THE USE OF SOCIAL SCIENCE DATA IN A CHANGE OF VENUE APPLICATION: A CASE STUDY*

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Introduction

This article describes how social science data and professional testimony were used to assist judicial decision-making in an application to have a criminal fraud trial moved from Middlesex County, Ontario, because of prejudicial attitudes extant in the community. Typically, in such applications, tenuous documentation of pre-trial publicity and perhaps some unsubstantiated "opinion" testimony by persons purportedly in touch with the pulse of the community are the only evidence introduced. The presiding judge is required to consider this circumstantial, indirect, evidence and draw a conclusion about the level and extent of public prejudice as the merits of the application are weighed. In the present case systematic empirical data were collected to assess levels of knowledge and prejudice among members of the population from which the veniremen would be selected, thus providing the judge with more direct evidence on which to form his opinion. Though descriptive of a particular case, the article illustrates how empirical studies can be generated and how basic research from the social sciences and other data sources can be used to bolster that empirical research. Such an approach might be used to assist judicial decisions on a number of problems.

I. *Background of the R.* v. *Brunner Application.*

In July 1977 Brunner was arrested and charged with fraud contrary to section 338(1) of the Criminal Code.[1] The specifics of the

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[1] R.S.C., 1970, c. C-34, as am.

information against him were that he had misrepresented his business ties with a building products company and had sold overpriced materials and services by fraudulent means, and so on. These charges were laid subsequent to Brunner having entered a guilty plea in *R.* v. *Stewart et al.*,[2] commonly known as the "Bevlen Conspiracy" or "Bevlen Fraud Trial", but prior to sentencing. In his trial on the new charge Brunner's connection to the *Bevlen* case would likely be brought out in three ways: the Crown, if his own counsel had not, would certainly cross-examine him as to his prior conviction in that case if he chose to testify; the Crown would lead "similar fact" evidence to demonstrate that the acts of selling allegedly unnecessary home improvements at exorbitant prices to easily led elderly victims was a *modus operandi* used by Brunner when employed by Bevlen; and a principal Crown witness had also been convicted in *Bevlen*. For various reasons defence counsel felt compelled to elect a jury trial. It was counsel's concern, however, that any jury picked from Middlesex County veniremen probably would be prejudiced against Brunner because of the similarity of the fraud charges to those in Bevlen as well as his actual connection to Bevlen. To understand this concern background on the *Bevlen* case must also be described.

The Bevlen Building Products Co. was an established and well-known Middlesex County firm. In December 1975 the *London Free Press*, the principal newspaper for the county, began publishing articles suggesting criminal charges might be laid against the president, officers, and salesmen in the firm. By August of 1976 twenty-two persons were indicted on fraud charges. Even the preliminary hearings made headlines. Further headlines were made when some of the defendants sought legal aid and the dispute eventually involved the Attorney General of Ontario and debate in the Ontario legislature. The fact that an initial panel of six hundred veniremen was called for the trial evoked further publicity and articles. When the trial finally began some of the accused represented themselves, with, it should be added, considerable articulateness and dramatic flair. However, the most sensational part of the trial involved the testimony of elderly men and women who described how they were badgered, confused, and cheated of their life savings by the salesmen. This testimony was also accompanied by Ontario Provincial Police wiretap evidence of conversations between Bevlen salesmen and the victims that not only supported the witnesses but could easily be characterized as spectacular in content.

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[2] Unreported, Middlesex County Court, Ont., 1977. All of the accused were associated with the Bevlen Building Products Company of London, Ontario and newspaper accounts immediately labelled the case as the *Bevlen* case. This article will subsequently refer to *Stewart et al.* as *Bevlen*.

After records were set for the longest criminal trial and longest deliberations by a jury in Middlesex County, eight of the defendants were found guilty. During subsequent sentencing the presiding judge's remarks as to the need for tougher consumer protection laws also received headlines. All told, over one hundred separate stories, most accompanied with major headlines and frequently reporting dramatic portions of the testimony, had been carried in the *Free Press* when the *Bevlen* trial ended in the summer of 1977.

Brunner was coming to trial on the subsequent charges several months after the *Bevlen* case ended. However, defence counsel theorized that the *Bevlen* case, because of its notoriety and its salience to Middlesex County residents, had induced continuing prejudice in large segments of the community; therefore, an impartial jury could not be chosen. An application for a change of venue was made. The Crown contested the application on the grounds that any prejudice which might have been aroused would have subsided and that the persons in the community where the crime took place should have the right to try the accused. Further, it was argued that defence counsel's right to challenge for cause and the trial judge's instructions to the jury would offer the accused sufficient protection.

II. *Prior Change of Venue Cases.*

Section 527(1) of the Criminal Code provides that "a court . . . or a judge . . . may at any time before or after an indictment is found . . . order the trial to be held in a territorial division in the same province other than that in which the offense would otherwise be tried if . . . it appears expedient to the ends of justice . . .". Reported Canadian case law on this provision is not extensive but a review of the case suggests the following general observations: the law itself is reasonably clear; venue change applications appear to be relatively rare; those applications which have been made have met with infrequent success.[3]

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[3] *King* v. *Roy* (1909), 14 C.C.C. 368 (fraud) (granted); *The King* v. *Graves et al.* (1912), 19 C.C.C. 402 (unknown) (granted); *Rex* v. *Upton* (1922), 37 C.C.C. 15 (murder) (granted); *R.* v. *DeBruge* (1927), 47 C.C.C. 311 (murder) (granted); *R.* v. *Bronfman*, [1930] 1 W.W.R. 382 (obstruction of justice) (denied); *R.* v. *Dick*, [1943] 1 W.W.R. 21 (buggery) (denied); *R.* v. *Adams* (1946), 86 C.C.C. 425 (Official Secrets Act) (denied); *Balcombe* v. *The Queen* (1954), 110 C.C.C. 146 (murder) (denied); *R.* v. *Abel* (1956), 119 C.C.C. 119 (murder) (granted); *R.* v. *Roberson and Myers* (1962), 39 C.R. 162 (bribery) (denied); *R.* v. *Martin*, [1963] 2 C.C.C. 391 (criminal negligence) (granted); *R.* v. *Beaudry*, [1965] 3 C.C.C. 51 (murder) (denied); *R.* v. *Turvey* (1971), 1 C.C.C. (2d) 90 (murder) (denied); *R.* v. *Kully* (1973), 15 C.C.C. (2d) 488 (murder) (granted); *R.* v. *Vaillancourt* (1973), 31 C.R.N.S. 73 (murder) (denied); *Re Trusz and the Queen* (1974), 20 C.C.C. (2d) 239 (fraud) (denied); *R.* v. *Alward and Mooney* (1975), 12 N.B.R. (2d) 267 (murder)

Since the relevant case law is reviewed in the longer paper upon which this article is based and in a recent article by Arnold and Gold,[4] we need only to summarize the major problems with which defence counsel was faced in convincing a judge that a "fair and reasonable probability" existed that Brunner could not receive a fair trial in Middlesex County. It had to be demonstrated that the publicity regarding fraudulent sales practices and the *Bevlen* trial had created widespread knowledge and prejudice; that this knowledge and prejudice had not dissipated in the intervening months since the trial ended; that this prejudice went beyond mere abhorrence of the crime itself and would be transferred to Brunner when his connection to the *Bevlen* case became known; that the prejudice was so widespread that peremptory challenges and challenges for cause would be insufficient to ensure an impartial jury; and, finally, that the prejudice was held so deeply that judicial instructions would be unlikely to nullify it.

III. *The Empirical Research.*

Two surveys were conducted to provide empirical data bearing on the defence theory that Brunner could not receive a fair trial in Middlesex County. Initially, only one survey was planned, but findings from the first survey left questions that called for a second survey. The surveys were presented to the court as two separate written reports, but for efficiency and clarity of presentation we will describe the main parts of the two surveys separately and have an integrated discussion section.

1. *Survey 1.*

One purpose of the survey was to determine the degree of public awareness and knowledge of the legal proceedings surrounding the Bevlen Conspiracy trial. A second purpose was to attempt to assess the degree to which people's attitudes might be biased toward a presumption of guilt in the instance of an accused involved in that case who was charged with a similar crime subsequent to pleading guilty in *Bevlen*.

a. *Sample and Procedure*. It was critical that the survey sample be similar to the "sample" that would make up the jury list. If the trial were held in Middlesex County the pool of approximately 200 jurors would be randomly chosen from the enumeration list for the

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(denied); *R.* v. *Threinen* (1976), 30 C.C.C. (2d) 42 (murder) (denied); *R.* v. *Jansen*, [1976] 4 W.W.R. 277 (murder) (denied). See also *R.* v. *Lavigne* (kidnapping) (denied), reported in Arnold and Gold, The Use of a Public Opinion Poll on a Change of Venue Application (1978-79), 21 Crim. L. Q. 445.

[4] Arnold and Gold, *op. cit.*, *ibid.*

county that was constructed for the last provincial election. The procedures for choosing the survey sample were intended to approximate that procedure as nearly as possible. Using a specially constructed unbiased randomization procedure, an initial sample of 280 phone numbers from the twenty-nine telephone exchange numbers which make up Middlesex County was selected from the September 1976 *Bell Canada Telephone Directory* for London-St. Thomas and surrounding area. Calls were placed between 5:30 and 9:15 p.m. on October 5th through 8th, 1977. In eleven percent of the households the respondent refused to be interviewed. Another three percent could not be reached after three call-backs or were eliminated because the respondents were non-Canadians and therefore ineligible for jury service. The final sample consisted of 241 respondents, or eighty-six percent of the original sample. It contained forty-seven percent males and fifty-three percent females and included persons of all ages and occupational categories.

b. *Research Instrument.* A nineteen item questionnaire appropriate for a telephone survey was constructed. Two initial "lead-in" questions asked about local media reading and television viewing habits. Next, a number of questions attempted to determine the degree of public knowledge about the *Bevlen* trial. The most critical question immediately followed the lead-in questions: Does the *Bevlen* conspiracy trial mean anything to you? If the answer was yes, respondents were asked to tell the interviewer about it as a check on "yea saying" or inaccuracy of recall. If the answer was no or a yes response was followed by inability to correctly provide details, the interviewer provided a prompting statement and question: The *Bevlen* trial involved salesmen for the Bevlen Building Products Company who were accused of fraudulent practices in selling people siding and other home improvements; does this information make the *Bevlen* trial familiar to you? If the answer was yes, respondents were asked to provide some additional details to ensure that the affirmative response would be supported. Some additional questions asked about specific details pertaining to the case to determine respondents' depth of knowledge. Next, four questions were intended to assess presumptions of guilt toward an accused involved in *Bevlen* who was subsequently charged with additional fraudulent practices. These questions, asked of persons who indicated no knowledge of *Bevlen* as well as persons who had knowledge of *Bevlen,* are contained in Table 1. As may be seen from that table, the questions moved from general attitudes toward an accused to more specific beliefs about how they would behave in a courtroom. Question d was clearly the most critical question since it was phrased in a manner similar to the question likely to be posed to veniremen in the courtroom. A third part of the questionnaire obtained demographic data which allowed us to eliminate persons who would not be

included in a typical jury pool (for instance, persons under eighteen and non-Canadians) as well as allow checks for the representativeness of the sample (for instance, age, sex, occupation). Finally, the questionnaire contained a section for interviewers to write down spontaneous remarks made by the respondent during the course of the interview.

c. *Results*. The primary measure of knowledge was recognition. Thirty-eight percent of resondents said they recognized the *Bevlen* case by its common name, "The *Bevlen* conspiracy trial" and were able to tell the interviewer enough about the case to verify their statement of recognition. An additional twelve percent did not recognize the case by name but when reminded of the nature of the case were able to provide additional details. Thus, at least fifty percent of the respondents in Middlesex County households were aware of, and had knowledge about, the *Bevlen* case.

The next set of analyses involved the presumption of guilt of an accused involved in the *Bevlen* case who was brought to trial on a subsequent and similar charge. These questions were asked of all respondents because even the "no-knowledge" persons had been apprised of the essential nature of the case in the probe to determine levels of knowledge about it. Therefore, these latter persons served as a "control group" against which the responses of the knowledge group could be compared. Table 1 presents the percentage of responses for each alternative for each of the four questions disaggregated into knowledge and no-knowledge respondents. It is apparent that with respect to the first two questions (a and b) there was a general tendency to assume high levels of guilt as a result of the accused being connected with the prior *Bevlen* case. There was also a tendency for persons who had knowledge about *Bevlen* to be more inclined to assume guilt than persons who did not have knowledge. These tendencies were continued in the final two items which were more specific to respondents' beliefs about how they would actually behave as jurors. In comparison to the no-knowledge persons the knowledge persons were more inclined to conclude that they would judge the accused as guilty rather than keep an open mind. This effect was quite salient in the final question. For the no-knowledge persons thirty-six percent indicated that, even if instructed by a judge to put all preconceived views about guilt aside, they either could not do so (twenty-one percent) or were uncertain (fifteen percent). For the knowledge group, however, this number totalled forty-eight percent: thirty percent said they believed they could not respond to the judge's instructions and eighteen percent expressed uncertainty.

Respondents in the knowledge group also tended to provide spontaneous comments during the interview that showed a strong

negative attitude toward the accused involved in *Bevlen*: for instance, "they should get what they have coming to them"; "the judge should hang 'em all"; "they ought to be horse-whipped", and so on. Combining both the knowledge and no-knowledge groups it can be estimated that forty-two percent of the surveyed persons expressed beliefs of irrevocable prejudice or at least uncertainty that they could set aside this prejudice, even under a judge's admonition to do so.

2. *Survey 2.*

The first survey left a major unanswered question. Consistent with the initial hypothesis, people who had knowledge of the *Bevlen* trial were more likely to indicate bias than no-knowledge persons (forty-eight percent versus thirty-six percent). But why was the professed bias in the no-knowledge group as high as thirty-six percent? Four explanations, not mutually exclusive, could be advanced for this finding. First, the measures of knowledge might have underestimated actual knowledge and its associated negative attitudes. Even though people are sometimes not aware of their cognitive processes and cannot immediately recall information it may be latent in their memory and consequently affect their behaviour and attitudes. Perhaps some of the people classified as "no-knowledge" actually had such latent processes operating, and these caused them to express bias on questions about presumed guilt. A second hypothesis is that knowledge of a prior criminal conviction prejudices people generally against an accused. Moreover, we might expect that the more similar the prior crime was to the crime with which the accused was charged, the greater the assumption of guilt would be. A third explanation is that, at least for some persons, the crime of defrauding little old ladies was so odious that they would feel they could not be unbiased against an accused, regardless of their knowledge about the *Bevlen* case or about the accused being involved in a previous fraud case. A fourth hypothesis assumes an artifact in the survey itself. Perhaps some people thought the survey questions were an indication that they might be called for jury duty and that an expression of bias might free them from such duty.

Survey 2 was designed to shed light on these different explanations. It experimentally manipulated four conditions of information about the accused's prior criminal record: no prior criminal record; a prior conviction for assault; a prior fraud conviction unrelated to *Bevlen*; a prior conviction for fraud in the *Bevlen* case. One hypothesis was that as the accused was described as having no prior record through conviction on other charges to conviction in *Bevlen* itself, presumptions of guilt and assertions or irrevocable bias would increase. Further, the absolute differences

between the prior record conditions and the interaction between knowledge and no-knowledge with record would allow us to speculate about the extent to which the record or the crime itself was causing respondents to assert they were biased.

Before turning to discuss procedure and results, a fortuitous but critical incident which profoundly affected Survey 2 should be mentioned. The second survey was designed during the week of October 10th and scheduled for actual execution on the evenings of October 17th and 18th. As the interviewers began their calls on October 17th, many respondents began with a statement to the following effect: "Oh, you mean the case that was on television last night." Unanticipated by and unknown to the researcher, CBC's television programme, "Marketplace", on Sunday evening, October 16th, had featured the *Bevlen* fraud as the subject of its programme. Although the programme detailed the case and noted that it centered around London, Ontario the word Bevlen was never mentioned, either as the name of the company involved or as the popular name of the trial. The local CBC station (CFPL) is the major channel for Middlesex County. Thus, the Marketplace programme could be expected to have wide viewing, and, as the results section will indicate, it apparently did.

a. *Sample*. The sample was drawn in exactly the same way as the first survey. However, the original purpose of the study was to test some experimental hypotheses rather than estimate the amount of knowledge and bias which existed in the population; therefore, a smaller sample was chosen. The initial sample consisted of seventy-nine phone numbers but attrition due to "not at homes" or refusals to participate in the survey reduced the final sample to fifty-nine persons (seventy-eight percent of the original sample).

b. *Research Instrument*. As in the first survey there were lead-in questions about newspaper reading and television watching habits. These were followed by the main knowledge question, that is, does the *Bevlen* conspiracy trial mean anything to you?, and the additional probes that were used in Survey 1. Next, the manipulation of criminal record followed. Four different conditions were posed to *each* respondent and with each condition three of the four questions (a, c, d) used in Survey 1 followed. The manipulation was effected in question "a". For example, in the "no criminal record" condition question "a" was posed as follows:

> "Suppose someone *not* involved in the original *Bevlen* case was arrested by the police and brought to trial by the Crown on a charge similar to that in the *Bevlen* case, that is defrauding an old woman by charging her excessive amounts for home improvements. Further, suppose you also know that the defendant has *no prior criminal record*. Would this create within your mind an impression, a belief, that he was probably guilty?"

In the other conditions "no prior criminal record" was replaced by "has a criminal record: one conviction for assault", "has a criminal record: one conviction for fraud" or "had been convicted of conspiracy to defraud in the Bevlen case". How questions "c" and "d" followed can be seen by referring to Table 2.

Each respondent was asked about all four criminal record conditions. However, to guard against an effect due to the order in which the conditions were posed, the respondents received the conditions in different, randomly determined, sequences.

c. *Results and Discussion.* It is important to reiterate the fact that the question attempting to assess knowledge about *Bevlen* was exactly the same as that used in the earlier survey because the change in level of knowledge was surprising. Whereas Survey 1 indicated that fifty percent of people in Middlesex County knew about the *Bevlen* case (thirty-eight percent recognized the name and twelve percent with a reminder) fully seventy-five percent of the persons in the second survey recognized the case and could identify it: fifty-seven percent by name alone and another eighteen percent when reminded of its essentials. Many respondents specifically commented on its being featured on "Marketplace".

Recall that the "Marketplace" programme never mentioned *Bevlen* by name. Yet, recognition of the *Bevlen* conspiracy trial changed from thirty-eight percent on October 5th and 8th to 57 percent on October 17th and 18th, a substantial reversal of the general tendency for memory to decay over time. Two possible explanations come easily to mind. The first utilizes the hypothesis, discussed previously, that many people had latent knowledge of *Bevlen* stored in their memory. The television programme provided "retrieval cues" that caused some people to recall the name Bevlen. The second explanation can be labelled an interpersonal communication hypothesis. Because the programme focused on an event which took place in London, Ontario, it would tend to be very salient to its residents and cause discussion among them. Recall that Survey 1 indicated that just prior to the "Marketplace" programme, recognition knowledge of *Bevlen* was thirty-eight percent. In talking about the programme those people with knowledge provided the label Bevlen (and undoubtedly more details) to those without information. For example, the next day Joe Worker says to Bill co-worker at coffee break: "The wife and I saw this programme about siding fraud in London on TV last night"; Bill co-worker replies, "Oh, you mean the *Bevlen* case. Didn't you read about that in the *Free Press?* Really bad characters . . .". In short the television programme could have started a chain of events which caused persons with knowledge to provide information to persons without. The two hypotheses are not incompatible with one another, and together they raised questions

favorable to the defence theory. The latent memory hypothesis suggests Survey 1 may have actually underestimated levels of knowledge in the population. The communication hypothesis suggests knowledge of *Bevlen* (and perhaps prejudice) would be likely to be shared in jury deliberations.[5]

Turn now to consider how the manipulations of prior record influenced presumptions of guilt and bias. The data reported in Table 2 show support for the hypothesis that, as we moved from an accused with no prior criminal record through convictions for assault and for fraud to conviction for fraud in *Bevlen*, the tendency to assume the accused was guilty would increase. This trend is apparent in all three questions, though the actual percentages differ somewhat due to the specificity of the particular question. Note also that "fraud in *Bevlen*" shows more bias than an unrelated fraud conviction. This difference is not statistically significant, and with such a small sample we would not necessarily expect it to be. It is, nevertheless, wholly consistent with the defence theory that there was something uniquely pejorative about being involved in *Bevlen*, as opposed to simply being a convicted fraud artist. These data also tend to go against the hypothesis that Survey 1 results can be explained simply by the fact that people were trying to ward off potential jury duty. When the accused was described as having no criminal record, or even a criminal record involving assault, far fewer persons said they could not be impartial jurors and set aside preconceived views to decide the case solely on the evidence. If the motive of the survey respondents was to avoid potential jury duty, they would have indicated high levels of bias in all record conditions.

As in the first survey, there were differences between knowledge and no-knowledge persons. Moreover, the differences were affected differently by the record condition. While they are also roughly mirrored in questions "a" and "c", focus attention on critical question "d". When no criminal record was involved, both groups of persons tended to indicate that they believed they could judge the case solely on the evidence (though the knowledge group was slighly less affirmative and slightly more inclined toward "don't know responses"). Introduction of a criminal record for assault, for fraud, and for fraud in *Bevlen* reduced affirmations of impartial behavior but for the no-knowledge group these responses remained at an average of fifty-nine percent (fifty-eight, fifty-nine and sixty percent respectively). For the knowledge group on the other hand affirmation of lack of impartiality or doubts about impartiality (the "don't know" response) increased as the record moved from assault, through fraud, to fraud in *Bevlen*. Remember, also, that in

[5] See *Regina* v. *Beaudry*, [1965] 3 C.C.C. 51.

this second survey the knowledge persons constituted seventy-five percent of the sample.

Finally, compare stated beliefs about impartiality as jurors with those of Survey 1. In that first survey it was estimated that, considering both denials of ability to be impartial and don't know responses, forty-two percent of persons in Middlesex County were biased. Using the same criterion and a weighted average to account for the fact that the knowledge group constituted seventy-five percent of the sample for Survey 2, it can be estimated that fifty percent of the respondents expressed beliefs they could not be impartial.

Conclusions

The two surveys indicated that approximately three and one half months after the end of the main publicity and headlines following the *Bevlen* conspiracy trial it remained a well-known, notorious event in Middlesex County. While it should be expected that memory of the trial would have diminished over time, a national television show republicized the event. In addition to this direct effect it may have served as a retrieval cue which activated latent memory of the case or caused people with knowledge to share their knowledge with others or both. From the surveys it may be estimated that up to seventy-five percent of the persons in Middlesex County may have had knowledge of the *Bevlen* case. The surveys also indicated that while there was also some bias in persons classified as having no knowledge about *Bevlen* the effect was clearly stronger in the knowledge group. Impressionic data gleaned from spontaneous comments emitted during the interviews indicated that negative feelings were often quite strong. From the second survey it could be estimated that at least fifty percent of the population in Middlesex County would express inability to remain impartial or at least doubt that they could be impartial in a fraud trial involving Brunner.

IV. *Examination in Chief of the Principal Researcher.*

The written reports of the results of the surveys were similar to the summary produced above, though they were slightly more elaborated and contained appendices with the actual questionnaires and details of the survey procedures. Additional interpretation and integration with broader bodies of sociological and social psychological literature was reserved for examination-in-chief. Upon being qualified as an expert the researcher's reports were submitted into evidence and he was asked to summarize their contents. Defence counsel then proceeded to develop the defence theory. The strategy was not only to bolster the empirical findings with additional opinion, literature, and research findings but to preempt questions likely to be raised by

the Crown. This strategy plus some occasional interrogative interjections from the judge resulted in the examination-in-chief lasting slightly over three hours. In this section we have attempted to summarize the main points raised in the examination. Though in actuality, of course, the examination followed orthodox legal phrasing and procedure, the most effective presentation technique is to rephrase the questions in terms of their main intention and produce the essence of the witness' responses.

1. *How similar were the survey samples to the venire panel which would likely be drawn for the trial?*

There are three factors relevant to answering this question: the similarity between the original target sample and the potential venireman sample; the similarity of procedures used to draw from these lists; and the similarity in attrition rates, that is the degree to which the final sample has "lost" some of the persons chosen in the original target sample. Consider each of these separately.

The jury *venire* would be based upon the enumeration list for Middlesex County which was drawn up for the last provincial election. The telephone list used for the survey may be slightly less inclusive than the enumeration list in that some households in the county do not have telephones but, on balance, it is reasonable to assume the telephone list allowed a representative sampling of households in Middlesex County and was not substantially different than the enumeration list from which veniremen are drawn. The next concern is with procedures for drawing the sample. Jurors are randomly drawn by means of a computer. While a computer was not used directly in drawing the survey sample in fact the random number table which formed the core of the sampling procedures was computer generated. There was no basic difference between jury selection procedures and survey selection procedures.

To properly answer the question about attrition rates I would have to know about the percentage and type of attritution which affects the juror list derived from the computer. That is, some of the people may have moved since the enumeration and cannot be traced, other persons may obtain a permanent or temporary waiver of their jury obligations, and so on. While no data are available regarding the attrition rate in Middlesex County, other studies suggest it may be considerable.[6] In short, it is not possible to answer the question directly. It can be argued, however, that the two surveys conducted

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[6] Christie, Probability vs. Precedence: The Social Psychology of Jury Selection, in Bermant *et al.*, Psychology and Law: Research Frontiers (1976); Kairys (ed.), The Jury System: New Methods for Reducing Prejudice (1975).

for this case reflect a reasonably accurate sample of opinions held in the households in Middlesex County.

2. *How valid are the responses of a telephone survey in comparison to those obtained from face-to-face interviews?*

While a face-to-face interview can usually obtain greater quantities of data from the respondent, because people will devote more time and because extended telephone interviews are more tiring to the respondent, there is no reason to think they yield less valid responses. Indeed, some experts believe they may yield more valid answers than face-to-face interviews, due to the fact that the telephone affords a degree of anonymity.[7]

3. *How do the levels of knowledge about Bevlen compare with levels of knowledge about other subjects, including other trials?*

The general literature on public opinion as well as my own research experience would suggest that the levels of knowledge about *Bevlen* are extremely high. Depending on the topic, its content, novelty, salience to the person and other factors, knowledge of public events, as determined by opinion polls, is generally not very high. People read newspapers and attend to television news programmes in a selective manner and their retention of much of the information even a few days later is frequently low.

Now, it should be noted that the surveys under consideration here were conducted some twenty-two months after the *Bevlen* case first made headlines and roughly four months since the conclusion of the trial. By almost any standard a recognition level of thirty-eight percent for the name Bevlen itself in the first survey is extremely high, not to mention the additional twelve percent of persons who recognized it after a reminder.

There can be little doubt that the *Bevlen* case had high interest value for the people of Middlesex County. Although it was publicized nationally on a CBC programme, there was particular salience for residents of Middlesex County. Note again that although the name Bevlen was not mentioned in the programme, comparison of Survey 1 with Survey 2 shows recognition of the name "Bevlen Conspiracy Trial" itself moved from thirty-eight percent to fifty-seven percent. Thus, not only were levels of knowledge abnormally high in the first place, the television programme apparently triggered a mechanism, whether a retrieval cue for memory or enhanced sharing or knowledge, which actually *reversed* the normal forgetting

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[7] See *e.g.*, Sudman, Reducing the Cost of Surveys (1976); Sudman, Applied Sampling (1976).

curve. With few qualifications the levels of knowledge about *Bevlen* are extraordinary.

4. *Turning now to the issue of bias, why are the levels of bias so high in persons with no knowledge of Bevlen?*

First, it should be noted that our categorization of no-knowledge persons may be incorrect, that is, even though we classified them as having no knowledge on the basis of our questions, some of these persons may indeed have knowledge of *Bevlen*. Certainly, the jump in recognition knowledge between Surveys 1 and 2 is consistent with the hypothesis that some people may have latent knowledge about the case; more than our simple questions about whether they recognize Bevlen may be required to bring it out. The television programme may have produced additional "retrieval cues" to help people recall the *Bevlen* case. Thus, perhaps many people classified as no-knowledge actually do have knowledge about Bevlen. Moreover, a number of psychological studies have tended to demonstrate that even though knowledge of an event may not be recalled, or at least articulated, by a person, the effect associated with the latent memory may affect attitudes and behaviour.[8] In this view, then, there is latent knowledge and negative affect toward the Bevlen fraud.

There is another potential explanation, however. It is not incompatible with the first explanation; in fact it may be viewed as complementary to it. In general people probably do have strong negative feelings about the crime of fraud, especially when it involves cheating little old ladies. We did receive many spontaneous negative comments about door-to-door salesmen and about people who prey on little old ladies. The difficulty with this explanation as a single explanation, however, comes from the results of Survey 2. If the accused had no prior criminal record or even a criminal record which was not associated with Bevlen, levels of expressed bias were substantially lower. These same findings, incidentally, were discussed earlier as tending to go against a third explanation, namely that people expressed bias simply as a means of attempting to avoid potential jury duty.

On balance, then, it is the researcher's opinion that the expressed bias in persons classified as no-knowledge may be due in part to the classification procedure: many of these persons may have latent knowledge and prejudicial feelings about the *Bevlen* case. It

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[8] See *e.g.*, Higgins, Rholes, and Jones, Category Accessibility and Impression Formation (1977), 13 J. of Experimental Social Psychology 141; Nisbett and Wilson, Telling More Than We Can Know: Verbal Reports on Mental Processes (1977), 84 Psychological Rev. 231.

should also be pointed out that Survey 2 suggests that, even by this less than accurate classification procedure, no-knowledge persons may now constitute only twenty-five percent of the total population.

5. *How valid are survey responses about professed bias in comparison to the legal situation where the potential juror is in the solemn atmosphere of the courtroom, is under oath, and is under the judge's scrutinizing eye? Might veniremen not respond differently under such conditions?*

There are two facets involved in the answer to this question and there are a number of studies and findings bearing on each. First, consider what psychologists call "social desirability". On tests or in surveys people are sometimes inclined to give answers that are consistent with what they perceive to be the normative or desirable thing to say, regardless of their own personal feelings.[9] Focusing on the legal system, the socially desirable response is to say that an accused has a right to a trial and is to be considered innocent until proven guilty. This is a norm which we are taught from primary school on and which forms part of our democratic ethos. In the case at hand, however, our surveys showed responses of professed bias which go against the tendency to give socially desirable responses. This overriding of the socially desirable norm can be interpreted as an indication that the reactions to the *Bevlen* conspiracy trial are genuine—and strong.

Next, consider the potential effect of the courtroom on juror responses. The general legal assumption is that the taking of an oath, the threat of perjury, and other things associated with the courtroom will induce potential jurors to tell the truth about their feelings. Thus, from this perspective it can be argued that had a judge and lawyers asked the same questions of our respondents under oath in a courtroom the results might have been different. It can be argued that professed bias might be even greater in the courtroom than it was in the survey. In the courtroom the social desirability pressures might be overcome and some of the survey respondents who indicated they could be unbiased might admit their bias. In trials involving challenges for cause potential jurors have admitted degrees of prejudice that even surprised jaded defence lawyers.[10]

There is an alternative hypothesis that needs to be considered, however. There are grounds for arguing that courtroom polling about bias might evoke even greater pressures to give socially desirable

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[9] See Crowne and Marlowe, The Approval Motive (1967); Carlsmith, Ellsworth and Aronson, Methods of Research in Social Psychology (1976).

[10] Vidmar, Social Science and Jury Selection, in Law Society of Upper Canada (ed.), Psychology and the Litigation Process (1976), p. 115.

responses than the surveys which we conducted. The major dynamic behind the tendency to give socially desirable responses is social approval from others. On the whole the more the source to whom people are giving their responses has high status and prestige, the more likely people are to want to be approved and to avoid censure or disapproval. Thus, to the extent that the judge is seen as an authority figure and to the extent that potential jurors believe the judge would endorse the norm that a person should be considered innocent until proven guilty, the more likely they would be to state they have no bias—even if such a statement is contrary to their deeper feelings. From this perspective the survey answers may have tapped underlying feelings more accurately than answers that would be obtained in a courtroom.

In summary this question raises very complex issues for which we do not have appropriate empirical data. But viewing the high levels of knowledge and professed bias uncovered in the two surveys, I think there is good reason for the court to be concerned in this case.

6. *What can you tell the court about the relationship between expressed attitudes about bias and actual bias in jurors' decision making?*

This question requires a complicated answer. The layman tends to think of bias in terms of that which is readily expressed, such as the statement that "I just don't like French Canadians, Indians, or Jews". The example of socially desirable responses which I have just described suggests the problem of ascertaining attitudes is more complicated, namely negative feelings about someone may not be expressed in order to avoid making a bad impression on the interviewer. But the picture is more complicated than that. The person may in fact be unaware of his bias. Unawareness can stem from a number of sources. In the same way that we seek approval from others we also want to have positive self regard. To the extent that a person believes that prejudice is wrong he may deny to himself that he harbors prejudice toward someone.[11] Sometimes the bias or prejudice is not salient when the person is queried but is later expressed when the target of bias comes into conflict with some other value or goal. Or perhaps the person just lacks the verbal skills or experience to recognize prejudice. The social psychological literature, generally, is filled with examples of inconsistencies between expressed attitudes and underlying attitudes or behavior.[12]

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[11] See *op. cit., ibid.* for more detailed discussion.

[12] Fishbein and Ajzen, Belief, Attitude, Intention, and Behavior (1975). For examples related to law see Rokeach and Vidmar, Testimony Concerning Possible Jury Bias in a Black Panther Murder Trial (1973), 3 J. of Applied Social Psychology

It is also important to note that bias, whether overt or covert, may manifest itself at various stages of a trial. The most obvious stage is the pretrial inclination toward the belief that the accused is guilty or innocent. But during the trial bias may also manifest itself in the tendency to focus on or recall certain aspects of testimony which are consistent with preconceived notions. It may also manifest itself in the jury room at the point of deciding on the verdict; if there is still doubt in the juror's mind he will probably resolve it in the direction of this bias. The general psychological literature bearing on these two assertions is wide-ranging but there are also studies demonstrating this point in the context of the legal system.[13]

It should be noted that inconsistencies between expressed attitudes and behavior can be a two-edged sword. People expressing bias or punitiveness toward criminals in the abstract sometimes moderate those attitudes when faced with particular cases.[14] From this perspective it could be argued that some of the persons expressing bias in the surveys might not behave with bias as a juror. My interpretation of the data, however, leads me to the conclusion that if there is going to be any inconsistency, it is probably in the other direction: some of the people classified as unbiased in our survey would express bias in actual jury behavior. I refer to the exceptionally high levels of knowledge about *Bevlen*, the fact that despite going against the socially desirable norm, many people openly expressed bias, and to the number of spontaneous remarks against the *Bevlen* defendants which were uncovered in our survey. Viewed in the light of the subtle and not-so-subtle ways that bias might be manifested in a trial, it seems reasonable to conclude that, if anything, the survey results may underestimate the actual prejudice which would bear on an accused associated with the *Bevlen* case.

7. *Can an admonition from the judge to set aside any prejudices nullify biases which jurors may have in this case?*

The notion that judicial instructions will cause jurors to behave in accordance with the goals and dictates of the trial proceedings is frequent in Canadian and American law, a recent instance of which is *R.* v. *Hubbert*,[15] the case on challenges to the jury. It is assumed that if a judge admonishes jurors to set aside prejudices, to put certain information such as a prior criminal record to limited use, or to ignore a statement made during trial proceedings, they will do so. It

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19; Vidmar and Ellsworth, Public Opinion and the Death Penalty (1974), 26 Santford L. Rev. 1245.

[13] See Vidmar, *op. cit.*, footnote 10.

[14] Vidmar and Ellsworth, *op. cit.*, footnote 12.

[15] (1975), 31 C.R.N.S. 27.

is not only a legally useful assumption (*Hubbert* said "necessary") but has some psychological validity as well. For example, reminding jurors about the need to keep an open mind may well sensitize them to the legal and socially desirable norm that an accused should be considered innocent until proven guilty. But, from a psychological perspective the assumption has limitations. In fact some data indicate that such an admonishment may sometimes have the opposite result from that intended.

Broeder[16] has described an experiment with civil juries. Tape recordings based on an actual trial were presented to a number of simulated juries drawn from persons who were on jury duty at the time of the experiment. There were three conditions, or versions, of the case: in one it was revealed that the defendant had no insurance but there was no objection or further attention paid to the disclosure; in a second condition it was revealed that he had insurance but again no objection was raised or further attention given to the issue; in a final condition it was revealed that he had insurance but there was an objection and the court directed the jury to disregard the insurance. A number of juries were exposed to each condition but, of course, each jury heard only one version. Where it was disclosed that the defendant had no insurance the average damage award was $33,000.00 and where it was disclosed that he had insurance (but no objection was raised) the award went to $37,000.00. However, in the condition where an objection was raised and an admonishment to disregard was given the average award was $46,000.00. Interestingly, analysis of the tape recorded deliberations indicated that the admonishment served to keep the jurors from discussing insurance during the deliberations. But it apparently did sensitize them to the issue with the result that the damage award was on the average $9,000.00 higher than the insurance with no admonishment condition.

Anthony Doob and his associates have conducted research more pertinent to the Canadian criminal jury in articles published in the *Criminal Law Quartlery*.[17] Doob investigated whether jurors can put information about an accused's prior criminal record to limited use, as assumed in section 12 of the Canada Evidence Act. In some experiments with simulating jurors conditions where an accused had no criminal record were compared with conditions where a criminal record was introduced, but with a judicial admonishment to use the

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[16] The University of Chicago Jury Project (1959), 38 Neb. L. Rev. 744.

[17] Doob and Kirshenbaum, Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act upon the Accused (1972), 15 Crim. L.Q. 88; Hans and Doob, Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries (1976), 18 Crim. L. Q. 235.

information only to determine the accused's credibility, not guilt. Contrary to the assumption of section 12, it was found that the record did influence judgments about guilt. Doob's research is supported by a number of other jury experiments directed to essentially the same issue,[18] as well as broader bodies of psychological research.[19]

Taken as a whole all of these studies raise questions about the general effectiveness of judicial admonitions in cancelling bias. Again, given the high levels of knowledge and of bias uncovered in our surveys I have especially strong reservations about the ability of a judicial admonishment to cancel bias in this case.

8. *What about the possibility that biases of individual jurors will be cancelled during jury deliberations?*

Like the notion of judicial admonishment, the assertion that jury deliberations evoke a compensatory process which cancels bias appears to be frequent in law. Recently, it was asserted in *R.* v. *Hubbert*.[20] And like the issue of judicial admonishment there is some psychological validity to the assumption; but, in my opinion, it also oversimplifies the social psychological dynamics which may be operating in the situation. There is little doubt that on the average twelve heads are better than one in recalling evidence with accuracy; and deliberation also may be effective in cancelling some random prejudices or biases which individual jurors may hold.[21] Yet, other research on group dynamics suggests different processes may come into play when similar biases are likely to be held by a majority of the jurors. Under such conditions the effects of group deliberation may enhance rather than reduce bias toward a particular decision.

Myers and Bishop, for example, formed discussion groups which were homogenously composed of people high or low in prejudice.[22] Next, the group members answered an "Attitudes toward Negroes" scale as individuals; then the researchers had the groups deliberate and reach a unanimous decision on the scale items. By comparing the group decisions to the average individual decisions it was found that while high prejudice groups were, as would be expected, initially prejudiced toward Negroes, group

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[18] See Vidmar, *op. cit.*, footnote 10.

[19] See Hans and Doob, *op. cit.*, footnote 17, or Schneider, Social Psychology (1976).

[20] *Supra*, footnote 15; see also *R.* v. *Makow* (1975), 28 C.N.R.S. 87.

[21] Dashiell, An Experimental Analysis of the Influence of Social Situations on the Behavior of Individual Human Adults, edited by Murchison (ed.), Handbook of Social Psychology (1935); Steiner, Group Process and Productivity (1972).

[22] Enhancement of Dominant Attitudes in Group Discussion (1970), 169 Science 778.

discussion made them even more negative; in mirror fashion, individuals in low prejudice groups who were initially favorable toward Negroes became even more positive. This "group polarization" phenomenon—the enhancement of initial bias through group deliberation—has been demonstrated in literally hundreds of studies dealing with a wide range of issues. I personally have published articles on this topic.[23] Some of these studies have been in the context of legal decision-making. Myers and Kaplan,[24] for example, had simulating jurors respond individually and then deliberate on traffic violation cases in which the evidence tended to indicate the defendants were either guilty or were not guilty. Jurors who deliberated low guilt cases became even more definite in their judgments of innocence or more lenient in recommended punishment, or both. Conversely, deliberation increased severity of judgments in the high guilt condition. In sum group discussion polarized initial judgments of guilt and punishment.

Thus, recent research in the social psychology of groups suggests that the legal assumption of a compensatory mechanism in juries may sometimes be quite wrong. When the initial attitudes of the jurors all tend to be biased in the same direction, the effect of deliberations is likely to be enhancement or polarization in the direction of the initial bias, not moderation of that bias as the compensation hypothesis would suggest. The high levels of stated bias uncovered in our survey lead me to suggest that all of the conditions for a polarization effect may be met in this case. Rather than cancelling bias against the defendant deliberations may serve to increase it.

9. *What can you say about the feasibility of a challenge for cause as an alternative to a change of venue in this case?*

I should note that I have argued that the social psychological assumptions contained in *R.* v. *Hubbert*,[25] the recent case on jury challenges, are, from a social scientist's perspective, somewhat naive, and that perhaps such challenges should be allowed more frequently than they are.[26] As a social scientist, I believe that if *R.* v. *Brunner* is held in London, it would be appropriate to allow a jury challenge.

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[23] Myers and Lamm, The Group Polarization Phenomenon (1976), 83 Psychological Bull. 602; Vidmar, Effects of Group Discussion on Category Width Judgments (1974), 29 Journal of Personality and Social Psychology 187.

[24] Group-induced Polarization in Simulated Juries (1976), 2 Personality and Social Psychology Bull. 63.

[25] *Supra*, footnote 15.

[26] See Vidmar, *op. cit.*, footnote 10.

However, in my opinion, a change of venue would be the preferable alternative. First the challenge is an imperfect tool for eliminating prejudiced jurors. As I have already indicated in my testimony today, what a potential juror says in the courtroom may not correspond with his other underlying feelings and behavior. Under the procedural restrictions imposed by Canadian law, even a team of lawyers and psychologists would probably make errors in classifying jurors as biased or not biased. Of course, the procedure of having two veniremen try a fellow venireman, as called for in Canadian law, will be even more error prone. Second, recall that even though I have suggested that our surveys may have underestimated the amount of bias regarding the *Bevlen* case, they nevertheless indicate that a very substantial portion of the population has openly indicated bias. We are not dealing with ten or fifteen percent of veniremen who may harbor bias but rather, as a conservative estimate, at least fifty percent. Even if we assume the triers can accurately ferret out biased jurors we can estimate that at least half of the sample of veniremen will be eliminated, perhaps many more. Since, in my opinion, the prejudice arising from the *Bevlen* case is primarily a function of the fact that the Bevlen Company was located in Middlesex County and much of the fraud was perpetrated here, a better solution would be to seek veniremen from a county where the *Bevlen* case is not salient and consequently, where the majority of persons will have open minds.

V. *Cross Examination.*

For the most part cross examination, which was lengthy, consisted of going over the ground covered earlier, an event forced by the defence strategy of a thorough, preemptive examination-in-chief. For the most part the expert's answers elaborated or clarified earlier statements.

VI. *Corroborative Documents and Testimony.*

Two additional sources of evidence were brought forth to provide corroboration for the survey data and testimony. The first source was an affidavit from the librarian of the *London Free Press*. It indicated that the *Free Press* is widely read in Middlesex County. The affidavit also indicated that from May 1976, when the indictment was first brought to public light, through September 1977, the *Free Press* had carried ninety-three articles on various aspects of the *Bevlen* conspiracy case. Many of the articles were page one news, displayed with prominent headlines, and contained extensive details regarding such things as wiretap conversations, details of the modus operandi, and the presiding judge's comments at sentencing of the convicted persons.

The second source of evidence came from the testimony of Mr. D, an official of a branch of a building products company located in

London, Ontario and engaged in the same kinds of sales in which the Bevlen Company had been engaged. Mr. D testified that as a result of the publicity arising from the *Bevlen* trial (a) his company had felt compelled to run full-page advertisements in the *Free Press* disassociating itself from practices like those of the Bevlen Company; (b) company salesmen had been unable to make sales in Middlesex County; (c) signed contracts amounting to thousands of dollars had been cancelled as a result of the "Marketplace" TV programme; and (d) that overall sales were down tens of thousands of dollars in comparison to previous years and in comparison to the company's regional offices outside of Middlesex County. This testimony provided strong corroborative support for the survey data and, in particular, the researcher's opinion that negative attitudes were very strong, were manifested in behavior, and were unique to Middlesex County.

VII. *Defence Arguments.*

The main thrust of defence counsel's summation arguments in support of the application focused on the fact that, unlike all prior venue change applications, the court in this case was not required to make an inference based solely on circumstantial evidence or unsubstantiated opinion about levels of knowledge and bias in the community. Rather, systematically collected data directly tapping knowledge and bias had been produced, along with corroborative testimony. It was stressed that defence counsel was in no way suggesting that such evidence should pre-empt the judge's decision-making function. Rather, he was suggesting only that the evidence should be weighed and considered, like any other evidence, in reaching that decision. Under the law the judge has wide discretion to conclude that the weight of the evidence is not enough to show that there is a "fair and reasonable probability" that the defendant cannot receive a fair trial.

In commenting on the evidence counsel noted especially that levels of knowledge and bias had actually increased, rather than decreased, since the end of the *Bevlen* trial. The evidence also suggested that it was not primarily the crime of fraud itself that evoked the bias but rather the massive publicity, the salience, and the particular details and circumstances which attended the *Bevlen* case. Moreover, the testimony of the officer from the building products firm provided corroboration of the validity of the survey data and the assumption that prejudice was localized to Middlesex County and nearby areas. Finally, it was acknowledged that the prejudice was not directly targeted on Brunner. Though his name had appeared in a number of the newspaper articles he was not a principal character in the *Bevlen* case. Indeed, in constructing the survey the

researchers had not even asked about recognition of the name Brunner. The argument, however, was that at this time in Middlesex County, *any* defendant in a criminal fraud trial involving building products who would be associated with the *Bevlen* fraud would evoke prejudice in large segments of potential veniremen. Since it was unlikely that Brunner's association with *Bevlen* could be avoided in the upcoming trial, the end result was that it was unlikely that a jury which would provide the accused with an impartial hearing could be chosen. Defence counsel then raised a few additional points which might bear on a decision "expedient to the ends of justice".

VIII. *Outcome and Post-mortem.*

In an oral decision the presiding judge ordered the trial to be moved to another place of venue.[27] The expert evidence tendered in the hearing, as corroborated by the civilian witness, formed the cornerstone of the decision. It was the first successful use of survey evidence for this purpose in Canada.[28] Indeed, it was one of the few successful attempts in North America, even though survey evidence has been introduced in a number of United States change of venue applications.[29]

Speculation on the reasons for the success could take many additional paragraphs, but space limitations here allow only a few brief observations. Each case, of course, is unique, not only in the degree of prejudice demonstrably extant in the community, but also with respect to the judge's receptiveness to hear such evidence and to the extent to which other factors are "expedient to the ends of justice". Nevertheless, some specific things stand out.

A review of previous surveys suggests the present research was distinguished by an attempt to ask survey respondents questions similar to those which would be asked in court. Prior surveys have tended to ascertain general evaluative responses (for instance, the degree to which the respondent likes or dislikes the accused) rather than ascertain the respondent's belief about his or her ability to set aside such feelings and impartially carry out the functions of a juror.[30] From both a legal and a social psychological[31] perspective

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[27] His Honour Judge McCart of the County Court of Middlesex ordered the case moved to the town of Cayuga in the Regional Municipality of Haldimand-Norfolk. In February 1978 the accused was acquitted by a jury after four days of trial.

[28] See Arnold and Gold, *op. cit.*, footnote 4.

[29] See Pollock, The Use of Public Opinion Polls to Obtain Changes of Venue and Continuances in Criminal Trials (1977), 1 Crim. Justice J. 269.

[30] Compare with data reported in Arnold and Gold, *op. cit.*, footnote 4 and Pollock, *op. cit.*, *ibid.*

[31] See generally Fishbein and Ajzen, *op. cit.*, footnote 12.

specific questions about intended behavior have more probative value. Second, the experimental manipulation of prior criminal record in Survey 2 helped rule out alternative interpretations that might have otherwise left the general results open to question. A third factor aiding the defence case was the luck in obtaining independent testimony from the building company executive which corroborated the survey findings. Fourth, the defence case was aided greatly by the fortuitous airing of the "Marketplace" programme. Not only did the absolute levels of recognition of the *Bevlen* case increase dramatically but, additionally, the increase helped to support the researcher's hypothesis that the first survey probably yielded a conservative estimate of levels of knowledge and prejudice in the community. Finally, the success of the application was greatly aided by the fact that the data were tendered through *viva voce* testimony rather than by affidavit. By this means the researcher was allowed to more clearly explain the data, to elaborate and qualify it, and, in particular, to introduce related bodies of literature that put the data into a broader legal and social psychological context. Also, cross-examination helped to enhance the credibility of the researcher and his data.

Although specific questions about ability to behave as an impartial juror and the construction of experiments within survey designs are always possible, some of these other factors would be missing in future cases. The application of ingenuity on a case by case basis, however, may yield ways of bolstering data. For example, McConahay and associates[32] collected data from several communities; by comparing responses with those obtained in the contested venue the researchers were able to demonstrate levels of prejudice would probably be lower if the trial were moved. As another example, in a subsequent case[33] the first author of this article collected data in a predominantly rural community regarding a couple charged with the killing of their child. Among other things, the data showed that members of the community had high levels of knowledge (frequently prejudicial or incorrect or both) that went far beyond what was reported in the mass media or was likely to be admissible at trial.

Conclusions

As demonstrated with this particular case, scientifically collected survey data can be a useful aid in change of venue applications. The

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[32] McConahay, Mullin and Frederick, The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little (1977), 41 L. and Contemp. Prob. 205.

[33] *R.* v. *Iutzi,* unreported, Supreme Court of Ontario, 1980.

evidence need not infringe upon the judge's prerogative to grant or refuse the application. Rather, the data simply provides the judge with a direct source of evidence about the state of community opinion. Such evidence should be subject to scrutiny and weighed in the context of other evidence and considerations.

Survey data, moreover, can be collected within reasonable financial guidelines. In this case the cost was small in comparison to other costs involved in putting the defendant on trial and ensuring that he received the due process of law. Survey research, however, is not a panacea and should be undertaken with discretion.

Sophisticated survey data might be a useful judicial tool in other contexts. For example, it could be used to help establish grounds for a challenge for cause and provide insights about the types of questions the judge allows to be put to potential jurors. In false advertising cases it could be used to help establish the degree to which claims are misleading. Similarly, in civil cases involving trademark infringements survey data could be collected to help demonstrate the degree to which a name or label creates confusion in the minds of consumers.

TABLE 1
PERCENTAGE OF RESPONSES FOR KNOWLEDGE AND NO-KNOWLEDGE PERSONS FOR ITEMS DEALING WITH PRESUMPTION OF GUILT

a. Suppose someone who had been involved in the original *Bevlen* case was later arrested by the police and brought to trial by the Crown on a similar charge, that is, defrauding an old woman by charging her excessive amounts for home improvements. Would this create within your mind an impression, a belief, that he was probably guilty?

	Yes	*No*	*Don't Know*	*Total*
Knowledge	76%	12%	12%	100%
No-knowledge	67%	13%	20%	100%

b. If you further suspected that the defendant had been convicted of conspiracy to defraud in the *Bevlen* case, what would you be inclined to conclude about his guilt? Would you be inclined to say: a) that he was definitely guilty; b) that he was probably guilty or; c) that you couldn't say whether he was guilty or innocent.

	Definitely Guilty	*Probably Guilty*	*Couldn't Say*	*Total*
Knowledge	29%	41%	30%	100%
No-knowledge	14%	43%	43%	100%

c. If you were chosen to serve as a juror in this case, do you think you could keep an impartial mind toward the accused or do you think you might be inclined to believe he was guilty?

	Impartial	*Guilty*	*Don't Know*	*Total*
Knowledge	51%	44%	5%	100%
No-knowledge	54%	24%	22%	100%

d. Let me put this last question another way. If you were picked as a juror and instructed by the presiding judge to put all preconceived views aside and decide the defendant's guilty only on the evidence brought before you, do you in all honesty think you could do so?

	Yes	*No*	*Uncertain or Don't Know*	*Total*
Knowledge	52%	30%	18%	100%
No-knowledge	64%	21%	15%	100%

TABLE 2
SURVEY 2: REPONSES OF KNOWLEDGE AND NO-KNOWLEDGE PERSONS TO ITEMS ON PRESUMPTION OF GUILT AS A FUNCTION OF TYPE OF PRIOR CRIMINAL RECORD

a. Suppose someone . . . in the original *Bevlen* case was arrested by the police and brought to trial by the Crown on a charge similar to that in the *Bevlen* case, that is defrauding an old woman by charging her excessive amounts for home improvements. Furthermore, suppose you also know that. . . . Would this create within your mind an impression, a belief, that he was probably guilty?

		Yes	*No*	*Don't Know*	*Total*
1. not involved — no criminal record	Knowledge	26%	62%	12%	100%
	No-knowledge	24%	41%	35%	100%
2. not involved — assault conviction	Knowledge	31%	62%	7%	100%
	No-knowledge	41%	35%	24%	100%
3. not involved — fraud conviction	Knowledge	55%	26%	19%	100%
	No-knowledge	59%	29%	12%	100%
4. involved — Bevlen conviction	Knowledge	79%	9%	12%	100%
	No-knowledge	76%	6%	18%	100%

b. If you were chosen to serve as a juror in this case, do you think you could keep an impartial mind toward the accused or do you think you might be inclined to believe he was guilty?

		Impartial	*Guilty*	*Don't Know*	*Total*
1. not involved — no criminal record	Knowledge	69%	17%	14%	100%
	No-knowledge	71%	6%	23%	100%
2. not involved — assault conviction	Knowledge	57%	19%	24%	100%
	No-knowledge	53%	29%	18%	100%
3. not involved — fraud conviction	Knowledge	46%	34%	20%	100%
	No-knowledge	53%	23%	24%	100%
4. involved — Bevlen conviction	Knowledge	31%	48%	21%	100%
	No-knowledge	38%	31%	31%	100%

c. Let me put this last question another way. If you were picked as a juror and instructed by the presiding judge to put all preconceived views aside and decide the defendant's guilt on the evidence brought before you, do you in all honesty believe you could do so?

		Yes	*No*	*Don't Know*	*Total*
1. not involved — no criminal record	Knowledge	71%	10%	19%	100%
	No-knowledge	76%	12%	12%	100%
2. not involved — assault conviction	Knowledge	69%	17%	14%	100%
	No-knowledge	58%	24%	18%	100%
3. not involved — fraud conviction	Knowledge	50%	24%	26%	100%
	No-knowledge	59%	23%	18%	100%
4. involved — Bevlen conviction	Knowledge	47%	36%	17%	100%
	No-knowledge	60%	20%	20%	100%