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## R' Blake Brown, A Trying Question: The Jury in Nineteenth-Century Canada

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Book Review

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R. Blake Brown, *A Trying Question: The Jury in Nineteenth-Century Canada*. Toronto: University of Toronto Press and the Osgoode Society for Canadian Legal History, 2009. x, 335 pp.

In a 1984 review essay on the inter-relationship(s) of law and society in English criminal law historiography, Doug Hay observed that “in history, there is no ‘background.’”<sup>1</sup> His point was that there are an infinite number of backgrounds, all of which are moving and changing, often in non-linear fashion, at different paces, either in counter-point or direct dialogue with the foreground which is the immediate subject of exposition. Legal historians who put their topics “in context” by treating the background as static are now fortunately few, at least when this background is conceived of as social or economic. But as Hay observed, the most immediately significant context for any area of legal history is often itself legal, and it is this legal context—the institutions, the rules of procedure and evidence—of which legal historians need to be the most aware, but often take for granted. Not that this is entirely our fault: while we have ample secondary sources on many non-law aspects of nineteenth century Canadian society, the nitty-gritty of the system has not attracted the same interest. While there are compelling stories about eccentric judges, or the consequential narratives these individuals produced, to be celebrated, excoriated or otherwise deconstructed, it is a brave researcher who chooses to devote him or herself to the dry bones of statutory changes to faceless structures such as the jury. Popular culture may imbue juries with drama galore, but this is necessarily fictional, since where reasoning and communication are the duty of (modern era) high court judges, that of jurors has been discretion and opacity.

Canadian legal historians therefore have good reason to be grateful to R. Blake Brown, a legally trained historian currently assistant professor in the history department at St. Mary’s University in Halifax, for choosing this subject for his doctoral dissertation (*The jury, politics, and the state in British North America: Reforms to jury systems in Nova Scotia and Upper Canada, 1825-1867*, Dalhousie University, 2005, under the supervision of the editor of this journal) and to the Osgoode Society for Canadian Legal History and University of Toronto Press for publishing his revised

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1. Douglas Hay, “The criminal prosecution in England and its historians” (1984) Mod. L. Rev. 1 at 16.

and expanded version as a monograph. The caveat here is that some will be disappointed if they take the book title at face value. The subtitle of *A Trying Question: The Jury in Nineteenth Century Canada* is somewhat misleading. If “Canada” taken as all of what is now Canada, or even what was then Canada, then restricting the discussion to Nova Scotia and Ontario as he does is problematic. In addition, the “nineteenth century” identified as particularly relevant to jury reform, the 1820s to 1880s, is a short one indeed. Nevertheless, it is a safe prediction that *A Trying Question* will soon be one of the most cited works of legal history in this country, and for good reason. Brown has done an exemplary job of detailing the changes in jury structure in the two jurisdictions he examines during this time period.

Of course, the book functions as far more than an expanded encyclopaedia entry. Brown’s primary purpose is to examine the political reasons behind the changes to the jury in both its forms, the trial or petit (petty) jury, the fact-finding body which is still with us, albeit in comparatively restricted ambits, and the grand jury, which is no more in Canada (although it maintains a significant presence south of the border) and which was once a mainstay of both the prosecution process and local governance. American and British historians have attributed this “decline” in the prominence of the jury, experienced in all common law jurisdictions to various degrees, to several factors, including increased technical complexity and professionalization of the prosecution process, the influence of legal formalist thought which prioritized reason over intuition, rules over facts, and education over local knowledge, and economic instrumentalism by state and judiciaries whereby private corporate interests were protected from short-sighted, bleeding-heart juror sympathy. Brown does not take issue with these explanations, but insists that place-specific factors also played their part. Using a comparative model, he argues that “understanding the causes of legal change requires an analysis of the effect of local change on inherited legal culture.” (11) In effect, the *why* of such an important transformation cannot be understood apart from the *how*. Tracing the trajectories of a set of political issues involving the jury in these two similar but far from identical jurisdictions, he comes to the conclusion that a number of locally determined, inter-related factors were also key—the rise of responsible government (provincially and municipally), party and the press; the influence of liberal thought and discourse; the process of state formation; and above all, the agitation and agency of what might be called the juror community, those people who were inconvenienced by jury duty, both personally and financially.

Whereas Brown's dissertation was organized geographically, chronologically, and thematically, here he has attempted to create larger categories of synthesis. Thus, Part One is "Juror Apathy and Allegations of Jury Packing, 1820s-1848," Part Two covers "Responsible Government and the Jury, 1848-1867," and Part Three "The Decline of the Jury in Post-Confederation Canada, 1867-1880s." Within each part are alternating chapters on Ontario and Nova Scotia, two for each jurisdiction in the first section, which occupies about a half of the book, and one each in each of the two subsequent sections. Each part also includes an introduction and conclusion, and each chapter a concluding recapitulation. These repetitions and summaries may strike some as redundant, but readers who are interested in an overview or in locating a specific jurisdiction, period or change rather than following the entire minutiae of bills, acts and *causes célèbres* will no doubt welcome the opportunities for skimming or more targeted reading.

In Part One, Brown addresses the question of how the ostensibly sacred aura of the English jury system was eroded from the start by the realities of transplantation into a different and challenging environment. In England, jury duty denoted power and status, but in Nova Scotia those called to jury duty saw only travel in poor weather on poorer roads, time away from farm or fishing, and the annoyance that one might not even be called on to deliberate. English sheriffs often selected those who lived near the court house, but in 1777 Nova Scotia instituted a form of balloting to ensure geographic representativeness, and jurors often had to travel long distances. Absenteeism was a chronic problem, and complaints were vocal and constant. Even those who did not have to travel had cause for complaint: due to the small population, a single grand jury in Halifax was selected to serve in sessions throughout an entire year. However, service on grand juries was slightly less irksome, presumably due to the role this institution played in local governance, providing the opportunity for grand jurors to exercise patronage in the appointment of local officials such as overseers of the poor and highway surveyors. The grand jury in both jurisdictions also had a powerful and meaningful criminal law function in determining the sufficiency of indictments which were presented to them by a clerk, the finding of "a true bill," on which a trial with a smaller, "petit" jury could proceed.

Although they experienced similar problems in adapting the jury system to colonial reality, Brown finds that "[p]rior to 1850, ... Upper Canadians did not express their distaste for jury service with the same intensity or frequency,"<sup>(43)</sup> due to differences in jury selection procedures—sheriffs could prefer the closer candidates—and the (relative) superiority of their

transportation system. Implied is a more robust tax base in rural Upper Canada: not only did this result in better roads, but also a propensity to look to financial compensation to ease the costs of time and travel instead of advocacy to reduce requirements for jury service as in Nova Scotia. Whether due to the less bothersome nature of jury service, the relatively minimal role of grand juries in local governance (officials were elected at township meetings), Simcoe's efforts at anglicization, or simply a more homogeneous population, "English jury ideology held a tighter grasp on the minds of many Upper Canadians." (47)

One problem that bedevilled both colonies was the perception that sheriffs exercised inappropriate power in the jury selection process, thereby indirectly affecting the outcomes of criminal trials and civil suits. In England sheriffs were appointed on a yearly basis: in Upper Canada and Nova Scotia sheriffs served at the pleasure of the governor, giving rise to suspicions concerning their neutrality, especially in politically sensitive state prosecutions and libel cases. In Nova Scotia, various attempts were made to mitigate this perception. In 1838, the legislature turned to a committee system, whereby each county was to select three magistrates each representing a different area, to prepare lists of eligible grand jurors along with the sheriff. This system floundered quickly when the magistrates, who were not remunerated for their efforts, did not cooperate, resulting in verdicts which were vulnerable to challenge. The legislature was embarrassed into passing retroactive curative legislation, but did not retreat from their course, as they extended the committee process to trial juries.

Renewed criticisms arose in Nova Scotia in the 1840s, with the advent of party politics and a partisan press, which when combined with ethnic tensions between Irish Catholics and English Protestants placed a number of juries in an unflattering public spotlight. Although Joseph Howe's victory augmented the reputation of juries, subsequent libel trials with less happy outcomes for critics of the establishment did not. The legislature responded with further amendments to the committee system, but the half-hearted participation by inadequately paid magistrates continued. In Upper Canada, claims of jury packing also had a long and noisy history, accompanied by years of efforts by the reform movement to de-politicize the system. From the Tory point of view, this alleged de-politicization was disingenuous at best and dangerous at worst, and Family Compacters like John Beverley Robinson drew on the language of British tradition to argue that the reformers were the ones doing the politicizing.

Once the Upper Canadian reformers achieved their primary goal of responsible government, jury reform was high on the agenda, in ways

both indirect and direct. The *Municipal Act* of 1849 transferred most of the extant local government functions of grand juries to elected municipal corporations. Once the *Crown Attorneys Act* of 1856 professionalized the indictment process, the grand jury began to seem moot in its prosecutorial function as well. In 1850 an innovative *Jury Act* created a complex system of balloting and recording designed to remove discretion from the system, but which carried a heavy cost, downloaded to the new municipalities. This included fees for selectors, for clerks who were responsible for endless copying and reporting, and eventually for jurors as well. These incentives were accompanied by significant penalties: non-compliance with statutory directions was to be punished with fines and imprisonment. Interestingly, in contrast to the trend to democratization in the political sphere, the property threshold for jury service was raised twice. If the rationale for this was to improve the jury's stature, it was a successful but ultimately wasted effort, as criticism began to centre on a cost/benefit analysis which drew on the new discourses of liberals to condemn juries as un-educated, un-predictable and downright un-necessary.

In Nova Scotia, attempts to secure democratic municipal reform were less successful. Halifax was incorporated in 1841, but rural grand juries continued to perform local government functions until county incorporation was mandated in the 1870s. The infamous "magistrates' affair" of 1848 began a trend of partisan replacements in the magistracy following changes in government which further corroded the reputation of juries as disinterested arbiters. Reforms designed to increase the inclusivity of juries to embrace Irish Catholics and Nova Scotians of colour merely underscored the deep political nature of the role. Deficiencies in jury selection propriety attracted the condemnation of judges and lawyers, who also began to use language of liberalism to express their lack of faith in the institution.

Brown notes that the Nova Scotia government was less "muscular" in asserting the power of the state in this situation, neglecting to use either the carrots of significant remuneration or the sticks of heavy fines and threats of imprisonment employed by Upper Canada to make its agents behave. Both jurisdictions began gradually to diminish the requirements for juries in civil, and then in criminal cases. Responsibility for criminal law passed to the new Dominion government in 1867, and Brown remarks on the irony that John A. Macdonald, who had been staunch in appealing to traditional jury ideology in previous debates, promoted the extension of summary justice with the *Speedy Trials Act* of 1869.

Somewhat confusingly, Brown contends that because many of the advocates for the elimination or diminution of the jury were equity

lawyers and judges, the contemporaneous movement for the fusion of law and equity may have played a part in the debate over the jury. No doubt those comfortable in arguing and dispensing equity law might have felt uncomfortable with an ideology that portrayed the jury as the *sine qua non* of British justice and liberty. However, if he means to suggest that the fusion movement itself helped to legitimate the juryless justice imparted by the courts of chancery in the minds of the denizens of the dominant common law culture, this is an interesting speculation, and one which merits more than the casual mention Brown affords it. A similarly fascinating but fleeting observation is that juries have come to have less appeal in an era which chooses to place its trust in rights documents. Perhaps the hegemonic liberalism which Brown sees as antithetical to the jury system is predisposed to prefer language-based correctives to institutional checks and balances.

A history focussed on the mid-nineteenth century, and a groundbreaking one at that, should not be faulted for not going further with such musings. But the meta-questions raised by the “decline” of an important institution cry out for further investigation, and yes, speculation, because “loser’s history” cannot but be fundamentally speculative. What does it mean that one of our more potent social tropes, a core component in what the editors—though to his credit not the author—of this work refer to as the “distinctiveness and the superiority of the common law system”(vii) has become a mere symbolic shadow of its former self? Or has this transformation been greater in theory than practice? Brown explains that he has eschewed statistical analysis in order to place the jury “in its constitutional, political, intellectual and cultural context.” (13) But does this methodology really support his claim that “the jury was where law and politics often met,” (3) or was this just the perception? Did the conscious decision to be more inclusive of blacks and Irish Roman Catholics in the jury pool of Nova Scotia make a difference except in the realm of partisan politics? How does the experience of other “places,” especially Quebec with its hybrid civil/common law system, illuminate the discussion? And what of places *within* Ontario and Nova Scotia? For instance, some counties in Ontario were far more active in petitioning for abolition or reduction in juries than others—were these poorer counties, counties which had other priorities for their tax revenue, or were other factors involved? Why, if jury duty was so onerous and becoming less ideologically important, were juries in Ontario reformed to be more rather than less elitist? Indeed, why was the option of expanding the pool to include women, seniors and the non-propertied seemingly not even considered, especially given the fact that retirees and the unemployed are the mainstay of today’s jury pools?

Blake Brown has done admirable work in illuminating one of many “backgrounds” to the intersections of law and politics in a critical period of state formation in Ontario and Nova Scotia. But this subject is by no means “done.” *A Trying Question* should be followed by many more studies of jury composition and activity to build on Brown’s pioneering and indispensable contribution.

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