presse. It was based on interviews with one or more of the jurors and hinted that

political motives had been involved in the jury's deliberations. As a consequence of the resulting furor, the Department of the Attorney General of Quebec asked that the general problem highlighted by the Gagnon incident be considered by the next meeting of the Uniformity Conference (a regular annual meeting of the Federal Deputy Minister of Justice and his provincial counterparts). At that meeting the Commissioners approved the following resolution:

> "... That jurors should be prohibited from discussing what went on in the jury room during the course of a trial".

This recommendation became law as section 576.2 of the Criminal Code in the Criminal Law Amendment Act, 1972.

Both the origin of section 576.2 and the previous common law on jury disclosures indicated that the object of the section is to maintain the high repute of and public confidence in jury trials. Its further object is to maintain the efficiency of the jury by assuring each juror of absolute privilege and strict confidence in relation to statements and decisions made about the case at hand in the jury room. This it does by preventing public revelation of the specific grounds and reasons for reaching (or not

reaching) a decision in a particular case. It clearly was not intended to interfere with collection of the general opinions and impressions of jurors on jury service.

The decision was made, therefore, to go ahead with the survey, but to carefully design the questionnaire to avoid any invitation to comment on anything regarding deliberations in a specific case. Once the questionnaire had been finalized it was sent to the Department of Justice for an assessment whether the questionnaire generally or any of the questions in particular could be construed to be in conflict with section 576.2. The opinion received was that "no question appears to contravene the spirit of s. 576.2 of the Criminal Code".

Sampling Problems

As with any survey, the most important problem was that of obtaining a proper sample. This was very complicated in that there were enormous regional disparities and potentially important disparities within regions as to the experience of individual panels. This was even further complicated by various concerns which were raised in the different provinces.

Although it was technically not necessary, a decision was made at the outset that no survey would be conducted without the full support of the Chief Justice of the Trial Division of the Superior Court of the province, the local sheriff's or prothonotary's office and the presiding judge. This led to differences in procedures and substance in some provinces.

In British Columbia, for example, the questionnaire was thoroughly reviewed by a superior court judge and one question was removed from the "pre-service" questionnaire for B.C. Even at that, the initial survey in Vancouver was aborted by the superior court judges two days before it was to be administered, until further adjustments could be made. In the province of Quebec, the difficulties and time involved in obtaining approval of the superior court led to the necessary but regrettable decision not to proceed with the surveys in that province. In other provinces, notably Alberta, Manitoba and Ontario, the enthusiastic cooperation of the judges and court officials made it possible to complete several jury panels.

In the result, the surveys were administered to a variety of panels which allowed interesting regional and

urban-rural comparisons without the systematic sampling which would have been preferred. Even given those sampling limitations, the surveys, constituting the most extensive research to date regarding jurors in Canada, provided a wealth of empirical knowledge that allowed for confident conclusions about the attitude of Canadian jurors and from which recommendations followed.

Procedure

The approach used was fairly simple: as early in their career as a juror as possible, they were administered the "pre-service" questionnaire (see Appendix 1). Typically, this was done immediately after the jurors had arrived and assembled on the first day of their service. Various people administered the questionnaire depending on the jurisdiction being sampled. Typically, it was somebody employed by the court. The cover sheet of the questionnaire explained that the survey was being performed by the Law Reform Commission of Canada. It was explained to them that they would be asked, at the end of their term of service, to fill out another questionnaire. This second questionnaire (the "post-service" questionnaire) was administered in a number

of different ways. In some jurisdictions, it was administered by the court personnel as the juror left on the last day of his service. In other jurisdictions, it was sent to the juror with a self-addressed envelope for return. The differences between administration methods was necessitated by the local conditions at the site of the survey. Each questionnaire had on it a place for the juror to fill in his month of birth and the last three digits of his telephone number. These two pieces of information, when combined, provided a way of matching pre- and post-service questionnaires while still maintaining complete anonymity. We estimate that we have almost 100% return on the pre-service questionnaire. In all, 644 people filled out pre-service questionnaires. The post-service questionnaire was filled out by 477 people, or 74% of the initial sample. Fifty-four of the post-service questionnaires could not be matched with pre-service questionnaires.

As one might expect, there were some variations on the completeness of our sampling. In the two Manitoba jurisdictions, Winnipeg and Brandon, where the questionnaires were administered completely by the court personnel, we had the highest proportion of matched questionnaires. The Nova

Scotia and Vancouver panels had the lowest proportion of matched questionnaires. The sample sizes and degree of completeness are shown in Appendix 2, Table 1.

In interpreting these results it should be remembered that only seven jury panels were sampled, and five of the provinces were not represented at all. There were some differences among the seven jurisdictions that were sampled on some of the questions, and when these differences are important, they will be mentioned. If no mention is made of jurisdiction differences, it can be assumed that they were not very important.

Various characteristics of the jurors are shown in Appendix 2, tables 2 - 5. As can be seen in these tables, there were some rather large differences among the jurisdictions on some variables.

How do the jurors rate the jury system and related aspects of the criminal jury trial?

There is no question that the jury system and other aspects of the criminal justice system that the jurors

experienced are very favourably rated by the jurors. However, before these high scores are attributed to actual experience with the jury and the courts, it should be pointed out that the jurors came in with very positive feelings. As will be shown in a later section, there were some small changes that occurred; the overwhelming finding, however, is that they were very favourable even before they had any experience.

"What is your overall view of the jury system?" (Pre-S #10; Post-S #20)

	Pre-service	Post-service
Very favourable	58.9%	57.1%
Somewhat favourable	32.7%	33.0%
Slightly favourable	5.1%	4.7%
Slightly unfavourable	1.1%	1.9%
Somewhat unfavourable	1.1%	2.3%
Very unfavourable	1.0%	0.9%
TOTAL	100%	100%

"In a criminal trial, do you think it is more likely that a judge or a jury will arrive at a just and fair verdict?" (Pre-S #6; Post-S #17)

	Pre-service	Post-service
Judge much more likely	15.6%	10.9%
Judge somewhat more likely	13.8%	13.2%
Equally likely	27.8%	26.9%
Jury somewhat more likely	28.3%	25.6%
Jury much more likely	14.6%	23.3%
TOTAL	100%	100%

It is perhaps worth noting that there were some initial differences among the various jurisdictions in the perceived relative fairness/justness of the verdicts of judges as compared to juries. These initial differences had diminished considerably after the panel had finished its term of service.

	Which is more likely to arrive at a just and fair verdict?					
	Pre-service			Post-service		
	Judge	Equal	Jury	Judge	Equal	Jury
Toronto	30.0%	24.4%	45.6%	30.1%	26.8%	43.1%
Winnipeg	40.8%	20.4%	38.8%	26.9%	19.2%	53.9%
Brandon	20.5%	34.1%	45.4%	15.8%	28.9%	55.3%
Williams Lake	8.6%	31.0%	60.4%	12.0%	28.0%	60.0%
Edmonton	22.0%	37.3%	40.7%	22.5%	37.5%	40.0%
Nova Scotia	35.8%	25.8%	38.4%	28.3%	21.2%	50.6%
Vancouver	34.5%	29.2%	36.3%	21.2%	31.3%	47.5%
TOTAL	29.4%	27.8%	42.9%	24.1%	26.9%	48.9%

Generally speaking the respondents thought that the likelihood of a wrongful conviction by a jury was small. However, in this case, although there were no significant differences before serving, there were some differences after serving.

"How likely do you think it is that a person could be wrongfully convicted by a jury" (Pre-S #5; Post-S #16)		
	Pre-service	Post-service
Very likely	5.9%	3.2%
Fairly likely	8.6%	13.4%
Somewhat likely	21.5%	20.4%
Fairly unlikely	31.2%	22.1%
Very unlikely	26.1%	30.6%
Extremely unlikely	6.8%	10.2%
TOTAL	100%	100%

Likelihood of wrongful conviction by jury

Pre-Service

	Very/ fairly likely	Some- what likely	Fairly unlikely	Very/ extremely unlikely
Toronto	19.2%	24.2%	29.1%	27.4%
Winnipeg	10.0%	12.0%	36.0%	42.0%
Brandon	9.1%	27.3%	29.5%	34.1%
Williams Lake	5.3%	24.6%	33.3%	36.9%
Edmonton	11.5%	26.2%	34.4%	27.9%
Nova Scotia	16.4%	15.6%	35.2%	32.8%
Vancouver	15.0%	21.2%	25.7%	38.1%
TOTAL	14.5%	21.5%	31.2%	32.9%

Likelihood of wrongful conviction by jury

Post-Service

	Very/ fairly likely	Some- what likely	Fairly unlikely	Very/ extremely unlikely
Toronto	22.6%	23.4%	25.0%	29.0%
Winnipeg	11.5%	17.3%	13.5%	57.6%
Brandon	2.6%	15.8%	39.5%	42.1%
Williams Lake	17.7%	19.6%	15.7%	47.1%
Edmonton	10.0%	20.0%	37.5%	32.5%
Nova Scotia	17.6%	22.4%	15.3%	44.7%
Vancouver	18.8%	18.8%	18.8%	43.8%
TOTAL	16.6%	20.4%	22.1%	40.8%

The jury was not the only aspect of the criminal justice system that was perceived in a favourable light by the jurors. As indicated below, all other parts of the system on which questions were asked received positive ratings.

"From what you know at this point, how fair do you think the courts are?" (Pre-S #7). "From what you know now, how fair do you think the courts are?" (Post-S #18).

	Pre-Service	Post-Service
Very fair	32.6%	41.2%
Quite fair	60.4%	53.7%
Somewhat unfair	6.5%	4.5%
Unfair	0.5%	0.6%
	100%	100%

"Do you feel that witnesses are treated fairly in court?" (Post-S #41)

Always	34.4%
Almost always	34.8%
Most of the time	28.6%
Not usually	2.2%
Almost never	---
TOTAL	100%

"Do you think that the police generally do a good job of investigating all necessary aspects of a case before it is brought to trial?" (Post-S #38)

Definitely yes	28.0%
Probably yes	55.3%
Undecided	9.1%
Probably not	5.5%
Definitely not	2.2%
	100%

"Do you feel that (Crown prosecuting attorneys (Post-S #39) (defense lawyers (Post-S #40) do a good job of presenting their cases?"

	Crown	Defense
Always	22.6%	17.8%
Almost always	38.1%	40.5%
Most of the time	37.4%	40.1%
Not usually	1.5%	1.5%
Almost never	0.4%	---
	100%	100%

As can be seen in Table 6, Appendix 2, the answers to these last four questions tended to be related (Correlations range from +.24 to +.66) indicating that those who thought that the courts were fair, for example, also tended to think that the police, Crowns, and defence prepared and presented their cases well.

To what extent do citizens suffer from being required to serve on the jury?

We often hear stories about jurors suffering greatly from being taken away from their job for jury duty. Although this clearly does happen in some cases, our data would suggest that it happens very rarely. After performing jury duty, the members of the jury panels were asked a number of questions related to the impact of the time spent on the panel on their everyday lives.

At the most general level, it is remarkable that only a small proportion of the respondents found jury duty to be a great inconvenience.

"Was performing jury duty an inconvenience to you or your family?" (Post-S #3)

It was a great inconvenience	4.7%
It was somewhat inconvenient	22.6%
It was a slight inconvenience	32.3%
It wasn't an inconvenience	40.4%

It is worth pointing out that there were some differences in the various panels on how inconvenient jury duty was found to be. The jurors in Winnipeg reported the highest level of inconvenience (17.3% great inconvenience, 26.9% somewhat inconvenient) and those in Williams Lake indicated the lowest level of inconvenience (nobody indicating it was a great inconvenience and 15.7% indicating it was somewhat inconvenient). There was no relationship between the answers to this question and the number of days that they were required to appear at the court house ($r = -0.04$, not significant). Thus reported "inconvenience" does not appear to be a simple function of the length of time they were actually required to be away from their normal activities.

There was a great deal of variability on how long the jurors were required to serve. The range was from fewer than four days to approximately three weeks. Although the number of days served (Post-S #1) was not correlated with rated inconvenience, time served on jury duty was slightly

correlated with whether or not the period served was rated as too long, about right or too short (Post-S #2, r= -0.18, p is less than .01). However, it is worth pointing out that only 15% of the jurors thought that the time served was too long. (There were differences across jurisdictions, with jurors in Winnipeg most likely to say that the period served was too long [38.5%] and jurors in Brandon least likely to say that the period was too long [2.6%].) As one might expect, these ratings in the different jurisdictions relate roughly to the amount of time actually served.

It would appear that in only one of the seven jurisdictions sampled (Toronto) was there a substantial number of jurors who had been able to negotiate the time that they would serve on a jury. In Toronto, 20.5% of the jurors indicated (Pre-S #1) that "the time for my jury service was previously postponed until now." In Vancouver, two jurors (1.9%) checked this response, and in the other five cities, nobody indicated that the time for their jury service had previously been postponed. Pooled across the seven jurisdictions, 2.7% of the jurors indicated that they had tried to get the time for their jury duty postponed, and an additional 6.3% indicated that they had tried to be excused from jury duty.

It is clear that one manner of obtaining jurors -- giving them the choice on when to serve -- was favoured by jurors in every jurisdiction.

"Would it have been helpful to you to have been given the choice of when you would serve your jury duty?" (Pre-S #2)

	Very helpful	Some help	Not helpful	Was given choice
Toronto	29.0%	35.2%	22.7%	13.1%
Winnipeg	32.7%	40.8%	26.5%	---
Brandon	48.8%	32.6%	16.3%	2.3%
Williams Lake	22.8%	31.6%	43.9%	1.8%
Edmonton	41.7%	28.3%	26.7%	3.3%
Nova Scotia	36.5%	33.0%	29.6%	0.9%
Vancouver	36.4%	29.0%	34.6%	---
TOTAL	34.1%	32.9%	28.3%	4.6%

This is not to suggest, however, that the jurors wanted jury duty to be voluntary. Although there was some variation across the seven jurisdictions, in each one, a majority of the respondents (both before and after serving) preferred a compulsory system.

"Do you think that jury duty should be mandatory for all citizens, or would you prefer a system where juries were made up of people who volunteer for jury duty?" (Pre-S #4; Post-S #12)

	Pre-Service	Post-Service
Definitely prefer a compulsory system	48.2%	53.2%
Probably prefer a compulsory system	21.8%	25.2%
Undecided	9.8%	7.6%
Probably prefer a volunteer system	12.3%	10.5%
Definitely prefer a volunteer system	7.9%	3.6%
	100%	100%

Very few jurors (11 out of 472 respondents, or 2.3%) indicated that performing jury duty was a great financial hardship (Post-S #5). An additional 14.8% indicated that it was a "slight hardship" leaving 82.8% indicating that "it didn't have any important financial effects on me."

It is not surprising, then, to find that of those who have a regular income, the majority in each jurisdiction received their regular pay.

"Did you receive your regular income while you were performing jury duty (e.g., are you being paid by your employer during this time)?" (Post-S #4)

	Received full pay	Received partial pay	Not paid	Do not have regular income
Toronto	55.4%	5.0%	0.1%	30.6%
Winnipeg	51.9%	13.5%	25.0%	9.6%
Brandon	27.8%	2.8%	19.4%	50.0%
Williams Lake	56.9%	9.8%	25.5%	7.8%
Edmonton	40.0%	---	32.5%	27.5%
Nova Scotia	59.0%	7.2%	12.0%	21.7%
Vancouver	51.3%	10.0%	11.3%	27.5%
TOTAL	51.6%	7.1%	16.4%	24.8%

Nobody in any of the seven areas indicated that he will "probably be dismissed" in response to the question "Is there any possibility that you will be dismissed or in any way harmed in your employment because of the time you spent on jury duty?" (Post-S #16). Indeed, only 1.5% of the

respondents (7 out of 469) answered that "I might be dismissed or I will be harmed in my employment."

As indicated below, the "fee and other expenses" were generally rated as being either small or adequate.

"What is your opinion of the fee and other expenses you receive for jury service?" (Post-S #7)

Generous	2.6%
Adequate	35.1%
Small	43.7%
Outrageously small	18.7%
	100%

Not surprisingly, those who were less happy about the fee also tended to be those who spent longer on jury duty (Post-S #1; r= +0.17), who found jury duty to be a greater inconvenience (Post-S #3, r= -0.23), who were more likely to indicate that performing jury duty was a hardship (Post-S #5, r= -0.28) and whose term of service on the jury panel ended after the expected time (Post-S #8, r= +0.22). It is probably also worth noting that those who were unhappy about the fee were also less likely to be favourably disposed to the jury system as a whole (Post-S #20, r= +0.22).

These costs of serving on a jury should, to some extent, be considered in the context of one of the "bene-

fits" of serving on the jury: most jurors anticipate that jury service will be an interesting experience. After serving, they indicate that, for the most part, it was an interesting experience (though naturally it was less interesting than expected for those who never acutally served on a jury).

"Overall, how interesting do you think it will be to perform jury duty?" (Post-S #3) "How interesting did you find the performing of jury duty to be?" (Post-S #19)

	Pre-Service	Post-Service
Very interesting	57.5%	64.4%
Somewhat interesting	32.5%	21.6%
Slightly interesting	5.7%	6.7%
Somewhat boring	2.8%	6.5%
Very boring	1.4%	0.9%
	100%	100%

The jurors were asked, after serving, what they disliked most about serving jury duty (Post-S #7). The primary dislike was coded for each respondent. Although there were a fair number of idiosyncratic dislikes mentioned, the problem mentioned the most was waiting. This was true in every jurisdiction except for Williams Lake.

	Major dislike:					
	Waiting	Job neglect	Loss of wages	Travel-ling	Serving on jury	Other
Toronto	72.6%	1.2%	2.4%	--	1.2%	22.6%
Winnipeg	27.6%	10.3%	10.0%	3.4%	3.4%	44.8%
Brandon	18.8%	12.5%	12.5%	6.3%	6.3%	43.8%
Williams Lake	13.0%	8.7%	17.4%	--	--	60.9%
Edmonton	76.5%	--	--	--	11.8%	11.8%
Nova Scotia	45.0%	7.5%	5.0%	7.5%	27.5%	7.5%
Vancouver	56.3%	14.6%	6.3%	6.3%	10.4%	6.3%
TOTAL	51.8%	7.0%	6.2%	3.1%	8.2%	23.8%

Given the proportion of time that the members of the panel reported spending "waiting at court to be called for a trial" (Post-S #21), it is not surprising that the Toronto panel members listed "waiting" as their major dislike. The explanation for the results for the Edmonton panel is less clear.

Proportion of respondents indicating that they spent little, some, or a lot of time "waiting at court to be called for a trial" (Post-S #21)

	Little time spent waiting (i.e., 0-10%)	Moderate amount of time spent waiting (i.e., 11-50%)	Large amount of time spent waiting (i.e., over 50%)
Toronto	10.8%	34.3%	54.9%
Winnipeg	68.4%	28.9%	2.6%
Brandon	54.4%	36.4%	9.1%
Williams Lake	60.6%	21.2%	18.2%
Edmonton	71.0%	29.0%	---
Nova Scotia	54.7%	33.3%	12.0%
Vancouver	32.8%	48.4%	18.8%
TOTAL	42.3%	34.6%	23.1%

What do jurors think of the selection process?

Almost half of the respondents (47.6%) were excluded from serving by one of the lawyers (Post-S #10). The variation that existed across jurisdictions (a high of 69.2% excluded from the Winnipeg panel to a low of 22% excluded in the Williams Lake panel) is hard to interpret since it may reflect differences in the cases heard rather than differences that are truly regional. Those excluded, not surprisingly, were slightly less likely than those not excluded to think that the selection process obtains fair and impartial jurors (Post-S #11, r= -.12).

Those who were excluded were asked to indicate what they thought about it. Given the fact that they had little information about the reasons for exclusion, it is notable that a substantial proportion thought that it was justified.

Was the decision to exclude you justified? (Post-S #10a)

It was definitely justified	7.8%
It was probably justified	35.5%
Undecided	33.8%
It was probably unjustified	14.3%
It was definitely unjustified	8.7%

Those who were excluded did not differ from those who had not been excluded on any of the evaluative questions having

to do with the courts or juries. In other words, there is no evidence whatsoever, that the exclusion of a citizen from serving on the jury by one of the lawyers (Post-S #10) makes the juror see the courts as less fair, juries as less good, or lawyers or crowns as less competent.

Jurors generally thought that the selection process was quite good.

"Do you think that the manner in which jurors are selected helps both sides obtain fair and impartial jurors?" (Post-S #11)

Definitely yes	35.7%
Probably yes	41.4%
Undecided	13.7%
Probably not	6.3%
Definitely not	3.0%

Do jurors perceive that they were sufficiently informed about various aspects of jury duty? Are there aids which they perceive would make their job easier?

It is fair to say that most jurors did not feel the need for additional information about their jury duty. After they had served on the jury, over 90% indicated that they either had no questions about jury duty or were able to get their questions answered.

"Generally speaking, were you able to get answers to questions you might have had about performing jury duty? (Post-S #9)"

(23.6%) I had no questions
(31.8%) Definitely yes
(38.2%) Generally yes
(6.4%) Seldom, almost never, or never

Similarly, those who actually sat on a jury felt that they were adequately informed about their duites and responsibilities as a member of a jury.

"Before you sat on your first jury, did you feel that you were adequately informed about your duties and responsibilities as a member of the jury?" (Post-S #28)

(61.4%) Definitely yes
(25.0%) Probably yes
(8.6%) Probably not
(5.0%) Definitely not

Obviously, neither of these questions deals directly with the problem of assessing whether or not there were things that the member of the jury panel should have known, but was not aware of, and therefore did not feel the need to ask. The responses to the two questions do suggest, however, that if it is felt that the members of a jury should have additional information, a more active approach to providing this information needs to be taken than simply providing a mechanism for answering questions.

We also included two questions dealing with the juror's active participation in the trial itself. In only one jurisdiction (Williams Lake, B.C.) did a substantial number of jurors feel that they had the right to ask questions of the witnesses during the trial (Post-S #29). Most (57%) of those who perceived that they were not allowed to ask questions of the witnesses indicated that they would have liked to have been able to.

Substantial proportions of the jurors in all jurisdictions except for Toronto and Brandon perceived that they were allowed to take notes during the trial. Of those who perceived that they were not allowed to take notes, approximately 48% would have liked to have been able to do so (Post-S #30).

Another possible aid for the jury that has been suggested is to give them written jury instructions that could be taken with them into the jury room. In every jurisdiction, at least half of the respondents (63% overall) felt that it would have been helpful to have had written jury instructions.

Do members of the jury perceive that they and the other members of the jury understand the proceedings? Do they learn from being on the jury?

Those jurors who had actually sat on a jury were asked a number of questions about the trials that they heard. In this section we will deal with those quesitons which deal directly or indirectly with the juror's understanding of what went on. Obviously, it should be kept in mind that although the juror might perceive that he understands the evidence and the instructions from the judge, this does not necessarily mean that he actually does understand everything that went on.

In any case, it is clear that the jurors in our sample perceived that they understood the presentation of the evidence.

"How did you find the presentation of evidence" (Post-S #31)

(34.4%) Very easy to understand
(55.7%) Easy to understand
(8.8%) Difficult to understand
(0.7%) Very difficult to understand
(0.4%) Impossible to understand

There were some minor variations across jurisdictions that are rather difficult to interpret since the differences may

be due to the actual cases that these jurors heard. In any case, however, in each of the seven jurisdictions sampled at least 80% of the respondents found the evidence either very easy or easy to understand.

Similarly, when the respondents were asked how they thought jurors in general found the evidence, the results were quite encouraging.

"Do you feel that juries generally are able to understand and evaluate the evidence" (Post-S #32)

(33.1%)	Definitely yes
(54.4%)	Probably yes
(7.7%)	Undecided
(4.0%)	Probably not
(0.7%)	Definitely not

The results on the perceptions of the judges' instructions were very similar: jurors felt that they were easy to understand and felt that juries generally were able to understand the judges' instructions.

"How did you find the instructions that were given to you by the judge?" (Post-S #33)

(51.1%)	Very easy to understand
(45.7%)	Easy to understand
(2.9%)	Difficult to understand
(0.4%)	Very difficult to understand
(0%)	Impossible to understand

"Do you feel that juries generally understand judges' instructions?" (Post-S #34)

(39.2%) Definitely yes
(57.1%) Probably yes
(3.3%) Probably not
(0.4%) Definitely not

These data, then, would lead to the suggestion that jurors generally don't have any trouble following the trial and the judges' instructions. However, before this inference is accepted, it should be emphasized that we are dealing here with the perceptions of the jurors -- not whether or not the jurors actually do understand, remember, and follow judges' instructions.

The responses of the jurors to two questions suggest that the real picture is not as good as the data presented thus far would imply. Those people who had served on one or more trials were asked (Post-S #36) if any of the defendants had a criminal record. If the answer was yes, they were asked if the judge gave any special instructions concerning this record. We can assume the judge in any trial where the defendant had a criminal record would give the standard limited use instructions. It is instructive, then, to look at the responses to this question. A total of 110 jurors indicated that the defendant in one of the trials they heard

had a criminal record. Of these 110 jurors, 36 (32.7%) indicated that they had been told to use it to determine credibility only. A total of 55 jurors (50%) indicated that the accused had a criminal record but the judge gave no "special instruction concerning the manner in which this information could be used". The remaining 19 jurors (17.3%) indicated that the judge did give special instructions, but they did not indicate on their questionnaires what those special instructions consisted of.

It appears then, that the data on the jurors' perceived ability to follow the instructions are deceptively reassuring: they tell us they understand everything, but, at least on this one question do not appear to be able to remember a particular instruction that they presumably were given.

The other "factual" question that the jurors were asked concerned the "reasonable doubt" instructions given by the judge (Post-S #15). This question asks the juror to indicate the "standard of proof necessary to convict an accused. In pre-testing it was determined that using the words "beyond reasonable doubt" served as too strong a cue

for the respondents. We therefore translated this formula into more common terminology. As indicated below, approximately three quarters of the respondents correctly answered this question.

"In which of the following situations would it be proper to convict an accused" (Post-S #15)

(4.8%)	If the Crown prosecutor had presented some evidence that would tend to show the accused was guilty, but other evidence showed the opposite and you could not decide which was true
(11.8%)	You are slightly more convinced that he is guilty than innocent
(9.7%)	You are fairly sure he is guilty
(73.7%)	You are certain he is guilty

This table contains all of those people who filled out a post-service questionnaire. As indicated earlier, some of those called for jury duty never actually served on a jury. It would be reassuring to find that those who had served made fewer errors than those who had not. However, as shown below, this does not seem to be the case: those who had served were more likely to be correct than those who had not served.

	Proper to convict if:				
	Some evidence	Balance of probabilities	Fairly sure	Certain	Total
Served on at least one jury	4.6%	11.7%	9.6%	74.0%	100%
Did not serve on any juries	5.1%	12.0%	9.7%	73.1%	100%

Chi square = -.078, df=3, not significant

Finally, we can look at the relationship between how easy the juror reported the instructions were to follow and his responses to the question about reasonable doubt. Because so few jurors indicated (Post-S #33) that they found the judges' instructions to be difficult, the data were dichotomized into those who found the judges instructions "very easy" versus those who found them difficult or simply "easy to understand."

Proper to convict if:

Found instructions from judge:	Some evidence	Balance of probabilities	Fairly sure	Certain	Total
Very easy	2.9%	13.8%	9.4%	73.9%	100%
Less easy	5.5%	10.2%	8.7%	75.6%	100%

Chi square = 1.84, df=3, not significant

It would appear, then, that the likelihood of getting the "correct" answer on this question was not related to serving on the jury or to perceiving the judges' instructions to be very easy to follow. Those who had served and those who stated that they found the judges instructions easy to follow were no more likely to answer this question "correctly" about their ability to understand the judge.

What do members of the jury think about two different aspects of the jury: the unanimity requirement and jury equity?

Before serving on the jury, the members of the jury panel were fairly evenly split on the question of unanimity. Notable also was the fact that a sizable number of the respondents were "undecided" as to whether majority verdicts should be allowed. After serving, there was a small shift (particularly among those who actually sat on a jury) toward wanting to maintain the unanimity requirement.

"Do you think that it would be a good idea to allow less than unanimous verdicts (e.g., that a person could be found guilty or not guilty if 10 or more of the 12 jurors agreed on a verdict)?" (Pre-S #8; Post-S #13)

	Pre-Service	Post-Service
Definitely yes	15.9%	20.0%
Probably yes	24.6%	20.4%
Undecided	21.0%	10.9%
Probably not	11.9%	12.2%
Definitely not	26.6%	36.4%

Both before and after serving, those who favoured maintaining the unanimity requirement were also more favourable toward the jury system overall (Pre-S #10, r=-.11; Post-S #20, r=-.17). Similarly, those who wanted to maintain the unanimity requirement were slightly more

likely, both before and after serving, to state that a jury is more likely than a judge to arrive at a just and fair verdict (Pre-S #6, r=+0.21; Post-S #17, r=+0.17).

Both before and after serving, members of the jury panel tended to favour the giving of instructions encouraging the jury to "follow your own conscience ... if it is necessary to do so to arrive at a just result". It should be noted, however, that the trial judges in British Columbia would not allow this question to be asked of the jurors prior to serving; hence there are no pre-measures in B.C..

"Do you think that jurors in criminal cases should be instructed that 'It is difficult to write laws that are just for all conceivable circumstances. Therefore, you are entitled to follow your own conscience instead of strictly applying the law if it is necessary to do so to reach a just result'?" (Pre-S #9; Post-S #14)

	Pre-Service	Post-Service
Definitely yes	28.8%	28.2%
Probably yes	29.2%	32.2%
Undecided	24.1%	14.9%
Probably not	8.8%	9.1%
Definitely not	9.1%	15.6%
	100%	100%

Does the experience of being on the jury panel change the citizen's perceptions of any aspect of the jury system?

Eight of the questions from the pre-service questionnaire were repeated on the post-service questionnaire. This

allowed us to see whether there were any substantial changes in the jurors views as a result of the experience he had had. However, it should be pointed out that there is a potentially serious methodological problem with the inference that change detected on the questionnaire is due to jury service rather than any other variable. Obviously, a number of other factors taking place between the beginning and end of the jury service could account for the apparent change. Similarly, the mere fact of filling out the questionnaire items twice could itself have an effect. The setting in which the person filled out the questionnaire and his mood when filling it out could account for apparent differences. With these cautions, then, we can now look at the changes that did and did not take place.*

As we have already pointed out, the jurors were overwhelmingly positive in their ratings of the overall jury system (Pre-service question 10; post-service question 20). However, there was a slight but statistically significant

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* Note that for these comparisons, only those subjects who filled out both questionnaires (and whose questionnaires were successfully matched) are being extended.

shift toward the less favourable end of the scale. Before anything much is made of this, two things should be pointed out. The shift which took place was approximately 0.1 of a scale point on a six point scale, which obviously, is not important from a policy point of view. Secondly, this shift was completely accounted for by those people who were called for jury duty but who served on no juries during their whole term of service. In other words, those who were called for jury duty but did nothing constructive during this time became less favourable, but those who did serve on at least one jury, maintained completely their originally highly favourable view of the jury.

Change in overall view of the jury

Those who served:	-0.04	t=2.18, df=404, p is less than .05
Those who didn't serve on any jury	-0.23	
TOTAL	-0.11	t(against zero)=2.55, df=405 p is less than .05

Note: Minus numbers indicate more negative (less favourable view of the jury after than before

The results were quite similar for the three other "evaluative" questions that were asked both before and after the term of service. However, on the other three questions, the overall shift was in a "positive" direction; but in each

case, those who actually sat on a jury were likely to change in a more favourable direction than were those who did not serve on a jury.

Change in perceived likelihood that a person could be wrongfully convicted by a jury (Pre-S #5 - Post-S #16)

Those who served:	-0.27	t=2.40, df=410, p is less than .02
Those who didn't serve on any jury:	+0.09	
TOTAL	-0.13	t=1.75, df=411, p is less than .10

Note: Minus numbers indicate that after serving they perceived the likelihood of a wrongful conviction as being lower.

Change in comparison between judge and jury: Which is more likely to arrive at a just and fair verdict (Pre-S #6 - Post-S #17)

Those who served:	-0.34	t=1.77, df=405, p is less than .10
Those who didn't serve on any jury:	-0.10	
TOTAL	-0.25	t=3.18, df=406, p is less than .01

Note: Minus numbers indicate that after serving the respondents were more likely to feel that a jury would arrive at a just and fair verdict.

Change in perceived fairness of the courts (Pre-S #7 - Post-S #18)

Those who served:	+0.15	t=2.38, df=407, p is less than .02
Those who didn't serve on any jury:	+0.01	
TOTAL	+0.10	t=3.23, df=408, p is less than .01

Note: Plus numbers indicate the courts are perceived as being more fair after serving than before

It would appear, then, from the results of these four analyses, that serving on a jury made people more favourable toward the jury and the courts generally. Those who were called for jury duty but did not actually serve on a jury tended to be relatively less favourable toward the jury and the courts.

There were four other questions that were asked both before and after jury service. Not surprisingly, those who actually served on a jury found the experience more interesting than they had thought it would be while those called for jury duty but who did not serve on a jury found the experience less interesting than they had anticipated (change from Pre-S #3 to Post-S #19, t=7.02, df=403, p is less than .001).

Whether or not they actually served on a jury, respondents seemed to be more in favour of having a compulsory system of jury duty (as compared to a volunteer system) after than before. The change of -.20 of a scale point (on a five point scale) was statistically significant (Pre-S #4 - Post-S #12; t=3.52, df=415, p is less than .01).

As indicated in the table below, there was a marginally significant difference between those who served and those who did not serve on a jury on their change in attitudes concerning the "equity" instructions. Those who served on a jury were less in favour of giving these instructions than they had been before. Those who were called for jury duty but did not serve were more in favour of giving the instructions.

Change in recommendation that "equity" instruction be given

Those who served:	-0.15	t=1.96, df=303, p is less than .051
Those who didn't serve on any jury:	+0.18	
TOTAL	-0.01	not significant

Note: Minus numbers indicate a change toward opposing the giving of "equity" instructions; positive numbers indicate a change in the direction of favouring the giving of equity instructions.

Those respondents who actually sat on juries moved toward favouring unanimous verdicts (Pre-S #8 - Post-S #13), while those who did not sit on a jury did not change substantially.

Change in desire for unanimous/majority verdicts

Those who served:	-0.20	t=1.85, df=411, p=.065
Those who didn't serve on any jury:	+0.09	
TOTAL	-0.09	t=1.14, not significant

Note: Minus numbers indicate a change toward being more in favour of unanimous verdicts.

Summary

Jurors in seven jurisdictions across Canada were surveyed both before and after serving on a jury panel. Generally speaking, the jurors rated almost all aspects of the criminal jury trial very positively both before and after they had performed their jury service. Not only was the jury system rated favourably, but the courts generally, and the various participants (Crowns, defense counsel, police) were seen as performing their jobs very well.

Very few jurors indicated that they were greatly inconvenienced by having to serve on the jury, though most jurors indicated that it would have been helpful to have been able to choose the time when they would serve on the jury. They do, however, prefer a compulsory system of jury

duty rather than having panels made up of volunteers. Most jurors who normally received a regular income indicated that they were receiving full or partial pay during their period of jury service. Nobody in our sample thought s/he would be dismissed from his/her regular employment. Only a very small number thought that they would be harmed in any way in their employment by being on jury duty. The major complaint that jurors had about jury duty was the amount of waiting that they had to do.

Most jurors indicated that they thought that the selection process helps both sides obtain fair and impartial jurors. Indeed, even of those who were excluded by one of the lawyers, only about 23% thought that the exclusion was unjustified.

Jurors felt that they were sufficiently informed about procedural matters before sitting on a jury. Similarly, their perception is that they and other members of the jury understood the evidence and the judge's instructions, about half of the jurors who indicated that an accused in a trial they heard had a criminal record stated that the judge gave no special instructions concerning the use to which this

information could be put. About a quarter of the panel members indicated levels of proof below that which is necessary to find an accused guilty. This was true whether or not the respondent actually served on a jury. Similarly, how easy they reported the judge's instructions to be was unrelated to how accurately they were able to report what the judge had said.

Jurors were quite evenly split on whether unanimity should be required in jury decisions, though after serving they were slightly more in favour of unanimous verdicts.

Generally speaking, being on a jury appeared to make people more favourably disposed to the jury than they were before serving. Those who were called for jury duty but did not actually serve on a jury tended to show little if any change.

Appendix 1:

Pre-Service Questionnaire

JUROR SURVEY - Part One

Each year, thousands of Canadians serve on juries in criminal cases. Until now, very little has been known about the reactions of the jurors themselves to being called for jury duty and to serving on juries. We at the Law Reform Commission of Canada are asking you to spend a few minutes filling out a questionnaire now (before you have experienced jury duty) and then again at the end of your period of jury duty.

In all of the questions that are being asked, we want your personal impression or your recollection of what happened. The "right" answer is that answer that most accurately describes your impression or feelings about the matter at hand.

Because we will be wanting to match your answers to this questionnaire with the answers to the questionnaire

that will be given to you at the end of your period of jury duty, we are asking you to give us some simple numerical information which will aid us in matching the questionnaires without having to ask you to put your name on the questionnaire.

All of your answers will, of course, be completely confidential and it will have no bearing on your jury service.

At the end of the questionnaire (or on the back of any of the pages) you should feel free to add any comments you wish. However, we do not want specific information as to your decision in a particular case and you should not devulge such information.

FOR QUESTIONNAIRE MATCHING PURPOSES ONLY: (do NOT put your name on this questionnaire)

The last three digits of your telephone number:_____

The month in which you were born (please check appropriate month)

( ) Jan	( ) Apr	( ) July	( ) Oct
( ) Feb	( ) May	( ) Aug	( ) Nov
( ) Mar	( ) June	( ) Sept	( ) Dec

Thank you very much for your help in this important matter. We think that you will agree that the importance of the subject, the proper administration of our courts, justifies the request for your time and thought.

JUROR SURVEY - PART ONE

PERSONAL INFORMATION: (Please check appropriate information)

Sex:
( ) Male
( ) Female

Age:
( ) 18-19
( ) 20-29
( ) 30-39
( ) 40-49
( ) 50-59
( ) 60 and over

Occupation: _____

Highest level of education attained
( ) Grade 6 or less
( ) Grade 7-10
( ) Grade 11-13
( ) Some College or University
( ) University degree
( ) Post-graduate

Have your ever served on a jury before?
( ) Yes
( ) No

QUESTIONS: (Please check appropriate answer)

1. Did you attempt to have your jury duty delayed to another time, or did you try to be excused from jury duty?
   ( ) a. I tried to get the time of my jury duty postponed
   ( ) b. I tried to be excused from jury duty
   ( ) c. I did not try to be excused from jury duty nor did I try to delay it
   ( ) d. I did not know that it was possible to be excused or to have it delayed
   ( ) e. the time for my jury service was previously postponed until now

2. Would it have been helpful to you to have been given the choice of when you would serve your jury duty?
   ( ) a. it would have been very helpful
   ( ) b. it would have been of some help
   ( ) c. it would not have been helpful
   ( ) d. I was given a choice

3. Overall, how interesting do you think it will be to perform jury duty?
   ( ) a. very interesting
   ( ) b. somewhat interesting
   ( ) c. slightly interesting
   ( ) d. somewhat boring
   ( ) e. very boring

4. Do you think that jury duty should be mandatory for all citizens, or would you prefer a system where juries were made up of people who volunteered for jury duty?
   ( ) a. definitely prefer a compulsory system
   ( ) b. probably prefer a compulsory system
   ( ) c. undecided
   ( ) d. probably prefer a volunteer system
   ( ) e. definitely prefer a volunteer system

5. How likely do you think it is that a person could be wrongfully convicted by a jury?
   ( ) a. very likely
   ( ) b. fairly likely
   ( ) c. somewhat likely
   ( ) d. fairly unlikely
   ( ) e. very unlikely
   ( ) f. extremely unlikely

6. In a criminal trial, do you think it is more likely that a judge or a jury will arrive at a just and fair verdict?
   ( ) a. it is much more likely that a judge will arrive at a just and fair verdict
   ( ) b. it is somewhat more likely that a judge will arrive at a just and fair verdict
   ( ) c. equally likely
   ( ) d. It is somewhat more likely that a jury will arrive at a just and fair verdict
   ( ) e. It is much more likely that a jury will arrive at a just and fair verdict

7. From what you know at this point, how fair do you think the courts are?
   ( ) a. very fair
   ( ) b. quite fair
   ( ) c. somewhat fair
   ( ) d. unfair

8. Do you think that it would be a good idea to allow less than unanimous verdicts (e.g., that a person could be found guilty or not guilty if 10 or more of the 12 jurors agreed on a verdict)?
   ( ) a. definitely yes
   ( ) b. probably yes
   ( ) c. undecided
   ( ) d. probably not
   ( ) e. definitely not

9. Do you think that jurors in criminal cases should be instructed that "It is difficult to write laws that are just for all conceivable circumstances. Therefore, you are entitled to follow your own conscience instead of strictly applying the law if it is necessary to do so to reach a just result"?
   ( ) a. definitely yes
   ( ) b. probably yes
   ( ) c. undecided
   ( ) d. probably not
   ( ) e. definitely not

10. What is your overall view of the jury system?
   ( ) a. very favourable
   ( ) b. somewhat favourable
   ( ) c. slightly favourable
   ( ) d. slightly unfavourable
   ( ) e. somewhat unfavourable
   ( ) f. very unfavourable

Thank you very much for filling out this questionnaire. If you have any suggestions or comments on the jury system, please write them on the back of any page of the questionnaire.

Appendix 2: Table 1

Sample size and degree of completeness of returns by jurisdiction

	Matched set	Pre-service only	Post-service only	Total
Toronto	117(60%)	69(35.4%)	9(4.6%)	195(100%)
Winnipeg	50(94.3%)	1(1.9%)	2(3.8%)	53(100%)
Brandon	37(80.4%)	8(17.4%)	1(2.2%)	46(100%)
Williams Lake	41(59.4%)	18(26.1%)	10(14.5%)	69(100%)
Edmonton	40(65.6%)	21(34.4%)	--	61(100%)
Nova Scotia*	71(49.7%)	54(37.8%)	18(12.6%)	143(100%)
Vancouver	67(51.1%)	50(38.2%)	14(10.7%)	131(100%)
TOTAL	423(60.6%)	221(31.7%)	54(7.7%)	698(100%)

Chi square = 60.87, df=12, p ~ .001

* In Nova Scotia, panels from Halifax, Windsor, and Lunenburg were sampled and pooled for all analyses.

Appendix 2: Table 2

Composition of the Jury panel -- Age

	-20	20-29	30-39	40-49	50-59	60+
Toronto	4.4%	25.7%	15.3%	23.0%	21.9%	9.8%
Winnipeg	--	14.0%	26.0%	26.0%	28.0%	6.0%
Brandon	2.2%	13.3%	22.2%	22.2%	28.9%	11.1%
Williams Lake	--	13.8%	34.5%	31.0%	15.5%	5.2%
Edmonton	3.3%	26.7%	26.7%	31.7%	6.7%	5.0%
Nova Scotia	--	8.8%	31.2%	24.0%	22.4%	13.6%
Vancouver	--	10.3%	13.7%	28.2%	19.7%	28.2%
TOTAL:	1.7%	16.8%	22.3%	25.9%	20.5%	12.9%

Appendix 2: Table 3

Composition of the jury panel -- Sex

	Male	Female
Toronto	41.6%	58.4%
Winnipeg	76.5%	23.5%
Brandon	86.4%	13.6%
Williams Lake	79.7%	20.3%
Edmonton	45.9%	54.1%
Nova Scotia	85.6%	14.4%
Vancouver	61.7%	38.3%
TOTAL	63.6%	36.4%

Appendix 2: Table 4

Composition of the jury panel -- Education (Highest level attained)

	Grade 6 or less	Grade 7-10	Grade 11-13	Some college/ university	University degree	Post-graduate
Toronto	1.6%	25.9%	36.8%	22.2%	10.3%	3.2%
Winnipeg	4.0%	38.0%	46.0%	4.0%	6.0%	2.0%
Brandon	6.7%	55.6%	24.4%	6.7%	4.4%	2.2%
Williams Lake	6.8%	44.1%	37.3%	8.5%	3.4%	--
Edmonton	--	32.8%	49.2%	13.1%	4.9%	--
Nova Scotia	5.6%	35.5%	27.4%	16.9%	9.7%	4.8%
Vancouver	4.3%	29.3%	43.1%	12.1%	7.8%	3.4%
TOTAL:	3.8%	33.8%	37.2%	14.7%	7.8%	2.8%

Appendix 2: Table 5

Composition of the jury panel -- Served previously on a jury

	Yes	No
Toronto	2.7%	97.3%
Winnipeg	3.9%	96.1%
Brandon	15.6%	84.4%
Williams Lake	11.9%	88.1%
Edmonton	3.3%	96.7%
Nova Scotia	11.2%	88.8%
Vancouver	9.4%	90.6%
TOTAL:	7.5%	92.5%

APPENDIX 2: Table 6

CORRELATIONS BETWEEN EVALUATIVE QUESTIONS

	Overall view of jury pr10	Judge v. jury pr6	Wrongful jury conviction pr5	Courts fair pr7	Overall view of jury po20	Judge v. jury po17	Wrongful jury conviction po16	Courts fair po18	Witness' treatment po41	Police Preparation po38	Crown's presentation po39	Defense presentation po40
Overall view (pr10) Low=favourable	---	-14	-16	+26	+51	-18	-14	+30	+13	+18	+20	(+06)
Judge v. jury (pr6) Low=judge fairer	-14	---	+21	(+01)	-13	+4.	+13	-10	(00)	(+08)	+16	(+11)
Wrongful jury conviction Low=likely (pr5)	-16	+21	---	-16	-23	+17	+27	-23	(-06)	(-02)	(-07)	(-09)
Courts fair (pr7) Low=fair	+26	(+01)	-16	---	+21	(-03)	-20	+49	+18	+23	+26	+21
Overall view (po20) Low=favourable	+51	-13	-23	+21	---	-26	-19	+41	+24	+24	+27	+20
Judge v. jury (po17) Low=judge fairer	-18	+46	+17	(-03)	-26	---	+24	-13	-13	(-06)	(-02)	(-02)
Wrongful conviction Low=likely (po16)	-14	+13	+27	-20	-19	+24	---	-32	-17	-21	-30	-20
Courts fair Low=fair (po18)	+30	-10	-23	+49	+41	-13	-32	---	+24	+32	+36	+25
Witness' treatment Low=fair (po41)	+13	(00)	(-06)	+18	+24	-13	-17	+24	---	+29	+42	+36
Police preparation Low=good (po38)	+18	(+08)	(-02)	+23	+24	(-06)	-21	+32	+29	---	+51	+36
Crowns' presentation Low=good (po39)	+20	+16	(-07)	+26	+27	(-02)	-30	+36	+42	+51	---	+66
Defence presentation Low=good (po40)	(+06)	(+11)	(-09)	+21	+20	(-02)	-20	+25	+36	+36	+66	---

Notes: (a) All correlations have been multiplied by 100 for ease of presentation
(b) All correlations except those in parentheses are significant at the 5% level
(c) Question numbers are indicated in the left hand column in parentheses
pr = Pre-service questionnaire; po = Post-service questionnaire

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Canadian trial judges' view of the criminal jury trial:

A report to the Law Reform Commission of Canada

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Synopsis

The Commission recognized that trial judges are an essential source of experience and knowledge about the criminal jury system. The Commission undertook, then, to systematically tap that expertise.

The paper presents and analyses the responses of one hundred and seventy-nine trial judges to a questionnaire containing forty-six questions. From the data, the judges' reactions to issues regarding the jury system were discussed. The judges' responses proved invaluable to the Commission when it came time to formulate recommendations regarding the jury system in Canada. Among other things, the survey found:

- overall favour with the jury system and confidence in their verdict finding ability;

- a need for streamlining jury service;

- except for stand asides, most are happy with the selection procedures;

- that the need for jury trials should continue to be correlated with the seriousness of the offence;

- over half allow jurors to ask questions and over a third allow note-taking;

- over half prefer majority rule decision (subsequent survey found the opposite);

- present size should be maintained;

- that improvements could be made in jury instructions and one way is with standardized jury instructions.

Introduction

This report contains the results of a survey questionnaire sent to the 530 judges who were listed by the Canadian Judicial Council as having the jurisdiction to hear criminal jury trials. Of the questionnaires sent out, over fifty were returned without having been filled out. In most of these cases, the judge indicated that he didn't hear criminal jury trials and, therefore, did not feel that it was proper for him to answer the questions. Presumably some of the non-respondents also did not fill out the questionnaire for this reason. A total of 179 judges* sent back questionnaires that were filled out in varying degrees of completeness. The questionnaire that was sent out and the overall results are found in the appendix to this report.

As with any survey, the results are dependent in part on the exact wording of the questions. As a result, in the text that follows, I have often repeated the question as it was asked to the judges. I strongly recommend that in

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* In addition, ten questionnaires were returned after the data had been analyzed and, therefore, are not included in this report.

reading about the results of the survey, that the obvious limits be kept in mind. In any piece of research such as this one, it becomes painfully obvious after the fact that some questions should have been asked in a different form and that certain additional questions should have been asked. However, even though the survey may have some limitations, it has one important strength: it is the best evidence presently available to us on the question of what the judges who hear criminal jury trials think about this aspect of our criminal jury system.

In many sections of this paper, I have presented not only the "overall" results on a particular issue, but also I have tried to understand some of the variation in opinion that exists among judges. Thus, for example, in the section entitled "overall evaluation of the jury" I have presented a table that shows that those judges most favourably disposed to the jury are most likely to feel that the jury can understand and evaluate the evidence. An obvious inference (though clearly it is an inference rather than a firm conclusion) is that if something could be done to improve the jury's understanding of the evidence, those judges who are less favourably inclined toward the jury would improve their

view of it. Tables such as this one are provided to help the reader understand the variation in opinion that exists rather than to provide firm interpretations.

In each of these tables, I have presented the data using a consistent format. An example is reproduced below: (question 46 by question 40)

	Jury can understand and evaluate evidence			
Overall view of jury	Definitely yes	Probably yes	Undecided/ no	Total
Very favourable	69.8%	29.2%	0.9%	100%
Somewhat favourable	32.5%	60.0%	7.5%	100%
Less favourable	7.1%	53.6%	39.3%	100%

Chi square = 66.69, p is less than .0001

These tables should be read row by row (rather than by columns). Thus in this table, it can be seen that of those judges who were "very favourable" in their view of the jury, 69.8% answered "definitely yes" to the question about the jury's ability to understand and evaluate the evidence. Fewer than one per cent of the judges who were very favourable about the jury were undecided or thought that the jury was unable to understand and evaluate evidence. In contrast

when one looks at those judges with the least favourable view of the jury (the third row of this table), only 7.1% thought that the jury could "definitely" understand and evaluate the evidence and 39.3% were undecided or thought that the jury could not do this. The "total" of 100% of each row is indicated to remind the reader that the percentages add to 100%* across rows (rather than down columns).

The statistic "chi square" is a "significance test" used to indicate whether two questions are significantly related. Unless a chi square is labelled as "not significant", the reader can infer that there is a significant relationship indicated in the table. The "p" or probability level can be thought of as a measure of the confidence that the reader should have that the variability across rows is "real". For example, in this table, the "p" value indicates that there is less than one chance in ten thousand that the differences across rows is due to random variability. When a chi square is indicated to be "not significant" the reader should interpret this as meaning that apparent variation

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* Occasional rounding errors will result in these figures adding to slightly less than or more than 100%.

across rows is best interpreted as being random, and, therefore, not worthy of interpretation.

Overall evaluation of the jury

Generally speaking it is fair to say that the judges were quite favourably disposed to the jury system as it presently stands. In all regions the judges' overall view of the jury was very favourable.

Overall view of jury (question 46)

	Very favourable	Somewhat favourable	Less favourable	Total
Atlantic	46.7%	40.0%	13.3%	100% (15)*
Quebec	43.8%	34.4%	21.9%	100% (32)
Ontario	71.2%	16.4%	12.3%	100% (73)
Prairies	55.2%	24.1%	20.7%	100% (29)
B.C.	66.7%	16.7%	16.7%	100% (24)
All provinces	60.7%	23.1%	16.2%	100% (173)

* (number of respondents in parentheses)
Chi square = 10.83, df=8, not significant

Although there is some variability, there was no significant effect of region. Thus, the differences that appear to exist among regions should be considered to be unimportant.

The judges feel that juries are unlikely to convict a person wrongfully (question 44); most of the judges feel that juries are able to understand and evaluate the evidence (question 63) and are able to understand the judges' instruction (question 41). In line with the findings of Kalven and Aeisel in their study of The American Jury, judges felt that they would be more likely to convict than would juries (question 9). Interestingly enough, the perceived relative likelihood of conviction by judges and juries did not relate significantly to the judges' perception of the likelihood that a jury would wrongfully convict someone. Judges who felt that juries were more conviction prone than they were did not feel that juries were more likely to wrongfully convict.

It is only when the judges were asked to compare jury verdicts to verdicts by judges, that one sees less than overwhelming enthusiasm for the jury. As shown below, in all regions, judges tended to feel that they were more likely to come up with just and fair verdicts (question 45) than would juries.

CONTINUED

1 OF 5

Who is more likely to come up with a just and fair verdict?

	Judge	Equal	Jury	Total
Atlantic	40.0%	33.3%	26.7%	100%
Quebec	44.1%	41.2%	14.7%	100%
Ontario	30.0%	47.1%	22.9%	100%
Prairies	34.5%	48.3%	17.2%	100%
B.C.	29.2%	54.2%	16.7%	100%
All provinces	34.3%	45.9%	19.8%	100%

Chi square = 4.11, not significant

Not surprisingly, the judges' overall view of the jury (question 46) was strongly related to their view of whether judges or juries would be more likely to come up with a just and fair verdict.

Who is more likely to come up with a just and fair verdict?

Overall view of jury	Judge	Equal	Jury	Total
Very favourable	17.5%	53.4%	29.1%	100%
Somewhat favourable	41.0%	26.2%	12.8%	100%
Less favourable	81.5%	18.5%	0%	100%

Chi square = 43.33, df=4, p is less than .0001

I will, therefore, focus on results for the "favourability" question. Where the results were different for the "judge vs. jury" question, these differences will be noted.

Apparently, one of the factors that accounts for some of the variation in the overall view of the jury was how well it was perceived that they performed their jobs. Those

judges who were most favourable were most likely to think that juries were able to understand and evaluate the evidence (question 40), understand the judges' instructions (question 41), and were least likely to think that the jury would wrongfully convict (question 44).

Jury can understand and evaluate evidence

Overall view of jury	Definitely yes	Probably yes	Undecided/ no	Total
Very favourable	69.8%	29.2%	0.9%	100%
Somewhat favourable	32.5%	60.0%	7.5%	100%
Less favourable	7.1%	53.6%	39.3%	100%

Chi square = 66.69, p is less than .0001

Juries understand judges' instructions

Overall view of jury	Definitely yes	Probably yes	No	Total
Very favourable	34.3%	57.1%	8.6%	100%
Somewhat favourable	10.3%	69.2%	20.5%	100%
Less favourable	0%	46.4%	53.6%	100%

Chi square = 40.50, p is less than .0001

Likelihood of wrongful conviction by jury

Overall view of jury	Likely	Fairly unlikely	Very unlikely	Extremely unlikely	Total
Very favourable	8.6%	25.7%	41.9%	23.8%	100%
Somewhat favourable	15.0%	40.0%	25.0%	20.0%	100%
Less favourable	28.6%	25.0%	28.6%	17.9%	100%

Chi square = 12.24, df=6, p=.0569 (marginally significant)

There was a clearly significant relationship between the judges' rating of who was more likely to be fair, a judge or a jury, and the perceived likelihood of a wrongful conviction by a jury. Once again, the judges who were less favourable to the juries apparently felt that juries were not performing their explicit fact-finding role well.

Likelihood of wrongful conviction by jury

More likely to arrive at just and fair verdict	Likely	Fairly unlikely	Very unlikely	Extemely unlikely	Total
Judge	24.6%	35.1%	26.3%	14.0%	100%
Equal	7.6%	25.3%	41.8%	25.3%	100%
Jury	5.7%	28.6%	42.9%	22.9%	100%

Chi square = 14.89, p=.0211

Another indication that the judges' evaluation of the jury is based, in part, on their view of the jury as a fact-finder is that those judges who were most favourably disposed to the jury (on both measures) were more likely to feel that there should be some offences where a jury trial is mandatory (question 37).

Should there be offences where a jury trial is mandatory

Overall view of jury	Yes	No	Total
Very favourable	50.9%	49.1%	100%
Somewhat favourable	25.0%	75.0%	100%
Less favourable	25.0%	75.0%	100%

Chi square = 11.54, p=.0031

Given all of these findings, it is not surprising that there was also a relationship between the judges' ratings of the jury and their view that it was a good fact-finder because it contained twelve people. As part of question 34, the judges were given six aspects of the jury that might be considered by some to be positive features. They were asked to rank order those that they considered to be positive. The importance of the twelve fact-finders on the jury was rated higher by those judges who felt that juries were more likely to come up with just and fair verdicts. There was not a significant relationship on the other "overall favourability" question.

"The jury, because it contains 12 people, is more able to come to a correct decision than is a single fact-finder."

More likely to arrive at just and fair verdict	Ranked 1 or 2	Ranked 3 or 4	Ranked 5 or 6	Not Ranked	Total
Judge	15.3%	16.9%	33.9%	33.9%	100%
Equal	17.7%	16.5%	31.6%	34.2%	100%
Jury	48.6%	17.1%	11.4%	22.9%	100%

Chi square = 17.97, p=.0063

Finally judges who were less favourable toward juries were more likely to feel that juries would be influenced by the personalities of the various parties on the case. Part

of question 35 asked the judges to rank order those listed features that they saw as problems.

"Juries are more likely than judges to be influenced by the personalities of the various parties involved in the case."

Overall view of jury	Ranked 1 or 2	Ranked 3 or 4	Ranked 5 or 6	Not Ranked	Total
Very favourable	19.8%	13.2%	1.9%	65.1%	100%
Somewhat favourable	37.5%	30.0%	7.5%	25.0%	100%
Less favourable	50.0%	32.1%	7.1%	10.7%	100%

Chi square = 37.26, df = 6, p is less than .0001

So far, we have shown that judges' overall evaluation of the jury is substantially related to their rating of the jury in its role as a fact-finder: those judges who were most favourable toward the jury thought that it was a better fact-finder. Interestingly enough, this carried over into the judges' view of the verdicts juries were likely to come up with: those judges who were least favourable about the jury were most likely to feel that juries were more acquittal prone than judges (question 9).

Compared to the jury, judges are:

Overall view of jury	More likely to convict	Equally likely to convict	Less likely convict	Total
Very favourable	33.0%	52.6%	14.4%	100%
Somewhat favourable	59.0%	33.3%	7.7%	100%
Less favourable	57.7%	19.2%	23.1%	100%

Chi square = 14.85, p = .005

Function of the jury

The judges' view of the function of the jury can best be inferred from their rankings of the "features" that are listed in question 34. The feature that received the highest ranking was the first one listed: the jury "involves the public in the work of the criminal justice system and serves to educate them". After this, the judges felt that the jury was important because it "is a good way of infusing community values into the trial", and because its decisions may be more likely to be seen as acceptable by the victim, defendant and the public at large. The features which were least likely to be listed by the judges as favourable aspects of jury trials were the idea that "the jury, because it contains 12 people is more able to come to the correct decision than is a single fact-finder" (alternative b, question 34) and the idea that "the jury is able to 'bend the facts' in coming to a verdict in a manner that a judge could not" (alternative d, question 34).

One might summarize these rankings by saying that the judges felt that the jury was most important because of its educative effect and because its decisions might be more

acceptable. The judges were least impressed with the jury's special fact-finding powers and the jury's ability to "bend the facts". Consistent with this last finding are the results from question 42. This question asked the judges if they felt that "jurors in criminal cases should be instructed that 'it is difficult to write laws that are just for all conceivable circumstances. Therefore, you are entitled to follow your conscience instead of strictly applying the law if it is necessary to do so to reach a just result'". Only eight (4.5%) of the judges answered this question in the affirmative although a majority of Canadian citizens in a recent Gallup poll felt it should be given to all jurors.

Jury service

As is evident from the provincial laws dealing with the jury, there is a good deal of variation on how long jurors serve on the jury panel. However, quite independent of how long people are required to serve on the jury panel, the vast majority of judges (89.8%) felt that the length of time that jurors served was appropriate (question 2). In most jurisdictions, it would appear that jurors sit on more than one trial during their term of service on the jury

panel (87.2% of the judges indicated that this was the practice in their jurisdiction). It seems likely that this variable (whether or not jurors serve on more than one trial) is not terribly important since, independent of actual practice, the judges felt that what happened in their jurisdiction was good.

Do you think it is good practice to allow jurors to sit on a number of juries during their term of service?

		Yes	No	Total
Do jurors sit on more than one trial during their term of service...?	Yes	91.3%	8.7%	100%
	No	13.6%	86.4%	100%

Chi square = 70.94, p is less than .001

Most of the judges did not feel that the per diem allowances given to jurors were sufficient (12.3% of the respondents thought they were sufficient; the others thought they should be increased). A variety of suggestions were made for increasing the amount given. Eighty of the respondents (45%) felt that the per diem should be increased by a specific amount whereas forty (22%) thought that the amount given to jurors should be tied to their own or the "community" salary.

The judges were generally (71.7%) in favour of streamlining the jury process by having some voir dires on the admissability of evidence held before the jury is selected (question 33).

Jury orientation

Most of the judges report that the jury panel is instructed, at the beginning of their term of service, on such things as the function of the jury, jury selection, court proceedings, etc.. Approximately 53% of the judges characterized these instructions as being "brief" whereas 34% of the respondents indicated that "detailed" instructions were given. Ninety-five percent of the respondents indicated that these instructions were given orally (though sometimes supplemented with written instructions). Generally speaking, it was the judge who gave the instructions.

Slightly over a third of the judges felt that a videotaped presentation to the "whole jury panel to instruct them about court procedure" (question 14) would be useful. As indicated in the tables below, those judges who thought such a videotape presentation would be useful were also more

likely to feel that pattern jury instructions would be useful (question 21). Similarly, those judges who felt that a videotape presentation would be useful felt that it would be useful for a judge to have written instructions that could be given to the jury to take with them during their deliberations (question 19). These findings suggest that the judges saw the use of a videotape presentation as one more way in which the jury could be assisted in understanding rules and procedures that were new to them.

Standardized (pattern) jury instructions would be useful

		Yes	No	Total
Videotape would be useful	Yes	88.1%	11.1%	100%
	No	73.4%	26.6%	100%

Chi square = 4.10, p=.0428

Written instructions for the jury would be useful

		Yes	No	Total
Videotape would be useful	Yes	44.1%	55.9%	100%
	No	25.9%	74.1%	100%

Chi square = 5.05, p=.0247

It made sense, then, that the judges most in favour of having a videotaped presentation to instruct the jury panel on court procedure would be less confident that the jury fully understands the instructions that are given to them.

		Juries generally understand judges' instructions			
		Definitely Yes	Probably Yes	No	Total
Videotape would be useful	Yes	8.6%	74.1%	17.2%	100%
	No	29.5%	50.9%	19.6%	100%

Chi square = 11.05, p=.004

Jury selection

Generally speaking, it is fair to say that the judges were reasonably happy with the selection process. At the same time, however, some did feel that there were some changes that could be made that would improve matters. Approximately 89% of the respondents felt that "the jurors are selected [in a manner that] helps both sides obtain fair and impartial jurors". Similarly, most judges (84%) thought that the number of peremptory challenges allowed the defense was all right as it presently stands. A similar proportion (74%) thought that the present number of peremptory challenges allowed the crown was adequate. Although it apparently is not employed very often in some jurisdictions, the judges (86% of them) thought that "the present system for challenges for cause" is "all right as it is now".

There were three areas where substantial numbers of judges felt that there was some cause for change. In the

first place only about a third of the judges felt that there was reason "to maintain a challenge to the array". Those who gave reasons for wanting to have the possibility of challenging the array mentioned such things as failure to follow the code or the possibility of corruption or fraud. Generally speaking, those who gave reasons for wanting to abolish the challenge for cause said that since it so rarely happens, there is no real need for it. The system of "stand asides" also came in for some criticism with slightly over half of the judges feeling that it should be changed. The changes suggested most often involved limiting the number of jurors who could be stood aside and setting up a system where there was equality between crown and defense. As one might expect from these findings, approximately half of the respondents favoured "a jury selection procedure whereby the Crown and defense are allowed equal numbers of peremptory challenges and the system of 'stand asides' is abolished".

Feelings about the selection process did relate to the overall view that the judges had of the jury system. Although it is difficult to infer causality from such data, the findings are consistent with the hypothesis that lack of confidence in the appropriatness of our selection process

leads judges to be less favourable toward the jury. As indicated below, for example, those judges least favourable about the selection process (question 43) had the least favourable overall view of the jury (question 46) and were least likely to feel that juries, as opposed to judges, are more likely to come up with just and fair verdicts (question 45).

Overall view of the jury

Selection process obtains fair and impartial jurors	Very favourable	Somewhat favourable	Less favourable	Total
Definitely yes	76.3%	18.6%	5.1%	100%
Probably yes	58.1%	25.8%	16.1%	100%
Undecided/No	35.0%	25.0%	40.0%	100%

Chi square = 17.55, p=.0015

Who is more likely to come up with a just and fair verdict?

Selection process obtains fair and impartial jurors	Very favourable	Somewhat favourable	Less favourable	Total
Definitely yes	29.3%	51.7%	19.0%	100%
Probably yes	29.5%	46.3%	24.2%	100%
Undecided/No	66.7%	27.8%	5.6%	100%

Chi square = 11.08, p=.0257

Given these findings, it is not surprising that the perceived adequacy of the selection process related to how

effective the jurors were seen in understanding and evaluating the evidence (question 40) and in understanding the judges' instructions (question 41).

Juries can understand and evaluate the evidence

Selection process obtains fair and impartial jurors	Definitely yes	Probably yes	Undecided/ no	Total
Definitely yes	76.7%	21.7%	1.7%	100%
Probably yes	38.9%	51.6%	9.5%	100%
Undecided/No	35.0%	45.0%	20.0%	100%

Chi square = 26.44, p is less than .001

Juries generally understand judges' instructions

Selection process obtains fair and impartial jurors	Definitely yes	Probably yes	No	Total
Definitely yes	40.0%	50.0%	10.0%	100%
Probably yes	15.1%	68.8%	16.1%	100%
Undecided/No	10.5%	42.1%	47.4%	100%

Chi square = 26.24, p is less than .001

Jury participation in the trial process

Two questions dealt with the jury's active involvement in hearing and remembering evidence. About half of the

judges (53.2%) indicated that they allow jurors to ask questions during the trial. In most of these cases, the judge indicated that the questions would be screened by him before they were asked. Interestingly enough, the judges' willingness to allow jurors to ask questions did not relate to the judges' impression as to whether the jurors were able to understand and evaluate evidence. One might conclude, then, that allowing jurors to ask questions was not seen as a way of dealing with jurors who otherwise didn't understand the proceedings. Similarly, the answers to this question did not relate to any of the questions having to do with the judges' overall view of the jury (questions 44, 45 and 46).

There was a good deal of variation in practice reported by the judges on the question of allowing jurors to take notes.

Are jurors allowed to take notes during the trial? (question 11)

No:	36%
Yes, they are encouraged:	23.3%
Yes, but only if they ask:	32%
Yes, but only in special circumstances:	8.7%

Allowing (or encouraging) note taking seemed to be unrelated to responses to other questions having to do with

the jury's ability to do its job. The judges' report of their practice with regard to note taking did not relate to whether or not they thought the jury could understand and evaluate the evidence (question 40) or to whether the judge felt that juries understand the judges' instructions. Similarly, the responses to this question did not relate to the judges' overall view of the jury (questions 44, 45 and 46).

Which offences should be jury offences?

A substantial proportion of the judges (approximately 40% of the respondents) felt that there should be some offences where a jury trial was mandatory. Most of those who felt that there should be mandatory jury offences felt that this should be reserved for the most serious offences (e.g., murder). Another relatively large group (19 judges) felt that jury trial should be mandatory for offences where a judicial officer was charged.

The belief that there are some offences that should always be tried by a jury is, obviously, a rather strong expression of confidence in the jury. It is not surprising,

then, that these judges were more likely to feel that a jury would come up with a just and fair verdict. Similarly, these judges had a more favourable overall view of the jury.

	Who is more likely to come up with a just and fair verdict			
There should be some offences where a jury trial is mandatory	Judge	Equal	Jury	Total
Yes	25.4%	43.7%	31.0%	100%
No	40.2%	27.1%	12.7%	100%

Chi square = 9.69, p=.0078

	Overall view of the jury			
There should be some offences where a jury trial is mandatory	Very favourable	Somewhat favourable	Less favourable	Total
Yes	76.1%	14.1%	9.9%	100%
No	50.5%	29.1%	20.4%	100%

Chi square = 11.54, p=.0031

About 80% of the judges felt that the present practice of having some offences where there was no possibility of a jury trial should be continued. Not surprisingly, almost all of the judges felt that in the less serious offences, the accused should not have the possibility of a jury trial.

Finally, where there is one choice as to whether a trial should be heard before a judge and jury, most of the

judges favoured continuing the present system whereby the decision is left to the accused.

Majority verdicts

Generally speaking, it is clear that the judges prefer majority verdicts over the present requirement of unanimity. Question 36 asked the judges to indicate (on a five point scale) whether they thought that "it would be a good idea to allow less than unanimous verdicts (e.g, that a person could be found guilty or not guilty if 10 or more of the 12 jurors agreed on a verdict)". The overall results were as follows:

Definitely yes:	38.6%
Probably yes :	27.8%
Undecided :	5.1%
Probably not :	14.2%
Definitely not:	14.2%

This preference for majority verdicts held across all regions of the country as indicated below:

Allow majority verdicts:
(number of respondents in parentheses)

	Definitely Yes	Probably Yes	Undecided or No	Total
Atlantic	43.8%	18.8%	37.5%	100% (16)
Quebec	55.9%	14.7%	29.4%	100% (34)
Ontario	39.4%	32.4%	28.2%	100% (71)
Prairies	30.0%	26.7%	43.3%	100% (30)
B.C.	20.8%	41.7%	37.5%	100% (24)

Overall chi square: 11.84 df=6, not significant

Although there is some variation, there was not a significant effect of region: hence it is safest to assume that there were no regional differences.

Those judges who are in favour of a change to majority verdicts apparently feel that there is no need to have different rules for different kinds of offences: almost three quarters of the respondents who favoured majority verdicts wanted them for all offences.

In an attempt to understand more fully this preference for change in the system, it was decided to investigate the relationship between the desire for majority verdicts and a number of other measures that were taken. Some writers (e.g., Hans Zeisel) have argued that majority verdicts (and reduction in the size of the jury) is, in effect, the first step on the way to the end of jury trials as we now know them. If this is the case, then we would expect that those judges who are most strongly in favour of the majority verdict would also be those who are least favourably disposed to the jury system as a whole. The last question asked the judges to indicate their "overall view of the jury system". Although generally speaking the jury system was rated very

favourably, there was some variation in these ratings. As indicated below, the judges in favour of majority verdicts were least favourably disposed to the jury system:

Overall view of the jury system

Allow majority verdicts	Very favourable	Somewhat favourable	Slightly favourable or unfavourable	Total
Definitely yes	50.7%	20.9%	28.4%	100%
Probably yes	60.4%	27.1%	12.5%	100%
Undecided/ No	73.7%	21.1%	5.3%	100%

Chi square = 13.91, df=4, p=.008

It would appear then, that those who favour the unanimity requirement are likely to like the jury system generally more than those who favour the relaxing of this requirement.

Interestingly enough, there was no relationship between the desire for unanimity and the perceived likelihood that a person could be wrongfully convicted by a jury (question 44). Similarly, the preference for majority verdicts did not appear to be related to the judge's perception that he or a jury would be more likely to convict (question 9).

There was, however, a relationship between the desire for majority verdicts and a judge's indication as to whether he thought a judge or jury would be more likely to come up with a just and fair verdict (question 45). As one might expect from the earlier results, those judges who were most in favour of majority verdicts were most convinced that judges rather than juries would be more likely to come up with just and fair verdicts.

Who is more likely to come up with a just and fair verdict?

Allow majority verdicts	Judge	Judge/jury equally	Jury	Total
Definitely yes	50.0%	39.4%	10.6%	100%
Probably yes	16 7%	56.3%	27.1%	100%
Undecided/No	29.8%	45.6%	24.6%	100%

Chi square = 15.98, df=4, p=.003

If part of the desire for majority verdicts stems from the feeling that a jury might not be unanimous because of an obstinate/bizarre/irresponsible juror, then one might expect that the desire for majority verdicts would be related to whether the selection process is perceived as fair. Although the overall relationship between the desire for majority verdicts and the rating of whether the "manner in which jurors are selected helps both sides obtain fair and impartial jurors" was of only marginal significance, when the

judges were divided into two groups -- those who favour majority verdicts and those who are either undecided or do not favour them -- there was a significant relationship.

Does selection process help both sides obtain fair and impartial jurors?

Allow majority verdicts	Definitely yes	Probably yes	Undecided/ no	Total
Yes	27.0%	58.2%	14.8%	100%
Undecided/No	45.8%	49.1%	5.1%	100%

Chi square = 7.90, df=2, d is less than .05

Those judges who were most in favour of majority verdicts were least likely to feel that the selection process as it now stands obtains fair and impartial jurors. It is possible that if they perceived improvements in the selection process they would be less in favour of majority verdicts.

A common reason given in support of majority as opposed to unanimous verdicts is that there is a problem of hung juries. Although overall there are not very many hung juries in Canada and judges did not as a whole see them as much of a problem (question 8), there did appear to be a relationship between their responses related to hung juries and their desire for majority verdicts. As shown in the

tables below, those judges who were most in favour of majority verdicts were most likely to indicate that they felt that hung juries were a problem (question 8) and were slightly, but not significantly, more likely to indicate that they personally had experienced a hung jury during the previous twelve months (question 7).

Are hung juries a serious problem in your jurisdiction?

Allow majority vericts	Yes/ undecided	Probably not	Definitely not	Total
Definitely yes	16.7%	42.4%	40.9%	100%
Probably yes	10.4%	22.9%	66.7%	100%
Undecided/No	5.2%	27.6%	67.2%	100%

Number of hung juries in previous twelve months

Allow majority verdicts	None	One or more	Total
Definitely yes	77.9%	22.1%	100%
Probably yes	81.6%	18.4%	100%
Undecided/No	93.2%	6.8%	100%

Chi square = 5.81, df=2, p is less than .10

Interestingly enough, whether or not a judge had had a hung jury in the previous twelve months seemed to be completely unrelated to his feeling that hung juries are a problem in criminal jury trials.

Allow majority verdicts	Number of hung juries in the past twelve months: None	One or more	Total
Definitely yes	90.0%	10.0%	100%
Probably yes	78.6%	21.4%	100%
Undecided/No	85.7%	14.3%	100%

Chi square = 1.97, df=2, not significant

As has been mentioned earlier, the erosion of the jury system as we presently know it can take a number of forms. Zeisel has argued that majority verdicts and smaller juries are similar ways of undermining the present jury system. It is not surprising, then, that those judges most in favour of majority verdicts would also be most likely to feel that juries should contain fewer than twelve people.

Allow majority verdicts	Juries should contain twelve people: Yes	No	Total
Definitely yes	64.7%	35.3%	100%
Probably yes	83.0%	17.0%	100%
Undecided/No	93.2%	6.8%	100%

Chi square = 16.18, df=2, p=.0003

Feelings about majority verdicts did not seem to be related to whether or not the judges felt that the jury system was too costly (question 35c), or to whether they felt that jury decisions would be seen as more acceptable by

the public (question 34f) or by the defendant and/or victim (question 34e). Finally, feelings about majority verdicts were unrelated to the judge's experiences as a prosecutor or to the number of jury trials he had heard in the previous twelve months (question 6).

Jury size

In general, it is clear that most judges were in favour of juries maintaining their present size. This was true in all provinces. Not surprisingly, given its recent history of having six-person juries, Alberta's sixteen respondents were less favourably inclined to the twelve-person jury than were judges elsewhere in the country. In the other provinces, 82% of the judges were in favour of keeping twelve people on the jury. In Alberta, the corresponding figure was 50% (chi square = 5.36, df=1, p is less than .05).

Elsewhere in this report, it is shown that those judges who wanted majority verdicts were less likely to want the jury size to remain at twelve. In a pattern similar to the results on majority vericts, those judges who favoured

smaller juries were less favourable overall toward the jury. As shown in the tables below, those favouring smaller juries thought that juries were more likely to wrongfully convict an accused, were less likely than judges to come up with just and fair verdicts and were less favourable overall to the jury. It would seem, as with majority verdicts, that reducing the size of the jury is a reaction of those judges who generally don't see value in the jury system.

Likelihood of wrongful conviction by jury

Juries should have 12 people	Likely	Fairly unlikely	Very unlikely	Extremely unlikely	Total
Yes	9.4%	28.1%	38.8%	23.7%	100%
No	28.6%	31.4%	25.7%	14.3%	100%

Chi square = 10.40, p=.0155

Who is more likely to arrive at a just and fair verdict?

Juries should have 12 people	Judge	Equal	Jury	Total
Yes	25.5%	51.1%	23.4%	100%
No	64.7%	26.5%	8.8%	100%

Chi square = 18.92, p=.0001

Overall view of the jury system

Juries should have 12 people	Very favourable	Somewhat favourable	Less favourable	Total
Yes	69.1%	20.9%	10.1%	100%
No	29.4%	32.4%	38.2%	100%

Chi square = 22.45, p is less than .0001

Thirty-one of the thirty-six judges who wanted to move away from twelve person juries expanded on their answer to the question by indicating thay they felt that smaller juries should be permissable in only certain cases. All of those who went into more detail about the nature of the cases where they felt smaller juries were acceptable indicated that they felt that the less serious offences were good candidates for smaller juries.

The charge to the jury

Although only 23% of the judges were quite certain that juries generally understand judges' instructions (question 41), most (81.6%) were at least reasonably sure that juries understood what was being told to them. Similarly, most judges felt that juries were able to understand and evaluate the evidence (question 40). However, the general area of instructing the jury did appear to be a part of the jury system that the judges felt could be improved.

For example, only 5.8% of the judges indicated that they ever "give juries written instructions to take with them to use during their deliberations". On the other hand,

over five times that number (32.4% of the judges) felt that "it would be useful generally for a trial judge to have written instructions that could be given to the jury to take with them" (question 19). Furthermore, as indicated in the section on "pattern jury instructions" a full 78.2% of the respondents indicated that they felt that "a collection of standardized instructions drawn up by leading members of the bench and bar [would] be useful... in explaining the law to the jury" (question 21).

One would expect that if a judge perceived that juries were having difficulty understanding him, he would not have a very favourable opinion about juries. As indicated in the tables below, there is some support for this hypothesis.

	Who is more likely to arrive at a just and fair verdict?			
Do juries generally understand judges' instructions	Judge	Equal	Jury	Total
Definitely yes	10.5%	52.6%	36.8%	100%
Probably yes	29.7%	51.5%	18.8%	100%
No	74.2%	19.4%	6.5%	100%

Chi square = 35.59, p is less than .001

Overall view of the jury

Do juries generally understand judges' instructions	Very favourable	Somewhat favourable	Less favourable	Total
Definitely yes	90.0%	10.0%	0%	100%
Probably yes	60.0%	27.0%	13.0%	100%
No	23.1%	25.0%	46.9%	100%

Chi square = 40.5, p is less than .001

Clearly, those judges who feel that the jury doesn't understand judges' instructions are not satisfied with the overall jury performance. We would expect, then, that these same judges would feel most strongly that something (e.g., giving them written instructions) should be done to improve the jury's understanding of what is being told to them. As indicated below, this seems to be the case.

Do you think it would be useful generally for a trial judge to have written instructions that could be given to the jury to take with them? (Question 19)

Do juries generally understand judges' instructions	Yes	No	Total
Definitely yes	20.5%	79.5%	100%
Probably yes	30.0%	70.0%	100%
No	51.6%	48.4%	100%

Chi square = 8.06, p=.0178

As indicated in the section on "pattern jury instructions" the same relationship holds for that possible

improvement: those judges who feel that juries generally don't understand the judge are most in favour of pattern jury instructions.

Pattern jury instructions

Overall, 78.2% of the respondents felt that "a collection of standardized instructions drawn up by leading members of the bench and bar would be useful to [them] in explaining the law to the jury". In fact, in all regions of the country except British Columbia, over 80% of the respondents favoured such instructions. In British Columbia only 13 of the 23 judges (56.5%) wanted such instructions (Chi square = 6.17, p is less than .05, in comparing B.C. with the rest of the country). The response to the suggestion of having pattern jury instructions was not related to the judges' experience in presiding over jury trials in the previous 12 months (questions 6).

The perceived usefulness of pattern jury instructions did, however, relate to the judges' confidence that the jurors were able to understand his instructions: those

judges who favoured pattern jury instructions were less confident that jurors at present understand judges' instructions.

	Do juries generally understand judges' instructions?			
Standardized instructions would be useful	Definitely yes	Probably yes	No	Total
Yes	17.4%	64.4%	18.2%	100%
No	40.0%	45.7%	14.3%	100%

Chi square = 8.20, p=.0166

It would appear, then, that one reason some judges oppose pattern jury instructions is that they feel the jury is doing well without then. Another indication that those opposing such instructions believe the jury is being adequately instructed at the moment is found in the responses to question 14. This question asked the judges if they felt it would be "useful to have a videotape presentation that would be shown to the whole jury panel to instruct them about court procedure". As shown in the table below, those judges who favoured pattern instructions were more in favour of having such a vidoetape.

	Would it be useful to have a videotape on court procedure to show to the jury?		
Standardized instructions would be useful	Yes	No	Total
Yes	39.4%	60.6%	100%
No	19.4%	80.6%	100%

Chi square = 4.10, p=.0428

Another indication that the feeling that pattern instructions would be useful is part of a larger overall feeling that the jury can use additional help is shown by the fact that the judges who favoured pattern instructions were more likely to feel it would be useful "for a trial judge to have written instructions that could be given to the jury to take with them" (question 19).

Would it be useful to have written instructions to give to a jury?

Standardized instructions would be useful	Yes	No	Total
Yes	37.1%	62.9%	100%
No	10.8%	89.2%	100%

Chi square = 8.11, p=.0044

The perceived usefulness of pattern jury instructions was not related to any of the questions that could be perceived as overall evaluations of the jury (question 44 - the perceived likelihood of a wrongful conviction by a jury; question 45 - the relative fairness of verdicts by judges and juries; question 46 - the overall view of the jury system).

Appendix

In the copy of the questionnaire that follows, I have indicated the percentage of respondents who chose each alternative. Although there were 179 respondents in all, some of the questions were answered by fewer respondents. The percentages listed, however, are based on the respondents to each question, and, therefore, add up to 100%. The number of respondents to each question is indicated in parentheses.

For questions 34 and 35, two percentages are listed for each feature of the jury system. The first of these indicates the percentage of the 179 respondents who listed this feature as one of his choices (ignoring the rank it was given). The second is the percentage of respondents who gave this feature a high ranking - i.e., ranked it as one of the first three features/problems.

JURY QUESTIONNAIRE - JUDGES

Please check (v) the appropriate response.

1. How long are jurors on the jury panel in your jurisdiction?

   _____

2. Is this length appropriate? (167)
   ( ) a) It is too long 6.6%
   ( ) b) It is about right 89.8%
   ( ) c) It is too short 3.6%

3. Do jurors sit on more than one trial during their term of service on the jury panel? (172)
   ( ) a) Yes 87.2%
   ( ) b) No 12.8%

4. Do you think that it is a good practice to allow jurors to sit on a number of juries during their term of service? (174)
   ( ) a) Yes 81.0%
   ( ) b) No 19.0%

5. After an initial period of jury service, do you think jurors should be exempt from further jury service for a certain period of time? (174)
   ( ) a) Yes 87.9%
   ( ) b) No 12.1%

6. How many criminal jury trials have you heard in the past 12 months? (179)

   _____

   None = 15.1%
   1-5 = 29.6%
   6-10 = 25.7%
   11+ = 29.6%

7. In how many of these trials was the jury unable to come to a verdict? (179)

   _____

   None = 84.4%
   One or more = 15.6%

8. Do you regard hung juries to be a serious problem in your jurisdiction? (174)
   ( ) a) Definitely yes 3.4%
   ( ) b) Probably yes 4.6%
   ( ) c) Undecided 3.4%
   ( ) d) Probably not 32.3%
   ( ) e) Definitely not 56.3%

9. Generally speaking do you think you are more or less likely to convict than is a jury? (165)
( ) a) I am much more likely to convict than is a jury 4.8%
( ) b) I am somewhat more likely to convict than is a jury 38.2%
( ) c) I am equally likely to convict as is a jury 42.5%
( ) d) I am some what less likely to convict than is a jury 13.3%
( ) e) I am much less likely to convict than is a jury 1.2%

10. In what kinds of cases, if any, are you likely to disagree with the jury's verdict?

_____

_____

_____

11. Are jurors allowed to take notes during the trial? (172)
( ) a) No 36.0%
( ) b) Yes, they are encouraged to do so (e.g., paper and pencils/pens are provided to all jurors) 23.3%
( ) c) Yes, but only if they ask 32.0%
( ) d) Yes, but only in special circumstances 8.7%

12. Are jurors allowed to ask questions of witnesses during the trial? (173)
( ) a) Yes 53.2%
( ) b) No 46.8%
If yes, what procedure do you use for this (e.g., when are the questions put to the witnesses, by whom, etc.)

_____

_____

_____

13. Is the jury panel as a whole given any instructions about such things as the function of the jury, jury selection, court proceedings, jury conduct at the beginning of their term of service and before the selection begins for the first trial? (173)
( ) a) No 12.1%
( ) b) Yes, brief instructions are given 53.2%
( ) c) Yes, detailed instructions are given 34.2%

If yes, how are these instructions given?

Method: (100)	By whom: (88)
orally: 83%	Judge : 86.4%
in writing: 5%	Other court personnel: 4.5%
written & orally: 12%	Both: 9.1%

14. Would it be useful to have a videotaped presentation that would be shown to the whole jury panel to instruct them about court procedure? (173)
( ) a) Yes 34.1%
( ) b) No 65.9%

15. Are jurors instructed not to tell anyone about their deliberations (Section 576.2 of the Criminal Code)? (175)
( ) a) No 9.1%
( ) b) Yes 90.9%
If yes, by whom?

_____
_____
_____

16. Do you feel that the per diem allowances given jurors are sufficient? (171)
( ) a) Yes 12.3%
( ) b) No 87.7%
If no, what would you suggest?

_____
_____
_____

17. Should special arrangements be made to pay jurors additional money if they are chosen to sit on a jury for a long trial? (174)
( ) a) No 18.4%
( ) b) Yes 81.6%
If yes, what arrangements would you suggest?

_____
_____
_____

18. Do you ever give juries written instructions to take with them to use during their deliberations? (172)
( ) a) No 94.2%
( ) b) Yes 5.8%

19. Do you think it would be useful generally for a trial judge to have written instructions that could be given to the jury to take with them? (173)
( ) a) Yes 32.4%
( ) b) No 67.6%

20. Do you think that at some time prior to the judge's instructions to the jury:
i) Counsel should be given the opportunity to request certain instructions on the relevant law be given to the jury, and
ii) Counsel be afforded an opportunity to object to any instructions given to the jury on the law? (168)
( ) a) Yes 79.2%
( ) b) No 20.8%

21. Would a collection of standardized instructions drawn up by leading members of the bench and bar be useful to you in explaining the law to the jury? (170)
( ) a) Yes 78.2%
( ) b) No 21.8%

22. In your opinion, should the judge's explanation of the law be given to the jury before or after the final addresses of counsel? (174)
( ) Before 5.2%
( ) After 94.8%

23. Is there any reason to maintain a challenge to the array? (149)
Yes = 32.2%
No = 67.8%

24. What is your opinion about the number of peremptory challenges of jurors allowed for the defence? (176)
( ) a) It is all right as it is now 84.1%
( ) b) It should be changed 15.9%

25. What is your opinion about the number of peremptory challenges of jurors allowed for the Crown? (175)
( ) a) It is all right as it is now 74.3%
( ) b) It should be changed 25.7%

If you feel it should be changed, what changes would you suggest?

26. What is your opinion about the system of allowing the Crown to direct jurors to "stand aside"? (175)
( ) a) It is all right as it is now 48.6%
( ) b) It should be changed 51.4%
If you feel is should be changed, what changes would you suggest?

27. Do you favour a jury selection procedure whereby the Crown and defense are allowed equal numbers of peremptory challenges and the system of "stand asides" is abolished? (165)
( ) a) Yes 47.3%
( ) b) No 52.7%

28. Who should exercise the challenge first, the defence or Crown? (167)
( ) a) The Defence 68.3%
( ) b) The Crown 26.3% Alternate: 5.4%

29. In dealing with challenge for cause, please outline briefly how you handle the following problems:
i) Picking the first two triers if two jurors have not yet been sworn (119)
Selected in usual way (first two drawn) 94.1%
Two people in courtroom not on the panel 14.2%
Sheriff selects two peopel 1.7%

ii) Determining what questions should be asked (97)
By judge after consultation/submissions from counsel: 63.9%
By counsel challenging for cause: 36.1%

iii) Determining who should ask the questions

30. Do you feel that the procedure in R. v. Hubbert is adequate? (134)
( ) a) Yes 94%
( ) b) No 6%

31. What is your opinion about the present system for challenges for cause? (158)
( ) a) It is all right as it is now 86.1%
( ) b) It should be changed 13.9%
If you feel it should be changed, what changes would you suggest?

_____

_____

_____

32. Do you think that juries for criminal trials should contain 12 jurors? (176)
( ) a) Yes 79.5%
( ) b) No 20.5%
If no, what kinds of cases (e.g., all cases, only the less serious cases, etc.) should have fewer than 12 jurors?

_____

_____

33. Do you favour the holding of voir dires on the admissability of certain evidence before the jury is picked? (173)
( ) a) Yes 71.7%
( ) b) No 28.3%

34. Which of the following do you see as positive features of the jury trial, as compared to trials before a judge alone? (Put "1" next to the most positive feature, "2" next to the next most positive, etc. down to the last feature you see as positive.) -----The first number is the percentage listing this as a feature; the second is the percentage ranking it 1, 2 or 3.-----
( ) a) It involves the public in the work of the criminal justice system and serves to educate them 86.6% -- 67%
( ) b) The jury, because it contains 12 people, is more able to come to the correct decision than is a single fact-finder 67.6% -- 31.3%
( ) c) The jury is a good way of infusing community values into a trial 78.2% -- 58.1%

( ) d) The jury is able to "bend the facts" in coming to a verdict in a manner that a judge could not 58.1% -- 17.3%
( ) e) Jury decisions may be more likely to be seen as acceptable by the defendant and/or the victim 79.3% -- 46.9%
( ) f) Jury decisions may be seen by the public at large as more acceptable (especially in trials that are well publicized) than would the same decision made by a judge alone 81% -- 49.7%
( ) g) Other (please specify)_____
( ) h) There are no positive features of jury trials.

35. Which of the following do you see as serious problems with the criminal jury trial as compared to trials before a judge alone? (Put "1" next to the most serious problem, "2" next to the next most serious problem, etc. down to the last item that you see as a serious problem.) -----The first number is the percentage listing this as a problem; the second is the percentage giving it a rank of 1, 2 or 3. -----
( ) a) The jury is less able than a judge to understand the facts and to weigh the facts properly 44.7% -- 21.8%
( ) b) The jury is unable to undertand and apply the law properly 53.6% -- 45.8%
( ) c) The jury system is too costly 41.9% -- 19%
( ) d) Juries are more likely than judges to be influenced by the personalities of the various parties involved in the case 52.5% -- 41.9%
( ) e) Juries are likely to base their decisions on prejudice or bias 43.6% -- 25.7%
( ) f) Citizens are too often frustrated, bored, or disillusioned by jury service 40.8% -- 15.1%
( ) g) Other (please specify) _____
( ) h) There are no serious problems with the criminal jury trial 39.1%

36. Do you think that it would be a good idea to allow less than unanimous verdicts (e.g., that a person could be found guilty or not guilty if 10 or more of the 12 jurors agreed on a verdict? (176)
( ) a) Definitely yes 38.6%
( ) b) Probably yes 27.8%
( ) c) Undecided 5.1%
( ) d) Probably not 14.2%
( ) e) Definitely not 14.2%

If yes, in what kinds of cases do you think less than unanimous verdicts should be allowed? (122)

( ) a) Only in the more serious offences 6.6%
( ) b) Only in the less serious offences 18.8%
( ) c) In all offences 74.6%

37. Should there be some offences where a jury trial is mandatory? (178)

( ) a) No 59.6%
( ) b) Yes 40.4%

If yes, what offences (or types of offences) should they be?

serious offences (e.g., murder): 35 of the 72 judges who answered "yes"
Offences where a judicial officer is charged: 19 judges
Obscenity: 4 judges

38. Should there be criminal offences where there is no possibility of jury trial? (167)

( ) a) No 19.2%
( ) b) Yes 80.8%

If yes, what offences (or types of offences) should they be?

39. If there are to be some offences where there is the possibility of a jury trial but it is not mandatory, how would the decision be made as to whether a particular case should go before a jury (e.g., should the decision be made by the accused, the Crown or the court)? (147)

Accused: 67.4%
Judge: 12.2%
Other: 20.4%

40. Do you feel that juries generally are able to understand and evaluate the evidence? (177)

( ) a) Definitely yes 50.8%
( ) b) Probably yes 40.7%
( ) c) Undecided 4.0%
( ) d) Probably not 4.0%
( ) e) Definitely not 0.5%

41. Do you feel that juries generally understand judges' instructions? (174)

( )	a) Definitely yes	23.0%
( )	b) Probably yes	58.6%
( )	c) Probably not	17.8%
( )	d) Definitely not	0.6%

42. Do you think that jurors in criminal cases should be instructed that "It is difficult to write laws that are just for all conceivable circumstances. Therefore, you are entitled to follow your own conscience instead of strictly applying the law if it is necessary to do so to reach a just result?" (177)

( )	a) Definitely yes	1.7%
( )	b) Probably yes	2.8%
( )	c) Undecided	1.7%
( )	c) Probably not	11.3%
( )	d) Definitely not	82.5%

43. Do you think that the manner in which jurors are selected helps both sides obtain fair and impartial jurors? (176)

( )	a) Definitely yes	34.1%
( )	b) Probably yes	54.5%
( )	c) Undecided	4.5%
( )	d) Probably not	6.3%
( )	e) Definitely not	0.6%

44. How likely do you think it is that a person could be wrongfully convicted by a jury? (176)

( )	a) Very likely	2.3%
( )	b) Fairly likely	4.5%
( )	c) Somewhat likely	6.8%
( )	d) Fairly unlikely	29.0%
( )	e) Very unlikely	35.8%
( )	f) Extremely unlikely	21.6%

45. In criminal trial, do you think it is more likely that a judge or a jury will arrive at a just and fair verdict? (173)

( )	a) It is much more likely that a judge will arrive arrive at a just and fair verdict	10.4%
( )	b) It is somewhat more likely that a judge will arrive at a just and fair verdict	23.7%
( )	c) Equally likely	45.6%
( )	d) It is somewhat more likely that a jury will arrive at a just and fair verdict	16.8%
( )	e) It is much more likely that a jury will arrive at a just and fair verdict	3.5%

46. What is your overall view of the jury system? (174)

( )	a) Very favourable	60.9%
( )	b) Somewhat favourable	23.0%
( )	c) Slightly favourable	5.7%
( )	d) Slightly unfavourable	4.6%
( )	e) Somewhat unfavourable	4.6%
( )	f) Very unfavourable	1.2%

Additional Comments:

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The Unanimity Requirement: Issues and Evidence

Report Prepared for the
Law Reform Commission of Canada

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Synopsis

This paper sets out the issues for and against retention of the unanimity requirement in criminal juries. These issues were considered from two points of view: an experiment on the effects of the unanimity rule, and other empirical work. The principal conclusions of this paper are:

- a move to majority verdicts would only marginally decrease the problem of hung juries;

- a majority verdict rule would decrease the amount of attention paid to minority viewpoints during jury deliberations;

- unanimous decisions are typically the verdicts favoured by an initial majority;

- jurors feel more confident with a unanimous decision than with a majority decision.

Introduction

Various empirical issues must be considered in evaluating the effects of the requirement that juries be unanimous in their verdicts. Evidence regarding these issues should be taken into account in determining whether to maintain the requirement for unanimity in jury verdicts or to allow majority verdicts in cases where all jurors cannot agree. This paper will describe each of these issues and provide empirical evidence about the effects of the requirement for unanimity with respect to each issue.

The empirical evidence in this paper comes basically from two sources. First, information about the effects of the unanimity requirement on verdicts and the relationship between individual pre-deliberation votes and final group verdicts comes from actual court cases. A second source of empirical evidence is a number of jury simulation studies which have been conducted by social scientists. The basic paradigm employed in this research is the presentation of the same criminal case to different groups of subjects. These groups of subjects must deliberate together on the case until a group verdict is reached. Half of the groups

in the experiment are told by the experimenter that they must reach a unanimous group decision, and the other half are told that they must reach a majority decision. Then, the experimenter compares the verdicts and deliberations of groups given the two different decision rules to determine what the effects are of requiring a unanimous verdict.

This basic design is used here as well. In considering the empirical issues surrounding the unanimity requirement, the relevant results from the study are included. In the Appendix is a complete description of the methodological aspects of the study, as well as the materials used in the study.

The Issues

(1) Does the unanimity requirement affect verdicts?

Probably the most important issue concerning the unanimity requirement is whether or not it directly affects the verdicts rendered by a jury. If it were the case, for example, that juries under majority decision rules convicted the defendant more often than juries under unanimity decision rules, this would be a powerful argument against relaxing the unanimity requirement.

In comparisons of conviction-acquittal percentages from jurisdictions which require unanimous jury verdicts or allow majority verdicts, it appears that the unanimity requirement does not affect conviction-acquittal ratios. That is, the number of convictions to the number of acquittals in jurisdictions with and without the unanimity requirement are not significantly different. However, Lempert (1975) has argued that certain variables may indeed affect jury verdicts, but that their effects may be too subtle to be detected in comparisons of conviction-acquittal ratios in different jurisdictions. To show how this might

be true for the unanimity requirement, suppose that unanimity only affects verdicts in those situations in which one or two jurors are holding out for acquittal against a majority of jurors in favour of conviction. Suppose that in this small number of cases, these jurors swing the entire jury from giving a guilty verdict to giving a not guilty verdict. These cases may represent only a small fraction of all jury trials. Thus, even if the unanimity requirement did affect verdicts in this small percentage of cases, this effect might not be discernible in comparisons of conviction-acquittal ratios from jurisdictions with and without the unanimity requirement.

Whatever the truth of this particular argument, there is some preliminary information from an ongoing jury simulation experiment that unanimous verdicts may be more reliable or subject to be repeated than majority verdicts (Hastie, personal communication). This means that if a number of groups were given a case and asked to deliberate until a unanimous decision was reached, they would all be more likely to reach the same verdict than if the groups had only been asked to reach majority decisions.

One way in which the requirement that a jury be unanimous clearly affects decisions made by juries is in the number of hung juries. The proportion of hung juries in jurisdictions that allow majority verdicts is less than the proportion of hung juries in those jurisdictions that require unanimity. In their work on the American jury, Kalven and Zeisel (1966) compared the percentages of hung decisions in states with and without the unanimity requirement. States requiring unanimity had 5.6% hung juries, while states not requiring unanimity had 3.1% hung juries.

Jury simulation experiments are not very informative with respect to the effects of the unanimity requirement on jury verdicts. Most jury simulation researchers have not found differences in convictions or acquittals as a function of the unanimity requirement. Jury researchers have often declared their simulated juries to be hung after a specified period of time allowed for deliberations. Although a number of these researchers have subsequently found statistically significant differences in the number of hung juries under unanimity and majority decision rules, the differences could easily be the result of their practice of artificially "hanging" the deliberations. This seems likely, given that

unanimity juries typically talk longer than majority juries do, an issue we will turn to next.

(2) Would relaxing the unanimity requirement save time in the administration of justice?

Time savings would almost certainly be a by-product of a relaxation of the unanimity requirement. First of all, as the evidence above indicates, there would be fewer hung juries, which would result in fewer re-trials. Depending on the number of hung juries in Canada per year, the effect of fewer hung juries could produce a considerable time saving.

A second source of time savings comes from the fact that juries required to reach a unanimous decision deliberate longer than juries that may render a majority decision. A number of jury simulation studies have found statistically significant differences in deliberation time for unanimity and majority juries (Bray, 1974; Ker, Atkin, Stasser, Meek, Holt, and Davis, 1976). In the experiment conducted for the purposes of this study (see appendix), about half of the groups had a majority/minority opinion split (either a 5-1 opinion split or a 4-2 opinion split). The other half had

even splits (3-3) in initial individual verdicts within the groups. Of those groups with minorities, the unanimity groups made more comments than the majority groups in their deliberations. This was not true of those unanimity and majority groups which had even splits of opinion initially. Thus, there were more comments in unanimity deliberations only when there was an uneven split of opinion, i.e., a majority favouring one position and a minority favouring the other. Nemeth (1976) found that when a minority of jurors favoured acquittal, unanimity juries deliberated significantly longer than majority juries. When a minority of jurors favoured conviction, however, the difference between unanimity and majority deliberation times was not significantly different. These findings suggest that in a number of instances, but not necessarily all instances, the unanimity requirement will result in longer deliberations.

(3) Is the unanimous jury decision a "majority rule" decision anyway?

One argument made by opponents of the unanimity requirement is that jurors are frequently superficial in their adherence to the unanimity requirement (See Johnson v.

Louisiana (1972) and Apodaca, Cooper & Madden v. Oregon (1972)). The argument is that whatever verdict the initial majority favours in a case will amost always be the final verdict arrived at "unanimously" by the jury. If this is true, then there may be no real point in requiring unanimity, since the final jury decision is a "majority" decision anyway.

Empirical evidence supports the view that unanimous decisions are typically the verdicts favoured by an initial majority. Kalven and Zeisel (1966) present data from their study on the American jury which indicates that most juries end up with a verdict that a substantial majority of the group supported to begin with. In addition, mathematical models have been employed in order to specify the relation between individual pre-deliberation verdicts of jury members and final group verdicts in jury simulations. Typically, studies using these mathematical models show that some form of a majority model best describes the relationship between individual verdicts and final group verdicts (Davis, 1973).

Thus, the empirical evidence supports the idea that most unanimous verdicts of juries are "majority rule". The

exceptions to this rule, those cases where the decision reached by a jury is not majority rule, may of course merit the preservation of the unanimity requirement.

We turn now to a discussion of the deliberation process under unanimity and majority decision rules. Legal writing about the unanimity requirement, and in particular the U.S. Supreme Court's decisions on this issue (Johnson v. Louisiana (1972); Apodaca, Cooper and Madden v. Oregon (1972)), contain a number of empirical assumptions about the effects of the unanimity requirement on the deliberative process. These include the effects of the unanimity requirement on the nature and quality of the group discussion, attention to minority opinions (minority here is used in the numerical sense rather than the ethnic or racial sense), and behaviour of minority members. What empirical evidence exists for these topics comes necessarily from jury simulation experiments, where it has been possible to observe the jury deliberation process. Each of these topics will be addressed separately.

(4) Does the presence or absence of the unanimity requirement result in differences in the quality of jury deliberations?

Mr. Justice Douglas, writing the dissent in the U.S. Supreme Court decision about the unanimity requirement (Johnson v. Louisiana (1972); Apodaca, Cooper & Madden v. Oregon (1972)), contended that the requirement for unanimity affected the quality of deliberations of juries:

> "... (N)on-unanimous jurors need not debate and deliberate as fully as must unanimous juries ... (H)uman experience teaches us that polite and academic conversation is no substitute for the ernest and robust argument necessary to reach unanimity (1647-1648)."

Mr. Justic Douglas suggests that majority juries may not deliberate as fully or as robustly as juries that are required to be unanimous.

This clearly important question about whether the requirement for unanimity affects the quality and thoroughness of the jury deliberation is just beginning to be examined experimentally. We know that the deliberations of unanimity juries are significantly longer than the deliberations of majority juries, on the average. At this point, we

do not know whether this length difference indicates that unanimity juries are discussing the case more fully and thoroughly than are majority juries, although it seems likely. What is needed is a comparison of the content and quality of deliberations by unanimity and majority juries. One study (Nemeth, 1976) has looked at differences in the number of task-oriented comments in unanimity and majority juries. Nemeth found that, in fact, jurors under unanimity made more of these task-oriented comments than did jurors under a majority decision rule. This is some evidence, then, that unanimity juries are more thorough in deliberations than majority juries.

There is very little evidence with respect to possible differences in deliberation quality. One technique for assessing quality of the discussion is to provide transcripts of unanimity and majority deliberations to judges and lawyers (with any references to unanimity and majority deleted) and ask them to rate each deliberation on its thoroughness, on whether or not the discussion focused on what they considered to be the important issues in the case, and on whether or not all viewpoints were adequately considered in the deliberation. These ratings would provide

measures of the quality of the deliberations of unanimity and majority juries. (See, Hans, V., The Effects of the Unanimity Requirement on Ratings of Jury Deliberations, Report to the Law Reform Commission of Canada.)

(5) Are there differences in treatment of minority viewpoints in the deliberation as a function of the unanimity requirement?

One concern in relaxing the requirement for unanimity in jury decisions involves the treatment during deliberations of dissenting or minority viewpoints. If there is no requirement that jurors be unanimous, the jurors holding the majority opinion may be less responsive and attentive to those members of the jury who present arguments in favour of another point of view, a supposition which only a minority of jurors hold. (Again, the term minority does not mean an ethnic or racial minority but rather a numerical minority.) If two jurors out of twelve favour a guilty verdict initially and the rest of the jurors favour a not guilty verdict, the two jurors may be described as a minority within that particular jury.

Mr. Justice White, in delivering the majority opinion in Johnson v. Louisiana (1972) and Apodaca, Cooper and Madden v. Oregon (1972), argued that jurors would not necessarily be affected in their treatment of minority opinions by the relaxation of the unanimity requirement. He stated:

> "We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments in favor of acquittal, terminate discussion, and render a verdict. On the contrary, it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction (1624)."

One suspects along with Mr. Justice White that majority jurors would not refuse to consider opposing arguments. Yet the possibility exists that there may be less thorough treatment of minority arguments when the group is not required to reach a unanimous decision.

Again, empirical evidence with respect to this particular issue is scant. Some experimental evidence from social psychology research on small group communication suggests that one should find greater attention directed towards minority viewpoints when group members are most interdependent (Festinger, 1950; Schachter, 1951). Such a

situation would arise when all jurors' votes are required for a final verdict. The study conducted in conjunction with this paper on the unanimity requirement supports this evidence. Approximately half of the groups had an initial "minority". Of these groups of jurors with minorities, those jurors in the unanimity condition tended to direct more comments towards minority members than jurors in the majority condition. This preliminary evidence suggests that jurors may direct less attention to minority members if they are not required to reach a unanimous decision. These data support the idea that minority positions will receive less consideration under majority decision rules than under unanimity decision rules.

(6) Are there differences in the behaviour of the minority members as a function of the unanimity requirement?

A question related to the previous one concerning treatment of minority opinion is whether the unanimity requirement affects the behaviour of minority members themselves. The unanimity requirement may provide an optimal environment for the presentation of minority arguments. This seems a good possibility, given the differences in

attention to minority members presented in the last section. By relaxing such a requirement, the position of strength of minority members may be weakened.

In this study, it was found that minority members of a jury talked significantly more in groups that were required to reach a unanimous decision than in groups required to reach a majority decision. Another jury simulation study (Kerr et al., 1976) found that minority members of majority-decision rule juries were the most likely to indicate that they were unable to make all their arguments.

To summarize, then, minority members in juries required to be unanimous talk more and report more frequently that they were able to make all their arguments than minority jurors in majority decision rule juries.

(7) Would the use of majority verdicts decrease respect for the legal system?

A final question concerning the unanimity requirement is whether or not the use of majority verdicts would affect the confidence of the community in the legal system. One

might suspect that members of the community would have less confidence in a verdict rendered by a majority of a jury than in a unanimous verdict. Community confidence in majority versus unanimous verdicts has not yet been assessed.

There is some information, however, about how the participants in majority and unanimity decision rule juries view the process. This information comes from post-deliberation questionnaires given in jury experiments. In the present study, jurors of groups with minorities under a unanimous decision rule tended to like their group more (indicating greater group cohesion or positive group feelings) than jurors of groups with minorities under the majority decision rule. Minority members of unanimity juries indicated in another study that they were more satisfied with the way decisions were made in the jury and were more satisfied with the final verdict than minority members of majority decision rule juries. (Kerr et al., 1976). Finally, Nemeth (1976) found that jurors under unanimity agreed more with the verdict reached by their groups and were more likely to think that "justice was administered" than jurors in majority juries.

For the participants in deliberations, there are more feelings that justice has been done and more positive appraisals of the deliberative process in general for members of uninamity groups. Whether the community at large is more favourably inclined towards unanimity in jury deliberations has yet to be determined.

Summary and Conclusions

Abolishing the requirement for unanimity would almost certainly decrease the number of hung juries in Canada, and would probably function to decrease deliberation times of juries. Thus, administration would take less time. The size and scope of the "problem" of hung juries and long deliberation times needs to be assessed before any change in the unanimity requirement is made on the basis of time savings. This is especially true since experimental evidence indicates that there may be a price to pay for saving time by removing the unanimity requirement. Majority juries devote less time to the task at hand and pay less attention to members arguing minority viewpoints than unanimity juries. Minority members in majority juries talk less and report more frequently that they were unable to make all of

their arguments than minority members of unanimity juries. Although there can be no differences in the conviction-acquittal ratios of verdicts rendered by unanimity and majority juries, these group process differences may contribute to a lowering of the reliability of jury verdicts under majority decision rule. Finally, empirical evidence supports the idea that unanimous decisions are usually "majority rule" decisions. There may be however, impact exceptions to this majority rule which merit the continued requirement for unanimity in jury deliberations. These issues and the empirical evidence presented with respect to them should be considered in making policy decisions concerning the unanimity requirement.

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Appendix

Items

1. Description of the experiment.

2. Case transcript use in the experiment.

3. Judge's instructions (including unanimity and majority instructions) employed in the experiment.

Appendix: Item 1. Description of the Experiment

The purpose of the research has been to describe and compare the group decision process under unanimity and majority decision rules. The experiment involved a jury simulation in which twenty groups of six members each listened to a criminal case presented on audio tape, received instructions that they must be or need not be unanimous in their group decision (ten groups in each condition), and deliberated until a group verdict was reached.

The subjects in the experiment were visitors to the Ontario Science Centre who volunteered for participation in the experiment. Although the exact characteristics of this group of subjects is unknown, there was clearly a wide range of ages and occupations. It was not uncommon for members within a jury group to have been previously acquainted (i.e., husband and wife, neighbours).

Groups of six subjects (three women and three men) were assembled at the Ontario Science Centre and ushered into a private room containing a rectangular table, six chairs arranged around the table, and videotaping equipment.

In front of each seat was a piece of cardboard with a letter on it (A,B,C,D,E, or F). Members of the group were asked to address one another during the deliberation with these letters. (This technique for determining who talked to whom in the deliberation was not entirely successful.)

After choosing seats around the table and sitting down, subjects were told by the experimenter that they were to imagine that they were jurors, sitting in court on jury duty. They were told that they would be listening to a judge summarize the facts and rules of law in a case of robbery. They then listened to an audio recording of a "judge" (actually a psychology graduate student) who gave a summary of the facts in a case of alleged robbery. This summary of facts would be comparable to a judge's summing up at the end of a case in a courtroom. Following the facts summary, the "judge" instructed the group members in the Criminal Code definition of robbery, reminded them that "the onus is on the Crown to show that the defendant is guilty of the offence", and gave reasonable doubt instructions. This ended the audio recording.

At this point, members of the group were asked to write down their individual verdicts in the case. All but

one of the subjects in the experiment did so. While the subjects were writing, the experimenter determined from a random numbers table whether the group was to be in the unanimity condition or the majority condition.

After collecting the individual votes from the subjects, the experimenter announced that there were a few more procedural details she must mention before the subjects began their deliberations. For groups in the unanimity condition, she then announced:

> "I am obliged to point out to you that you must be unanimous in your verdict."

For groups in the majority decision rule condition, she instead announced:

> "As you may know, in certain cases in this jurisdiction, majority verdicts may be accepted. If you find that you cannot agree unanimously on a verdict, then a majority verdict, where 5 out of 6 of you agree, is acceptable."

Although in fact majority verdicts are not acceptable in any jurisdiction in Canada for any jury trial, no subject expressed any disbelief over this instruction at any point in the experiment, (including the deliberations).

After making one of the two statements above, the experimenter then continued:

> "I am obliged to remind you that while it is desirable that you should agree, it is not necessary and if in good conscience any of you are unable to agree with the others, you are at liberty to retain your views. You are not obliged to simply agree with the majority if in good conscience you find yourself unable to do so."

The experimenter then instructed the group to select a foreman (woman) to preside over the deliberations and to notify her when they had reached a verdict. While they engaged in the selection procedure, the experimenter turned on the videotaping equipment (the camera and the microphone were already set up and were directed at the group), made any necessary adjustments, and then left the room.

The groups deliberated privately until they reached a verdict or decided to declare themselves "hung". They were allowed as much time as they wanted to deliberate. After the group had arrived at a decision, the experimenter gave them a post-deliberation questionnaire. The subject was asked whether he or she agreed with the group verdict, whether the subject had been able to make all the arguments he or she had wanted to make, the subject's estimate of the

influence of any persons in the group who held a minority position initially, and finally, how much the subject liked the group (a question designed to measure group cohesiveness).

After all twenty groups in the experiment had been run, assistants transcribed the videotapes of the group deliberations. This involved not only transcribing the verbal exchanges in the group, but also determining the speaker of each comment and to whom the comments were addressed. The reliability of judgments about who spoke to whom in the group was fairly good; two raters coding the same group agreed 68% of the time on the directionality of comments.

These tape transcripts were then coded using two different coding systems. One system classified each comment in terms of its content, (Comments about identification, the "getaway car", and the defendant were all assigned different codes) and in terms of its favourability or neutrality with respect to a guilty verdict. Thus, a statement such as "The positive identification in the police lineup is pretty damaging evidence against the defendant" would be coded as a

comment about identification which was favourable to a guilty verdict. This content system is similar to that used in Hans and Doob (1976). The other coding system attempted to describe the interpersonal behaviour of the jurors by classifying aspects of their verbal behaviour. The coding system is similar to Bases (1951). Comments were classified as to whether they indicated agreement or disagreement with another opinion, hostility, question-asking, giving of information, or giving of opinions. By using this second coding system, we hoped to find out more about the group dynamics in the deliberations, and in particular whether or not these group dynamics differed for unanimity and majority groups.

The results from this study are described in part in the body of this paper.

Appendix: Item 2. Case transcript used in the experiment

The first one to take the stand was Mrs. Hawthorne, the cashier at the Loblaw's grocery store on St. Clair Avenue close to Bathurst. She described the events occurring on June 24 of this year. She testified that about 9:45 p.m., 15 minutes before the store's closing time, a masked figure came into the store and over to her register. She described the person as a male, about 5 feet 10 inches tall, with dark hair and a slight build. He had a nylon stocking pulled over his face. He held a silver pistol in his left hand, according to her testimony. He waved the pistol at her and said "Don't move, put all your money in a bag". She said he spoke with an accent. After she had given him the money from her cash register and he'd placed it in a grocery sack, he ordered her to get the person in charge to open the safe. She went over to the store manager, Mr. Woodley, and he came out of his office, went to the safe, and opened it for the robber. All this time, Mrs. Hawthorne testified, the robber kept his gun pointed at her. After the manager put the money from the safe (about $2000.00) into the sack for the robber, the man picked it up and left. Mrs. Hawthorne testified that the man walked quickly out of the

store and got into what appeared to be a blue car parked in front of the store and drove away. The whole incident took between 15 and 20 minutes.

Mr. Woodley, the store manager, then took the stand. He testified that events were as Mrs. Hawthorne described them. As well, his description of the robber closely fitted Mrs. Hawthorne's. Both were later successful in identifying the accused in a police line-up.

A person passing by the store at the time of the robbery, a Miss Waverly, also testified for the prosecution. She said that while walking by the Loblaw's she noticed a commotion in the store and saw a man with a gun. She was able to get a good look at the getaway car which was parked just in front of the store. She got the license number of the car. She was, however, later unable to pick the accused out of a police line-up.

Officer Berton of the Toronto Police Force then took the stand for the prosecution. He testified that he had received a call to go over to the Loblaw's on the night of June 24 to investigate a robbery. He arrived within 10

minutes of receiving the call, about 10:15 pm, at the Loblaw's store. He took descriptions of the robber and of the event from all the people in the store. He also took the description and the license number of the getaway car from Miss Waverly. She apparently was the only one to see the car license clearly.

Under cross-examination, Officer Berton was asked to describe the emotional state of the cashier and the store manager. You may be aware that when people are very upset, they may have difficulty seeing and remembering things accurately. The policeman said that both the cashier and the store manager were extremely upset but the details of their stories were very similar, so that in his opinion they were not too upset to remember what had happened.

Officer Berton further testified that he had traced the license number of the getaway car to a car belonging to a man named Joe Bolles.

Joe Bolles then took the stand and testified that he had been drinking at the corner bar on the evening in question. You'll recall that his appearance was quite different

from the description of the robber as given by the cashier and the store manager. Several patrons and the bartender corroborated Bolles' story that he had been at the bar from 8 pm until midnight on the evening of the robbery. Mr. Bolles admitted having loaned his car keys to the accused, Andrew Cunningham.

The police went to the residence of the accused and apprehended him. Several hundred dollars were found in a search of his apartment. No gun was found.

The defendant took the stand in his own behalf. You'll recall his appearance -- medium height, brown hair, and slender. This would be consistent with the description of the robber which was given by the cashier and the store manager. The defendant, Mr. Cunningham, testified that he was not guilty of the robbery. He said that on the evening in question, he had borrowed a car from his friend Joe Bolles to go to a movie. He had in fact driven past the Loblaw's on St. Clair on the way to the movie but not at the time of the robbery. He spoke without an accent.

Appendix: Item 3. Judge's instructions in the experiment

Section 302(d) of the Criminal Code states that anyone commits robbery who "steals from any person while armed with an offensive weapon". Now Mr. Cunningham here has been charged with robbery under this section. In this case, the onus is on the Crown to show that the defendant is guilty of the offence. The Crown must show that the defendant is guilty beyond a reasonable doubt. A reasonable doubt is not a fanciful possibility but rather a real doubt raised by the evidence in a reasonable way. If you have such a doubt, then it is your duty to acquit the accused.

Unanimity instructions:

> I am obliged to point out to you that you must be unanimous in your verdict.

Majority instructions:

> As you may know, in certain cases in this jurisdiction, majority verdicts may be accepted. If you find that you cannot agree unanimously on a verdict, then a majority verdict is acceptable.

I am obliged to remind you that while it is desirable that you should agree, it is not necessary and if in good

conscience any of you are unable to agree with the others then you are at liberty to retain your views. You are not obliged to simply agree with the majority if in good conscience you find yourself unable to do so.

You should select a foreman who would preside over the deliberations and express a verdict when you reach it. Members of the jury, it is up to you to decide whether this man should be found guilty or not guilty of robbery as charged.

6265.

The Effects of the Unanimity Requirement On Ratings of Jury Deliberations

A Report to the Law Reform Commission of Canada

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Synopsis

A major issue in the reconsideration of jury trials is whether to move away from the unanimous rule towards majority verdicts. The purpose therefore of this experiment was to test the effects of the unanimity requirement against majority requirement in the deliberations of juries. The deliberations of twenty-eight simulated juries were evaluated. The experiments indicated that:

- when majority rule verdicts were required minority views tend to be disregarded and;

- there were no discernable qualitative differences in the deliberations.

Introduction

In order to determine whether to maintain or remove the requirement that all members of a jury must agree before they may render a verdict, it is important to consider how such a change would affect the functioning of the jury. The unanimity requirement may affect two related aspects of the jury. It may influence the fact-finding ability of the jury, and it may change the position of those with minority opinions in the jury.

Ideally, a jury should engage in a thorough and careful consideration of the evidence in the case. Since a jury that is not required to reach unanimity need not deliberate as fully as juries required to reach full consensus, the thoroughness and quality of the deliberation, including the adequacy of the discussion of the evidence, may be affected by the unanimity requirement.

The unanimity requirement may also encourage those with differing opinions to express their thoughts, and may lead to more careful consideration of dissenting views.

There are two reasons why these are critically important functions of the jury.

First, if the unanimity requirement puts those with minority viewpoints in a stronger position, this would at least in some cases have a direct impact on the jury's fact-finding ability. In certain cases, only a minority of jurors may have a specific perspective on a case or particular information which is relevant to the case. In these instances, if a majority of jurors cut off the deliberation and outvoted the minority without carefully considering their views, the quality and 'correctness' of the decision would suffer.

Second, the use of the jury helps to ensure that a representative group for the community decides a defendant's fate. The removal of the unanimity requirement may decrease the strength of any minority member's views within the jury and thus may interfere with the representative nature of the jury decision.

In order to evaluate the impact of changing the unanimity requirement, it was important to obtain empirical

information about how the unanimity requirement affects these two aspects of the jury decision process: the attention paid to minority opinions and the fact-finding ability of the jury. There have been a small number of experiments in which the presence or absence of the unanimity requirement has been varied and its effects on group discussion observed. These studies have been reviewed in a study done for the Law Reform Commission, entitled "The Unanimity Requirement: Issues and Evidence". To briefly summarize these studies, they indicate that requiring unanimity results in somewhat longer group diliberations, and that group members with minority viewpoints tend to talk more in unanimity decision rule deliberations than in majority decision rule deliberations.

A different and complementary approach to studying the effects of the unanimity requirement was necessary in order to determine more precisely how it might affect the functioning of the jury. It was important to obtain subjective judgments about the quality of the jury deliberations and the influence of the minority under unanimity and majority decision rules.

The fact that deliberations under a unanimous decision rule tend to be longer has been used to suggest that unanimity deliberations are more thorough and "better" than deliberations under majority decision rules. This may not be the case. Indeed, in some lengthy deliberations, a trivial issue is needlessly and endlessly debated. Instead of relying on deliberation length as an indication of deliberation quality, a better indication is to have people who viewed unanimity and majority deliberations make their own judgments about the quality of the deliberations. In a similar fashion, the fact that minority members tend to talk more under unanimous decison rules is not unambiguous evidence that they are more influential in deliberations in which unanimity is required. Again, to more directly assess the strength of the minority required having people make subjective evaluations about minority influence under unanimity and majority decision rules.

1. Method of the Study

People with some legal background were used to evaluate simulated jury deliberations in which unanimity had or had not been required.

2. Materials

There were 28 simulated jury deliberations available from a previous study on the unanimity requirement.(1) Twenty-eight groups had all been given the same case on which to deliberate and reach a verdict. Each group was composed of four people who, before the deliberation began, had rated the defendant guilty (the majority), and two people who had initially thought that the defendant was not guilty of the offence (the minority). In approximately half of these deliberations, the group members had been told that they must be unanimous to render a verdict, and the remaining groups were told that five out of six of them must agree to render a group verdict. In eighteen of these groups, none of the jurors were previously acquainted, while in the other ten groups, at least two members within a group knew one another.(2) We used 26 of these videotaped deliberations in the present study.(3)

A questionnaire was composed of 24 questions about deliberation quality, adequacy of the consideration of the evidence, and the influence of the majority and minority, for use in the present study. A copy of this questionnaire may be found in the appendix.

3. Subjects

It was decided to use law students as evaluators, since their legal training and background would aid them in deciding whether a group was discussing the case appropriately. The law students were recruited by means of signs placed around Osgoode Hall Law School in Toronto which asked second and third year law students to participate in a study to evaluate simulated jury deliberations. Twenty-six law students were recruited and each student was paid five dollars for participating in the study.

4. Procedure

When the law student arrived at the appointed time, the experimenter explained that the student would be watching and rating videotapes of two simulated jury deliberations. She also explained that these videotapes had come from a previous study on jury decision making, and that each group was composed of four people who thought the defendant was guilty (the majority) and two people who thought the defendant was not guilty (the minority) when they began the

discussion.(4) The experimenter then handed the questionnaire and the transcript describing the evidence in the case to the law student. This was done before the students had seen the first deliberation. The subjects were to know before they viewed the first deliberation what kinds of questions they would be asked about the group discussions.

Each subject was then shown a pair of deliberations -- one unanimity deliberation and one majority deliberation.(5) The experimenter played the first deliberation for the subject; when the deliberation ended, the subject filled out the questionnaire for that group. The experimenter removed the completed questionnaire, gave the subject a second, blank questionnaire, and the same procedure was repeated for the second deliberation. After the completion of the experiment, the experimenter explained the purpose of the study and paid the student.

5. Results

(a) Deliberation Quality

A number of different questions about the quality of the group deliberations were asked of the law students.

They were asked to rate the overall quality of the deliberation, to indicate how well the group members appeared to understand the facts and legal aspects of the case, to rate the thoroughness and vigor of the group discussion, and to evaluate how well group members dealt with one another's arguments and how closely they stuck to the evidence presented. Groups which were required to be unanimous and groups required to reach majority verdicts did not differ significantly on any of these questions. In addition, a composite "quality" question composed by combining responses to a number of these questions(6) indicated no significant differences between unanimity and majority deliberations. In this case, then, the unanimity requirement did not affect law students' perceptions of deliberation quality.

(b) Consideration of Evidence and Legal Issues

In a related set of questions, students were asked to indicate whether groups spent an adequate amount of time discussing the evidentiary and the legal issues in the case. Subjects were asked to rate on a seven point scale how much time in the deliberation was spent discussing a number of issues. We were interested in their evaluation of the adequacy of the discussion of particular topics rather than

their perceptions of the actual amounts of time spent discussing those topics. Therefore, the seven point scale ranged from "far too much time" (1) to "far too little time" (7), with the midpoint (4) labelled "neither too much nor too little time".

There were no general, consistent effects of decision rule on the adequacy of discussion of topics in the group deliberations. Overall, the analysis of evidence topics showed no systematic effects of the unanimity requirement, although for one piece of evidence, the "getaway" car, members of majority groups were perceived as discussing that evidence significantly more than members of unanimity groups (X (mean) for Majority groups 4.73; F(1,23) 4.93, p .05).

In the discussion of legal issues in the case, again the unanimity requirement had no consistent effect. There were no significant differences between experimental conditions in discussions of reasonable doubt and the legal definition of robbery. Discussion of the burden of proof, however, was affected by the unanimity requirement. There was a significant interaction between Acquaintance and Decision rule for the discussion of the burden of proof

(Acquaintance x Decision rule F(1,23) - 4.4071, p .05). For groups in which some members had been previously acquainted, there were no differences in discussion of the burden of proof for unanimity and majority groups (X for Acquainted Unanimity groups 5.5, X for Acquainted Majority groups 5.2). However, for the previously unacquainted groups, unanimity groups were perceived as spending more time discussing the burden of proof than majority groups (X for Unacquainted Unanimity groups 5.06, X for Unacquainted Majority groups 6.06).

One part of the discussion affected by the unanimity requirement was telling personal stories and making other comments unrelated to the case. There was a significant interaction between acquaintance and decision rule for the telling of personal stories (Acquaintance x Decision rule F(1,23) 5.35, p .05). Acquainted unanimity and majority decision rule groups did not differ on this dimension (X for Acquainted Unanimity groups 3.6, X for Acquainted Majority Groups 3.7), but in unacquainted groups, majority group members were perceived as spending more time telling personal stories than unanimity groups (Unacquainted Unanimity groups 3.75, Unacquainted Majority groups 2.69). The same

trend appeared in responses to another question on making comments unrelated to the case. Responses to these two separate questions were combined; the analysis for the composite question again showed a significant acquaintance x decision rule interaction (Acquaintance x Decision rule $F(1,23)$ 4.75, p .05). Unacquainted majority group members made more personal and/or unrelated comments than unacquainted unanimity group members did (X for Unacquainted Unanimity groups 7.69, X for Unacquainted Majority groups 5.44), while acquainted groups again did not differ (X for Acquainted Unanimity groups 6.8, X for Acquainted Majority groups 7.0). This area of irrelevant and personal comments, then, is one in which unanimity deliberations are under certain conditions (in this study, in previously unacquainted groups) of better quality than majority deliberations.

(c) Minority and Majority Influence

The unanimity requirement had a marked and consistent effect on ratings about the minority's influence and participation. The law students were asked to indicate how influential the people holding minority opinions were in the discussion. Minority members in unanimity decision rule

groups were perceived as significantly more influential than minority members in majority decision rule groups (X for Unanimity groups 3.62, X for Majority groups 5.62; F(1,23) 11.1111, p .01). In addition, minority members were seen as participating in the group discussion significantly more under a unanimity decision rule than under a majority decision rule (X for Unanimity groups 3.92, X for Majority groups 4.58; F(1,23) 5.0204, p .05). There were no significant differences in the students' perceptions of how much time had been spent considering the minority's arguments in unanimity and majority groups(7). All three questions relating to the minority were combined for a joint analysis and this analysis indicated a statistically significant effect for decision rule (X for Unanimity groups 11.89, X for Majority groups 14.96; F(1,23) 9.1954, p .01). Thus, the minority members were in a stronger position under a unanimous decision rule than under a majority decision rule.

Law students were asked the same set of questions about the influence and participation of those group members holding majority opinions in the discussion. Minority and majority influence may be related such that as minority

influence and participation increases under unanimity, majority influence and participation decreases. However, this was not strongly supported by the data from the study. The perceived influence of the majority and perceptions of the time spent in the discussion considering the majority's arguments did not differ significantly as a function of decision rule. Perceptions of the participation of majority members tended to be greater under a majority decision rule than under a unanimous decision rule (X for Unanimity groups 4.3, X for Majority groups 3.76; F(1,23) 4.06859, p .06). This is in line with the hypothesis stated above. However, when all three questions relating to the majority are combined for analysis, there are no significant differences between unanimity and majority decision rule conditions. Although decision rule does affect perceptions of majority participation, it does not have a significant impact on perceptions of majority infuence or the amount of time spent considering the majority's arguments. Thus, decision rule does not appear to have as strong and as consistent an effect on the position of the majority as it has on the position of the minority.

6. Discussion

The study demonstrates the impact that the unanimity requirement has on the position of the minority in the jury. In the experiment, the unanimity requirement had a substantial effect on perceptions of the influence and participation of minority members in the group deliberations. The results of this study indicate that removal of the unanimity requirement would affect the functioning of the jury by decreasing the potential for minority participation and influence.

Although no consistent difference in deliberation quality as a function of the unanimity requirement emerged in this experiment, it is unlikely that this would always be the case. In the present study, deliberation quality and minority influence were not strongly related.(8) However, it is quite likely that deliberation quality and minority influence would be highly correlated in other cases in which certain minorities may have crucial information relevant to the case. In these instances, one would expect that the unanimity requirement would affect the fact-finding ability of the jury by increasing the strength of the minority within the group and thus ensuring that the crucial information would be introduced in the discussion.

CONTINUED

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Endnotes

1. This study is the second experiment conducted as part of my Ph.D. research on the effects of the unanimity requirement on group decision making.

2. We attempted to form groups in which no group member knew any other member, but in ten groups this was not possible.

3. Two unanimity deliberations in which no one was previously acquainted were randomly discarded in order to have equal numbers of groups which had been given unanimity and majority decision rules.

4. The complete instructions were as follows:

"The purpose of this study I'm conducting here at Osgoode Hall Law School is to obtain expert evaluations of jury deliberations. What you will be doing is watching and rating two similar jury deliberations on a number of different dimensions: the thoroughness of the deliberation; how well the jury seemed to understand the facts and the

law, whether every person's point of view is considered, etc.. I'll give you the list of questions you'll be asked to answer about each deliberation before we start.

First, let me explain where these videotapes came from. I ran a study on jury decision making at the Ontario Science Centre this summer. Science Centre visitors volunteered to participate as mock jurors. Each person read a transcript of a criminal case and made an individual decision about the defendant's guilt; that is, they indicated whether they thought the defendant was guilty or not guilty of the offence he was charged with. Six people were selected at a time to discuss the case and reach a group verdict. We selected for each group four people who initially indicated that they thought the defendant was not guilty. We refer to those four people in the group who thought initially that the defendant was guilty as the majority. Those two people who initially thought the defendant was not guilty we refer to as the minority.

We used this selection procedure because we wanted at least some initial disagreement of opinion within each group.

Each group of six people deliberated until they reached a group verdict. The deliberations were videotaped, and all participants were aware of this fact.

There were a number of other variables involved in the experiment: different groups were in different experimental conditions. I prefer not to talk about these variables until after you've finished. At any rate, you need not be concerned about them while you are making your ratings.

In a moment, I'll play the first deliberation for you. Before that, you can have a few minutes to look over the case and questions you'll be answering about the deliberations. You'll be free to take notes or to refer back to the case or the questions while you're watching the deliberation. Let me know when you are ready."

5. Pairings of unanimity and majority deliberations were randomly determined, with the constraint that acquainted groups were paired with other acquainted groups (five pairs), and unacquainted groups were paired with other unacquainted groups (eight pairs). Each of the thirteen pairs of deliberations was viewed by two subjects. One

subject received the unanimity deliberation of the pair first, while another subject received the same pair but in reverse order. The pair of deliberations assigned to each subject and the order in which the deliberations were viewed were randomly determined.

Although the effects of the order variable were calculated, they will not be reported in this paper. The order in which the deliberations were viewed had a negligible effect on the subjects' judgments in most dimensions.

6. The questions included were: "Rate the overall quality of the deliberation"; "In the group discussion, how closely did the group members stick to the evidence presented?"; "How thorough was the discussion?"; "How vigorously did the group members debate the case?"; and, "How well did group members deal with one another's arguments?".

7. The variable of acquaintance had a significant effect on responses to this question. Subjects viewing acquainted groups perceived them as spending significantly more time considering the minority's arguments than subjects who viewed unacquainted groups (X for Acquainted groups 4.1, X

for Unacquainted groups 4.84; F(1,24) 5.93765, p .05). The interaction between acquaintance and decision rule was not statistically significant.

8. The correlations between ratings of the overall quality of the deliberation and the perceived influence of the minority were .25 for unanimity deliberations and .45 for majority deliberations.

Appendix

Copy of the questionnaire
Group number _____

Please make a check mark on the line which best corresponds to your feelings.

1. Rate the overall quality of the deliberation.
   _____ Extremely good
   _____ Quite good
   _____ Fairly good
   _____ Neither good nor poor
   _____ Fairly poor
   _____ Quite poor
   _____ Extremely poor

2. How well did the group members understand the facts of the case?
   _____ Extremely well
   _____ Quite well
   _____ Fairly well
   _____ Neither well nor poorly
   _____ Fairly poorly
   _____ Quite poorly
   _____ Extremely poorly

3. How well did the group members understand the legal aspects of the case?
   _____ Extremely poorly
   _____ Quite poorly
   _____ Fairly poorly
   _____ Neither well nor poorly
   _____ Fairly well
   _____ Quite well
   _____ Extremely well

4. In the group discussion, how closely did the group members stick to the evidence presented?
   _____ Not at all closely
   _____ Slightly closely
   _____ Somewhat closely
   _____ Fairly closely
   _____ Quite closely
   _____ Very closely
   _____ Extremely closely

5. How thorough was the discussion.
_____ Extremely thorough
_____ Very thorough
_____ Quite thorough
_____ Fairly thorough
_____ Somewhat thorough
_____ Slightly thorough
_____ Not at all thorough

6. How vigorously did the group members debate the case?
_____ Not at all vigorously
_____ Slightly vigorously
_____ Somewhat vigorously
_____ Fairly vigorously
_____ Quite vigorously
_____ Very vigorously
_____ Extremely vigorously

7. Using the numbers which correspond to the alternatives on the scale below, indicate how much time was spent in discussing the topics listed.

Scale

1 - far too much time
2 - too much time
3 - somewhat too much time
4 - neither too much nor too little time
5 - somewhat too little time
6 - too little time
7 - far too little time

Topic	Number
Eyewitness identifications	_____
The "getaway" car	_____
The defendant's testimony	_____
Joe Bolles' testimony	_____
The defendant's character	_____
Legal definition of robbery	_____
Reasonable doubt	_____
Burden of proof	_____
Personal stories	_____
Other comments unrelated to case	_____

8. How well did group members deal with one another's arguments?

_____ Extremely poorly
_____ Quite poorly
_____ Fairly poorly
_____ Neither well nor poorly
_____ Fairly well
_____ Quite well
_____ Extremely well

9. How influential were those holding majority opinions in the discussion?

_____ Extremely influential
_____ Very influential
_____ Quite influential
_____ Fairly influential
_____ Somewhat influential
_____ Slightly influential
_____ Not at all influential

10. How influential were those holding minority opinions in the discussion?

_____ Not at all influential
_____ Slightly influential
_____ Somewhat influential
_____ Fairly influential
_____ Quite influential
_____ Very influential
_____ Extremely influential

11. How much did members who held majority opinions participate in the discussion?

_____ Far too little
_____ Too little
_____ Somewhat too little
_____ Neither too much nor too little
_____ Somewhat too much
_____ Too much
_____ Far too much

12. How much did members who held minority opinions participate in the discussion?

_____ Far too little
_____ Too little
_____ Somewhat too little
_____ Neither too much nor too little
_____ Somewhat too much
_____ Too much
_____ Far too much

13. How much time was spent considering the majority's arguments?
_____ Far too much time
_____ Too much time
_____ Somewhat too much time
_____ Neither too much nor too little time
_____ Somewhat too little time
_____ Too little time
_____ Far too little time

14. How much time was spent considering the minority's arguments?
_____ Far too much time
_____ Too much time
_____ Somewhat too much time
_____ Neither too much nor too little time
_____ Somewhat too little time
_____ Too little time
_____ Far too little time

15. To what extent do you think group members liked one another?
_____ They liked one another extremely well
_____ They liked one another a great deal
_____ They liked one another quite a bit
_____ They liked one another somewhat
_____ They liked one another slightly
_____ They neither liked nor disliked one another
_____ They disliked one another slightly
_____ They disliked one another somewhat
_____ They disliked one another quite a bit
_____ They disliked one another a great deal
_____ They disliked one another extremely.

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LANGUAGE AND JURY INSTRUCTIONS

A Report Prepared for the
Law Reform Commission of Canada

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Synopsis

This paper suggests ways of improving the understandability of jury charges by concentrating on linguistic factors. The suggestions are directed to judges who hear criminal jury trials and to existing or subsequently formed committees that will develop standardized jury charges.

The paper is divided into discussions of four aspects of effective communication: sentence structure, lexical complexity, paragraphs and overall organization, and presentation. Under each heading actual instructions are taken from transcripts of jury charges and improved to the theory outlined in each category.

The thesis is that by applying the techniques of effective communication as outlined, a judge or drafting committee could supplement legal expertise and thereby construct jury charges that are legally correct and understandable to lay jurors. The actual results of applying these techniques in formulating charges to real trial situations is dealt with in another paper in this volume entitled "Comprehension of Jury Instructions in a Simulated Canadian Court".

A. Introduction

Trial judges have always shown great concern about the accuracy of the instructions that they give the jury on the law.1 And rightly so, for if the instructions are not accurate, the jury's decision might be overturned by a higher court. However, excessively legalistic and detailed jury instructions suggest that judges often address themselves more to the court of appeal than to the jurors. As a consequence, judges risk losing sight of the other important objective of jury instructions -- to enable the jurors to understand the law. In other words, clarity and understanding are often obscured by legalism and detail. The judge's dilemma, then, is to cover the law adequately while keeping the instructions as simple and as understandable as possible. One solution to this problem suggested in the Law Reform Commission's Working Paper on the Jury is the preparation of well-drafted pattern jury instructions.

This paper discusses several aspects of drafting jury instructions in order to make them more understandable. The purpose of the paper is to show the possibilities of and the need for carefully drafted instructions whether prepared by

individual judges working alone or by a committee working on pattern instructions. The paper also points out the importance of involving lay individuals, including communications experts, in the drafting process.

The best jury instructions are those that combine legal exactness with lay comprehensibility. Achieving this ideal is a two-stage process. First, the law that the judge gives to the jury must be the appropriate law, explained in the correct way. This requirement is not the concern of this paper. Rather, this paper focuses on the second part, the requirement that the jurors understand what the judge is telling them. Here, just as it is incumbent on the judge to get the law right, it is incumbent on the judge to get the language right in order to ensure that the jury can apply the law to the facts of the case.

Getting the language right, as a first step, requires finding the best way of translating legal terminology into terms that the layman can understand. Through that translation process, the lay juror must be made to perceive the whole meaning of the law in terms of the factual situation before him. Even given that legal terminology can properly

be conveyed into lay understanding, the juror must take a further step -- he must be able to associate the law to the facts of the case.

Through appropriately organized jury instructions given by the judge, the juror should be better able to associate his belief in the facts of the case with the applicable law. For this association to take place, however, the juror must first have a basic understanding of the law he is to apply and then have a sufficiently precise memory of all the evidence presented at trial. In short, the jury's proper functioning depends on the understanding and memory of the individual jurors.

In a normal person, understanding and memory are dependant on language and how language is used. Language, after all, is merely a tool of communication, where signs or sounds are made by one person to convey a message to another. Understanding breaks down when the receiver of the message cannot, for one reason or another, make out the message of the sender. Memory is lost when the message, though immediately understandable, is too unfamiliar or too complex to be retained for a sufficient period of time.

Although this relationship between language on one hand and understanding and memory on the other may seem too simple, it is of the utmost importance when it comes to formulating jury instructions. If memory and understanding are the ends of jury instructions, language is the means.

When instructing jurors on the law, judges should be aware of principles of precise language and meaning. Yet there is more to making jury instructions understandable than grammatical correctness. Sentences explaining the law can be grammatically correct, but if the spoken version is badly delivered, logically obscure or syntactically complex jurors won't be able to understand the law or to remember it for a sufficient period of time.

While the amount and complexity of the evidence varies from trial to trial, the complexity of the law does not have to vary as well. This requires that the judge formulate his charge using language that the average juror can understand and remember. Therefore, it is to the trial judge that this paper is directed. By using the suggestions contained in this paper, the judge, when drafting his charge to the jury, should be able to achieve that goal of facilitating under-

standing and memory by the jurors. In an experiment conducted for the Law Reform Commission (Jones and Myers, 1978) it was found that instructions that are developed on the basis of recent research on language use are more understandable to juries than ones developed by traditional criteria.

It is the results from this new and ongoing research into language use that particularly prompts this paper. Standard works on language use, such as Flesch2, commonly restrict their attention to written English only. Those manuals of rhetoric that do tackle spoken English usually concentrate on declamatory rather than instructional styles. Whatever their focus, none of these guidebooks incorporates the new knowledge.

As the source for many of the ideas that follow is current linguistic and psycholinguistic research, it means that these suggestions are valid mostly for English.* No comparable body of research results exist for French. While

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* However, it might be of some interest to the French-speaking reader to know about the peculiarities of the English language in this regard.(Ed).

some of the findings, perhaps even most of them, are likely to be valid for French also, it would be premature now to attempt to base a program of jury instruction preparation in French on these particular findings.

The problem of delivery, naturally, must receive attention in this context. An analysis of oral instructions that are transcribed into writing may not present an accurate picture of how well a jury understood what the judge was telling them. Through pauses, gestures and other paralinguistic techniques, a judge may have been able to impart more understanding to the jury than is evident from the transcript of the trial. Without an accurate representation of the judge's delivery, a constructive critique becomes too abstract to be of any practical use. Keeping that in mind, it is useful to concentrate on the technical aspects of linguistic clarity -- those things that make instructions more logical, more comprehensible and easier to remember. Besides being helpful in assisting a judge to construct his charge to the jury in the most clear, direct and concise terms possible, these techniques will also be useful in developing pattern jury instructions for general use.

A theory, or model, is necessary to guide a trial judge or drafting committee in constructing a jury charge that is legally sound yet is easy for the jury to understand and remember. The basis for this model should be that the focus of the instruction is non-lawyers. With that objective, directness and simplicity should be the watchwords. The rest of this paper discusses ways of recognizing problems of effectively communicating law to the jury and of dealing with these problems. Some of the problems are not purely grammatical, or syntactic, but more semantic in nature. This, in turn, has an impact on the kind of remedies available, in that there may be no hard and fast rules but only general guidelines. In the end, it is hoped that this model, concentrating on four areas -- sentences, words, paragraphs and presentation -- will help the judge construct his charge to the jury not only on the law but on the evidence as well. And, using this model, a drafting committee should be able to develop a set of standardized jury instructions.

The task, then, is to see how jury instructions should be constructed by using the increased awareness of how modern language is actually understood (and that is not

necessarily the way that traditional "school" grammar says that it is). This new awareness is due primarily to advances in the field of psycholinguistics. This field, the study of relationships between language and meaning, comparatively recent discipline, has made remarkable progress in the last two decades. Linguistics, in particular psycholinguistics, has been able in some areas to determine, relatively accurately, just how language and language constructions affect comprehension and memory. It is not so much the language constructions directly that psycholinguistics is concerned with but rather the effects that these constructions have on the listener's mental processes.

How do memory and comprehension react to such things as negatives? Normally, it would seem that since a negative in effect turns the meaning of a sentence upside-down, negatives should detract from comprehension and memory. Yet as experiments have pointed out, sometimes just the opposite reaction takes place. Such a negative might, however, be an insignificant impediment to immediate comprehension but in turn it might be a significant factor in aiding memory.

How do things like abstraction, sentence length, structure, word frequency, sentence complexity, passive

voice, embedding and branching affect the way a juror understands the instructions of a judge? More important, though, how can these factors be used or avoided as the case calls for to develop jury instructions that are precise and accurate in law and easy for the jury to understand and remember? Since students of language have addressed themselves to such questions, though not explicitly in the field of jury instruction until quite recently, their discoveries should be of interest to judges and those working on pattern instructions.

B. Sentence Structure

Grammar has an important part to play in how well a jury can understand and remember the judge's instructions. This does not mean only that the judge must make all his sentences absolutely complete and grammatically flawless. It may be that the jurors will find it difficult to understand and remember sentences that are constructed strictly by the rules. People often speak differently from the way they write. The important thing is that the message gets to the listener in an understandable and unambiguous way.

Since jury instructions are oral rather than written, the rules developed for written language may be inappropriate. Often, the judge will find it necessary to speak in colloquial terms and to ignore, temporarily, grammatical rules. As Flesch says, "The rules of English usage are not immutable natural laws but simply conventions among English speaking peoples".3 The same could be said about the French language.

Most of the time, however, the judge does use gramatically correct sentences to instruct the jury, in most cases reading or paraphrasing sentences that he has written. Here, at the written stage, attention to sentence structure is important both for understanding and for memory. When a judge is drafting instructions for his own use or when pattern jury instructions are being developed for common use certain principles of language usage should be followed.

Although sentences may be grammatically correct, the level of sentence <u>complexity</u> may inhibit understanding and memory. First, in terms of understanding, the more complex a sentence is, the more difficult it will be for the listener to understand the speaker's meaning.

Logical complexity would, by common sense, seem to be a very important factor in understanding. And apparently, illogical construction will be more difficult to assimilate than a construction that follows some kind of coherent, rational and familiar pattern.

Memory too is affected by syntactic complexity. To a large extent, memory is dependant on preliminary understanding. Naturally, a message that is easily understood by the listener should also be easy to remember. However, even if a complex sentence is understood equally as well as a simple one by the listener, it doesn't follow that the listener will remember the complex sentence as well as he remembered the simple one.

Sentence complexity is actually measured not just in terms of the words and phrases in the particular sentence or the meaning of a sentence. As well, complexity is determined in an intermediate step that involves measuring the logical structure of the sentence.

If the structure of a sentence is made less complex, understanding and memory should be aided. Here is where

certain principles of language usage that relate to sentence construction can be used to facilitate these two goals. In other words, by employing the rules of language usage, as outlined below, sentences should be made less complex and understanding and memory should correspondingly be enhanced.

1. Active vs. Passive Voice

Like most language usage rules, the ones that have to do with passive sentences are not absolutely rigid. Yet, in most cases, sentences should be spoken or written in the active voice. At least one psycholinguistic study has found that, in testing recall, passives were usually recalled in the active voice. This means that when the listener is asked to recall a passive sentence, he is put to transforming the sentence - a task he could easily be saved from doing. Psycholinguistic studies on memory and understanding indicate that both these goals are more difficult to achieve when the message receiver is given more to do. In most cases, for example, when testing recall of normal passive and active voice sentences, the active voice sentence is usually recalled better than the passive voice sentence. This latter type of sentence is more complex in that an

additional grammatical rule must be employed to form or understand the construction.

Under normal circumstances, then, active voice sentences should be favoured over passive sentences. However, in the context of jury instructions, there are instances where just the opposite may be true. When giving instructions, it does not hold, for several reasons, that using the active voice is always the most effective way of instructing the jury on the law.

In jury instructions, the passive voice is in some cases more appropriate than the active voice.* Often, the judge will want to emphasize the logical object of the instruction and this object may be more forcefully indicated by using the passive voice which puts it at the start of the sentence. For example, instead of saying:

You should take the witness's demeanour into account.

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* This is particularly valid in English. In general, the French language will resort to the active voice rather than the passive voice which is often considered awkward and clumsy. The passive voice is however useful to emphasize the complement of the object.(Ed.)

the instruction should read:

The witness's demeanour should be taken into account.

Besides emphasizing the logical object of the instruction, the passive voice tends to be more formal and therefore subject to better recall.

In actually instructing the jury on the law, the passive voice may be the most appropriate voice. However, the judge should be careful not to use it in other parts of his charge as well. If the passive voice is not used sparingly, the jury won't be able to benefit from its impact. Over-use of the passive in the non-instructional parts of the judge's charge may have an over-kill effect on the passive when used in the essential instructional part.

Generally, then, two rules emerge for the use of passives in instructing the jury. First, in general,passives should be avoided in jury charges. Second, when the jury is being instructed on how they should apply the law to the facts as they have determined them, the passive voice can be an effective tool in that it highlights the natural object of the instruction.

There are occasions when the logical object of the sentence is more important than the logical subject. Such situations call for the passive. The research findings are clear that the passive leads to better recall of the logical object than does the active (and vice-versa for recall of the logical subject).

> When law enforcement officers induce or persuade a person to commit a crime ...

draws attention to the law enforcement officers rather than the accused. The passive form of this sentence focuses on the accused.

> When a person is induced or persuaded to commit a crime by law enforcement officers ...

Truncated passives (those without a logical subject) are also appropriate in those instances where the actor is not important.

> The intentions of a person may be inferred from what he says and what he does.

The passive is not the proper choice if the actor is the focus.

Was the gun fired by the accused?

is not the question to be asked if it is known that a gun was fired and the interest lies in finding out whether the accused did it. In this case the active

Did the accused fire the gun?

is preferred.

2. Embedding

If reduced complexity is a goal of concise and understandable jury instructions, one problem that must be dealt with is embedded clauses. Of particular concern are those embeddings that separate a subject or an object from the verb and those cases where a clause is embedded in a clause that is itself embedded in a third clause.

When two levels of embedding have been used in one sentence, the sentence itself may still be perfectly grammatical. However, with this many embeddings, sentences are

normally rejected by language users as being incomprehensible. This is not to say that this many embeddings are actually ungrammatical but that is the way they are perceived by those using the language. In fact, though, it's probably the case that if the embeddings are placed syntactically correctly within the sentence that no amount of embeddings will made the sentence ungrammatical.

The point is, that with an increasing number of embedded constructions, the meaning of the sentence becomes increasingly ambiguous or at least obscure. As was said in the Commission's Background Paper on Theft and Fraud, there is a limit beyond which multiple embedded clauses can be understood.

Such embedded constructions, though rampant in legislation, don't seem to be used much in jury instructions, except where the Criminal Code is quoted. The reason may be that because they pose so much difficulty in understanding, they are also difficult to construct. Furthermore, jury instructions are constructed by the judge to be spoken and this will have the effect of tempering complexity at the construction stage.

The problems are really those of relation. With increased embedding, the subject and predicate become spatially and temporally farther and farther apart and correspondingly more difficult to relate. The problem with embedding occurs when nouns which occur early in the sentence are related to verbs which occur later in the sentence. Thus, the meaning of the sentence becomes more obscure the further the subject gets from the verb. The problem, as far as psycholinguistics is concerned, is that as these complex constructions become difficult to relate, they also pose a considerable strain on memory. Besides being a strain on the immediate memory for the ideas contained in the complex construction, the juror's memory is probably also taxed for recall of subsequent information.

When instructing the jury, it is essential to construct sentences in such a way as to make their meaning as clear as possible. This involves making the meaning of the instruction as simple and conducive to recall as possible. By eliminating multiple embeddings, the sentences in the instruction become less complex, and the jury is spared that extra mental analysis that taxes the memory and consequently understanding of the instructions as a whole.

3. Left -- vs. Right-Branching

Many of the rules that should be adopted for making jury instructions simpler and more understandable are only rules of convention. If people are used to conversing in a particular way, they will obviously understand messages better if the messages are sent in language that is formulated on the basis of those conventions.

Left-branching sentences state the conditions or qualifications of the active part of the sentence before the verb while right-branching sentences state the qualifications after the active part of the sentence.

> If a person has disease of the mind to an extent that renders him incapable of appreciating the nature and consequences of his act, then he is insane within the meaning of the Criminal Code.

has a left-branching structure.

> A person is insane within the meaning of the Criminal Code, if he has disease of the mind to an extent that renders him incapable of appreciating the nature and consequences of his act.

has a right-branching structure.

Contemporary speakers today are not used to talking (though they may write) in sentences that are left-branching as opposed to right-branching. Yet, while the layman conventionally speaks in a right-branching fashion, the lawyer very often makes his sentences using left-branching constructions. In Access to the Law, Dean Friedland suggests that the lawyer's over-use of left-branching sentences in legal discourse is rooted in history. He notes the antiquated rules of drafting written by George Coode in 1843 called On Legislative Expression. There, Coode states that good legislative style requires that the conditions be stated before the thing that the conditions apply to. Even today, notes Friedland, "Coode's work is still regarded as a guide to good drafting".[4]

Left-branching sentences pose two major problems for the listener, even though the construction itself is perfectly grammatical. The first problem involves a psychological issue; the second has to do with memory.

First the psychological problem. Left-branching sentences are not normally used by English or French speakers today. Because he is unfamiliar with the construction, the

listener spends more time just trying to sort out the elements of the sentence. If a judge is instructing a jury on the case put forward by the defence he might say, for example, that under certain circumstances the defendant can't be found guilty. When he lists the conditions first, it means the juror must:

1) keep the condition in mind;
2) find out what the conditions apply to; and,
3) see the effect of their application.

But lay jurors aren't used to that kind of construction. In normal conversation, the conditions would be kept to the end of the sentence, after the active element, or that which the conditions apply to, has been stated. Not only does this seem somehow to be the right way to speak, but it is also the most logical way. Logically, it doesn't make sense to state the qualifications of a thing and then state what it is that's being qualified.

The second problem, memory, really follows from the psychological problems posed by left-branching sentences. Because left-branching constructions require that the listener hold on to conditions for a time before he is told what the conditions are to apply to, he taxes his short term

memory. The memory problem is furthered by the obvious impact that unfamiliar constructions have on understanding. If the listener can't understand the message in the first place, his memory of the message will be confused at best and impossible at worst.

When developing instructions, familiarity of usage must guide the decision as to how to use sentences. Right-branching sentences are more familiar to contemporary English speakers and although the legal profession may be used to reading left-branching constructions, they should avoid doing so when providing instructions to the lay jury.

4. Length

Sequences of short sentences give a choppy effect and may distract the listener. Overly long sentences reduce the possibility of conveying meaning effectively.

As much as possible, jury instructions should be developed as though they would be read verbatim. By developing the instructions with this in mind, a natural sentence length should be arrived at as a matter of course.

Spoken language is spontaneously broken up by pauses and full stops and this effect can be achieved in written instructions with proper use of punctuation. Especially if the judge normally reads his instructions, he should be careful to break up sentences so that he doesn't sound long-winded to the jury. Of course, it is more human and consequently more conducive to better communication if the judge speaks to rather than reads to the jury.

In practice, it is more often the case that sentences used in jury instructions will be too long rather than too short. One effect of long sentences, especially spoken ones, is that unless the subject matter is very interesting the listener will become bored. Especially given the lecture type of situation where the judge is speaking down to the jury, the judge must be careful not to tax the juror's mind by making him assimilate several ideas in one sentence. The juror may soon begin to lose the drift of what the judge is saying, especially in a technical area such as law, and find it increasingly difficult to put his mind to the task of being able to apply the law to the facts of the case.

As it now stands, when the judges instruct the jury on the law, they too often resort to a verbatim reading of the

Criminal Code. But as the Code is now written, verbatim accounts are probably incomprehensible to the average juror. For example, the Law Reform Commission's Working Paper on Theft and Fraud cites sections 287.1 (1), 290 (2) and 292 (1) of the Code:

> Each of these subsections is unduly long - ten, eleven and nine lines respectively. Each is of such grammatical structure as to obscure its meaning. Each, therefore, falls short of one very important goal for criminal law - ready accessibility and comprehensibility for the ordinary members of the society served by this law.

Even when the judges don't quote from the Criminal Code, their instructions often contain seventy or eighty words. This is far above the number of words that can be used in a sentence and still allow the jurors to understand it without difficulty. Flesch says, for example, that any written sentence containing more than 21 words is probably too difficult for the lay reader.5

Although there doesn't seem to have been any conclusive tests on this hypothesis, instructions would probably be made more understandable if they were made shorter. Instead of one sentence having three or four distinct points of law that the listener must process, each point should

constitute a new sentence. Mostly, this is achieved through simple punctuation techniques. Finally, regardless of whether or not shorter sentences facilitate understanding and recall, shorter sentences are easily more conducive to reading instructions aloud to the jury. Shorter sentences are also likely to have fewer clauses and the relationships between the nouns and the verbs are more directly evident in such sentences.

C. Lexical Complexity

Words are the essence of jury instructions. Through these tools, the judge can make the jurors understand the esoteric meanings of the law or he can baffle or bore them. The problem is one of choice. How can the judge choose the right word or combination of words that will bring the law accurately, simply and cogently to the lay jury?

There are many lexical factors that determine how well or how poorly a jury will comprehend an instruction. Some of these factors, the use of jargon, synonyms, abstract terms or figurative language for example, should be avoided if possible for they frequently make the instruction

ambiguous. One way out of such difficulty would be to compose a whole list of words that should be avoided. It is known from linguistic studies, for example, that lexical or syntactic negatives (disinherit and not believable, respectively) may hinder understanding. The use of double negatives, (not unbelievable) for instance, is particularly confusing. One could also extract particular words from actual court transcripts and show how they would not hold any meaning for the man on the street. The word 'proximate', for example, isn't even listed in Thorndike and Lorge's frequency count of 30,000 English words.*

To approach the problem from that direction, though, is to try to cope with the symptoms rather than the problem itself. The basic issue with wording a jury instruction is one of care in choice. Whether a judge is constructing an instruction for a specific case he is hearing, or a research team is developing a complete set of pattern jury instructions, they need to take time to ensure, through their choice of words, that the law is precisely explained and

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* The same holds true in French whose legal terminology constitutes a learned language of its own. For example, words like "anatocisme", "novation", "emphy téase".(Ed.)

that that explanation is made understandable and meaningful to the jury.

As well, the language changes and words that are useful now may become rare or ambiguous, hence less useful, in the future. A list prepared today would not serve as well next year.

Aside from doing the choosing for the judge or research team, which is not possible in this context, the alternative approach is to describe the kinds of situations that should be avoided. Basically, this means avoiding words of five general types:

1) abstract words that don't effectively convey the intended meaning;

2) words that don't add any meaning to the instruction (superfluous words);

3) words that the jury is unlikely to know;

4) words that might invoke inappropriate conclusions; and,

5) complex words, such as negative prefix words.

By concretizing sentences, paring instructions of superfluous words, and by replacing low-frequency words with more

commonly used ones, the result will be better, more understandable and more precise jury instructions.

The following points give a rough outline of how words can work for, rather than against, comprehension. It is again important to consult additional reference material and to practice constant revision.

It is particularly important to refer to recent dictionaries. English, like all languages, changes and only new dictionaries or revisions and supplements to older ones provide the information necessary to understand what a word means at a particular time. The Oxford English Dictionary is indeed authoritative,* but it is over forty years old. It reflects the language of the first third of the twentieth century and not that of the last third. The supplements to it that are now appearing bring this dictionary up to date, but the series of supplements is not complete at this time.

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* In French, the Littré Dictionary is still a valuable work of reference but, at the present time, the Petit Robert Dictionary is the most used, at least until completion of the "Trésor de la langue française".(Ed.)

1. Abstract Words

The use of abstract words pose many problems for jury instructions. For the most part, however, the problems must be overcome by careful scrutiny either by the judge when he constructs his own charge or by the drafting committee when it develops pattern instructions. The key to the solution is - avoid.

The difficulty with abstract words stems from three sources: their operative nature; their lack of precision; and, the difficulty involved in making words concrete.

First, when abstract words are used in a sentence, they more often than not tend to be the operative or important words in the sentence. As Fowler says, "the abstract word is always in command as the subject of the sentence".[6] This being so, if abstract words are generally more difficult to comprehend than concrete words, the meaning of the instruction as a whole will probably be less conducive to understanding.

Second, it is far easier to be abstract than to be concrete in writing or in speaking. As Sir Ernest Gowers

says, "To express one's thoughts accurately is hard work, and to be precise is sometimes dangerous. We are tempted to prefer the safer obscurity of the abstract".[7] Further, abstract terminology tends to make the language sound more learned and more impressive. Substance can be replaced by form.

Third, although it isn't difficult to say that a written or spoken passage is abstract, it is difficult to pinpoint where the problem lies and how to go about correcting it. Different methodologies have been proposed to reduce abstraction but, taken individually, they seem weak indeed. It is often suggested, for example, that concreteness can be induced by changing nouns to verbs. Practically, this is a difficult and artificial exercise and often it just doesn't work.

Although comprehension and recall of abstract as opposed to concrete words have been tested in psycholinguistic studies, their application is rather limited. Most linguistic tests of abstraction and recall are inadequate in that they only test whether or not anindividual can recall specific words in a given sentence.

Furthermore, testing on the basis of immediate recall probably wouldn't give the same results if recall was tested over a longer period of time. This caveat is especially relevant for recall of jury instructions in that the instructions are given immediately prior to a review of the evidence which, depending on the case, might take a relatively long time.

The tests do indicate, however, that concrete words are recalled significantly better than abstract words. Paivio and Yuille offer an explanation for the increased recall of of concrete words. "The reader may store the 'basic idea' of a paragraph in the form of a visual image. When asked to recall the verbal content of the paragraph, the subject generated verbal association to the stored image".8

Mental imagery is at the root of the abstraction problem. Well ordered, concrete material is more easily understood than abstract material because concreteness produces imagery for the juror to refer to. Abstract instructions, especially when phrased in unfamiliar language, do not given the juror anything to mentally hold on to.

When constructing pattern jury instructions, then, emphasis should be put on trying to keep them as concrete as possible. However, as was indicated before, there is no easy way of distinguishing concrete from abstract words. Further, the abstractness of a jury instruction may involve more than mere word choice. The whole sense of the instruction may be based in abstract thought and changing abstract words to more concrete ones won't necessarily make the instruction as a whole more comprehensible.

Here is an example taken from a charge to a jury on circumstantial evidence:

> Indirect or circumstantial evidence is that which tends to establish a fact which is in dispute by proving some other fact or facts which, though true in themselves, do not of themselves conclusively establish the fact in issue, but which support an inference or a presumption of its existence.

Besides being somewhat syntactically convoluted, the main problem with the instruction is that it is generally too abstract. Yet, the general sense of the passage would not be made concrete by replacing the abstract words with concrete ones although that constitutes a part of the concretization process.

The main problem with abstraction, as seen through the passage cited above, is that there seems to be no focus from which the juror can visually interpret the judge's meaning. By including the defendant's alleged conduct as a focal point for the juror and by concretizing some of the abstract terms the instruction is made more meaningful for the jury:

> Circumstantial evidence does not prove that the defendant committed the alleged crime. Instead circumstantial evidence proves a fact that makes it easier to believe that the accused did commit the alleged crime.

Here the jury is able to relate the evidence to the defendant and determine whether or not the evidence is material to the question of the defendant's guilt. The juror should actually be able to visualize the situation as portrayed through the evidence and associate that with the conduct of the defendant to determine the relevancy of the fact to the guilt of the accused.

Overall, the most effective way to guard against abstraction when developing pattern jury instructions is to keep things simple and direct. More than merely providing concreteness to the instruction, simplicity and directness forces the author or speaker to be precise and accurate himself.

2. Superfluous Words

"Legal language differs from other forms of English.* An example of one of the differences is that lawyers often use more than one word when only one could be used".[9] The legal profession's penchant for using too many words is a result of trying to be as precise as possible. When instructing the jury on the law, the tendency is even more prevalent in that the judge may often strive to insure that the court of appeal will not overturn his decision.

For jury instructions, exactness is too easily sought after at a very expensive price. As the number of modifiers, adjectives and adverbs increases, the ability of the juror to wade through the mass of verbiage and come up with the essence of meaning is correspondingly decreased.

Jury instructions should be made as concise, explicit and simple as possible. The easiest way to make the instructions concise is, of course, to use fewer words when constructing the charge. This entails going through a

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* Legal texts in French also point to this difference.(Ed.)

written jury instruction and discarding all superfluous words. If a word does not add anything to the meaning of the instruction, it should be struck out.

There are two very important reasons for doing away with superfluous words. First, these words detract from the precision of the instruction and consequently tend to obscure its meaning. Wordiness allows the speaker to skirt an issue without ever coming to grips with it. Second, even if the listener can extract the meaning, he is made to do extra work in processing the instruction thereby leaving him less mentally capable of understanding and assimilating more material. Finally, saved from learning to process long, meaningless sentences, the jury should be better able to understand the judge's meaning and associate that law to the facts as they have decided them.

3. Using Familiar Words

Professional misuse of words is not a new problem. Around four hundred B.C. Hippocrates stated, "The chief virtue that language can have is clearness, and nothing detracts from it so much as the use of unfamiliar words".

The legal profession is notorious for its use of jargon or legalese and, consequently, use of unfamiliar words is probably the most identifiable problem in jury instructions. A general rule, as illustrated by linguistic studies, is that words used infrequently in common parlance should be avoided in the context of jury instruction.

Jurors are expected to hear the instruction once and quickly emerge with an accurate understanding of the law. Yet the low-frequency words that are used by the judge don't permit this kind of quick perception on the part of the jury. Processing speed on the part of the jury is a crucial factor in terms of how accurately a jury will understand the law.

> Perception is a good indicator of the speed with which a particular item will be cognitively processed. It is safe to assume that the speed of processing is one indicator of the ease with which the item will be processed. Consequently, since high frequency words are perceived more quickly, it is reasonable to predict that jury instructions will be processed more easily if common words are used.[10]

If it is true that judges tend to deliver instructions more for the court of appeal than for the jury, they will tend to speak in language that is best communicated to that

audience. Here, precision for the appeal court judges takes precedence over understandability for the lay jury. Consequently, if it comes down to a choice between using words that the jury will understand or words that will be more precise for the appeal court judges, the latter will undoubtedly apply.

This is not to say, however, that understandability and legal preciseness are mutually exclusive concepts. Unquestionably, a careful choice of words will fill both criteria.

Several studies of word frequency are available. The classic, Thorndike and Lorge, dates from the nineteen forties. More recently Carroll, Davis and Richman have published the results of their extensive survey of word frequency. This study is particularly useful in that it provides not only a measure of the number of times per million words that a particular word appears in a sample of one million words, but also measures the kinds of contexts in which the word is found. These latter data permit them to develop a dispersion score, an indication of how restricted to a particular field or fields a certain word is.

Some words that commonly appear in jury instructions have little currency outside the law (though they have the same meaning in the law and outside and so cannot be called legal jargon). For example, onus,* which often occurs in the instruction on burden of proof, is so infrequent that it shows up in neither of the word frequency studies. In this case several alternatives, words with greater frequency, are available; perhaps the best is responsibility, though duty and obligation might be appropriate in some circumstances.

Demeanour, often used in the instruction on witness credibility occurs only six times in a million words (Thorndike and Lorge), less than one in a million in the more recent count (Carroll, Davis and Richman); it can be replaced with manner (over one hundred occurrences in a million) or conduct (also over one hundred occurrences). As well, demeanour is not nearly as widely dispersed as either manner or conduct.

Particular problems are raised by legal terms which may have no meaning at all to the layman or which may have a different connotation outside legal language.

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* From Latin: onus probandi, meaning literally: the burden of proving. (Ed.)

In a theft case, for example, instead of trying to impress on the jury that they must determine whether or not the defendant had the necessary intent or whether they believed he had a 'colour of right', the real question for the jury is to decide whether the defendant acted dishonestly. Here the choice of words can be seen as the determining factor in how well or how badly a jury will associate the facts of a case with the equally factual consideration of culpability.

This doesn't mean, however, that the words the judge uses to explain the criterion for culpability to the jury should be chosen glibly. Unless, as in the case of theft where dishonesty is ultimately the criterion used, the judge can express the law precisely in terms that the jury is familiar with, he is better to try to get the legal meaning across to the jury through some other device - possibly with the use of examples. Yet by using theft as a paradigm, we can see that it is at least possible to describe the law in common, everyday terms. In fact, the Commission found, while researching for theft and fraud offences, that trial judges are often left to doing this very kind of translation when they instruct the jury.

Often a word that is neutral in connotation in its legal use will have a negative connotation for the layman.

Presume has strong negative implications in its general use, implications that interfere with its use in jury instructions. Dictionaries regularly report this negative aspect*:

> 2. To take upon oneself, undertake without adequate authority or permission; to venture upon (Oxford).
>
> 1. To take upon oneself without leave, authority, or warrant: undertake rashly (Webster's Third).
> To presume something is to guess it as being reasonable or possible beforehand or without full knowledge, but it may imply an unwarranted conclusion and is often used in a questioning tone of voice (American Heritage).
>
> 10. To take for granted as the basis of argument or action; to suppose (Oxford).
>
> To assume something is to take it for granted without proof but sometimes on safe, if incomplete, grounds (American Heritage).

This implication will make it difficult for jurors to properly understand "presumption of innocence". Assume "supposer" in French**, however, is considerably more neutral in its everyday use.

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* It is equally true in French, both languages owing much to Latin. Petit Robert -- (To) PRESUME: given as probable; Nouveau Petit Larousse -- (To) PRESUME: 2. To judge in accordance with certain probabilities; to consider as probable. (Ed.)

** In French: Petit Robert -- (To) SUPPOSE: 2. To think, to hold as a probable fact without being in a position to state it in a positive manner; Nouveau Petit Larousse -- (To) SUPPOSE: To frame as a hypothesis that a fact is established, is admitted. (Ed.)

4. Homonyms

Many words have a variety of meanings. Sometimes these are closely related, sometimes they are widely divergent. The existence of multiple meanings can present problems for jurors since they cannot be sure which they are to use. Consider plan as it occurs in planned and deliberate. In an instruction on degree of murder the phrase is used as part of the test to distinguish two kinds of intent: that formed sometime before the act and that formed closer in time to the act. Unfortunately, plan may well not provide a useful test; for many people, one of the several meanings of plan is "intend"*. For these people, plan does not distinguish these two kinds of intent.

The case of plan illustrates the need for continual revision of pattern charges and the need to consult recent dictionaries. The Oxford English Dictionary (1933) does not give "intend" as one of the meanings of plan. Webster's Third (1966), however, not only defines plan as meaning "intend", it gives intend as a synonym for plan:

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* In French, the term "sanction" is a good example. Its use may cause errors in understanding if it is used as a synonym of "ratification". (Ed.)

4. to have in mind: INTEND.

The various meanings of a word are given in historical order in Webster's; "intend" is the fourth out of five for plan. Meaning three in Webster's are the same as a meaning in the Oxford that is given the date 1899 for its first occurrence. Thus, sometime after the turn of the century, plan developed a new meaning, "intend". When the Oxford was being prepared that new meaning was not widespread enough to command attention. Thirty years later, when the decisions were being made for Webster's, that new meaning was in common use.

Deliberate, as an adjective, is no help either, since it, too, has recently added "intend" as a meaning. A phrase such as arrange beforehand aids in making clear the appropriate meaning of planned and deliberate.

The psycholinguistic research on homonyms is clear in its findings that, while all the meanings are evoked when the homonym is used, the meaning that is most salient at any time is the one most closely related to the context. Since plan is being used in a context where intent is the focus, it seems likely that jurors will have trouble using plan in the appropriate sense.

This phrase, planned and deliberate, also represents another problem in legal usage for the lay jury. Normally in English a conjunction such as and connects two different ideas. That, however, is not the case in many legal phrases. Planned and deliberate are not two distinct tests to be employed in reaching the verdict, but one test for which there are two names. Most of the legal couplings, (breaking and entering, last will and testament, fit and proper, among many others) come to us from the period when Norman French was declining in importance in the courts, when it was not yet clear whether French or English terminology would win the day. Rather than make a commitment to one or the other, lawyers used both the French and English word. Normally one member of the pair is the French (or Latin) word, the other is the Old English equivalent, though the style of couple synonyms became fashionable and a few phrases exist where both members are from the same language.

Lay jurors are not familiar with this style and it does not appear that they are ever explicitly instructed that the couplings are pairs of synonyms. They are, then, likely to try to interpret the pair as they normally would, as representing not two words for one idea, but as two distinct ideas.

5. Negative Words

Some words are probably understood by first comprehending the separate meanings of the several parts of the word and then combining these meanings. Illegal, as an example, would be understood by first finding the meaning of the prefix il- and the meaning of the root legal and then combining these two elements. In contrast, understanding wrong does not require the combining step as this word has only one part. Negative adjectives or phrases are formed in English in three ways: by using not followed by an adjective (not true); by using a negative prefix with a root (untrue) or by using a single unmodified word with the negative meaning (false).

Research has consistently shown that of the three types single words are easiest to comprehend and remember and least likely to be misunderstood. Hearing not true or untrue, the juror has to remember both true and the fact that it is negatively modified; there is a danger that the fact of negative modification will be forgotten and only true remembered. It appears that words with negative prefixes are better, in this sense, than words modified by not, although the evidence is not as clear on this issue.

Examples, in addition to those given above, are easy to come by. Disbelieve can be replaced by reject; disregard with ignore. I have no doubt (a double negative because doubt is one of the negative words) is not as good as I am certain.

The use of a negative prefix word, however, is appropriate when an explicit contrast is desired. A good example of this use in a charge:

> that evidence must be not only consistent with the guilt of the accused, but inconsistent with any other rational conclusion ...

from an instruction on circumstantial evidence.

D. Paragraphs and Overall Organisation

Having dealt briefly with sentences and words, we can now go on to consider the broad outlines of larger units - essentially paragraphs (or their spoken equivalents). Here, as well, an orderly presentation of material will aid the jurors in their task.

Many of the same principles that apply to sentences apply to paragraphs as well. Paragraphs should be coherent, comprehensible and interesting. Interest can be maintained by variation in sentence length, by shift from general points to questions of detail, and by careful use of vocabulary. Given the different possibilities of paragraph structure, the judge can decide which variations are not appropriate to the particular requirements of jury instructions. It should also be noted that the general organizational principles of paragraph structure apply to the instructions as a whole. Here again, coherent structure is both the starting and the end point.

Organization is the easiest step in making jury instructions effective. This, the final step, doesn't involve debating if what will be done will be legally accurate or how it will be received in the court of appeal. These matters will have been taken care of earlier. Here the judge or the drafting committee can concentrate solely on making the instructions understandable and subject to easy and accurate recall.

The importance of organization in developing pattern jury instructions was stressed in the California Jury Instructions:

> Thoughtful consideration should be given also to the order in which instructions are read. A natural, logical and interesting sequence is always possible. A haphazard arrangement by which the judge jumps from one subject to another may lead to confusion rather than to the enlighterment of the jurors.[11]

Many of the same organizational principles that apply to other kinds of writing apply as well to jury instructions. Generally, for example, jury instructions, like any good essay, require three main elements - an introduction, a body, and a conclusion. Moreover, the functional attributes of organized writing apply in an essential way to developing jury instructions.

> The function of organization is two-fold. First, an audience can more easily understand and appreciate a message that is set in a clear framework. Second, an organizational pattern helps the speaker to eliminate wordiness, i.e. material that is unnecessary to the realization of his purpose.[12]

Organization occurs on two levels: internal and holistic. First, there is individual organization of the various parts of the instruction. Then, the individual sections should be organized on an overall basis.

If the judge is put to charging the jury on several issues of law, each issue should be organized individually.

If, for example, the legal issues that the jury needs to be instructed on include a substantial charge like robbery, a defence like drunkenness and, say, a general instruction like witness credibility, each of these legal issues should be organized individually, each in logical and coherent manner.

Take the issue of drunkenness. Like most defences, drunkenness requires that a condition or conditions be met before the jury can accept the defence. It would be illogical in these kinds of issues to state the conditions requisite to the acceptable defence before stating that the effect of an acceptable defence is reduced culpability.

This kind of organization is called hierarchial structuring and simply describes the process where general concepts are logically broken down into component parts. With this kind of organization, a jury is provided with a logical and natural way to sort out complex legal concepts into constituent elements for easy digestion, understanding and recall.

A particular problem for organization is posed by the instruction on murder. The Criminal Code is not organized

in this hierarchical fashion and any attempt to use it as a pattern, by quoting it and then commenting on it, will present a confused and difficult model for the juror. Three crucial elements are involved in making the decision on degree of murder; the culpability of the homicide, intent, and planning and deliberation. If first-degree murder is discussed first, all three of these elements must be introduced at once. A much clearer pattern for the jury follows from approaching it as a hierarchical decision question. The first question a jury must ask is whether the accused is guilty of culpable homicide; if so, then he is at least guilty of manslaughter and the jury can proceed to discuss intent. If the jurors find that the accused had the necessary intent, then, and only then, should they proceed to consider planning and deliberation. If jurors find that the accused lacked the necessary intent, however, they need go no further, and would return a verdict of guilty of manslaughter without having even considered first-degree murder; they need not consider that, because they know he is not guilty of second-degree murder.

Once the individual elements constituting the legal issue have been organized internally, some overall organiza-

tion is needed. Again, the reason for the holistic organization is that a logical structure will make it easier for the jury, and even the judge, to perceive a logical and orderly sequence to the charge. This, in turn, will allow the jury to digest, understand and remember what the judge has told him.

Holistic or overall organization should proceed on the same principles as those used to determine the internal organization of individual legal issues. The exact ordering or sequence, however, will vary from case to case and will be determined by such factors as priority of issues or whether one issue is a defence to a substantive charge. As was said before, organization of jury instructions is much the same as organization of other kinds of writing in that an introduction, body and conclusion are essential to the overall structure. In the context of jury instructions, the introduction should familiarize the jury with the way they are to apply the law to the facts as they find them. The body, of course, will constitute a logically structured presentation of the legal issues. The conclusion will reiterate what is required of the jury in terms of how they should apply the law to the facts and it should also include any summation or concluding comments by the judge.

E. Presentation

The preceding sections have dealt with lexicon, sentences, and structure. Yet there are other, no less important factors which facilitate understanding and memory in the jury. Delivery, for example, is very important for making jury instructions understandable and conducive to more accurate recall. If instructions are presented to the jury in a monotone, boring voice, without illustrations, the average juror will find it more difficult to pay attention to what the judge is saying. If, on the other hand, the judge delivers his charge with proper tone of voice and recourse to illustration, and if he looks at the jury, the jurors will be more inclined to be interested in and consequently pay more attention to what the judge is trying to communicate.

These delivery factors, however, are not subject to discussion in the same way as matters of vocabulary or sentence complexity. There are two reasons for this. First, evaluation is difficult. From the transcripts of jury charges, no indication is given as to how the judge sounded to the jury; whether he was monotonous and boring or inflec-

tive and interesting. Second, if judges or drafting committees take care to construct charges with the understanding of the juror in mind, the improvements in the written instruction will dictate an improvement in the delivery as well.

There are, however, certain delivery factors which the judge may find useful in making his charge and which are essential in developing pattern jury instructions. Such things as the use of examples and repetition are helpful in ensuring effective delivery, and yet still allow the judge to retain that essential personal touch in his charge.

In the abstract, legal concepts are difficult for a lay audience. Moreover, when asked to apply these concepts to a factual situation, the task becomes especially difficult and the jury needs some kind of concrete illustration to help them visualize how the abstract law relates to the real world. In his instruction, the judge should endeavour to bridge this gap so as to allow the jury to make the vital connection.

One effective way of doing this is for the judge to make his instruction as visual and concrete as possible. As

we saw earlier, abstract words can often be made more concrete by various means. The judge should go further than this, though, and concretize his instruction by using hypothetical and actual case examples. Through these examples, the jury sees how the law is applied to actual situations and will be more confident in applying the law to the facts of the case as they have discerned them.

Another technique that should facilitate jury recall of instructions is the use of repetition. To date it has generally been thought, probably naively, that juries can discharge their function properly by hearing the instructions without repetition. But, as Jerome Frank has stated,

> "One of the greatest fictions known to the law is that a jury of twelve laymen can hear a judge read a set of instructions once, then understand them, digest them and correctly apply them to the facts in a case".[13]

The simple fact of the matter is that not every juror is capable of the kind of mental attention that is necessary to understand and remember an often complex series of legal concepts.

The judge must allow for instructing a juror of less than average intelligence. The easiest way to insure that

his instructions are understood by all twelve jurors is to repeat the instruction. More than that, though, the judge should, when repeating the instruction, use the examples referred to earlier. This has two advantages. First, the repeated instructions don't sound redundant. Second, the juror is given a good taste of the law in the abstract and then is shown how that law is to be applied.

The use of examples and repetition are factors that cannot be documented in the form of pattern jury instructions. This, however, is just as well. The nature of these factors is such that a judge must decide, according to each jury, how much repetition or use of examples is needed to fulfil the requirements of understandability and recall. Here again, practice, reflection, and the use of appropriate reference material will bring about improvement in both the text itself and its presentation to the jury.

F. Conclusion

Sentence complexity, unfamiliar vocabulary, a disorganized charge, and poor delivery are all factors that detract from the jury's understanding and consequently from

its ability to discharge its responsibilities effectively. By concentrating on improving these areas, the judge will be better able to formulate his charge towards the goal of inducing better understanding and recall in the jury.

Although these considerations involving the language of jury instructions should be helpful to judges constructing their individual charges, the primary reason for them is to provide a good language base for developing pattern jury instructions. Legal experts do not always think of the essential communication aspect along with the legal considerations. With increased attention to language itself, however, pattern jury instructions can be developed that are legally precise as well as easily understood and remembered by the jury.

Effective pattern jury instructions, then, will require an interdisciplinary approach where leading members of the bench work closely with comunications experts. Once the pattern instructions have been developed and codified, they should be compiled in a loose-leaf form to allow for ongoing changes. Each year, for example, a review committee comprised of the same kind of personnel that developed the

instructions in the first place could incorporate necessary changes that could then be sent to all the trial judges in Canada.

Finally, pattern jury instructions based on an accurate statement of the law, but a statement which is understandable to the lay jury, should do several things. First, and most obviously, it should allow the jury to understand and remember the instructions better. Second, because of the increased understanding and recall by juries, their verdicts should be of a better quality than would otherwise be the case. In turn, increased understanding should result in fewer hung juries. Third, because of better quality verdicts, there should be fewer appeals. This also implies a saving in time and money. Finally, to come full circle, pattern jury instructions will save the judge time in researching the law and will insure that his instructions to the jury will be directed at it and not at the court of appeal.

ENDNOTES

1. Without the pioneering work of Bruce Sales, Amiram Elwork and James Alfini this paper would be a far worse one. We hope we have been able to do more than simply rehash their work, but they did not leave us much to do. We have also profited from the work of Robert and Veda Charrow.

2. Even Flesch's The Art of Plain Talk concentrates on writing.

3. Flesch, R., The Art of Readable Writing, (2nd ed.) Harper and Row, N.Y. (1974), p. 112.

4. Friedland, M. Access to the Law, The Law Reform Commission of Canada, Carswell, Methune, Toronto, (1976), p. 68.

5. Flesch, op cit, p. 185.

6. Fowler, H.W., Dictionary of Modern English Usage, 2nd ed. by Sir Ernest Gowers, Oxford University Press, (1965), p. 5.

7. Gowers, Sir Ernest., The Complete Plain Words, 2nd ed. by Bruce Frazer, Pelican, Middlesex, (1975), p. 132/

8. Paivio, A., and Yuille, J.C., "Abstractness and recall of connected discourse", Journal of Experimental Psychology, (1969), 82, p. 467.

9. Friedland, op cit, p. 67.

10. Sales, B.D. et al, "Improving comprehension for jury instructions". In Sales, B.D., ed. Perspectives in Law and Psychology, Vol. 1 The Criminal Justice System, Plenum, New York, D977, p. 33.

11. California Jury Instructions, 1958 with 1967 update, p. 8.

12. Felber, S.B. and Koch, A., What Did You Say?, Prentice-Hall, New Jersey, (1973), p. 140.

13. Frank, J., Law and the Modern Mind, Peter Smith Ltd., (1930) p. 180.

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COMPREHENSION OF JURY INSTRUCTIONS IN A SIMULATED CANADIAN COURT

A Report to the Law Reform Commission of Canada

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Synopsis

Evidence is available suggesting juries have difficulty understanding judges' instructions. This, it is believed, is due not only to the complexity of the law but also to other factors such as language and delivery. It would follow, then, that by improving areas such as language and delivery, juries should better understand the judges' instructions.

The purpose of this experiment was to test, in a simulated situation, whether juries can generally better comprehend jury charges when the charge is formulated according to linguistic principles relating to comprehensibility.

Two charges were formulated on a hypothetical case. Six juries (generally six-member juries) were given the original sample charge that did not benefit from revision according to the principles of construction referred to above and four juries received the charge that was revised according to those principles.

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Generally, there were significant findings that the revised charge improved how well the juries understood the law. More specifically, it was found that the revised charge improved understanding in jurors who have no post-secondary school education.

Introduction

Jury research, of various kinds, in the United States suggests quite clearly that juries do not understand the instructions on law given to them at the end of a trial as well as should be expected.1 In a study with simulated juries in Florida, Strawn and Buchanan (1976) found that the average score on a test of comprehension of legal concepts that was given following such instructions was only 70% correct. Sales, Elwork and Alfini (1977) found that the existing pattern jury instructions in Michigan were not as effective in communicating legal concepts as a revised set they had prepared. Using a different type of test, Charrow and Charrow (1978) report similar findings for the California Jury Instructions. It seems prima facie unlikely that juries in Canadian courts are able to understand the instructions any better than their American counterparts.

In another paper in this volume (Myers and Jones, 1978) some methods of improving the comprehensibility of jury instructions are discussed. The evidence that these suggestions work is derived principally from experiments

that focus on one particular linguistic factor; it might not be the case that they are as useful when applied to a real-life situation. The work of Sales and his colleagues and that of the Charrows indicate quite strongly that such factors do have an effect outside the psycholinguistics laboratory. It was felt that it would be useful to test whether such revisions did lead to improvements in juror comprehension in a Canadian courtroom. In this paper the results of that test are examined.

Previous experiments in juror comprehension (the only exception being Strawn et al. (1976) in Florida) have established only that one set of instructions is (or is not) better than another set. They do not establish whether the better set is "satisfactory" in some absolute sense.[2] As the purpose of the experimental research reported here is to show that one set of instructions is better than another, that a set of instructions can be improved by following certain guidelines, the design of this study should be directly comparable to the Sales et al. (1977) and to the Charrows (1978) studies.

It is essential, in any case, to establish first that these guidelines do lead to more comprehensible instruc-

tions; only then does it make sense to test for how absolutely satisfactory the better type of charge is.

In one crucial respect, this study differs from the others. Rather than rewriting existing pattern instructions (as Sales et al. and the Charrows did), the revised instruction used here was created de novo following the psycholinguistic principles outlined in Myers and Jones (1978). This latter procedure more closely parallels the situation that will occur when (and if) a decision is made to create pattern instructions in Canada. It is therefore an appropriate procedure for this experiment.

Experiment Materials

The case chosen for simulation is based closely on R. v. Linney (1977), 32 C.C.C. (2d) 294 (S.C.C.), a case involving the defense of provocation. In the initial trial, the defense of self-defense was also introduced, but this was not included in the simulation prepared for this study. The facts of the case are straightforward (for a detailed fact situation, see Appendix A). The accused (identified here as Dashney) shot his neighbor (here Vincent) in

Dashney's house. Vincent frequently bullied Dashney and on the night of the shooting had entered Dashney's house and acted belligerently. This woke Dashney, who was hit with a coffee pot when he confronted Vincent. Dashney retreated to his bedroom and attempted to lock the door, but was unable to do so. He then came from the room with a shotgun, pointed it at Vincent's chest (Vincent having followed him) and fired.

The case was appealed on the ground that the judge had improperly instructed the jury on the burden of proof required in a successful defence of provocation. The appeal was granted and a new trial ordered. (Linney had originally been found guilty of second-degree murder.)

This case was chosen because the facts were simple and easily summarized and because the crucial instructions seemed to be three: burden of proof/reasonable doubt, murder/manslaughter, and provocation. These represent three different kinds of issues. The first instructs on how to evaluate evidence in coming to a decision. The second instructs on what law is to be applied and how to apply it to the evidence once the latter is evaluated. The third is

instruction on a defence. This is a difficult instruction. Normally, it is incumbent upon the Crown to prove the case it has brought against the accused beyond a reasonable doubt. If the accused produces some evidence of a defence which would require the judge to put that defence to the jury as at least a partial excuse for the accused's conduct, the Crown must prove beyond a reasonable doubt that this theory of the defence is invalid.

The Chairman of the Law Reform Commission wrote to a number of judges across Canada requesting them to provide a jury charge on the three issues outlined above. Each judge was sent a copy of the fact situation (Appendix A) later used in simulations of the trial. All judges realized that the source was R. v. Linney.

Several of these judges took the time to prepare a charge. One of these was selected with the advice of several of the staff of the Law Reform Commission to be used in the simulated trials to be described later in this report. The major difficulties with the charge, in terms of the factors considered in this study, lie in the use of citations from the Criminal Code; that fault is common to

all charges, including those used in actual cases. Since the reformulations reported on here principally replace these Criminal Code citations, part of this exercise is to demonstrate how patterned or standardized jury instructions can be substituted for the present practice of reading verbatim from the Criminal Code and from judgments of the courts of appeal. The judge's charge used in this study is referred to as the original charge, that prepared by the experimenters as the reformulated charge.

The reformulated charge contains some passages in common with the original one. The experimenters' goal was to simulate the effect of pattern jury instructions prepared according to the recommendations in Myers and Jones (1978) and the Law Reform Commission's general recommendations on jury instructions. Both sources suggest that a policy of allowing only the pattern instruction to be read (a policy followed in several jurisdictions in the United States) would be mistaken. Instead the pattern instructions would serve as a model for the judge to follow, adapting them to the particular case at hand. In particular, the judge would have to frame, on his own, those passages relating the instructions on the law, which would be the subject of the

model instructions, to the evidence introduced in the case. The reformulated charge, then, consists of model instructions on the issues of law together with parts of the original instruction concerning the evidence of the case. (The original charge may be found in Appendix B and the reformulated one in Appendix C. Those sections with a vertical line along the left side are the parts shared by the two charges.)

It is possible that lawyers and judges may criticize both the original charge and the reformulated charge on the ground that neither would pass the scrutiny of a court of appeal. One of the claims of this study and the more general report on jury instruction language (Myers and Jones, 1978) is that the tests employed by appeal courts are not necessarily the appropriate ones anyway. Such tests are frequently based on criteria that are meaningful only to those with legal training (such as the distinction between "reckless" and "careless", a distinction of kind rather than mere degree which is not commonly made by the layman). Since this study actually tested whether the instruction was understood in the legally prescribed way, the argument that the charge would not be accepted on appeal loses some

weight. If it was discovered in an empirical study that a disallowed instruction actually did lead to correct juror behaviour or vice-versa, then the empirical evidence should surely take precedence over the informal and more intuitive evidence employed by the appellate courts.

Though the immediate object of the experiment was to see how reformulated instructions affected juror comprehension in a simulated situation, the ultimate object was to prove their utility in a real trial. For this reason a compromise had to be made in the reformulated charge between what, to a linguist, would promote optimum understanding and yet still be acceptable to a court of appeal even given, as suggested above, that the product would detract from a juror's full understanding of the meaning intended by the law.

Analysis and Comparison of the Charges

Since the reformulated charge is not simply a rewording of the original one, no sentence by sentence comparison between the two is possible. The reformulated charge conforms as closely as possible to the principles given in

Myers and Jones (1978), with the caveat given above. It is possible, nonetheless, to point out some of the ways in which the original charge violates those principles, and some of the ways those principles guided the creation of the reformulated charge.

The original charge contains a number of words that linguists have calculated as not being familiar to the average person. These are called low frequency words and are measured by Thorndike and Lorge (1944) and by Carroll, et al. (1971) word counts.[3] These include words such as wrongful (one occurrence per million, Thorndike and Lorge: not listed, Carroll, et al.); reckless (33 occurrences per million, Thorndike and Lorge; 1.56 occurrences per million, dispersion .56, Carroll, et al.); culpable (one occurrence per million, Thorndike and Lorge; not listed, Carroll, et al.); and indictable (not listed, Thorndike and Lorge; as indict, .01 occurrences per million, dispersion .0, Carroll et al.). These words can be avoided either through rephrasing (wrongful is dealt with in this way by providing an alternative to Sec. 215) or by use of a more common word.[4]

The use of the word planned is probably unavoidable in a charge dealing with homicide. Unfortunately for clarity,

it is a word with several meanings, only one of which is appropriate in this context. The American Heritage Dictionary of the English Language cites the verb plan with the following meanings:

> 1. To formulate a scheme or program for the accomplishment or attainment of: plan a campaign. 2. To have as a specific aim or purpose; intend: They plan to go to the beach.... 3. To draw or make a graphic representation of.

The existence of the meaning that is nearly synonymous with intend creates problems for the use of plan in a homicide instruction, for plan is being used here to distinguish two kinds of criminal acts both of which already include intent. The addition of deliberate is no help because it too has among its meanings, "intentional". If planned and deliberate is to be used, it does occur in the reformulated charge, some further explication is required, such as:

> For you to be satisfied that the killing was planned and deliberate, you must be satisfied that it was arranged beforehand.

In the original charge the phrase is used without further explanation.

An alternative, in this case, to additional comment on the phrase is to use it in its verbal rather than its adjectival form. As a verb, deliberate does not contain the simple implication of intent only in any of its meanings, but always includes the idea of preparation beforehand. This approach is also used in the reformulated charge:

> If you believe that _____ planned and deliberated to kill or harm _____ ...

Similar problems of multiple meaning occur with "material" which may mean either "physical substance" or (in law only) "relevant". This word is simply avoided in the reformulated charge, but it occurs in several places in the original one. (For a more complete discussion of material, see Sales, et al., 1977.)

The use of the word presume (or its nominal form, presumption) throughout the part of the original instruction concerning reasonable doubt has unfortunate consequences. While to a person trained in law it probably means nothing more than "take for granted until proved otherwise", it has a different connotation for the layman. While assume likely has the neutral meaning for the lay person, presume implies

that the assumption is an unwarranted one (see the careful discussion of synonyms in the American Heritage Dictionary, p. 1037). In the reformulated charge only assume is used.

Other words in the original charge with special legal meanings include many of those given in the discussion of word frequency, such as culpable and reckless. These are uniformly avoided in the reformulated instructions.

Syntax or sentence construction is another important variable that linguists have found affect the comprehension of meaning. As there is little sentence by sentence match between the two charges, only a few examples of syntactical problems will be given, and these are given more to illustrate the syntactic issue than to provide a list of comparisons.

Several alternative syntactic forms exist for most sentences. In choosing the one best suited to enhance comprehensibility particular attention must be paid to the relations between the verb and the various nouns that have grammatical functions in the sentence. The most familiar of these choices is that between the active and the passive

voice. While some studies show that some passives are more difficult to comprehend than their corresponding actives (these studies are discussed in detail in Myers and Jones, 1978), the passive is particularly useful if the logical object is the focus of the sentence. The inappropriate use of the active can be illustrated by the following from the original charge:

> I will define murder by reading the relevant sections of the Criminal Code.

Since what is at issue is what murder is and not what the judge is doing, the active form is less preferable here than passive, which would make murder the subject of the sentence, possibly as:

> Murder is defined in several sections of the Criminal Code.

The reformulated charge approaches murder by a different route, and so this syntactic problem does not surface at this point in that charge.

Other syntactic patterns effect the apparent relationship between a verb and its nouns. Consider from the original charge:

> ... the burden of proving every fact necessary to enable you to convict the accused of any offence is on the Crown ...

which obscures the fact that the Crown has to do something, by making the Crown an object, a syntactic relationship usually reserved for more passive elements of the logical structure, as well as separating it by a series of clauses. In this case there is a direct counterpart in the reformulated charge where the Crown is the subject, although of a subordinate clause:

> It is the responsibility of the Crown to prove beyond a reasonable doubt.

The original charge also contains a syntactic structure that is frequently confusing. The source of the phrase is the Criminal Code, Sec. 215:

> (2) A wrongful act or insult ...

The problem for the listener is to decide whether wrongful modifies only act or modifies both act and insult. This can be avoided by simple rewording, as occurs in the reformulated charge:

> Only insults or illegal acts ...

(replacing the infrequent wrongful, also).

The most dramatic difference between the two charges is the organization of the instructions for murder. In the original charge, following the pattern of the Criminal Code, first-degree murder is defined first, then second-degree and finally manslaughter. All the issues, intent, planning and deliberation, must be raised at once in order to define first-degree murder. In the reformulated charge, the various kinds of homicide are presented in a more logical order. Is the accused guilty of a criminal act? If so, then at least he is guilty of manslaughter and it then, and only then, makes sense to consider the question of intent. If intent is found then the jury must go on to discuss whether it was planned and deliberate, but if no intent is found then no further consideration is warranted and the jury would return a verdict of manslaughter. The reformulated charge thus directs the jurors to a systematic decision process, where the original charge, ultimately the Criminal Code, suggests an illogical and confusing pattern to follow.

One factor that affects comprehension is not reflected in the difference between the two charges. The reformula-

tion did not take into account the effect of length. It is probably the case that, on an overall appraisal, even instructions that are otherwise constructed for optimum juror comprehension will not be as well understood if they and the review of the evidence are lengthy. Since the trial simulation for which the reformulation was intended did not require a long discussion of the evidence by the judge, no attempt to deal with this variable was included as part of the study.

Preparation of Experiment

In order to test whether, in fact, the revisions made to the charge lead to improved understanding, members of simulated juries were tested for their comprehension of the relevant law after hearing either the revised or the original instruction.

Two hundred potential subjects were asked to participate as jurors in the study. These were selected from those already on the jury rolls in the Regional Municipality of Ottawa-Carleton, Ontario. Using the jury rolls as the basis for selection means that those who were asked represented as

random a selection of members of the community as a regular jury panel would. As the jury list from which the names were selected was for 1977, it was possible to eliminate those that had been called for service in that year; only those who had not served were contacted for this experiment. The two hundred names selected were the first and last hundred from this list of over five thousand.

Each was sent a letter by the Chairman of the Law Reform Commission requesting his or her participation in the study. The letter was accompanied by a reply post card; those who volunteered for the study returned the card to the Commission indicating their preference for time and date. (See Appendix D for the letter and the return card.) This free choice of time and date resulted in an unequal distribution of jurors; six juries (thirty-seven jurors) heard the original charge and only four (twenty-two jurors) heard the revised charge.

Approximately 10 per cent of the original letters were returned as undeliverable (presumably the individuals had moved). In order to ensure that enough subjects would be available, the original list of two hundred was supplemented

by an additional twenty names. These were determined by finding the name in the Ottawa-Hull telephone directory that was nearest to the name of each of the original addressees whose letter was undeliverable. Each of these additional twenty was an Ottawa-Carleton resident.

Each individual was invited to participate in a study described simply as "an experiment which the Law Reform Commission of Canada is conducting". As the experiment was to be conducted in English, the letters were sent in English only. However, no distinction was made in soliciting subjects as to whether their native tongue was English or French. As it turned out, the fact that the simulated juries that were used in the experiment were of mixed linguistic background prompted very useful conclusions about formulating jury instructions in Canada that were not made in the experiments conducted in the United States.

No other information as to the nature of the project was provided to these potential subjects. All subjects actually participating were paid the standard Ontario jury pay, $10, for their day of service.

The participants were directed to come to the County Court House in Ottawa and to report to the jury lounge there. As they arrived, six-person juries were formed and when sufficient jurors were available they were taken into the court room by a constable. On both days that the experiment was conducted twelve jurors were available at the first simulated trial; in an attempt to not keep subjects waiting unduly, all twelve were instructed at the same time. These jurors were split into two six-person juries for the deliberation.[5]

Since the formality of a real trial may have some effect on comprehension, great care was taken to impart the atmosphere of a real court to the simulation. A real court-room, of the Supreme Court division, in the County Court House was used for the setting. The judge who gave the instructions was presented as a real judge, fully gowned. (When the experiment was finished all subjects indicated that they believed the judge to be a real one.) The constable (one of the regular constables of the court house) announced the judge: "This court is now in session. All rise. Judge _____ presiding."

Once in the courtroom the first experimenter explained the importance of the experiment and outlined the procedures that would be followed. Subjects were told that they would take a test immediately after retiring to the jury room and that their deliberations would be recorded. They were also informed that a time limit would be placed on their deliberations; this was done to encourage the jurors to seriously discuss the case rather than rush to a quick verdict since they knew that such thorough discussion would not prolong their service. A justification of the use of six- rather than twelve-person juries was provided.

After the experimenter concluded his instructions the judge was formally conducted into the court room and the simulation of the trial began. The facts relevant to the case were presented by a second experimenter acting as a lawyer (see Appendix A for the fact situation read at this point). The jurors were allowed to ask questions about the facts, though only a few did so. The jurors were then instructed on the law relating to the case by a third experimenter acting as judge (see Appendices B and C for the two charges).

Following the instructions from the judge, the jurors retired to a deliberation room. Each subject then filled out the questionnaire (Appendix E). Once all the jurors had completed their tests, the jury began its deliberations. These deliberations ended when the jury had reached a unanimous verdict or when one hour had passed. The result of the deliberation was reported to the experimenters.

Each juror was then asked to indicate any changes that he wished to make to the first questionnaire and, finally, to provide some demographic information.

Results and Analysis of Experiment

In all, fifty-nine jurors participated in the experiment. Thirty were female and twenty-nine male. Ten men and twelve women heard the revised charge; nineteen men and eighteen women heard the original charge. Forty-five jurors reported English as their native language; fourteen reported some other language. Unfortunately, these fourteen were not proportionally distributed between the two charges; twelve were on juries that heard the original charge and only two on ones that heard the revised charge. Thirty-one had some

education beyond high school; twenty-eight had not. Revised charge juries included fourteen with post-secondary education and eight without; original charge juries had twenty and seventeen, respectively. These demographic characteristics are presented in Table 1.

Table 1. Demographic Characteristics of Study Jurors

	Sex		Education		Native Language	
	Male	Female	Some Post-Second.	No Post-Second.	English	Other
All Juries	29 49%	30 51%	31 53%	28 47%	45 76%	14 24%
Reformulated Charge Juries	10 45%	12 55%	14 64%	8 36%	20 91%	2 6
Original Charge Juries	19 51%	18 49%	17 46%	20 54%	25 68%	12 32%

It is very difficult to say how closely these jurors resemble "typical" jurors in Canada. In Doob's survey (reported elsewhere in this volume) many characteristics varied so widely from jurisdiction to jurisdiction that no simple picture emerges. For example, in all the juries Doob surveyed, 63.6 per cent of the jurors were men; a much larger percentage than in the panel used in this study where men constituted 49 per cent of the juries. In those juries in Toronto in Doob's survey, however, only 41.6 per cent

were men, so that the experimental group resembles more closely juries in Toronto than in say, Nova Scotia, where juries were 85.6 per cent male.

In education, on the other hand, while there is wide variation in the actual juries (35.7 per cent post secondary in Toronto, 11.9 per cent post secondary in Williams Lake) the study juries had considerably more members with education beyond high school than the average (53 per cent versus 25.3 per cent). This is likely to always be the case with simulated jury studies, as those with university education are more likely to be motivated to participate in such experiments. Further, any sample drawn in Ottawa-Carleton is likely to contain a greater number of individuals with post-secondary education since Ottawa-Carleton has a greater number of such individuals than other jurisdictions.[6] The consequence for this study, however, is to make the findings very conservative. The variable being measured, increased comprehension with revised instructions, has its greatest effect on those with no post-secondary education (see Table 7 and discussion below). Since it is likely that the study sample contains fewer individuals who will be greatly affected by the variable than does the population, the study

probably underestimates its effect in the true population of jurors.

These juries differ from an actual jury in another respect. Because of the limited number of volunteers, it was impracticable to eliminate any of them through challenges. It is difficult to determine how this might prejudice the study. Jurors who might have been challenged would serve on original charge and revised charge juries with random probability. Unless it could be shown that the factors that would lead to a juror being challenged would influence his responses to one charge in one way and his response to the other in another way, the fact that no jurors were challenged should have no systematic effect on the results. Furthermore, although there are various ways a juror can be challenged (or stood aside), the only challenge procedure that requires some rational explanation for excusing the juror is "challenge for cause". As it is now, challenge for cause, except in rare occurrences, excludes only those who are biased or suspected of being biased in the case. It is certain that none of the subjects used in this experiment were so biased.

The questions concerning the comprehension of the relevant law are 9 - 18 on the questionnaire (Appendix E).[7] Questions 16 and 17 are multiple-part questions but are weighted so that they each count as a single question (scored by counting the number of correct sub-parts and dividing by four). The verdict question (#1) is scored correct if the verdict agrees with the findings on the facts (questions 3 - 8) and the finding on provocation (question 9). As it turns out, only the answer regarding provocation was relevant (in part because the correctness of response to this question was related to the findings on the facts as explained in footnote 6). The verdict is correct if the verdict is manslaughter and the juror finds that the accused was provoked or if the verdict is second-degree murder and the provocation finding is that he was not provoked (there were two of the latter). The scores that are reported in the following discussion are the sum of the "comprehension" and "verdict" scores. A perfect score is 11, attained by no one.

The principal finding is that the charge does make a difference in the verdict. All the jurors that heard the revised charge believed that the accused was provoked and

found him guilty of manslaughter; that is, each revised charge juror was correct on the verdict. Of the jurors who heard the original charge, seven made the wrong verdict based on their belief as to the existence of provocation. The relationship between type of charge and correctness of verdict is significant ($X2 = 3.09$, p is less than .05, one-tailed).8

It follows that all the revised charge juries reached a unanimous verdict of manslaughter. Four of the six original charge juries also reached unanimous manslaughter verdicts, but the other two original charge juries were unable to come to a conclusion within the one hour allowed. In each instance one juror remained in favour of second-degree murder.

Table 2. Correctness of Verdict and Type of Charge

		Correctness of Verdict		
		Right	Wrong	Total
Type of Charge	Reformulated	22	30	52
	Original	0	7	7
	Total	22	37	

$X2 = 3.09$, p is less than .05, one-tailed

It also seems certain that the jurors' understanding of the relevant law is improved with the revised instruction, though not as improved as one might hope. The mean score for revised charge jurors is 7.88 (out of 11); for original charge jurors the mean is 6.8 ($t = 2.15$, $df = 57$, p is less than .025, one-tailed).[9] As well, the median score for revised charge jurors is 8; for the other jurors it is 7. The summary statistics for the two juries and the distribution of scores within each set of jurors are given in Tables 3 and 4.

Table 3. Frequency Distribution of Scores (Rounded to Nearest Whole Number) by Type of Charge

	Reformulated Charge		Original Charge	
Number Correct	Number	Cumulative Per Cent	Number	Cumulative Per Cent
11	2	9	1	3
10	4	27	1	5
9	2	36	5	19
8	5	59	5	32
7	6	89	12	65
6	1	91	5	78
5	0	91	3	86
4	2	100	5	100
Total	22		37	

Table 4. Summary of Scores by Type of Charge

Jurors	Mean	Variance	Standard Deviation	Number
Reformulated Charge All	7.88	3.33	1.82	22
Original Charge All	6.8	3.29	1.81	37

t = 2.5, df = .57, p is less than .015, one-tailed

Since the jurors were not proportionally distributed by native language and education, it is important to assess the influence of these factors on the jurors' scores. It is clearly possible that jurors whose native language is not English will have more difficulty with the complex language of a jury instruction than will those whose native language is the same as that in which the instruction is given. As well, education beyond high school is likely to have made the legal concepts more familiar and the difference in score might result from a difference that existed prior to the instruction rather than from the difference in the instructions. It is possible to control for the effect of both variables.

When the scores for English native language jurors are compared to those of jurors reporting other native languages, there is a significant difference independent of

type of charge. The mean score for all Engligh native language jurors is 7.46, for the others 6.39 (t = 1.86, df = 57, p is less than .05, one-tailed). Of course, the poor showing for the non-English may be simply because most of them (twelve of the fourteen) received the original charge. It is necessary to control for language while testing charge and to control charge while testing language.

When the non-English native language jurors who heard the original charge are compared to the English native language jurors who heard the same charge (mean = 6.35 and 7.02, respectively) the difference in scores is not significant (t = 1.02, df = 35). The number of non-English jurors in the group of revised charge jurors is too small, only two, to allow for valid comparisons. These findings show that when charge is controlled for, language does not lead to a significant difference.

When only those jurors whose native language is English are compared across charges (revised mean = 8.0, original mean = 7.02) the difference is significant (t = 1.74, df = 43, p is less than .05, one-tailed). Again the number of revised-charge non-English is too small for com-

parisons to be made. In sum, when native language is controlled for, type of charge does make a difference.

While native language may play some role in the comprehension of jury instructions, its exact significance cannot be assessed from this data. In any case, it cannot be the only factor that is responsible for differences in comprehension since when native language is controlled for, there remains a significant difference in scores between revised and original charge jurors. The summary of the language comparison data can be found in Table 5.

Table 5. Summary of Scores by Native Language

Jurors	Mean	Variance	Standard Deviation	Number
Reformulated Charge				
English	8.0	3.45	1.86	20
Non-English	6.63	.78	.88	2
Original Charge				
English	7.02	3.27	1.81	25
Non-English	6.35	3.3	1.82	12
All				
English	7.46	3.52	1.87	45
Non-English	6.39	2.86	1.69	14

All, English vs. All, Non-English
t = 1.86, df = 57, p is less than .05, one-tailed

Reformulated Charge, English vs. Original Charge, English
t = 1.74, df = 43, p is less than .05, one-tailed

Correctness of verdict is also independent of language, as the results in Table 6 show.

In contrast, the education factor does appear to have had some real effect on the jurors' scores. Independent of charge, jurors with some post-secondary education scored significantly higher than those jurors without (7.81 vs. 6.53, respectively) ($t = 2.77$, $df = 57$, p is less than .005, one-tailed). As well, the relationship between education and verdict is significant ($x^2 = 3.08$, p is less than .05, one-tailed). For complete statistical data see Tables 7 and 8.

Table 6. Correctness of Verdict and Native Language

		Correctness of Verdict		
		Right	Wrong	Total
Native Language	English	41	4	45
	Non-English	11	3	14
	Total	52	7	
	X2 = .63			

When this variable is controlled for it appears that the effect of the charge is significant only for those who

have had no education beyond high school. As in the case of language, it is necessary to control for education and compare charge and to control charge and compare across education. These two analyses are among the most revealing of the study.

Table 7. Summary of Scores by Education

Jurors	Mean	Variance	Standard Deviation	Number
Reformulated Charge				
Some Post-Secondary	8.14	4.65	2.16	14
No Post-Secondary	7.41	.95	.97	8
Original Charge				
Some Post-Secondary	7.54	2.84	1.68	17
No Post-Secondary	6.18	2.92	1.71	20
All				
Some Post-Secondary	7.81	3.62	1.9	31
No Post-Secondary	6.53	2.63	1.62	28

Reformulated Charge, No Post-Secondary vs. Original Charge, No Post-Secondary
t = 1.84, df = 26, p is less than .05, one-tailed

All, Some Post-Secondary vs. All, No Post-Secondary
t = 2.77, df = 57, p is less than .005, one-tailed

Original Charge, Some Post-Secondary vs. Original Charge, No Post-Secondary
t = 2.44, df = 35, p is less than .01, one-tailed

Table 8. Correctness of Verdict and Education

		Correctness of Verdict		
		Right	Wrong	Total
Education	Some Post-Secondary	30	1	31
	No Post-Secondary	22	6	
	Total	52	7	

$X2 = 3.08$, p is less than .05, one-tailed

For the jurors who heard the original instructions, those who had some post-secondary education scored significantly higher than those who didn't (7.54 vs. 6.18 for those with no post-secondary schooling) ($t = 2.29$, $df = 35$, p is less than .025). However, there was no significant difference between the two education groups for those who heard the revised charge (8.14 vs. 7.41) ($t = .86$, $df = 20$).

Comparing across charges within education groups, the difference in charge had no effect for those with post-secondary education (revised = 8.14, original = 7.54) ($t = .84$, $df = 29$). Most importantly, though, for those with only a high school education or less, the revised charge did lead to significantly greater comprehension (revised mean = 7.41, original mean = 6.18) ($t = 1.84$, df =

26, p is less than .05, one-tailed). Equally interesting is the result from comparing jurors who have post-secondary education and heard the original charge with those without post-secondary education who heard the revised charge. While the former scored very slightly higher (7.54 vs. 7.41) the difference is insignificant (t = .25, df = 23). The revision of the charge thus has a clear effect for those without education beyond high school.

As the difference between the education groups was significantly reduced with the revised charge, this is strong evidence that the revision has an important and wanted effect. The consequence of using the revised charge is to significantly reduce any differences in knowledge of the law that may have existed among the jurors prior to the instruction. The original charge was far from effective in doing this; what prior differences may have existed were not reduced sufficiently by that charge to equalize knowledge of the law.[10]

As was noted in the discussion of the demographic characteristics of the study jurors, this finding on education means that the study as a whole underestimates the

effect of the revision in charge on the true population of jurors. Since the comparison between all jurors who heard the revised charge and all who heard the original one compares fewer individuals who would be most affected by the difference than would a more typical set of jurors, the difference between mean scores for the two groups (already quite significant) is probably less than it would be in the whole population.

The sex variable does not have any clear effect. While male jurors who heard the reformulated charge did score higher than female jurors who heard that charge (male = 8.65, female = 7.23) that difference is not great enough to be significant. The difference between males and females overall and in the original charge juries is even smaller with women scoring higher in the latter case (see Table 9).

Table 9. Summary of Scores by Sex

Jurors	Mean	Variance	Standard Deviation	Number
Reformulated Charge				
Male	8.65	1.92	1.39	10
Female	7.23	3.78	1.94	12
Original Charge				
Male	6.68	3.44	1.86	19
Female	6.93	3.28	1.81	18
All				
Male	7.36	3.73	1.93	29
Female	7.05	3.38	1.84	30

Reformulated Charge, Male vs. Original Charge, Male
t = 2.85, df = 27, p is less than .005, one-tailed

In comparing within sex and across type of charge, however, there is a difference as the study predicts. Reformulated charge males did significantly better (mean = 8.65) than original charge males (mean = 6.68) ($t = 2.85$, $df = 27$, p is less than .005, one-tailed). There was no such significant difference between the two female groups (reformulated = 7.23, original = 6.93). The men's groups probably differ more than the female groups simply because, as well as the charge difference, the education difference is greatest for the men's groups. Fifty-eight per cent of the original charge males had no more than high school education, but only 30 per cent of the reformulated charge males had no post-secondary schooling (the corresponding figures for females are 50 and 42 per cent -- see Table 10). The number of subjects is too small to statistically assess the contribution of each factor, sex and education.

Table 10. Sex, Type of Charge and Education and Native Language

	Education		Native Language	
	Some Post-Secondary	No Post-Secondary	English	Non-Engl.
Reformulated Charge				
Male	7-70%	3-30%	10-100%	0
Female	7-58%	5-42%	10-83%	2-17%
Original Charge				
Male	8-42%	11-58%	13-68%	6-32%
Female	11-61%	7-39%	12-67%	6-33%
Total	31-53%	28-47%	45-76%	12-24%

There is no relationship between sex and correctness of verdict ($X^2 = .73$) or sex and type of verdict.

Table 11. Correctness of Verdict and Sex

		Correctness of Verdict		
		Right	Wrong	Total
Sex	Male	25	4	29
	Female	27	3	30
	Total	52	7	

$X^2 = .002$

In the latter case, two males and three females each found the accused not guilty, even though they believed that he was provoked and that he shot the victim as charged. Two males found him guilty of second-degree murder and one of first-degree murder; no female juror found him guilty of murder.

Each juror was asked how sure he was of his verdict prior to deliberation (question #2). Certainty is not related to correctness of verdict ($X^2 = .55$), nor is it related to score. The jurors were grouped into two sets,

Table 12. Correctness of Verdict and Certainty

		Correctness of Verdict		
		Right	Wrong	Total
Certainty	Very Sure	34	5	39
	Less Sure	18	2	20
	Total	52	7	

$X^2 = .001$

one containing all those who felt very sure about their verdict, and the other, those who were less sure (see Table 13). While those who felt very sure scored slightly lower than the less sure (7.14 and 7.33, respectively), this difference is not significant ($t = .35$, $df = 57$).

Table 13. Summary of Scores by Certainty

Jurors	Mean	Variance	Standard Deviation	Number
Very Sure	7.14	3.54	1.88	39
Less Sure	7.33	3.63	1.9	20

There is no relationship between charge and certainty (see Table 14).

Table 14. Certainty and Type of Charge

		Correctness of Verdict		
		Right	Wrong	Total
Type of Charge	Reformulated Original	25	12	37
	Total	39	20	

$\chi^2 = .0006$

Only seven jurors changed any of their pre-deliberation answers. One of these was from a reformulated charge jury, but the change was only to indicate that the juror was now "very sure" as opposed to "somewhat sure" (question #2). The other six jurors (from original charge juries) who made changes did so to questions concerning the comprehension of the law. It appears, though, that no systematic conclusions can be drawn from this data.

Conclusion

The significant findings of this study are that the reformulated charge does lead to increased comprehension of the relevant legal issues (at least as measured by the questionnaire used). As well, there is a relationship between type of charge heard and the ability to arrive at a correct verdict based on the juror's understanding of the facts. All the jurors hearing the reformulated charge correctly applied the law to their understanding of the facts; 16 per cent of the jurors who heard the original charge incorrectly applied the law to the facts as they believed them to be. This improvement in comprehension was most pronounced for those who had not had any post-secondary education. Since

this group is under-represented in the study, the overall difference between charges is likely smaller in the study than would be the case in a more representative population of real jurors.

The difference in charge holds even if only those whose native language is English are considered; the number of non-English native language jurors was too small to properly assess the effect of the difference in charge on them.

ENDNOTES

1. The experiment carried out in this study owes much to the work of Bruce Sales and Amiram Elwork, and the authors wish to acknowledge their debt to them.

2. The former model, the one employed in this paper, is known as norm-referenced as opposed to criterion-referenced. Each calls for a different procedure, particularly different testing materials.

3. In addition to an estimated frequency-per-million score, Carrol et al., (1971) includes a measure of dispersion. This dispersion score can range from .0 (concentrated in one subject area) to 1.0 (distributed proportionally through all seventeen subject categories used in the study).

4. The word careless could be used instead of reckless. While the two words careless and reckless are distinct in law, (distinguished in that the latter, but not the former, requires an assessment of the state of mind of the subject) they are not so distinct in ordinary usage. Nearly every dictionary, including the Oxford English Dictionary, uses "careless" without modification to define reckless.

5. Six- rather than twelve-person juries were used in the study to increase the number of juries as it was originally intended to include a comparison of deliberation "quality" in this report. For the purposes of this study, where the concern is primarily with the individual rather than the jury as a whole, the use of the smaller jury does not seem to be a serious impediment to extending the results to members of actual juries. The most recent study comparing twelve- and six-person juries (Padawer-Singer, et al., 1977) found no difference in verdict between the two types.

The jurors in the study were told that the six-person jury was being used for convenience, that it is permitted in several jurisdictions, and that some research had indicated that it did not differ radically from the twelve-person jury. Surprisingly, none of the jurors thought that the study was about six-person juries, although that was one of the obvious differences from a "normal" jury.

6. The number in Ottawa-Carleton with post-secondary education is admittedly much smaller than in the study. The data from the 1970 census for those persons five years of age and older not attending school shows 28 per cent in Ottawa-Carleton had some post-secondary education; in

Toronto the level was 24 per cent. The Canadian average was 19 per cent.

7. Question 9 is different from the others in that it requires a conclusion to be drawn from the facts of the particular case. It is scored correct if the answers to the fact questions (3-8) indicate that the juror believed the facts to be such that provocation was the legally correct decision and the juror found provocation or that the juror's belief as to the facts indicate that provocation was not an appropriate finding for him and the juror did not find provocation.

8. The findings of significance or lack thereof followed by the notations are based on whether the results of the experiment are caused by some effect other than chance. A significant finding, then, is one that is attributable to the reformulation rather than mere chance. The notations are scientific calculations upon which the experimenter bases his conclusion regarding significance.

In each case where a X2 is reported for this study, one of the actual observations was less than 10. Therefore, in each case the X2 is corrected for continuity.

9. For those who object to treating the scores as interval level data, the scores were treated as ordinal data and the Mann-Whitney U-Test applied. These results confirm the significance of the difference in type of charge ($z = -2.3$, p is less than .01).

10. There is another interpretation of these results. The one presented in the main text assumes that the scores made by those with post-secondary education who heard the original charge were higher than those of the others hearing that charge because they already knew many of the answers. Alternatively, the pre-test knowledge could have been equal for both education groups and the higher scores a result of a differential ability (greater in those with more education) to understand the complex language of the original charge. While such an interpretation would not be inconsistent with the major thesis of this study, two points may be raised against it. First, the laboratory experiments that underlie the principles used to reformulate the charge have not detected an education factor in this way. Second, in pre-tests of the questionnaire with university students, scores were very high even among those who heard only the fact situation and no instructions on the law at all; that is, university students responding to the questions with only their general knowledge did strikingly well on earlier versions of the questionnaire.

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APPENDICES

APPENDIX A

Regina v. Dashney

Fact Situation

Dashney is charged with the first degree murder of Vincent. Dashney and Vincent were neighbours and apparently friends. Dashney was of mild temperament and failing health. Vincent was younger and aggressive and had a serious alcohol problem. When drunk, Vincent was given to violent and bullying conduct, at times abusing Dashney in a sadistic manner. On the night that Vincent died, Vincent entered Dashney's house uninvited and drunk. Six people were in the house. Dashney, who had been asleep, got up to get something to eat. An argument ensued between Dashney and Vincent in the course of which Vincent assaulted Dashney, hit him over the head with a coffee pot, insulted him, threatened him, and then began hurling things about the house. Dashney retreated to his nearby bedroom and sought unsuccessfully to fasten the bedroom door. Failing to do so, he emerged from the bedroom with a shot-gun which he fired at Vincent from a distance of a few feet, killing him. Dashney, as a defence to the charge of first degree murder, said that he was provoked by Vincent to the point that he was not responsible for his own actions. The Crown counsel, on the other hand, contends that the actions of Vincent were not sufficient to give rise to a defence of provocation.

APPENDIX B: ORIGINAL CHARGE

Introduction

Ladies and gentlemen of the Jury, it is now my duty, to charge you on the law relating to the facts of this case. You know what the facts are in this case and all I have to do is to tell you how the law applies to those facts. On the basis of how you think the law applies to the facts, you will decide, as a group, on the verdict in this case.

This is a serious offence that the accused has been charged with. Your consideration of the guilt or lack of guilt that is attributable to the accused in this case must be serious as well. As representatives of the community, you must decide what if any crime the accused is guilty of. As part of this responsibility you have to take great care to see that no innocent man is ever found guilty.

What I will now tell you is the law relating to the facts of this case as you know them.

Unabridged Charge

In order to convict Dashney of any offence, that is either murder or manslaughter, both of which verdicts I will leave with you as a matter of law, you must be satisfied beyond a reasonable doubt that Vincent died as a result of being shot by Dashney on the night alleged in the indictment which you will have with you in the jury room when you retire to consider your verdict.

That is to say, you must first ask yourself this question: "Am I satisfied beyond a reasonable doubt that Vincent died on the night in question as a result of being shot by the accused?"

If you answer that question with "yes, I am so satisfied", you will go on to consider what offence, if any, was committed by the accused.

You will naturally ask the question, "What is a reasonable doubt?". I answer by saying that it is exactly what the words indicate. A reasonable doubt, by its words, must be a reasonable one, and it is not a doubt which one

conjures up in one's imagination or conjectures on to avoid doing one's duty. It is a doubt which would cause you to hesitate before making a decision with respect to a matter of some importance in your own life. What is expected of you is that you apply yourself to the best of your ability and that you only return a verdict of quilty if you are satisfied by the evidence to a moral certainty.

If you have a reasonable doubt upon any material and essential issue in this case you must give the benefit of that doubt to the accused.

Subject to statutory exceptions and the defence of insanity, neither of which are issues in the present case, the burden of proving every fact necessary to enable you to convict the accused of any offence is on the Crown, and the Crown must prove those facts, and each one of them, beyond a reasonable doubt. That burden is on the prosecution from the beginning to the end of the case and it never shifts. This includes the burden of eliminating any reasonable doubt raised by evidence of any possible defence which would reduce the primary charge of murder to manslaughter. It remains on the Crown throughout and the doctrine of reason-

able doubt, as I have defined it, is applicable to the charge of murder, the included offence of manslaughter and the defence of provocation with which I will deal shortly. That is because there is a rule of law which is inherent in our system called the "presumption of innocence". It means that every accused standing before the court on trial is presumed to be innocent until his or her guilt is proven beyond a reasonable doubt.

If you are satisfied beyond a reasonable doubt, as I explained, that Vincent died at the time and place alleged as a result of being shot by the accused, you then ask yourself, first, "Is the accused guilty of murder" or, to put it another way, "has the Crown proved every fact essential to murder beyond a reasonable doubt?".

I will define murder by reading the relevant sections of the Criminal Code. In so doing I point out to you that you may be satisfied beyond a reasonable doubt that Dashney killed Vincent, but killing is not always murder. The killing must be accompanied by certain circumstances or lack certain circumstances to constitute murder.

The first applicable section is 205 defining homicide, which means killing a human being. It reads:

> 205. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
>
> (2) Homicide is culpable or not culpable.
>
> (3) Homicide that is not culpable is not an offence.
>
> (4) Culpable homicide is murder or manslaughter or infanticide.
>
> (5) A person commits culpable homicide when he causes the death of a human being,
>
> (a) by means of an unlawful act,
> (b) by criminal negligence.

You will note that all homicide is not culpable or blameworthy. A soldier carrying out orders during a war is not guilty of culpable homicide when he shoots an enemy soldier in battle. To reach a verdict of not guilty of any offence in the present case you must be satisfied beyond a reasonable doubt that the accused did not cause the death of Vincent by means of an unlawful act or by criminal negligence. Particularly in view of the wide definition of "unlawful act", I express the opinion, although it is for you to decide, that there has been proof beyond a reasonable doubt that when the accused discharged his shotgun directly

at Vincent at such a short range, he did indeed cause death by an unlawful act or by criminal negligence. If this is your decision, the accused is within the category of "criminal homicide" and your duty will be to return a verdict of guilty of first degree murder, second degree murder or manslaughter.

I now deal with the section which defines murder. Sec. 212 reads:

> 212. Culpable homicide is murder
>
> (a) where the person who causes the death of a human being
>
> (i) means to cause his death, or
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.

There are degrees of murder. Section 214 reads:

> 214. (1) Murder is first degree murder or second degree murder.
>
> (2) Murder is first degree murder when it is planned and deliberate.
>
> (7) All murder that is not first degree murder is second degree murder.

The offence section is s. 218:

> 218. (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence ...

Section 217 reads: "culpable homicide that is not murder or infanticide is manslaughter".

To convict of murder in the first degree, you must be satisfied beyond a reasonable doubt that the acused intended to murder Vincent and that his act was planned and deliberate. I express the opinion, not binding on you, as it is a question of fact, that it is doubtful that Dashney planned to murder Vincent and deliberately did it, in this case on the evidence before you.

To convict of murder in the second degree, you must be satisfied beyond a reasonable doubt that Dashney intended to murder Vincent and did murder him, within the definition of murder which I have read to you. As to Dashney's intent, or state of mind, we normally infer, in the absence of evidence of insanity, intoxication, provocation, or self-defence, that a man intends the usual consquences of his act. We

infer, in normal circumstances, when a person fires a shotgun directly at another, that the person who fires the gun intends to murder the other person. If the accused here did that, he would have committed an act falling within the definition of murder for even discharging a loaded gun by firing it at another is an unlawful act within the definition of murder, or in the least an act of criminal negligence within the definition because it shows a wanton or reckless disregard for the life or safety of the deceased within the definition of criminal negligence contained in section 202 of the Code.

However, to be guilty of murder, the accused must have had the necessary intent to do something within sec. 212(a) and if you have any reasonable doubt about the existence of that necessary intent, then you must acquit of the charge of murder and consider a verdict of manslaughter. You may return a verdict of manslaughter in two circumstances:

(a) You are not satisfied beyond a reasonable doubt that Dashney, who had committed a culpable homicide, had the mental state required for either type of murder; or

(b) Even though Dashney committed murder, you are not satisfied beyond a reasonable doubt that the Crown has proved that he was not provoked.

As to provocation, the principal theory of the defence is based on the existence of provocation of the accused by the deceased on the night of the alleged offence and in relation to the conduct of the deceased towards the accused over a period of time.

I now read to you the section of the Code dealing with provocation as all culpable homicide not amounting to murder is manslaughter, as I have already read to you.

Section 215 reads in part:

> 215. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
>
> (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purpose of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.
>
> (3) For the purposes of this section the questions
>
> (a) whether a particular wrongful act or insult amounted to provocation, and
> (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
>
> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything

> that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

As I have said, questions of fact are for your decision and whether or not the conduct of the deceased towards the accused amounted to provocation is a matter for your consideration.

Now, the principal theory of the defence, as enunciated by counsel for the accused, both in his cross-examination of Crown witnesses and in his address to the jury, is based on the existence of provocation of the accused by the deceased the night of the alleged offence and in relation to the conduct of the deceased towards the accused over a period of time.

The evidence discloses, if you believe it, that the deceased had a problem with alcohol and that, when drinking, he was disposed to violent and bullying conduct. Most of us have seen such persons. It appears that the deceased entered Dashney's house uninvited while intoxicated. Dashney got out of bed to get something to eat. After an argument between Dashney and Vincent, Vincent assaulted the

accused, hit him over the head with a coffee pot, insulted him, threatened him and committed other acts of violence in throwing things around. The evidence also indicates that Vincent had treated the accused in a sadistic manner on previous occasions. I have already discussed the evidence with respect to this subject. All of these matters are questions of fact for your decision, not mine. But, if you believe them, you then ask yourself if the conduct of the deceased was such as to so provoke the accused that he acted as he did in a heat of passion caused by the conduct of the deceased, without a time lapse for the accused to calm himself; and further ask yourself, do I have a reasonable doubt whether or not Dashney did so act under the provocation.

I should make clear to you that provocation, as I read it, is defined as a wrongful act or insult which would:

> (a) be sufficient to deprive an ordinary person, not necessarily the accused, not confronted with all the same circumstances of the accused, of the power of self-control: and
>
> (b) caused the accused himself to act actually upon it on the sudden and before there was time for his passion to cool.

I express the opinion that if somebody suddenly hit an ordinary person on the head with a coffee pot, without

apparent reason, and committed the act which the evidence indicates, an ordinary person could easily become provoked and the accused could have been provoked, but these are questions of fact for you to decide.

If you have a reasonable doubt on this question of provocation, you must give the benefit of that doubt to the accused, and on the assumption that you are satisfied beyond a reasonable doubt that Dashney killed Vincent by shooting him, but you have a reasonable doubt on the question of provocation, then your verdict would be manslaughter.

You will therefore have four possible verdicts open to you, on any one of which you must be unanimous to find, assuming there is no disagreement. Those possible verdicts are:

(1) Guilty of first degree murder, or
(2) Not guilty of first degree murder, but guilty of second degreee murder, or
(3) Not guilty of murder but guilty of manslaughter, or
(4) Not guilty.

It would be my opinion, which I am entitled to express but which is not in any respect binding on you as it is a

question of fact, that the conduct of Vincent towards Dashney, on the night in question, combined with the previous acts, could well be sufficient to deprive an ordinary person of the power of self control and cause the accused to act in the heat of passion caused by sudden provocation. The evidence adduced could certainly raise a reasonable doubt about whether or not legal provocation existed which might well have deprived the accused of his self control, as an ordinary person, would be so deprived, and not a person given to flights of temper, and cause him to act as he did on the sudden without a reasonable cooling off period. If you agree, then your verdict would be manslaughter.

Of course, if you have any reasonable doubt with respect to any essential fact on any of the first three possible verdicts, then you must give the benefit of such reasonable doubt to the accused and acquit him.

(Conclude with general instructions.)

Conclusion

Now that you have heard the law that relates to the facts of this case, I want again to remind you of your general duty as representatives of the community. In light of the facts of this case and the law that applies to those facts, you must try to come to a decision as to the guilt or lack of guilt of the accused in this case. You must not be concerned with sympathy or compassion or mercy for the accused.

With these thoughts, you will now retire to the jury deliberation room to consider your verdict.

If, in your discussions on any part of the evidence or the law you have a question to ask in the way of clarification, I will be available to provide an answer. What you must do is contact one of the attendants and he or she will bring the question to me and I will have the attendant relate the answer to you.

APPENDIX C: REFORMULATED CHARGE

Introduction

Ladies and gentlemen of the Jury, it is now my duty to charge you on the law relating to the facts of this case. You know what the facts are in this case and all I have to do is to tell you how the law applies to those facts. On the basis of how you think the law applies to the facts, you will decide, as a group, on the verdict in this case.

This is a serious offence that the accused has been charged with. Your consideration of the guilt or lack of guilt that is attributable to the accused in this case must be serious as well. As representatives of the community, you must decide what if any crime the accused is guilty of. As part of this responsibility you have to take great care to see that no innocent man is ever found guilty.

What I will now tell you is the law relating to the facts of this case as you know them.

MODIFIED CHARGE

Content

In order to convict Dashney of any offence, that is either murder or manslaughter, both of which verdicts I will leave with you as a matter of law, you must be satisfied beyond a reasonable doubt that Vincent died as a result of being shot by Dashney on the night alleged in the indictment.

This is to say, you must first ask yourself this question: "Am I satisfied beyond a reasonable doubt that Vincent died on the night in question as a result of being shot by the accused?"

If you answer that question with "yes, I am so satisfied", you will go on to consider what offence, if any, was committed by the accused.

Reasonable Doubt and Burden of Proof

A Defendant is assumed to be innocent. It is the responsibility of the Crown to prove beyond a reasonable

doubt that the defendant is guilty. The burden of proof is always with the Crown and never with the accused. The evidence must be convincing beyond a reasonable doubt in order for you to find the accused guilty. Reasonable doubt exists when you do not believe the truth of the Crown's claims. The doubt must not be just personal whim or imagination, but must be based on reason and common sense. You cannot require absolute certainty for that seldom occurs in life. If you can say that he really is guilty, of that I am morally certain, then you are satisfied beyond a reasonable doubt. If you are not convinced beyond a reasonable doubt by the evidence, then you must find the accused not guilty of the offence on which you have the doubt.

If you are satisfied beyond a reasonable doubt, as I explained, that Vincent died at the time and place as a result of being shot by the accused, you then ask yourself, first, "Is the accused guilty of murder", or, to put it another way, "has the Crown proved every fact essential to murder beyond a reasonable doubt?".

HOMICIDE - INTRODUCTION

You have four possible verdicts in this case:

1. Not guilty
2. Guilty of manslaughter
3. Guilty of second degree murder
4. Guilty of first degree murder

You will find it helpful to consider the verdicts in that order.

HOMICIDE - DEFINITION

Killing another human being, directly or indirectly, by any means, is homicide. Homicide is not always a criminal act. For example, a soldier carrying out orders during a war is not guilty of an offence when he shoots an enemy soldier in battle. A motorist who accidentally kills a pedestrian is also normally not guilty of any offence. As jurors you must decide whether the accused did kill Vincent. If you believe that he did, then you must consider whether the homocide was a criminal act or not. If you are not satisfied that he killed Vincent, then he would be not guilty. Homocide is a criminal act if the killing

(1) was done by an illegal act. The killing is criminal even when the death was an unintended or unexpected result of the act,

(2) (or it is a criminal act if the killing) was the result of criminal negligence. For you to decide that the accused was criminally negligent you must find that he acted callously, without paying proper attention to the life and safety of others.

Any homicide that is a criminal homicide is for our purposes either murder or manslaughter. If the defendant did not commit a criminal act, then you will find him not guilty.

JURY DUTY - DECISION ON TYPE OF HOMICIDE

If you have decided that the accused is guilty of a criminal homicide then you are required to decide whether the facts of the case indicate that it is first degree murder or second degree murder or manslaughter. I will now tell you how to decide which if any of these kinds of homicide the accused is guilty of.

TYPES OF HOMICIDE

There are two important questions you must ask when determining the type of Homicide.

The first is: "What was the state of mind of the accused at the time of the killing?"

The second is: "Was the killing planned or deliberate?"

You must be satisfied beyond a reasonable doubt that Dashney meant to kill or meant to physically harm Vincent when he acted, if you are to find the accused guilty of murder. If you believe that he meant to physically harm Vincent then you have to decide whether he knew that such harm is likely to lead to death and whether he was indifferent as to whether death resulted or not. In determining Dashney's state of mind, reason and common sense should guide you. It is normally reasonable to conclude that a person will have meant the usual consequences of his actions. If the accused meant to kill Vincent or meant to harm him knowing and not caring that death might result, you should find him guilty of murder and then go on to decide whether he is guilty of first-degree murder or of second-degree murder. If you do not believe beyond a reasonable doubt that he meant to kill or harm Vincent, but did commit a criminal act, you will find him guilty of manslaughter.

Having examined the accused's state of mind and having found him guilty of murder it is necessary to determine whether it is first or secor degree murder. You must ask whether Dashney planned and deliberated to kill or harm Vincent. To plan to kill is more than to mean to kill. For you to be satisfied that the killing was planned and deliberate you must be satisfied that it was arranged beforehand. It is reasonable to conclude that the killing was not planned and deliberate if it was impluse or if it was on the spur of the moment. If you believe that Dashney planned and deliberated to kill or harm Vincent than you have decided that he is guilty of first-degree murder. Finally, If Dashney mean to kill or harm Vincent but did not plan to do so, he is guilty of second-degree murder.

I express the opinion, not binding on you, as it is a question of fact, that it is doubtful that Dashney planned to murder Vincent and deliberately did it, in this case on the evidence before you.

To convict of murder in the second degree, you must be satisfied beyond a reasonable doubt that Dashney intended to murder Vincent and did murder him, within the definition of

murder which I have read to you. As to Dashney's intent, or state of mind, we normally infer, in the absence of evidence of insanity, intoxication, provocation, or self-defence, that a man intends the usual consequences of his act. We infer, in normal circumstances, when a person fires a shotgun directly at another, that the person who fires the gun intends to murder the other person. If the accused here did that, he would have committed an act falling within the definition of murder, for even discharging a loaded gun by firing it at another is an unlawful act within the definition of murder, or in the least an act of criminal negligence within the definition because it shows a wanton or reckless disregard for the life or safety of the deceased within the definition of criminal negligence in the Criminal Code.

However, to be guilty of murder, the accused must have had the necessary intent as I have explained and if you have any reasonable doubt about the existence of that necessary intent, then you must acquit of the charge of murder and consider manslaughter on the basis of he defence of provocation raised by counsel for the accused.

EFFECT OF PROVOCATION

If the accused acted in the heat of passion as a result of provocation, he is guilty only of manslaughter and not guilty of murder. If on the test of intent you have found Dashney guilty of murder of either degree then you must consider whether he was provoked.

ASSESSING PROVOCATION

In order to decide whether provocation occurred, you should first consider how an ordinary person would act in the situation. You will have to decide whether the circumstances were those that would provoke an ordinary person. If this is your conclusion then you will have to decide whether Dashney did lose self-control and whether he acted before he could regain self-control. The actions of the victim that led to the accused's loss of self-control cannot have been legal ones. Only insults or illegal acts can result in a successful defence of provocation.

The Crown must convince you beyond a reasonable doubt that he was not provoked; otherwise you must conclude that he was so provoked.

As I have said, questions of fact are for your decision and whether or not the conduct of the deceased towards the accused amounted to provocation is a matter for your consideration.

Now, the principal theory of the defence, as enunciated by counsel for the accused, both in his cross-examination of Crown witnesses and in his address to the jury, is based on the existence of provocation of the accused by the deceased the night of the alleged offence and in relation to the conduct of the deceased towards the accused over a period of time.

The evidence discloses, if you believe it that the deceased had a problem with alcohol and that, when drinking, he was disposed to violent and bullying conduct. Most of us have seen such persons. It appears that the deceased entered Dashney's house uninvited while intoxicated. Dashney got out of bed to get something to eat. After an argument between Dashney and Vincent, Vincent assaulted the accused, hit him over the head with a coffee pot, insulted him, threatened him and committed other acts of violence in throwing things around. The evidence also indicates that

Vincent has treated the accused in a sadistic manner on previous occasions. I have already discussed the evidence with respect to this subject. All of these matters are questions of fact for your decision, not mine. But, if you believe them, and you have a reasonable doubt as to the necessary intent of the accused on the murder charge, you then ask yourself if the conduct of the deceased was such as to so provoke the accused that he acted as he did in a heat of passion caused by the conduct of the deceased, without a time lapse for the accused to calm himself; and further ask yourself, do I have a reasonable doubt whether or not Dashney did so act under the provocation.

I express the opinion that if somebody suddenly hit an ordinary person on the head with a coffee pot, without apparent reason, and committed the act which the evidence indicates, an ordinary person could easily become provoked and react accordingly, but that is a question of fact for you to decide.

If you have a reasonable doubt on this question of provocation, you must give the benefit of that doubt to the accused, and on the assumption that you are satisfied beyond

a reasonable doubt that Dashney killed Vincent by shooting him, but you have a reasonable doubt on the question of provocation, then your verdict would be manslaughter.

CONCLUDING INSTRUCTION

You as a jury have four possible verdicts. You can find the accused not guilty. You will make this decision if you believe that he did not kill Vincent or if you decide that the killing was not the result of an illegal act or criminal negligence by Dashney. If you find that it was an illegal killing, then you will find the accused guilty of murder or manslaughter. If you are not satisfied beyond a reasonable doubt that Dashney meant to kill or harm Vincent, then the proper verdict is guilty of manslaughter. If he did mean to kill or harm Vincent but was provoked, the proper verdict is also manslaughter. If he meant to kill or harm Vincent but did not plan or arrange to do so, the proper verdict is second-degree murder. When the killing or harm was both meant and planned, the proper verdict is first-degree murder. Again though, if you find that he was provoked, you should find him guilty of manslaughter only. I have instructed you on how to assess intent, planning and deliberation, and provocation.

It would be my opinion, which I am entitled to express but which is not in any respect binding on you, as it is a question of fact, that the conduct of Vincent towards Dashney, on the night in question, combined with the previous acts, could well be sufficient to deprive an ordinary person of the power of self-control and cause an ordinary person to act in the heat of passion caused by sudden provocation, as it is contended that the accused did. The evidence adduced could certainly raise a reasonable doubt about whether or not legal provocation existed which might well have deprived the accused of his self-control, as an ordinary person, would be so deprived, and not a person given to flights of temper, and cause him to act as he did on the sudden without a reasonable cooling off period. If you agree, then your verdict would be manslaughter.

Of course, if you have any reasonable doubt with respect to any essential fact on any of the first three possible verdicts, then you must give the benefit of such reasonable doubt to the accused and acquit him.

(Conclude with general instructions.)

CONCLUSION

Now that you have heard the law that relates to the facts of this case, I want again to remind you of your general duty as representatives of the community. In light of the facts of this case and the law that applies to those facts, you must try to come to a decision as to the guilt or lack of guilt of the accused in this case. You must not be concerned with sympathy or compassion or mercy for the accused.

If, in your discussions on any part of the evidence or the law, you have a question to ask in the way of clarification, I will be available to provide an answer. What you must do is contact one of the attendants and he or she will bring the question to me and I will have the attendant relate the answer to you.

With these thoughts, you will now retire to the jury deliberation room to consider your verdict.

APPENDIX D: RECRUITMENT LETTER AND REPLY CARD

Our file: 1541-1

800 Varette Building
130 Albert Street
Ottawa, Ontario
K1A 0L6

June 12, 1978

Dear Sir:

You have been randomly selected, just as a juror would, to participate in an experiment which the Law Reform Commission of Canada is conducting. Besides the ten dollars we will pay you for your time, you will also be afforded a unique insight into how the Canadian justice system works, and at the same time you will be able to participate in a project designed to improve that system.

While you are certainly not obliged to participate, we encourage you to do so by sending in the enclosed post card (no postage necessary) indicating your name, address and phone number and when you would like to participate. The experiment will be fairly short - two or three hours on a Saturday morning or afternoon. I am sure you will find it very interesting.

As you will notice, the experiment is scheduled for the second and third Saturdays in July. Because the time is so short, may I encourage you to respond with your post card as soon as possible and no later than July 1.

Thank you for your valuable assistance in this regard.

Yours sincerely,

Francis C. Muldoon, Q.C.
Chairman

Encl.

I will participate in your jury study.

I will come to the County Court House, 2 Daly Avenue, Ottawa at the following time: (Check one only)

Saturday July 8	Saturday July 15
9:30 a.m. ____	9:30 a.m. ____
10:15 a.m. ____	10:15 a.m. ____
1:00 p.m. ____	1:00 p.m. ____
1:45 p.m. ____	1:45 p.m. ____

Name _____

Address _____

Telephone _____

APPENDIX E: QUESTIONNAIRE

Law Reform Commission Jury Study

You have heard the evidence in this case and have been instructed in the relevant law. Before you begin deliberations we want you to answer a few questions. You can begin this questionnaire as soon as the Court Official has left the room. Please use the pens we have provided.

Please circle the correct answer

I. VERDICT

1. Dashney is

   A. Not Guilty
   B. Guilty of manslaughter
   C. Guilty of second-degree murder
   D. Guilty of first-degree murder

2. How certain are you that this is the correct verdict?

   A. Very sure
   B. Somewhat sure
   C. Somewhat unsure
   D. Very unsure

II. The following six questions deal with the facts of the case. Even though some answers may seem obvious it is important that all be dealt with seriously. Do you agree with the statement?

3. Dashney was often the victim of Vincent's bullying.

   A. Yes
   B. No

4. Dashney feared for his life on the night Vincent was killed.

   A. Yes
   B. No

5. Dashney lost self-control on the night in question after being struck by Vincent.

   A. Yes
   B. No.

6. Dashney went to his bedroom for the purpose of getting a gun in order to shoot Vincent.

   A. Yes
   B. No

7. Vincent had threatened Dashney the night he was shot.

   A. Yes
   B. No

8. Dashney intended to kill Vincent when he came out of the bedroom with the gun.

   A. Yes
   B. No

III. The following questions concern the application of the law to the facts of this case and in general.

9. Was Dashney provoked (in the legal sense of provoked) by Vincent?

   A. Yes
   B. No

10. In a case like this it must be determined whether or not the accused was provoked. In reaching this decision the first matter that must be considered is

    A. How easy it was to provoke the accused.
    B. Whether or not the accused did lose self-control.
    C. Whether the victim intended to provoke the accused.
    D. How an average person would act in the situation.

11. The judge may decide whether or not the accused was provoked.

    A. Yes
    B. No

12. In applying the test of reasonable doubt to the matter of provocation, if you have a reasonable doubt it means that

    A. The Crown was able to convince you that the defence was wrong.
    B. The Crown was not able to convince you that the defence was wrong.
    C. You do not believe either the defence or the Crown.

13. When the accused has offered the defence of provocation, in order for you to find that the accused was provoked

    A. The sole burden of proof is on the defence to show that he was provoked.
    B. The sole burden of proof is on the Crown to show that he was not provoked.
    C. The burden of proof is shared by the defence and the Crown.

14. If you have any doubt about any aspect of the Crown's case you must find the accused not guilty of any offence.

    A. Yes
    B. No

15. If anyone kills another human being he has committed homicide?

A. Yes
B. No

16. If someone kills another human being on impulse he might be guilty of (answer yes or no for each of the four verdicts)

First-degree murder
A. Yes
B. No

Second-degree murder
A. Yes
B. No

Manslaughter
A. Yes
B. No

No offence
A. Yes
B. No

17. An accused who means only to physically harm another person and that person dies as a result can be found guilty of (answer yes or no for each of the four verdicts)

First-degree murder
A. Yes
B. No

Second-degree murder
A. Yes
B. No

Manslaughter
A. Yes
B. No

No offence
A. Yes
B. No

18. The jury has decided that the accused is guilty of a criminal offence. Now they must decide whether he is guilty of murder or manslaughter. In order to do so they must

    A. Determine whether he committed a criminal act
    B. Determine whether he planned to kill the deceased
    C. Determine his state of mind at the time of the killing

You may answer the following two questions in English or in French.

19. Please tell us what you understand provocation to be.

    _____
    _____
    _____
    _____
    _____

20. Please tell us what you understand the difference between murder and manslaughter to be.

    _____
    _____
    _____
    _____
    _____

Now that you have finished the questionnaire please wait until the other members of your jury have completed it and then begin your deliberations on a verdict. When the jury has reached a verdict please inform the attendant. If you have not reached a unanimous verdict within one hour, the attendant will ask for a final vote. There will then be a few more brief questions.

Keep this questionnaire for the moment.

Post-Deliberation Questionnaire

I. Are there any answers from the pre-deliberation questionnaire you wish to change? If so, please indicate them on that questionnaire in pencil.

II. You will note that the questionnaire provides no identification of you. We would, however, like some data about you so our results can be compared with those of other studies.

1. What is your age? _____
2. What is your occupation? _____
3. What is your spouse's occupation? _____
   (In 2 and 3, if not now employed, also indicate previous occupation, if any.)
4. What education have you had? _____
5. Native language
   French _____ English _____ Other _____
6. Are you male or female? _____
7. Have you ever served on a jury before? _____
8. What do you think we are studying? _____

As we expect to have more juries participate in our study we would prefer not to tell you at this time all the details of our study. We do not mean to keep you in the dark forever. We will be sending you a description of the study by the end of July.

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JURY SELECTION

A Report to the Law Reform Commission of Canada

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Law Reform Commission

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Synopsis

The paper examines the present Canadian practice regarding jury selection and is divided into an examination of the out-of-court selection process as determined by provincial legislation and the in-court selection process as determined by the Criminal Code.

The first part of the paper, dealing with the out-of-court process, looks briefly at the historical origins of the jury and then analyses the two main functions of the provincial legislations: qualification for service and, disqualification and exemption from service. A comparison of the provincial Acts is given as well.

The second part of the paper, in-court selection, starts with an historical survey of the process. The paper then examines the Criminal Code provisions for challenges and stand-asides. Other selection procedures not now provided for in the Code are examined as well.

Finally, the paper highlights the problems with both in court and out-of-court processes.

I. Introduction

The process of selecting jurors in criminal cases in Canada is broken down into two main parts -- out-of-court selection and in-court selection. The out-of-court selection procedure is basically designed to draw prospective jurors randomly from the jurisdiction in which the case is to be heard. Once the array of prospective jurors is determined by the out-of-court selection procedure, the in-court selection procedure draws twelve men and women from the array that should constitute a fair and impartial jury.

The initial process, out-of-court selection, involves two procedures, both of which are governed by provincial statutes or territorial regulations. First, the jury list must be randomly chosen from the judicial district in which the case is to be tried. Second, these prospective jurors are screened for the first time to determine whether they qualify to constitute the array.

The second process, that which determines which jurors on the array will constitute the jury panel, is governed by various provisions in the Criminal Code. This process also

involves several different procedures whereby counsel take turns deciding who should be on the jury that will bring a verdict in the case.

This research project provides background research in the area of jury selection, analyses present law and practice, and raises some problems in the area. The emphasis, then, will be on articulating the law and highlighting some of the problem areas rather than offering solutions.[1]

II. Out-of-Court Selection

As was pointed out in the introduction, the mechanics of summoning jurors and the law governing the basic qualification of jurors is dealt with by provincial statutes and territorial regulations. Each jurisdiction has created its own unique procedure.[2] Generally, however, every provincial statute or territorial regulation deals with the questions of who on the jury list is qualified to serve, disqualified from service, exempt or excused from service.

1. Background

Blackstone, in his Commentaries,[3] traces our concept of trial by jury to "all those nations which adopted the feudal system, as in Germany, France and Italy, who had all of them a tribunal composed of twelve good men and true...". An opposite view, and one espoused by Forsyth in his History of Trial by Jury,[4] is that our system is of indigenous growth growing out of "modes of trial in use among the Anglo-Saxons and Normans, both before and after the Conquest".

Whatever its origin, trial by jury started to take the form we know in the reign of Henry VI, 1422-1461. In the early days of trial by jury in England, the freemen of the community would gather twice each year to see whether the district, or hundred as it was called, had its proper complement of members. In Trial by Jury,[5] Moschzisker attributes David Hume as saying that these gatherings were in effect the origin of the English jury system.

Once the jury system in England had become established, the court began directing the local sheriff by a

writ venire facias to obtain twelve members of the community for jury service. By a later statute, 6 George I, C.50, the sheriff was directed to return the names, abodes and descriptions of the jurors to the court. While the purpose would seem to be to assist the parties in their assessment of prospective jurors, the actual reason for providing this information was so that the sheriff might know accurately upon whom to levy fines for non-attendance.

2. Qualifications for Jury Service

The Criminal Code specifically endorses qualifications created under provincial laws.[6] The qualifications in force in Canada are summarized in Table 1. These qualifications are mandatory and inflexible. (See Appendix A for summary of selection procedures in the provinces.) Ontario has a unique and obviously very effective procedure for determining if a prospective juror qualifies for service. When a prospective juror is notified by the Attorney General's department that his or her name has been chosen for jury service, he or she receives a questionnaire (Ontario Regulation 857-76) that must be completed and returned to the

sheriff's office. On the form, the prospective juror must provide some essential information that will help determine whether he or she qualifies for service -- age, occupation, citizenship, ability to read and understand English, criminal convictions, physical or mental disabilities and previous service as a juror.

TABLE 1

British Columbia (1970)	- Registered voter for the legislative assembly.
Alberta (1970 amended 1971)	- At least 21 years of age. - A Canadian citizen or natural born British subject.
Saskatchewan (1953, amended 1970, 72)	- Every inhabitant of Saskatchewan between the years of 18 and 65, and a Canadian citizen or British subject.
Manitoba (1970 amended 1971)	- Every inhabitant of Manitoba between the years of 18 and 65, and a British subject.
Ontario (1974 amended 1975)	- Every inhabitant of Ontario over 18 years of age and not over 69 years of age. - Canadian citizen.
Québec (1964 amended 1971, 1976)	- Canadian citizen. - Of majority age. - Entered on the electoral list.
New Brunswick (1973)	- Canadian citizen. - Between the years of 19 and 65. - Not suffering from physical or mental condition and not incompatible to duties required of them.
Prince Edward Island (1974)	- Every inhabitant of Prince Edward Island between the years of 18 and 70. - British subject. - Resident of province for twelve months.
Newfoundland (1970)	- Resident of province for twelve months. - British subject. - Possessed of property, clear title worth $5,000.00 or owning or occupying land with rental value of $360.00 (varies with location).
Nova Scotia (1969, amended 1971)	- Canadian citizen. - Between the years of 21 and 65. Resident of the jury district (there are 18 districts) in the province for a period of twelve months. - Assessed for taxes as owner or occupant.

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Yukon (1971)	- Of the age of 21 or over. - Canadian citizen or British subject. - Able to speak and understand English.
North West Territories (1974)	- Of the age of 21 or over. - Canadian citizen or British subject. - Able to speak and understand English or French.

Jury qualification requirements in Canadian provinces are considerably different than those in the United States or England. The American Bar Association standards for trial by jury,[7] as recommended by the Advisory Committee on the Criminal Trial, say that -- "The names of those persons who may be called for jury service should be selected at random from sources which will furnish a representative cross-section of the community". Canadian laws by and large have long met the standard. This ideal has only recently been achieved in England. While American law probably now meets the standard, its compliance is also only recent. The fight by Negros to be registered as voters and the procedures which permitted key men to make selections of people to comprise the array and the selection of middle-class, blue-ribbon juries were two of the signs of the shortcomings of the American law prior to the drafting and adoption of the American Bar Association standards.

The American Bar Association Standards[8] declare the purpose of the standards relating to juror qualifications to be:

(a) to promote the cross-section character of juries;

(b) to ensure that those who serve as jurors are capable of performing competently;

(c) to prevent arbitrary exclusion of persons from jury service; and,

(d) to protect persons from undue burdens from jury service.

The American Bar Association Standards go on to describe how, through questionnaire or interview, the court official is to determine the qualifications of prospective jurors and disqualify those not meeting the minimum requirements. It suggests the following criteria to determine whether or not a prospective juror qualifies for service:

i) inability to read, write, speak and understand the English language;

ii) incapacity, by reason of mental or physical infirmity, to render efficient jury service;

iii) failure to meet reasonable requirements concerning citizenship, residence, or age; and,

iv) pending charge or conviction of a felony or a crime involving moral turpitude.

Prospective jurors may be excused from jury service on the basis of clearly stated grounds for exemption, such as:

i) that the person has previously serviced as a juror within a specified period of time; or,

ii) that the person is actively engaged in one of a limited number of specifically identified critical occupations.

The Court may excuse other persons upon a showing of undue hardship or extreme inconvenience.

In England in 1965 the Morris Committee report on trial by jury stated that a property qualification in England excluded many males, most females, and all members of families of those eligible. The Committee[9] recommended that the basic qualification "be citizenship as evidenced by inclusion in the register as a parliamentary elector, between the ages of twenty-one[10] and sixty-five[11] with an ability to "read, write and understand English without difficulty"[12] and with a residence requirement in the country for five years.[13]

In Canada, because qualification for jury service is determined by provincial legislation or territorial ordinance, procedure varies from jurisdiction to jurisdiction. Nevertheless, there are several general points that can be noted about the provincial provisions for qualification:

1) The minimum age for service by a juror varies from province to province depending upon the age of majority in the particular province. Merely for the sake of consistency, the minimum age should be the same nationally.

2) The maximum age for service varies from the province to province. Some provinces have an age limit of 65, but there are many people in the community beyond age 65 who are capable of making a material contribution to trial by jury.

3) Several provinces have property requirements. These requirements, minimal as they may be, are unnecessary.

4) Most provinces have residence requirements. The residence requirements of some provinces are probably unnecessary because the ability of a person to contribute to a just verdict seldom depends on where he lives.

5) Landed immigrants are not permitted to serve on juries. Consideration should be given to permitting landed immigrants to take part in jury service. Basic requirements such as an inability to understand, read and write English or French will disqualify those landed immigrants who can't adequately perform their functions as a juror. The only real drawback to extending the privilege of jury service to landed immigrants is the fact that no accurate or recent information is kept on their location, educational level or language capabilities. However, legislation could be enacted to the effect that any person fulfilling the qualifications of jury service and so desiring to be included for jury duty could notify the Mayor, Reeve or Clerk of each municipality to allow these first selectors of jurors to consider their names at the appropriate time.[14]

6) Under the present jury selection procedures in many provinces, people otherwise eligible are excluded from service for two reasons. First, a number of municipal officials who have a legal obligation to file with the sheriff lists of voters from their municipalities fail to do so and nothing is done to require them to do so.[15] Second, in unorganized territories, as in the case of Indians living on reserves, there is, except in Manitoba,[16] no procedure contained in provincial legislation for getting the names of the inhabitants to the sheriff for inclusion in the lists of jurors. This situation has been created by the neglect of municipal officials and the inadequacy of provincial legislation and should be remedied.

3. Disqualification and Exemption

As well as established qualifications for jury service, laws spell out certain disqualifications and exemptions from service. Chart No. I contains a comparison of disqualifications, province by province. Chart No. II contains a comparison of exemptions, province by province.

There are three specific problems with the exemptions and disqualifications: the confusion between the terms; the lack of uniformity among the provinces; and, the multifarious categories of exemption and disqualification.

CHART I

Disqualifications

1. persons not qualified under this Act;
2. members of the Privy Council, Senate or House of Commons, Canada;
3. members of the executive council of the Provincial government;
4. officers of the court;
5. lawyers;
6. peace officers;
7. firemen;
8. persons mentally ill;
9. persons who do not speak the language that will be used in the trial;
10. persons charged or convicted of a criminal act but not pardoned;
11. consorts of disqualified persons;
12. consorts of judges;
13. persons not Canadian citizens;
14. persons not residents in the Province;
15. persons under the age of majority;
16. judges;
17. magistrates;
18. justices of the peace;
19. sheriffs or sheriff's officers;
20. gaolers;
21. employees of federal Department of Justice or Ministry of the Solicitor General;
22. employees of provincial Department of Justice;
23. spouses of 5, 6, 16, 17, 18, 19 and 20;
24. spouses of 21 and 22;
25. persons with physical ailment, incompatible;
26. students-at-law;
27. physicians, veterinary surgeons, coroners;
28. spouses of 26 and 27;
29. clergy;
30. witnesses;
31. persons in religious community;
32. persons ineligible through previous jury service;
33. persons over maximum age.

	B.C.	ALTA	SASK	MAN.	ONT.	QUE.	N.B.	NFLD	N.S.	PEI.	NWT.	Y.T.
1						X						
2	X			X	X	X						
3	X			X	X	X						
4				X	X	X						
5				X	X	X						
6	X			X	X	X						
7						X						
8	X	X				X				X	X	X
9				X		X						
10	X	X	X	X	X	X	X	X	X	X	X	X
11						X						
12						X						
13				X								
14				X								
15				X								
16				X	X							
17				X								
18				X								
19				X	X							
20				X	X							
21				X								
22				X								
23				X	X							
24				X								
25	X	X		X	X					X	X	X
26					X							
27					X							
28				X								
29					X							
30					X							
31					X							
32					X							
33	X											

CHART II

Exemptions

1. Members of the Privy Council, or of the Senate, or of the House of Commons of Canada;
2. members and officers of the Legislative Assembly;
3. salaried officials and employees of government of Canada;
4. salaried officials and employees of government of province;
5. mayors, reeves, councillors and employees of municipality;
6. sheriffs and sheriff's officers;
7. constables and peace officers;
8. baliffs;
9. officers of court of justice;
10. members of the R.C.M.P.;
11. magistrates;
12. justices of the peace;
13. coroners;
14. judges;
15. firemen;
16. professors and school teachers;
17. clergy;
18. people employed in maintaining utilities;
19. physicians-surgeons;
20. dentists;
21. nurses;
22. chemists and druggists;
23. optometrists;
24. chiropractors;
25. osteopaths;
26. X-ray technicians;
27. orderlies;
28. lab technicians;
29. physiotherapists;
30. barristers, solicitors and students-of-law;
31. editors, reporters and publishers;
32. ferry and tugboat operators;
33. postmasters;
34. mail-carriers;
35. railway workers and operators;
36. bus operators;

37. pilots and others related to aircraft flight;
38. radio or telegraph operators;
39. telephone operators;
40. millers;
41. employees of the Canadian Armed Forces;
42. managers, clerks and cashiers of banks;
43. chartered accountants;
44. undertakers;
45. mental or physical infirmity, incompatible;
46. woman claiming one year exemption;
47. farmers between April 1 and October 31;
48. women living in convent;
49. gaolers;
50. Mennonites;
51. spouses of 6, 7, 8, 9, 11, 12, 13, 14 and 49;
52. secretaries of the Governor-General or the Lieutenant-Governor;
53. probation officers and social workers;
54. consuls;
55. land surveyors;
56. customs and revenue officers;
57. Lieutenant-Governor;
58. members of a jury committee;
59. person caring for one who is infirm, aged or mentally incompetent;
60. lighthouse keepers;
61. persons not within statutory age;
62. domestic or other obligations at judge's discretion;
63. persons exempt through previous jury service.

	B.C.	ALTA	SASK	MAN.	ONT.	QUE.	N.B.	NFLD	N.S.	PEI.	NWT.	Y.T.
1		X	X	X			X	X	X	X	X	X
2		X	X				X	X	X	X	X	X
3		X	X	X				X		X		
4		X	X	X				X		X		
5		X			X			X				
6		X	X			X		X	X	X	X	X
7		X	X				X	X	X	X	X	X
8		X	X			X		X	X	X	X	X
9		X	X			X		X	X	X	X	X
10		X	X					X			X	X
11		X	X			X		X	X	X	X	X
12		X	X			X		X			X	X
13		X	X							X	X	X
14						X		X	X		X	X
15		X	X	X			X	X		X	X	X
16		X	X	X			X	X		X		
17		X	X	X		X	X	X	X	X		
18												X
19		X		X			X	X	X	X	X	X
20				X					X			
21		X	X	X	X			X			X	X
22		X	X	X	X		X	X			X	X
23					X							
24				X								
25				X								
26								X				
27								X				
28								X				
29								X				
30		X	X				X		X	X		
31		X								X		
32		X	X					X		X		
33		X	X				X			X	X	X

	B.C.	ALTA	SASK	MAN.	ONT.	QUE.	N.B.	NFLD	N.S.	PEI.	NWT.	Y.T.
34		X	X				X			X		
35		X	X	X	X			X		X	X	X
36		X	X					X				
37		X		X	X			X		X		
38		X	X	X				X		X	X	X
39		X	X					X		X	X	X
40		X	X	X								
41		X		X	X	X	X	X	X	X	X	X
42			X	X				X				
43			X									
44			X	X				X				
45			X			X		X				
46								X		X		
47			X									
48				X								
49												X
50				X								
51					X							
52					X							
53												X
54							X					
55		X										
56							X					
57									X			
58									X			
59							X					
60										X		
61					X	X		X				
62	X			X		X			X		X	X
63						X				X	X	X

First, the confusion between the terms disqualification and exemption. Normally, it would seem that those provisions listed under disqualifications would mean complete bar to service while a potential juror can refuse to serve if his status is one enumerated under the exemption provisions. In reality, however, although lawyers and police officers should, because they are only exempt from service, be able to serve as jurors if they wish, they are, in reality, treated as disqualified. The reason, it seems, is that although the court is, by the legislation, usually given the duty of deciding who is ineligible or exempt from service, the judge will leave the decision to the local sheriff since it is the sheriff who is in closest contact with the prospective jurors. One unfortunate result of this is that the sheriffs are generally reluctant to leave with the individual who falls into the exempt category the decision as to whether or not that individual desires to serve. Instead, the sheriffs will generally treat that person as disqualified. In terms of practical effect, then, there is no difference between disqualifications and exemptions.

Second, the lack of uniformity in the provincial provisions for exemptions and disqualifications. For example,

what are disqualifications in Manitoba and Ontario are merely exemptions in the other provinces and in the territories. In fact, in the area of disqualification, the only consistency throughout the country is the fact that those who have had previous criminal convictions are prohibited from serving. Even in this area, the procedure changes from province to province as to time limits on this disqualification.

Finally, there are far too many categories of exemption, some of which are no longer defensible as legitimate categories for excusal. It is probably the case that if trial by jury is to reflect the views of a cross-section of the community there should be no categories of disqualification or exemption other than for cases of physical or mental disability or some special hardship to the juror.

Just what constitutes hardship will, of course, depend on the circumstances of the case and will be subject to some kind of subjective decision. It is clear from Chart II that the court can excuse jurors in Quebec, British Columbia, Manitoba, Nova Scotia, Yukon and North West Territories.[17] Without doubt, some sheriffs' officers in Manitoba and

British Columbia de facto have assumed the power to excuse jurors when it appears their situation warrants it. There are numerous incidents where an officer had excused persons served with a summons for various reasons: in one instance because the person served suffered from a prostate condition; in one because he was thereupon recognized as a person having a criminal record; in one where it became apparent that the municipal clerk had mistaken one particular man for his retarded brother; in one because of an apparent lack of knowledge of the English language.

The sheriff or other local official is really in the best position to assess whether a candidate for jury service is disqualified or exempt. With one restriction, it is best that this function be officially allocated to the sheriff through legislation. The restriction is that, should the categories of exemption and disqualification remain, the sheriffs be informed as to how to assess each category according to the circumstances of the candidate and no longer arbitrarily exclude those from service who fall into the exempt category.

This need to educate sheriffs as to how to interpret the jury selection sections of the provincial legislation

extends regardless as to whether they are given the role officially through legislation or unofficially by the court. Besides learning to distinguish the categories of exemption and disqualification, the sheriffs should learn how to apply properly the provisions that make a candidate ineligible if certain characteristics he or she posesses are incompatible with service as a juror. If, for example, the provincial legislation stipulates that a person is ineligible to serve when that person has a physical handicap incompatible with service as a juror, the sheriff should be careful not to exclude that person from an opportunity to serve if the physical impairment is not incompatible with service. The fact that a person is an amputee, for instance, isn't necessarily any indication that he or she will not be able to perform properly his or her function as a juror.

The out-of-court selection process will determine the names of those in the community who have been randomly selected and who are eligible to serve. From this pool the sheriff will make up enough jury panels for the trials that will be held in that particular judicial district in the coming year. The sheriff will then determine how many prospective jurors are needed on a particular panel. His

decision will depend on several factors such as the kind of case that is to be heard and the particular district it is being heard in. As such, not all those who are selected in the out-of-court process will actually be called for service.

III. In-Court Selection

Once a given panel is made for a particular trial, another process of selection, the in-court selection process, will determine which members of the panel will actually serve on the trial. While the out-of-court process is governed by provincial law, the in-court selection is determined by the Criminal Code of Canada.

1. Background

In its early days of development, jurors brought a verdict according to their personal knowledge of the matter in dispute.[18] For example, in one case during the reign of Charles II, 1660-96, the accused objected to a juror "on the ground that he was on terms of friendship with the prosecutor".[19] North, LCJ replied:

> "And do you challenge a juryman because he is supposed to know something of the matter? For that reason the juries are called from the neighbourhood, because they should not be wholly strangers to the fact."

Accordingly, for many years it was held that jurors' private knowledge of the matter in dispute could influence their verdict "as much as the oral and written evidence which was produced in Court". It was even the case that a verdict could be given on this ground alone although no evidence was adduced at trial.[20] The practice even went so far as to allow a jury to render a verdict contrary to the weight of the evidence adduced.[21] This practice of permitting jurors to decide a verdict on their own knowledge of the circumstances of the case appears to have coincided with and lasted as long as the procedure of attaints -- a further hearing where if it was found that the first jury's verdict was wrong, its members were severely punished.[32] In time, as attaints fell into disuse and new trials were ordered, juries were prohibited from deciding on a verdict according to their own knowledge of the event.[33] Today, personal knowledge of circumstances of a case is usually ground for challenge for cause.[34]

When the jury system in England was still in its infancy, a challenge to the constitution of the jury could

be made on the ground that the jury was not composed of hundredors of the district where the cause of action arose.[35] In 1585, Stat. 27 Eliz. ch. 6 provided that it was sufficient if two hundredors were on the jury. Subsequently, 6 George IV ch. 50 (1826) provided that jurors need only be good and lawful men of the body of the country.[26]

Historically, objections to the list of prospective jurors was made on the basis of the jury list only. In civil trials, both defence and prosecution were given the list of names of jurors on the panel immediately when the return was made, well in advance of trial. In criminal felony cases, however, the list was not available to the accused except by indulgence of the court. Only after he had entered a plea was a copy of the names of the jurors given to the defence and only if he so requested. In 1709, by Statute 7 Anne c. 21, the list, including professions and places of abode, was provided to the accused in treason cases only.[27] As late as 1848 in R. v. Dowling,[28] Erle, C.J. refused to expand the categories and this no doubt explains section 532(1)(c) of the Criminal Code being restricted to treason cases.

Challenge for cause has its roots in seventeenth century England. Section 567(1) of the Criminal Code outlines the grounds for challenge for cause. Only subsections (a) and (e) of that section do not correspond with the historical common law grounds as delineated by Chief Justice Coke of England in the seventeenth century. Also, the common law had one ground that the Criminal Code does not consider. The following table compares the present day provisions for challenge for cause with their historical roots.29

Apart from challenges for cause, an accused man was entitled to a peremptory challenge in treason cases. Blackstone explains why English law allowed this provision "full of tenderness and humanity to prisoners": "...every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike".30

Table 2

Criminal Code Provisions	Historical Common Law Provision
567(1) (a) The name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;	
(b) a juror is not indifferent between the Queen and the accused;	Propter affectum
(c) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months;	Propter delictum - in that the conviction affects the juror's credit and renders him infamous.
(d) a juror is an alien; or	Propter defectum - in that the juror is incompetent or lacking sufficient estate.
(e) a juror is physically unable to perform properly the duties of a juror.	
	Propter honoris respectum - as where a lord of parliament is empanelled on a jury.

At first the Crown had an unlimited number of peremptory challenges. This right was totally erased by (1305) 33 Edw I, Sec. 4 because of the mischief "to the subject tending to infinite delays and danger".[31] Where sentence of death was possible, 35 peremptory challenges were allowed. By Stat. 22 Hen. VIII, c. 14 (1531), 20 were allowed in murder, felony and petty treason.[32] By Stat. 1 and 2 Phil and Mary c. 10 (1555), the earlier position was revived. By 6 Geo. IV c. 50 (1826), it was reduced again to 20 for murder and felony. To balance the rights in this regard, however, the Crown was allowed to stand aside any number of prospective jurors until the panel was used up. If the panel was used up and twelve jurors had not been chosen, those stood aside would, in order, be called again. If a juror was called a second time, the Crown could only challenge for cause.[33] It had no peremptory challenge. This provision was included in Mr. Justice Stephen's draft code, the forerunner of our present Criminal Code and, with few changes,[34] has come to be section 570(1) of the present day Criminal Code.[35]

2. Peremptory Challenge and Stand Aside

Although peremptory challenges of a prospective juror are normally thought of as a right ascribed to the defence,

the Crown too has a limited right to have jurors dismissed without cause. Further, the Crown also has the right to stand jurors aside almost without restriction. Originally, the purpose of these procedures was to expose jurors not qualified to serve and those who bore some real or apprehended partiality. The respective rights of Crown and defence in relation to peremptory challenge and stand aside are set out in Table 3.[36]

TABLE 3

Peremptory Challenge and Stand Aside

	Offence punishable with death	More than five year maximum	Five years or less
Each accused has	20	12	4
Crown has	4 plus 48 stand asides	4 plus 48 stand asides	4 plus 48 stand asides

There is a question whether this kind of challenge should be continued. While the American Bar Association Standards for Jury Trials suggest that the challenges including stand asides, be retained as an integral way to ensure the rights of the Crown and accused in securing an impartial trial, the rationale does not really speak to the ostensible purpose for the procedure in the first place.

That peremptory challenges and stand asides are the most efficacious vehicles for exposing the unqualified and biased jurors are beliefs that require some re-thinking.

Should the concept of peremptory challenge be maintained, a more equitable arrangement should be attempted than the present system. A possible solution is to abolish the Crown's right to stand aside and give both defence and Crown an equal number of peremptory challenges. The advantage the defence would have in joint trials could be limited by some systematic formula.

3. Challenge for Cause

In theory, challenge for cause involves questioning prospective jurors to see that they do not fall into one of the classes outlined in subsection 567(1) of the Criminal Code. Practically, however, the questioning is limited to the issue of bias (567(1)(b)) because the other categories for challenge -- the name of the juror does not appear on the panel (567(1)(a)); a juror has been convicted of an offence (567(1)(c)); a juror is an alien (567(1)(d)); and, physical incapability to serve (567(1)(e)) -- will have been taken care of in the out-of-court selection process.

The procedure for challenge for cause is outlined in sections 568 and 569 of the Criminal Code. Each counsel is given an opportunity to challenge jurors one by one. If either the defence or Crown wish to challenge, the court may require the challenge to be in writing. Two "triers of fact" will then decide if the challenge is valid. These triers of fact will be either the last two sworn jurors or if no jurors have yet been sworn the judge may appoint two persons present for that purpose.37

In the absence of other evidence, the candidate can be called and questioned.38 There is little restriction on the questioning, although normally one cannot ask, "Are you biased?". The procedure of questioning the prospective juror is not used much in Canada, except in Ontario and Quebec. The use in Ontario appears to be on the increase, certainly in obscenity cases. In Quebec, challenges for cause are quite common, often involving every candidate and often initiated by simply saying "for cause" without any more formality. The courts have granted even greater latitude in the trials of Jacques Rose et al; so much so that after Rose was excluded from the court room, the court instructed the Crown to challenge each candidate for cause.

(See Appendix C for American Law Institute's suggested grounds for challenge for cause.)

Montreal has a unique procedure in regard to challenge for cause. At the opening of the Assize, Crown Counsel questions all candidates about their qualification to serve. The transcript can then be made available to defence counsel who then has more to work with than the name, address and occupation as set out in the list of jurors.

Old English cases restricted the right to question the candidate until some evidence of bias was led.[39] Further, the questions had to be direct.[40] These cases are not applicable in Canada because the English cases are premised on a requirement that the cause be assigned with great particularity -- the allegation must be specific. An allegation that the candidate is not indifferent is insufficient[41] whereas in Canada it is sufficient to frame the challenge within the general wording of s. 567 without being more specific.[42] However, even in Canada there must be some evidence of how the candidate is not indifferent.

The charge to the triers of the issue in Richard v. The Queen,[43] provides a good indication of the English procedure:

> "You gentlemen are to determine whether or not the witness, Mr. English, stands indifferent, that is, that he is impartial, that he could give a fair decision on the evidence in the case, and you have heard what he has to say. Now you gentlemen have to decide."

This charge leaves it to the common sense of the triers to decide whether or not indifference exists. Because it is essential that all members of the jury be impartial, it would be useful to devise a practical procedure that would provide a right of appeal from the rejection of a challenge for cause.

A safeguard may already exist if the accused or the Crown can challenge peremptorily or stand aside a juror after a challenge for cause has failed. In R. v. Ward, the Ontario Court of Appeal said that a peremptory challenge or stand aside could be used after an unsuccessful challenge for cause. The Quebec Court of Appeal agreed in Palomba v. The Queen.[44]

It seems clear that:

1. at common law if challenge for cause was denied, the other procedures to reject a candidate were available;

2. prior to the enactment of the first Criminal Code in 1892, Canadian law adopted the common law on the point;

3. the common law position would be applicable today except to the extent that the Criminal Code alters it;

4. until 1973 the bulk of writers and judges assumed that the common law position was applicable;

5. under the Criminal Code an accused has a right to a peremptory challenge and also a challenge for cause;

6. under the Criminal Code the Crown has a right to a peremptory challenge, a challenge for cause and also to a stand aside.

Have Sections 562, 563, 567 and 569 that deal with peremptory challenges by accused, challenge by the prosecutor, challenge for cause and other grounds for challenge respectively altered the common law position? This question becomes particularly relevant in light of the wording of sub-section 567(3) of the Criminal Code which states:

> "Where the finding ... is the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn."

The problem, of course, is that a literal reading of that section, especially with reference to the word "shall" is inconsistent with sub-section 563(3) in that the dominant part of that sub-section envisages further rejection procedures taking place after challenge for cause is denied. Sub-section 563(3) states:

> 563(3) - "The accused may be called upon to declare whether he challenges a juror ... for cause before the prosecutor is called upon to declare whether he requires the juror to stand by, or challenges him peremptorily ...".

Three things can be noted about this sub-section as it compares with sub-section 567(3):

1. The sub-section contemplates a rejection being made by the Crown of a juror (whether by peremptory challenge or stand aside) after defence has challenged for cause and lost.

2. If Parliament had intended to qualify Crown counsel's follow-up right of rejection, it could have said so at the conclusion of ss. 563(3).

3. If ss. 563(3) contemplates a follow-up rejection by the Crown, the literal construction of ss. 569(3) is wrong.

Canadian law should expressly allow a peremptory challenge to the defence if the challenge for cause fails. Moreover, there is no reason to deprive the Crown of its right of rejection because of an unsuccessful challenge for cause exercised by the defence.

One final area of concern in challenge for cause may lie in the application of paragraph 567(1)(b) which states;

> "A prosecutor or an accused is entitled to any number of challenges on the ground that a juror is not indifferent between the Queen and the accused."

When is a potential juror "not indifferent between the Queen and the accused"? Today, many criminal trials are based on a community incident that has attracted the close attention of the media. Take, for example, the recent Toronto case of the "shoe-shine boy slaying". Is it possible in cases of this nature to draw an indifferent jury from the community?

Indifference between the Queen and subject in Canada today probably means that the jury candidate has not arrived at a conclusion with respect to any matter in issue in the case. (For a summary of the case law, see Appendix B.) Mere reading of newspaper reports without reaching a conclusion might leave a candidate indifferent. Personal knowledge of a relevant fact might be cause for challenge. Forming a firm conclusion by reading newspaper accounts should be cause for challenge.

4. Other Selection Procedures

a) Struck Jury

Apart from the procedures already discussed, there is another procedure employed in some American States for

selection of jurors. The system of struck jurors has its roots in common law.[46] A statute of George II (1722-1760) enacts with respect to special juries that the court could "appoint a jury to be struck before the proper officer of the court where the cause is depending in such manner as special juries have been and are usually struck in such courts respectively upon trials at bar had in said courts".

By this procedure both sides alternatively delete names from the list of jurors (say a list of 48) until the required number (24 at common law; 12 in Alabama) is reached. These are then summoned to appear.[47]

White, J. in Swain v. State of Alabama, said of struck juries:

> "Since striking a jury allowed both sides a greater number of challenges and an opportunity to become familiar with the entire venire list, it was deemed an effective means of obtaining more impartial and better qualified jurors. Accordingly, it was used in causes of "great nicety" or "where the sheriff (responsible for the jury list) was suspected of partiality". It is available in many States for both civil and criminal cases. The Alabama system adheres to the common-law form, except that the veniremen are drawn from the regular jury list, are summoned to court before striking begins and the striking continues until 12 rather than 24 remain. It was adopted as a fairer system to the defendant and prosecutor and a more efficacious, quicker way to obtain an impartial jury satisfactory to the parties."

Before Canada can adopt a system of struck juries, if it is indeed a desirable system, the procedure for disclosing to counsel information about the prospective jurors needs much attention. A uniform system of disclosure is needed across the country to replace the inadequate provisions in the Criminal Code and provincial Acts.

Sub-section 532(c) of the Criminal Code allows that the list bearing the name, address and occupation of each jury candidate be given to counsel at least ten days before the arraignment. The wording of the sub-section, however, limits the applicability of the provision to treason cases. While the information about a jury candidate as provided as a result of complying with ss. 532(c) of the Criminal Code is grossly inadequate in itself to allow counsel to assess jurors, it should nevertheless be broadened to apply in all cases.

Legislation in two provinces has touched on the subject of disclosure of jury lists. Section 22 of the Jury Act of Ontario (1974) permits inspection of the jury list and a copy can be obtained in exchange for payment of two dollars in both civil and criminal cases. The disclosure

can be made only within ten days of the sitting of the court. The same provision exists in Manitoba by section 52 of the Jury Act but expressly applies in civil cases only.

b) Voir Dires

Much has been written about the use of the voir dire in the United States. No doubt it helps determine who is unfit and who is unbiased. Abused and unchecked (it is abused), great time can be spent as counsel try to indoctrinate jurors to their views.

> "Hypnotic suggestive techniques enable us to change the minds of the prospective jurors who have prejudices against us and influence those who are as yet undecided to vote in our favour."[48]

It is questionable whether our system can tolerate the delay which is the price of this luxury.

The voir dire can take various forms:

a) entirely conducted by counsel,
b) conducted by counsel under control by the Court,
c) entirely conducted by the Court,
d) conducted by the Court and supplemented by counsel.

Type (c) will be shorter than (b);[49] but might provide for a be less than adequate[50] outcome although opinion varies on

this. The time it takes to conduct a voir dire also varies according to place and case. Sometimes a voir dire will be completed in an hour, sometimes the process will take several days.

According to the American Bar Association Standards for Jury Trials, the main purpose of the voir dire is not to challenge the array but to discover "bases for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges".

If a satisfactory procedure could be found to help counsel spot the unqualified and biased, the need for something like a voir dire might be diminished. The solution to the problem may lie in the use of questionnaires.

In 1966, the Canadian Bar Association passed a resolution as set out in Appendix D. Devised by Frank Muldoon, Q.C., now Chairman of the Law Reform Commission of Canada, the resolution was accompanied by a suggested questionnaire (see Appendix E). This procedure provides a relatively simple and useful basis for spotting the biased. (For questionnaires in use in other jurisdictions, see Appendix F.)

Whatever the deficiencies of questionnaires, it must be possible to meet the needs now served in the United States by voir dires by having prospective jurors complete a simple form.

Recent developments have been made in the United States towards a more sophisticated method of juror selection. Some states now use psychological tests for selection of jurors. Redmount, an American writer, explains how the system works in three California counties:

> "In San Francisco County, the potential juror is required to select the correct synonym for twenty-five legal terms, picking one of four choices for each term. In San Diego County, an oral true-false test is used to measure a prospective juror's response to hypothetical trial problems. In Los Angeles County, the jury aspirant is given a three-part examination, one part requiring him to follow explicit directions in a test situation, another part assessing his ability to understand sample jury instructions, and a third part testing his recall from a brief movie of an accident scene shown to him. The Los Angeles procedure appears to be the most advanced psychological approach yet used in the selection of jurors."[52]

Redmount suggests[53] testing of the following areas: critical thinking ability, personality status, attitudinal orientation, social perception, and knowledge of general information about the institution of law. The results of

such testing are far from clear, but together with studies after the event, as was done in the Chicago Jury Project,[54] some insight may be made available for future selection procedures.

IV. Conclusion

This background paper was divided into two major considerations in relation to how juries are comprised -- out-of-court selection and in-court selection. Rather than drawing multifarious conclusions on these two aspects of jury selection procedure, it would be more appropriate at this point to make some observations based on the research from which recommendations might proceed.

The section of this paper relating to out-of-court selection procedures was divided into a discussion on qualifications for service and a discussion on disqualifications and exemptions from service. Several main problems were noted within the law relating to juror qualification:

1. There are some difficulties with the rationale for maintaining property and residence requirements for jury

service. For example, the relationship between whether a candidate owns land in the judicial district in which the case is being heard and his or her ability to render a just and fair verdict is problematic. In the same vein, it is difficult to see why landed immigrants who would otherwise qualify for jury service are prevented from doing so on the basis of their status as landed immigrants.

2. There has been some problem in the past in almost all provinces and territories in trying to produce a complete jury list. While part of the problem is caused by inadequate voters lists or directories, part of the problem also lies in inadequate legislation. The legislative inadequacy lies in its failure to compel officials to return the names of all eligible jurors to the sheriff.

3. Generally, there is a problem caused by the lack of uniformity across the country in legislation dealing with juror qualification.

As to disqualification and exemption from service, there are four points to note:

1. The terms exemption and disqualification are confusing. Many categories designated as exempt turn out in fact to be considered as disqualified.

2. The categories of disqualified and exempt don't allow for every situation where a person should not be compelled to serve on a jury. For example, not all exemption provisions in each province and territory allow for situations of extreme hardship on the part of the prospective juror.

3. Many of the provisions for disqualification or exemption in the statutes or ordinances are no longer feasible as reasons for not being eligible to serve on a jury. There is no consistent or principle-oriented approach to deciding who should be exempt or disqualified from service.

4. As in the provisions for qualifications for service, the provincial and territorial provisions for disqualification and exemption are not uniform across the country.

The second part of this paper dealt with the selection of those from the list of jurors that would constitute the actual jury. Several points were noted about the various areas that constitute the in-court selection process:

1. There seems to be no particular reason for the discrepancy in peremptory challenges allowed to the defence and Crown. As such it is incongruous that the Crown should be allowed forty-eight stand asides while the defence has none.

2. There is a marked confusion arising from the provisions of the Criminal Code as to the right of counsel to challenge peremptorily after a challenge for cause is lost.

3. There is an obvious gap in pre-screening procedures that could be remedied by the use of simple questionnaires that would require the prospective juror to produce the type of information that would immediately indicate whether or not he or she is a viable candidate for that particular jury.

Appendix A

The following is a brief summary of the procedures for selection of jurors province by province.

Section 9 of the British Columbia Act imposes a duty upon the sheriff to impanel a sufficient number of jurors from the Provincial Voters List as supplied by the Registrars of Voters of the various counties. Names are selected at random from the lists, the number of names being left to the sheriff. The qualification to be a voter is that one be over the age of nineteen, and provided that one meets the citizenship and residence requirements, no one is excluded. It follows that Indians and Doukhobors are eligible for service as jurors, although apparently by choice the Doukhobors do not participate.

Section 9 of the Alberta Statute imposes a duty upon the sheriff to compile a list of persons liable to be returned as jurors. The sheriff looks to the lists of electors, to assessment rolls and to "all other public papers". The clerk makes up ballots from the list containing 1,000 names from Calgary and Edmonton and 200 names from all other

places and draws the required numbers. Provided that a person is nineteen and meets the residence requirements, he is entitled to be registered as an elector. As in other provinces, assessment rolls are based upon the value of property.

Section 8 of the Saskatchewan Act imposes a duty on the sheriff to compile a list of at least 150 persons liable to serve as jurors. The sheriff has access to the assessment rolls and all other public papers. The sheriff turns the list over to the local registrar who gives the list to the judge, who selects therefrom between 24 and 48 names.

The Manitoba Act divides the selection process into two parts. The first selectors are comprised of the Mayor, Reeve, and Clerk and the Reserve Chief and Band Manager take part as well. The first selectors select from the latest revised and certified list of electors for the municipality, the names of persons qualified and liable to serve as jurors. They make use of the municipal election list. They pick 1/20 of the list, using names of persons who are, from the integrity of their character, the soundness of their judgment and the extent of their information, the most discreet and competent for the performance of the duties of

jurors. The Board of final selectors is comprised of a judge, sheriff, and prothonotary. The Board draws ballots. Depending on the district, either 500 or 1,000 names are drawn and the final selectors make the same character assessment as outlined for the first selectors. As each person is selected, the name, address and occupation of such person is entered on the jury roll.

By Section 5 of the Ontario Act, a sheriff determines the number of jurors required for each court in his county. The Director of Assessment picks the names of as many jurors as are required from the information obtained in the most recent census of the county. The Director of Assessment mails a notice to the prospective jurors to be returned to the sheriff. The sheriff then enters the names of the eligible jurors on the jury roll.

In Quebec, the sheriff receives the electoral lists from the returning officer annually and from these lists can extract 150 names that will constitute the jury panel. Those 150 names are selected by drawing numbers and in each municipality in the sheriff's district, the name on the list that corresponds to the number drawn will designate the person required for the panel. If the trial is to be conducted

in one language only, the sheriff must ensure that only jurors of that language constitute the panel. If the trial is to be conducted in both official languages, the panel must consist of an equal amount of jurors of each language.

By the New Brunswick statute, a Jury Board is established, comprised of a county court judge or clerk as chairman, a sheriff and a person designated by the Minister of Municipal Affairs. The Jury Board prepares a list making use of the provincial electors voting list. The Jury Board uses a procedure of random selection and lists the names in alphabetical order. Those on the list are notified by letter permitting them to apply for exemption. Thirty-one of the eligible jurors are chosen by lot by the Jury Board to constitute the petit jury.

By the Nova Scotia statute, a jury committee includes municipal representatives. From the municipal tax rolls the committee selects by random choice the names of a number of persons qualified and liable to serve. The jury officer, usually the prothonotary, is a member of the committee and presents the list to a judge. The judge selects at random from the jury list the names of such number of persons as he directs.

By the Prince Edward Island Act, the sheriff returns to the prothonotary two lists, one comprised of the names and places of residence of 350 persons selected by him and qualified to serve. From that list the prothonotary draws 48 names. When asked how the list was assembled, the sheriff replied, "We select a jury list from all over the county. As we travel over the county serving papers we talk to a lot of people and from talking to them, we select our jury people". It appears that a rather folksy and informal procedure exists in this Province.

By section 54 of the Newfoundland Act, a magistrate makes out a list of all persons qualified and arranges that list alphabetically. The procedure for choosing the jury list is similar to that of P.E.I. He delivers that list to the sheriff.

By virtue of the Yukon Ordinance, the sheriff is required to compile a list of forty-eight persons qualified to serve. He is supposed to look to municipal voters lists, assessment rolls and other public documents. In practice he looks to the local city directory and the telephone book, because, he says, many qualified persons do not appear on

the other lists. The custodian of each such record furnishes the sheriff with information as to the qualifications of each such person. The sheriff sends the list to the clerk, who determines the number required to constitute a panel and prepares a card for each name on the list. The sheriff then draws the number of names required as determined by the clerk.

In the North West Territories, the sheriff compiles a list of at least forty-eight persons, with names, addresses, occupations, and a statement as to whether the person speaks French, English or both. The sheriff has access to municipal voters lists and assessment records. He gives the lists to the clerk. The clerk decides the number required and prepares cards with respect to each name and makes two separate groups, one for French-speaking people and one for English-speaking. The sheriff draws lots as is done in the Yukon Territories.

Appendix B

Canadian decisions can be catalogued as follows:

1. Held to be not indifferent and cause existed:

   R. v. Whelan (1868), 28 UCQB2 - where a juror had said that if he were on accused's jury he would hang him.

   R. v. Dowey (1869), 1 P.E.I. 291 Tremeear, 6th Ed. page 954, - where candidate was a member of the grand jury which found the indictment or took part in a verdict at the first trial.

   R. v. Rasmussen (1935), 62 CCC 217 - where the candidate is related to one party, on appeal, appeal dismissed because verdict was just.

2. Held to be indifferent and cause did not exist:

   R. v. Bureau (1931), 13 Can. Abr. 1338. Members of the jury may have read and spoken about the first trial undergone by accused and had doubtless formed opinions on the question of his guilt, but declared themselves resolved to put aside such opinion and to decide solely in accordance with the evidence adduced before them.

   R. v. Carlin No. 1 (1903), 6 CCC 365. Juror made remarks prior to trial "that if he were selected as a juror he would send the accused to jail", the remark not being known to the defence until after the juror was sworn and the court being satisfied that the verdict was just.

   Richard v. The Queen, (1957) 31 CR 340. After verdict on a retrial appeal was based facts that 37 of 68 jurors challenged and held to be indifferent had in examination by chief said that their mind was made up against the accused, but in cross-examination by Crown counsel said they were prepared to listen to all of the evidence and to give a verdict according to the evidence.

R. v. Fred MacTemple (1935), 64 CCC 11. Members of jury had been members of jury which had a short time before convicted accused's father of murder on the same facts. Evidence of guilt was clear and uncontradicted.

Appendix C

The ALI Code provides:

A challenge for cause to an individual juror may be made only on the ground:

(a) That the juror has not the qualifications required by law.

(b) That the juror is of unsound mind or has such defect in any organ of the body as renders him incapable of performing duties of a jury.

(c) That the juror entertains such conscientious convictions as would preclude his finding the defendant guilty.

(d) That the juror served on the grand jury which found the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information.

(e) That the juror served on a jury formerly sworn to try the defendant on the same charge.

(f) That the juror served on a jury which has tried another person for the offence charged in the indictment or information.

(g) That the juror served as a juror in a civil action brought against the defendant for the act charged as an offence.

(h) That the juror is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.

(i) That the juror is related by blood or marriage within the fourth degree to the defendant or to the person alleged to be injured by the offence charged or on whose complaint the prosecution was instituted.

(j) That the juror has a state of mind in reference to the cause or to the defendant or to the person alleged to have been injured by the offence charged,

or to the person on whose complaint the prosecution was instituted, which will prevent him from acting with impartiality; but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the evidence.

(k) That the juror was a witness either for the State (Commonwealth or People) or the defendant on the preliminary examination or before the grand jury or is to be a witness for either party at the trial."
(page 68-69)

Appendix D

SUBJECT: Jurors Declarations

SECTION: Criminal Justice

TEXT: "WHEREAS the administration of justice demands that jurors in criminal cases be actually indifferent as between the Crown and the accused; and

WHEREAS it is virtually impossible for counsel in such cases to ascertain whether a prospective juror be indifferent, in the absence of direct - and often merely accidental - knowledge of bias; and

WHEREAS it is desirable, in the interests of the administration of justice that the selection of trial juries be not unduly protracted in the quest to ascertain bias, if any;

BE IT RESOLVED:
That the Canadian Bar Association recommends that the Criminal Code be amended to provide that each prospective juror shall complete a form of declaration by answering in writing the questions therein propounded."

CARRIED

DISPOSITION: The above resolution forwarded to the Minister of Justice on November 16, 1966. A copy of the following schedule and a copy of the transcript of the discussion on the resolution was also forwarded to the Minister of Justice for information only. Acknowledged by letter from the Minister of Justice, November 22, 1966.

Re-submitted on 24 February 1970.

Appendix D

NOTE

The proposed new Section 547A now 567A and schedule to Part XVII attached hereto formed part of the resolution re jurors declarations as originally presented to the 1966 Annual Meeting in Winnipeg but are NOT part of the resolution on this subject as finally adopted by the meeting. This is forwarded for information only, as an indication of the sort of amendment contemplated by the proponents of the resolution.

November 16, 1966 Secretary

Appendix D

PROPOSED NEW SECTION 547A TO THE CRIMINAL CODE (NOW 567A)

547A(1) In this Section "clerk of the court" means the person designated by the provisions of sub-section (2) of Section 668 of this Act.

(2) Prior to any arraignment and trial for which a panel of petit jurors have been returned, each juror shall, with such assistance from the clerk of the court as may be necessary, complete a form of declaration by answering in writing the questions therein and shall clarify or add to his answers as the clerk of the court thinks necessary for their clarity.

(3) Upon completion of the said declaration with necessary clarifications and additions or alternations as provided in sub-section (2), each juror shall attend upon the clerk of the court to make his declaration as to the truth of the contents and to sign the declaration, which shall thereupon be attested by the clerk of the court.

(4) Where a juror is unable, for any reason to make the answers or complete the declaration as required, the clerk of the court shall assist such juror insofar as he is able therein, and the clerk of the court, in such event, shall at the foot of the declaration state the fact of such assistance and state, insofar as he can perceive it, the apparent reason for such juror's requiring such assistance.

(5) In any case where the clerk of the court, through illness or absence cannot perform the duties described in sub-sections (2) and (3) any notary public for the place, who is indifferent between the Queen and the accused, may perform the said duties.

(6) A true, legible, typewritten or photographic copy of each juror's declaration as duly completed in accordance with the provisions of this Section shall thereupon be supplied to (a) counsel for each accused (or if none, to each accused personally) who is to be arraigned and tried, and (b) to counsel for the prosecution.

(7) A prosecutor or an accused shall be entitled to use the said copies for the purposes of formulating any challenge, and as prima facie proof of the contents of any such declaration, as provided in this Part.

(8) The declaration form to be supplied each juror for completion shall be in the form designated in the schedule to this Part.

(9) Where the provisions of Sections 535 and 536 relating to mixed juries are applicable, each juror shall be entitled to be supplied with a form of declaration in either English or French at his choice and shall be entitled to make his answers in the language he has chosen.

Appendix E

SCHEDULE TO PART XVII

_____ Assize, 19

_____, _____
(place) (province)

(1) The Queen vs.
Prosecution Counsel is:
Defence Counsel is:

The accused is charged with (the attempted murder of _____ and with the related charges of assault causing bodily harm, and other kinds of assault and with possession of a dangerous weapon.)

I have/have not had any personal business, social or professional relationship with the accused, the alleged victim, or with either counsel. (If the juror answers that he has any such relationship, answer below with whom and what the relationship is.)
(cross out the false expression)

_____
_____
_____

I have/have not a personal belief as to the guilt or innocence of the accused. (If the juror answers that he has such belief, answer below what it is and how it occurred.)
(cross out the false expression)

_____
_____
_____

(2) The Queen vs.
Prosecution Counsel is:
Defence Counsel is:

The accused _____ is charged with (theft of a hydro pole from _____).

I have/have not had any personal business, social or (cross out the false expression) professional relationship with the accused, the alleged victim, or with either counsel. (If the juror answers that he has any such relationship, answer below with whom and what the relationship is.)

_____
_____
_____

I have/have not a personal belief as to the guilt or innocence (cross out the false expression) of the accused. (If the juror answers that he has such belief, answer below what it is and how it occurred.)

_____
_____
_____

(3) The Queen vs.
Prosecution Counsel is:
Defence Counsel is:

The accused, _____ is charged with (the rape of _____ and with related charges of indecent assault, and other kinds of assault.)

I have/have not had any personal business, social or professional relationship with the accused, the alleged victim, or with either counsel. (If the juror answers that he has any such relationship, answer below with whom and what the relationship is.)
(cross out the false expression)

_____
_____
_____

I have/have not a personal belief as to the guilt or innocence of the accused. (If the juror answers that he has such belief, answer below what it is and how it occurred.)
(cross out the false expression)

_____
_____
_____

I believe that the crimes charged, if proved beyond any reasonable doubt, ought to be punished
(a) according to law, or
(b) in the following manner:

_____
_____
_____

I am/am not a Canadian citizen or subject of Her Majesty, Queen Elizabeth II.
(cross out false expression)

I have made the answers herein conscientiously believing them to be true and knowing them to be of the same force and effect as if made under oath and pursuant to the Canada Evidence Act.

SOLEMNLY DECLARED before)
me at the of)
in the Province)
of , this)
day of , 19)

_____
(juror's signature)

_____
(actual designation of the person
is clerk of the court pursuant
to Section 547A or notary pursuant
to sub-section 5 thereof)

(NOTE: It is a serious offence to make a false declaration.)

Appendix F

In Texas, Judge Ellis has devised a procedure for completion of questionnaires aimed at the biased and unqualified and distribution to counsel.

In Wyoming, a questionnaire aimed at the biased and the unqualified is attached to each summons as served by the sheriff. Copies are supplied to counsel.

In California, a questionnaire has been suggested. (Jury Selection in California, 452-3, 5 Stanford Law Review, 268).

In Delaware and Maryland, a questionnaire is in use.

In Vermont, there is a jury questionnaire form.

In The Chosen Ones, page 46-48, a form "for proper investigation of a particular prospective juror" is set out.

In England two forms have been suggested:

1. In a "memorandum submitted by Justice to the Departmental Committee on Jury Service", December, 1963, it was recommended that candidates on service of summons be given a questionnaire, to be returned completed within ten days.

2. In April, 1965, the report of the Morris Committee (Cmnd. 2627) recommended the use of the questionnaire.

ENDNOTES

1. A variety of sources were consulted, including the authorities referred to in the Jury Process; a Bibliography, The American Judicature Society, a large number of English, Canadian and American books, Parliamentary Debates, reports, texts and Statutes. Further, correspondence was carried out with a Sheriff in a large centre in each province, representatives of the National Indian Brotherhood and a representative of many Hutterite colonies. Special inquiries were made as to the position of Eskimos and of Doukhobors. Lawyers on the prosecution and defence side in Quebec and Ontario, two lawyers in each state of the United States and interested groups in Quebec were consulted as well. One inquiry was made to London, England.

2. S.B.C., 1970, Cap. 15 and amendments thereto.
R.S.A., 1970, Cap. 194 and amendments thereto.
R.S.S., 1965, Cap. 79 and amendments thereto.
R.S.M., 1970, Cap. J30 and amendments thereto.
S.O., 1970, Cap. 63 and amendments thereto.
S.Q., 1976, Cap. 9 and amendments thereto.

R.S.P.E.I., 1974, Cap. J5 and amendments thereto.
R.S.N.S., 1967, Cap. 156 and amendments thereto.
R.S.N.B., 1973, Cap. J3 and amendments thereto.
R.S.N., 1970, Cap. 186, Pt.III and amendments thereto.
R.O.N.W.T., 1956, Cap. J2 and amendments thereto.
R.O.Y.T., 1971, Cap. J2 and amendments thereto.

3. Blackstone, Commentaries, Vol;. 3, 1897, p. 349-459.

4. Forsyth, W., History of Trial by Jury, (2nd ed.); James A. Morgan, F. B. Lynn and Co., Jersey City, p. 11.

5. von Moschzisker, R., Trial by Jury, (2nd ed.) Geo. T. Visel & Co., Philadelphia, Penn., 1930, p. 25-26.

6. Criminal Code of Canada, Section 554(1).

7. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, Carswell Co. Ltd., Toronto, May, 1968, p. 8.

8. Ibid., p. 3.

9. Report of the Departmental Committee on Jury Service, Command Paper No. 2627, p. 21.

10. Ibid., p. 25.

11. Ibid., p. 23.

12. Ibid., p. 26.

13. Ibid., p. 28.

14. The sheer number of landed immigrants in Canada is reason enough that they be considered as eligible for jury service. Latest figure available is for 1976. Figures indicate number of immigrants landed in Canada were:

1976: 149,429; 1975: 187,881; 1974: 218,465;
1973: 184,200; 1972: 122,006; 1971: 121,900;
1970: 146,713; 1969: 161,531; 1968: 183,974;
1967: 222,876; 1966: 194,743.

15. For example, sec. 21(3) of the Manitoba Jurors Act says that "failure of one or more municipalities to

send in a list does not invalidate the selection". In response to a letter to the National Indian Brotherhood and letters to all of its members, no replies were received other than one letter from British Columbia and one from Yukon. No complaints have been received about unfair treatment of Indians, but it seems clear that Indians living on reserves across the country are precluded from service on juries because the relevant legislation requires that the municipal offices of various titles turn in lists, and the categories of such officers do not include the leaders of Indian reserves. It is possible that Hutterites are excluded as well as the occupants of any other kinds of similar colonies. The response from the Hutterites' representatives was to the effect that Hutterites are not interested in taking part for religious reasons, but technically they are probably excluded from jury service because of this kind of technical defect in the provincial legislation.

16. S.M. 1971, c. 32, s. 18.

17. In the States of Wyoming, South Carolina, Nebraska, Oklahoma, Delaware, Oregon, Maryland inter alia, the

courts have similar jurisdiction. ABA Standard 2.1(d) recommends similar provision in cases of extreme, not modest, hardship or inconvenience.

18. Op. cit., Forsyth, p. 124.

19. Ibid., p. 134-35.

20. Ibid., p. 135. See also, for example, Bushnel's Case, 1670, Vaughan Rep. 135.

21. Op. cit., Forsyth, p. 136.

22. Ibid., p. 136 and 149 ff.

23. R. v. Sutton, 4 M and Sel 540; op. cit., Forsyth, p. 137.

24. Criminal Code, S. 567(1)(b).

25. Op. cit., Forsyth, p. 138.

26. Ibid., p. 138.

27. Op. cit., Blackstone's Commentaries, Vol. 4, p. 1736.

28. R. v. Dowling, 3 Cox C.C. 509.

29. Op. cit., Forsyth, p. 148,49.

30. Op. cit., Blackstone's Commentaries, Vol. 4, p. 1738.

31. Op. cit., Forsyth, p. 192.

32. Ibid., p. 191 and Blackstone's Commentaries, Vol. 4, p. 1739.

33. R. v. Morin, 1890, 18 S.C.R. 407.

34. R. v. Churton, 1919, 1 W.W.R. 774.

35. R. v. Brennan, 1962, 40 C.R. 329.

36. American courts evolved the voir dire to perform the function served by peremptory challenges and stand asides. The voir dire as used in the United States is largely unknown in Canada and completely unknown in

England. An examination of the numerous United States books and articles makes it clear that such challenges are being used for the further purposes of obtaining jurors partial in favour of the side having the challenge. One lawyer writes that an important use is to build up a friendship with the jurors. The recent use of hypnotists in the conduct of voir dire makes it clear that one further goal is to win the jurors over before the case begins.

37. See Criminal Code, Sections 568, 569.

38. R. v. Cooke, (1914), 22 C.C.C. 241.

39. See R. v. Chandler, (1964), All E.R. 767.

40. See R. v. Edmonds, (1821), 4 BE Ald. 420.

41. R. v. Dowling, (1848), 3 Cox C.C. 509.

42. Criminal Code, Section 568(2); Form 37; R. v. Elliot, (1973), 22 C.R.W.S. 143; R. v. Jones, R. v. Daly, 22 C.R. 156.

43. Richard v. The Queen.

44. R. v. Ward, (1973), 22 C.R.N.S. 153.

45. Palomba v. The Queen, (1976), 32 C.R.N.S. 31; reversing R. v. Rose, (1973), 22 C.R.N.W. 46.

46. Op. cit., Forsyth, p. 143, 144.

47. Ibid., p. 145.

48. "Voir Dire Examination of Jurors:" Judge C.J. Crebs, 1963, University of Illinois Law Forum 644: An appraisal by an attorney, J.P. Carr, ibid., page 653.

49. Ibid., p. 646. (Judge Crebs' appraisal).

50. Ibid., p. 657. (Mr. Carr's view).

51. Op. cit., ABA Standards, p. _____.

52. Redmount, "Psychological Tests for Selecting Jurors", 1957 5 Kansas Law Review. 391. See too, "Psychological Tests and Standards of Competence for Selecting Jurors", 1956, 65 Yale Law J. 531-542.

53. Ibid., Redmount, p. 401.

54. Also by Singer and Barton at Columbia University. See Broeder, D.W. "Voir Dire Examinations: An Empirical Study", 1965, 38 South Cal. L. Rev. 503.

END

Yukon (1971)	- Of the age of 21 or over. - Canadian citizen or British subject. - Able to speak and understand English.
North West Territories (1974)	- Of the age of 21 or over. - Canadian citizen or British subject. - Able to speak and understand English or French.

Jury qualification requirements in Canadian provinces are considerably different than those in the United States or England. The American Bar Association standards for trial by jury,[7] as recommended by the Advisory Committee on the Criminal Trial, say that -- "The names of those persons who may be called for jury service should be selected at random from sources which will furnish a representative cross-section of the community". Canadian laws by and large have long met the standard. This ideal has only recently been achieved in England. While American law probably now meets the standard, its compliance is also only recent. The fight by Negros to be registered as voters and the procedures which permitted key men to make selections of people to comprise the array and the selection of middle-class, blue-ribbon juries were two of the signs of the shortcomings of the American law prior to the drafting and adoption of the American Bar Association standards.

The American Bar Association Standards[8] declare the purpose of the standards relating to juror qualifications to be:

(a) to promote the cross-section character of juries;

(b) to ensure that those who serve as jurors are capable of performing competently;

(c) to prevent arbitrary exclusion of persons from jury service; and,

(d) to protect persons from undue burdens from jury service.

The American Bar Association Standards go on to describe how, through questionnaire or interview, the court official is to determine the qualifications of prospective jurors and disqualify those not meeting the minimum requirements. It suggests the following criteria to determine whether or not a prospective juror qualifies for service:

i) inability to read, write, speak and understand the English language;

ii) incapacity, by reason of mental or physical infirmity, to render efficient jury service;

iii) failure to meet reasonable requirements concerning citizenship, residence, or age; and,

iv) pending charge or conviction of a felony or a crime involving moral turpitude.

Prospective jurors may be excused from jury service on the basis of clearly stated grounds for exemption, such as:

i) that the person has previously serviced as a juror within a specified period of time; or,

ii) that the person is actively engaged in one of a limited number of specifically identified critical occupations.

The Court may excuse other persons upon a showing of undue hardship or extreme inconvenience.

In England in 1965 the Morris Committee report on trial by jury stated that a property qualification in England excluded many males, most females, and all members of families of those eligible. The Committee[9] recommended that the basic qualification "be citizenship as evidenced by inclusion in the register as a parliamentary elector, between the ages of twenty-one[10] and sixty-five[11] with an ability to "read, write and understand English without difficulty"[12] and with a residence requirement in the country for five years.[13]

In Canada, because qualification for jury service is determined by provincial legislation or territorial ordinance, procedure varies from jurisdiction to jurisdiction. Nevertheless, there are several general points that can be noted about the provincial provisions for qualification:

1) The minimum age for service by a juror varies from province to province depending upon the age of majority in the particular province. Merely for the sake of consistency, the minimum age should be the same nationally.

2) The maximum age for service varies from the province to province. Some provinces have an age limit of 65, but there are many people in the community beyond age 65 who are capable of making a material contribution to trial by jury.

3) Several provinces have property requirements. These requirements, minimal as they may be, are unnecessary.

4) Most provinces have residence requirements. The residence requirements of some provinces are probably unnecessary because the ability of a person to contribute to a just verdict seldom depends on where he lives.

5) Landed immigrants are not permitted to serve on juries. Consideration should be given to permitting landed immigrants to take part in jury service. Basic requirements such as an inability to understand, read and write English or French will disqualify those landed immigrants who can't adequately perform their functions as a juror. The only real drawback to extending the privilege of jury service to landed immigrants is the fact that no accurate or recent information is kept on their location, educational level or language capabilities. However, legislation could be enacted to the effect that any person fulfilling the qualifications of jury service and so desiring to be included for jury duty could notify the Mayor, Reeve or Clerk of each municipality to allow these first selectors of jurors to consider their names at the appropriate time.[14]

6) Under the present jury selection procedures in many provinces, people otherwise eligible are excluded from service for two reasons. First, a number of municipal officials who have a legal obligation to file with the sheriff lists of voters from their municipalities fail to do so and nothing is done to require them to do so.[15] Second, in unorganized territories, as in the case of Indians living on reserves, there is, except in Manitoba,[16] no procedure contained in provincial legislation for getting the names of the inhabitants to the sheriff for inclusion in the lists of jurors. This situation has been created by the neglect of municipal officials and the inadequacy of provincial legislation and should be remedied.

3. Disqualification and Exemption

As well as established qualifications for jury service, laws spell out certain disqualifications and exemptions from service. Chart No. I contains a comparison of disqualifications, province by province. Chart No. II contains a comparison of exemptions, province by province.

There are three specific problems with the exemptions and disqualifications: the confusion between the terms; the lack of uniformity among the provinces; and, the multifarious categories of exemption and disqualification.

CHART I

Disqualifications

1. persons not qualified under this Act;
2. members of the Privy Council, Senate or House of Commons, Canada;
3. members of the executive council of the Provincial government;
4. officers of the court;
5. lawyers;
6. peace officers;
7. firemen;
8. persons mentally ill;
9. persons who do not speak the language that will be used in the trial;
10. persons charged or convicted of a criminal act but not pardoned;
11. consorts of disqualified persons;
12. consorts of judges;
13. persons not Canadian citizens;
14. persons not residents in the Province;
15. persons under the age of majority;
16. judges;
17. magistrates;
18. justices of the peace;
19. sheriffs or sheriff's officers;
20. gaolers;
21. employees of federal Department of Justice or Ministry of the Solicitor General;
22. employees of provincial Department of Justice;
23. spouses of 5, 6, 16, 17, 18, 19 and 20;
24. spouses of 21 and 22;
25. persons with physical ailment, incompatible;
26. students-at-law;
27. physicians, veterinary surgeons, coroners;
28. spouses of 26 and 27;
29. clergy;
30. witnesses;
31. persons in religious community;
32. persons ineligible through previous jury service;
33. persons over maximum age.

	B.C.	ALTA	SASK	MAN.	ONT.	QUE.	N.B.	NFLD	N.S.	PEI.	NWT.	Y.T.
1						X						
2	X			X	X	X						
3	X			X	X	X						
4				X	X	X						
5				X	X	X						
6	X			X	X	X						
7						X						
8	X	X				X				X	X	X
9				X		X						
10	X	X	X	X	X	X	X	X	X	X	X	X
11						X						
12						X						
13				X								
14				X								
15				X								
16				X	X							
17				X								
18				X								
19				X	X							
20				X	X							
21				X								
22				X								
23				X	X							
24				X								
25	X	X		X	X					X	X	X
26					X							
27					X							
28				X								
29					X							
30					X							
31					X							
32					X							
33	X											

CHART II

Exemptions

1. Members of the Privy Council, or of the Senate, or of the House of Commons of Canada;
2. members and officers of the Legislative Assembly;
3. salaried officials and employees of government of Canada;
4. salaried officials and employees of government of province;
5. mayors, reeves, councillors and employees of municipality;
6. sheriffs and sheriff's officers;
7. constables and peace officers;
8. baliffs;
9. officers of court of justice;
10. members of the R.C.M.P.;
11. magistrates;
12. justices of the peace;
13. coroners;
14. judges;
15. firemen;
16. professors and school teachers;
17. clergy;
18. people employed in maintaining utilities;
19. physicians-surgeons;
20. dentists;
21. nurses;
22. chemists and druggists;
23. optometrists;
24. chiropractors;
25. osteopaths;
26. X-ray technicians;
27. orderlies;
28. lab technicians;
29. physiotherapists;
30. barristers, solicitors and students-of-law;
31. editors, reporters and publishers;
32. ferry and tugboat operators;
33. postmasters;
34. mail-carriers;
35. railway workers and operators;
36. bus operators;

37. pilots and others related to aircraft flight;
38. radio or telegraph operators;
39. telephone operators;
40. millers;
41. employees of the Canadian Armed Forces;
42. managers, clerks and cashiers of banks;
43. chartered accountants;
44. undertakers;
45. mental or physical infirmity, incompatible;
46. woman claiming one year exemption;
47. farmers between April 1 and October 31;
48. women living in convent;
49. gaolers;
50. Mennonites;
51. spouses of 6, 7, 8, 9, 11, 12, 13, 14 and 49;
52. secretaries of the Governor-General or the Lieutenant-Governor;
53. probation officers and social workers;
54. consuls;
55. land surveyors;
56. customs and revenue officers;
57. Lieutenant-Governor;
58. members of a jury committee;
59. person caring for one who is infirm, aged or mentally incompetent;
60. lighthouse keepers;
61. persons not within statutory age;
62. domestic or other obligations at judge's discretion;
63. persons exempt through previous jury service.

	B.C.	ALTA	SASK	MAN.	ONT.	QUE.	N.B.	NFLD	N.S.	PEI.	NWT.	Y.T.
1		X	X	X			X	X	X	X	X	X
2		X	X				X	X	X	X	X	X
3		X	X	X				X		X		
4		X	X	X				X		X		
5		X			X			X				
6		X	X			X		X	X	X	X	X
7		X	X				X	X	X	X	X	X
8		X	X			X		X	X	X	X	X
9		X	X			X		X	X	X	X	X
10		X	X					X			X	X
11		X	X			X		X	X	X	X	X
12		X	X			X		X			X	X
13		X	X							X	X	X
14						X		X	X		X	X
15		X	X	X			X	X		X	X	X
16		X	X	X			X	X		X		
17		X	X	X		X	X	X	X	X		
18												X
19		X		X			X	X	X	X	X	X
20				X					X			
21		X	X	X	X			X			X	X
22		X	X	X	X		X	X			X	X
23					X							
24				X								
25				X								
26								X				
27								X				
28								X				
29								X				
30		X	X				X		X	X		
31		X								X		
32		X	X					X		X		
33		X	X				X			X	X	X

	B.C.	ALTA	SASK	MAN.	ONT.	QUE.	N.B.	NFLD	N.S.	PEI.	NWT.	Y.T.
34		X	X				X			X		
35		X	X	X	X			X		X	X	X
36		X	X					X				
37		X		X	X			X		X		
38		X	X	X				X		X	X	X
39		X	X					X		X	X	X
40		X	X	X								
41		X		X	X	X	X	X	X	X	X	X
42			X	X				X				
43			X									
44			X	X				X				
45			X			X		X				
46								X		X		
47			X									
48				X								
49												X
50				X								
51					X							
52					X							
53												X
54							X					
55		X										
56							X					
57									X			
58									X			
59							X					
60										X		
61					X	X		X				
62	X			X		X			X		X	X
63						X				X	X	X

First, the confusion between the terms disqualification and exemption. Normally, it would seem that those provisions listed under disqualifications would mean complete bar to service while a potential juror can refuse to serve if his status is one enumerated under the exemption provisions. In reality, however, although lawyers and police officers should, because they are only exempt from service, be able to serve as jurors if they wish, they are, in reality, treated as disqualified. The reason, it seems, is that although the court is, by the legislation, usually given the duty of deciding who is ineligible or exempt from service, the judge will leave the decision to the local sheriff since it is the sheriff who is in closest contact with the prospective jurors. One unfortunate result of this is that the sheriffs are generally reluctant to leave with the individual who falls into the exempt category the decision as to whether or not that individual desires to serve. Instead, the sheriffs will generally treat that person as disqualified. In terms of practical effect, then, there is no difference between disqualifications and exemptions.

Second, the lack of uniformity in the provincial provisions for exemptions and disqualifications. For example,

what are disqualifications in Manitoba and Ontario are merely exemptions in the other provinces and in the territories. In fact, in the area of disqualification, the only consistency throughout the country is the fact that those who have had previous criminal convictions are prohibited from serving. Even in this area, the procedure changes from province to province as to time limits on this disqualification.

Finally, there are far too many categories of exemption, some of which are no longer defensible as legitimate categories for excusal. It is probably the case that if trial by jury is to reflect the views of a cross-section of the community there should be no categories of disqualification or exemption other than for cases of physical or mental disability or some special hardship to the juror.

Just what constitutes hardship will, of course, depend on the circumstances of the case and will be subject to some kind of subjective decision. It is clear from Chart II that the court can excuse jurors in Quebec, British Columbia, Manitoba, Nova Scotia, Yukon and North West Territories.[17] Without doubt, some sheriffs' officers in Manitoba and

British Columbia de facto have assumed the power to excuse jurors when it appears their situation warrants it. There are numerous incidents where an officer had excused persons served with a summons for various reasons: in one instance because the person served suffered from a prostate condition; in one because he was thereupon recognized as a person having a criminal record; in one where it became apparent that the municipal clerk had mistaken one particular man for his retarded brother; in one because of an apparent lack of knowledge of the English language.

The sheriff or other local official is really in the best position to assess whether a candidate for jury service is disqualified or exempt. With one restriction, it is best that this function be officially allocated to the sheriff through legislation. The restriction is that, should the categories of exemption and disqualification remain, the sheriffs be informed as to how to assess each category according to the circumstances of the candidate and no longer arbitrarily exclude those from service who fall into the exempt category.

This need to educate sheriffs as to how to interpret the jury selection sections of the provincial legislation

extends regardless as to whether they are given the role officially through legislation or unofficially by the court. Besides learning to distinguish the categories of exemption and disqualification, the sheriffs should learn how to apply properly the provisions that make a candidate ineligible if certain characteristics he or she posesses are incompatible with service as a juror. If, for example, the provincial legislation stipulates that a person is ineligible to serve when that person has a physical handicap incompatible with service as a juror, the sheriff should be careful not to exclude that person from an opportunity to serve if the physical impairment is not incompatible with service. The fact that a person is an amputee, for instance, isn't necessarily any indication that he or she will not be able to perform properly his or her function as a juror.

The out-of-court selection process will determine the names of those in the community who have been randomly selected and who are eligible to serve. From this pool the sheriff will make up enough jury panels for the trials that will be held in that particular judicial district in the coming year. The sheriff will then determine how many prospective jurors are needed on a particular panel. His

decision will depend on several factors such as the kind of case that is to be heard and the particular district it is being heard in. As such, not all those who are selected in the out-of-court process will actually be called for service.

III. In-Court Selection

Once a given panel is made for a particular trial, another process of selection, the in-court selection process, will determine which members of the panel will actually serve on the trial. While the out-of-court process is governed by provincial law, the in-court selection is determined by the Criminal Code of Canada.

1. Background

In its early days of development, jurors brought a verdict according to their personal knowledge of the matter in dispute.[18] For example, in one case during the reign of Charles II, 1660-96, the accused objected to a juror "on the ground that he was on terms of friendship with the prosecutor".[19] North, LCJ replied:

> "And do you challenge a juryman because he is supposed to know something of the matter? For that reason the juries are called from the neighbourhood, because they should not be wholly strangers to the fact."

Accordingly, for many years it was held that jurors' private knowledge of the matter in dispute could influence their verdict "as much as the oral and written evidence which was produced in Court". It was even the case that a verdict could be given on this ground alone although no evidence was adduced at trial.[20] The practice even went so far as to allow a jury to render a verdict contrary to the weight of the evidence adduced.[21] This practice of permitting jurors to decide a verdict on their own knowledge of the circumstances of the case appears to have coincided with and lasted as long as the procedure of attaints -- a further hearing where if it was found that the first jury's verdict was wrong, its members were severely punished.[32] In time, as attaints fell into disuse and new trials were ordered, juries were prohibited from deciding on a verdict according to their own knowledge of the event.[33] Today, personal knowledge of circumstances of a case is usually ground for challenge for cause.[34]

When the jury system in England was still in its infancy, a challenge to the constitution of the jury could

be made on the ground that the jury was not composed of hundredors of the district where the cause of action arose.[35] In 1585, Stat. 27 Eliz. ch. 6 provided that it was sufficient if two hundredors were on the jury. Subsequently, 6 George IV ch. 50 (1826) provided that jurors need only be good and lawful men of the body of the country.[26]

Historically, objections to the list of prospective jurors was made on the basis of the jury list only. In civil trials, both defence and prosecution were given the list of names of jurors on the panel immediately when the return was made, well in advance of trial. In criminal felony cases, however, the list was not available to the accused except by indulgence of the court. Only after he had entered a plea was a copy of the names of the jurors given to the defence and only if he so requested. In 1709, by Statute 7 Anne c. 21, the list, including professions and places of abode, was provided to the accused in treason cases only.[27] As late as 1848 in R. v. Dowling,[28] Erle, C.J. refused to expand the categories and this no doubt explains section 532(1)(c) of the Criminal Code being restricted to treason cases.

Challenge for cause has its roots in seventeenth century England. Section 567(1) of the Criminal Code outlines the grounds for challenge for cause. Only subsections (a) and (e) of that section do not correspond with the historical common law grounds as delineated by Chief Justice Coke of England in the seventeenth century. Also, the common law had one ground that the Criminal Code does not consider. The following table compares the present day provisions for challenge for cause with their historical roots.29

Apart from challenges for cause, an accused man was entitled to a peremptory challenge in treason cases. Blackstone explains why English law allowed this provision "full of tenderness and humanity to prisoners": "...every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike".30

Table 2

Criminal Code Provisions	Historical Common Law Provision
567(1) (a) The name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;	
(b) a juror is not indifferent between the Queen and the accused;	Propter affectum
(c) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months;	Propter delictum - in that the conviction affects the juror's credit and renders him infamous.
(d) a juror is an alien; or	Propter defectum - in that the juror is incompetent or lacking sufficient estate.
(e) a juror is physically unable to perform properly the duties of a juror.	
	Propter honoris respectum - as where a lord of parliament is empanelled on a jury.

At first the Crown had an unlimited number of peremptory challenges. This right was totally erased by (1305) 33 Edw I, Sec. 4 because of the mischief "to the subject tending to infinite delays and danger".[31] Where sentence of death was possible, 35 peremptory challenges were allowed. By Stat. 22 Hen. VIII, c. 14 (1531), 20 were allowed in murder, felony and petty treason.[32] By Stat. 1 and 2 Phil and Mary c. 10 (1555), the earlier position was revived. By 6 Geo. IV c. 50 (1826), it was reduced again to 20 for murder and felony. To balance the rights in this regard, however, the Crown was allowed to stand aside any number of prospective jurors until the panel was used up. If the panel was used up and twelve jurors had not been chosen, those stood aside would, in order, be called again. If a juror was called a second time, the Crown could only challenge for cause.[33] It had no peremptory challenge. This provision was included in Mr. Justice Stephen's draft code, the forerunner of our present Criminal Code and, with few changes,[34] has come to be section 570(1) of the present day Criminal Code.[35]

2. Peremptory Challenge and Stand Aside

Although peremptory challenges of a prospective juror are normally thought of as a right ascribed to the defence,

the Crown too has a limited right to have jurors dismissed without cause. Further, the Crown also has the right to stand jurors aside almost without restriction. Originally, the purpose of these procedures was to expose jurors not qualified to serve and those who bore some real or apprehended partiality. The respective rights of Crown and defence in relation to peremptory challenge and stand aside are set out in Table 3.[36]

TABLE 3

Peremptory Challenge and Stand Aside

	Offence punishable with death	More than five year maximum	Five years or less
Each accused has	20	12	4
Crown has	4 plus 48 stand asides	4 plus 48 stand asides	4 plus 48 stand asides

There is a question whether this kind of challenge should be continued. While the American Bar Association Standards for Jury Trials suggest that the challenges including stand asides, be retained as an integral way to ensure the rights of the Crown and accused in securing an impartial trial, the rationale does not really speak to the ostensible purpose for the procedure in the first place.

That peremptory challenges and stand asides are the most efficacious vehicles for exposing the unqualified and biased jurors are beliefs that require some re-thinking.

Should the concept of peremptory challenge be maintained, a more equitable arrangement should be attempted than the present system. A possible solution is to abolish the Crown's right to stand aside and give both defence and Crown an equal number of peremptory challenges. The advantage the defence would have in joint trials could be limited by some systematic formula.

3. Challenge for Cause

In theory, challenge for cause involves questioning prospective jurors to see that they do not fall into one of the classes outlined in subsection 567(1) of the Criminal Code. Practically, however, the questioning is limited to the issue of bias (567(1)(b)) because the other categories for challenge -- the name of the juror does not appear on the panel (567(1)(a)); a juror has been convicted of an offence (567(1)(c)); a juror is an alien (567(1)(d)); and, physical incapability to serve (567(1)(e)) -- will have been taken care of in the out-of-court selection process.

The procedure for challenge for cause is outlined in sections 568 and 569 of the Criminal Code. Each counsel is given an opportunity to challenge jurors one by one. If either the defence or Crown wish to challenge, the court may require the challenge to be in writing. Two "triers of fact" will then decide if the challenge is valid. These triers of fact will be either the last two sworn jurors or if no jurors have yet been sworn the judge may appoint two persons present for that purpose.37

In the absence of other evidence, the candidate can be called and questioned.38 There is little restriction on the questioning, although normally one cannot ask, "Are you biased?". The procedure of questioning the prospective juror is not used much in Canada, except in Ontario and Quebec. The use in Ontario appears to be on the increase, certainly in obscenity cases. In Quebec, challenges for cause are quite common, often involving every candidate and often initiated by simply saying "for cause" without any more formality. The courts have granted even greater latitude in the trials of Jacques Rose et al; so much so that after Rose was excluded from the court room, the court instructed the Crown to challenge each candidate for cause.

(See Appendix C for American Law Institute's suggested grounds for challenge for cause.)

Montreal has a unique procedure in regard to challenge for cause. At the opening of the Assize, Crown Counsel questions all candidates about their qualification to serve. The transcript can then be made available to defence counsel who then has more to work with than the name, address and occupation as set out in the list of jurors.

Old English cases restricted the right to question the candidate until some evidence of bias was led.[39] Further, the questions had to be direct.[40] These cases are not applicable in Canada because the English cases are premised on a requirement that the cause be assigned with great particularity -- the allegation must be specific. An allegation that the candidate is not indifferent is insufficient[41] whereas in Canada it is sufficient to frame the challenge within the general wording of s. 567 without being more specific.[42] However, even in Canada there must be some evidence of how the candidate is not indifferent.

The charge to the triers of the issue in Richard v. The Queen,[43] provides a good indication of the English procedure:

> "You gentlemen are to determine whether or not the witness, Mr. English, stands indifferent, that is, that he is impartial, that he could give a fair decision on the evidence in the case, and you have heard what he has to say. Now you gentlemen have to decide."

This charge leaves it to the common sense of the triers to decide whether or not indifference exists. Because it is essential that all members of the jury be impartial, it would be useful to devise a practical procedure that would provide a right of appeal from the rejection of a challenge for cause.

A safeguard may already exist if the accused or the Crown can challenge peremptorily or stand aside a juror after a challenge for cause has failed. In R. v. Ward, the Ontario Court of Appeal said that a peremptory challenge or stand aside could be used after an unsuccessful challenge for cause. The Quebec Court of Appeal agreed in Palomba v. The Queen.[44]

It seems clear that:

1. at common law if challenge for cause was denied, the other procedures to reject a candidate were available;

2. prior to the enactment of the first Criminal Code in 1892, Canadian law adopted the common law on the point;

3. the common law position would be applicable today except to the extent that the Criminal Code alters it;

4. until 1973 the bulk of writers and judges assumed that the common law position was applicable;

5. under the Criminal Code an accused has a right to a peremptory challenge and also a challenge for cause;

6. under the Criminal Code the Crown has a right to a peremptory challenge, a challenge for cause and also to a stand aside.

Have Sections 562, 563, 567 and 569 that deal with peremptory challenges by accused, challenge by the prosecutor, challenge for cause and other grounds for challenge respectively altered the common law position? This question becomes particularly relevant in light of the wording of sub-section 567(3) of the Criminal Code which states:

> "Where the finding ... is the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn."

The problem, of course, is that a literal reading of that section, especially with reference to the word "shall" is inconsistent with sub-section 563(3) in that the dominant part of that sub-section envisages further rejection procedures taking place after challenge for cause is denied. Sub-section 563(3) states:

> 563(3) - "The accused may be called upon to declare whether he challenges a juror ... for cause before the prosecutor is called upon to declare whether he requires the juror to stand by, or challenges him peremptorily ...".

Three things can be noted about this sub-section as it compares with sub-section 567(3):

1. The sub-section contemplates a rejection being made by the Crown of a juror (whether by peremptory challenge or stand aside) after defence has challenged for cause and lost.

2. If Parliament had intended to qualify Crown counsel's follow-up right of rejection, it could have said so at the conclusion of ss. 563(3).

3. If ss. 563(3) contemplates a follow-up rejection by the Crown, the literal construction of ss. 569(3) is wrong.

Canadian law should expressly allow a peremptory challenge to the defence if the challenge for cause fails. Moreover, there is no reason to deprive the Crown of its right of rejection because of an unsuccessful challenge for cause exercised by the defence.

One final area of concern in challenge for cause may lie in the application of paragraph 567(1)(b) which states;

> "A prosecutor or an accused is entitled to any number of challenges on the ground that a juror is not indifferent between the Queen and the accused."

When is a potential juror "not indifferent between the Queen and the accused"? Today, many criminal trials are based on a community incident that has attracted the close attention of the media. Take, for example, the recent Toronto case of the "shoe-shine boy slaying". Is it possible in cases of this nature to draw an indifferent jury from the community?

Indifference between the Queen and subject in Canada today probably means that the jury candidate has not arrived at a conclusion with respect to any matter in issue in the case. (For a summary of the case law, see Appendix B.) Mere reading of newspaper reports without reaching a conclusion might leave a candidate indifferent. Personal knowledge of a relevant fact might be cause for challenge. Forming a firm conclusion by reading newspaper accounts should be cause for challenge.

4. Other Selection Procedures

a) Struck Jury

Apart from the procedures already discussed, there is another procedure employed in some American States for

selection of jurors. The system of struck jurors has its roots in common law.[46] A statute of George II (1722-1760) enacts with respect to special juries that the court could "appoint a jury to be struck before the proper officer of the court where the cause is depending in such manner as special juries have been and are usually struck in such courts respectively upon trials at bar had in said courts".

By this procedure both sides alternatively delete names from the list of jurors (say a list of 48) until the required number (24 at common law; 12 in Alabama) is reached. These are then summoned to appear.[47]

White, J. in Swain v. State of Alabama, said of struck juries:

> "Since striking a jury allowed both sides a greater number of challenges and an opportunity to become familiar with the entire venire list, it was deemed an effective means of obtaining more impartial and better qualified jurors. Accordingly, it was used in causes of "great nicety" or "where the sheriff (responsible for the jury list) was suspected of partiality". It is available in many States for both civil and criminal cases. The Alabama system adheres to the common-law form, except that the veniremen are drawn from the regular jury list, are summoned to court before striking begins and the striking continues until 12 rather than 24 remain. It was adopted as a fairer system to the defendant and prosecutor and a more efficacious, quicker way to obtain an impartial jury satisfactory to the parties."

Before Canada can adopt a system of struck juries, if it is indeed a desirable system, the procedure for disclosing to counsel information about the prospective jurors needs much attention. A uniform system of disclosure is needed across the country to replace the inadequate provisions in the Criminal Code and provincial Acts.

Sub-section 532(c) of the Criminal Code allows that the list bearing the name, address and occupation of each jury candidate be given to counsel at least ten days before the arraignment. The wording of the sub-section, however, limits the applicability of the provision to treason cases. While the information about a jury candidate as provided as a result of complying with ss. 532(c) of the Criminal Code is grossly inadequate in itself to allow counsel to assess jurors, it should nevertheless be broadened to apply in all cases.

Legislation in two provinces has touched on the subject of disclosure of jury lists. Section 22 of the Jury Act of Ontario (1974) permits inspection of the jury list and a copy can be obtained in exchange for payment of two dollars in both civil and criminal cases. The disclosure

can be made only within ten days of the sitting of the court. The same provision exists in Manitoba by section 52 of the Jury Act but expressly applies in civil cases only.

b) Voir Dires

Much has been written about the use of the voir dire in the United States. No doubt it helps determine who is unfit and who is unbiased. Abused and unchecked (it is abused), great time can be spent as counsel try to indoctrinate jurors to their views.

> "Hypnotic suggestive techniques enable us to change the minds of the prospective jurors who have prejudices against us and influence those who are as yet undecided to vote in our favour."[48]

It is questionable whether our system can tolerate the delay which is the price of this luxury.

The voir dire can take various forms:

a) entirely conducted by counsel,
b) conducted by counsel under control by the Court,
c) entirely conducted by the Court,
d) conducted by the Court and supplemented by counsel.

Type (c) will be shorter than (b);[49] but might provide for a be less than adequate[50] outcome although opinion varies on

this. The time it takes to conduct a voir dire also varies according to place and case. Sometimes a voir dire will be completed in an hour, sometimes the process will take several days.

According to the American Bar Association Standards for Jury Trials, the main purpose of the voir dire is not to challenge the array but to discover "bases for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges".

If a satisfactory procedure could be found to help counsel spot the unqualified and biased, the need for something like a voir dire might be diminished. The solution to the problem may lie in the use of questionnaires.

In 1966, the Canadian Bar Association passed a resolution as set out in Appendix D. Devised by Frank Muldoon, Q.C., now Chairman of the Law Reform Commission of Canada, the resolution was accompanied by a suggested questionnaire (see Appendix E). This procedure provides a relatively simple and useful basis for spotting the biased. (For questionnaires in use in other jurisdictions, see Appendix F.)

Whatever the deficiencies of questionnaires, it must be possible to meet the needs now served in the United States by voir dires by having prospective jurors complete a simple form.

Recent developments have been made in the United States towards a more sophisticated method of juror selection. Some states now use psychological tests for selection of jurors. Redmount, an American writer, explains how the system works in three California counties:

> "In San Francisco County, the potential juror is required to select the correct synonym for twenty-five legal terms, picking one of four choices for each term. In San Diego County, an oral true-false test is used to measure a prospective juror's response to hypothetical trial problems. In Los Angeles County, the jury aspirant is given a three-part examination, one part requiring him to follow explicit directions in a test situation, another part assessing his ability to understand sample jury instructions, and a third part testing his recall from a brief movie of an accident scene shown to him. The Los Angeles procedure appears to be the most advanced psychological approach yet used in the selection of jurors."[52]

Redmount suggests[53] testing of the following areas: critical thinking ability, personality status, attitudinal orientation, social perception, and knowledge of general information about the institution of law. The results of

such testing are far from clear, but together with studies after the event, as was done in the Chicago Jury Project,[54] some insight may be made available for future selection procedures.

IV. Conclusion

This background paper was divided into two major considerations in relation to how juries are comprised -- out-of-court selection and in-court selection. Rather than drawing multifarious conclusions on these two aspects of jury selection procedure, it would be more appropriate at this point to make some observations based on the research from which recommendations might proceed.

The section of this paper relating to out-of-court selection procedures was divided into a discussion on qualifications for service and a discussion on disqualifications and exemptions from service. Several main problems were noted within the law relating to juror qualification:

1. There are some difficulties with the rationale for maintaining property and residence requirements for jury

service. For example, the relationship between whether a candidate owns land in the judicial district in which the case is being heard and his or her ability to render a just and fair verdict is problematic. In the same vein, it is difficult to see why landed immigrants who would otherwise qualify for jury service are prevented from doing so on the basis of their status as landed immigrants.

2. There has been some problem in the past in almost all provinces and territories in trying to produce a complete jury list. While part of the problem is caused by inadequate voters lists or directories, part of the problem also lies in inadequate legislation. The legislative inadequacy lies in its failure to compel officials to return the names of all eligible jurors to the sheriff.

3. Generally, there is a problem caused by the lack of uniformity across the country in legislation dealing with juror qualification.

As to disqualification and exemption from service, there are four points to note:

1. The terms exemption and disqualification are confusing. Many categories designated as exempt turn out in fact to be considered as disqualified.

2. The categories of disqualified and exempt don't allow for every situation where a person should not be compelled to serve on a jury. For example, not all exemption provisions in each province and territory allow for situations of extreme hardship on the part of the prospective juror.

3. Many of the provisions for disqualification or exemption in the statutes or ordinances are no longer feasible as reasons for not being eligible to serve on a jury. There is no consistent or principle-oriented approach to deciding who should be exempt or disqualified from service.

4. As in the provisions for qualifications for service, the provincial and territorial provisions for disqualification and exemption are not uniform across the country.

The second part of this paper dealt with the selection of those from the list of jurors that would constitute the actual jury. Several points were noted about the various areas that constitute the in-court selection process:

1. There seems to be no particular reason for the discrepancy in peremptory challenges allowed to the defence and Crown. As such it is incongruous that the Crown should be allowed forty-eight stand asides while the defence has none.

2. There is a marked confusion arising from the provisions of the Criminal Code as to the right of counsel to challenge peremptorily after a challenge for cause is lost.

3. There is an obvious gap in pre-screening procedures that could be remedied by the use of simple questionnaires that would require the prospective juror to produce the type of information that would immediately indicate whether or not he or she is a viable candidate for that particular jury.

Appendix A

The following is a brief summary of the procedures for selection of jurors province by province.

Section 9 of the British Columbia Act imposes a duty upon the sheriff to impanel a sufficient number of jurors from the Provincial Voters List as supplied by the Registrars of Voters of the various counties. Names are selected at random from the lists, the number of names being left to the sheriff. The qualification to be a voter is that one be over the age of nineteen, and provided that one meets the citizenship and residence requirements, no one is excluded. It follows that Indians and Doukhobors are eligible for service as jurors, although apparently by choice the Doukhobors do not participate.

Section 9 of the Alberta Statute imposes a duty upon the sheriff to compile a list of persons liable to be returned as jurors. The sheriff looks to the lists of electors, to assessment rolls and to "all other public papers". The clerk makes up ballots from the list containing 1,000 names from Calgary and Edmonton and 200 names from all other

places and draws the required numbers. Provided that a person is nineteen and meets the residence requirements, he is entitled to be registered as an elector. As in other provinces, assessment rolls are based upon the value of property.

Section 8 of the Saskatchewan Act imposes a duty on the sheriff to compile a list of at least 150 persons liable to serve as jurors. The sheriff has access to the assessment rolls and all other public papers. The sheriff turns the list over to the local registrar who gives the list to the judge, who selects therefrom between 24 and 48 names.

The Manitoba Act divides the selection process into two parts. The first selectors are comprised of the Mayor, Reeve, and Clerk and the Reserve Chief and Band Manager take part as well. The first selectors select from the latest revised and certified list of electors for the municipality, the names of persons qualified and liable to serve as jurors. They make use of the municipal election list. They pick 1/20 of the list, using names of persons who are, from the integrity of their character, the soundness of their judgment and the extent of their information, the most discreet and competent for the performance of the duties of

jurors. The Board of final selectors is comprised of a judge, sheriff, and prothonotary. The Board draws ballots. Depending on the district, either 500 or 1,000 names are drawn and the final selectors make the same character assessment as outlined for the first selectors. As each person is selected, the name, address and occupation of such person is entered on the jury roll.

By Section 5 of the Ontario Act, a sheriff determines the number of jurors required for each court in his county. The Director of Assessment picks the names of as many jurors as are required from the information obtained in the most recent census of the county. The Director of Assessment mails a notice to the prospective jurors to be returned to the sheriff. The sheriff then enters the names of the eligible jurors on the jury roll.

In Quebec, the sheriff receives the electoral lists from the returning officer annually and from these lists can extract 150 names that will constitute the jury panel. Those 150 names are selected by drawing numbers and in each municipality in the sheriff's district, the name on the list that corresponds to the number drawn will designate the person required for the panel. If the trial is to be conducted

in one language only, the sheriff must ensure that only jurors of that language constitute the panel. If the trial is to be conducted in both official languages, the panel must consist of an equal amount of jurors of each language.

By the New Brunswick statute, a Jury Board is established, comprised of a county court judge or clerk as chairman, a sheriff and a person designated by the Minister of Municipal Affairs. The Jury Board prepares a list making use of the provincial electors voting list. The Jury Board uses a procedure of random selection and lists the names in alphabetical order. Those on the list are notified by letter permitting them to apply for exemption. Thirty-one of the eligible jurors are chosen by lot by the Jury Board to constitute the petit jury.

By the Nova Scotia statute, a jury committee includes municipal representatives. From the municipal tax rolls the committee selects by random choice the names of a number of persons qualified and liable to serve. The jury officer, usually the prothonotary, is a member of the committee and presents the list to a judge. The judge selects at random from the jury list the names of such number of persons as he directs.

By the Prince Edward Island Act, the sheriff returns to the prothonotary two lists, one comprised of the names and places of residence of 350 persons selected by him and qualified to serve. From that list the prothonotary draws 48 names. When asked how the list was assembled, the sheriff replied, "We select a jury list from all over the county. As we travel over the county serving papers we talk to a lot of people and from talking to them, we select our jury people". It appears that a rather folksy and informal procedure exists in this Province.

By section 54 of the Newfoundland Act, a magistrate makes out a list of all persons qualified and arranges that list alphabetically. The procedure for choosing the jury list is similar to that of P.E.I. He delivers that list to the sheriff.

By virtue of the Yukon Ordinance, the sheriff is required to compile a list of forty-eight persons qualified to serve. He is supposed to look to municipal voters lists, assessment rolls and other public documents. In practice he looks to the local city directory and the telephone book, because, he says, many qualified persons do not appear on

the other lists. The custodian of each such record furnishes the sheriff with information as to the qualifications of each such person. The sheriff sends the list to the clerk, who determines the number required to constitute a panel and prepares a card for each name on the list. The sheriff then draws the number of names required as determined by the clerk.

In the North West Territories, the sheriff compiles a list of at least forty-eight persons, with names, addresses, occupations, and a statement as to whether the person speaks French, English or both. The sheriff has access to municipal voters lists and assessment records. He gives the lists to the clerk. The clerk decides the number required and prepares cards with respect to each name and makes two separate groups, one for French-speaking people and one for English-speaking. The sheriff draws lots as is done in the Yukon Territories.

Appendix B

Canadian decisions can be catalogued as follows:

1. Held to be not indifferent and cause existed:

   R. v. Whelan (1868), 28 UCQB2 - where a juror had said that if he were on accused's jury he would hang him.

   R. v. Dowey (1869), 1 P.E.I. 291 Tremeear, 6th Ed. page 954, - where candidate was a member of the grand jury which found the indictment or took part in a verdict at the first trial.

   R. v. Rasmussen (1935), 62 CCC 217 - where the candidate is related to one party, on appeal, appeal dismissed because verdict was just.

2. Held to be indifferent and cause did not exist:

   R. v. Bureau (1931), 13 Can. Abr. 1338. Members of the jury may have read and spoken about the first trial undergone by accused and had doubtless formed opinions on the question of his guilt, but declared themselves resolved to put aside such opinion and to decide solely in accordance with the evidence adduced before them.

   R. v. Carlin No. 1 (1903), 6 CCC 365. Juror made remarks prior to trial "that if he were selected as a juror he would send the accused to jail", the remark not being known to the defence until after the juror was sworn and the court being satisfied that the verdict was just.

   Richard v. The Queen, (1957) 31 CR 340. After verdict on a retrial appeal was based facts that 37 of 68 jurors challenged and held to be indifferent had in examination by chief said that their mind was made up against the accused, but in cross-examination by Crown counsel said they were prepared to listen to all of the evidence and to give a verdict according to the evidence.

R. v. Fred MacTemple (1935), 64 CCC 11. Members of jury had been members of jury which had a short time before convicted accused's father of murder on the same facts. Evidence of guilt was clear and uncontradicted.

Appendix C

The ALI Code provides:

A challenge for cause to an individual juror may be made only on the ground:

(a) That the juror has not the qualifications required by law.

(b) That the juror is of unsound mind or has such defect in any organ of the body as renders him incapable of performing duties of a jury.

(c) That the juror entertains such conscientious convictions as would preclude his finding the defendant guilty.

(d) That the juror served on the grand jury which found the indictment or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information.

(e) That the juror served on a jury formerly sworn to try the defendant on the same charge.

(f) That the juror served on a jury which has tried another person for the offence charged in the indictment or information.

(g) That the juror served as a juror in a civil action brought against the defendant for the act charged as an offence.

(h) That the juror is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution.

(i) That the juror is related by blood or marriage within the fourth degree to the defendant or to the person alleged to be injured by the offence charged or on whose complaint the prosecution was instituted.

(j) That the juror has a state of mind in reference to the cause or to the defendant or to the person alleged to have been injured by the offence charged,

or to the person on whose complaint the prosecution was instituted, which will prevent him from acting with impartiality; but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the evidence.

(k) That the juror was a witness either for the State (Commonwealth or People) or the defendant on the preliminary examination or before the grand jury or is to be a witness for either party at the trial."
(page 68-69)

Appendix D

SUBJECT: Jurors Declarations

SECTION: Criminal Justice

TEXT: "WHEREAS the administration of justice demands that jurors in criminal cases be actually indifferent as between the Crown and the accused; and

WHEREAS it is virtually impossible for counsel in such cases to ascertain whether a prospective juror be indifferent, in the absence of direct - and often merely accidental - knowledge of bias; and

WHEREAS it is desirable, in the interests of the administration of justice that the selection of trial juries be not unduly protracted in the quest to ascertain bias, if any;

BE IT RESOLVED:
That the Canadian Bar Association recommends that the Criminal Code be amended to provide that each prospective juror shall complete a form of declaration by answering in writing the questions therein propounded."

CARRIED

DISPOSITION: The above resolution forwarded to the Minister of Justice on November 16, 1966. A copy of the following schedule and a copy of the transcript of the discussion on the resolution was also forwarded to the Minister of Justice for information only. Acknowledged by letter from the Minister of Justice, November 22, 1966.

Re-submitted on 24 February 1970.

Appendix D

NOTE

The proposed new Section 547A now 567A and schedule to Part XVII attached hereto formed part of the resolution re jurors declarations as originally presented to the 1966 Annual Meeting in Winnipeg but are NOT part of the resolution on this subject as finally adopted by the meeting. This is forwarded for information only, as an indication of the sort of amendment contemplated by the proponents of the resolution.

November 16, 1966 Secretary

Appendix D

PROPOSED NEW SECTION 547A TO THE CRIMINAL CODE (NOW 567A)

547A(1) In this Section "clerk of the court" means the person designated by the provisions of sub-section (2) of Section 668 of this Act.

(2) Prior to any arraignment and trial for which a panel of petit jurors have been returned, each juror shall, with such assistance from the clerk of the court as may be necessary, complete a form of declaration by answering in writing the questions therein and shall clarify or add to his answers as the clerk of the court thinks necessary for their clarity.

(3) Upon completion of the said declaration with necessary clarifications and additions or alternations as provided in sub-section (2), each juror shall attend upon the clerk of the court to make his declaration as to the truth of the contents and to sign the declaration, which shall thereupon be attested by the clerk of the court.

(4) Where a juror is unable, for any reason to make the answers or complete the declaration as required, the clerk of the court shall assist such juror insofar as he is able therein, and the clerk of the court, in such event, shall at the foot of the declaration state the fact of such assistance and state, insofar as he can perceive it, the apparent reason for such juror's requiring such assistance.

(5) In any case where the clerk of the court, through illness or absence cannot perform the duties described in sub-sections (2) and (3) any notary public for the place, who is indifferent between the Queen and the accused, may perform the said duties.

(6) A true, legible, typewritten or photographic copy of each juror's declaration as duly completed in accordance with the provisions of this Section shall thereupon be supplied to (a) counsel for each accused (or if none, to each accused personally) who is to be arraigned and tried, and (b) to counsel for the prosecution.

(7) A prosecutor or an accused shall be entitled to use the said copies for the purposes of formulating any challenge, and as prima facie proof of the contents of any such declaration, as provided in this Part.

(8) The declaration form to be supplied each juror for completion shall be in the form designated in the schedule to this Part.

(9) Where the provisions of Sections 535 and 536 relating to mixed juries are applicable, each juror shall be entitled to be supplied with a form of declaration in either English or French at his choice and shall be entitled to make his answers in the language he has chosen.

Appendix E

SCHEDULE TO PART XVII

_____ Assize, 19

_____, _____
(place) (province)

(1) The Queen vs.
Prosecution Counsel is:
Defence Counsel is:

The accused is charged with (the attempted murder of _____ and with the related charges of assault causing bodily harm, and other kinds of assault and with possession of a dangerous weapon.)

I have/have not had any personal business, social or professional relationship with the accused, the alleged victim, or with either counsel. (If the juror answers that he has any such relationship, answer below with whom and what the relationship is.)
(cross out the false expression)

_____
_____
_____

I have/have not a personal belief as to the guilt or innocence of the accused. (If the juror answers that he has such belief, answer below what it is and how it occurred.)
(cross out the false expression)

_____
_____
_____

(2) The Queen vs.
Prosecution Counsel is:
Defence Counsel is:

The accused _____ is charged with (theft of a hydro pole from _____).

I have/have not had any personal business, social or (cross out the false expression) professional relationship with the accused, the alleged victim, or with either counsel. (If the juror answers that he has any such relationship, answer below with whom and what the relationship is.)

_____
_____
_____

I have/have not a personal belief as to the guilt or innocence (cross out the false expression) of the accused. (If the juror answers that he has such belief, answer below what it is and how it occurred.)

_____
_____
_____

(3) The Queen vs.
Prosecution Counsel is:
Defence Counsel is:

The accused, _____ is charged with (the rape of _____ and with related charges of indecent assault, and other kinds of assault.)

I have/have not had any personal business, social or professional relationship with the accused, the alleged victim, or with either counsel. (If the juror answers that he has any such relationship, answer below with whom and what the relationship is.)
(cross out the false expression)

_____
_____
_____

I have/have not a personal belief as to the guilt or innocence of the accused. (If the juror answers that he has such belief, answer below what it is and how it occurred.)
(cross out the false expression)

_____
_____
_____

I believe that the crimes charged, if proved beyond any reasonable doubt, ought to be punished
(a) according to law, or
(b) in the following manner:

_____
_____
_____

I am/am not a Canadian citizen or subject of Her Majesty, Queen Elizabeth II.
(cross out false expression)

I have made the answers herein conscientiously believing them to be true and knowing them to be of the same force and effect as if made under oath and pursuant to the Canada Evidence Act.

SOLEMNLY DECLARED before)
me at the of)
in the Province)
of , this)
day of , 19)

_____
(juror's signature)

_____
(actual designation of the person
is clerk of the court pursuant
to Section 547A or notary pursuant
to sub-section 5 thereof)

(NOTE: It is a serious offence to make a false declaration.)

Appendix F

In Texas, Judge Ellis has devised a procedure for completion of questionnaires aimed at the biased and unqualified and distribution to counsel.

In Wyoming, a questionnaire aimed at the biased and the unqualified is attached to each summons as served by the sheriff. Copies are supplied to counsel.

In California, a questionnaire has been suggested. (Jury Selection in California, 452-3, 5 Stanford Law Review, 268).

In Delaware and Maryland, a questionnaire is in use.

In Vermont, there is a jury questionnaire form.

In The Chosen Ones, page 46-48, a form "for proper investigation of a particular prospective juror" is set out.

In England two forms have been suggested:

1. In a "memorandum submitted by Justice to the Departmental Committee on Jury Service", December, 1963, it was recommended that candidates on service of summons be given a questionnaire, to be returned completed within ten days.

2. In April, 1965, the report of the Morris Committee (Cmnd. 2627) recommended the use of the questionnaire.

ENDNOTES

1. A variety of sources were consulted, including the authorities referred to in the Jury Process; a Bibliography, The American Judicature Society, a large number of English, Canadian and American books, Parliamentary Debates, reports, texts and Statutes. Further, correspondence was carried out with a Sheriff in a large centre in each province, representatives of the National Indian Brotherhood and a representative of many Hutterite colonies. Special inquiries were made as to the position of Eskimos and of Doukhobors. Lawyers on the prosecution and defence side in Quebec and Ontario, two lawyers in each state of the United States and interested groups in Quebec were consulted as well. One inquiry was made to London, England.

2. S.B.C., 1970, Cap. 15 and amendments thereto.
R.S.A., 1970, Cap. 194 and amendments thereto.
R.S.S., 1965, Cap. 79 and amendments thereto.
R.S.M., 1970, Cap. J30 and amendments thereto.
S.O., 1970, Cap. 63 and amendments thereto.
S.Q., 1976, Cap. 9 and amendments thereto.

R.S.P.E.I., 1974, Cap. J5 and amendments thereto.

R.S.N.S., 1967, Cap. 156 and amendments thereto.

R.S.N.B., 1973, Cap. J3 and amendments thereto.

R.S.N., 1970, Cap. 186, Pt.III and amendments thereto.

R.O.N.W.T., 1956, Cap. J2 and amendments thereto.

R.O.Y.T., 1971, Cap. J2 and amendments thereto.

3. Blackstone, Commentaries, Vol;. 3, 1897, p. 349-459.

4. Forsyth, W., History of Trial by Jury, (2nd ed.); James A. Morgan, F. B. Lynn and Co., Jersey City, p. 11.

5. von Moschzisker, R., Trial by Jury, (2nd ed.) Geo. T. Visel & Co., Philadelphia, Penn., 1930, p. 25-26.

6. Criminal Code of Canada, Section 554(1).

7. American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, Carswell Co. Ltd., Toronto, May, 1968, p. 8.

8. Ibid., p. 3.

9. Report of the Departmental Committee on Jury Service, Command Paper No. 2627, p. 21.

10. Ibid., p. 25.

11. Ibid., p. 23.

12. Ibid., p. 26.

13. Ibid., p. 28.

14. The sheer number of landed immigrants in Canada is reason enough that they be considered as eligible for jury service. Latest figure available is for 1976. Figures indicate number of immigrants landed in Canada were:

1976: 149,429; 1975: 187,881; 1974: 218,465;
1973: 184,200; 1972: 122,006; 1971: 121,900;
1970: 146,713; 1969: 161,531; 1968: 183,974;
1967: 222,876; 1966: 194,743.

15. For example, sec. 21(3) of the Manitoba Jurors Act says that "failure of one or more municipalities to

send in a list does not invalidate the selection". In response to a letter to the National Indian Brotherhood and letters to all of its members, no replies were received other than one letter from British Columbia and one from Yukon. No complaints have been received about unfair treatment of Indians, but it seems clear that Indians living on reserves across the country are precluded from service on juries because the relevant legislation requires that the municipal offices of various titles turn in lists, and the categories of such officers do not include the leaders of Indian reserves. It is possible that Hutterites are excluded as well as the occupants of any other kinds of similar colonies. The response from the Hutterites' representatives was to the effect that Hutterites are not interested in taking part for religious reasons, but technically they are probably excluded from jury service because of this kind of technical defect in the provincial legislation.

16. S.M. 1971, c. 32, s. 18.

17. In the States of Wyoming, South Carolina, Nebraska, Oklahoma, Delaware, Oregon, Maryland inter alia, the

courts have similar jurisdiction. ABA Standard 2.1(d) recommends similar provision in cases of extreme, not modest, hardship or inconvenience.

18. Op. cit., Forsyth, p. 124.

19. Ibid., p. 134-35.

20. Ibid., p. 135. See also, for example, Bushnel's Case, 1670, Vaughan Rep. 135.

21. Op. cit., Forsyth, p. 136.

22. Ibid., p. 136 and 149 ff.

23. R. v. Sutton, 4 M and Sel 540; op. cit., Forsyth, p. 137.

24. Criminal Code, S. 567(1)(b).

25. Op. cit., Forsyth, p. 138.

26. Ibid., p. 138.

27. Op. cit., Blackstone's Commentaries, Vol. 4, p. 1736.

28. R. v. Dowling, 3 Cox C.C. 509.

29. Op. cit., Forsyth, p. 148,49.

30. Op. cit., Blackstone's Commentaries, Vol. 4, p. 1738.

31. Op. cit., Forsyth, p. 192.

32. Ibid., p. 191 and Blackstone's Commentaries, Vol. 4, p. 1739.

33. R. v. Morin, 1890, 18 S.C.R. 407.

34. R. v. Churton, 1919, 1 W.W.R. 774.

35. R. v. Brennan, 1962, 40 C.R. 329.

36. American courts evolved the voir dire to perform the function served by peremptory challenges and stand asides. The voir dire as used in the United States is largely unknown in Canada and completely unknown in

England. An examination of the numerous United States books and articles makes it clear that such challenges are being used for the further purposes of obtaining jurors partial in favour of the side having the challenge. One lawyer writes that an important use is to build up a friendship with the jurors. The recent use of hypnotists in the conduct of voir dire makes it clear that one further goal is to win the jurors over before the case begins.

37. See Criminal Code, Sections 568, 569.

38. R. v. Cooke, (1914), 22 C.C.C. 241.

39. See R. v. Chandler, (1964), All E.R. 767.

40. See R. v. Edmonds, (1821), 4 BE Ald. 420.

41. R. v. Dowling, (1848), 3 Cox C.C. 509.

42. Criminal Code, Section 568(2); Form 37; R. v. Elliot, (1973), 22 C.R.W.S. 143; R. v. Jones, R. v. Daly, 22 C.R. 156.

43. Richard v. The Queen.

44. R. v. Ward, (1973), 22 C.R.N.S. 153.

45. Palomba v. The Queen, (1976), 32 C.R.N.S. 31; reversing R. v. Rose, (1973), 22 C.R.N.W. 46.

46. Op. cit., Forsyth, p. 143, 144.

47. Ibid., p. 145.

48. "Voir Dire Examination of Jurors:" Judge C.J. Crebs, 1963, University of Illinois Law Forum 644: An appraisal by an attorney, J.P. Carr, ibid., page 653.

49. Ibid., p. 646. (Judge Crebs' appraisal).

50. Ibid., p. 657. (Mr. Carr's view).

51. Op. cit., ABA Standards, p. _____.

52. Redmount, "Psychological Tests for Selecting Jurors", 1957 5 Kansas Law Review. 391. See too, "Psychological Tests and Standards of Competence for Selecting Jurors", 1956, 65 Yale Law J. 531-542.

53. Ibid., Redmount, p. 401.

54. Also by Singer and Barton at Columbia University. See Broeder, D.W. "Voir Dire Examinations: An Empirical Study", 1965, 38 South Cal. L. Rev. 503.