

## Three Cheers for Lord Denman: Reformers, the Irish, and Jury Reforms in Nova Scotia, 1833-1845

R. Blake Brown

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### Résumé de l'article

L'article suivant analyse le rôle important du jury au regard de la loi, de la politique et de l'État, dans la Nouvelle-Écosse d'avant la Confédération. Afin d'éviter qu'un jury soit noyauté, l'assemblée législative élaborait des procédures complexes pour mieux encadrer la sélection des jurés. La mise en oeuvre de ces procédures relevait de comités composés de magistrats et de shérifs; ces représentants officiels se révélèrent toutefois peu fiables pour appliquer les mesures bureaucratiques instaurées par l'État. Les jurés ne restaient pas imperméables aux débats sur les partis politiques, sur la diffamation et sur les questions relevant du domaine public. Dans les années 1840, les immigrants irlandais installés en Nouvelle-Écosse, forts de leur expérience de noyautage de jury en Irlande, se plaignirent qu'ils n'étaient jamais appelés à faire partie d'un jury. Des réformistes politiques affirmèrent aussi que des représentants officiels choisissaient des jurés défavorables à leur cause, surtout lorsqu'il s'agissait de cas majeurs de poursuite en diffamation, les torys se servant de cette tribune pour tenter de museler une presse réformatrice de plus en plus critique. Ces procès en diffamation soulignaient l'importance du rôle du jury dans la protection de la liberté de la presse et montraient conséquemment que les réformistes avaient les moyens d'ébranler le leadership des torys dans la colonie. Les virulentes dénonciations des irrégularités dans la sélection des jurés débouchèrent sur l'adoption d'une loi réformatrice; le problème de la politisation des jurés resta cependant difficile à régler entièrement à cause de la montée et de la reconnaissance des partis politiques en Nouvelle-Écosse.

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R. BLAKE BROWN

## *Résumé*

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## *Abstract*

*This article explores the important place of the jury in the relationship between law, politics, and state in pre-Confederation Nova Scotia. The legislature responded to fears of jury packing by creating more complex procedures for jury selection. These jury selection systems relied for their implementation on committees composed of magistrates and sheriffs, officials who proved unreliable instruments for carrying out a more bureaucratic state policy. Juries also reflected, and influenced, debates about political parties, libel, and the public*

sphere. In the 1840s, Irish immigrants to Nova Scotia drew upon their experience of packed juries in Ireland to complain that they were systematically excluded from jury service. Political reformers also asserted that officials packed juries against them with their political opponents, especially in high profile libel cases in which Tories attempted to silence the increasingly critical reform press. These libel cases highlighted the role of the jury in protecting freedom of the press and therefore reformers' ability to challenge the Tory leadership of the colony. The fierce complaints over jury selection irregularities led to the passage of reform legislation, though a final solution to the politicization of juries remained elusive with the emergence and acceptance of political parties in Nova Scotia.

JURIES PLAYED IMPORTANT ROLES in the legal and political governance of British North America in the early nineteenth century. Trial juries (otherwise called 'petit' or 'petty' juries) rendered judgment on many criminal offences and civil claims. Grand juries were responsible for determining whether there was sufficient evidence against an accused to have his or her case go to trial. Importantly, however, grand juries also had significant roles in local government. At General Sessions (or 'quarter sessions'), grand juries, drawn from the prominent citizens of the community, worked with magistrates to administer local affairs.

Most Canadian historians are aware of the jury's cultural significance, and a few have examined various jury issues, such as the class composition of juries in particular locales,<sup>1</sup> attitudes to jury service,<sup>2</sup> and how jury reforms reflected shifting views about the law.<sup>3</sup> Nevertheless, the key place of the jury as a nexus

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- 1 Jim Phillips, "Halifax Juries in the Eighteenth Century," in *Criminal Justice in the Old World and the New*, eds. Greg T. Smith, Allyson N. May and Simon Devereaux (Toronto: Centre of Criminology, 1998), 135-82; Donald Fyson, "Jurys, participation civique et représentation au Québec et au Bas-Canada: les grands jurys du district de Montréal (1764-1832)," *Revue d'histoire de l'Amérique française* 55 (2001): 85-120; Nancy Kay Parker, "Reaching a Verdict: The Changing Structure of Decision-Making in the Canadian Criminal Courts, 1867-1905," (Ph.D. Dissertation, York University, 1999); Nancy Parker, "Swift Justice and the Decline of the Criminal Trial Jury: The Dynamics of Law and Authority in Victoria, BC, 1858-1905," in *Essays in the History of Canadian Law; Volume VI: British Columbia and the Yukon*, eds. Hamar Foster and John McLaren (Toronto: University of Toronto Press and Osgoode Society, 1995), 171-203.
  - 2 David Murray, "Just Excuses: Jury Culture in Barrington Township, Nova Scotia, 1795-1837," in *Planter Links: Community and Culture in Colonial Nova Scotia*, eds. Margaret Conrad and Barry Moody (Fredericton: Acadiensis Press, 2001), 36-57; R. Blake Brown, "Storms, Roads, and Harvest Time: Attitudes Towards Jury Service in Pre-Confederation Nova Scotia," forthcoming in *Acadiensis*.
  - 3 Paul Romney, "From Constitutionalism to Legalism: Trial by Jury, Responsible Government, and the Rule of Law in the Canadian Political Culture," *Law and History Review*, 7 (1989): 121-74.

among law, politics, and state in the nineteenth century has been unrecognized. Nova Scotians debated fiercely the merits and roles of juries in the mid-nineteenth century, and legislators passed a series of acts that attempted to prevent jury packing and improve the quality of jurors selected. Political reformers and Irish Catholic Nova Scotians often argued that officials packed juries against them with tories or Protestants. This article focuses on the efforts to address the concern with biased juries in Nova Scotia in the late 1830s and early 1840s, and, in doing so, explores the importance of juries for historians of constitutional politics, libel and the public sphere, and state formation.

This article first weighs the strength of the state in Nova Scotia according to its ability to implement jury reforms. It thus contributes to the historiography exploring the growth of government institutions and capabilities in pre-Confederation Canada.<sup>4</sup> Nova Scotia created complex jury selection systems that relied for their implementation on committees composed of magistrates and sheriffs. Magistrates and sheriffs, however, resisted the expansion of their administrative duties caused by the creation of a more bureaucratic jury selection regime. The battle between the legislature and the magistrates and sheriffs became a serious issue, interfering with the smooth operation of the judicial system and causing headaches for colonial politicians.

Juries also reflected, and influenced, debates about political parties, libel, and the public sphere. The increased acceptance of the idea of political 'parties' at mid-century ensured that politics seeped its way into the justice system, including the jury system.<sup>5</sup> Every trial could thus easily become a 'political' trial in mid-nineteenth-century British North America. This was especially important because of the rapid growth of the press in this period. Jeffrey McNairn argues that the expanding number of newspapers in Upper Canada, as well as the existence of other public forums such as taverns and voluntary associations, created a 'bourgeois public sphere' in which individuals could participate freely in debates over

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4 For some of the best studies of increased state activity at mid century see Allan Greer and Ian Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1992); Bruce Curtis, *True Government by Choice Men? Inspection, Education, and State Formation in Canada West* (Toronto: University of Toronto Press, 1992); J.I. Little, *State and Society in Transition: The Politics of Institutional Reform in the Eastern Townships, 1838-1852* (Montreal: McGill-Queen's University Press, 1997); Bruce Curtis, *The Politics of Population: State Formation, Statistics, and the Census of Canada, 1840-1875* (Toronto: University of Toronto Press, 2001).

5 On the growing acceptance of political parties see Carol Wilton, "British to the Core: Responsible Government in Canada West," in *Change and Continuity: A Reader on Pre-Confederation Canada*, ed. Carol Wilton (Toronto: McGraw-Hill Ryerson, 1992), 290; Phillip A. Buckner, *The Transition to Responsible Government: British Policy in British North America, 1815-1850* (Westport, CT: Greenwood Press, 1985), 73-7; Philip Girard, "'I will not pin my faith to his sleeve': Beamish Murdoch, Joseph Howe, and Responsible Government Revisited," *Royal Nova Scotia Historical Society Journal*, 4 (2001): 48-69.

issues of public importance.<sup>6</sup> Freedom of the press required that newspaper publishers have some protection from libel suits that could stifle political debate. Several high profile libel cases emphasized the role of the jury in protecting freedom of the press (and therefore reformers' ability to challenge the tory leadership of the colony). Jury reforms thus had special importance to the development of liberal democracy in British North America at mid-century.

In discussing the importance of jury reforms in the political and legal life of Nova Scotia, this article first briefly describes the colony's jury system in the 1830s. It then evaluates the ability of Nova Scotia to implement its jury legislation, and considers charges levelled by political reformers and Irish Catholic Nova Scotians that they were systematically excluded from jury service.

### The Nova Scotia Jury System

After establishing Halifax, the English began using juries, although until the late 1750s Nova Scotia did not draft its own criminal procedure laws but relied on the laws of England.<sup>7</sup> Nova Scotia passed jury statutes in 1759 and 1760,<sup>8</sup> then laid out more detailed selection methods when it passed a comprehensive jury selection statute in 1796.<sup>9</sup> This act required that the county sheriffs return to the county prothonotaries or clerks a list of all persons qualified to serve as jurors.<sup>10</sup>

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- 6 Jeffrey L. McNairn, *The Capacity to Judge: Public Opinion and Deliberative Democracy in Upper Canada, 1791-1854* (Toronto: University of Toronto Press, 2000). In making this claim, McNairn draws from the work of Jürgen Habermas. See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Thomas Burger, trans. (Cambridge, Mass.: Massachusetts Institute of Technology Press, 1991), 19-26; Craig Calhoun, "Introduction: Habermas and the Public Sphere," in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge: Massachusetts Institute of Technology, 1992), 1-48.
- 7 Jim Phillips, "'Securing Obedience to Necessary Laws': The Criminal Law in Eighteenth Century Nova Scotia," *Nova Scotia Historical Review* 12, no. 2 (1992): 92-106. The colony had not employed juries during the Annapolis regime. D.G. Bell, "Maritime Legal Institutions under the *Ancien Régime*, 1710-1850," *Manitoba Law Journal* 23 (1996): 106. And see T.G. Barnes, "'The Daily Cry for Justice': The Juridical Failure of the Annapolis Royal Regime, 1713-1749," in *Essays in the History of Canadian Law, Volume III: Nova Scotia*, eds. Philip Girard and Jim Phillips (Toronto: University of Toronto Press and Osgoode Society, 1990), 27-8; Thomas Garden Barnes, "'As Near as May Be Agreeable to the Laws of this Kingdom': Legal Birthright and Legal Baggage at Chebucto, 1749," in *Law in a Colonial Society: The Nova Scotia Experience*, eds. Peter Waite, Sandra Oxner, and Thomas Barnes (Toronto: Carswell, 1984), 1-23.
- 8 Phillips, "Halifax Juries in the Eighteenth Century," 138-40.
- 9 *An Act to regulate Juries*, Statutes of Nova Scotia [SNS] 1796, c.2.
- 10 The 'prothonotary and clerk of the Crown' acted as the chief clerk of the Supreme Court in Halifax. The prothonotary completed the administrative work of the Court, as well as serving as the clerk of the crown in criminal cases. Deputy prothonotaries performed the work of the chief prothonotary in each county. Barry Cahill and Jim Phillips, "The Supreme Court of Nova Scotia: Origins to Confederation," in *The Supreme Court of Nova Scotia, 1754-2004: From Imperial Bastion to Provincial Oracle*, eds. Philip Girard, Jim Phillips, and Barry Cahill (Toronto: University of Toronto Press and Osgoode Society, 2004), 71-2.

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The prothonotaries or clerks then wrote the names of the jurors on ballots and placed them in locked ballot boxes. The grand jury for the county for the year was then drawn, and the sheriff summoned the jurors. The selection process for petit jurors required the prothonotaries at the end of each term or session of a court to draw by ballot a new panel of petit jurors to be summoned for the next term or session. This system effectively divided the responsibility for jury selection between the sheriff and the prothonotary, and thus ensured that no single person could be charged with packing a jury.<sup>11</sup>

The legislature altered the method of selecting grand jurors in 1833. The 1833 act limited grand jury duty to wealthier citizens and dictated that jurors be drawn from different parts of each county or district. It also placed more power in the hands of sheriffs by eliminating the role of prothonotaries in jury selection. It required the sheriff of each county or district to make up lists of qualified persons. The sheriffs then returned these lists to the General Sessions, which determined how many grand jurors from each settlement or township would serve. The sheriff was to keep the names of the jurors for each township or settlement in a separate box, and then draw the appropriate number from each box when ordered to do so by the General Sessions.<sup>12</sup>

The 1833 act, then, placed grand jury selection almost wholly within the administrative control of the sheriff. Grievances soon emerged regarding the greater power exercised by the sheriffs.<sup>13</sup> Between 1834 and 1837, the Assembly received three petitions that protested the new grand jury selection scheme and

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11 *An act to regulate Juries*, SNS 1796, c.2, ss.2-3. For a contemporary description see Beamish Murdoch, *Epitome of the Laws of Nova Scotia*, vol. 3 (Halifax: Joseph Howe, 1833), 171-4. Cape Breton, which existed as a separate colony from 1784 to 1820, employed a similar jury selection system. Library and Archives Canada (LAC), MG9, B11: Cape Breton Ordinances: An Ordinance for regulating Grand and Petit Juries and Declaring the Qualification of Jurors, 1803.

12 *An Act relating to Grand Jurors*, SNS 1833, c.51.

13 Sheriffs possessed considerable power and job security before responsible government. In Nova Scotia, sheriffs received annual appointments. In the late eighteenth century, the chief justice of the Supreme Court nominated three people in each county to serve as sheriff; the lieutenant governor then chose one from this list. In practice, the lieutenant governor appointed the first person from the short-list. Despite the requirement for an annual reappointment, sheriffs often held their positions for very long periods before responsible government and it was almost impossible to prevent a sheriff's renewal, even if there were concerns about his conduct or competency. SNS, 35 Geo. III, c.1; *An Act to empower the Governor, Lieutenant Governor, or Commander in Chief, to appoint Sheriffs in such Counties where it may be found necessary*, SNS 1778, c.2; Brenton Halliburton to William Young (15 February 1856), Nova Scotia Archives and Records Management (NSARM), MG2, vol. 734, n.750: William Young Papers; Philip Girard, "The Supreme Court of Nova Scotia: Confederation to the Twenty-First Century," in *The Supreme Court of Nova Scotia, 1754-2004*, eds. Girard, Phillips, and Cahill, 152. On sheriffs in Upper Canada see David Murray, *Colonial Justice: Justice, Morality, and Crime in the Niagara District, 1791-1849* (Toronto: Osgoode Society and University of Toronto Press, 2002), 42-51.

argued that checks were needed on the sheriffs. In one petition, fifty-nine citizens of Truro noted that the 1833 act authorized the sheriff to make out the jury lists of such persons “as in his opinion” were qualified. Further, the sheriff also filled and kept the jury boxes and drew the jurors. These facts made it “evident that he has the sole power of forming the Grand Inquest of the County and (if he chose) of selecting a Jury to serve purposes of his own or in which he feels an interest without being subject to any control whatever.” The problem for the citizens of Truro was that “such a power vested in any one man is inconsistent with the principles of the noble Constitution,” which required that “the balance of power” be “nicely poised.”<sup>14</sup> The second petition came from Onslow (near Truro) in Colchester County in 1834. The petitioners felt compelled to turn the Assembly’s attention to the “defective state of the law regulating grand Juries” because they believed that “their civil rights and liberties are endangered.” The jury act of 1796 had split the duty of jury selection between the sheriff and prothonotary such that the two officials “thus constituted mutual checks upon each other and the community had at least the guarantee for impartiality in balloting this grand court of inquiry in which their civil rights and liberties are so much concerned.” But, as the 1833 act allowed the sheriffs to make up the lists and keep the ballot boxes, it placed “the whole power in the hands of the sheriffs making them the judges of the qualifications, keepers of the boxes and drawer of the ballots without any of those salutary checks which are necessary to secure impartiality.”<sup>15</sup> A third petition concerning the selection of grand juries came from the eastern part of Annapolis County in 1837. The petitioners stated their belief that the grand jury act had to be amended.<sup>16</sup>

In the heated election of 1836, Nova Scotians selected a number of reform-minded persons to the Assembly, and in 1838 these reformers helped usher in a major revision of Nova Scotia’s jury laws. The act responded to at least two broad concerns about juries. The first was a belief by many reformers that grand juries should appoint their own foremen.<sup>17</sup> The second motivation for a new jury bill was dissatisfaction with the selection procedures for grand jurors introduced in 1833.<sup>18</sup> The 1838 jury act thus established a new method for selecting grand jurors.<sup>19</sup> The biggest change was the adoption of a system using jury

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14 NSARM, RG5, series P, vol. 5, no.49: (15 December 1834) Petition from Truro concerning modifications in the duties of the Sheriff [emphasis in original].

15 NSARM, RG5, series P, vol. 5, no.59: (22 December 1834) Petition from Onslow concerning the regulations for the grand juries.

16 NSARM, RG5, series P, vol. 6, no.101: (9 March 1837) Petition from the eastern part of Annapolis County concerning a better means of selecting the grand jury.

17 *Novascotian*, 12 February 1835; “Grand Jury Presentment,” *Ibid.*, 27 December 1837.

18 *Journal of the House of Assembly* (JHA) 1837, 40, 43, 57.

19 For trial jurors, the practice temporarily remained the same: the sheriffs returned the names of persons qualified to serve to the prothonotaries or clerks, who then created ballots that were used to select the jury panels.

'committees.' In each county, the General Sessions was to select three magistrates representing different parts of the county. These three magistrates, along with the sheriff or his deputy, were to prepare lists of all people eligible to be grand jurors. The committee was to update the list at least every three years. The General Sessions then determined the number of grand jurors that should come from each of the townships and settlements of the county, and the sheriff and prothonotary balloted from boxes representing each community to determine the grand jury that would serve for the full year.<sup>20</sup>

The 1838 act also affected the selection of 'special juries' in Nova Scotia. Special juries were usually composed of jurors of a higher social rank than petit juries, and in England were often formed in commercial disputes, libel cases, and marital cases involving infidelity.<sup>21</sup> The Nova Scotia act of 1838 required that a panel of forty-eight potential special jurors be drawn from the boxes containing the names of grand jurors collected by the committees of magistrates and sheriffs. The parties received a copy of the panel, and the plaintiff and defendant took turns striking out names until twenty-four jurors were left, whom the sheriff then summoned.<sup>22</sup>

### Implementing the 1838 Jury Act

By removing grand jury selection from the exclusive control of the sheriff, the 1838 act seemed to offer a reasonable solution to the complaints from petitioners. Unfortunately for the legislature, the use of committees of magistrates and sheriffs to identify eligible jurors would prove a very troublesome practice from the very start. A major problem was that magistrates simply failed to complete the requirements of the act.

This issue first became evident in October 1839 in the trial of Smith Douglas Clarke and John Elexon at the Supreme Court in Halifax. Clarke faced an indictment for murder, and Elexon was charged as an accessory before the fact. A day before the trial was to begin, Attorney General Samuel George William Archibald learned that the Halifax grand jury had been drawn and summoned improperly. The problem arose from the 1838 jury act's requirement that three magistrates be appointed at the first General Sessions to make lists of the qualified jurors. According to the *Novascotian*, the magistrates "had made no appointment in the June Sessions – nor in September – nor until December."<sup>23</sup>

20 *An Act for the Regulation of Juries*, SNS 1838, c.6, ss.4-9.

21 Historians have given little attention to special juries in British North America. On their use in England see James C. Oldham, "The Origins of the Special Jury," *University of Chicago Law Review* 50 (1983): 137-221; James Oldham, "Special Juries in England: Nineteenth Century Usage and Reform," *Journal of Legal History* 8 (1987): 148-66.

22 Murdoch, vol. 3, 175-6; *An Act to regulate Juries*, SNS 1796, c.2, s.6; *An Act for the Regulation of Juries*, SNS 1838, c.6, s.17.

23 "Supreme Court," *Novascotian*, 23 October 1839.



As a result, the grand jury had been selected under the old law. After becoming aware of the problem, Attorney General Archibald recommended that the trial be postponed. The case attracted plenty of attention when it finally went to trial in January 1840, partly because it was a murder trial, which usually attracted large crowds, and partly, as the *Novascotian* noted, because of the delay caused by the failure to comply with the jury act which had “excited some curiosity.”<sup>24</sup> The jury ultimately found Clarke guilty and Elexon not guilty.

Attorney General Archibald and Solicitor General James W. Johnston brought the problems in Halifax jury selection to the Executive Council’s attention.<sup>25</sup> In a memorandum in October 1839, they told the Council that the defective state of the grand jury lists of Halifax County had induced them to delay the trial of Clarke and Elexon. Since the grand jury sitting for the year had been improperly constituted, Archibald and Johnston had not considered themselves “warranted in proceeding upon an indictment” found by such a jury. They believed that the problem could only be remedied by an act of the Assembly, without which, in their opinion, the Supreme Court and the General Sessions would not “have the aid of a legal Grand Jury at the next term.”<sup>26</sup>

Informed of the problem, Lieutenant Governor Colin Campbell emphasized the failure to implement the 1838 jury act in addressing the legislature on 31 December 1839. He told the legislators that he had been “principally induced to call you together at this early period, from its having come to my knowledge, that the requisitions of the Act for the Regulation of Juries, which passed in the Session of 1838, have not been duly attended to.” As a result, “important criminal proceedings have been already delayed for the want of legal Grand Juries, and great public inconvenience must necessarily follow, unless a speedy remedy shall be afforded by the Legislature.”<sup>27</sup> This led reformer William Young to present a bill to amend the jury act, “and render valid the proceedings of certain Grand Juries.”<sup>28</sup>

On 2 January 1840 the Assembly appointed a select committee to inquire into why magistrates and sheriffs had failed to comply with the 1838 jury act.<sup>29</sup> The committee reported back in March 1840. Officials in the counties of Lunenburg, Hants, Annapolis, Digby, Cumberland, Guysborough, Pictou, Colchester, Sydney, Kings, Queens, and Yarmouth claimed that their officials

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24 “Supreme Court,” *Ibid.*, 23 January 1840. Also see “Trial of Clarke and Elexon,” *Acadian Recorder*, 25 January 1840.

25 In 1838 the Council was divided in two: the Executive Council (which retained executive powers) and a new Legislative Council that sat as an upper house.

26 NSARM, RG1, vol. 214.5D: (5 Nov 1839) Executive Council Minutes. The original of this letter, dated 25 Oct 1839, is at NSARM, RG1, vol. 245, no.105.

27 *JHA* 1840, 643. Also see *Acadian Recorder*, 4 January 1840.

28 *JHA* 1840, 645.

29 *JHA* 1840, 646.

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had complied with the 1838 statute. However, Robert Roberts, the sheriff of Cape Breton, said that the act had arrived too late for its provisions to be met.<sup>30</sup> In two other counties, Richmond and Inverness, the sheriff and magistrates, despite being notified of the new act, did not follow it; instead, they drew grand jurors under the old law. There were other problems. In Shelburne County, three magistrates were appointed, but they were not sworn as the law directed. Halifax experienced an egregious failure. The clerk of the peace for the county acknowledged that he saw the act published in the *Royal Gazette*, yet the committee of the Assembly reported that “the June Term (the first after the passing of the Act,) passed over without the legal nomination of Justices – and a loose and unsatisfactory reason is given by the Clerk of the Peace for this most culpable neglect of the Law.”<sup>31</sup> Whatever the reason offered by the clerk of the peace, the real reason for the failure to comply may have been that the magistrates and the sheriff did not receive any additional compensation for their work on the jury selection committees.

The Assembly debated the problem in early January 1840 and almost immediately decided to address the issue, even before the committee had made its report. Young’s proposed bill would have legalized all proceedings of grand juries, except for criminal indictments, even if the grand juries were not formed according to the statute. Young rationalized the move by saying that something had to be done to stop the embarrassment to the country. He was perplexed that the justices and grand juries had disobeyed the law in many counties: “They had exercised all the powers of legal authorities, – they had proceeded to find indictments, – to try criminals, – and to make assessments, without the least shadow of law for so doing.”<sup>32</sup>

James Boyle Uniacke, a lawyer and member of one of the most esteemed families in the colony, opposed the idea that the Assembly should approve the proceedings of improperly selected grand juries. He laid the blame for the failure to administer the act on the magistrates, who, he said, “were themselves entirely irresponsible.”<sup>33</sup> Further, he pointed out that the Assembly must, in part, blame itself for the lack of compliance, because the act had required that the committee of three magistrates be appointed at the first meeting of the General Sessions after the act’s passage. It had taken so long for the act to be received in some parts of the province, however, that this date had passed and

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30 For a discussion of communication difficulties within the Nova Scotia justice system see William H. Laurence, “Process and Particulars: The Informational Needs and Sources of a Nineteenth-Century Nova Scotian Sheriff,” *Épilogue* 12, no. 1 (1997): 1-22.

31 *JHA* 1840, App. 87, 226.

32 “Provincial Parliament,” *Acadian Recorder*, 11 January 1840. Also see “House of Assembly,” *Ibid.*, 4 January 1840.

33 “House of Assembly,” *Ibid.*, 4 January 1840; J. Murray Beck, “James Boyle Uniacke,” *Dictionary of Canadian Biography (DCB)*, Vol. 8.

officials went ahead and appointed grand juries in the way they had before the 1838 act. For his part, Thomas Forrester, a prosperous Halifax merchant and radical member of the reform movement, believed that the magistrates should have attempted to abide by the act as soon as possible, rather than simply disregard it. He criticized the magistrates, saying that, although many were respectable in private life, they often lacked the energy or talent required for public affairs.<sup>34</sup>

The 1840 legislation validated the decisions of grand juries, even if not formed under the 1838 act. The statute also stipulated that at the opening of the next sitting of the Supreme Court, the justice or justices were to find out if the General Sessions had formed jury selection committees and whether the jury lists had been made out properly. If these tasks were incomplete, then the justice(s) were to nominate and appoint three magistrates from the county and swear them to discharge their duty. Despite the problems of implementing the 1838 statute, the 1840 amendment extended the use of jury committees to the formation of the lists of eligible trial jurors.<sup>35</sup>

The failure of the magistrates to fulfill their statutory duties demonstrated the weakness of the state in Nova Scotia in the late 1830s and early 1840s. In discussing the governance of Nova Scotia, Lieutenant Governor Campbell said in July 1840 that “by far the most serious defect in the Government” was the utter lack “of power in the Executive and its total want of energy to attempt to occupy the attention of the Country upon real improvements or to lead the Legislature in the preparation and adoption of measures for the benefit of the colony.”<sup>36</sup> It was not just a lack of will that hindered new initiatives however. Nova Scotia also lacked effective administrative instruments.

Magistrates were dispersed across the colony, often in rather remote locations, and were thus clumsy tools for implementing a new jury selection program. Magistrates situated far from the capital possessed considerable power in their localities because they could act with substantial independence. A reader of works by Judith Fingard and Jim Phillips on the criminal justice system in Halifax might assume a strong state apparatus across Nova Scotia.<sup>37</sup>

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34 “Legislative Summary,” *Novascotian*, 16 January 1840; David A. Sutherland, “Thomas Forrester,” DCB, vol. 7. Also see “Provincial Parliament,” *Acadian Recorder*, 11 January 1840.

35 *An Act to continue and amend the Act for the Regulation of Juries, and to render valid the proceedings of certain Grand Juries*, SNS 1840, c.8, ss.2-6.

36 Lieutenant Governor Sir Colin Campbell to Lord John Russell (27 July 1840), LAC, RG7, G7, vol. 11: Governor General’s Office, Despatches from Lieutenant Governors to Governor, Lieut. Governor Nova Scotia to Governor, 1820-1827, 1836-1877.

37 See, for example, Jim Phillips, “Securing Obedience to Necessary Laws’: The Criminal Law in Eighteenth Century Nova Scotia;” Jim Phillips, “Poverty, Unemployment, and the Administration of the Criminal Laws: Vagrancy Laws in Halifax, 1864-1890,” in *Essays in the History of Canadian Law, Volume III*, 128-62; Jim Phillips, “The Criminal Trial in Nova

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Historians, however, have paid less attention to the justice system in the rural areas of the colony, and the historiography that does exist suggests that a high level of state control did not exist outside the metropolis before Confederation. Local resistance to the extension of centralized legal systems was not unknown in the British North American colonies in the mid-nineteenth century,<sup>38</sup> and any changes to the legal system that increased the burden on the colony's magistrates was probably unappreciated. Even in Halifax County, where the state was presumably strongest, the magistrates failed to comply with the 1838 legislation.

Nova Scotia's inability to uniformly implement the act across the colony thus indicates the weakness of the magistracy as a tool for carrying out complicated state policies. Except for the single 'First Justice' in each General Sessions, the vast majority of the colony's magistrates had little or no legal education, and rarely possessed the social status of justices of the peace in England. English magistrates were chosen from the leisure class,<sup>39</sup> but no such class existed in rural Nova Scotia. The magistrates thus tended to resent the large amounts of time judicial work consumed – they preferred duties that brought them the spoils of patronage.<sup>40</sup> This was a very localized justice system, and, as Graeme Wynne concludes, "these officials were tentacles of the 'state'," but "their strength in that capacity should not be overestimated" since "most jus-

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Scotia, 1749-1815," in *Essays in the History of Canadian Law, Volume VIII: In Honour of R.C.B. Risk*, eds. G. Blaine Baker and Jim Phillips (Toronto: University of Toronto Press and Osgoode Society, 1999), 469-511; Jim Phillips, "Women, Crime, and Criminal Justice in Early Halifax, 1750-1800," in *Essays in the History of Canadian Law, Volume V: Crime and Criminal Justice*, eds. Jim Phillips, Tina Loo, and Susan Lewthwaite (Toronto: University of Toronto Press and Osgoode Society, 1994), 174-206; Judith Fingard, *The Dark Side of Life in Victorian Halifax* (Potters Lake, NS: Pottersfield Press, 1989); Judith Fingard, "Jailbirds in Mid-Victorian Halifax," in *Law in a Colonial Society*, eds. Waite, Oxner, and Barnes, 81-102.

38 Michael S. Cross, "'The Laws Are Like Cobwebs': Popular Resistance to Authority in Mid-Nineteenth Century British North America," in *Ibid.*, 103-23; Susan Lewthwaite, "Violence, Law, and Community in Rural Upper Canada," in *Essays in the History of Canadian Law, Volume V*, 353-86; Jack Little, "Popular Resistance to Legal Authority in the Upper St. Francis District of Quebec: The Megantic Outlaw Affair of 1888-89," *Labour/Le Travail* 33 (1994): 97-124.

39 On English magistrates see Norma Landau, *The Justices of the Peace, 1679-1760* (Berkeley: University of California, 1984); J.M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton, NJ: Princeton University Press, 1986), 59-67.

40 Sandra E. Oxner, "The Evolution of the Lower Court of Nova Scotia," in *Law in a Colonial Society*, 68; J. Murray Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957), 129; W.S. MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857* (Toronto: McClelland and Stewart, 1965), 186-7. For a contemporary description of the role of magistrates see John George Marshall, *The Justice of the Peace and County & Township Officer in the Province of Nova Scotia* (Halifax: Gossip & Coade, 1837).

tices enjoyed a great deal of freedom in their conduct of local business; many indeed fell sorely short of the demands of their offices.”<sup>41</sup>

### **Politics, Ethnicity, and Jury Packing**

The ink was barely dry on the 1840 legislation responding to the failure to implement the 1838 act when new criticisms began to emerge. Whereas complaints about the problem of implementing the 1838 statute focused on the weakness of the colonial state, the criticisms that appeared after 1840 related to ethnic animosities, changing ideas about the propriety of political ‘parties,’ and the role of libel and the press in shaping the public sphere. Reformers and Irish Roman Catholic Nova Scotians charged that magistrates and sheriffs were intentionally selecting biased jurors; that is, they were attempting to pack juries with Tories and Protestants.

The roots of this challenge to the justice system’s fairness frequently stretched from Nova Scotia across the Atlantic to Ireland. Most of the almost 13,000 Irish who arrived in Halifax between 1815 and 1839 were Protestant. Many passed through Nova Scotia and settled in New Brunswick. Of those that remained before 1840, most established themselves along the eastern shore of Nova Scotia, in the Arichat-St. Peter’s area of Cape Breton, or in Halifax, where they could find work as labourers on the construction of wharves and warehouses along the waterfront and on the new Citadel Hill fortifications. A few of these early immigrants prospered, such as Lawrence Kavanagh, who in 1823 became the first Catholic to take a seat in the Assembly. Another Irish Catholic, Lawrence O’Connor Doyle, joined Kavanagh, representing Arichat, Cape Breton County in the Assembly in 1832. Doyle teamed with Joseph Howe to provide leadership in the 1830s to the inexperienced cast of reformers in the Assembly. Born in Halifax in 1804 to a Roman Catholic merchant, Doyle received his education at Stoneyhurst College in Lancashire, England. Returning to Nova Scotia in 1823, Doyle studied law under Richard John Uniacke and became the first Catholic lawyer in the colony when he received his call to the bar in 1828. Soon after entering the Assembly in 1832, he became an avowed reformer, and, along with William Young, served as a source of legal expertise for the reformers. Doyle also joined the non-sectarian Charitable Irish

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41 Graeme Wynn, “Ideology, Society, and State in the Maritime Colonies of British North America, 1840-1860,” in *Colonial Leviathan*, 313. For other discussions of magistrates and their effectiveness see Allan Greer, “The Birth of the Police in Canada,” in *Ibid.*, 18; Murray, *Colonial Justice: Justice, Morality, and Crime in the Niagara District*, 42; Susan Dawson Lewthwaite, “Law and Authority in Upper Canada: The Justices of the Peace in the Newcastle District, 1803-1840” (Ph.D Dissertation, University of Toronto, 2001), 82-7; Donald Fyson, “Criminal Justice, Civil Society and the Local State: The Justices of the Peace in the District of Montréal, 1764-1830” (Ph.D dissertation, Université de Montréal, 1995).

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Society, whose membership included Joseph Howe and Thomas Chandler Haliburton.<sup>42</sup>

The close connection between Doyle and Howe mirrored the larger relationship between the reform movement and Irish Catholics in Nova Scotia. Many Irish Catholic immigrants felt that the Nova Scotia political system failed to support their interests or provide opportunities for advancement. Just before the incorporation of Halifax in 1841, for example, Irish Catholics held only fifteen of 130 places as magistrates and as other petty officials in the city. "This might not concern a day-labourer," Terrence Punch points out, "but an ambitious Irish storekeeper might resent a system that relegated his race and creed to process-servers and cullers of fish."<sup>43</sup> The Irish thus supported the reformers' goal of removing the oligarchy controlling much of Nova Scotia.

The connection between the reform movement and the Irish would not last indefinitely. Several factors frayed the unity of reformers. First, friction grew because of the continued poor representation of Irish in elected and appointed positions, despite the successes of a few prominent men such as Doyle.<sup>44</sup> Another source of tension was the extent to which many Irish Catholics came to support the Repeal Movement in Ireland. The *Act of Union*, 1801 had formally combined England and all of Ireland. Daniel O'Connell, the most prominent voice of Irish independence during the first half of the nineteenth century, led the movement in Ireland for repeal.<sup>45</sup> In Nova Scotia, Doyle increased his interest in Irish affairs during the 1840s. He supported Irish repeal, as did many members of the Charitable Irish Society. This support, how-

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42 Charles Bruce Fergusson, "Laurence (Lawrence) O'Connor Doyle," *DCB*, vol. 9; Terrence M. Punch, *Some Sons of Erin in Nova Scotia* (Halifax: Petheric Press, 1980), 39-46; Kildare Dobbs, "Newfoundland and the Maritimes: An Overview," in *The Untold Story: The Irish in Canada*, vol. 1, eds. Robert O'Driscoll and Lorna Reynolds (Toronto: Celtic Arts of Canada, 1988), 191-3; Terrence M. Punch, "'Gentle as the Snow on a Rooftop': The Irish in Nova Scotia to 1830," in *Ibid.*, 226-7; Herbert Leslie Stewart, *The Irish in Nova Scotia: Annals of the Charitable Irish Society of Halifax, 1786-1836* (Kentville, NS: Kentville Publishing Company, 1949), 131-8.

43 Terrence M. Punch, *Irish Halifax: The Immigrant Generation, 1815-1859* (Halifax: International Education Centre, Saint Mary's University, 1981), 38.

44 For example, in Halifax there were thirty-three important civic offices to be filled each year between 1842 and 1849. The recorder and marshal were unelected. The other thirty-one positions consisted of the mayor, six alderman, twelve common councillors, and twelve city assessors. There were never more than three Irish Catholics among the thirty-three office-holders during the 1840s. In part, this lack of representation stemmed from the fact that many Irish did not fulfill the necessary property qualifications for voting. The act incorporating the city of Halifax limited voters to those who owned or occupied a house, warehouse, field, wharf or shop valued at twenty pounds. *An Act to Incorporate the Town of Halifax*, SNS 1841, c.55; Punch, *Irish Halifax: The Immigrant Generation*, 39-40.

45 Oliver MacDonagh, *The Hereditary Bondsman: Daniel O'Connell, 1775-1829* (London: Weidenfeld and Nicolson, 1988); K. Theodore Hoppen, *Ireland Since 1800: Conflict and Conformity* (London: Longman, 1989), 9-32.

ever, threatened to create a cleavage with anglophile reformers, many of whom deemed the repeal movement disloyal.<sup>46</sup> These problems contributed to the collapse of a tory and reform coalition government in 1843; the subsequent election placed in power a tory ministry with a slim majority headed by James W. Johnston, who became Attorney General.<sup>47</sup>

The influx of Irish immigrants to Nova Scotia because of the Irish potato famine constituted a third cause of discord. During the 1840s, as famine ravaged Ireland, an increasing number of Irish Catholics came to all of the Atlantic provinces. More likely to settle in towns than the previous Irish immigrants, the new wave soon constituted a substantial proportion of the urban labour force. Usually without many financial means when they arrived, Irish Catholics brought with them a history of religious and ethnic mistrust and conflict. Halifax had the greatest concentration of Irish in Nova Scotia, and the amount of ethno-religious tension soon rose dramatically.<sup>48</sup>

In this context of discord, the Irish and reformers united in criticizing the justice system, and, in particular, jury selection. Early criticisms were levelled at sheriffs. For example, in January 1841 ‘Darby O’Toole’ complained in the *Novascotian* about sheriffs and their partiality in the jury selection process. O’Toole began by reminding readers that every person discharging important judicial duties should “so comport himself in the eyes of the public that not even a *suspicion of partiality* in the exercise of his *official* functions, could be reasonably entertained.” The sheriff should be held to the same standard. “Such however is the constitution of frail human nature that it is morally *impossible* for a Sheriff, who is a *violent political partizan*, to perform the duties of his office without incurring (and indeed deserving) the imputation of *partiality*.” “Not a writ can be served,” O’Toole continued, “not an *execution* extended – not a *venire facias* issued – not a *Sheriff’s Jury* impaneled – without a *manifest token* of either forbearance or severity that may be fairly attributed to peculiar political views.”<sup>49</sup>

Reformers also frequently aimed their attacks at the magistrates, who, along with the sheriff, constituted the committees responsible for selecting eligible jurors. In December 1842, ‘Morgan Dillyham’ criticized the selection of grand

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46 Fergusson, “Laurence (Lawrence) O’Connor Doyle;” *Punch, Some Sons of Erin in Nova Scotia*, 39-46.

47 D.A. Sutherland, “James William Johnston,” *DCB*, vol. 10 (1871-1880); J. Murray Beck, *Politics of Nova Scotia, Volume One: Nicholson-Fielding, 1710-1896* (Tantallon, NS: Four East, 1985), 123.

48 T.W. Acheson, “The 1840s: Decade of Tribulation,” in *The Atlantic Region to Confederation: A History*, eds. Phillip A. Buckner and John G. Reid (Toronto: University of Toronto Press, 1994), 314-6. Increasing ethno-religious tensions stemming from greater Irish immigration in the 1840s was not of course limited to Nova Scotia. See, for example, Scott W. See, *Riots in New Brunswick: Orange Nativism and Social Violence in the 1840s* (Toronto: University of Toronto Press, 1993).

49 “Sheriffs,” *Novascotian*, 21 January 1841.

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jurors in Annapolis County. In doing so, he blamed the tory magistrates of the county. It was “lamentable that these opposers *fill all the principal offices in the County* – are a majority on the Bench of Sessions – and do not always conceal their party predilections, prepossessions, and prejudices, in the discharge of duties which are of the most grave and important character.” Dillyham continued, asserting that because of partisan magistrates there was “*not a legal Grand Jury in the County.*” His charge was that the 1838 jury act required that a committee of three magistrates work with the sheriff to help select the potential grand jurors, but that only two magistrates had acted in that capacity. This was not an innocent oversight, claimed Dillyham. He said that at least three-quarters of the county’s freeholders were friends of responsible government, but the biased committee meant that the grand jury consisted almost wholly of tories.<sup>50</sup>

To understand why reformers expressed fierce views about jury composition, it is necessary to appreciate the connection between the Nova Scotia press, libel law, the debate about ‘party’ government, and Jeffrey McNairn’s thesis that reformers were concerned with creating outlets for informed public debate. In early nineteenth-century British North America, there were few regularly published newspapers. Those that were published had a limited readership, and aimed at a genteel audience. They shaped their content accordingly to include, for example, commercial and foreign news, and essays on morals, history and literature. Most newspapers were reluctant to comment on provincial politics. This changed in the 1820s and 1830s. The number of communities in Upper Canada (and Nova Scotia)<sup>51</sup> with local newspapers rose dramatically, and McNairn suggests that most of these Upper Canada newspapers “became political weapons to create and reflect public opinion.”<sup>52</sup> Newspapers increasingly published legislative debates and political commentary. Readers participated in this new forum of political dialogue by subscribing to papers reflecting their political orientation and by writing letters to the editor.

As newspapers became more interested in local politics and political dialogue, the reform press pushed traditional boundaries of journalistic decorum in challenging the colonial tory oligarchies. Politicians of all political stripes recognized and celebrated freedom of the press, but opinion differed as to

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50 “County Affairs” *Ibid.*, 15 December 1842 [emphasis in original].

51 Gertrude E.N. Tratt, *A Survey and Listing of Nova Scotia Newspapers, 1752-1957* (Halifax: Dalhousie University Libraries and Dalhousie University School of Library Service, Occasional Paper 21, 1970); D.C. Harvey, “Newspapers in Nova Scotia, 1840-1867,” *Canadian Historical Review*, 26 (1945), 279-301; J.S. Martell, “The Press of the Maritime Provinces in the 1830s,” *Ibid.*, 19 (1938), 24-49. Nova Scotia also witnessed a rapid growth in the number and size of voluntary associations at mid century, which McNairn identifies as constituting another important forum for public debate. David Sutherland, “Voluntary Societies and the Process of Middle-class Formation in Early-Victorian Halifax, Nova Scotia,” *Journal of the Canadian Historical Association* 5 (1994): 237-63.

52 McNairn, *The Capacity to Judge*, 119.



whether the law should regulate civility in newspapers. The Family Compact in Upper Canada employed the law to rein in opposition publishers, either through government prosecutions (seditious libel) or when individual members of the compact privately sued newspaper proprietors for libel.<sup>53</sup> This occurred in Nova Scotia as well, where tories argued that the reform press divided the colony into political camps by misrepresenting the truth and demonizing those branded 'tories.' Many Nova Scotians in the early 1840s had yet to accept the idea of political parties; they instead expressed faith in the ability of independent and public-spirited men to represent the interests of all Nova Scotians. Many tories believed that checks were needed to limit power, and stressed the independence of elected legislators. Thus the tory William Johnston feared parties, believing that they encouraged patronage, while Beamish Murdoch resisted the reformers' view that patronage should be dispensed according to the wishes of the party with a majority in the Assembly. Murdoch believed that reason in politics, not opposition, achieved the best results.<sup>54</sup>

From the perspective of many tories, libel proceedings constituted a legitimate means of forcing aggressive liberal party-builders to refrain from using their aligned presses to express extreme rhetoric of questionable veracity. The tory *Morning Post* encapsulated this view in 1844, writing that Nova Scotia's newspapers "now teem with falsehoods innumerable." They "in fact, insert *anything* that will have an apparent tendency to advance the interests of a party, or gain supporters to a few interested individuals, who hold several presses under their thumb, as the instruments of gaining power, by cajoling the people with sophistry, or misleading them with untruths."<sup>55</sup>

53 H. Pearson Gundy, "Liberty and Licence of the Press in Upper Canada," in *His Own Man: Essays in honour of Arthur Reginald Marsden Lower*, eds. W.H. Heick and Roger Graham (Montreal: McGill-Queen's University Press, 1974), 71-92; Barry Wright, "Sedition in Upper Canada: Contested Legality," *Labour/Le Travail* 29 (1992): 7-57. On liberty of the press and libel in Prince Edward Island see J.M. Bumsted, "Liberty of the Press in Prince Edward Island," in *Canadian State Trials, Volume I: Law, Politics, and Security Measures, 1608-1837*, eds. F. Murray Greenwood and Barry Wright (Toronto: University of Toronto Press and Osgoode Society, 1996), 522-46.

54 Girard, "'I will not pin my faith to his sleeve': Beamish Murdoch, Joseph Howe, and Responsible Government Revisited," 48-69; Beck, *Politics of Nova Scotia*, 117; Beck, "The Party System in Nova Scotia," *Canadian Journal of Economics and Political Science* 20 (1954): 514-5. Also see Janet Ajzenstat, "The Constitutionalism of Etienne Parent and Joseph Howe," in *Canadian Constitutionalism, 1791-1991*, ed. Janet Ajzenstat (Ottawa: Canadian Study of Parliament Group, 1992), 168-70; Buckner, *The Transition to Responsible Government*, 296; Greg Marquis, "In Defence of Liberty: 17th-Century England and 19th-Century Maritime Political Culture," *University of New Brunswick Law Journal* 42 (1993): 69-94.

55 "Misrepresentations," *Halifax Morning Post*, 3 September 1844, 3. Also see "Party Policy," *Ibid.*, 21 September 1844, 2; "Politics of Nova Scotia," *Ibid.*, 5 October 1844, 3; "Provincial Politics, Past, Present and Future," *Ibid.*, 5 December 1844, 3; "Party Combinations," *Ibid.*, 11 January 1845, 2; "Politics of Nova Scotia," *Halifax Times*, 18 June 1844, 5; *Ibid.*, 10 September 1844, 3; "Party Policy," *Ibid.*, 17 September 1844, 6.

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The reform press, of course, perceived things differently. Many reformers stated their belief that two parties were already in *de facto* existence, and that an active and critical press needed to inform Nova Scotians of the decisions of the tory 'party' that had come to power with the collapse in 1843 of the 1840 coalition government.<sup>56</sup> In August 1844, the *Yarmouth Herald*, a reform newspaper, suggested that the tories had the support of just two of the colony's fourteen or fifteen newspapers, which meant that they were "beginning to feel the estimation in which they are held by the intelligent yeomanry." But, if "the Liberal press could be silenced," warned the *Herald*, "and the constituency be uninformed of what is transpiring, or informed only through official and subservient channels, certain personages might feel perhaps more secure than they do at present."<sup>57</sup>

In the 1835 Joseph Howe trial for seditious libel, a relatively friendly jury found for Howe.<sup>58</sup> In the cases of Richard Nugent and William Annand, Nova Scotian reformers were less fortunate than Howe, and charges of jury packing flew furiously. Law and politics collided in these spectacular cases, which became symbols for the necessity of jury reform to protect press freedom.

In complaining of partiality in the justice system, especially bias in jury selection, reformers, and especially the Irish Catholics among them, tapped into the long history of jury packing in Ireland. Charges of jury packing marred Irish trials throughout the nineteenth century as Irish Catholics asserted that juries were full of biased Protestants.<sup>59</sup> Despite attempts to rig juries, however,

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56 See, for example, "To the Patrons of the Novascotian and Morning Chronicle," *Halifax Morning Chronicle*, 7 May 1844, 2; "The No-Party System – How it Works," *Ibid.*, 3 September 1844, 2; "The Conservatives and the Government," *Ibid.*, 19 September 1844, 2.

57 "The Press," *Yarmouth Herald*, 1 August 1844, 3. Also see *Halifax Morning Chronicle*, 13 August 1844, 2-3; "The Governor's Printer," *Ibid.*, 5 September 1844, 2-3.

58 David Alexander Sutherland, "The Merchants of Halifax, 1815-1850: A Commercial Class in Pursuit of Metropolitan Status," (Ph.D. Dissertation, University of Toronto, 1975), 264, n.77. Also see Beck, Joseph Howe, *Volume I: Conservative Reformer, 1804-1848* (Kingston and Montreal: McGill-Queen's University Press, 1982), 129-46; Beck, "'A Fool for a Client': The Trial of Joseph Howe," in *The Acadiensis Reader, Volume I: Atlantic Canada Before Confederation*, eds. P.A. Buckner and David Frank, (Fredericton, NB: Acadiensis Press, 1985), 227-44; Barry Cahill, "R. v. Howe (1835) for Seditious Libel: A Tale of Twelve Magistrates," in *Canadian State Trials, Volume I*, eds. Greenwood and Wright, 547-75; Lyndsay M. Campbell, "Licence to Publish: Joseph Howe's Contribution to Libel Law in Nova Scotia," forthcoming in *Dalhousie Law Journal*. For an earlier example of how seditious libel was employed to chill public criticism in Nova Scotia see Barry Cahill, "Sedition in Nova Scotia: R. v. Wilkie (1820) and the Incontestable Illegality of Seditious Libel before R. v. Howe (1835)," *Dalhousie Law Journal* 17 (1994): 458-97.

59 R. Blake Brown, "'A Delusion, A Mockery, and a Snare': Challenges to the Array and Jury Selection in England and Ireland, 1800-1850," *Canadian Journal of History* 39 (2004): 1-26; John F. McEldowney, "The Case of The Queen v. McKenna (1869) and Jury Packing in Ireland," *Irish Jurist* 12 (1977): 339-53; J.F. McEldowney, "Some Aspects of Law and Policy in the Administration of Criminal Justice in Nineteenth-Century Ireland," in *The Common Law Tradition: Essays in Irish Legal History*, eds. J.F. McEldowney and Paul O'Higgins (Dublin:

nineteenth-century Irish jurors were notorious for their willingness to acquit defendants; Irish juries convicted defendants at considerably lower rates than their English counterparts. Several factors led to lower conviction rates, including a more tolerant attitude towards violent crime, and juror sympathy with defendants accused of ‘agrarian’ crimes, such as cattle mutilation and assaults stemming from landlord and tenant disputes. Jury intimidation was also sometimes a factor, as jurors feared reprisals for finding guilty verdicts.<sup>60</sup> Popular resistance to the implementation of central authority thus marked Ireland in this period, as did a desire by officials to reduce the number of acquittals by packing juries, especially in high profile, political cases. Jury selection therefore became contentious.

This issue burst onto the public consciousness in 1844 with the O’Connell trial. In *O’Connell*, eight Irish Catholic defendants were charged and convicted of sedition. The key defendant was Daniel O’Connell, who in 1843 had begun to organize massive meetings throughout Ireland to call for the repeal of the *Act of Union*. The English government sought to silence him, and in October 1843 he, and several of his supporters, were arrested and charged with sedition. This led to concerns that a packed jury would try O’Connell. At trial, the defendants objected to the special jury on several grounds, including that the jury book for Dublin had been fraudulently prepared. Ostensibly, the jury book was to contain the names of all eligible jurors, but the defendants charged that it did not contain the names of fifty-nine eligible Catholic jurors.<sup>61</sup> The Court dismissed the defendants’ objection, and O’Connell was found guilty and sentenced to a year in jail. The defendants grounded an appeal to the House of Lords on several claims, including the failure of the trial court to substantiate their complaint regarding the jury selection process.<sup>62</sup>

The House of Lords divided three to two in the appeal in overturning the conviction. The most famous of the majority judgments was that of Lord Denman. He believed that if the House of Lords did not insist on granting a

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Irish Academic Press, 1990), 136-53; John D. Jackson, Katie Quinn, and Tom O’Malley, “The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past,” in *World Jury Systems*, ed. Neil Vidmar (Oxford: Oxford University Press, 2000), 284-88; Neal Garnham, *The Courts, Crime and the Criminal Law in Ireland, 1692-1760* (Dublin: Irish Academic Press, 1996), 133-45.

60 David Johnson, “Trial by Jury in Ireland, 1860-1914,” *Journal of Legal History* 17 (1996): 270-93; John Saville, *1848: The British State and the Chartist Movement* (Cambridge: Cambridge University Press, 1987), 47-52, 186-192.

61 For the arguments concerning the challenge to the jury at the trial see *Shaw’s Authenticated Report of the Irish State Trials* (Dublin: Henry Shaw, 1844). Also see Charles Gavin Duffy, *Young Ireland: A Fragment of Irish History, 1840-1850* (New York: D. Appleton and Company, 1881), 389-414.

62 *O’Connell v. Reg.*, [1844] 8 *All England Law Reports* 1061, 1071-73. On the politics surrounding the case see Robert Carl Shipkey, *Robert Peel’s Irish Policy: 1812-1846* (New York, 1987), 346-54.

remedy for the trial court's failure to uphold the challenge to the jury panel, then trial by jury, he declared in a famous quip, "instead of being a security to persons who are accused," would be "a delusion, a mockery, and a snare."<sup>63</sup>

The trial of O'Connell received extensive newspaper coverage, not only in England and Ireland, but also in British North America, including Nova Scotia.<sup>64</sup> It had an immediate impact in Nova Scotia, where many Irish Catholics and reformers invoked it in substantiating their complaints about jury selection. An early instance of O'Connell's trial in the Nova Scotia discourse about juries appeared in May 1844 when Richard Nugent charged that a partial jury selected by tory magistrates had convicted him for libel. Nugent had learned the newspaper trade under the tutelage of Howe. As Howe became more interested in politics, Nugent increased his role at the *Novascotian*, ultimately becoming its sole owner in 1842. His time as proprietor would be short lived however. A strong defender of reformers, his criticisms of tories led to a series of libel proceedings. In August 1842 he published a letter that criticized the Halifax city recorder, William Q. Sawers. The letter said, among other things, that Sawers was "a rapacious attorney, doing a small business." In November of the same year, the *Novascotian* printed another letter attacking a 'Councillor Skunkfeet,' a reference that Silas Livingston Morse of Annapolis County identified as himself. Sawers and Morse, with the assistance of Attorney General Johnston, sued Nugent for libel and in both cases juries found against Nugent. As a result, Nugent faced damages totaling £150, plus costs. New libel suits and the threat of bankruptcy forced Nugent to sell the *Novascotian* in the fall of 1843. Unable to pay his new debts, Nugent was sent to the county jail for twelve months.<sup>65</sup>

Nugent, however, did not sit quietly in his jail cell. In May 1844, he wrote to the *Novascotian* to argue that the justice system was biased against reformers. "Circumstances have given my enemies a triumph, but it is the triumph of the strong over the weak – of the wealthy and powerful over the poor and humble," he asserted; it was "not the triumph of justice, but of power." He focused on special juries, calling them "admirable contrivances to punish the conductors of Liberal Journals, especially when the Grand Jury list from which they

63 *O'Connell v. Reg.*, 1135

64 Nova Scotia newspapers representing all political perspectives covered the case. See, for example, "The Irish State Trials," *Halifax Morning Chronicle*, 3 October 1844, 2; "The Irish State Trials," *Halifax Times*, 13 August 1844; "The Irish State Trials," *Yarmouth Herald*, 10 October 1844, 1; "The State Trials," *Spirit of the Times*, 28 June 1844, 4.

65 Beck, "Richard Nugent," *DCB*, Vol. 8. For discussions of the litigation see "Libel Case – Sawers vs. Nugent," *Halifax Morning Post*, 25 July 1843, 2; "Correspondence," *Ibid.*, 27 July 1843, 2; "Libel," *Halifax Times*, 17 October 1843, 5; "Supreme Court," *Morning Herald*, 21 July 1843, 2; "Libel Case – Sawers vs. Nugent," *Yarmouth Herald*, 4 August 1843, 3. The special jury panels for Nugent's trials may be found at NSARM, RG39, series C, Halifax County Supreme Court: Sawers vs. Nugent (1843).

are drawn is made up almost exclusively of violent and uncompromising Tories!” Nugent was a Roman Catholic, and he compared how his opponents secured legal victories with how Daniel O’Connell had been convicted: “Verdicts have been secured against me precisely as the Tory Ministry of England secured a verdict against the patriotic O’Connell.”<sup>66</sup>

Allegations of a packed jury in an 1844 Amherst libel case against William Annand further evidenced the importance of jury composition in the context of debates over party politics and freedom of the press.<sup>67</sup> The publisher of the *Pictou Observer* sued Annand, who had taken control of the *Novascotian* after Nugent’s financial collapse. An article in the *Novascotian* in September 1844, later attributed to Joseph Howe,<sup>68</sup> asserted that the prothonotary had failed to keep the ballot box in his possession before the jury had been selected. Instead, the sheriff of Cumberland County, Joshua Chandler, transported the jury box from the courthouse to the deputy prothonotary’s office. Chandler claimed that the weight of the box forced him to pause at the business of James Delaney,<sup>69</sup> where it was alleged that those who were “interested in obtaining verdicts against the Liberal Press” could tamper with it.<sup>70</sup> Of 312 potential jurors, 226 lived in rural Cumberland County (where tories held sway), while eighty-six lived in Amherst (a stronghold of reformers). The forty-eight member jury panel, however, contained only two inhabitants from Amherst. Howe mocked the composition of the panel by keeping a box in his office containing 226 black beans and eighty-six white beans and suggesting that no one who blindly drew from the box could match the division of jurors in Annand’s libel case.<sup>71</sup> In suggesting that the jury selection process had somehow resulted in the drawing of inordinate number of tories, Howe publicized his bean experiment in probabilities:

The Bean Box proves, that, in 99 cases out of 100, at least 10 white beans will be drawn out of 48 – that in half the cases there will be 15 or 16; and that although such a thing as but *one* or *two* being drawn is barely possible, it is so improbable, that, if it were to happen ... the presumption would almost amount to a moral certainty *that the proportions in the box had been changed.*<sup>72</sup>

66 *Novascotian*, 13 May 1844.

67 *Ibid.*, 2 September 1844.

68 “Great Public Meeting!,” *Ibid.*, 10 February 1845.

69 “Letter from Mr. Delaney,” *Halifax Morning Post*, 15 August 1844, p.2; “James W. Delaney,” *Halifax Morning Chronicle*, 17 August 1844, 2-3.

70 *Novascotian*, 2 September 1844.

71 Beck, *Joseph Howe, Volume I*, 275-6.

72 *Novascotian*, 2 September 1844. [emphasis in original] For references to this bean box analogy see, for example, *Halifax Morning Chronicle*, 17 August 1844, 3; “McCoubry vs. Annand,” *Ibid.*, 5 September 1844, 3.

The jury found against Annand and awarded £50 in damages. The defense waited until after the trial to point out the selection irregularities to prevent prejudicial treatment from the jury. Delaney and Chandler publicly proclaimed their innocence,<sup>73</sup> and Annand failed to get a new trial, the Supreme Court pointing out that a loose practice had developed of allowing the sheriff to retain the ballot box.<sup>74</sup>

Annand's libel case in Antigonish resulted in especially fierce verbal sparring in the Assembly between Howe and Attorney General Johnston that again demonstrated the important differences between reformers and Tories in their view of political parties and the role of the press. Johnston admitted that he held the reform press in contempt: "I feel for it a contempt so perfect – so entire – that language cannot express its fullness." He said that the country parts of the colony desired news and knowledge, but that the reform press only supported its own political position. "You who pretend to be the friends of the people," Johnston told the Assembly, "with the cry of patriotism on your lips – in your hearts, as proved by your acts, are traitors to your trust, and abuse the confidence which has been reposed in you."<sup>75</sup> Howe responded by detailing the allegations of jury packing in Annand's case and charging that the silencing of the reform press stemmed from Johnston's desire to defend his own party's indefensible political positions.<sup>76</sup>

The reform press argued that the trials of Nugent and Annand demonstrated that the Tories constituted a 'party,' despite their claims to the contrary, and were willing to use patronage and the law to silence opposition reformers. For example, the *Morning Chronicle*, also published by Annand, mocked the "No-party Government" in September 1844, saying that the Tories were "never ungrateful to unscrupulous partizans," and had thus rewarded Delaney for his assistance in pursuing the reform press with an appointment to the magistracy.<sup>77</sup> In its next edition, the *Chronicle* asserted that Attorney General Johnston had sought to use the law to suppress the press. These efforts, the *Chronicle* argued, would fail "though every jury-box in the country be

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73 Delaney asserted that "a more scandalous, unprincipled attempt to slander an absent man was never perpetuated." "Letter from Mr. Delaney," *Halifax Morning Post*, 15 August 1844, 2. Also see "Cumberland Jury Box," *Ibid.*, 20 August 1844, 2; "Correspondence," *Ibid.*, 10 September 1844, 3; "Correspondence," *Ibid.*, 28 September 1844, 2; "James W. Delaney," *Halifax Morning Chronicle*, 17 August 1844, 2.

74 "McCoubry vs. Annand," *Novascotian*, 16 September 1844; "McCoubrey vs. Annand," *Halifax Morning Chronicle*, 10 September 1844, 2; "McCoubry vs. Annand," *Ibid.*, 12 September 1844, 2.

75 "Provincial," *Yarmouth Herald*, 19 August 1844, 1.

76 "Provincial," *Ibid.*, 19 August 1844, 1. Also see "The Press and its Assailants," *Ibid.*, 26 August 1844, 3; "Close of the Session," *Halifax Morning Chronicle*, 30 July 1844, 3.

77 "McCoubry vs. Annand," *Ibid.*, 10 September 1844, 2.

deposited, unlocked, and unprotected, in the hands of their own subservient partisans.”<sup>78</sup>

The reform press tapped into the events in Ireland to buttress their argument and encourage support for the reform party. Following the libel proceedings against Annand in Antigonish in 1844, the *Novascotian* noted how, in England, judges were “checked and counter checked by appeal,” a point made clear by the “late trial of O’Connell.” The newspaper called for a revision of the jury law, for though it was unclear if there was “an augean stable to sweep out,” there were clearly “filthy corners” apparent from, among other incidents, the drawing of the special jury at Annapolis in Nugent’s case, and the jury lists in Halifax, where it was notorious that the majority of reformers were “excluded both from the Grand and Special Juries.”<sup>79</sup>

Reformers also explored the possible exclusion of Irish Catholics from juries in Halifax to substantiate their claims of politically-motivated procedural skulduggery. In January 1845, the *Novascotian* began printing excerpts from the *Halifax Register*, an Irish reform newspaper, attacking the selection of grand jurors. According to the *Novascotian*, the *Register* “merely says in civil language what every Irishman has been saying to himself for the last month – that there is nearly as much fairness in the system here, as there is in Ireland.” The *Register* complained that special juries were drawn from the grand jury lists, which were, however, incomplete and inaccurate. An inspection of the jury lists would show them to have defects and omissions providing “abundant cause to complain.”<sup>80</sup>

The reform press connected connected politics, ethnicity, religion, and jury selection. According to the *Novascotian*, the unfairness of the grand jury had been denied, but, “[w]ho will deny it now, the Conservatives have 2/3 of the Jury – In a city with many thousands of respectable Irish Catholics in it, not one comes out of the Box, whatever proportion may have been inside?”<sup>81</sup> The *Register* made references to O’Connell’s trial, including that Irish Catholics had been removed from the Halifax jury list in the same way that Catholic names were removed from the Dublin jury rolls.<sup>82</sup>

The *Register* continued to press its criticisms of jury selection, and in perhaps its most passionate statement on the topic, it charged that Halifax had three hundred reformers who possessed the proper qualifications to serve as grand jurors, yet only one hundred of their names had made their way onto the list of eligible citizens. Similarly, the paper suggested that Catholics represented one-

78 “The Press,” *Ibid.*, 14 September 1844, 2. Also see “Jurisprudence,” *Ibid.*, 12 December 1844, 3.

79 “McCoubry vs. Annand,” *Novascotian*, 16 September 1844.

80 “The Grand Jury System,” *Ibid.*, 20 January 1845.

81 “The Jury System,” *Ibid.*, 3 February 1845.

82 “The Jury System,” *Ibid.*, 3 February 1845; “The Jury System,” *Halifax Morning Chronicle*, 30 January 1844, 2.

third of the Halifax population and that one hundred Catholics could act as grand jurors. Nevertheless, there was not a single Catholic on the jury list. It was vitally important that no one class (i.e. the tories) dominated – juries had to possess a diversity of community opinion. “If we find their interests, their prejudices, their predilections, or their hatreds converging to establish any thing, we cannot have much respect for their opinions, nor confidence in their intentions,” asserted the paper. “Now this is just what happens in Nova Scotia. The Jurors in numberless instances have a *common interest* in oppressing the man who is upon his trial. Is this not a violation of the Constitution?”<sup>83</sup>

The *Register*’s reference to the English constitution reflected the willingness of Nova Scotia’s reformers to grab hold of English ‘jury ideology’ to charge that tories had denigrated a sacred institution by packing juries. In England, the role of juries as a protector of individual freedom in the face of state oppression had become an important part of English legal culture by the seventeenth century.<sup>84</sup> The English criminal trial jury, according to Thomas Andrew Green, “came to represent the community in the face of (allegedly) tyrannical, or otherwise illegitimate authority.”<sup>85</sup> Lois G. Schwoerer traces the long history of jury ideology, which she identifies as a politicized perception of the jury as an institution protecting traditional rights from governmental assault. Schwoerer dates the emergence of this ideology to the political struggles of seventeenth-century England, when a history of juries was invented that rooted them “in custom and the distant past.” The jury was deemed to be part of the ancient and unwritten English constitution that would “protect subjects’ liberties from an overbearing, arbitrary government.”<sup>86</sup> This jury ideology had become a pillar of English nationalism, embodying the alleged superiority of England to the nations of Europe. Transmitted through widely reprinted politi-

83 “The Courts,” *Novascotian*, 10 February 1845. Also see “The Jury System – Grand and Special,” *Halifax Register*, 14 January 1845, 2; “The Jury System,” *Ibid.*, 21 January 1845, 2; “The Halifax Courts,” *Ibid.*, 21 January 1845, 7; “The Courts,” *Ibid.*, 28 January 1845, 2.

84 ‘Legal culture’ is an elastic concept that refers to “ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds.” Lawrence M. Friedman, “The Concept of Legal Culture: A Reply,” in *Comparing Legal Cultures*, ed. David Nelken (Aldershot: Dartmouth Publishing, 1997), 34. Also see Roger Cotterell, “The Concept of Legal Culture,” in *Comparing Legal Cultures*, ed. Nelken, 13-31; Richard J. Ross, “The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History,” *William and Mary Quarterly*, 3rd ser. 50 (1993): 28-41; Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2002).

85 Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago: University of Chicago Press, 1985), 381.

86 Lois G. Schwoerer, “Law, Liberty, and Jury ‘Ideology’: English Transatlantic Revolutionary Traditions,” in *Revolutionary Currents: Nation Building in the Transatlantic World*, eds. Michael A. Morrison and Melinda Zook (Lanham: Rowman and Littlefield Publishers, 2004), 40, 54.



cal tracts, this thinking about the jury would travel throughout many parts of the British Empire, including to Nova Scotia.

For Nova Scotia's Irish Catholics, grand jury membership was important because of the grand jury's traditional roles in the administration of justice and in local governance. Irish immigrants also desired membership on the grand jury, however, because it bestowed one of the honours of respectability and citizenship.<sup>87</sup> As David Neal argues in the context of early nineteenth-century Australia, the "day-to-day operation of juries, politically important though it was in some cases, was not as important as the mark of political status conferred by enrolment on the jury lists."<sup>88</sup> The jury acts of Nova Scotia did not list ethnicity or race as reasons for exclusion from juries, but the Irish wanted to ensure that this factor did not play a role in jury selection, particularly given the context of rising ethnic tensions in the 1840s.

The complaints over jury selection culminated in a large public meeting at Mason's Hall in Halifax on 6 February 1845 to discuss the issue.<sup>89</sup> The tory press criticized the meeting, arguing that the reform leaders were injecting juries with party feelings where none previously existed. The *Morning Post* argued that Howe and the reformers were intent in manipulating the Irish in attendance simply to further their own political agendas.<sup>90</sup> The *Times* expressed concern over the alleged omissions from the jury lists, though it also questioned whether reformers had raised the issue simply because it was "a profitable topic upon which to descant in the Legislature."<sup>91</sup>

Among the prominent speakers at the Mason's Hall meeting were reformers Lawrence O'Connor Doyle, Joseph Howe, and Pictou County Assemblyman George Renny Young, as well as Andrew Mitchell Uniacke, a tory member of the Assembly for Halifax.<sup>92</sup> Doyle was the first to address the meeting. He told the crowd that he would not sit while harm was done to his religious denomination. To prove harm, he provided statistics on the composition of jury panels and juries to establish that Catholics had been systematically excluded. For

87 The membership of the 1849 Halifax grand jury is suggestive of the remaining social prestige attached to grand jury service, at least in Halifax. The twenty-four member jury included several prominent merchants. *Novascotian*, 12 September 1853, 294; *Halifax Herald*, 13 June 1898, 8; *Acadian Recorder*, 30 December 1916; *Halifax Herald*, 26 September 1892; D.A. Sutherland, "Daniel Cronan," *DCB*, Vol. 12; S. Buggey, "John Esson," *Ibid.*, Vol. 9.

88 David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge: Cambridge University Press, 1991), 185-6.

89 "Public Meeting," *Novascotian*, 3 February 1845; "Public Meeting," *Halifax Morning Chronicle*, 6 February 1845, 4.

90 "Review of the Public Meeting held on Thursday, 6th Instant," *Halifax Morning Post*, 8 February 1845, 2; "Review of the Public Meeting on Thursday last, the 6th Inst.," *Ibid.*, 11 February 1845, 3.

91 "Grand Jury Agitation," *Halifax Times*, 4 February 1845, 6.

92 Shirley B. Elliott, ed., *The Legislative Assembly of Nova Scotia, 1758-1983: A Biographical Directory* (Halifax: Province of Nova Scotia, 1984), 221.

example, he said there were at least 100 Catholic men qualified to act as grand jurors in Halifax, yet almost all had been excluded. The jury list should contain all eligible names, said Doyle, leading someone to exclaim, “Was it not so in Dublin?”<sup>93</sup>

Howe expressed his surprise and pleasure at seeing many Irish, Scotch, English, and Nova Scotians present at the meeting to consider the injustices of the jury system. He knew that the Irish were especially sensitive to such charges, as the Irish had been so “long used to packed Juries and injustice, at home.” He told the audience that Richard Nugent had asked him for advice before his libel trial. Howe initially told Nugent that he should face his accusers – that he should go before the jury, tell them the truth, and let their consciences lead them to a verdict. After Nugent showed him the jury list for the case, however, Howe said he concluded that no reformer could have a fair trial.<sup>94</sup>

Howe also offered statistical proof of bias in the system. According to Howe, of the 163 names on the grand jury list for Halifax, there were fifty-six reformers and 107 conservatives. Howe also analyzed twelve special jury panels drawn from the Halifax grand jury list. Although conservatives were only one-third of the population, Howe charged that out of 576 names, 426 were conservatives and 150 were reformers. He concluded by drawing upon the role of the jury in British constitutional rhetoric. European history told him that among the worst abuses of power, “none were so appalling as those which sprung out of an abuse of the Executive Power, in the packing of Juries.” His message was clear: “Let us be careful, then, in this country, to check the beginnings of evil – that the dearest right of British subjects, the highest safeguard of our liberties, may be religiously preserved.”<sup>95</sup>

Young, a lawyer who had become a potent spokesman for the reformers after entering the Assembly in 1843,<sup>96</sup> focused on the constitutional aspects of the jury. He said that he needed scarcely to say that trial by jury was “an essential element of liberty.” To Young, the elective franchise, trial by jury, and freedom of the press, were “the three pillars on which the safety of the subject and the state alike depended – the very essence of constitutional freedom.” The jury, he explained, was important because it ensured that the press could not be dragged before the courts unfairly. Young lauded Howe, whose story of the box of beans was “known from one end of the Province to the other,” and had “directed public inquiry to the subject.” He also alluded to O’Connell’s case,

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93 “Great Public Meeting!,” *Novascotian*, 10 February 1845; “Great Public Meeting!,” *Halifax Morning Chronicle*, 10 February 1845, 1-2.

94 “Great Public Meeting!,” *Novascotian*, 10 February 1845; “Great Public Meeting!,” *Halifax Morning Chronicle*, 10 February 1845, 1-2.

95 “Great Public Meeting!,” *Novascotian*, 10 February 1845; “Great Public Meeting!,” *Halifax Morning Chronicle*, 10 February 1845, 1-2.

96 Beck, “George Renny Young,” *DCB*, Vol. 8.

and Lord Denman's claim that "trial by jury, if not conducted free from political influence, could be regarded as nothing else than 'a delusion, a mockery, and a snare.'"97

The tory Andrew Mitchell Uniacke also rose to speak, and the crowd hissed their disapproval. He expressed his belief that trial by jury was the most valuable inheritance that Nova Scotians had received from England. He also alluded to the Irish in saying that they were "not fairly represented in Grand and Special Juries. From their wealth, intelligence, and respectability, their claims ought not, and could not be overlooked." Although admitting that he was a tory in his own politics, he wished to see equal justice done to all parties: "We should leave our children incorruptible Courts, and fair trial by Jury, as the best inheritance we could bequeath to them," for it was "the bulwark of every Englishman's dearest rights."<sup>98</sup>

Someone then moved resolutions stating that juries should equitably represent all classes of people. A committee formed to carry forward the resolutions. According to the *Novascotian*, Thomas Donovan then "moved that three cheers be given for Lord Denman, and fair trial by jury all over the world," and that cheers, "loud and deafening, followed."<sup>99</sup> The committee appointed at the meeting drafted a petition and sent it to the Assembly, in which the petitioners reported "with deep regret" that, owing to the non-observance of the 1838 jury act, the list of grand jurors for Halifax County contained "only one hundred and sixty-three names, which number may be considered very deficient, rendering the list defective and highly objectionable."<sup>100</sup>

On 24 February 1845 Doyle introduced a bill to amend the jury act and repair the grand jury lists.<sup>101</sup> The bill passed, despite the tories' control of the Assembly, possibly because some tories were interested in draining off some Irish Catholic support from the reformers. The act tried to force the Halifax magistrates to perform their duties fairly.<sup>102</sup> But, despite the fierceness of the complaints by the Irish and reformers, the legislation did not institute radical

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97 "Great Public Meeting!!," *Novascotian*, 10 February 1845; "Great Public Meeting!!," *Halifax Morning Chronicle*, 10 February 1845, 1-2.

98 "Great Public Meeting!!," *Novascotian*, 10 February 1845; "Great Public Meeting!!," *Halifax Morning Chronicle*, 10 February 1845, 1-2. The *Acadian Recorder* mocked Uniacke's appearance at the meeting, saying that he believed the issue was "a popular one with those to whose opinions Mr. U. stands opposed." He thus "comes forth with his lures, and throwing his sprats, hopes they may catch mackerel for his use at the next Election." *Acadian Recorder*, 15 February 1845.

99 "Great Public Meeting!!," *Novascotian*, 10 February 1845; "Great Public Meeting!!," *Halifax Morning Chronicle*, 10 February 1845, 1-2.

100 NSARM, RG5, series 'P', vol. 9, no.18: (17 February 1845) Petition from Halifax for revision of the Grand Jury Act; *JHA* 1845, 231.

101 *Ibid.*, 241.

102 "Legislative Summary," *Novascotian*, 3 March 1845.

changes to jury selection. It required that the March General Sessions in Halifax appoint five magistrates (rather than three under the 1838 jury act) to create, with the assistance of the sheriff, a list of eligible jurors. While the 1838 jury act allowed the sheriff and prothonotary to jointly ballot for the grand jurors, the new act required one of the justices of the Supreme Court to draw the names. Borrowing from English practice, a new provision also required that the grand jury list be posted on the door of the county courthouse for at least ten days to allow people to notice and report omissions or errors. As a further check, a newspaper advertisement was to indicate publicly the time and place of a special sessions to examine and, if necessary, amend the grand jury list. The five selecting magistrates and the sheriff had to attend this special sessions and answer under oath any questions posed to them by other magistrates.<sup>103</sup> The public outcry and the new act resulted in the careful creation of a new, and greatly expanded, grand jury list for Halifax in 1845.<sup>104</sup>

### Conclusion

In 1999, Allan Greer lamented that it was “difficult today to get anyone interested in the history of democracy.”<sup>105</sup> Historians, said Greer, had generally abandoned the study of the nineteenth-century movements for responsible gov-

103 *An Act to amend the Act for the regulation of Juries*, SNS 1845, c.1, ss.1-2, 4, 6.

104 A copy of the 1845 Halifax jury list may be found in NSARM, RG34-312, series G, vol. 2: Halifax Sessions, List of Grand Jurors, 1845. Included in this expanded list of potential jurors were some black Nova Scotians; over the next several years a number of blacks served as jurors in Halifax. In a January 1846 debate in the Assembly, Howe reported that some people had objected “to coloured people appearing on the juries,” though he personally said that “he was glad of it,” for he believed that some blacks “not only possessed the property qualification, but the intelligence and moral conduct a juror should possess.” William Young also supported the practice. He told the Assembly that he “rejoiced to see that in these Colonies we had risen above the common prejudices by allowing men of colour to remain upon the list, and he was perfectly satisfied there was not a man in the House who would oppose that privilege.” The public pronouncements supporting the inclusion of black Nova Scotians on juries reflected the peculiar position of blacks in the colony at mid century. Nova Scotia’s black community made concerted efforts to engage the political system in the 1840s. Although only a small voting block, black Nova Scotians had both tories and reformers pursuing their ballots. Tory leader James W. Johnston claimed to be a friend of the black community and it was under his government that the 1845 act passed. On the other hand, reformers tried to ensure that black Nova Scotian understood that it was their calls for reform that had resulted in the 1845 legislation. “The Jury System,” *Novascotian*, 26 January 1846; David A. Sutherland, “Race Relations in Halifax, Nova Scotia, During the Mid-Victorian Quest for Reform,” *Journal of the Canadian Historical Association*, n.s. 7 (1996): 45. Also see *Halifax Sun*, 24 March 1845; *Halifax Morning Chronicle*, 7 June 1845. “The Day of Trial,” *Novascotian*, 26 April 1847; J.F.W. Johnston, *Notes on North America, Agricultural, Economical, and Social*, vol. 1 (Edinburgh: Blackwood, 1851), 7.

105 Allan Greer, “Historical Roots of Canadian Democracy,” *Journal of Canadian Studies* 34 (1999): 7.

ernment in large measure because of the whiggish overtones of the traditional historiography. In examining the debates surrounding Nova Scotia juries in the 1830s and 1840s, however, this article demonstrates that political events can still teach us much about the operation of the justice system, ideas concerning independence and political parties, free speech, and the transfer of ethnic tensions across the Atlantic.

Juries formed the cultural conduit through which considerable political rhetoric flowed. As part of colonial legal culture, the jury became one of the battlegrounds in the bitter political struggles that dominated Nova Scotia in this period. The debates and legal reforms concerning juries demonstrated that the jury was a cornerstone of 'British Justice,' but also an unstable entity in colonial legal culture. The jury became a lightning rod for political discord, and provided the means by which political reformers sought to flex their muscles. In other words, the jury was where law and politics met. As a key point of intersection between law and politics, the history of the jury speaks volumes about the transition to responsible government and state formation.

The 1838 Nova Scotia jury act was designed to limit the role of sheriffs in selecting grand juries under the 1833 grand jury act. The creation of jury committees was a well-intentioned attempt to use the bureaucratic tools of the *ancien régime* – magistrates and sheriffs – in a process that would choose jurors in a new, more systematic and comprehensive way. But, unsalaried magistrates and sheriffs could not be trusted to complete these responsibilities. The administrative machinery of the colony too often proved ineffective.<sup>106</sup>

The colony's laws also lacked processes that prevented the possibility of partiality in jury selection. In the first half of the 1840s, this became a key issue in the libel trials of William Annand and Richard Nugent. McNairn has demonstrated that libel trials in Upper Canada shaped the contours of freedom of the press, and were thus important to whether public opinion would determine government policy.<sup>107</sup> In Nova Scotia, reformers took a special interest in jury selection, particularly in libel cases, and screamed foul when they believed reform newspaper publishers faced packed juries. As in Upper Canada, the jury system thus became badly entwined in politics. Irish Catholic Nova Scotians, aware of the long history of packed juries in Ireland and the recent trial of Daniel O'Connell, felt sure that officials excluded them from the grand jury lists. The 1845 jury act, which applied only to Halifax, responded to these

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106 George Perry echoes the view that Nova Scotia possessed a weak state apparatus that made it less able to successfully implement new programs in his examination of the delayed development of a centralized education program in Nova Scotia vis-à-vis Upper Canada. George D. Perry, "'The Grand Regulator': State Schooling and the Normal-School Idea in Nova Scotia, 1838-1855," *Acadiensis* 32 (2003): 60-83. Also see Wynn, "Ideology, Society, and State in the Maritime Colonies," 284-328.

107 McNairn, *The Capacity to Judge*, 137-41.

protests by tinkering with the jury selections process. With the colony increasingly divided into political camps, however, patronage encouraged citizens to fight fiercely for one side or the other. Every office would eventually become a spoil for the winner of provincial elections. As a result, the tweaking of the Halifax jury system in 1845 was not a final solution to complaints of bias in the jury system. In the second half of the 1840s and early 1850s increased Irish immigration and battles between reformers and tories would continue to place pressure on the jury system.<sup>108</sup>

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**R. BLAKE BROWN** is a SSHRC Post-Doctoral Fellow at Saint Mary's University. He completed his PhD at St. Mary's University in 2005, where his thesis examined reforms to jury systems in Nova Scotia and Upper Canada between 1825 and 1867. He is currently beginning work on a history of firearms regulation in Canada.

**R. BLAKE BROWN** est détenteur d'une bourse de perfectionnement post-doctoral du Conseil de recherches en sciences humaines à l'Université Saint Mary's. Il a obtenu son doctorat à l'Université Dalhousie en 2005; sa thèse portait sur les réformes apportées aux systèmes de jugement par jury en Nouvelle-Écosse et dans le Haut-Canada entre 1825 et 1867. Il travaille présentement à une histoire de la réglementation des armes à feu au Canada.

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108 R. Blake Brown, "The Jury, Politics, and the State in British North America: Reforms to Jury Systems in Nova Scotia and Upper Canada, 1825-1867" (Ph.D Dissertation, Dalhousie University, 2005).