

CHALLENGING A POTENTIAL JUROR FOR CAUSE: RESUSCITATION OR REQUIEM?

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I. INTRODUCTION

The use of juries in civil cases is severely circumscribed in Australia, and only a small percentage of criminal cases are decided by juries.¹ This percentage, while small, is significant. Only the most serious criminal cases are tried before a jury,² and it is such cases that tend to generate the greatest amount of public interest. Consequently, "[l]egal ideology and popular commonsense images of the operation of the criminal justice system derive overwhelmingly from jury trial in higher criminal courts".³ As there is no reason to believe that a trial by jury in serious criminal cases will be abolished,⁴ it follows that improvements made to the operation of the jury system should serve to increase the level of public confidence in the administration of justice.⁵

In theory, challenges for cause facilitate the selection of a jury that is both impartial and representative of the wider community. In Australia, challenges for cause must be exercised in the absence of any relevant information to support the

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1 For example, in New South Wales approximately one per cent of criminal cases are decided by juries. See New South Wales Law Reform Commission ("NSWLRC") Report 48, *The Jury in a Criminal Trial*, 1986 at 18 ("NSWLRC Report"). See also D Brown and D Neal, "Show Trials: The Media and the Gang of Twelve" in M Findlay and P Duff (eds), *The Jury Under Attack* (1988) 126 at 127-8.

2 NSWLRC Report *ibid* at 16.

3 D Brown and D Neal *ibid* at 128.

4 Note 1 *supra*.

5 NSWLRC Report, note 1 *supra* at 19. See also *Kingswell v The Queen* (1985) 159 CLR 264 at 301-2, per Deane J.

challenge. While the procedure varies between jurisdictions,⁶ generally a decision to challenge for cause must be made on the basis of the prospective juror's name, appearance, and possibly her or his occupation.⁷ Consequently, lack of knowledge about prospective jurors renders challenges for cause of limited practical importance.⁸

This article examines a number of questions. First, is the challenge for cause worth resuscitating? The answer to this question requires an understanding of the historical development of the challenge, and an analysis of the effectiveness of existing safeguards to ensure that an impartial jury is empanelled. Second, if the challenge for cause is allowed to die, are peremptory challenges and judicial directions an appropriate substitute? Finally, what alternatives to the Australian practice warrant consideration? In particular, should we look to North America for guidance?

II. HISTORICAL DEVELOPMENT OF THE CHALLENGE

It is generally accepted that the modern common law jury evolved from the Frankish *inquisito* used by the Norman kings, and introduced into England following the Conquest in 1066.⁹ The Anglo-Norman jury, used extensively during the reign of Henry II (1154-1189),¹⁰ consisted of a body of neighbours brought together to decide disputed questions of fact.¹¹ Holdsworth notes that, unlike the modern jury, "[t]he decision upon questions of fact was left to [the jurors] because they were already acquainted with them, or if not already so acquainted with them, because they might easily acquire the necessary knowledge".¹²

While jurors were expected to have knowledge of the matters in dispute, by the middle of the thirteenth century it was also a requirement that they be

6 For example, until recently Victoria permitted a degree of jury vetting which is proscribed by statute in New South Wales: *Jury Act* 1977 (NSW), s 67A. Information compiled by the police was provided to the local prosecuting authorities: *R v Katsuno* (1997) 99 A Crim R 350 at 358-9. This practice has been held by the HCA to be contrary to the *Juries Act* 1967 (Vic), s 21(3): *Katsuno v R* ("*Katsuno*") (1999) 166 ALR 159 at 160, per Gleeson CJ; at 166, per Gaudron, Gummow and Callinan JJ; and at 193, per Kirby J. Cf *Juries Act* 1957 (WA), s 30.

7 M Findlay, *Jury Management in New South Wales*, The Australian Institute of Judicial Administration Incorporated (1994) p 45; P Weems, "A Comparison of Jury Selection Procedures for Criminal Trials in New South Wales and California" (1984) 10 *Syd LR* 330 at 343. For a discussion of jury empanelment in Victoria, see *R v Weston* (1999) 1 VR 887.

8 NSWLRC Report, note 1 *supra* at 53.

9 F Pollock and F Maitland, *The History of English Law*, vol 1, Cambridge University Press (2nd ed, 1898) p 140; W Holdsworth, *A History of English Law*, vol 1, Methuen and Co Ltd (7th ed, 1956) p 313; H Potter, *An Historical Introduction to English Law and its Institutions*, Sweet and Maxwell Ltd (3rd ed, 1948) p 232. See also *Katsuno*, note 6 *supra* at 180-2, per Kirby J. Forsyth, in his seminal work on the jury, argues that the English jury "is of indigenous growth, and was not copied or borrowed from any of the tribunals that existed on the continent": W Forsyth, *History of Trial by Jury*, Carswell (1876) p 11. This view is not shared by other eminent legal historians.

10 W Holdsworth *ibid*, p 313; F Pollock and F Maitland *ibid*, p 144; H Potter *ibid*, p 233.

11 W Holdsworth *ibid*, p 317.

12 *Ibid*.

impartial and indifferent to the outcome of the case. If there was just cause to suspect a lack of impartiality, a litigant in a civil case,¹³ or an accused in a criminal case,¹⁴ could object to the juror being on the inquest and request that the juror be removed.¹⁵

As trial by jury evolved, two types of challenges emerged: a challenge to the array, and a challenge to the polls. The challenge to the array was a challenge to the whole panel, either on the basis that the officer concerned with summoning and returning the panel was a party to the suit or related by "blood or affinity to either of the parties"¹⁶ (a principal challenge); or alternatively, that there were "circumstances which create[d] a probability or suspicion of bias or partiality in the returning officer"¹⁷ (a challenge for favour).¹⁸

A challenge to the polls was a challenge to an individual juror, not the whole panel.¹⁹ Coke classed challenges to the polls under four heads: *propter affectum* (a well-grounded suspicion of bias or partiality);²⁰ *propter delictum* (where a juror has been convicted of some offence that affects her or his credit);²¹ *propter defectum* (some defect in capacity, such as lack of sufficient estate,²² for example villein, ie non-freehold, tenure);²³ and *propter honoris respectum* (where a lord of parliament is impeached on a jury).²⁴

Such challenges for cause applied equally to civil and criminal trials.²⁵ In criminal trials for treason and felony, an accused²⁶ was also entitled to a limited number of peremptory challenges.²⁷ These were challenges where no cause needed to be shown.²⁸

13 F Pollock and F Maitland, note 9 *supra*, pp 621-2.

14 W Holdsworth, note 9 *supra*, p 324.

15 W Forsyth, note 9 *supra*, p 145.

16 *Ibid*, p 147.

17 *Ibid*, p 148.

18 See also, J McEldowney, "Stand By For The Crown: An Historical Analysis" [1979] *Crim L Rev* 272 at 273-4.

19 *Ibid*.

20 W Forsyth, note 9 *supra*, pp 148-9.

21 *Ibid*, p 149.

22 *Ibid*, p 148.

23 W Holdsworth, note 9 *supra*, p 336.

24 W Forsyth, note 9 *supra*, p 148.

25 *Ibid*, p 191.

26 At common law, the Crown could exercise an unlimited number of peremptory challenges. This common law right was, according to Coke, deemed to be "mischievous to the subject, tending to infinite delays and danger": Co Litt 156, b, quoted in W Forsyth, note 9 *supra*, p 192. In 1305, the Crown's right of peremptory challenge was abolished by 33 *Edw I*, St 4: *Ibid*. This resulted in the judicially sanctioned practice of the Crown's right to ask potential jurors to 'stand aside' (or stand-by). For a discussion of the Crown's right to stand potential jurors aside, see J McEldowney, note 18 *supra*, pp 274-7.

27 At common law, an accused was entitled to thirty-five peremptory challenges, "being one less than the number of three juries": W Forsyth, note 9 *supra*, p 191. For a discussion of the legislative history of the accused's right to peremptory challenge in England, see *ibid* (7 and 8 *George IV*, c 28); R Broderick, "Why the Peremptory Challenge Should be Abolished" (1992) 65 *Temple Law Review* 369 at 371-3, (*Criminal Justice Act* 1988 (UK), s 118, which abolished the accused's right to peremptory challenge).

28 J McEldowney, note 18 *supra*, p 274. Forsyth, quoting from Co Litt 156 b, notes that such challenges were referred to as 'peremptory' "because [an accused] may challenge peremptorily upon his own dislike, without showing of any cause": W Forsyth, note 9 *supra*, p 191.

Trial by jury was not granted immediately to the residents of the newly established colony of New South Wales. While calls for the right to be tried by a jury could be heard as early as 1791, Bennett notes that "there was no place for a jury in a convict settlement and it was not until 1823 that anything approaching jury trial in its strict sense was granted a place in the Colony's jurisprudence".²⁹ In 1832, the Legislative Council enacted a Bill³⁰ which prescribed that, "all civil matters were to be heard before a civil jury of *twelve*, subject to the rules and practice of the Courts of Record at Westminster".³¹ The Act also made provision for a limited right to a jury trial in a criminal matter.³² A Bill,³³ enacted the following year, declared expressly that an accused in a criminal matter, and the parties in a civil matter, had a right of challenge. In 1847, "public opinion prevailed in having the confused and complex mass of jury laws consolidated and made permanent".³⁴ The statute, entitled "An Act to consolidate and amend the Laws relative to Jurors and Juries in New South Wales"³⁵, preserved³⁶ first, the right of both parties to challenge the array for alleged partiality on the part of the sheriff; second, the right of the prosecutor to stand potential jurors aside; third, the right of any party to challenge a potential juror for cause; and fourth, the right of an accused charged with murder or other felony to exercise up to twenty peremptory challenges.

Under the *Jury Act* 1977 (NSW), currently in force in New South Wales, the Crown's right to require jurors to stand aside has been abolished³⁷ and replaced with three peremptory challenges without restriction for each person prosecuted.³⁸ The accused in a criminal proceeding³⁹ is also accorded three peremptory challenges without restriction. Any party, including the Crown,⁴⁰ can exercise an unlimited number of challenges for cause.⁴¹

III. EMPANELLING AN IMPARTIAL AND REPRESENTATIVE JURY: THE ROLE OF THE PEREMPTORY CHALLENGE

It is generally accepted that a jury should possess two fundamental features; it should be impartial, and it should be generally representative of the

29 J Bennett, "The Establishment of Jury Trial in New South Wales" [1959-61] *Syd LR* 463 at 463-4. See also, D Neal, "Law and Authority: The Campaign for Trial by Jury in New South Wales" [1987] *Journal of Legal History* 107 at 109.

30 2 *Wm IV*, No 3 1832.

31 J Bennett, note 29 *supra* at 473 (emphasis in text).

32 2 *Wm IV*, No 3, s 40. See also J Bennett *ibid* at 474.

33 4 *Wm IV*, No 12 (28 August 1833).

34 J Bennett, note 29 *supra* at 481. See also M Findlay, note 7 *supra*, p 235.

35 11 *Vic No* 20.

36 *Ibid*, s 24.

37 *Jury Act* 1977 (NSW), s 43(2).

38 *Ibid*, s 42(1)(b).

39 *Ibid*, s 42(1)(a).

40 *Ibid*, s 43(1).

41 *Ibid*, s 41.

community.⁴² Whether a jury is 'representative of the community' depends, to a large extent, on out-of-court selection procedures⁴³ such as compilation of the jury roll, subsequent removal from the jury roll, and exemption from jury duty.⁴⁴ In theory, in-court selection procedures, in particular the peremptory challenge, ensure that an impartial jury is empanelled.

A. The Effect of the Peremptory Challenge: Theory vs Practice

The High Court of Australia has referred to the accused's right to challenge a potential juror peremptorily as "both ancient and important, being fundamental to our system of trial by jury".⁴⁵ Blackstone described it as, "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous".⁴⁶ Many now question whether reality justifies the rhetoric.

From the point of view of the accused, the justification for the right of peremptory challenge rests on two grounds. First, it allows the accused⁴⁷ to dismiss those individuals whom the accused suspects of bias, "where there is not the overt manifestation of bias necessary to justify a challenge for cause".⁴⁸ Second, it ensures that the accused has a good opinion of the jury by permitting the accused to remove those individuals he or she, for whatever reason, dislikes.⁴⁹ Put another way, it allows for the covert expression of common stereotypes which, in an age of 'political correctness', the accused, or the accused's counsel, would prefer not to articulate.⁵⁰

In theory, vesting a right of peremptory challenge in the Crown and the accused in a criminal case, and the parties in a civil case, also promotes the administration of justice. It "provides a ready corrective for errors by a trial judge in refusing to grant a challenge for cause".⁵¹ It allows for the summary removal of a juror who has survived a challenge for cause but who, in the

42 P Byrne, "Jury Reform and the Future" in M Findlay and P Duff, note 1 *supra* at 192; M Isreal, "Ethnic Bias in Jury Selection in Australia and New Zealand" (1998) 26 *International Journal of the Sociology of Law* 35 at 36-7; *Kingswell v The Queen* (1986) 60 ALJR 17 at 31, per Deane J.

43 "The process of jury selection used in the jurisdictions that exist in [Australia and New Zealand] can be divided into two parts: first, the selection of the jury panel from the list of qualified jurors (the out-of-court selection procedures); and, second, the selection of the actual jury from the panel (the in-court selection procedures)": M Isreal *ibid* at 38.

44 The out-of-court jury selection procedure in New South Wales is canvassed in detail in M Findlay, note 7 *supra* at 5-6 and 35-45. M Isreal, note 42 *supra* at 41:

It is difficult to suggest that juries in Australia are anything more than 'moderately representative'... of the whole community. Many jurisdictions have only scrapped the property qualifications (the requirement that jurors own a specified amount of property) relatively recently and the marked variations in selection procedures between states mean that juries in some states are far less representative than others.

45 *Johns v The Queen* (1979) 141 CLR 409 at 429, per Stephen J.

46 4 William Blackstone, *Commentaries*, 353.

47 In a criminal matter, the right to exercise a peremptory challenge rests with the accused, not the accused's counsel (*Johns*, note 45 *supra*), although this right can be, and usually is, delegated by the accused to defence counsel. See *Jury Act 1977* (NSW), s 44.

48 J Gobert, "The Peremptory Challenge - An Obituary" [1989] *Criminal Law Review* 528 at 529.

49 *Katsuno*, note 6 *supra* at 181, per Kirby J; D Tanovich, "Rethinking Jury Selection: Challenges for Cause and Peremptory Challenges" (1994) 30 *Criminal Reports (4th)* 310 at 322.

50 J Gobert, note 48 *supra* at 529.

51 *R v Sherratt* [1991] 1 SCR 509 at 532-3, per L'Heureux-Dube J.

opinion of the challenger, may harbour resentment or bias.⁵² Finally, it permits counsel "to choose jurors before whom they feel comfortable trying the case".⁵³ In other words, it allows counsel to choose a jury that will be receptive to counsel's case theory.⁵⁴

Critics of the use of the peremptory challenge paint a less salutary picture. One advocate for the abolition of the peremptory challenge maintains that,

claims extolling the value of the peremptory challenge are predicated on nothing more than baseless speculation and courthouse apocrypha. The evils it propagates, however, are well documented. The peremptory challenge is habitually employed to discriminate against citizens on the basis of invidious and atavistic classifications. It is used to affix marks of inferiority on historically disenfranchised groups. Its exercise subverts the representativeness of the petit jury. . . . In short, it stands as an anti-democratic artifact that countermands a century of civil rights legislation and without substantial justification. In each of these ways, the peremptory challenge undermines not only the appearance of justice, but the cause and ends of justice itself.⁵⁵

Admittedly, Broderick is referring to the use of the peremptory challenge in an American trial where either counsel or the trial judge is generally accorded a right to *voir dire* prospective jurors.⁵⁶ While the context may be markedly different, the use of the peremptory challenge in the Australian jury selection process raises similar concerns.⁵⁷

B. The Peremptory Challenge in an Australian Context

In the course of their investigation into the management of juries in New South Wales, Findlay and his project team identified several patterns in the operation of the peremptory challenge mechanism in the jury selections they observed.⁵⁸ From their observations, they concluded that the use of the peremptory challenge was often arbitrary, used in a partisan manner to

52 Katsuno, note 6 *supra* at 181, per Kirby J; D Tanovich, note 49 *supra* at 322.

53 J Gobert, note 48 *supra* at 530.

54 D Tanovich, note 49 *supra* at 322-3. For a discussion of the concept of a case theory, see E Ohlbaum, "Basic Instinct: Case Theory and Courtroom Performance" (1993) 66 *Temple Law Review* 1; T Mauet and L McCrimmon, *Fundamentals of Trial Techniques: Australian Edition*, Longman Cheshire Pty Ltd (1993) pp 7-10.

55 R Broderick, note 27 *supra* at 370-1.

56 A jury selection *voir dire* in a United States Court usually involves, the routine questioning of potential jurors in order to gauge their competence and potential bias. The examination of the prospective jurors may be conducted by either the court or the attorneys involved in the trial. Generally, *voir dire* questioning includes inquiries about a potential juror's occupation, family, education, prior convictions, prior encounters with the police or parties to the trial, knowledge of the trial, or prior jury service.

C Whitebread and D Contreras, "Free Press v Fair Trial: Protecting the Criminal Defendant's Rights in a Highly Publicized Trial by Applying the *Sheppard-Mu'Min* Remedy" (1996) 69 *Southern Californian Law Review* 1587 at 1600.

57 For example, see M Findlay, note 7 *supra* at 49-52; M Isreal, note 42 *supra* at 43-5; NSWLRC Report, note 1 *supra* at 52-3. For a discussion of New Zealand and Canada, see M Isreal, note 42 *supra* at 45; C Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 *McGill Law Journal* 147 at 169; D Tanovich, note 49 *supra* at 323 and 331; K Roach, "Challenges for Cause and Racial Discrimination" (1995) 37 *Criminal Law Quarterly* 410 at 417-18.

58 During July and August 1993, the project team observed a selection of juries for ten criminal trials in the Sydney District Court: M Findlay, note 7 *supra* at 49.

manufacture a jury favourable to the interests of the challenging party, based on crude stereotyping, and did not afford the accused much input into the selection process.⁵⁹ They noted that "the overall impression was that, even where the peremptory challenge was used with some identifiable motive, it was an extremely imprecise tool, relying upon questionable and crude social stereotypes".⁶⁰ The New South Wales Law Reform Commission, which ultimately recommended the retention of the right of peremptory challenge, conceded that factors such as a person's gender, age, race and dress, were of "dubious utility" if the object is to identify unsuitability or bias.⁶¹

Isreal notes that the peremptory challenge is often used by counsel in Australia to exclude indigenous Australians and members of ethnic minorities from the jury.⁶² It should be noted, however, that empirical evidence suggests that this conclusion may not apply to the use of the peremptory challenge in New South Wales. Findlay notes that, "[i]t seems from the figures available that no particular ethnic group is singled out as the object of challenge".⁶³ He concludes that,

[t]he main problem presented by the peremptory challenge system is not so much that it is discriminatory or pernicious, but rather that, for the purposes of detecting bias and securing an 'impartial' jury composed of the accused's peers, it is inaccurate and arbitrary, to the point of being apparently without use.⁶⁴

In summary, the empirical evidence appears not to support the reliance, placed by judges and others, on the grounds for retaining peremptory challenges discussed above. This raises an obvious question: If the peremptory challenge fails to achieve its fundamental objectives, why not simply abolish it?⁶⁵ Such action is not without precedent. In the United Kingdom, the *Criminal Justice Act* 1988 (UK), s 118, has abolished the right of peremptory challenge.

59 *Ibid* at 51-2.

60 *Ibid* at 50-1. The High Court of Australia has recently commented that,

[t]here are many theories and claims, some apocryphal and all untested in this country, about the susceptibilities of juries and the matters which should guide counsel in deciding whether to make a peremptory challenge. *No matter how eccentric or illogical such theories may be, there is nothing in law to prevent prosecutors and defence counsel from giving effect to them in making peremptory challenges.*

Katsuno, note 6 *supra* at 172, per Gaudron, Gummow and Callinan JJ (footnote omitted) (emphasis added).

61 NSWLRC Report, note 1 *supra* at 51.

62 M Isreal, note 42 *supra* at 45.

63 M Findlay, note 7 *supra* at 76-7. The available evidence suggests that the percentage of Aboriginal jurors (0.5 per cent) is equal to their representation in the overall population of New South Wales, and in this respect Aboriginals in New South Wales are not under-represented on juries. It should be noted, however, that 0.5 per cent is far below the percentage of Aboriginal and Torres Strait Islanders in the overall prison population (7 per cent): M Findlay, note 7 *supra* at 5; NSWLRC Report, note 1 *supra* at 39. Further, as noted by Kirby J in *Katsuno*, "[m]odern prosecutorial guidelines of the DPP forbid challenges, including peremptory challenges, on the basis of prejudice, inherent characteristics or generic considerations of potential jurors shared in common with many citizens": note 6 *supra* at 187-8, citing, at note 129, the Director of Public Prosecutions (Cth), *Director's Policy in Relation to Jury Selection* (Policy 4.5.1).

64 M Findlay, note 7 *supra* at 51.

65 Generally see J Gobert, note 48 *supra* at 528; R Broderick, note 27 *supra* at 371-3. For a practitioner's response to the abolition of the peremptory challenge in the United Kingdom, see, P Herbert, "Racism, Impartiality and Juries" (1995) 145 *New Law Journal* 1138.

Interestingly, in the Australian context, the answer appears in large measure to be attributable to the ineffectiveness of the challenge for cause procedure.⁶⁶

IV. RESUSCITATING THE CHALLENGE FOR CAUSE

The High Court of Australia has identified the challenge for cause as one of the procedural safeguards available to ensure that the accused in a criminal case receives a fair trial. In the often-quoted passage from the leading Australian case on the exercise of the challenge for cause, *Murphy v The Queen*,⁶⁷ a case involving prejudicial pre-trial publicity, Mason CJ and Toohey J noted,

It is fundamental that, for an accused to have a fair trial, the jury should reach its verdict by reference only to the evidence admitted at trial and not by reference to facts or alleged facts gathered from the media or some outside source. However, the might of media in 'sensational' cases makes such a pristine approach virtually impossible. Recognizing this, the courts have used various remedies such as adjournment, change of venue, severance of the trial of one co-accused from that of the others, express directions to the jury to exclude from their minds anything they may have heard outside the courtroom and the *machinery of the challenge for cause*.⁶⁸

State trial and appellate courts, particularly those dealing with the impact of pre-trial publicity in high profile cases, have echoed the High Court's remarks.⁶⁹ In reality, the absence of relevant information about prospective jurors throws a spanner into the "machinery of the challenge for cause",⁷⁰ and reluctance to consider alternative procedures hinders any attempt to remove the spanner from the machine. To put this discussion in context, it is first necessary to outline briefly the challenge for cause procedure, and the requisite burden of proof the challenger must meet.

A. Exercising a Challenge for Cause

A party to a proceeding can challenge a potential juror for cause on the basis, [t]hat the proposed juror does not possess the necessary qualifications or that he has some personal defects which render him incapable of discharging his duty as a juror or that he is not impartial or that he has served on another jury⁷¹ in respect of the same matter or that he has been convicted for an infamous crime.

66 For example, the NSWLRC noted that "[a]lthough the availability of any right of peremptory challenge may conflict with the principle of representativeness, it is vital that such right remain... particularly since the right of challenge for cause is of little practical importance": NSWLRC Report, note 1 *supra* at 53.

67 *Murphy v The Queen* (1989) 167 CLR 94.

68 *Ibid* at 98-9 (emphasis added).

69 For example, see *R v Plunkett* (1997) 69 SASR 452 at 467; *R v Keogh* (unreported, SACCA, Matheson, Millhouse and Mullighan JJ, 22 December 1995) at 5; leave to appeal to HCA refused in *Keogh v The Queen* (HCA, 3 Oct 1997); *R v Von Einem* (1991) 55 SASR 199 at 211; *R v Simpson* (1999) 106 A Crim R 590 at 595; *R v Bell* (unreported, NSWCCA, Spigelman CJ, Abadee and Ireland JJ, 8 October 1998); *R v Richards* (unreported, NSWCCA, Spigelman CJ, Greg James J and Smart AJ, 29 April 1999) at 9.

70 A Frieberg, "Jury Selection in Trials of Commonwealth Offences" in M Findlay and P Duff, note 1 *supra* at 121; P Weems, note 7 *supra* at 343; M Findlay, note 7 *supra* at 45.

71 Note 67 *supra* at 102. See also A Frieberg *ibid* at 120; P Weems *ibid* at 341.

As has been noted above, such a right is unlimited.⁷² Disqualification for ineligibility is governed largely by statute and, if proved by the challenger, presents little difficulty. Given the thorough out-of-court selection procedures, such challenges are relatively rare.⁷³ What is more difficult to establish is a challenge for cause based on partiality.⁷⁴

A challenge for cause can be made after a potential juror has been called and before that juror is sworn by the clerk of the court.⁷⁵ The challenge can be made before or after the rights of peremptory challenge have been exhausted and is tried by the presiding judge at the trial.⁷⁶ Once a *prima facie* case is established, the potential juror is sworn and questioned under oath on a *voir dire*. If, on the balance of probabilities,⁷⁷ disqualification or bias is established, the judge will remove the juror from the panel.⁷⁸

The challenger must set out a *prima facie* case in support of the application to challenge for cause. Of course, the evidence needed to support a successful application to challenge will depend on the particular facts of the case. However, it has been held that "[i]t is beyond question that some foundation must be laid before an application to challenge for cause will succeed".⁷⁹

In *Murphy v The Queen*, discussed in detail below, the High Court noted that in cases of alleged bias resulting from prejudicial pre-trial publicity, the requisite evidence presented to the court to establish a *prima facie* case,

[o]rdinarily . . . will take the form, at least initially, of an affidavit relating to the disposition of a particular juror. There may be cases where a reading by the trial judge of offending material, where it has been published in circumstances that justify an inference that members of the jury are likely to have read it and to have been influenced against the accused, will be enough. But they are exceptional cases. There is still a need⁸⁰ to provide a sufficient foundation of fact to justify acceding to the application.

In *Murphy*, the fact that one prospective juror was discharged prior to trial after volunteering that she did not feel that she could fulfil her duty impartially given what she had heard and been told about the case,⁸¹ and the submission to the

72 *Jury Act* 1977 (NSW), s 41; *Juries Act* 1967 (Vic), s 39; *Juries Act* 1927 (SA), s 67; *Jury Act* 1995 (Qld), s 43(1); *Juries Act* 1957 (WA), s 38(1); *Juries Act* 1899 (Tas), s 52; *Juries Act* 1967 (ACT), s 34(2)(c); *Juries Act* 1962 (NT), ss 42 and 46.

73 Although such challenges are rare, they do occur. For example, in the Survey of Court Procedures conducted by the NSWLRC as part of its report into the jury in a criminal trial, a challenge for cause based on the inability of a potential juror to speak English, which renders a person ineligible to serve as a juror under the *Jury Act* 1977 (NSW) sch 2, was reported: NSWLRC Report, note 1 *supra* at 49.

74 Again, while rare, such challenges do occur. In the NSWLRC study *ibid*, a prospective juror who was known to a witness was successfully challenged for cause.

75 *Jury Act* 1977 (NSW), s 45(1); *Juries Act* 1967 (Vic), s 34(2); *Juries Act* 1927 (SA), s 64; *Jury Act* 1995 (Qld), s 44(2); *Juries Act* 1957 (WA), s 38(3); *Juries Act* 1899 (Tas), s 52; *Juries Act* 1967 (ACT), s 35; *Juries Act* 1962 (NT), s 45. For a discussion of the procedural aspects of jury selection, see, M Findlay, note 7 *supra* at 45-6; P Weems, note 7 *supra* at 342.

76 *Jury Act* 1977 (NSW), s 46; *Juries Act* 1967 (Vic), s 38; *Juries Act* 1927 (SA), s 68; *Jury Act* 1995 (Qld), s 43(6); *Juries Act* 1967 (ACT), s 36A.

77 *R v Hubbert* (1975) 11 OR (2nd) 464 at 480.

78 P Weems, note 7 *supra* at 342.

79 Note 67 *supra* at 103-4, per Mason CJ and Toohey J.

80 *Ibid* at 104.

81 *Murdoch, Murphy, Murphy and Murphy v The Queen* (1987) 37 A Crim R 118 at 124.

Court of copies of "voluminous press publicity",⁸² was held by the New South Wales Court of Criminal Appeal,⁸³ and subsequently the High Court,⁸⁴ to be an insufficient foundation of fact to justify a challenge for cause.⁸⁵ In coming to this conclusion, the Court of Criminal Appeal noted that,

[i]t is not appropriate for this jurisdiction to adopt the practice followed in some other countries of permitting in effect a fishing expedition with each prospective juror. There must be a sound basis made out on a prima facie footing to anticipate the probability or [sic] prejudice on the part of an individual juror. The fortuitous circumstances that one such juror disclosed a concern on her part in conjunction with the media publicity falls short of carrying the case to the point where it can be said that the judge no longer had any discretion to exercise in this field and that the only proper decision for him to have made would have been that contended by the appellant [to grant a challenge for cause of each prospective juror].⁸⁶

The High Court reached a similar conclusion.⁸⁷

There is little doubt that the reference to "other countries" constitutes an inappropriate use of the plural, and that the United States is the jurisdiction referred to. To date, Australian courts have not considered the burden of proof applied by courts in Canada.

The Supreme Court of Canada has declared that the challenge for cause process should not be seen as either "extraordinary" or "exceptional".⁸⁸ To meet the prima facie burden, the challenger must establish an "air of reality" to the application.⁸⁹ This is a question of law, not fact, and the burden is not onerous. In fact, it has been described as the "lowest burden [of proof] recognized in the law of evidence".⁹⁰

In *R v Sherratt*,⁹¹ a case which, like *Murphy*, concerned prejudicial pre-trial publicity, L'Heureux-Dube J noted that it is impossible to postulate rigid guidelines as to what will breathe an "air of reality" into a challenge for cause.⁹² However, Her Honour went on to state that,

[t]he threshold question is not whether the ground of alleged partiality will create such partiality in a juror, but whether it could create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a realistic *potential* for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed.⁹³

82 *Ibid* at 122.

83 *Ibid* at 125-6.

84 Note 79 *supra*.

85 The Court of Criminal Appeal noted that,

[i]n its entirety [the pretrial publicity] undoubtedly created a state of public awareness of the circumstances of the five accused men - an awareness which could well have the potential to influence the mind of the jury, who might ultimately be called upon to try them.

Note 81 *supra* at 122.

86 *Ibid* at 126 (emphasis added).

87 Note 79 *supra*.

88 Note 51 *supra* at 536.

89 *Ibid* at 535.

90 D Tanovich, D Paciocco and S Skurka, *Jury Selection in Criminal Trials: Skills, Science, and the Law*, Irwin Law (1997) p 96.

91 Note 51 *supra*.

92 *Ibid* at 536.

93 *Ibid* (original emphasis).

In Australia, the relevant case law suggests that judges prefer to adopt a middle ground solution and rely on the "considerable body of experience by trial judges in the criminal justice system which has convinced trial judges that jurors approach their task in accordance with the oath they take, *that they listen to the directions they are given and implement them*".⁹⁴ Empirical evidence suggests that judges may place too much confidence in judicial directions.⁹⁵ This will be discussed in greater detail below.

Why do Australian courts appear unwilling to follow the Canadian example and view challenges for cause, not as exceptional cases, but rather as routine applications governed by a low burden of proof? One can speculate that, in addition to the perceived impact on potential jurors of the oath and judicial instructions, the perceived flaws in the jury selection process employed by some courts in the United States, and the continued availability of peremptory challenges,⁹⁶ mitigate against a judicial embrace of the "air of reality" burden of proof.

B. Voir Dire Questioning of Potential Jurors

In Australia, the words '*voir dire* questioning of potential jurors' invoke images of the jury under attack. Findlay concedes that, "[f]or a system of challenge to operate in a more logical and scientific manner, more information on prospective jurors needs to be available to the challenger."⁹⁷ However, he then notes that,

as American experience demonstrates... any expansion in challenges for cause will have serious consequences for the administration of jury service. Due to the complications associated with a system of challenge for cause, and the radical 'surgery' this would require on the present selection process in New South Wales, we do not advocate an expansion of this form of challenge.⁹⁸

Is the jury selection process employed in many American courts as flawed as we in Australia perceive it to be? Arguably, the answer is 'yes'. Alschuler, in a detailed analysis of the use of the *voir dire* in jury selection in the United States, argues that the process is prolonged, "sometimes consuming as much time as the

94 *Bell*, note 69 *supra* at 4 (emphasis added). See also *Yuill* (1993) 69 A Crim R 450 at 453-4, per Kirby ACJ; *R v Von Einem* (1991) 55 SASR 199 at 218; *R v Schumacher* (unreported, NSWCCA, Handley JA, Abadee and Hulme JJ, 2 April 1996) at 2; *R v VPH* (unreported, NSWCCA, Gleeson CJ, Newman J, Sully J, 4 March 1994); *R v Glennon* (1992) 173 CLR 592 at 605-6.

95 A Tanford, "The Law and Psychology of Jury Instructions" (1990) 69 *Nebraska Law Review* 71 at 106. See also, NSWLRC Report, note 1 *supra* at 109.

96 Weems notes that,

[v]oir dire rarely occurs in the courts of New South Wales because the judge usually postpones hearing the reasons for the challenge for cause until all peremptory challenges are exhausted. Unless the person challenging for cause uses up all of his peremptory challenges, there is no need to determine if cause in fact exists.

P Weems, note 7 *supra* at 342. Given the relatively infrequent use of the challenge for cause in New South Wales, it is difficult to ascertain whether the reduction of peremptory challenges to 3 in 1987 has had an impact on this practice. (It is worth noting that the practice elicited the express disapproval of the NSWLRC: see NSWLRC Report, note 1 *supra* at 49).

97 M Findlay, note 7 *supra*, p 176.

98 *Ibid.*

trial",⁹⁹ used improperly to indoctrinate jurors,¹⁰⁰ and constitutes an undue intrusion into jurors' privacy.¹⁰¹ Findlay highlights similar problems.¹⁰² These concerns, while valid, highlight a problem with the process, not an inherent flaw in the use of the *voir dire* to empanel an impartial jury.

V. LESSONS FROM CANADA: USE OF THE CHALLENGE FOR CAUSE IN CANADIAN COURTS

In Canada, in-court selection of jurors falls within the jurisdiction of the federal Parliament,¹⁰³ and is governed by the *Criminal Code*.¹⁰⁴ The *Code* provides for challenges to the array,¹⁰⁵ peremptory challenges,¹⁰⁶ and challenges for cause.¹⁰⁷ Procedurally, the exercise of challenges to the array and peremptory challenges is similar to the Australian practice.¹⁰⁸ The challenge to an individual juror for cause is, however, markedly different. Reference to the challenge for cause provision, and in particular the partiality provision,¹⁰⁹ illustrates this point.

Challenges for cause are governed by s 638 of the *Criminal Code*.¹¹⁰ Section 638(1)(b), which is the most commonly used basis for challenges for cause,¹¹¹ provides that a prosecutor or an accused is entitled to any number of challenges on the ground that "a juror is not indifferent between the Queen and the accused". The term "not indifferent" has been judicially interpreted to mean "not impartial",¹¹² and "it has become common to refer to the 'partiality' rather than to the lack of 'indifference' of the juror".¹¹³ Once a challenge for cause is made, and the presiding judge determines that there is an "air of reality" to the application, the English practice of appointing a mini-jury consisting of two 'triers' applies.¹¹⁴ L'Heureux-Dube J describes how the procedure operates in practice:

99 A Alschuler, "The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts" (1989) 56 *University of Chicago Law Review* 153 at 157.

100 *Ibid* at 160-1.

101 *Ibid* at 232.

102 M Findlay, note 7 *supra* at 243.

103 Note 51 *supra* at 520.

104 *Criminal Code*, RSC 1985, C-46.

105 *Ibid*, s 629.

106 *Ibid*, s 634.

107 *Ibid*, s 638.

108 For a discussion of challenges to the array and peremptory challenges in Canada, see note 90 *supra*, pp 59-65 (challenging the array), ch 9-11 (peremptory challenge).

109 Note 104 *supra*, s 638(1)(b).

110 Note 104 *supra*.

111 Note 77 *supra* at 479; note 90 *supra*, p 89.

112 Note 51 *supra* at 533-5; Hubbert *ibid* at 476.

113 Note 90 *supra*, p 89.

114 This has been codified in the *Criminal Code*, RSC 1985, C-46, s 640(2). Where the ground of the challenge is that the name of a juror does not appear on the panel, the issue is tried by the presiding judge on the *voir dire*: s 640(1). In Australia, all challenges for cause are tried by the presiding judge at the trial, note 76 *supra*.

[T]he trial of the truth of the challenge for cause is heard by the last two jurors sworn. If no jurors have yet been sworn, then two prospective jurors are appointed by the Court to hear and decide the challenge.¹¹⁵ If these triers decide that the challenge is valid, the juror will not be sworn. If, however, they find that the challenge is groundless, the juror must be sworn unless either side decides to exercise a peremptory challenge or stand aside. The decision of the triers is final and no appeal lies therefrom.¹¹⁶

The party making the challenge calls the proposed juror as a witness. Both sides are entitled to question the witness, provided the questioning is relevant, succinct and fair.¹¹⁷ "It must not be or become a fishing expedition."¹¹⁸ While counsel generally is permitted to ask the questions, the scope, content and number of questions is strictly controlled by the presiding judge.

To assist the presiding judge in the exercise of her or his discretion, a number of limiting principles can be distilled from the case law.¹¹⁹ First, the process is not to be used to find out what kind of juror the person is likely to be.¹²⁰ "It is not a procedure for wide-ranging personalized disclosure."¹²¹ Second, the process is not to be used to attempt to secure a favourable jury.¹²² Third, the process should not be used "deliberately as an aid to counsel in deciding whether to exercise the right of peremptory challenge, although indirectly a proper challenge and the trial of its truth may have that effect".¹²³ Fourth, the process is not to be used to indoctrinate the jury to the challenger's theory of the case.¹²⁴ Finally, the process is not to be used "to over- or under-represent a certain class in society".¹²⁵

Admittedly, once a *prima facie* case in support of the challenge has been established, these principles would apply equally to the challenge for cause procedure in Australia, and as such are unexceptional. What is interesting about the Canadian procedure is that, once the low burden of proof to establish a *prima facie* case has been met, the challenge for cause can, in appropriate circumstances, be used to question *each* prospective juror.¹²⁶ The leading Australian case on the exercise of challenges for cause, *Murphy v The Queen*,¹²⁷

115 While, in practice, this is what occurs, it is not a statutory requirement that the persons appointed be prospective jurors. The section provides, *inter alia*, that, "if no jurors have then been sworn, two persons present whom the court may appoint for the purpose, shall be sworn to determine whether the ground of the challenge is true": s 640(2).

116 Note 51 *supra* at 521-2.

117 Note 77 *supra* at 480.

118 *Ibid.* See also, *Sherratt* [1991] 1 SCR 509 at 528.

119 The principles, and the case law from which the principles are taken, are summarised in note 90 *supra*, pp 88-9.

120 Note 77 *supra* at 475.

121 Note 90 *supra*, p 88.

122 Note 51 *supra* at 528.

123 Note 77 *supra* at 475.

124 *Ibid.*

125 Note 51 *supra* at 533.

126 For a discussion of the procedure used in the trial courts of Ontario, see, A Cooper, "The ABCs of Challenge for Cause in Jury Trials: To Challenge or Not to Challenge and What to Ask if You Get It" (1994) 37 *Criminal Law Quarterly* 62; N Vidmar and J Melnitzer, "Juror Prejudice: An Empirical Study of a Challenge for Cause" (1984) 22 *Osgoode Hall Law Journal* 487.

127 Note 67 *supra*.

can be used to illustrate how such a challenge might be used in an Australian context.

A. *Murphy v The Queen* in a Canadian Context

In 1986 and 1987, few Australians would have escaped the media attention focused on the criminal trial of Michael Murdoch, and the Murphy brothers, Leslie, Michael and Gary. They, together with a fifth man, John Travers, were convicted of the brutal sexual assault and murder of Anita Cobby.¹²⁸

On 2 February 1986, while walking along a suburban street in Blacktown, NSW, Anita Cobby was seized by the five men and dragged into a car. She was robbed, beaten, threatened with a knife, and sexually assaulted in the car. Later, she was dragged from the car, through a barbed wire fence, into a paddock, where she was subjected to repeated sexual assaults, both vaginal and anal, forced to perform fellatio, and then brutally murdered when her throat was cut by Travers. The first trial, which was due to commence on 16 March 1987, was aborted and the jury discharged when *The Sun* newspaper described Michael Murphy as, "Michael Patrick Murphy, 34, unemployed a prison escapee of no fixed address". The trial was relisted to commence on 23 March 1987. The reasons for the delay in the commencement of the trial generated further media attention. When the Court convened on 23 March, an application was made by defence counsel to adjourn the trial for a period of six months. This application was denied. Defence counsel then made an application to challenge each prospective juror for cause pursuant to s 45 of the *Jury Act* 1977 (NSW), on the grounds that the proposed jurors would not be impartial. This application was also denied.

One can speculate that, had the case been tried in Canada, the application to challenge each potential juror for cause would have been successful. Given the intense pre-trial media attention, and the voluntary admission by one potential juror that she had been influenced by that publicity, it is likely that the low burden of proof required to establish an "air of reality" that there existed a realistic potential for the existence of partiality on the part of some jurors could be met. The fact that no case could be made out against a particular juror would not bar the application, and a limited *voir dire* of each prospective juror could, at the discretion of the trial judge, be allowed.

In Canada, the questions to be asked of each potential juror would be vetted by the presiding judge, and asked either by counsel making the challenge, or by the judge. In the *Murphy* case, such questioning may have proceeded as follows:¹²⁹ Have you read about this case in the newspapers or heard about it on the radio or television? Have you heard about this case from anyone such as family, friends or other members of the panel? Have you discussed this case with anyone? Do you believe that you can set aside any preconceived biases, prejudices or partiality that you may hold and decide this case with a fair and impartial mind? Have you formed an opinion as to the guilt or innocence of the

128 Note 81 *supra* at 119-20.

129 Generally, see A Cooper, note 126 *supra* at 66-7.

defendant? Having heard the witnesses' answers to the questions, and observed their demeanor, the triers would determine whether the witness should be sworn, or disqualified for cause.

VI. ARGUMENTS AGAINST AN EXPANSION OF THE CHALLENGE FOR CAUSE

The Canadian experience highlights the fact that loosening the tourniquet on applications to challenge for cause will not automatically lead to the Americanisation of the jury selection process. However, prior to advocating the liberalisation of the existing Australian practice, three concerns must be addressed: whether questioning potential jurors is an effective means of exposing partiality, whether existing safeguards provide adequate protection, and the impact a restricted *voir dire* of potential jurors will have on the length of trials.

A. Exposing Partiality

Long standing opinions, values, and beliefs cannot be checked like a hat at the jury room door.¹³⁰

Partiality, within the context of a challenge for cause, should not be equated with bias.¹³¹ Everyone has predispositions or prejudices¹³² shaped by experience, upbringing and belief system. Further, partiality should not be equated with knowledge. In a world of twenty-four hour news channels, tabloid press, and Internet access, finding an ignorant juror, particularly in a highly publicised case, is neither likely nor desirable.¹³³ Empanelling a jury representative of the "average stupidity"¹³⁴ should not be the objective. The objective of the jury selection process should be to empanel an impartial jury.

What is meant by the term 'impartial'? In *R v Parks*, Doherty JA, on behalf of the Ontario Court of Appeal, noted,

[p]artiality has both an attitudinal and behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases. A partial juror is one who is biased and who will discriminate against one of the parties to the litigation based on that bias.¹³⁵

130 J Gobert, "In Search of the Impartial Jury" (1989) 79 *Journal of Criminal Law and Criminology* 269 at 319.

131 *R v Parks* (1993) 15 OR (3rd) 324 at 336.

132 The word 'bias' means, "a predisposition or prejudice": *The Concise Oxford Dictionary*, Clarendon Press (9th ed, 1995) p 123.

133 Note 67 *supra* at 99, per Mason CJ and Toohey J; *Bell*, note 69 *supra* at 3-5. See also J Gobert, note 130 *supra* at 311; C Whitebread and D Contreras, note 56 *supra* at 1611.

134 J Gobert, note 130 *supra* at 310.

135 Note 131 *supra* (emphasis added). In *Webb and Hay v The Queen* (1994) 181 CLR 41 at 74, Deane J outlined the circumstances that might give rise to disqualification of a potential juror by reason of apprehended bias:

The qualities of an impartial juror in the context of a criminal prosecution have been identified by Gobert.

An impartial juror must respect the institutionally created biases in favor of an accused, including the presumption of innocence and the government's burden of proving guilt beyond a reasonable doubt. Impartiality thus subsumes an acceptance of the values inherent in the Anglo-American legal system. An impartial juror must be willing to suspend judgment until after hearing the evidence. Impartiality thus subsumes neutrality and detachment. An impartial juror must be equally open to persuasion by opposing counsel, as well as by other jurors. Impartiality thus subsumes open-mindedness and evenhandedness. An impartial juror must understand and resolve to follow judicial instructions. Impartiality thus subsumes comprehension and commitment. An impartial juror must base his or her vote on the evidence, objectively perceived, and the logical inferences to be drawn therefrom. Impartiality thus subsumes objectivity and rationality. Finally, an impartial juror must be prepared to temper, if appropriate, technical legal rules with more universally recognized principles of justice. Impartiality thus subsumes independence, a lack of rigidity, and a commitment to fairness.¹³⁶

The questions to be put to potential jurors should be prepared with these qualities in mind. In other words, the questions should do more than focus on the attitudinal component. They should also target the behavioural component.¹³⁷

The question remains, however, whether any form of questioning will expose partiality, particularly partiality based on subconscious bias? Provided the questions are properly formulated, and the potential jurors are truthful, in clear cases of partiality the answer is 'yes'. In less clear cases, the answer is more equivocal.¹³⁸ In Canadian cases where a challenge for cause has been allowed, the mini-jury constituted to 'try' the challenge regularly find lack of partiality on the part of potential jurors.¹³⁹ It is not possible to ascertain objectively whether

The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is disqualification by conduct, including published statements. That category consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias. The third category is disqualification by association. It will often overlap the first and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings. The fourth is disqualification by extraneous information. It will commonly overlap the third and consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias. (footnotes omitted).

See also *R v Hill* (1999) 74 SASR 262 at 267.

136 Note 130 *supra* at 326-7.

137 Note 131 *supra*.

138 Gobert maintains that "[r]ealistically, except in the most blatant cases, it is naive to expect to determine impartiality from voir dire": note 130 *supra* at 317. Brennan J expressed a similar opinion in *Murphy*, note 67 *supra* at 123. His Honour was of the view that the efficacy of the challenge for cause procedure in detecting bias is "doubtful".

139 For example, see the cases referred to in *A Cooper*, note 126 *supra* at 64-5. See also *N Vidmar* and *J Melnitzer*, note 126 *supra*.

such findings are justifiable.¹⁴⁰ However, one thing is certain – if potential jurors are not questioned, lack of impartiality cannot be exposed.¹⁴¹

B. Effectiveness of Existing Safeguards

The challenge for cause procedure is one of a number of safeguards employed to deal with behavioural bias. Reliance is also placed on the juror's oath or affirmation;¹⁴² "diffused impartiality" resulting from the "melting of 12 individuals of varying backgrounds in a single decision making body";¹⁴³ the dynamics of jury deliberation;¹⁴⁴ the seriousness of the task and the solemnity of the trial process;¹⁴⁵ and the judicial warnings concerning the need for an impartial assessment of the evidence given prior to the empanellment of the jury, and periodically throughout the trial.¹⁴⁶

The secrecy surrounding jury deliberations makes it difficult to assess the effectiveness of such safeguards.¹⁴⁷ However, the impact of judicial warnings, both before empanellment and during the trial, has been the subject of some empirical research. The findings cast doubt on the confidence¹⁴⁸ courts place in judicial warnings.

Tanford, in his review of the research into the impact of jury instructions on juries in the United States, concludes that "[a]dmonishing jurors is an ineffective way to prevent harm from improper evidence. Indeed, research suggests that admonitions tend to aggravate the very harm they are intended to reduce."¹⁴⁹ The applicability of this general proposition may have to be modified when the instructions focus on behavioural bias. Pfeifer, in his review of the empirical evidence, suggests that jury instructions dealing specifically with attitudinal

140 The subjective nature of a finding for cause is illustrated by the case of *R v Williams* (1996) 106 CCC (3d) 215 at 233, where MacFarlane JA, on behalf of the British Columbia Court of Appeal, reviewed the answers of nine potential jurors disqualified by the mini-jury for cause in a prior mistrial. He concluded that he was "unable to ascertain any proper basis for the finding that they could not be impartial". While a strong argument can be made that this decision merely reflects judicial conservatism, it does highlight the subjective nature of the ultimate decision of the trier. For a critical analysis of *Williams*, see note 90 *supra*, pp 113-15.

141 C Petersen, note 57 *supra* at 179.

142 *Bell*, note 69 *supra* at 4; *Yuill* (1993) 69 A Crim R 450 at 453-4, per Kirby ACJ; *R v Glennon* (1992) 173 CLR 592 at 605-6. See also *Williams* (1996) 106 CCC (3d) 215 at 231. Cf *Parks*, note 131 *supra* at 343; note 90 *supra*, pp 102-3.

143 *Williams*, note 140 *supra* at 231.

144 *Ibid.*

145 Note 94 *supra*.

146 *Ibid.*

147 Kirby J recently described the jury as "enigmatic as the Sphinx": *Katsuno*, note 6 *supra* at 197 (footnote omitted).

148 The following observation of Duggan J in *R v Von Einem* (1991) 55 SASR 199 at 218, is typical:

In my view, the court is justified in placing considerable confidence in the modern juror's ability to assess evidence critically and to comprehend and act upon directions to reach conclusions upon the evidence alone. (See comments of Toohey J in *Hinch v Attorney-General (No 2)* (1987) 164 CLR 15 at p 74). (emphasis added)

See also note 94 *supra*; note 81 *supra* at 124.

149 A Tanford, "The Law and Psychology of Jury Instructions" (1990) 69 *Nebraska Law Review* 71 at 106. See also, NSWLRC Report, note 1 *supra* at 109.

racism can reduce this form of behavioural bias.¹⁵⁰ It appears, however, that a judge's request prior to empanellment that biased jurors step forward and identify themselves is not overly effective.¹⁵¹ Three cases highlight this point.

During the examination-in-chief of a prosecution witness in *R v Schumacher*,¹⁵² a note was passed to the trial judge from a member of the jury which read, "[t]his witness is my nephew, does this make any difference?". In commenting on the trial judge's refusal to discharge the jury, the NSWCCA noted, "[i]t is true that the juror should have spoken up before the jury itself was empanelled. Why he did not is not apparent. It may be that he was not attending as closely as he should have been at the time the list of witnesses was read out."¹⁵³

In *R v Hill*¹⁵⁴ the daughter of the accused, called as a witness for the Crown, had worked as a prostitute approximately ten years before the commencement of the trial. It came to light after the trial had concluded and the accused was convicted, that the foreman of the jury had been a client. The SACCA, by majority, concluded that, in the circumstances, the association itself did not give rise to an apprehension of bias.¹⁵⁵ The juror was not questioned as to why he did not disclose the association, either when the witness' names were read out, or after the witness was called to give evidence.

On the fifth day of trial in *R v Gibson*,¹⁵⁶ it emerged that one of the jurors knew two of the prosecution witnesses. When questioned why she did not come forward when the witness' names were read out, the juror stated that "she was not very good with names and did not recognise the two witnesses until she saw them in the witness box".¹⁵⁷

Vidmar and Melnitzer¹⁵⁸ identify a number of factors that may account for the reluctance of potentially biased jurors to identify themselves: potential jurors may not know the identity of witnesses, what constitutes 'bias' may not be understood, a potential juror may be reluctant to appear different from other members of the panel, an admission of bias may be perceived as a confession of weakness of character, or a potential juror may be aware of his or her bias but may want to be selected to secure a conviction. In summary, what little research has been done suggests that the considerable confidence judges place in jury instructions is not warranted.

150 J Pfeifer, "Reviewing the Empirical Evidence on Jury Racism: Findings of Discrimination or Discriminatory Findings?" (1990) 69 *Nebraska Law Review* 230 at 248-9. Cf K Roach, note 57 *supra* at 424.

151 N Vidmar and J Melnitzer, note 126 *supra* at 509-10.

152 Note 94 *supra*.

153 *Ibid* at 1-2.

154 Note 135 *supra*.

155 *Ibid* at 269, per Duggan J; at 273, per Lander J.

156 *R v Gibson* (unreported, NSWCCA, Spigelman CJ, Studdert and Adams JJ, 26 November 1999).

157 *Ibid* at 4.

158 Note 126 *supra* at 509-10.

C. Cost vs Benefit of a Restricted Voir Dire of Potential Jurors

It has been suggested that "[c]ourts that rely on cost considerations to disallow challenges for cause are erring in law".¹⁵⁹ This may dissuade judges from articulating cost concerns when dealing with an application to challenge for cause, however it would be naive to assume that such considerations do not have an impact on the exercise of discretion.¹⁶⁰

In *R v Sherratt*,¹⁶¹ the Supreme Court of Canada stated expressly that cost considerations should not influence a trial judge's decision to grant or deny an application to challenge for cause. L'Heureux-Dube J, on behalf of the Court, stated:

If the challenge process is used in a principled fashion, according to its underlying rationales, possible inconvenience to potential jurors or the *possibility of slightly lengthening trials* is not too great a price for society to pay in ensuring that accused persons in this country have, and appear to have, a fair trial before an impartial tribunal, in this case, the jury.¹⁶²

There is no question that allowing restricted *voir dire* questioning of potential jurors in cases where the "air of reality" burden has been met will lengthen trials. How much they are lengthened will depend on the nature of the perceived partiality and the number of questions asked. In a 'typical' case, estimates range from one hour¹⁶³ to one and a half days.¹⁶⁴ In the final analysis, attempting to ensure that a defendant receives a fair trial before an impartial jury must take precedence over economic expediency. In the words of Blackstone, "delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters".¹⁶⁵

VII. CONCLUSION

It should be possible in practice as well as in theory to challenge for cause. Arguably, counsel should be permitted to challenge each potential juror for cause whenever: race, ethnicity, religious affiliation, or sexual orientation may engender prejudice against either the defendant or the victim; the nature of the

¹⁵⁹ Note 90 *supra*, p 104.

¹⁶⁰ The NSWLRC, in rejecting proposals to allow any form of *voir dire* questioning of potential jurors, encapsulated the concern when they noted,

This procedure [questioning by the presiding judge based on questions agreed upon by counsel] would considerably lengthen criminal trials, both by the time taken to settle the issue of whether the questions were necessary and then by the question process itself. It must be remembered that in the *voir dire* examination the members of the jury panel are asked questions. At the trial of an individual accused person, the jury panel usually numbers in excess of forty people.

NSWLRC Report, note 1 *supra* at 50.

¹⁶¹ Note 51 *supra*.

¹⁶² *Ibid* at 533 (emphasis added). See also note 131 at 351, wherein Doherty JA remarked, "[f]airness cannot ultimately be measured on a balance sheet". Generally, see note 90 *supra*, pp 104-6.

¹⁶³ Note 99 *supra* at 158, n 16.

¹⁶⁴ N Vidmar and J Melnitzer, note 126 *supra* at 511. Generally, see note 90 *supra*, pp 104-6.

¹⁶⁵ Note 46 *supra*, p 350; quoted in *Sherratt* note 51 *supra* at 525. Admittedly this quote is taken out of context, but it is submitted that the proposition applies equally to the cost versus benefit analysis of allowing a restricted *voir dire* of potential jurors in appropriate cases.

charges may engender prejudice against the defendant; or the pre-trial publicity may affect the impartiality of the jury.¹⁶⁶

Three benefits flow from the Canadian challenge for cause procedure which current Australian safeguards, in particular the use of the peremptory challenge and judicial warnings, do not address adequately. First, some partial potential jurors will be disqualified; second, the empanelled jury will be sensitised to the need to confront behavioural bias to ensure that it does not impact on their verdict; and third, the appearance of fairness in the mind of the accused will be enhanced.¹⁶⁷ This is not to suggest that the challenge for cause will ensure that a truly impartial jury is empanelled. No procedure can achieve such a goal. However, as Vidmar and Melnitzer note,

[f]rom the perspective of modern psychological assessment techniques, the challenge for cause process, as prescribed under *Hubbert*, is a rather rough and primitive instrument. It might be compared to a net that has a substantial number of holes in it. *Yet, even with these holes, the net appears adequate to snare at least many of the persons who are not indifferent between the Queen and the accused.*¹⁶⁸

Reference to the Canadian procedure illustrates that limited *voir dire* questioning of potential jurors in appropriate cases will not automatically lead to the extensive questioning to which potential jurors in some United States jurisdictions are subjected. While adopting the totality of the Canadian model may not be considered appropriate in an Australian context,¹⁶⁹ aspects of the procedure do warrant serious consideration. In particular, a challenge for cause should be viewed as a routine, rather than exceptional, application governed by a low burden of proof. Once this burden has been met, relevant, succinct and fair questioning of potential jurors, under the strict control of the presiding judge, should be allowed.

166 Generally, see A Cooper, note 126 *supra* at 65; C Petersen, note 57 *supra* at 178.

167 These benefits were identified in *Parks*, note 131 *supra* at 351-2, per Doherty JA.

168 Note 126 *supra* at 511 (emphasis added).

169 For example, it is unlikely that we will see a return to the English practice of appointing a mini-jury to try challenges for cause.