Pretrial prejudice in Canada: a comparative perspective on the criminal jury

A comparative analysis with another country makes possible a clearer view of the American jury and the risks and benefits of proposed reforms.

by Neil Vidmar

The American criminal jury is under intense scrutiny and criticism, largely as a result of some highly publicized trials such as those of O. J. Simpson, the Menendez brothers, and William Kennedy Smith. These trials have caused commentators to raise questions about the effects of the mass media in creating a climate of prejudice. They have also produced concerns about inherent general prejudices or biases that jurors may hold as a result of their racial, gender, or other identities. In many respects these trials are not representative of most criminal jury trials but, nevertheless, they have fostered consideration of a Farrago of reforms including abolition of the unanimity rule and peremptory challenges and expansion or contraction of voir dire. They have also engendered debate about sequestration of jurors, television in the courtroom, and constraints on lawyers.

While empirical research rather than anecdote is needed to determine how serious and extensive these jury problems actually are, the impact of any reforms on the jury system and, indeed, the whole criminal justice process should be simultaneously considered. The parts of the system are interdependent: some rules and practices are predicated on rules and practices in other parts of the system. A comparative analysis with another country can help us step back from the American jury, view this system interdependency more clearly, and critically examine the risks and benefits of proposed reforms.

This article provides an overview of the jury system of Canada, with particular reference to the trial of Paul Bernardo. The Bernardo trial is interesting because it overlapped that of O.J. Simpson, involved not only murder but heinous acts that exceeded those in the Simpson case, and posed a serious threat to the integrity of the trial process.

Against a backdrop of a series of rapes by the "Scarborough rapist" that terrorized a number of Toronto suburbs beginning in mid-1990, two teenager girls, Linda Mahaffy and Kristen French, went missing in 1991 and 1992. Their sexually-abused bodies were subsequently found. Mahaffy's had been dismembered by a power saw, encased in cement, and dumped in a lake.

Police were stymied until January, 1995, when a 23 year-old woman residing in St. Catharines, Ontario, Karla Homolka, was severely beaten by her 29-year-old husband, Paul Bernardo. In the police investigation that followed she confessed that she had participated with Bernardo in the kidnapping, sexual enslavement, and degradation of the two teenagers. Homolka nevertheless insisted that Bernardo alone murdered the girls. She also eventually implicated Bernardo (and herself) in numerous other sexual crimes, including the drugging and rape of her younger sister that accidentally resulted in the girl's death. The latter incident had been treated as a natural but unexplained death. Finally, she also informed the authorities that the victims' rapes and tortures, each occurring over several days, had been videotaped by Bernardo.

Bernardo was arrested and charged as the Scarborough rapist in February, 1993, and later charged with kidnapping, rape, and murder. Canadian and U.S. media covered the story extensively and engaged in much speculation about the crimes, but police and prosecutors remained tight-lipped. After many searches of the couple's home police failed to find the videotapes. Thus, Homolka became the Crown's crucial witness against her husband, and a highly controversial plea bargain was struck. For her full cooperation and testimony Homolka would receive two 12-year sentences for manslaughter, to be served concurrently. At her June, 1993 plea and sentencing trial the judge allowed Canadian media representatives to be present, but in an attempt to preserve the integrity of the Bernardo trial he drew upon common law precedent to forbid them from publishing any details until the latter trial was completed.

Despite the reporting ban, public rumors about the Homolka and Ber-
nardo crimes was intense. Radio and print media in nearby Buffalo, New York, as well as other American mass media, reported some of the forbidden information. A public opinion survey in December, 1993, found that many persons in the trial venue (moved to Toronto from St. Catharines) reported that they had learned details of the case from others, from reading U.S. news sources, or from facsimile or internet communications.

Bernardo's trial did not begin until May 1995, but in the interim the case had been kept before the public by litigation over the publication ban, the resignation of Bernardo's first lawyer and the appointment of a new defense team, publicity from various victims' rights groups, widespread dissemination of anonymous flyers reporting erroneous and gruesome details about the Mahafey and French deaths, media editorials about the Homolka plea bargain, and allegations of police incompetence. Moreover, rumors, which turned out to be true, surfaced that the missing videotapes had been found and would be used as evidence.

The jury
The Canadian constitution, the Canadian Charter of Rights and Freedoms, guarantees the right to a jury trial only for more serious crimes. The Criminal Code is the body of statutory law passed by Parliament that applies to all the provinces and territories of Canada. "Summary conviction" offenses, for which the possible punishment is less than five years imprisonment, are subject to trial by judge alone. There is a class of offenses, such as murder, that must be tried by judge and jury. However, the vast majority of offenses in the Code are hybrid offenses in which the Crown can elect to proceed by indictment or by summary conviction. If the Crown chooses indictment, the accused has the right to be tried by judge and jury or by judge alone.

The jury consists of 12 members, and it must be unanimous in its verdict. No provision is made for alternate jurors. However, if, for reasons of illness or misbehavior, up to two jurors are removed, the trial judge has the discretion to allow a verdict by a ten-person jury. Paralleling American development over the past several decades, the Canadian jury has become more representative, drawing its pool of veniremen randomly from the voter lists from the last provincial election. Nevertheless, the sheriff of the district, who is in charge of drawing the pool, has considerable latitude in excusing jurors and the Criminal Code provides that irregularities in drawing the venire are not grounds for overturning a conviction. In most of the provinces of Canada lawyers and others engaged in the practice or enforcement of law are excluded from jury service on the grounds that they would not be disinterested parties. Other categories of persons, such as doctors and firemen, may also be excluded.

When the Bernardo trial began in May, 1995, 980 prospective jurors were summoned to appear at the Royal York Hotel, which had been turned into a

4. The editorials involved general discussion of the issues and the need for investigation and thorough public airing of the matter after the Bernardo trial was completed, when the media would be free from the judicial restraint.
5. It is possible to have a trial for murder by judge alone but the Crown prosecution and the defense must give mutual consent.
gigantic courtroom. The charges against the accused were read—two counts each of first-degree murder, kidnapping, unlawful confinement and aggravated sexual assault, and one count of causing an indignity to a corpse. Bernardo pleaded not guilty to each count. Jury selection began. In

order to eliminate persons who believed that they could not serve under the trial conditions, the trial judge explained to the assembled panel that the trial would last an estimated four months and that the jurors would be required to view very explicit photographs and videos of sexual acts. Over the next three days the remaining members of the panel were randomly called one-by-one to a nearby courtroom, placed under oath, and asked up to eight questions in a procedure that Canadian law calls a “challenge for cause.”

Each juror was asked:

(1) Have you read, heard or seen anything about this case in the media (that is newspapers, radio or television)?
(2) Have you obtained information about it from anywhere else?
(3) Have you read, heard or seen anything about the accused’s, Paul Bernardo’s, background, character or lifestyle?
(4) Have you read, heard or seen anything about Karla Homolka or about her trial?
(5) As a result of this case some groups and organizations have circulated petitions or have sought support concerning issues which relate to this case, the victims or their families. Have you supported any of these groups or associations, for example: by signing a petition, writing a letter of support or by making a donation?
(6) As a result of any knowledge, discussion, and/or contact with any group or organization, have you formed an opinion about the guilt or innocence of the accused, Paul Bernardo?
(7) If you have formed an opinion about the guilt or innocence of the accused, are you able to set aside that opinion and decide this case only on the evidence you hear in the court room and the judge’s directions on the law?

No other information about the juror, other than physical appearance and demeanor, was available to the prosecutor or defense.

In contrast to U.S. practice, the trial judge in Canada does not have authority to determine which jurors are impartial and which are not. Rather, that decision is placed in the hands of two layperson “triers.” For the selection of the first juror, two persons are randomly chosen from the venire panel and sworn to serve as triers. They listen to the prospective jurors’ answers to the questions and, under instructions from the judge, render a verdict on whether he or she is “impartial between the Queen and the accused.” If a prospective juror is found to be not impartial, another is called, and the process continues until an unbiased one is found. After the first juror is chosen, he or she replaces one of the triers to choose the second impartial juror. The first two jurors then serve as triers for juror number three; jurors two and three are the triers for juror four; the rotating “trier” schedule continues until 12 jurors are seated. However, even if the triers decide that a person is impartial, either the Crown
or the defendant can exercise one of their peremptory challenges—20 are allotted to each side in a murder case—necessitating other jurors to be called and tried until that juror slot is filled. If a juror is acceptable to both sides, he or she is seated in the jury box for the remainder of the proceeding. When the twelfth juror is chosen, the jury is sworn.

With some persons excused for hardship, others excused for bias, and others rejected through peremptories, 225 veniremen were called in the Bernardo case before a jury was seated. The total jury selection process took five days, an extraordinarily lengthy proceeding for a Canadian trial. When all 12 were selected the judge admonished the jurors to not discuss the case with anyone, told them that a number of legal matters still had to be resolved, and ordered them to return in two and a half weeks for the commencement of the trial.

The Bernardo trial
At the end of May the Bernardo trial began with television and print coverage that was unprecedented in Canadian history. Although radio and television coverage was not allowed in the courtroom the streets outside were jammed with communications equipment. Long queues of spectators waited for the limited public seating. The trial involved some of the most disturbing evidence ever heard and seen in a courtroom. The graphic videotapes of the rapes and torture of the two girls were played over and over and over for the jury. The press and public were allowed to hear the audio portion of the days and hours of the victims’ torture and humiliation by Bernardo and Homolka, but only the jury and court officials saw as well as heard the evidence. Nevertheless, the audio portion left little for the imagination, and the printed media reported it extensively, as well as Karla Homolka’s testimony about the details.

Throughout the trial, the jurors went, unescorted, back to their homes each evening. They were not sequestered until they began their deliberations some four months after the trial began. Paul Bernardo was found guilty of the murders and other charges and sentenced to life in prison. We will likely never learn how the jurors reached their verdict because Canadian law forbids jurors to disclose anything, ever, about their deliberations.

Controlling for prejudice
Any legal system that utilizes a group of laypersons as jurors to decide important issues must consider ways of constraining and guiding them to conform to the rational purposes of the law. How it is done may differ from country to country. The Bernardo trial has some elements that are typical of Canadian jury trials and others that are atypical. A comparative analysis requires that the jury must be placed in the context of its legal culture, including the values and assumptions of the particular legal system. Before discussing this point further it is necessary to briefly describe the various forms of pretrial prejudice that jurors may bring to the courtroom and the kinds of controls and remedies that a judicial system may use in an attempt to ensure a fair trial.

For purposes of analysis, pretrial prejudice may be divided into four types. Interest prejudice involves circumstances in which jurors may have a direct stake in the trial due to their relationships to the defendant, the victim, witnesses, or outcome. Specific prejudice involves attitudes and beliefs about the particular case that may cause the juror to be incapable of deciding guilt or innocence with an impartial mind. These attitudes and beliefs may exist because of personal knowledge about the case, publicity through mass media, or public discussion and rumor arising in the community from which the jurors are drawn.

Generic, or general, prejudice involves the transferring of prejudice to the case as a result of juror stereotyping of the defendant, victims, witnesses, or the nature of the crime itself based upon assumptions about categories of persons or the charges. Bias against a racial or ethnic group or against persons charged with sex abuse are examples of generic prejudice; the identity of the particular defendant is immaterial.

Finally, conformity prejudice arises when the case is of significant interest to the community such that a juror perceives that there is strong community feeling about the case and what is expected regarding the case outcome; as a consequence, the juror would be influenced in reaching a verdict based on the perceived consensus rather than his or her own judgment regarding the meaning of the evidence.

A legal system may attempt to control or provide remedies for these prejudices in various ways. By common law practice or by statute it may exclude persons who have interest prejudices. It may prevent or control prejudice before trial by placing constraints on mass media or by removing incentives for interest prejudice to arise. Alternatively, or in addition, it may provide for screening of the jurors in an attempt to eliminate those who cannot be impartial. It may also develop controls at trial that are intended to ameliorate or suppress any prejudices. Finally, the jury verdict may be reviewed by the trial judge or appellate judges and overturned. In contrast to the United States, the Canadian system differs in its emphasis on these mechanisms.

Curses on pretrial publicity
A major difference between Canada and the United States lies in the controls that the judiciary may place on the mass media in order to prevent pretrial publicity. The Canadian legal system stands in contrast to England and the U.S. England, with its severe contempt of court laws, emphasizes the value of fair trial over free press while the United States, with Nebraska Press Association v. Stuart and related cases, emphasizes the value of free press over 7.

7. Canada permanently abolished capital punishment in 1976 after a 14 year moratorium on hanging. Under the life sentence Bernardo would be eligible to apply for parole after 25 years. However, in a subsequent proceeding initiated by the Crown he was found to be a dangerous offender and is now serving an indefinite life sentence.
8. Elaborated in a number of affidavits and trial testimony, the most recent of which is R. v. Musson, unreported, Ontario Court of Justice (Central West Region), April 29, 1995. The analytical scheme encompasses the prejudices recognized in American law; see Knapp, Scope of Your Own Examination, 314 L. Ed. 2d. 763 (1995).
fair trial. Canada puts a different balance to the two competing values. Section 11(d) of the Canadian Charter guarantees an accused the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal" and section 2(b) provides for "...freedom of the press and other media of communication." The Criminal Code (s:486) also declares the right to a proceeding in open court. However, two sections of the Code place limits on these rights. Section 537 provides the judge with the power to exclude everyone but the prosecutor, the accused and his counsel from the preliminary inquiry, roughly similar to an American pretrial hearing and ordinarily held for indicable offenses, if it appears to be in the best interests of justice to do so. Section 486 gives the judge authority to ban the public and press from all or part of criminal trial proceedings if it is in the interest of public morals, the maintenance of order, or the proper administration of justice. The apparent contradiction between these sections of the Code and the Charter guarantees are reconciled by section 1 of the Charter, which declares that the rights and freedoms are not absolute: "reasonable limits may be prescribed by law as can be demonstrably justified in a free and democratic society."11

With respect to the preliminary inquiry, the Criminal Code provides that although the fact that the inquiry has been held may be reported, the accused person has the right to ask for an order banning publication of the content of the proceedings until the charges are dropped or the trial is ended. The motion must be granted; the judge has no discretion. Defendants frequently invoke this right, particularly in cases likely to draw public interest. As mentioned above, the Code also provides that in unusual circumstances the judge may exclude the public or press from the inquiry. Consequently, the preliminary inquiry is seldom a source of prejudicial pretrial publicity.

Although the judge drew upon common law precedent to ban publication of the detail of the Homolka trial proceedings until the termination of the Bernardo trial, his order should be viewed in the context of the general philosophy of the Criminal Code and the Charter. The philosophy was also reflected in the Bernardo trial with respect to the judge's decision to prohibit both the public and the press from viewing the videotapes that were shown to the jury. Canadian trial practice does not allow sidebar conferences; the jury is removed from the courtroom for all legal arguments. The Code proscribes publication of anything said in the absence of the jury until the jury retires to consider its verdict, at which time sequestration is mandatory. The ban does not apply if the jury is sequestered during the whole trial, but sequestration is extremely rare.

Two other matters bear on the control of pretrial prejudice. The first is that cameras are not permitted in Canadian Courtrooms. The second is that section 649 of the Criminal Code prohibits jurors from ever disclosing anything about their deliberations under threat of a summary conviction that could result in a sentence of six months imprisonment and a fine of $5000. This law was passed in 1972 with another goal in mind, but its effect is to curtail one form of interest prejudice. The jurors in the Bernardo case were not tempted to lie about their lack of impartiality in anticipation of a lucrative contract with the National Inquirer, "Hard Copy" or any book publisher at the trial's end. Fame and financial gain are not motives for Canadian jurors.

Jury selection in Canada

The jury selection process in the Bernardo trial was not typical of Canadian jury practice and procedure. Challenges for cause occur in only a small percentage of criminal trials. Most often, jurors are selected without any individual questioning at all. The trial judge may ask the assembled panel if any of them have health or other problems that would pose a hardship and if anyone has a connection to the parties in the case that would make them interested parties. The judge may excuse such jurors or stand them aside. The names of the remaining jurors are randomly selected and they are called one by one to face the accused. At this point the Crown prosecutor or defense lawyer may exercise one of the peremptory challenges allotted to each side; however, the decision is made solely on the physical characteristics and demeanor of the juror. Thus, in most cases Canadian practice ignores specific or generic prejudices. It presumes that any biases will be set aside, or that, in any event individual biases will be canceled out by the need for 12 persons to reach a unanimous verdict. A leading case, Regina v. Hubbert, asserted that the presumption is that a juror will follow his or her oath to decide the case with an impartial mind.12

The presumption of impartiality enunciated in Hubbert and other cases can be rebutted by evidence of potential prejudice tendered by one of the parties, usually the defendant. In this event the judge may allow a "challenge for cause." The burden of proof is low. There must be "a realistic possibility" or an "air of reality" to the application. The determination of whether the burden has been carried

11. The recent case of Dagomais v. CBC involves an important curb on the power of the judiciary to prevent publication of potentially inflammatory materials. The case involved former and present members of a Catholic religious order who ran an Ontario training school for boys. They were charged with multiple counts of sexual and physical abuse of young boys who were in their care. As their trial date approached, their defense lawyers applied for an injunction preventing the Canadian Broadcasting Company from airing a television miniseries program, "The Boys of St. Vincent," a fictional account based on real events perpetrated by members of the order of Christian Brothers at the Mt. Cagel Orphanage in St. John's Newfoundland. Relying on common law authority the judge granted a Canada-wide injunction. The Ontario Court of Appeal upheld the injunction but limited its scope to Ontario and the city of Montreal. Upon further appeal the Canadian Supreme Court applied a balancing test under s1 of the Charter and quashed the injunction. Dagomais did not absolutely curb common law judicial authority on the issue, but it enunciated guidelines involving a reasonable risk that alternative remedial measures, such as "challenges for cause," would not suffice. The decision was based on a balancing of the salutary effects of a ban against the deleterious effects of the delay of the free expression of ideas. Note that in both the Homolka case and the Dagomais case the issue was delay, not permanent ban, on publication of materials.


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rests entirely on the discretion of the trial judge, but the applicant must produce some evidence. The evidence may be in the form of documentation of media coverage, sworn affidavits by persons knowledgeable about the community, or an opinion tendered by an expert, perhaps based on a survey of the community.

In the past challenges for cause were granted primarily for specific and conformity prejudice arising from evidence of taints from mass media coverage or rumor and gossip in the community. However, in R. v. Parks the Ontario Court of Appeal recognized generic prejudice in a case involving a black defendant. Taking judicial notice of evidence of considerable racial prejudice in Toronto the court ruled that a black defendant charged with a crime against a white person was entitled to ask potential jurors if they had any racial biases that would prevent them from being impartial. That ruling has subsequently been interpreted as involving any black defendant and other cases have expanded the issue to other racial and ethnic categories.

Additionally, the basic reasoning of the Parks court has persuaded a number of judges to allow challenges for cause in cases involving sexual assaults and crimes of violence against women. This expansion of Parks is highly controversial and will ultimately have to be decided in the courts of appeal. Significantly, the British Columbia courts have rejected the Parks approach and the issue has not arisen for appeal courts in other provinces. Thus, at present judicial law regarding forms of generic prejudice is unsettled.

When a judge does permit a “challenge for cause” the process is similar to the one described above with respect to the Bernardo case. However, typically the questions put to jurors are limited to one or two questions requiring only yes or no answers. The lawyer for the side that requests the challenge asks the questions. The process is kept under tight control by the judge and usually the judge does not allow further exploration of the juror’s reasoning behind the answer. The questions must directly address the juror’s state of mind. They may not inquire about anything involving the juror’s personal life or beliefs. A typical question is as follows:

As His Honour will tell you, in deciding whether or not the Crown has proven the charges against an accused person, a juror must judge the evidence of all witnesses without bias, prejudice or partiality. That is, the juror must decide the case with an open and fair mind. In this case the complainant is a young girl, now 9 years old, who alleges that when she was 5 years old she was the victim of a serious sexual assault by Mr. Thomas. Knowing these facts about the charges against Mr. Thomas, do you believe that you can set aside any preconceived biases, prejudices or partiality that you may hold and decide this case with a fair and impartial mind?

A number of policy considerations lie behind the restrictions on the scope and form of questions that may be put to jurors. The Hubbert court specifically proscribed “American practices” of probing into jurors personal lives as unfair to the jurors, who are not on trial. It was also concerned that extensive questioning would unnecessarily prolong trials. It also rejected any attempt to use the questioning as a basis for exercising peremptory challenges or to indoctrinate jurors: “an accused is entitled to an indifferent jury not a favorable one.” In the subsequent case of R. v. Sherratt the Canadian Supreme Court also expressed concern that questioning should not be used to thwart the representativeness of the jury.

Such limited questioning may seem to many American lawyers to be almost useless, particularly when the decision about impartiality is made by two layperson “triers” rather than the judge. However, in 25 cases involving sexual assaults against children and teenagers, an average of 36 percent of jurors stated that they could not be impartial and were dismissed by the triers. The Canadian process should also be compared with the limited voir dire that are conducted in U.S. federal courts or the highly restrictive voir dire in a state capital murder trial that was sanctioned by the U.S. Supreme Court in Mu ‘Min v. Virginia.

Finally, the limitations of the challenge for cause process are recognized when there is evidence that large segments of the community have been tainted by pretrial publicity arising from media coverage or interpersonal networking. Section 599 of the Criminal Code provides for a change of venue. The party requesting the change, either Crown or defendant, must produce evidence to convince a judge that there is a “fair and reasonable probability” that a fair trial cannot be obtained in the original community.

Controls on the trial process

The Canadian presumption about jurors following their oath and the limited questioning process when challenges for cause are allowed should be viewed in the context of the whole jury system. Not only does Canadian law attempt to control factors that might engender pretrial prejudice before trial, it also provides for greater control over the jury than does the American system.

The Canadian trial judge has limited discretion to summon witnesses who are not called by either the prosecutor or the defense if he or she determines that it is necessary to the
"ends of justice." The exercise of this power does not require the consent of the parties. However, the power must be—and is—used sparingly. The judge also has a positive duty to put questions to a witness in order to clarify an obscure answer, a misunderstanding of a question put to the witness, or an omission by legal counsel of a question that the judge believes is relevant to the issues in the case. It is improper for either the Crown prosecutor or defense counsel to offer any personal opinions about the evidence or for the defense lawyer to invite the jury to ignore the law.

Even more important, after the evidence and final arguments have been given, the trial judge has the positive duty of reviewing the case for the jury. The judge must impartially but substantially review the theories of the prosecution and the defense and the evidence presented by both sides. Moreover, the judge is entitled to express an opinion to the jury about the importance of various pieces of evidence and may even offer an opinion regarding the credibility of a witness. In undertaking this commentary the judge must make it clear that the jury is not bound to accept her opinion regarding the facts. The judge also has the obligation of raising any questions arising from the evidence that favor the defendant even if they were not raised by the defendant’s legal counsel and she must instruct the jury on reasonable doubt and the unanimity requirement. The judge may provide the jury with a written description of the different verdicts open to it but may not ask the jury to particularize the basis of its verdict; only a general verdict is considered to be proper.

The significance of this judicial guidance of the jury should not be underestimated in Canadian legal thinking regarding the mitigation of any pretrial prejudice. It looms large, though implicit, in the presumption that jurors will follow their oath to be impartial and in the belief that even when challenges for cause are allowed, the limitations of the questioning process can be offset by the intervention and guidance of the judge.

It would be remiss to not mention a striking feature of Canadian law. While the Charter gives great weight to the presumption of innocence and the principle of double jeopardy, the Crown prosecutor does have a limited right to appeal a jury acquittal. The grounds for an appeal must be that the jury was not properly instructed on the law. This limitation on double jeopardy requires a thorough review by appeal courts, but on occasions the Crown has been successful in obtaining a new trial. This appeal provision is another indication of tighter control over the jury process in comparison to American practice.

Other differences
This brief overview of the Canadian jury system and the problem of pretrial prejudice is not entirely complete. Canadian rules of evidence sometimes differ in significant ways from American rules, and these influence what the jury sees and hears and how it sees and hears it. The Crown is required to disclose its witnesses and evidence in advance of trial, but the defense is not under a similar obligation. Inherent judicial power and Gentile notwithstanding, the rules of lawyer behavior outside the courtroom before, during, and after the trial are often in marked contrast to the United States. A lawyer holding press conferences to discuss the evidence, the judge, or anything that could affect the trial or by innuendo bring the administration of justice into disrepute would likely face serious contempt of court charges, censure from colleagues, or, more likely, both. Indeed, the legal culture is such that even a lawyer having no connection to a case would be unlikely to offer highly evaluative commentary to the media about the conduct of the case or the witnesses, as sometimes occurs in the United States.

Inside the courtroom lawyers wear gowns inherited from English tradition (the wigs are, mercifully, absent) and follow formal rules of decorum. In a manner similar to the most formal of American courts, the lawyers sit at a counsel table or stand at a lecturn during the trial. They can approach a witness only with permission of the judge. Addresses to the jury at the beginning and end of the trial are made from the lecturn. Especial deference is given to the judge, who, until recent years, was always addressed as Your Lordship or Ladyship; but the prescriptive norms also extend to the forms of address between the lawyers. For instance, even when hotly disputing a legal point, the adversaries frequently refer to their opponent as "my friend." It is not an easily measurable phenomenon, but the atmosphere of the Canadian courtroom surely must have an impact on the jurors.

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Because different values can be applied as standards to evaluate legal systems, it is inappropriate to conclude that the Canadian jury system is better or worse than the American system. Nevertheless, this comparative analysis helps to draw attention to the fact that jury systems are indeed systems, with interconnected parts. The relatively limited jury selection procedures in Canada need to be viewed in the context of the greater constraints on pretrial publicity and on more judicial control over the trial process. Given the fact that American jurisprudence does not allow such restraints, proposals to eliminate peremptory challenges, severely curtail voir dire, or to change the unanimity rule, to take three examples, should be considered in the light of checks and balances—or their absence—in other parts of the system. Changes in a single part could bring unexpected consequences.

The point made at the beginning of the article still stands. Solid empirical evidence that there are major problems with the American jury system is needed. However, if problems do exist a systems analysis cautions us to conduct limited experiments with changes and evaluate them before they are adopted on a permanent basis.