

**Case Studies of Pre-and Mid-trial Prejudice in Criminal and Civil
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Neil Vidmar¹

“Extensive publicity before trial does not, in itself, preclude fairness. In many respects media exposure presents problems not qualitatively different from that experienced in earlier times in small communities where gossip and jurors’ personal acquaintances with lawyers, witnesses, and even the accused were not uncommon. Properly motivated and carefully instructed jurors can and have exercised the discipline to disregard that kind of prior awareness. Trust in their ability to do so diminishes when the prior exposure is such that it evokes strong emotional responses or such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome. That is also true when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.”

(U.S. v. McVeigh, 1996:1473)

INTRODUCTION

Judge Matsch’s opinion explaining his decision to move the Oklahoma bombing trial to Denver concluded that “the entire state had become a unified community, sharing the emotional trauma of those who had become directly vic-

¹School of Law , Duke University, Durham, NC 27708-0360. E-mail: Vidmar@law.duke.edu.

timized" (*U.S. v. Mc Veigh*,1997). While *McVeigh* is a highly exceptional case, Judge Matsch's comments in this excerpt of his opinion raise issues about legal presumptions that must be overcome in establishing pretrial prejudice and about community reactions to legal events. In another part of his opinion Judge Matsch expressed doubts about conclusions from research "consisting largely of simulated trials" in comparison to his own experience as a lawyer and judge (*U.S. v. McVeigh*, 1996:1473).

A recent review of the pretrial publicity literature by Studebaker et al.(2000; see also Studebaker and Penrod,1997) reported only six published articles and reports dealing with field studies, as opposed to laboratory simulations, and a review article by Steblay et al. (1999) located only five survey studies, in contrast to locating 39 simulation studies. The reviewed studies involved only criminal cases. The purpose of this article is to present actual case studies of criminal and civil litigation in which concerns about the effects pre-trial and mid-trial prejudice were present. Its purpose is to broaden the perspective from which trial prejudice should be viewed.

It is probable that hundreds of surveys have been introduced in both criminal and civil litigation (see Pollock,1977; Bronson, 1989).² However, few have been published in academic journals due to work product or proprietary reasons, or just because the persons who conducted the surveys had no interest in publishing in an academic journal. Despite the small numbers, Steblay et al.(1999), using the technique of meta-analysis, concluded that larger effects of pretrial publicity were obtained when the respondents were potential jurors, when there were multiple points of publicity, when real, as opposed to artificial, pretrial publicity was involved in the study and when there was a greater length of time between exposure to publicity and judgment of the defendant. The Steblay article thus suggests that laboratory studies may underestimate effects of pretrial publicity.

²The first attempt to introduce survey evidence for a change of venue for a criminal trial was in the Alger Hiss case in 1950 (Pollock,1977), and a second attempt was made in *Irvin v. State* (1953). Although both surveys were ruled inadmissible, subsequent developments in admissibility standards reduced the barriers to introducing surveys and other social science evidence in cases involving pretrial prejudice.

However, as this article will demonstrate, research on real cases provides more than just the issue of statistical power. It very substantially broadens the conceptual base from which both theoretical and applied issues need to be viewed. The primary case studies reviewed in the article involve trials occurring over the past three decades. I was involved as an expert in the cases, conducting research and proffering testimony in the form of *viva voce* or affidavit evidence. Most are unreported cases.³ Some involved new empirical research while others relied on “off the shelf” research because of the need for an immediate opinion. The criminal cases include trials in Canada, Australia, New Zealand and England as well as the United States. Case studies of other researchers are also discussed. The studies provide a perspective that complements and extends the Steblay et al. research in several ways. They provide grist for devising a conceptual framework about pre-trial prejudice that includes the sometimes powerful effects of gossip, social norms, and “generic” prejudices that jurors may hold about the parties involved in the case or about the elements involved in the litigation. Problems caused by mass media publicity often cannot be separated from these other sources of prejudice. The cases also provide important insights about the legal and social context in which concerns about pre-trial and mid-trial prejudice arise. These perspectives are important for the conceptualization and methodology of simulation experiments. Finally, the cases provide insights bearing on the assessment of prejudice and the efficacy, or lack of it, of remedies for potential jury prejudice.

A FRAMEWORK FOR CONCEPTUALIZING TRIAL PREJUDICE

The conceptual framework is anchored around American case law. This will

³The research and testimony was not always accepted by the court or was given *de minimus* weight, but that does not affect their illustrative value. For the most part citations are made to the case itself. The research tendered in the cases is on file with the author.

simplify discussion even though some of the material involves trials in other countries. The basic social and psychological principles apply across countries even though these countries utilize measures to prevent prejudice and different remedies when potential prejudice is extant.⁴ Moreover, as will become clear, the differing legal cultures provide an opportunity for demonstrating issues that would be more difficult to demonstrate with an exclusive focus on American cases.

Basic reviews of United States case law can be found in Gertner and Mizner (1997) and Knapp (1992). For present purposes it is sufficient to observe that the constitutional provision for an “impartial “ jury has spawned a substantial body of case law about the factors that may prevent a juror from approaching a trial with an impartial state of mind. In *Patton v. Yount* (1984), a leading case on pre-trial publicity, the United States Supreme Court asserted that jurors are not impartial if “they have such fixed opinions that they [can] not judge impartially the guilt of the defendant.” In *McVeigh* Judge Matsch, quoting from a dictionary, asserted that prejudice involves an “adverse judgment or opinion formed beforehand or without knowledge or examination of the facts” and then went on to state

The existence of such a prejudice is difficult to prove. Indeed it may go unrecognized in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative values. (*U.S. v. McVeigh*, 1996:1472).

⁴ The writings of Blackstone (1769/1966) and, later, Kennedy (1826) show that potential juror prejudice was recognized early in the development of the modern jury system. Outside the United States other countries, unconstrained by American First Amendment case law, utilize *sub judice* or statutory law to prevent mass media from disseminating material in advance of trial that might prejudice jurors. Additionally, jurors are strongly discouraged or actually forbidden from disclosing anything about their deliberations. In the event that these various prophylactic measures fail the courts in these other countries have different presumptions and remedies for the prejudice. For example, Canada allows a very restricted form of pre-trial questioning of jurors under certain conditions, but in ordinary trials jurors are called and seated without questioning. In England, Australia, Ireland, New Zealand, and Scotland the basic presumption is that jurors will follow their oath to be impartial and no questioning of jurors takes place, except under the most exceptional circumstances. In England, Scotland, and Ireland even peremptory challenges are not permitted (see Vidmar, 2000).

Gertner and Mizner (1997) note that U.S. law recognizes three broad categories of prejudice. The first category is the juror's connection to the case or the parties. A second category involves disqualifications prescribed by law (and will not be considered further here). The third category involves attitudinal biases against the parties such as prejudices about race, national origin, religion, fixed opinions with respect to important issues in the case such as conscientious objection to the death penalty or to the insanity defense, or biases resulting from exposure to pre-trial publicity.

There are additional facets of pre-trial and mid-trial prejudice that are associated with the first and third categories set forth by Gertner and Mizner. For conceptual purposes juror pre-trial and mid-trial prejudice can be divided into four types: interest prejudice, specific prejudice, generic prejudice, and conformity prejudice. By considering each type, illustrated by examples, we can begin to see the issues that concern lawyers and judges.

Interest Prejudice

Interest prejudice, sometimes called “manifest” or “obvious” prejudice, involves, as Gertner and Mizner (1997) indicate, prejudices arising from the juror having a direct or indirect interest in the outcome of the trial. This interest may be reflected in familial, social or economic relationships with one of the parties to the litigation, with witnesses or other actors in the trial. A relative of the victim or the accused in a criminal case is the most typical example of interest prejudice. Even if there might be the possibility that the prospective juror could be impartial, the appearance of fairness would likely be jeopardized. Similarly, a juror who is, or has been, a party with interests correspondent with or adverse to one of the parties in civil or criminal litigation may be deemed not eligible to serve as a juror: e.g., a juror who owns stock in a company that might be affected by the verdict. Other forms of interest prejudice may be more indirect

and psychological in nature. As noted by Gertner and Mizner (1997), the law recognizes that a juror suffering from an injury similar in type and occurrence to the one in a plaintiff's complaint may not be impartial.

Potential juror interest prejudice may not be immediately obvious in some case contexts. In *North Carolina Eastern Municipal Power Agency v. Carolina Power and Light* (1988; hereinafter *NCEMPA*) the plaintiff corporation sued the defendant power company in a contract dispute involving more than one billion dollars. The trial was scheduled to take place in a jurisdiction in which the defendant was the sole electricity supplier to consumers whereas NCEMPA supplied counties outside that jurisdiction. On behalf of the plaintiff I conducted focus groups composed of jury-eligible persons from the scheduled trial venue. The participants in the focus groups revealed that they might be biased in favor of the defendant if a large award would be likely to raise utility rates in their own community. Their reasoning was that their own financial interests and the potential scorn of their rate-paying neighbors and friends might bias them toward a defense verdict on liability or, if liability were found, toward an award smaller than the evidence warranted. A subsequent survey designed as a result of these findings was conducted in the jurisdiction served by the defendant, counties served by the plaintiff and a county served by neither plaintiff nor defendant. The findings supported the plaintiff's argument that the trial should be moved to a neutral county: jurors in the original jurisdiction tended to favor the defendant, jurors in the counties served by the plaintiff favored the plaintiff, but jurors in the neutral county favored neither side. In response to a series of open-ended questions, respondents in the plaintiff and defendant counties offered explanations for their views that were consistent with the hypotheses developed from the focus groups. The case settled before the issue was heard, but the findings from the study were used to bolster a motion for a change of venue in an unrelated case, *City of Durham*.

In *City of Durham v. Carolina Waste Equipment and Lodal* (1991) a garbage truck caught fire and the ensuing flames destroyed 10 other trucks. Losses exceeded \$1.7 million. The fire engendered substantial media publicity about the

losses to the city because the trucks were self insured and about the consequent adverse impact of the loss on municipal taxpayers. City of Durham sued the manufacturer of the trucks and the company that sold and maintained the trucks, asking for compensatory and punitive damages. The defendants moved for a change of venue, arguing that the financial interests of Durham taxpayers raised a real possibility that jurors might be not impartial. I tendered an affidavit on behalf of the defendants motion, relying in part on the *NECMPA* findings.⁵ The trial judge granted the motion, and the decision was upheld by the North Carolina Court of Appeals (*City of Durham v. Lodal, 1995*).

The important lessons from these two civil case examples are that interest prejudice should not be thought of in terms that are too narrow and that empirical research may help to demonstrate those prejudices.

Specific Prejudice

Specific prejudice exists when the juror holds attitudes or beliefs about specific issues in the case at trial that prevent the juror from rendering a verdict with an impartial mind based solely on the trial evidence. The beliefs and attitudes may involve factual knowledge about the case that may be ruled inadmissible, such as a prior criminal record, an improperly obtained confession, or, in civil cases, information about prior conduct of one of the parties to the suit.

In addition to these matters the case may generate rumors that are not factually true. For instance, *R.v. Iutzi* (see Vidmar and Melnitzer, 1984) involved charges against a mother and father in the death of their young child. Survey research that I conducted for a change of venue motion revealed that some members of the rural community in which the accused lived had heard that the child was killed for insurance while others heard that he had been placed in a washing

⁵This required permission from the plaintiff in *NCEMPA*.

machine and still others reported that the Children's Aid Society had taken a previous child away from the mother. None of these rumors was factually correct. Thus, in some cases erroneous "facts" could be as prejudicial or more prejudicial than actual facts.

In other instances knowledge about the alleged facts of the crime may generate strong emotions that are discussed among members of the community and cause it to be viewed as especially heinous. In *R. v. Reynolds* (1997) a mother was charged with killing her seven-year-old-daughter. Mass media accounts reported that the prosecution had concluded that the girl had been stabbed in the head 84 times. Community emotions were inflamed initially against the mother when news accounts reported that the child had been brutally killed, that the mother had fathered all five of her children by different men and that at the time of her daughter's death she was under investigation by the Children's Aid Society. The media also contained articles that reported other things negatively bearing on the mother's character. One long newspaper article built sympathy for the young victim by portraying her as leading a tragic life of abuse and neglect. The trial was delayed for legal reasons, and community emotions were fanned again a year later when the local newspaper published a tribute poem that the mother had written her deceased daughter to commemorate the first anniversary of the girl's death. The public emotions were so high that an official police report expressed concern for the safety of the mother when she was held in detention and later following her release on bail. More will be said about the *Reynolds* case, but for now it serves to illustrate how media reports may help to create highly charged emotions among potential jurors.

Generic Prejudice

Generic or general prejudice involves the transferring of pre-existing prejudicial attitudes, beliefs, or stereotypes about categories of persons to the

trial setting. The stereotyping may involve the plaintiff or defendant, the victim/complainant, or witnesses. It may also involve the crime or civil dispute itself. As contrasted with specific prejudice, the specific case or particular trial participants is immaterial. Rather, it is the perceived characteristics of the parties or dispute that causes the juror to *categorize* one or more trial participants as falling within a stereotyped class such that the evidence is evaluated in a biased manner or the burden of proof is improperly slanted as a result of the pre-existing attitudes and beliefs.

Racial or ethnic prejudice is the most commonly recognized form of generic prejudice. For some persons the knowledge that the accused is an African American may cause them to assume it is more likely that the accused is guilty than if, all other things equal, the accused is white. Gertner and Mizner (1997) extended this example further, suggesting that a crime committed by a member of one racial group in a neighborhood populated by another race might be grounds for challenging individual jurors or granting a change of venue. In short the particular litigant or witness is characterized by racial group membership and the negative traits associated with the stereotype of that group.

Consider a more complex example from an Australian case, *Attorney General vs John Fairfax Publications* (1999; see also Freckelton, 1999), in which I testified as an expert and that will be discussed in more detail below to demonstrate a different point. An issue in the case was potential pre-trial prejudice against a Vietnamese defendant, Duong Van IA, following an issue of the *Sydney Morning Herald* that contained two articles identifying Duong as a drug boss.

A sample of persons were surveyed about their knowledge of and attitudes toward the case. Few expressed familiarity with it. Near the end of the survey the respondents were asked to assume that they were called as a juror and to assume they were admonished by the judge that they were under oath to decide a case fairly and impartially, that the burden of proof was on the prosecution and that the accused was charged with supplying 220 grams of heroin. For a randomly selected half of the respondents the accused was identified as Duong Van Ia, but for the other half the accused was identified as Lan Tran Cao, a

totally fictional defendant with a Vietnamese name. In response to an open-ended question, substantial and approximately equal numbers of respondents stated that they would be inclined toward assuming the guilt of Lan Tran Cao as well as Duong Van Ia. The most reasonable explanation for the findings about the fictional Lan Tran Cao involves the fact that over an extended period of time many other media articles identifying Vietnamese immigrants as involved in the drug trade in Sydney had been published. As a consequence, for some respondents a Vietnamese name alone created a belief that someone with a Vietnamese name charged with a drug offense was likely guilty. In other words the defendant was judged by his apparent group membership and the activities perceived to be associated with that membership. Incidentally, recent research with actual criminal trial jurors in Australia found various generic prejudices relating to media publicity mentioned in the jury room by one or more jurors in 23 of 41 trials (see Chesterman, Chan and Hampton, 2001: 86).

A survey by Moran and Cutler (1991) showed that general attitudes toward drug crimes, created in part by media accounts, were correlated with prejudice toward defendants who were charged with drug distribution. There are similarities in their data that correspond with the *Fairfax* case data, except that the ethnicity was not involved.

Generic prejudice can also be directed against persons accused of certain crimes. In a sample of 25 actual cases, prospective Canadian jurors were asked in court if they could be impartial in deciding a charges involving sexual abuse of children (Vidmar, 1997). The percentages of persons stating that they could not be impartial ranged from 11 percent to 59 percent. Although some of the jurors may have had other reasons for asserting lack of impartiality, additional evidence in some of the cases and general research on attitudes toward sexual abuse strongly suggested that many of these jurors assumed that if the person was accused of such a heinous crime he must be guilty. In response to questions as to whether they could be impartial in the sex abuse trial various jurors stated: "If I were to answer this question honestly, I do have somewhat of a problem with this [given that I am] a teacher;" "I guess in certain situations I consider people are guilty

until proven innocent; I know that it's not the way it is suppose (sic) to be , but that's the way it is sometimes;" "I'm very prejudiced against child molesters, rapists and wife beaters and I think they should be lashed in my opinion" (Vidmar, 1997).

Stereotypes about homosexuality often evoke both beliefs about behavior and strong negative emotions (Herek,1986: Herek and Berrill, 1982). In *R.v. Musson* (1995) I reviewed these findings in testimony for a Canadian case involving a physician charged with homosexual offenses but who denied being a homosexual. Subsequently, the judge allowed a question about attitudes toward homosexuality to be put to prospective jurors and several jurors stated that they could not be impartial.

Generic prejudice may sometimes occur with respect to attitudes regarding parental responsibility. Recall that in the *Iutzi* case already discussed above (Vidmar and Melnitzer, 1984) both the father and the mother were charged with the death of their child. Each accused the other as the perpetrator. In the pre-trial survey of the community each respondent was asked if he or she was inclined to think that "both the father and the mother are equally guilty, that the mother is more guilty than the father or that the father is more guilty than the mother." A substantial number of jurors spontaneously stated that even if the father actually was the killer of the child, the mother should also be found guilty. Their expressed reasoning was that a mother has responsibility for her children's welfare, regardless of who did the killing.

Gertner and Mizner (1997) also listed prejudice against the insanity defense as potential grounds for excluding jurors. In *U.S. v. Allsup* (1997) an appeals court reversed a conviction on the grounds that the judge refused to question jurors about their attitudes toward the insanity defense. U.S. studies of attitudes toward the insanity defense (e.g. Hans and Slater, 1982) indicate high levels of rejection of the defense. *R. v. McGregor* (1992) involved a defendant who killed his estranged wife, a government lawyer, with a cross-bow on a main street in downtown Ottawa, Canada and was pleading a mental illness defense. A survey of jury-eligible persons in Ottawa that I designed asked the following

questions near the beginning of the interview:

“As you probably know, defendants in criminal trials can plead not guilty by reason of insanity, arguing that because of their mental condition they should not be held responsible for what they have done. What is your personal feeling about the insanity defense, is it sometimes appropriate or should the insanity defense never be allowed under any circumstances?” and “If you were serving as a juror in a criminal trial, could you consider voting not guilty by reason of insanity if the evidence at trial justified it?”

Seventeen percent of respondents said the insanity defense should not be allowed and thirteen percent stated they were unalterably opposed to the insanity defense under any circumstances. In a second case, *R.v. Theberge* (1994), involving the trial of a man who stalked and killed the teenage daughter of a prominent physician, the same two questions were asked in a survey of jury-eligible persons residing in the northern Ontario city where the trial was scheduled to take place. Thirty-four percent of respondents said the defense should not be allowed and nineteen percent reported being unalterably opposed to the insanity defense. In both *McGregor* and *Theberge* specific and conformity prejudice against the defendants also existed, but the data indicated that the generic prejudice contributed as an independent factor in community attitudes.

The *McGregor* case also involved an additional type of generic prejudice. The killing by use of a crossbow on a busy Ottawa street was unusual, and resulted in large, publicized memorial services for the victim. However, all of this occurred in a general atmosphere of concern about violence against women. The attack occurred on the first anniversary of the “Montreal Massacre” in which a misogynist killed 14 female engineering students, and in the recent aftermaths of the Clarence Thomas hearings on his nomination to the Supreme Court and the William Kennedy Smith rape trial in Florida (all of which were attentively followed by many Canadians). There had also been recent government commissions addressing domestic violence and other feminist issues. The Ottawa media coverage consistently and extensively linked McGregor to these general concerns about violence, including comparisons with the perpetrator of the Montreal Massacre. Verbatim responses to open-ended questions in the survey reflected a transference of these other events to McGregor by the respondents.

Prejudices regarding the death penalty, including both persons who would never impose the death penalty for any accused and persons who would impose it in all cases should also be categorized as generic prejudices. The prejudice of people of both persuasions is independent of the particular accused person. The literature on death penalty attitudes is extensive (see Allen, Mabry and McKelton,1998) and will not be reviewed in this article.

While the above examples address general prejudice in criminal contexts, generic prejudices have also been documented in civil dispute contexts. Surveys involving persons with attitudes supporting tort reform have found that persons with strong attitudes about the need for tort reform tend to be negatively disposed toward tort plaintiffs in general and to be inclined toward verdicts favoring defendants (see Hans, 2000; Moran, Cutler and DeLisa,1994;Goodman et al, 1990) In one unreported North Carolina case involving a claim arising out of an automobile accident, seven prospective jurors asserted during voir dire that they were so offended by television advertisements by a local plaintiff's trial lawyer that they would be unlikely to decide in favor of any plaintiff, no matter who the lawyer was.⁶ They offered the explanations that while some people may have justifiable claims, the vast majority of plaintiffs are out to get something for nothing and are manipulated by greedy trial lawyers. Similar to the issues that arise in criminal cases, the specific plaintiff was not the issue for these jurors; rather these jurors held a blanket view that appeared to encompass any tort plaintiff.

It is important to observe, if it is not already apparent, that, conceptually, generic prejudice can be a very inclusive concept. It can apply to prejudices about plaintiffs, defendants, witnesses, crime types, defenses, punishments or other sanctions, or some combination of the above. Indeed, case law has recognized many forms of generic prejudices, including attitudes toward loyalty oaths, obscenity, and political beliefs (see Gertner and Mizner, 1997: Ch.3; Knapp, 1992). Nevertheless. to have both theoretical and practical utility we must keep in mind the fact that for legal purposes generic prejudices involve at-

⁶The specific trial cannot be identified for legal reasons.

titudes and beliefs that have the potential to affect behaviors of jurors in ways that are inappropriate. Even though a juror may have a bias against defendants with blue eyes, unless the bias is likely to be translated into behavioral prejudice against a party in the litigation, it is legally irrelevant. On the other hand, although generic prejudices are conceptually different from specific prejudices, they can have major consequences for juror behavior –and for the assessment of juror impartiality. Conceptualizing generic prejudice separately from specific prejudice aids in the development and interpretation of assessment surveys, as illustrated by the prejudice against all Vietnamese accused of drug crimes as opposed to the specific Vietnamese defendant in the *Fairfax* case, by the child sexual abuse cases, the insanity defense cases, and the tort claims cases.

Conformity Prejudice

Conformity prejudice exists when the juror perceives that there is such strong community reaction in favor of a particular outcome of a trial that he or she is likely to be influenced in reaching a verdict consistent with the perceived community feelings rather than an impartial evaluation of the trial evidence. In *McVeigh*, as noted at the beginning of this article, Judge Matsch concluded that the whole state of Oklahoma was united as a family to the disaster and that the strong emotional responses that it generated fit into a pattern of normative values. He went on to assert that independently of jurors' personal stake in the trial outcome, identification with a community point of view can result in jurors feeling "a sense of obligation to reach a result which will find general acceptance in the relevant audience" (*U.S. v. McVeigh* 1996:1473).

In a Florida case, *Lozano v. State* (1991), an Hispanic police officer killed and African-American motorcycle driver, resulting in a riot. The trial was moved was moved on the theory that jurors in the original venue would be reluctant to vote for acquittal because of fear that an acquittal would cause a second

riot in their community (see Wetherington et al., 1999). In *R.v. Taylor et al.* (1983), a Canadian case, the accused were charged with a number of “terrorist” offences, including the firebombing of video stores. A prospective juror whose husband was a fireman conceded during questioning that while she felt that she could be impartial in deciding the guilt or innocence of the defendants, she did not feel that she could stand up to the hostility of her husband and other fireman’s families if she voted for a not guilty verdict. *R.v. Kenny* (1991) involved a number of members of a lay order of Catholic monks, the Christian Brothers, who were charged with sexually abusing young boys under their care in the Mt. Cashel Orphanage in St. John’s, Newfoundland (see Ogloff and Vidmar, 1994). A strong community reaction developed against the defendants, but a very striking feature was that, although public revulsion and calls for punishment of the offenders came from both the Catholic and Protestant communities, the strongest reactions against the defendants came from Catholics (see Vidmar, 2001b). The fact that highly respected members of their religion engaged in such nefarious activities was viewed as an apostasy that threatened the Catholic community’s moral and social standing as well as their personal values and provoked even stronger reactions in them than in their Protestant neighbors.

Conformity prejudice may, of course, be extant in civil cases. In the *North Carolina Eastern Municipal Power Agency* (1988) case described above, the prospective jurors’ feeling that they might feel pressure from friends and neighbors if they returned a damage award that would result in increases of their neighbors’ local electricity rates can be seen as conformity prejudice.

Multiple and Interaction Effects of Forms of Prejudice

It goes without saying that more than one form of potential prejudice may be present in a particular trial. To take a hypothetical example, media pub-

licity may present extra-legal facts and drive emotions about a defendant that is a Japanese corporation accused of dumping toxic chemicals in a community. Obviously, all four types of prejudice might be extant in that community and their combined effect may be greater than the sum of the individual parts. The conceptual framework presented here is simply a cognitive device for helping to think about problems of trial prejudice. It also leads us to think more expansively about the sources of trial prejudice.

SOURCES OF PRE-TRIAL AND MID-TRIAL PREJUDICE

Media Publicity Conveying Specific Prejudicial Facts

The Oklahoma Bombing Trial was one of the most media-covered criminal events of the last quarter of the twentieth century, perhaps rivaled only by the O.J. Simpson trial. Studebaker and Penrod (1997; Studebaker et al., 2000) reported that in the original Oklahoma City venue there were 939 articles published in the *Daily Oklahoman* between April 1995 and January 1996, that 105 of them were on the front page, and that the stories were accompanied by 307 pictures. In contrast the *Denver Post* carried only 174 articles, with 24 on the front page and nine pictures. The *Daily Oklahoman's* stories, moreover, carried more statements depicting the emotional aspects of the case and on subjects related to the community. While the Oklahoma bombing and O.J. Simpson cases possibly top the list for the highest degrees of pre-trial and mid-trial publicity from mass media, the problem is not atypical. Furthermore, research on the content of media stories indicates that, at least for criminal cases, they are generally slanted in a direction that favors the prosecution (e.g. Imrich, Mullin and Linz, 1995).

In what was labeled the Beven Conspiracy trial (see Vidmar and Judson, 1981), involving the defrauding of elderly citizens in home improvement sales in a

Canadian city of around 200,000 persons, the local newspaper carried over 100 articles, including editorials on the case. The *Reynolds* (1997) case took place in Kingston, Ontario, a city of 160,000 persons. The local *Whig Standard* newspaper printed 48 articles about the case extending from the time of the incident in September 1997 through October 1999. Although some articles were routine notices of hearings, many were lengthy feature stories, none of which reported the defendant's side of the case. There was also television and radio coverage. In addition three Toronto papers, which are widely distributed in Kingston carried additional articles.

R.v. Maxwell (1996; see Corker and Levi, 1996; Gibb,1996) was an English case involving fraud charges against the sons of deceased media magnate Robert Maxwell. Hundreds of thousands of pounds were reported missing from pension funds controlled by the Maxwell corporations, and many pensioners lost their main source of income. Coverage of the story, all of it adverse to the defendants, involved almost every newspaper and television station in England and Wales. A partial compilation of newspaper stories and editorial clippings filled several file drawers. Public reaction fanned by the media accounts was so intense that when the Maxwell defense attempted to commission a survey to document the extent of pre-trial prejudice, numerous survey organizations refused out of fear that any activities they undertook on behalf of the Maxwell brothers would cause such outrage that their own business reputation would be harmed.⁷

Concerns about mass media coverage also arise in civil cases. Sometimes a single newspaper or other media article induces concerns about the fairness of trial when it occurs close to the time of trial. In *Bravos v. Pillsbury Madison and Sutro* (1996) the complainants' sued the defendant law firm over age discrimination. Notices had been sent to the prospective jury pool and jury selection was scheduled for March 24, 1997. Although there had been some limited news coverage of the case prior to trial, on March 9, 1997 the headline story of the Sunday edition of the *San Francisco Examiner* contained 55 paragraphs about

⁷A compilation of newspaper articles is on file with the author who was a consultant in the case. The information about the refusal of survey organization to do research is based on personal knowledge from that consulting.

the case, accompanied by photographs of plaintiff Bravos. The overwhelming number of the paragraphs presented the plaintiffs' side of the case and included statements playing on stereotypes of lawyers as scheming and avaricious. In fact only two brief paragraphs said anything about the defense case, namely lead defense counsel's statement denying the plaintiffs' claims.⁸ I did not conduct new empirical research in this case because of severe time restraints, but I put a content analysis of the media coverage in the context of research findings about effects of pre-trial publicity. The trial judge granted a six-month continuance. In *In re: Air Crash Near Cali Columbia* (1996) a jury was to be selected on September 2, 1997 for a case involving a claim of negligence against American Airlines for a crash that occurred near Cali, Columbia in December 1995. The trial was to be held in the Federal Southern District of Florida, which contains a high percentage of citizens who are ethnically Hispanic. Two weeks before trial CNN and all of the other major television networks and nationwide newspapers carried a story about an American Airlines Pilot Reference Guide that characterized Latin American passengers in negatively stereotypical terms. Coverage of the story with commentary was particularly heavy in the Miami newspapers, including Spanish language newspapers. On August 19 and 20 CNN's Spanish language channel as well as other Miami channels aired stories that included interviews with one of the plaintiffs and a lawyer for the plaintiffs. Defense lawyers were concerned that this publicity would have an extra impact on Hispanic members of the community because they were the targets of the invidious characterizations.⁹

Concerns about mass media-effects may arise in the midst of trial. Despite the attention given to the sequestering of the jury in the O. J. Simpson case, sequestering is an infrequent remedy. Often, the trial judge will admonish jurors to not read newspaper accounts or watch television news about the case while the

⁸There was also a morning talk show television appearance by plaintiff Bravos and her lawyer but the primary concern was the newspaper story.

⁹Because a defense motion on the potentially adverse effects of this publicity had to be made immediately, no new empirical research could be undertaken and an affidavit based on conclusions from published research findings was submitted. The trial judge, however, denied the defendant's motion for a continuance.

trial is in progress. Whether jurors follow are willing to obey the admonition is an un-researched issue. Whether they can avoid media publicity even if they have good intentions is another matter. In *In Re Air Crash Near Morrisville, North Carolina* (1998; hereinafter “American Eagle”) American Airlines was contesting its liability for an American Eagle crash that killed 15 people in 1994, arguing that American Eagle is a totally independent company. The jury had been dismissed for the weekend with an admonition from the trial judge to not read or listen to reports concerning the trial. In open-court discussions with the lawyers following the dismissal the trial judge made a number of comments to the lawyers about the case that were reported the next day, Saturday, in a page one headline story of the *Greensboro News and Record* that was entitled “Judge Calls Airline Ads Misleading.” The essential story was repeated the following day. The articles contained a number of direct quotes that had been made in the courtroom by the federal judge that included the following:

“Mrs. Josefson [one of the passengers whose survivors were plaintiffs in the suit] believed she was flying American Airlines.”

“American’s advertising on this is completely misleading.”

“They lead people to believe they are getting major airline quality.”

The articles paraphrased the judge offering an opinion that under the current law the facts may not be enough to prove that American Airlines is liable for the crash. The article further reported comments of a plaintiff’s lawyer: “I wish we could put her [the deceased plaintiff] on the witness stand so she could explain that she relied on American Airlines” and “Does it take the dead talking before we hold a company that has paid \$200 million on their advertising budget a year to be responsible?”

Lawyers for American Airlines solicited an emergency affidavit from me, and I offered an opinion about the potential impact of the publicity that was submitted to the court on Monday morning. The judge dismissed the opinion, stating that he had admonished the jurors to not expose themselves to media publicity. He refused to question the jurors individually about the story, but upon persistent urging of defense counsel he eventually questioned them en masse. Their answers contradicted the judge’s faith in his admonition. Although they

were initially reluctant to say anything, eight of the nine members of the jury admitted that they knew about the article. One conceded reading it. Another reported that his cousin, who knew he was serving on the jury, called to ask him what he thought about the article and to gossip about it. Another juror confessed that his mother called the article to his attention and they engaged in a conversation about it. The other jurors were less explicit in revealing the source of their knowledge, saying only that they had heard about it. In response to a question by the judge asking if they could remain impartial the jurors said they would not be affected, and the trial continued.

More will be said about jurors' self reports about prejudice, but for the moment the important point involves the observation that media publicity and informal sources of communication from members of a juror's primary groups can combine to potentially taint a jury.

Community Involvement, Rumor and Gossip

In the *Iutzi* case involving the parents charged with killing their child (Vidmar and Melnitzer, 1984) a judge, responding to provisions in the Canadian criminal code, entered an order prohibiting newspaper, television and radio coverage of all preliminary court proceedings prior to trial. Thus, other than a brief report in a weekly newspaper and a short television report at the time of the child's death, there was no media coverage of the case. Nevertheless, as described earlier, the survey of the rural community near the time for trial almost two years later revealed that many members of the community had extensive knowledge of the case and reported information about it that was factually incorrect. Prospective jurors questioned at trial as well as the survey respondents admitted having discussed the case with neighbors, friends and family members. The survey also revealed strong negative attitudes toward the defendants. A number of respondents remarked about the shame for their community because

such awful crimes were supposed to be only committed in large cities, not their rural community with its strong family values.

In *R.v. Bowers* (1986) a mother reported that her baby was kidnaped, setting off a province-wide search for kidnappers before the child was found dead in snow-covered woods. People in the community of 6000 persons along the shores of Lake Huron reacted strongly to the notoriety that the media coverage brought upon the town. As in *Iutzi*, the town residents expressed views that their values were harmed by the event and extensively discussed the case among themselves. One of the interesting aspects of the case was that the informal gossip and the local newspaper coverage emphasized that while Julie Bowers' husband was a lifelong resident of the town, Bowers herself was an outsider, having come from England. This emphasis on her outsider status may be seen as a response to the perceived heinousness of the crime and its effect on the community (see Vidmar, 2001). The trial was moved to Toronto and Bowers was acquitted. However, community feeling against Bowers remained so strong that following the acquittal there were fears for her safety if she returned to the town.

Bronson (1989) documented community reactions in a rural Florida county when a young white woman was killed, and the persons charged with her death were African Americans. Although there was media coverage of the events, Bronson's survey documented extensive rumor and community discussion regarding the crime and the defendants. McConahay, Mullin and Frederick (1977) also documented similar community responses when Joan Little became a nationwide cause celebre in the 1970s after she killed a jailer with his own ice pick weapon as he attempted to force her to perform oral sex on him. The McConahay et al. research, like that of Bronson, also helped established that many members of the rural community held racist attitudes.

There are several important lessons to be drawn from these examples. The first, most clearly illustrated by the *Iutzi* case, is that pre-trial prejudice can arise quite independently of media coverage. However, in most instances the community rumor, gossip and formation of opinion occur in conjunction with media coverage. The media reflect public opinion and they also help to create public

opinion (see, Anastasio, Rose and Chapman, 1999; Bogart,1989; Thaler, 1994). Studies of the media indicate that if the story does not capture and hold public attention the media move on to other stories (Bogart, 1989; Graber,1988). Cases in which the event is the subject of continuing coverage over a period of time and is reflected in multiple sources of coverage tend to reflect intense community interest.

The second lesson is that when notorious events have particular salience to people because they are acquainted with the actors or because the events are personally threatening to individual and community values, the likelihood of rumor and gossip is increased. Allport and Postman's (1947) classic book, *The Psychology of Rumor*, documented the general dynamics of this phenomenon. The third lesson is that the rumor and gossip may create perceptions that there is community consensus about what the verdict should be. Before the turn of the nineteenth century Emile Durkheim observed:

Crime brings together upright consciences and concentrates them. We have only to notice what happens, particularly in a small town when some moral scandal has been committed. They stop each other on the street , they visit each other, they seek to come together to talk of the event and to wax indignant in common.

Durkheim, (1893/ 1967)

It is important to add that, as evidenced by the Oklahoma Bombing case, the O.J Simpson case (see Barak,1996) and numerous others (Jost,1995), community rumor and gossip about infamous crimes or events that lead to civil trials are not limited to small, close-knit communities.

Additional Sources of Bias in a Mass Media Age

Trans-border media coverage of legally relevant events and newer forms of media communication, such as the internet and fax machines pose new sources of potential prejudice. Coverage of the O.J. Simpson trials (Barak,1996) and the

Oklahoma City Bombing trial, for example, was transmitted around the nation and, indeed, around the world by CNN and other news sources. The potential impact of these sources on jurors can be illustrated by a Canadian case.

Paul Bernardo was charged with kidnaping, raping, and killing two young women (one was dismembered) that he abducted (*R.v. Bernardo*, 1993; see Vidmar, 2000b). His wife, Karla Homulka, participated in these crimes, as well as other crimes, which the couple videotaped in their home in St. Catherines Ontario. The crimes were the subject of intense interest throughout Canada, but particularly in the southern parts of Ontario. Homulka pleaded guilty and the crimes were detailed in her sentencing hearing. Although members of the Canadian Press were allowed to attend the hearing, the trial judge, relying upon Canadian law that allows some restrictions on press coverage, proscribed publication of the content of the hearing until after Bernardo's trial. The goal of the publication ban was to reduce, if not prevent, the degree and extent of pre-trial prejudice against Bernardo. Canadian mass media adhered to the ban under threat of serious contempt of court charges. However, through various means, possibly including intentional leaks by Canadian reporters, newspapers and television and radio stations in nearby Buffalo, New York, immune from the Canadian judge's orders, carried stories providing details of the Homulka hearing. The case was also covered by the *New York Times* and the *Washington Post*. Interested Canadians in Toronto, where Bernardo's trial was moved from St. Catherines, were able to purchase these newspapers and watch the television news reports. Other Canadians asked acquaintances to fax or email reports from the U.S. An organization called the "Canadian Coalition for Responsible Government" that had an address in Buffalo, printed a flier that purported to give many of the details of the Homulka hearing. Many of the alleged facts in the flier turned out to be erroneous but it was distributed on the streets of Toronto and other nearby cities. Readers were urged to reproduce the flier and distribute it to acquaintances by fax or other means. For a \$20 contribution sent to the Buffalo address the organization offered to send additional details, including pictures of both Homulka and Bernardo. An Angus Reid Poll(1993)

found that, nationwide, 14 percent of Canadians reported that they had actually obtained prohibited details on the Homulka trial through U.S. publications or broadcasts, but in Ontario fully 26 percent of those polled said that they had obtained the information.

While the Bernardo case raises particularly serious issues for Canada and other countries that rely on laws of contempt to prevent pre-trial publicity, it also has relevance to the United States. Despite First Amendment case law, which places a very high priority on a free press, judges sometimes do attempt to control pre-trial publicity by barring media access to pre-trial court proceedings and by placing restrictions on what lawyers and other parties may say to the press (see Gertner and Mizner, 1997; Wetherington et al., 1999). Evidence rules exclude certain information, such as a defendant's criminal record. However, fax machines, the internet and aggressive mass media may thwart these remedial measures.

In contrast to television and newspapers the internet provides easy access to news events, and information about a defendant's prior criminal record. A television broadcast or a newspaper article may appear once or twice and then it is relegated to archives that often requires substantial effort to retrieve. In contrast internet sites can and do retain easily accessible information, allowing a prospective or an actual juror to retrieve it at will. While it is likely that most jurors will try to follow the judge's admonitions to ignore outside influences, there are sufficient numbers of documented cases involving jurors seeking out prohibited publicity (*U.S. v. Horton*, 1981) or taking other prohibited actions during the trial or during deliberations (e.g. *U.S. v. Pinto*, 1980; Mueller, 1978). The Australian study by Chesterman et al. (2001) found evidence that jurors did engage in ex-parte investigations, including investigation on the internet. A New Zealand study involving in-depth interviews with jurors from 48 criminal trials also found jurors engaging in ex-parte investigations, despite judicial instructions that such investigations were not permitted (Young, Cameron, and Potter, 1999). Thus, the internet, which may provide may prove to be a serious source of pre- or mid-trial tainting of one or more jurors.

An Important Caveat: Effects of “One Shot” Publicity

As noted, a one-time story can raise serious concerns about effects on a jury pool or even on sworn jurors. Particularly if the article is of special relevance to the jurors and occurs near in time to trial proceedings, as in the *American Eagle* and *Bravos* cases, a “one shot” media story may have serious deleterious effects. Jurors and prospective jurors may be more attentive to publicity about events relevant to local courts than other citizens. However, important questions arise about how long lasting the effects of publicity are in the absence of special interest in the subject, either for the individual juror or the community. Consider an experiment that was undertaken for the *Fairfax* case in Australia. More background is necessary to understand the context of the experiment. In Australia, as in all common law jury systems outside the United States (see Chesterman, 2000, Vidmar, 2000a) the mass media may be prosecuted for reporting material that is deemed to carry “a substantial risk of interfering with the administration of justice.” On October 27, 1997 the *Sydney Morning Herald* began a three-part series on the drug trade in Sydney (see Freckelton, 1999). The front page *Morning Herald* headline was entitled “Unmasked: Our New Drug Bosses” and was accompanied by large color photographs of Duncan Lam and Duong Van Ia. Mr. Duong’s photograph was labeled “Top Heroin Distributor.” The supra-headline stated: “These two men have carved out a giant portion of Australia’s \$3 billion heroin trade, building a network from Southern China to Sydney. Police admit they are failing to stop nine out of ten heroin shipments.” The main story, consisting of 39 paragraphs, noted that Duong was nicknamed “Uncle Six,” a clear mafia-like labeling. An accompanying story on Duong, on page 7, entitled “Uncle Six: from Refugee to High Roller” consisting of 23 paragraphs, was accompanied by a photograph of Duong and his mistress and another of his mistress alone and mentioned Duong’s “Uncle Six” sobriquet 17 times. There were accompanying stories on Mr. Lam (34 paragraphs) and on the police (18 paragraphs). The very last paragraph at the end of the “Un-

cle Six' story the article mentioned that in 1993 Duong had been charged with taking part in the supply and distribution of 223 grams of heroin but had yet to face trial on the charges. Duong was in fact tried on some of these charges in March 1998, but the result was a hung jury. Immediately at the conclusion of the trial, the publisher, John Fairfax Ltd., was charged with contempt for the articles it had published more than five months earlier.

Ordinarily, notice of contempt proceedings by the Attorney General occurs within days of the publication of an article, rather than many months after its publication. The October 27 articles and pictures on Duong were on their face extremely prejudicial and could probably have contaminated the jury pool if their publication was near the time of trial. However, the five month interval between publication and trial raised questions about longer term effects. With one very minor exception the stories on Duong were not repeated by other media sources in the ensuing five months and there was no indication of community responses to the articles. Research in Australia as well as the United States indicated that citizen memory for single news stories is very brief (see Australian Law Reform Commission, 1986; Bogart, 1989; Graber, 1988). The reasons are multiple but include the facts that readers typically read only the first few paragraphs of news articles, that articles are read selectively, and that interpolated life events cause memory of single stories to fade quickly. If Fairfax had been charged shortly after the stories on Duong appeared, a survey could have been conducted to test the hypothesis that the long time interval would result in dissipation of memories of the prejudicial stories, particularly since he would stand trial under his Vietnamese name, rather than the nick name of "Uncle Six.". However, because the contempt charges occurred *after* Duong's trial Fairfax was put in the position of producing next best evidence.

In January, 1999 a sample of persons who regularly subscribed to the *Morning Herald* were recruited to come to the offices of a research organization under the pretext of a study about newspaper readership habits. Some respondents were provided a full copy of the entire *Herald* edition of August 1997 containing the Duong stories and other were given not only that edition but the two follow-up

editions dealing with the drug trade. Control group respondents were provided with copies of editions published a week later that contained no stories on the drug trade. All respondents were told to read the newspapers as they would normally read the newspaper. Most respondents took half an hour or longer to read them, a time that was consistent with published research on newspaper reading behavior. They then were asked to fill out a questionnaire about what they read, which advertisements appealed to them and other questions intended to disguise the true purpose of the study. The questionnaire made no mention of the Duong stories. Two weeks later the respondents were contacted again by telephone and a detailed interview directed toward their memory and recognition of the prejudicial articles about Duong was conducted. Of 109 respondents in the experimental conditions, no respondent spontaneously recalled the name of Duong or “Uncle Six”, although names of other notorious persons associated with the drug trade were mentioned. A more detailed question about heroin distributors also produced no recall. In response to a direct recognition question only one respondent of 109 was able to associate Duong with “Uncle Six.” Recall from earlier discussion of the *Fairfax* case, substantial numbers of respondents did associate the name Duong with the illegal drug trade but since a pseudo Vietnamese person, Lan Tran Cao, evoked similar levels of association it is probable that the association of Duong was a function of generic prejudice against Vietnamese, especially in the context of an interview that asked many questions about the drug trade.

The *Fairfax* experiment, in conjunction with the more general research on the impact of news media on the public (Australian Law Reform Commission, 1986; Bogart, 1989; Graber, 1988), raises important questions about the effects of even highly prejudicial news stories that are subject to selective exposure, that occur in isolation, that occur without additional indication of interest among members of the community and that are removed in time from jury selection. The findings also raise questions about the ecological validity of simulation studies that provide one-shot exposure to brief synopses of prejudicial materials and then require the subjects to render verdicts on a defendant shortly afterward,

sometimes within minutes (see Wilson and Bornstein,1998; and, more generally, Bornstein, 1999).

Sources of Generic Prejudice

Sources of generic prejudice may be diffuse. Some prejudices, of course, arise out of complex socialization, personality and cultural experiences. Racial or ethnic prejudice is a clear example. However, generic prejudices can be created or enhanced by mass media. The *McGregor* cross-bow killing case, as already discussed, is a clear example: media reports consistently tied the defendant to general issues regarding violence against women and to other criminal cases. In the *Fairfax* case, the survey research showed that many respondents had drawn opinions connecting Vietnamese and drug problems based on extensive mass media coverage of the subject over extended periods of time. Greene (1990) reviewed field and laboratory research showing that pre-trial publicity about one case could have impact on subsequent cases. In one instance widely disseminated media accounts about an erroneous conviction based on eyewitness testimony occurred shortly before a laboratory experiment (Greene and Loftus,1984). The media stories appeared to have had an effect on mock jurors. In marked contrast to prior similar experiments in the same setting the mock jurors were less willing to convict in the simulation study. In subsequent research (Greene and Wade, 1987) these basic findings were replicated in different contexts. Greene and Wade also demonstrated that the greater the similarity between the case that received the publicity and the target case, the greater the likelihood that the effects would transfer to a subsequent case.

Similarly, in the 1980s and 1990s news coverage of child sex abuse in nursery schools and elsewhere contributed to public perceptions of widespread abuse and at least in some persons apparently created negative attitudes that bias them toward believing an accused person is guilty before even hearing the evidence

(Vidmar, 1998).

Generic prejudices against tort plaintiffs have been ascribed to publicity about a tort crisis. Bailis and MacCoun (1996), Chase (1995) Daniels and Martin (1995), Galanter (1997) and Garber and Bower (1999) have all documented the fact media coverage is highly biased in the coverage of tort claims. The media report verdicts favoring plaintiffs, particularly when awards are high, and ignore defense verdicts. Studies of attitudes favoring tort reform resulting from this media coverage have shown that these attitudes are negatively related to the way that plaintiff's claims are viewed (see Hans, 2000; Greene,1990; Goodman, Loftus and Greene,1990; Moran, Cutler, and DeLisa,1994).

Mass media stories that create generic biases need not be inaccurate stories. Apparently many drug dealers in Sydney are ethnically Vietnamese or Chinese. However, the legally relevant issue is the creation of perceptions that if a person of Vietnamese ethnicity is accused of a drug offense he is probably guilty. Anastasio, Rose and Chapman (1999) have shown that news media differentially depict categories of people. Women are covered in different ways than men. Whites are pictured in close-up photographs more often than African Americans. Sixty-two percent of persons pictured in stories relating to poverty are African American whereas the proportion of African Americans who make up the American poor is only 29 percent. In coverage of the O.J. Simpson trial the major news sources typically reported differences between whites and African Americans, citing the latter as believing in Simpson's innocence and whites as believing in his guilt (see Barak, 1996; Graham, Wiener and Zucker, 1997). Moreover, various sources of evidence indicate that one-sided coverage actually does affect public opinion (e.g. Anastasio, Rose and Chapman,1999; Stalans,1993).

ASSESSMENT OF PREJUDICE IN COURTS AND IN SURVEYS

Remedies and the Need for Evidence

Case studies also shed light on assessment problems. Courts begin with the assumption that judicial admonitions and instructions, the jurors' oaths to decide the case on the evidence and the process of deliberation will cancel many prejudices. Additionally, the voir dire process allows the exercise of peremptory and for- cause challenges to jurors. Only if it is determined that the taint in the jury pool is so extensive that judicial admonishments and voir dire may be ineffective remedies, will a judge order alternative remedies such as a temporary stay of proceedings, a change of venue, or the importation of a venire from outside the district. In cases of mid-trial prejudice an additional remedy is declaration of a mis-trial.¹⁰ If one of the parties seeks one of these more extreme remedies, that party carries the burden of showing cause for the remedy.

The case law on remedies in high profile trials is discussed in Gertner and Mizner (1997) and Wetherington et al.(1999), but without reviewing the details here it is fair to say that, as a group, judges tend to have a great deal of faith in the self reports of jurors during the voir dire process. This faith holds even though in most federal and many state courts the judge does the questioning of the jurors, often in a cursory manner and not under ideal assessment conditions. In a leading case, *Mu'Min v. Virginia* (1991), the Supreme Court approved a very truncated voir dire procedure in a state trial despite extensive trial publicity. Mu'Min, serving a life term for murder, was charged with another murder while out of prison on a work detail. The case evoked a great deal of publicity in the community where the crime occurred. The trial judge did not grant a change of venue and refused to allow individual voir dire. The judge began by asking the whole panel four questions about the effect of the pre-trial publicity or information obtained through other sources. He then questioned jurors in groups of four with close-ended questions requiring a yes or no answer. Each time that a juror indicated he had acquired information about the case from outside sources, the judge asked if the juror had formed an opinion; only if

¹⁰Sequestering jurors is another remedy for potential tainting if prejudicial mid-trial publicity can be anticipated in advance. However, despite the wide attention given to sequestering in the O.J. Simpson trial, it is an infrequently used remedy.

the juror responded affirmatively, was the juror excused. The judge refused to ask questions regarding the source of information or the content of that information. Despite some vigorous dissent to the majority opinion, *Mu'Min* the U.S. Supreme Court upheld the procedure. Other courts have approved similar restrictive voir dres (see *People v. Johnson*, 1989; and generally, Ginger, 2000) Patterson and Neuffer (1997) provide similar examples from civil trials in which the judge relied on self reports of impartiality despite the presence of strong interest prejudices.

The potential lack of efficacy of a procedure such as that approved in *Mu'Min* when there has been substantial pre-trial publicity was demonstrated by Moran, Cutler and Loftus (1990). Those authors reported that, compared to a minimal voir dire, extended voir dire procedures in controlled substance trials appeared to induce jurors to provide more information to the court. **Jurors'**

Failure to Disclose Prejudices During Voir Dire

The success of voir dire is dependent upon jurors disclosing any prejudices or interests that they might have. There are a number of reasons why jurors might not disclose prejudices. The juror may be unaware of the prejudice. Ogloff and Vidmar (1994), for example, conducted an experiment in which respondents were exposed to videotaped testimony or newspaper accounts of the actual graphic testimony of a victim of the sexual abuse in the Mt. Cashel Orphanage cases, described earlier in this article. Compared to a control group of respondents who were exposed to neutral material, the respondents exposed to the victim's testimony were more likely to view the perpetrator as guilty and recommend a harsher punishment than control respondents exposed to neutral material. However, they were just as likely as control respondents to assert that they could be impartial in judging the guilt of the accused. Moran and Cutler (1991) reported similar findings in two field studies of criminal trials involving

extensive publicity, one involving charges of distribution of large quantities of marijuana and one involving the murder of a police officer during a drug sting operation. In both cases respondents' knowledge about the case was significantly related to the perceived culpability of the defendants. However, knowledge was unrelated to stated ability to be impartial. These findings may reflect the fact that despite their knowledge or emotional reactions to the case, the jurors could truly set their prejudices aside and decide the case solely on the trial evidence. However, it is also plausible that, as in many other domains of human behavior, respondents may not have been adequately aware of their attitudes and the effect of those attitudes on their judgment (Nisbett and Wilson,1977).

Another possible explanation for non-disclosure is that respondents were aware of their biases, but were not inclined want to disclose them to researchers or to the court. Seltzer et al. (1991) observed the voir dire of thirty-one criminal trials and subsequently interviewed 190 of the jurors. Although jurors had been asked if they or a family member had been a victim of a crime, 25 percent of the jurors disclosed that they should have answered affirmatively but they did not. Almost 30 percent of the jurors said during the interview that they knew a law enforcement officer, but had not disclosed this information when it was asked in voir dire. Seltzer et al. did not explore the reasons for the failures to disclose the information, but they did observe that in most cases the voir dire questions were brief and perfunctory.¹¹

Gregory Mize (1999), a federal judge in Washington D.C., interviewed jurors called for felony trials over which he presided. Jurors were asked up to 18 questions during group voir dire. He then interviewed each juror individually in a separate room. To persons who had not responded to any of the questions posed in the group session, he asked the following question: " I noticed you did not respond to any of my questions. I just wondered why. Could you explain?" Some of the non-responders said they did not understand the questions. Some stated that they were resentful at being called for jury duty or had health prob-

¹¹In contrast an exploratory study of voir dire in four serious felony cases by Johnson and Haney (1994) found that extended attorney-conducted voir dire did elicit admissions of bias and appeared to eliminate persons with strong biases.

lems. Others indicated that they were strongly biased against the police while others said they were biased in favor of the prosecution. One juror said she was the defendant's fiancée and another said that the defendant was a member of the same church. Some were former crime victims or a family member had been a crime victim. Others had been charged with crimes. Still others held strong attitudes about gun control while others had friends or in law enforcement or had themselves worked in law enforcement.

Another explanation for non-disclosure of feelings and beliefs may be evaluation apprehension. Marshall and Smith (1986) sent questionnaires about the voir dire to 422 jurors who had served on jury duty and obtained a 65 percent response rate. The questionnaires assessed perceived demand characteristics in the courtroom, evaluation apprehension and expectancy effects as well as juror self-reports about their candor during the voir dire. Marshall and Smith concluded that evaluation apprehension and demand characteristics influenced jurors' responses to questions. In short, some jurors attempted to provide answers consistent with what they perceived to be expected of them rather than their own honest answers.

Vidmar and Melnitzer(1984) reported that in the *Iutzi* child killing case the judge's request to the whole panel of 130 assembled jurors to come forward if they had a relationship to the case or could not otherwise be impartial resulted in only four people coming forward. However, in the sequestered individual questioning of 50 jurors that took place immediately afterward, 34 admitted to preconceived notions about the guilt of the accused. The failure to step forward may have been a result of the jurors not understanding the question posed by the judge or to conformity effects, that is reluctance of jurors to appear different from other jurors who also did not disclose bias. In *McVeigh* (1996) Judge Matsch touched upon another explanation that might explain some jurors failure to disclose biases, namely that the juror wants to serve on the jury to "do justice."

These various hypotheses, separately or in combination, offer a plausible explanation for the findings of Nietzel and Dillehay (1982) who examined the effects

of four types of voir dire on sustained challenges for cause in 13 Kentucky capital murder trials. The four types of procedures involved whether voir dire were conducted individually or en masse and whether the jurors in individual voir dire were conducted with all jurors present or under conditions of sequestration. The highest number of sustained challenges resulted under conditions of individual sequestration. In a follow-up study of 18 capital cases Nietzel, Dillehay and Himelein (1987) also found that individual sequestered voir dire produced the highest number of sustained challenges.

“Minimization” and Contradiction in Self-Reports of Attitudes and Beliefs

The various hypotheses derived from studies of the voir dire process that might explain why jurors do not disclose information and prejudices are difficult to sort out in case studies of pre-trial prejudice, but evidence consistent with such effects is easily documented.

Bronson (1989) examined the voir dire in a Florida trial involving an interracial killing that was the subject of extensive media publicity and community gossip and rumor. The victim was a young white female and the defendants were African -American males. The voir dire was conducted on the individual jurors but in open court in the presence of all the venire members. Survey data of the community undertaken for a change of venue motion (that was denied) had produced evidence of high levels of knowledge and very strong beliefs in the defendants' guilt, and extensive racist attitudes associated with these beliefs. Bronson described what he labeled the “minimization effect.” During the voir dire prospective jurors reluctantly admitted to having read about the case but constantly used a “minimization” vocabulary: that is, the use of qualifiers such as “just,” “nothing other,” “nothing but,” “except,” “no more than,” “little bit,” “only,” and “that’s all.” Thus, one person responding to a question about

what he knew about the case said “*Only* thing I have read is what’s in the paper.” In a follow up this juror added, “I read something...I didn’t read all of it. I *just* glanced [at the paper].” Another juror acknowledged, “I’ve heard it discussed and I read some *but* not a whole lot.” When she was asked about the nature of the discussion she had heard she responded, “it’s *just* the things I’ve heard people say.” Other jurors replied as follows: “*just* when it first happened in the news,” “*Not much, just* newspaper and television coverage,” “*Just* the headlines is all I know,” and “*Just* what I read. I didn’t read that much.” One juror who had been a friend of the victim stated that she knew her, “*Just* as a close friend, *just* we lived in the same town, and I’ve *just* known them since they were children.”

A likely minimization effect issue also arose in a civil case, *Regents of the University of California v. Genentech* (1999, hereinafter “Genentech”), a case involving a patent infringement claim over the human growth hormone, Protropin. The jury had been chosen and the trial was set to commence on April 12, 1999 when the Genentech lawyers learned that in an entirely unrelated case Genentech had agreed to plead guilty to a federal felony charge for “off label” promotion of Protropin and pay a fine of \$50 million. The defense was properly concerned that this knowledge might affect the way that the jurors might view Genentech’s actions and motives with regard to the patent infringement issues. Alerted to the potential impact of this disclosure on the jury, the trial judge refused to delay the trial, but did strongly admonish the jurors to avoid any news articles involving Genentech. On April 15 the jurors were in the jury room waiting to be called into court. One of the jurors had brought a copy of the *Oakland Tribune* and began reading. When she turned to the business section she was startled by the headline: “Genentech admits criminal guilt: FDA triumphs in \$50 million case.” She uttered a startled exclamation, but what occurred next is unclear. There was evidence that at least one other juror, and very possibly more than one, saw the headline, but evidence was conflicting as to whether they read further, how many other jurors read the account and the extent and duration of discussion about the story. The newspaper incident was brought to

the attention of the judge, who questioned the jurors en masse about whether anyone had seen the article. The transcript reveals that after an awkward pause a male juror raised his hand, there was another awkward pause, and then other jurors reluctantly admitted having seen the headline.

The trial commenced while the judge considered what to do. At the end of the day the judge questioned the jurors individually, stressing that he understood the paper incident was an accident but needed to know what happened. Although the jurors might have been telling the truth, their responses were highly consistent with a “minimization effect.” One juror stated that he saw a headline but as soon as he saw it he “stayed away.” Another said, “We were not interested in this thing and we have to put it aside because we are not supposed to talk about this.” Still another said, “I think we all saw the same headline.” Another said, “We didn’t know what it was. We saw ‘Genentech’ and turned it over.” However, another juror implied that only the original juror saw the headline: “She was reading and all of a sudden turned the paper over.” Five of the jurors said that the only thing they saw and comprehended was the name “Genentech.” One stated, “I looked up and saw the headline with the name Genentech and about three or four other words. And I couldn’t tell you what the headline said. I saw the name of Genentech and she put the paper down and folded it up. And that was that.” Another juror confirmed seeing the headline but asserted “*That’s all I saw* [the name Genentech]. And then we didn’t read another word of it.” Still another juror admitted that he had seen the story in a different paper before coming to court. He stated that he had seen the name “Genentech” and that “it was in large type,” but he had stopped reading further and added the disclaimer, “the *only* thing I saw, as I recall, in large type was ‘Genentech’-the word-the name. And that was that.”

As part of a motion for a mistrial, on behalf of Genentech I tendered an affidavit that discussed the “minimization” effect in the context of the jurors’ denials of comprehending anything but the name “Genentech” in the headline. The affidavit reviewed psychological literature on reading comprehension that indicated that a person with a high school education reads and comprehends

leisure material at a rate of 250 words per minute; that research with sophisticated monitoring equipment recording eye movements concluded that reading spans, excluding peripheral vision, encompass 120 degrees of vision; and that processing of information occurs in grouping of words, that is, as syntax involving phrases, clauses and sentences rather than single words. This literature raised a realistic possibility that the jurors saw and comprehended more than *just* “Genentech,” but it was highly academic and unlikely to persuade a judge. To supplement the academic literature I conducted an experiment specifically designed to test the hypothesis that the jurors comprehended more than just the name of the company. A convenience sample of 38 jury-eligible citizens were recruited for a jury study and tested individually. The respondent was asked to assume he or she was a juror in the patent infringement trial involving Genentech and was given a summary of juror experience prior to the *Oakland Tribune* incident in the jury room. The experimenter then immediately placed a copy of the April 15 *Oakland Tribune* in front of the respondent (but slightly to the side in the manner similar to the way that all jurors except the juror who was reading the paper would have had to view it), and without any delay opened it to the front page of the business section. Although the jurors themselves indicated that it was likely that they had been exposed to the article for at least ten or fifteen seconds, indeed, probably much longer, the experiment allowed only two seconds of exposure before it was removed from view. The respondent was then asked an open-ended question about what he or she had read, if anything. Of the 38 respondents, 30, or 79 percent, reported reading not only the word “Genentech” but in addition reported that Genentech had made an admission of guilt, and one third reported the \$50 million fine. The results of the experiment were consistent with the other evidence suggesting that a minimization effect had been present in the actual jurors’ reports of what they had read and comprehended.

Inconsistency in juror attitudes as a function of socially desirable responses or jurors lack of self-awareness are also often reflected in survey responses conducted for change of venue motions. *R. v. Theberge*(1994), a case mentioned

earlier in regard to generic prejudice about the insanity defense, involved a man accused of stabbing the teenage daughter of a local physician to death. The case was attended by a great deal of local media coverage and community gossip. A telephone survey was undertaken of the community to assess the degree and extent of prejudice against the accused. The survey began with a series of general open-ended questions and recognition items that progressively became more specific; it also assessed the degree to which the respondent had discussed the case with members of their family, friends and co-workers, and if so, whether opinions about his guilt or innocence had been discussed. Recognition levels were high, many respondents indicated they had discussed the case with others and that the discussions tended to conclude that Theberge was guilty. Question 19 then asked: "If, at his trial, a judge or jury found Mr. Theberge to be not guilty by reason of insanity, would you personally find this result very acceptable, acceptable, unacceptable or very unacceptable?" Only 28 percent reported that the verdict would be acceptable or very acceptable, but fully 52 percent of respondents reported that the verdict would be unacceptable or very unacceptable, and the remaining 21 percent stated that were unsure of their view. Question 19b asked all respondents the reason for their answer and these were recorded verbatim.

Six additional questions or sub-questions followed before the following question (Question 22a) was put to the respondent:

Assume that you were called as a potential juror in the Theberge case and assume you were told by the judge that it was your duty to keep an open mind about the insanity

defense. Do you honestly think that you could do so or do you think that your existing attitudes about Mr. Theberge might make you biased against the insanity defense in this case?

Thirty-three percent of respondents stated that they might be biased, and 10 percent were uncertain, but 57 percent stated that they could keep an open mind. All respondents were then asked to explain the reason for their answer (Question 22b) and, like Question 19b, their answers were recorded verbatim. Respondents who stated they could be open-minded typically asserted that a

person should be considered innocent until proven guilty, although about 10 percent responded with some variation of the following contradictory statement: “He’s guilty but I would give him the decency of a fair trial.” However, further data analysis revealed even greater levels of inconsistency. While 57 percent of respondents asserted open minds in response to Question 22a, in response to Question 19a, only 28 percent had stated that a not guilty verdict would be unacceptable or very unacceptable: a 29 percent discrepancy in professions of impartiality. Consequently, the answers of each respondent who reported having an open mind in response to Question 22 were compared to the closed- and open-ended responses to Question 19 and earlier questions. The data showed that some persons who professed open minds in response to Question 22 had earlier made comments like the following in response to Question 19b: “He should get the death penalty,” “no way you can convince me he is insane,” “my mind is made up-he’s guilty,” and “everybody knows he is guilty.” Thus, for these persons their professions of impartiality as a juror in response to Question 22a were strongly contradicted by their earlier answers. Considering statements of this type to be not impartial, the data were recalculated to yield an estimate that 51 percent of the survey respondents held strongly biased attitudes against the defendant.

Similar results were found in *R. v. Reynolds* (1977). Recall from previous discussion that Louise Reynolds was charged with stabbing her daughter, age seven, 84 times in 1997 and that a great deal of community hostility to her a year later, after a memorial poem by Ms. Reynolds was printed in the *Kingston Whig Standard*. Defense counsel put forth an alternative theory of the child’s death, namely that she child had been killed by a pit bull dog that was near the crime scene and had been covered in blood. The child’s body was exhumed in 1999 and examined by two forensic scientists who tendered reports strongly supporting the alternative theory.¹² The local *Whig Standard* did not report the exhumation, but it was reported in nationally circulated Toronto newspapers.

¹²Charges were eventually dropped against Reynolds when the Crown Prosecutor’s forensic expert admitted errors and changed his opinion from the one he had given at Reynold’s preliminary hearing, see O’Hara (2001) Appleby (2001).

In March 2000, in preparation for a motion for a change of venue, I designed a survey to assess whether community opinion was still inflamed or whether sentiments had dissipated over the intervening months. The survey design was similar to the *Theberge* survey, beginning with general questions to assess degrees of knowledge and recording verbatim respondents' answers to open-ended questions. A super majority of respondents indicated knowledge of the case, and many were able to provide detailed factual knowledge of the case. Then, Question 14 asked the following: "If Louise Reynolds is put on trial for second degree murder, and a jury finds Louise Reynolds not guilty of killing her child, would you personally find the 'not guilty' verdict very acceptable, acceptable, unacceptable, or very unacceptable?" Thirty-five percent of respondents said unacceptable or very unacceptable and an additional 20 percent said they were unsure. Each respondent was asked to explain and the answers were recorded verbatim. Following question 14 additional questions were posed. Then Question 20 asked:

Finally, think carefully about this situation. Try to think about what your true feelings and beliefs would be. Assume that you are called as a potential juror in the Louise Reynolds case and learn that she is charged with second degree murder in the death of her seven year old daughter. In the courtroom you are told by the judge that the Crown prosecutor bears the burden of proving guilt, and it is the duty of the jurors to listen to the evidence and be impartial, that is keep an open mind about her guilt or innocence. Considering everything that you personally know about the case and your attitudes about it, do you believe that you could be an impartial juror?

In reply, 72 percent of respondents said they could be impartial, 23 percent said they could not and 5 percent were unsure. Those persons stating that they could be impartial offered explanations to the effect that everyone deserves a fair trial. However, note that while 72 percent of respondents professed to be unbiased in responding to Question 20, in response to Question 14, fully 35 percent said a not guilty verdict would be unacceptable and an additional 20 percent were unsure. In short, a substantial discrepancy existed between responses to Questions 14 and 20.

Similar to the procedure in *Theberge*, the inconsistency was explored by compar-

ing the verbatim responses of each person who said he or she could be impartial in response to Question 20 but had asserted in Question 14 that a not guilty verdict would be unacceptable or that he or she was unsure. Selected examples from these “inconsistent” jurors are as follows:

R#50192: I remember she [the girl] was missing and her mom murdered her. I get general information on what happened to her, mom was convicted of murder. I believe she did it. Just from the story from the news. If we had capital punishment she should go.

R# 50193: [Deceased girl] found on Roseman Crescent. Found under stairs. Mother claims not to have done it. Because she denied doing it and denied knowing where daughter was, there’s no way a dog did it. Because of evidence presented in newspaper via Kingston police force. Life in prison, no chance of parole. Everybody entitled to a fair trial, but from everything I’ve read she’s guilty.

R#50198: I think if police have her she must be guilty. If the police have her for killing her daughter she must be guilty.

R# 50137: That’s Sharon Reynolds. They found her in her basement and it was supposed to be a dog, they was a story about stab wounds and they dug her out. Because I feel that she’s guilty; no mother can be that stupid because no kid can be screaming bloody murder without you hearing. If she’s guilty the same thing should happen to her and if she’s not it should be publicly announced to clear her name.

R#50016: I think the mother killed her daughter and think she was convicted and don’t know what sentence she received. Somebody slipped up in the trial and didn’t come up with enough evidence to convict. I hope she is convicted and sent to jail, for a mother to kill her own child there must be something wrong with her mentally.

Responses similar to *Theberge* and *Reynolds* were also found in *R. v. McGregor* (1992), the cross-bow killing case. In each instance the findings raise serious doubts about the respondents’ professed ability to be fair and impartial as jurors. Questions can and have been raised as to whether survey findings can

be generalized to the courtroom. The surveyed jurors were responding anonymously and were not under oath. They were not exposed to the “gravity” of the courtroom atmosphere, to admonitions by the judge, the actual trial evidence that might disabuse them of preconceived notions, and to the effects of the deliberative process. On the other hand, the data appear quite consistent with research on juror disclosure in voir dire, with the experimental studies of juror behavior (e.g. Steblay et al. 1999) and with more general bodies of social psychological research on self knowledge, social desirability, and conformity.

SUMMARY AND DISCUSSION: INSIGHTS FROM THE CASE STUDIES

The case studies reviewed in this article yield a number of insights about trial prejudice that are relevant to both basic and applied research. One very general insight is that concerns about trial prejudice in actual litigation involve civil as well as criminal cases. This observation contrasts with the published literature, which has tended to focus exclusively on criminal cases.

A second general insight is that litigation concerns frequently involve mid-trial as well as pre-trial prejudice, also a topic missing from the published literature. The basic social and psychological dynamics of bias appears to be similar across these variations, but drawing attention to the scope of trial prejudice issues opens the door to expanded conceptualization and opportunities for investigating an important phenomenon.

The conceptual framework describing four categories, or types, of trial prejudice – interest, specific, generic and conformity prejudice– is consistent with case law, although the terms used in the framework are new labels. The framework’s utility is simply as a cognitive device for identifying and differentiating issues that arise in litigation.

The topic of what the framework labels *specific* prejudice has been the concern

of the vast bulk of simulation research on pre-trial publicity. The case studies and the conceptual framework derived from the cases reveal important lacunae in conceptualization and external validity of many simulation experiments. The experiments have been designed and discussed as a problem of individual attitude change. To wit, persons with no prior knowledge of the stimulus case are individually exposed to a newspaper account, typically only a single article bearing on the trial issues, that conveys prejudicial material. Then the individual is asked to assume the role of a juror, exposed to trial materials and asked to render a verdict. The responses of these individuals are compared to individuals in a control condition.

In contrast, the case studies show, the real world problems are much more social psychological, indeed even sociological, in nature. Media accounts generate interest in the case which in turn provokes discussion among friends, family and co-workers. Rumor and gossip fuel the discussion and shape the moral meaning of the media accounts. Implicitly or explicitly community norms and values are brought to the fore. The *Iutzi* case is particularly useful in this regard since it helps to show the development of strong prejudices toward the defendants developing in the absence of mass media influence. In the other cases, however, media stories and social responses were intimately related. In *Theberge*, *McGregor*, and *Reynolds*, for example, the media reported on the incident leading to the death and then reported on the community responses to the death. These responses included memorial vigils for the victims, calls for institutional actions to prevent such incidents in the future and calls for harsher punishment of offenders. In *McGregor*, the media linked the case to issues of domestic violence against women. In *Reynolds* the little girls death was linked to issues of child abuse. Thus, in cases that cause lawyers and judges concerns about obtaining a fair trial in a community, there is often a dynamic, two-way relationship between the media and social responses. Media report the incident. Members of the community respond as individuals and as members of informal or organized social groups. The media report the community responses, helping to solidify perceptions of a consensus about community norms. In many instances the

media reports link the specific trial to more general issues, placing it within a broader category of cases.

Thus, in addition to *specific* prejudice, the mass media often assist in the development of both *generic* and *conformity* prejudice that may be a factor in a trial. Compared with the various other case studies described in this article *McVeigh* was arguably atypical only in terms of its expansion beyond the immediate physical and social boundaries of the community and in degree of intensity of emotions aroused from the catastrophic number of victims.

An additional insight from the case studies bears on findings of weak or null results in experimental studies. Because the manipulation of prejudicial material is so pallid in simulation studies when compared to all of the forces at play in actual cases, it seems inappropriate to conclude that when effects are not found in simulations we should not conclude they are absent in real world cases. These issues bear directly on the exchange between Carroll et al. (1986) and Fulero (1987) about the relevance of research findings for applied purposes. The research conducted for the *Fairfax* case, however, adds additional material for controversy: limited or selective exposure and time between exposure and trial may mute or erase effects of prejudicial publicity. Note that this finding is arguably consistent with an experiment by Kramer, Kerr and Carroll (1990). Those authors found that a delay of several days between exposure and verdict reduced the impact of what they labeled “factual” publicity although delay did not affect what they labeled “emotional” publicity.”

The potential role of *generic* prejudice in the context of pre- and mid-trial publicity has received relatively scant scholarly attention although, of course, racial and other general biases have long been recognized as psychological states inherent in certain potential jurors. Case law has also recognized what I have called generic prejudice. However, in this article attention is drawn to the role mass media plays in generating general stereotypes and in sometimes linking them to specific cases, as in *McGregor* and *Reynolds*. As described earlier, a substantial body of literature has been devoted to the subject of how mass media creates stereotypes that may have serious implications for litigants in civil as well as

criminal cases. Attitudes about plaintiffs in tort cases have been influenced by mass media stories and these in turn have been shown to influence juror decisions on liability and on damages. By identifying generic prejudice as a separate category of prejudice researchers become more attuned to matters that may be relevant to a particular trial.

The case studies also raise issues related to self disclosure of prejudice in the courtroom and in surveys intended to uncover potential prejudice that will be useful to courts in deciding upon appropriate remedies. The “minimization” effects and inconsistencies in answers regarding fairness may not easily be produced in laboratory research, at least not in the magnitudes found in real cases, although the findings are highly consistent with general research on social desirability, apprehension anxiety and conformity. Additional documentation and better understanding of these effects can have important implications for choice of remedies for trial prejudice.

The implications of the foregoing discussion for the assessment of trial prejudice and for considering the external validity of simulation research can be posed as a series of questions, or analytical categories:

1. How accessible and prominent are media stories?
2. To what extent are they repeated over time?
3. To what extent are the stories repeated by other media sources?
4. What is the interval between the last publicity and the start of trial?
5. To what extent does community gossip, rumor and the formation or assertion of community norms exist?
6. To what degree are prospective jurors (or actual jurors in the event of mid-trial publicity) actually exposed to the publicity in media and in community gossip and to what degree do they actually recall it?
7. To what degree does the venue in question differ from venues to which the trial might be moved?
8. What is the content of the publicity? To what degree does it involve interest, specific, generic and conformity factors that bear on impartiality?
9. To what degree does the content consist of legally inadmissible factual material, mis- information, and emotion-arousing information?
10. To what extent do the responses of jurors show conflicting answers or “minimization”?
11. How do all of these factors bear on jurors’ ability to provide accurate and truthful answers in the voir dire and appropriately follow judicial admonitions and instructions at trial?

Finally, although this article raises some serious issues for research on pre- and mid-trial publicity, it is not intended as a general indictment of experimental simulation research on this subject. Research for case studies often involves only correlational research that cannot easily tease out causal relationships nor can it answer important questions bearing on effects of publicity on verdicts, the effects of judicial admonitions or the processes by which verdicts have been reached. In fact in many of the affidavits tendered for these cases I relied heavily on the experimental literature to draw links between demonstrable prejudice and the potential for it to influence the jury's decision-making processes (e.g. Kerr, Carroll and Alfini, 1991; Pennington and Hastie, 1991). Field research and experimental research can and should complement each other. The goal of this review is intended to be constructive by broadening the scope of issues. Researchers undertake studies of pre-trial publicity with at least some intent of ultimately providing information that may be of use to legal decision-makers. Perhaps judges, like Judge Matsch, will continue to be skeptical of research "consisting largely of simulated trials," (*U.S. v. McVeigh*, 1996:1475), but a recognition of the legal context can help in the design of research that judges will consider more legally relevant.

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References

Allen, M., Mabry, E. And McKelton, D. (1998). Impact of juror attitudes about the death penalty on juror evaluations of guilt and punishment: a meta-analysis. *Law and Human Behavior*, 23, 715-732.

Allport, G. and Postman, L. (1948). *The Psychology of Rumor*. New York: Henry Holt

Anastasio, P., Rose, K. and Chapman, J. (1999). Can the media create public opinion? A social identity approach. *Current Directions in Psychological Science*, 8, 152-155.

Angus Reid Group (1993). Public opinion on publication bans and the Homulka trial. *The National Angus Reid Poll*. The Angus Reid Group (December 29, 1993)

Appleby, T. (2001). Mother cleared in killing of girl, 7 *The Globe and Mail*, January 26, 2001, p A1.

Attorney-General for NSW v. John Fairfax Publications, Pty, Ltd. [1999] NSWSC 318.

Australian Law Reform Commission (1986). *Prejudicial Publicity and the Courts*. Sydney: Australian Law reform Commission.

Bailis, D, and MacCoun, R. (1996). Estimating liability risks with the media as your guide. *Law and Human Behavior*, 20, 419- 430.

Barak, Greg, ed, (1996) *Representing O.J. :Murder ,Criminal Justice and Mass Culture*. Guilderland, NY: Harrow and Heston.

Blackstone, W. (1769/1966). *Commentaries on the Laws of England* (Clarendon Edition).

Bogart, Leo (1989). *Press and Public*. Hillsdale, N.J. Erlbaum

Bornstein, B. (1999). The ecological validity of jury simulations: is the jury still out? *Law and Human Behavior*, 23, 75-91.

Bronson, E. (1989), *The Effectiveness of Voir Dire in Discovering Prejudice in High Publicity Cases: An Archival Study of the Minimization Effect*, Department of Political Science, California State University, Chico.

Bravos v Madison, Pillsbury and Sutro, Cal. Superior Court (City and County of San Francisco) (Case No. 971620) (1997) (unreported).

Carroll, J., Kerr, N., Alfini, J., Weaver, F., MacCoun, R., & Feldman, V. (1986). Free press and fair trial: the role of behavioral research. *Law and Human Behavior*, 10, 187-201.

Chase, O. (1995). Helping jurors determine pain and suffering awards. *Hofstra Law Review*, 23, 763-790.

. Chesterman, M., Chan, J. And Hampton, S. (2001). *Managing Prejudicial Publicity*. Sydney: Justice Research Center. Sydney: Law and Justice Foundation of New South Wales

City of Durham v. Carolina Waste Equipment and Lodal (1991) General Court of Justice, Superior Court Division (Durham County) No. 91-CVS-00729.

City of Durham v. Lodal (1995). North Carolina Court of Appeals (Fourteenth District), No. COA95-43. (Unreported)

Corker, D. and Levi, M. (1996) Pre-trial publicity and its treatment in the English courts. *Criminal Law Review*, 1996, 622- 632.

Daniels, S. and Martin, J. (1995). *Civil Juries and the Politics of Reform*. Evanston, IL: Northwestern University Press.

Durkheim, Emile (1893/1967). *The Division of Labor in Society*, George Simpson, trans. Glencoe, Ill: The Free Press.

Freckelton, I. (1999). Social psychology, survey evidence and prejudicial publicity. *Psychiatry, Psychology and Law*, 6, 215-231.

Fulero, S. (1987). The role of behavioral research in the free press/fair trial controversy: another view. *Law and Human Behavior*, 11, 259-264.

Galanter, M. (1997). An oil strike in hell: contemporary legends about the civil justice system. *Arizona Law Review*, 40, 717-752.

Garber, S. and Bower, A. (1999). Newspaper coverage of automotive product liability verdicts. *Law & Society Review*, 33, 93-

Gertner, N. and Mizner, J. (1997). *The Law of Juries*. Little falls, NJ: Glaser

Legal Works

Gibb, F. (1996). The result of the Maxwell brothers' case has put the system under the spotlight, *The Times*, January 30, 1996 at 31

Ginger, A.(2000). *Jury Selection in Civil and Criminal Trials* (June 2000 Supplement): Westport Ct., Lawpress Corp.

Goodman, J., Loftus, E., and Greene, E. (1990). Matters of money: voir dire in civil cases. *Forensic Reports.*, 3, 303-330.

Graber, D. (1988) *Processing the News*, 2d ed..Lanham,MD: University Press of America.

Graham, Sandra, Weiner, Bernard, and Zucker, Gail (1997). An attributional analysis of punishment goals and public reactions to O.J. Simpson, *Personality and Social Psychology Bulletin*, 23, 331-346.

Greene, E. (1990). Media effects on jurors. *Law and Human Behavior*, 14, 439-450.

Greene and Loftus (1984). What's new in the news? The influence of well-publicized news events on psychological research and courtroom trials. *Basic and Applied Social Psychology*, 5,211-221.

Greene, E. and Wade,R. (1987). Of private talk and public print: general pre-trial publicity and juror decision-making. *Applied Cognitive Psychology*,2, 123-135.

Hans, V. (2000). *Business on Trial*. New Haven: Yale University Press.

Kennedy, J. (1826). *Law and Practice of Juries*.(publisher unknown)

Herek, G. (1986) On heterosexual masculinity. *American Behavioral Scientist*, 29, 563-577.

Herek, G. and Berrill, K.(1992). *Hate Crimes: Confronting Violence Against Lesbians and Gay Men*. Newbury Park: Sage Publications.

Imrich, D., Mullin, C. and Linz, D. (1995). Measuring the extent of prejudicial pretrial publicity in major American newspapers: a content analysis.

Journal of Communication, 45, 94-117.

In re : Air Crash Near Cali Columbia (1996). U.S. District Court, S.D.Fla.(Case No. 96-MD-1125) (unreported).

In re: Air Crash near Morrisville, North Carolina on December 13,1994 (1998). U.S. D.C.(Middle District) (Case MDL No. 1084) (unreported).

Irvin v. State, 66 S. 2d 288 (Fla.,1953)

Johnson, C. and Haney, C. (1994), Felony voir dire:an exploratory study of its content and effect, *Law and Human Behavior*,18, 487-506.

Jost, A.(1995). The jury system; are major changes needed? *CQ Researcher*, 42, 993-996. Kerr, N., Kramer,G., Carroll, J., and Alfini, J. (1991). On the effectiveness of voir dire in criminal cases with prejudicial pretrial publicity: an empirical study. *American University Law Review*, 40, 665-701.

Knapp, G. (1992) Scope of voir dire examination, 114 L Ed 2d 763
Lozano v State, 584 So.2d 19 (Fla 3d DCA 1991)

Marshall, L. and Smith, A. (1986). The effects of demand characteristics, evaluation anxiety, and expectancy on juror honesty during voir dire. *The Journal of Psychology*, 120, 205-217.

McConahay, J., Mullin, C., and Frederick, J. (1977).The uses of social science in trials with political and racial overtones: the trial of Joan Little. *Law and Contemporary Problems*, 41, 205-229.

Mize, G. (1999) On better jury selection: spotting ufo jurors before they enter the jury room. *Court Review*, 36,10-15.

Moran, G. and Cutler, B. (1991). The prejudicial impact of pretrial publicity. *Journal of Applied Social Psychology* ,21, 345-

Moran,G., Cutler, B., and DeLisa, A. (1994). Attitudes toward tort reform, scientific jury selection, and juror bias: verdict inclination in criminal and civil

trials. *Law & Psychology Review*,18, 309-328.

Moran, G., Cutler, B., and Loftus, E. (1990). Jury selection in major controlled substance trials: the need for extended voir dire. *Forensic Reports*,3, 331-348.

Mueller,C.(1978). Jurors impeachments of verdicts and indictments in federal court under rule 606b, *Nebraska Law Review*, 57, 935-956.

Mullin, C., Imrich,D., and Linz,D. (1996). The impact of acquaintance rape stories and case-specific pretrial publicity on juror decision making. *Communication Research*, 23, 100-135.

Mu' Min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899 (1991).

Nietzel, M.and Dillehay, R. (1983). Psychologists as consultants for changes of venue: the use of public opinion surveys. *Law and Human Behavior*,7, 309-

Nietzel, M.and Dillehay, R. (1982). The effects of variations in voir dire procedures in capital murder trials. *Law and Human Behavior*,6, 1-14.

Nietzel, M, Dillehay, R. and Himelin, M. (1987). Effects of voir dire variations in capital trials: a replication and extension. *Behavioral Sciences and the Law*,5, 467-477.

Nisbett, R., and Wilson, T.(1977). Telling more than we can know: verbal reports on mental process. *Psychological Review*, 84, 231-259.

North Carolina Eastern Municipal Power Agency v. Carolina Power and Light (1988) (unreported).

O'Hara, J. (2001) Dead wrong. *Macleans* ,May 14, 2001, 53-62.

Ogloff , J. and Vidmar, N. (1994), The impact of pretrial publicity on jurors: a study to compare the relative effects of television and print media in a child sex abuse case, *Law and Human Behavior*,18, 507-526.

Patterson, A. and Neufer, N. (1997). Removing juror bias by applying psy-

chology to challenges for cause. *Cornell Journal of Law and Public Policy*,7, 97-106.

Patton v. Yount , 467 U.S. 1025, 104 S Ct 2885 (1984).

Pennington, N. and Hastie,R. (1991). A cognitive theory of juror decision making: the story model. *Cardozo Law Review*, 13,519-577.

Pollock, A. (1977). The use of public opinion polls to obtain changes of venue and continuances in criminal trials. *Criminal Justice journal*,1, 269-288.

Regents of the University of California v. Genentech, U.S. District Court, Northern Dist. California Case No. C90-2232-Cal (Motion for Mistrial due to prejudicial Publicity, May 12, 1999) (Unreported).

R. v. Bernardo (1993), Ontario Court of Justice, February 18, 1993 (unreported).

R.v. Bowers (1986), Ontario Supreme Court,1986 (unreported).

R. v. Iutzi (1980), Ontario Supreme Court (unreported).

R. v. Kenny (1991), Newfoundland Supreme Court (unreported).

R. v. Maxwell (June 11,1990), (Unreported)

R. v. McGregor (1992), Ontario Court of Justice(General Division) (December,1992, unreported)

R. v. Musson (1995), Ontario Court of Justice (Central West Region) (April 20, 1995, unreported)

R.v. Reynolds (1998), Superior Court of Justice (East Region) Court File 3015/98 (unreported).

R. v. Taylor et al. (1983), British Columbia Supreme Court (unreported).

R. v. Theberge (1994), Ontario Court of Justice, Northeast Region (May 25,1994,unreported)

Seltzer, R., Venuti,M., and Lopes,G. (1991). Juror honesty during the voir dire. *Journal of Criminal Justice*,19, 451-462.

Stalans, L. (1993). Citizens' crime stereotypes, biased recall, and punishment preferences in abstract cases: the educative role of interpersonal sources. *Law and Human Behavior*, 17, 451-470.

Stebly, N, Besirevic, J. Fulero, S. Jimines-Lorente, B. (1999). The effects of pretrial publicity on juror verdicts; a meta-analytic review. *Law and Human Behavior*, 23, 219-235.

Studebaker, C. And Penrod, S. (1997). Pretrial publicity: the media, the law and commonsense. *Psychology, Public Policy and Law*, 3, 428-460.

Studebaker, C., Robbenolt, J. Pathak-Sharma, M. And Penrod, S. (2000). Assessing pretrial publicity effects: integrating content analytic results. *Law and Human Behavior*, 24, 317-336.

Thaler, P. (1994). *The Watchful Eye: American Justice in the Age of the Television Trial*. Westport, CT: Praeger

U.S. v. Allsup 566 F 2d 68(9th Cir. 1997).

U.S. v. Burr (1807)

U.S. v. Horton, 646 F.2d 181 (5th Cir, 1981)

U.S. v. McVeigh, 918 F. Supp. 1467 (1996)

U. S. v. McVeigh, 955 F.Supp.1281 (1997)

U.S. v. Pinto, 486 F.Supp 578 (1980).

Vidmar, N. (1997). Generic prejudice and the presumption of guilt in sex abuse trials. *Law and Human Behavior*, 21, 5-26.

Vidmar, N., Ed. (2000a). *World Jury Systems*. Oxford, England :Oxford University Press.

Vidmar, N. (2000b). The Canadian criminal jury: searching for a middle ground. In Vidmar, N., Ed. (2000). *World Jury Systems*. Oxford, England :Oxford University Press

Vidmar, N. (2001). Retributive justice: its social context. In Ross, M. and Miller, D., eds, *Social Justice Research*. Cambridge: Cambridge University

Press,

Vidmar, N. and Judson, J. (1981). The use of social science data in a change of venue application: a case study. *Canadian Bar Review*, 59, 77-102.

Vidmar, N. and Melnitzer, J. (1984). Juror prejudice; an empirical study of a challenge for cause. *Osgoode Hall Law Journal*, 22, 487-511.

Wetherington, G., Lawton, H., and Pollock, D. (1999), Preparing for the high profile case: an omnibus treatment for judges and lawyers. *Florida Law Review*, 51, 425-488.

Wilson, J. and Bornstein, B. (1998), Methodological considerations in pre-trial publicity research: is the medium the message? *Law and Human Behavior*, 22, 585-597.

Young, W. Cameron, N. and Potter, S. (1999). *Juries Survey: Report of Findings*. Wellington: New Zealand Law Commission.