JUROR PREJUDICE: AN EMPIRICAL STUDY OF A CHALLENGE FOR CAUSE

BY NEIL VIDMAR* AND JULIUS MELNITZER**

The authors empirically examine the challenge for cause process in the context of a murder trial in a rural region in southern Ontario. A survey was undertaken to assess prejudice in the community. This is the expected indicator of community prejudice and is compared to prejudice found in potential jurors. The study also compares the verdicts on each potential juror screened in the challenge for cause process, as rendered by the triers, defence counsel and a professional psychologist observing the procedure. The results of these studies are presented within.

I. INTRODUCTION

Canadian law recognizes that, in exceptional cases, many of the veniremen on the panel from which the jury will be drawn, may not be "indifferent between Her Majesty the Queen and the accused at bar." The most common cause of such a state of affairs is pre-trial publicity that has inflamed community sentiments against the accused or disseminated evidence that would not be admissible at trial.¹ In such cases the procedural remedies of peremptory challenges, stand asides, or judicial admonitions to the jurors are considered inadequate, and other remedies are provided: stay of proceedings,² change of venue³ and challenge for cause.⁴

Of these alternatives, challenge for cause is the most controversial — and the least understood. This article presents an empirical study of a challenge for cause in a child killing case. The study provides data bearing upon some of the questions raised about the challenge for cause. Will veniremen provide candid answers to questions about their potential prejudices? Can a systematic community survey provide reliable information about the extent of prejudice among a panel of pro-

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² Canadian Criminal Code s.508.

³ Code s.527.

⁴ Code s.567(1).
spective jurors? Are the lay triers, entrusted under Canadian law to
decide whether or not a venireman is impartial, competent assessors of
prejudice? Is a trial judge's address to the full panel of veniremen re-
garding the need for prejudiced persons to identify themselves a viable
alternative to the challenge for cause?

A. The Challenge for Cause

The Criminal Code provides that "[a] prosecutor or an accused is
entitled to any number of challenges on the ground that . . . a juror is
not indifferent between the Queen and the accused." The trial judge
has the authority to determine whether the challenge shall be allowed.
If it is, two members from the venire panel are sworn to serve as triers
of the person to be challenged. That person is put under oath and ques-
tioned by the challenging party. After hearing the testimony, the triers
are ordered to reach a verdict as to whether the challenged person is
impartial or not. If the verdict is "not impartial," the prospective juror
is excused; if the verdict is "impartial" the Crown or the accused may
still exercise a peremptory challenge, or, in the Crown's case, a stand
aside.

In the United States, as is fairly well known, there is a right to
challenge each juror on the panel in almost all criminal and civil cases.6
Neither the prosecution nor the accused has to justify the challenge.
The questioning may be lengthy and cover a wide range of topics, in-
cluding the juror’s personal attitudes, beliefs, the newspapers he or she
reads, and so forth. Many American jurisdictions use the challenge,
called the voir dire, as standard procedure in almost every trial.7 In
Canada, challenges for cause are the exception rather than the rule. In
discussions with judges and criminal lawyers across Canada, we have
found that many of these informants cannot recall an instance where a
challenge for cause took place in their jurisdiction. Conversely, chal-
lenge for cause are allowed with some frequency in Toronto and ad-
joining jurisdictions, particularly when the case involves ethnic or racial
minorities.

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6 Code s.567(1)(b). Some changes in the challenge for cause have been proposed by the Law

7 See Hans and Vidmar, "Jury Selection," in Kerr and Bray, eds., The Psychology of the
Courtroom (1982). In some jurisdictions, prospective jurors are required to fill out a lengthy per-
sonal background questionnaire prior to coming to court. This information is used by counsel as a
basis on which to begin examination.

In recent years, especially in federal courts, the judiciary has attempted to drastically cur-
tail the scope of allowable questions, and many judges have begun to conduct the questioning
rather than allow prosecution and defence counsel to do it.
R. v. Hubbert is the leading case: the Ontario Court of Appeal asserted that challenge for cause should be evaluated in the context of modern times and that the procedure has a role to play in the criminal justice process. For example, the Court recognized that the mass media may disseminate prejudicial information that may justify a challenge. On the other hand, the Court expressed concern that Canadian procedures should not develop along American lines: in Canada, there is an initial presumption that a juror "will perform his duties in accordance with his oath," and furthermore, the "[c]hallenge for cause is not for the purpose of finding out what kind of juror the person is likely to be — his personality, beliefs, prejudices, likes or dislikes." It also "must never be used by counsel as a means of indoctrinating the jury panel to the proposed defence or otherwise attempting to influence the result of the eventual trial." A principle was enunciated that the trial judge "has wide discretion and must be firmly in control of the challenge process"; also, the judge should ensure that the questioning of jurors should be "relevant", "succinct" and "fair". In essence, Hubbert ultimately gave discretion to the trial judge to decide when challenge for cause should be allowed and the scope of the questions that may be put to jurors.

As has already been noted, challenge for cause is a rarely used procedural device, despite Hubbert's potential. Few lawyers or judges have had any experience with it. Some express doubts as to its utility. Others just do not understand its intended function in the criminal justice process. Yet, there is a growing awareness that Canadian society is marked by racism and other prejudices that might jeopardize the right of an accused to a fair trial. There is also a growing awareness that the mass media often create a climate that prejudices large segments of whole communities against an accused. Challenge for cause may,
therefore, be a useful tool in helping to rectify the condition of widespread pre-trial prejudice. It is important that we begin to understand its parameters.

B. Overview of the Study

Before considering some of the issues surrounding challenge for cause, it will be helpful to provide a brief overview of the case study from which our empirical data were drawn. The case involved a child murder in a predominantly rural community. Both the mother and father were charged with second degree murder. Defence counsel had reason to believe that there was substantial pre-trial prejudice against the defendants in the community. A telephone survey was undertaken, and it confirmed defence counsel's fears. The survey evidence was presented to the presiding trial judge. Largely on the basis of this survey evidence, the judge allowed a challenge for cause. Up to fifteen questions were put to each juror. Before the challenge process began, the judge addressed the full panel of 150 jurors and requested that any persons come forward who had a connection to the case or who might otherwise be prejudiced. During these proceedings, a social psychologist sitting in the public gallery took extensive notes on the challenge process, and subsequently made his own decision about the impartiality of each prospective juror before the triers rendered their verdict. Thus, it was possible to compare trier verdicts with the psychologist's judgment. It was also possible to compare defence counsel's agreement with the triers, and with the psychologist.

C. Some Empirical Issues Involved in the Challenge for Cause

As noted above, a number of issues have been raised regarding the challenge for cause. Some of these issues are essentially normative ones, such as whether Canadian legal procedure should or should not mimic American procedure; others, however, are empirical ones. This research is addressed primarily to the latter. There are at least four such issues and they are interrelated. They will be discussed in the or-

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18 Defence counsel also tendered other evidence to bolster the survey findings, namely newspaper articles and affidavits from legal assistants who had earlier been threatened by unknown persons, as they were attempting to gather evidence for the case.

19 Each defendant was represented by separate counsel. Throughout the challenge for cause phase of the trial these counsel acted as a team and made joint decisions. Therefore, in the remainder of this article we will use the term "defence counsel" to refer to these team decisions.
der in which they are treated in the subsequent data analysis.

The first issue is whether the challenge for cause is likely to have much utility in encouraging prospective jurors to disclose their attitudes and feelings about the case. A basic assumption behind challenges on grounds of prejudice is that prospective jurors will attempt to tell the truth about their feelings. Some critics assert that this assumption, upon which all else rests, is naive; jurors will not be candid about their prejudices. Psychologists have long recognized the tendency for people to be reluctant to disclose prejudices in the belief others may come to view them in a negative light.\textsuperscript{20} The challenge is conducted in a public courtroom presided over by the highly prestigious figure of the judge. Thus, jurors might feel great pressure to hide any prejudicial feelings or beliefs and instead indicate that they have open and impartial minds. Under Hubbert, the scope of the questions put to the jurors is likely to be restricted, and intensive cross-examination of the answers to questions appears proscribed. As a consequence, it can be argued that the challenge for cause will seldom reveal much about the state of the venireman's mind. We can shed light on these competing perspectives by examining what jurors actually said during the challenge for cause.

The second issue involves questions about the validity of survey evidence which may be tendered to help establish the claim that there is a reasonable probability that substantial community prejudice exists. Demonstration of such prejudice may be used to argue for a change of venue, but it may also be used in a motion for a challenge for cause. In the very recent past, the primary evidence set forth in such motions was usually documentation of newspaper articles about the case and perhaps the sworn opinion of some persons purportedly in touch with the pulse of the community.\textsuperscript{21} Such evidence was often rejected on the grounds that it was unreliable and unsystematic, or that public emotions may have cooled and memories faded in the time interval between the crime and the trial.\textsuperscript{22} Recently, however, better, more reliable evidence on the state of public opinion has been tendered in pre-trial motions. That evidence has been gathered through the use of scientifically designed surveys that directly measure the state of public opinion.\textsuperscript{23}

\textsuperscript{20} Vidmar and Judson, \textit{supra} note 1; or Crowne and Marlowe, \textit{The Approval Motive} (1964).

\textsuperscript{21} Vidmar and Judson, \textit{id.}

\textsuperscript{22} For a review of the case law see Vidmar and Judson, \textit{The Use of Social Science Data in a Change of Venue Application} (Research Bulletin #488, Dept. of Psych., U. West. Ont., 1979) at 4-9.

\textsuperscript{23} \textit{Supra} note 1. Survey evidence was also tendered in the recent "Squamish Five" trial: see \textit{R. v. Taylor et al.}, unreported, B.C.S.C., 1983.
Such evidence is direct rather than indirect. It allows reliable projections about the whole community and it measures attitudes as they exist at the present time, thus bringing more accurate evidence to bear on arguments that emotions have abated and memories faded.\(^{24}\)

Much criticism has been directed to the validity of such survey evidence; in particular, questions have been raised about whether the conditions under which surveys assess people's opinions are comparable to conditions in the courtroom.\(^{26}\) After all, survey interviews, whether obtained over the telephone or face-to-face, are conducted under conditions somewhat dissimilar to the courtroom; for example, in the former instance the respondent is at home, the interviewer is not a legal authority figure, consent to the interview is voluntary, the respondent is not under oath, and answers are given under conditions where jury duty is not imminent. Thus, critics of survey evidence have argued that respondents' answers are only hypothetical and perhaps frivolous, or given in the belief that by expressing prejudice they can avoid possible jury duty.

It is, however, possible to examine the survey validity issue in the context of the present case. The results of the survey conducted for the case can be compared to the answers that were given in court under oath during the challenge for cause. To the degree that the answers given in the courtroom correspond with those predicted by the survey, we will be able to draw conclusions about the reliability of the survey in predicting responses.

A third issue involves the ability of the challenge for cause to determine which potential jurors are not impartial. This is a different question than that posed by the first issue, namely whether prospective jurors will give candid replies to the questions that are asked. Even if jurors do disclose potential biases, will the triers be able to distinguish between those who are impartial and those who are not?

The challenge procedure is, after all, an unusual process. Unlike the American challenge procedure, in which the decision about the impartiality or non-impartiality of the venireman is placed in the hands of the trial judge, the Canadian procedure places the decision in the hands of two lay triers selected from the jury panel.\(^{26}\) Some legal ex-

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\(^{24}\) Questions can be constructed to determine not only what people think or feel in a general sense, but also to speak to the legally relevant issues of impartiality. For example, respondents in the surveys can be asked to consider the facts of the case as they know them and to indicate whether or not they believe they can be an impartial juror if the trial judge instructs them it is their duty to do so. See Vidmar and Judson, supra note 1.

\(^{26}\) Vidmar and Judson, id.

\(^{26}\) Id.
experts would argue that it is too much to expect two laymen to understand the subtleties of prejudice as it might be understood by an experienced trial judge (or trial lawyers, or a psychologist). The triers, therefore, will make haphazard decisions that are inconsistent with the legal goals of the challenge for cause.

Of course, it is impossible to determine whether the triers make correct or incorrect decisions with respect to some absolute criterion, but it is possible in this case to compare the triers' verdicts with two other criteria. Firstly, their verdicts can be compared with the judgment of the psychologist who sat in the courtroom, who heard the same evidence as the triers, and who made a judgment about whether each potential juror was biased or not. Secondly, the triers' verdicts can be compared with the decisions of the defence team, both of whom are experienced trial lawyers: that is, how many times did defence counsel exercise peremptory challenges against veniremen whom the triers had found to be impartial? To the degree that the triers' verdicts correspond to these two criteria, inferences about trier competence may be made.

A fourth issue involves the question of whether an address by the judge to the jury panel will cause persons with a bias to step forward and excuse themselves. As noted in Hubbert, before the jury selection process begins, some trial judges make a practice of inquiring whether there is anyone on the panel who is closely connected with a party to the case or a witness, or whether for some other reason they cannot decide the case impartially. Such jurors are then excused. The Court observed that such jurors rarely step forward and it seems obvious to us that most jurors would be reluctant to come forward under such conditions. Nevertheless, our discussions with judges indicate that many adhere to the belief that a judicial request to the whole panel will cause persons who are not impartial to declare their bias.

Empirical evidence on the effectiveness of a judge's query to the jury panel can be obtained in the present study by comparing the number of persons who came forward to the judge's request and the number who should have come forward, as determined by jurors' answers in the challenge for cause, and by other information which defence counsel had concerning some of the prospective jurors.

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27 Hubbert, supra note 8, at 293 (C.R.N.S.).

28 Id.
II. CASE BACKGROUND AND DATA SOURCES

A. Background to the Challenge for Cause Motion in R. v. Iutzi\textsuperscript{29}

In May, 1978 a fourteen-month old male child was found dead in Thamesford, a village in largely rural Oxford County, Ontario. He had died of head injuries. Both parents were charged with second degree murder. Each denied killing the child. The parents had lived in a number of villages in Oxford County. They both had worked at a series of odd jobs throughout the county and were frequent hitchhikers on its highways and roads. Anecdotal evidence suggested that they were widely known and somewhat "notorious" throughout the county. Defence counsel became alarmed about the extent of community prejudice against the accused when the accused reported threats against themselves and when law students working for defence counsel were also threatened by citizens in the street.

It is also important to note that while the charges against the parents and various pre-trial motions regarding the case had been reported in the local media, the coverage from these sources was not massive. Rather, defense counsel suspected that community prejudice resulted from word-of-mouth rumor. This was plausible as the total population of Oxford County is only about 90,000 persons, with about 30,000 located in the county seat of Woodstock and the rest scattered among farms and villages. Sociologists have documented the fact that notorious events occurring in rural communities are widely discussed by the members of that community. They have also shown that these discussions not only transmit information, but convey expectations about how the community should feel about the event.\textsuperscript{30}

Consequently, defence counsel hired the first author of this article to conduct a telephone survey of Oxford County to attempt to assess the degree of community prejudice. A smaller survey was also undertaken in Middlesex County which abuts Oxford County, but is considerably less rural. Based upon the survey findings, defence counsel applied for a change of venue on a Supreme Court motion, but for various reasons, the application was denied. The survey evidence was re-introduced by means of affidavit at the trial itself. At an in-chambers hearing, the presiding judge also refused a change of venue, but allowed a challenge for cause.

\textsuperscript{29} Unreported, Ont. S.C., 1979.

\textsuperscript{30} See McCloskey, Mullin and Frederick, The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little (1977), 41 Law & Contemp. Prob. 205, for a discussion of this issue in an American community.
B. The Survey Findings\textsuperscript{31}

The survey consisted of in-depth telephone interviews with respondents in 197 randomly selected households in Oxford County\textsuperscript{32} and uncovered the fact that the \textit{Iutzi} case had a high recognition level. Sixty-six percent of the respondents acknowledged familiarity with the case. For those respondents acknowledging familiarity, the interviewers asked them to provide some additional details to ascertain whether they truly had knowledge about the case, or whether instead, they said so to avoid appearing ignorant or uninformed. This follow-up question produced some interesting results. Firstly, the term “child abuse” or associated terms such as “battering”, “neglect” or “mistreatment” were mentioned in thirty-nine percent of the sample, even though the interview had been carefully constructed to avoid such terms. Secondly, one in eight persons reported that knowledge of the case was derived from a source in addition to the mass media. Many personally knew one of the accused or had heard about the case from someone who did know them. Some sample responses are as follows:

“They once rented from my family”;
“My neighbours know them”;
“I know his family in Woodstock, a relative”;
“I know a fellow by that name”;
“I worked with his sister”;
“I know him pretty good”;
“They worked for us at one time”;
“I saw him today across the street. While I was in the restaurant, one fellow pointed him out and we talked about him.”

These responses would not surprise a rural sociologist — or anyone who has lived in a small town. They provided indirect evidence that a great deal of gossip about the case may have been taking place, as personal knowledge increases interest and is more likely to cause greater discussion and transmission of facts and rumors.

The next part of the interview attempted to uncover the degree to which people held attitudes that would likely render them incapable of serving as impartial jurors. One of the questions asked if the respondent could serve as an impartial juror in the \textit{Iutzi} case if “instructed by

\textsuperscript{31} This section summarizes the survey findings. A copy of the complete report of the survey can be obtained from Neil Vidmar.

\textsuperscript{32} Ninety-four interviews were also obtained from adjoining Middlesex County and 50 were undertaken in Toronto. The levels of knowledge and prejudice in these two samples were much lower than those obtained in Oxford County and these data served as a standard against which the Oxford data could be compared. These other data are, however, not directly germane to the thesis of this article and will henceforth be ignored.
the presiding judge to put all preconceived views aside and decide the defendants' case solely on the evidence brought before you . . .” Fifty percent said no, or indicated uncertainty. Questions asking the respondents to give their spontaneous views on the case were even more revealing. These responses uncovered a great deal of community information and misinformation about the case, much of which was inadmissible at trial. Some respondents stated that the mother had a psychiatric history, that Children's Aid had been involved prior to the death, that an elder daughter had been “taken away” by Children’s Aid, and that the mother and father had each accused the other of the death. Some knew where the victim's body was found and its condition. Other comments revealed allegations of the accuseds' alcoholism, their welfare status and many debts, of killing the child for insurance money, of malnourishing him, of putting him in a washing machine, of the mother barricading herself in a house, of “two children [previously] being taken away by Children's Aid,” and of the trial already having been held and the parents convicted. A number of respondents spontaneously expressed the belief that the accused could not get a fair trial in Oxford County; many expressly made comments similar to one person who said that they were “definitely guilty but I'd give them the courtesy of hearing both sides.”

One additional question was particularly revealing: it asked whether the respondent was inclined to think that “both the father and mother are equally guilty, that the mother is probably more guilty than the father, or that the father is probably more guilty than the mother?” Defence counsel had asked, almost as an afterthought, that this question be added to the survey interview on the grounds that it might be helpful later in formulating arguments to the jury about their responsibility to acquit both accused if it could not be determined which parent had killed the child.\(^8\) Unexpectedly, it uncovered the fact that many respondents held a notion of strict criminal negligence; that is, many spontaneously said that in their opinion a mother was absolutely responsible for the welfare of her child and she must be considered responsible even if she did not actually kill the child. Women were more likely to hold this view than men, but substantial numbers of both sexes expressed the belief.

One other finding from the research should be noted. In many of the interviews, there was some indication that people knew more about the case than they were willing to reveal to the interviewer. They re-

\(^8\) R. v. Schell and Paquette (1977), 33 C.C.C. (2d) 422.
responded co-operatively at the beginning of the interview, but as the questions began to focus on the specifics of the *Iutzi* case, they became evasive or actually terminated the interview. Consider some examples:

“It was a child that was abused; no, I don’t know anything about this at all; if this is about the thing coming up in court I don’t want to be involved at all.” (Interview terminated.)

“I know nothing; nothing; mistreat children.” (Interview terminated.)

“Child beating.” (Respondent says she knows more but would not talk about it.)

As a consequence of the high number of such responses, the research psychologist undertook nine additional face-to-face interviews in the county. The purpose was simply to obtain information about the evasiveness hypothesis. The technique used was a standard one employed by social psychologists in situations where evasiveness is suspected: the regular interview was administered to the respondent; then, the interviewer put the questionnaire away as if the interview had been terminated and engaged the respondent in an informal discussion about the topic. Thinking that the interview was over, the respondent frequently relaxed and gave additional information that had been withheld. The technique provided some indication that evasiveness may have taken place. For example, during the formal interview, one woman professed only meagre knowledge of the case, no knowledge of the accused, and that she had not discussed the case with anyone. In the informal discussion, however, she revealed that she had gone through school with one of the accused persons, she knew many of the case details, and just two days previously, she and her husband had had a lengthy discussion of the case with neighbours. These additional interviews suggested that the survey findings may have actually underestimated the degree of community knowledge and prejudice.

C. *The Challenge for Cause*

The presiding judge consented to defence counsel’s request for a challenge for cause; the request was not opposed by the Crown. While the full jury panel was still seated in the courtroom, the judge requested that any persons come forward who had a relationship with any of the parties to the case or who could not, on other grounds, be impartial. Four persons did so, as will be described subsequently. The panel was then ushered out of the courtroom to a waiting room. The challenge process then began.

Since many readers may not be familiar with the challenge proce-
dure, it is worthwhile to describe it in some detail. Two veniremen were randomly selected from the panel, seated in the jury box, and sworn as triers. The first prospective juror was called to the witness box and sworn. Next, defence counsel asked the juror a series of questions about the case (discussed in more detail below). The Crown was allowed to ask clarifying questions. Defence counsel and the Crown were then allowed to make a brief submission to the triers regarding whether the testimony showed that the venireman was impartial or partial. Finally, the judge charged the two triers to deliberate on the venireman’s testimony and render a verdict on whether the venireman was indifferent between the Queen and the accused. If the venireman was found to be impartial, and defence counsel and the Crown were content with the verdict (that is, a peremptory challenge was not exercised), the person was sworn as a juror, and the judge excused the first trier from further service. The next venireman was called, and the challenge process was repeated. The two triers in this instance were the remaining original trier and the first juror. (The jury selection process under a challenge for cause involves a form of “round robin” procedure whereby the jurors form successive two-person mini-juries to render verdicts on the challenge.) A second venireman was found to be impartial and seated as the second juror. The judge excused the remaining original trier, and the two sworn jurors served as triers until a third juror was chosen. The second and third jurors then served as triers until a fourth venireman was found to be impartial, whereupon the third and fourth jurors served as triers until a fifth was chosen. This procedure was repeated until twelve jurors were seated. In the particular case at hand, those jurors who were sworn in but no longer served as triers stayed seated in the jury box, and observed challenges to remaining jurors.\textsuperscript{34} It should also be noted that the two triers on each challenge for cause did not leave the jury box, but rather remained seated and deliberated their verdicts in view of the whole court, though in tones that were not audible to observers.\textsuperscript{35} Despite the complex sequence of steps involved, the time between calling a prospective venireman to the witness box and the verdict averaged about twenty minutes for each challenge.

\textsuperscript{34} One possible consequence of having the jurors continue to observe the challenge process is that the exposure to a wide range of persons with different opinions, in addition to the defence counsel’s arguments about what it means to be impartial, may serve to influence their decisions on impartiality and sensitize them about their duty as jurors.

\textsuperscript{35} In a recent trial in Vancouver when a challenge for cause took place, the triers retired to the jury room for their deliberations. This has the advantage of allowing the triers to deliberate more freely and openly, but the disadvantage of consuming more court time; see Taylor, supra note 23.
Defence counsel were allowed to ask up to fifteen questions of each potential juror. These had been screened by the judge beforehand, and throughout the challenge process, he allowed only minor deviations from the set of questions. The questions can be grouped into five categories. The first category inquired about the juror’s knowledge of the case. The second category involved questions about whether the juror had expressed opinions about the case or had some connection with the accused. The third category questioned whether the juror knew any of the witnesses in the case and whether this fact would prevent an objective evaluation of the testimony. The fourth category of questions was directed to the issue of strict parental responsibility uncovered in the survey: jurors were asked whether either of the defendants must be considered criminally responsible simply on the grounds that the child was killed. The fifth category of questions concerned preconceived notions of guilt and related to the juror’s ability to set aside any preconceptions and decide the case solely on the evidence.

It is important to note several additional facts about the challenge process. The Crown attorney asked few questions throughout, though on several occasions he did make a submission to the triers that the

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26 The exact questions put to the prospective jurors are as follows:

Knowledge
(1) Are you familiar with the Iutzi case; that is, had you heard of it before today?
(2) What have you heard about the case?
(3) Where did you obtain that information?
(4) Have you discussed the case with anyone?

Opinion or Connection to the Iutzi
(5) Have you ever expressed an opinion about the Iutzi's guilt or innocence to anyone?
(6) Do you know either the Iutzi or anyone that is a relative of one of the accused or is in any way connected to them?
(7) Does anything you know or might have learned about the Iutzi or the case cause you to hold an opinion about their guilt or innocence?

Witnesses
(8) Do you know any of the witnesses in this case? Whom? (Veniemen were shown a list of witnesses.)
(9) Would the fact that you know this witness make it difficult for you to reject or disbelieve his (her) evidence?

Preconceived Notions of Responsibility for Child’s Welfare
(10) The charge against the Iutzis is that they are responsible for the death of their fourteen-month old child. Do you believe that a mother or father or both must be held criminally responsible for the death of their child?
(11) Do you have any children?
(12) Does the fact that this case involves the death of a young child prevent you from giving the Iutzis an impartial hearing?

Preconceived Notions of Guilt
(13) Does the fact that the accused have been arrested and charged by the police cause you to believe that they must be guilty or would not be on trial here today?
(14) Can you weigh the evidence in an impartial manner by setting aside any preconceptions you have told us about before deciding whether either of the accused or both are guilty or not?
(15) Are you willing, as the law requires, to consider the accused innocent unless the evidence presented at trial convinces you beyond a reasonable doubt that one or both of them are guilty?
evidence would indicate the impartiality of the venireman. The Crown and defence counsel had agreed ahead of time that the Crown would exercise the right to “stand aside” certain veniremen if they were called. In a number of instances, defence counsel had information that certain potential jurors had publicly expressed the belief that the defendants were guilty and that they would vote guilty if picked to serve on the jury.

A total of seventy-five veniremen were called before a jury was chosen. The process of jury selection lasted one and one-half days. Not all jurors were challenged for cause. In twenty instances the Crown exercised its stand aside option. In five instances defence counsel exercised peremptory challenges. Thus, in the end, only fifty of the seventy-five veniremen called were actually challenged for cause. Of this number not all were actually tried by the triers. The defence peremptorily challenged a venireman in six instances during the questioning process, when it became apparent that the potential juror was biased\(^{37}\); in another six instances defence counsel withdrew the challenge and accepted the juror when impartiality became apparent.\(^{38}\) One venireman called was quite deaf, whereupon the Crown stood him aside. In the result, only thirty-seven of the fifty challenged persons went through the entire challenge process and were tried.

D. Psychological Ratings

The psychologist took no part in the challenge process. He sat in the public gallery, listened to the testimony, and took notes. While the triers were reaching a verdict he made his own decision about the potential juror. The decision was simply whether in his professional opinion, the person was likely to be an impartial juror.

\(^{37}\) The reasons for this action were tactical. These peremptory challenges were exercised only after a number of jurors had been accepted. Defence counsel had utilized only a few of its twenty-four peremptories and could, therefore, afford to waste some of them. The trial judge appeared to be growing restless and impatient. This was a way of indicating to him that defence counsel were acting fairly and not attempting to abuse their challenge for cause privileges.

\(^{38}\) These decisions too were based upon tactical considerations similar to those described, \textit{ibid.} If defence counsel wanted the juror, withdrawing the challenge saved time; it might appease the judge; it avoided the risk that the triers would find the potential juror not to be impartial.

We note, however, that both the tactics of exercising peremptory challenges and withdrawing the challenge before the triers reached a verdict, may violate older legal precedent. His Honour Judge I.A. Vannini, \textit{Challenges to a Jury} (1973), 23 C.R.N.S. 57 at 64, was of the opinion that “[i]f made by the accused the challenge cannot be withdrawn by him but must proceed to a verdict.”
III. RESULTS AND ANSWERS

A. The Candidness of Veniremen Answers

The first issue to consider is whether veniremen will give candid answers. The results of the replies to the five categories of questions put to the challenged veniremen are summarized in Table 1.

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<th>QUESTION CONTENTS</th>
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<th>RESULTS</th>
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<td>Knowledge:</td>
<td>50</td>
<td>27 Admitted Knowledge</td>
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<tr>
<td>Opinion:</td>
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<td>50</td>
<td>11 Admitted Knowing a Principal Crown Witness</td>
</tr>
<tr>
<td>Responsibility for Child&lt;sup&gt;a&lt;/sup&gt;</td>
<td>47</td>
<td>27 Said They Would Hold Parents Responsible and Could Not Put This out of Mind</td>
</tr>
<tr>
<td>Preconceived Guilt&lt;sup&gt;b&lt;/sup&gt;</td>
<td>32</td>
<td>7 Indicated Pre-judgment on Guilt</td>
</tr>
</tbody>
</table>

<sup>a</sup> 3 were excused before these questions were asked.
<sup>b</sup> 18 were excused or tried before these questions were asked.

Table 1 shows that twenty-seven of the fifty stated that they had rather detailed knowledge of the case. Seven of them admitted that they had expressed an opinion about the case that might render them incapable of reaching an impartial verdict. Eleven stated that they knew one of the witnesses who would be called to testify in the case, such as a family doctor, an ambulance driver, or a nurse. Twenty-seven persons said that they would be inclined to hold the parents responsible for the death of the child, despite whoever had actually caused the death. Females were somewhat more likely to hold these views than males. Finally, of thirty-two persons who were asked directly about their preconceptions of guilt, seven indicated that they did not believe that they could be impartial.
What was the particular nature of the answers? Some of the essence of the replies would be lost in any written transcript because of the non-verbal cues, the hesitations and the tone of voice. Nevertheless, it is possible to select some anecdotes that give the flavor of the replies. Consider some answers to the question which asked: “The charges against the Iutizis are that they are responsible for the death of their fourteen-month old child. Do you believe a mother or father or both must be held criminally responsible for the death of their child?”

Venireman #8 replied, “Well, parents are responsible; if something happened to my kids, I'd be responsible.”
Venireman #12, after a long pause broke into a nervous smile and said, “If there was any cruelty mixed in, I'd think it was.”
Venireman #41 said, “Yes, I have feelings about it; I think they are criminally responsible.”

One of the questions relating to preconceived notions of guilt asked: “Does the fact that the accused persons have been arrested and charged by the police cause you to believe that they must be guilty or they would not be on trial here today?”

Venireman #10 paused for a long while, then lowered his voice and replied, “I'd think that there would be a good reason for them being here.”
Venireman #15 was asked the question and did not answer. The question was repeated, but there was still no answer. Defence counsel rephrased the question slightly, and the venireman finally replied, “I think they are probably guilty.”

These data speak to the issue of whether some veniremen can be induced to disclose their feelings and attitudes, even if their answers may not be the socially desirable ones; that is, they are contrary to the culturally accepted norm, or belief, that an accused must be considered innocent until proven guilty. Some veniremen may not have disclosed their true feelings, but clearly many appear to have provided candid answers. We can conclude that a substantial number of veniremen disclosed attitudes and beliefs that could be considered to be prejudiced.

B. The Validity of the Survey Data

By comparing the survey data with the veniremen answers, as reported in Table 1 and the accompanying text, plus the data on peremp-
tory challenges and stand asides, we can obtain some sense of the validity of the telephone survey, that is, its ability to uncover community prejudice. These data are presented in Table 2. It should be noted, however, that it is not possible to make an exact comparison as the challenge for cause sometimes asked different questions than were asked in the survey. Nevertheless, even these approximations are enlightening.

<table>
<thead>
<tr>
<th></th>
<th>Challenged Veniremen Responses</th>
<th>Defence Peremptory and Crown Stand Asides(^a)</th>
<th>Total in Challenge (A + B)</th>
<th>Survey</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>General Knowledge</td>
<td>27 of 50</td>
<td>14 of 21</td>
<td>41 of 75</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>55%</td>
</tr>
<tr>
<td>2.</td>
<td>Relation or Connection to Iutzi</td>
<td>15 of 50</td>
<td>3 of 21</td>
<td>18 of 75</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>24%</td>
</tr>
<tr>
<td>3.</td>
<td>Expressed Opinion about Case(^b)</td>
<td>7 of 50</td>
<td>14 of 21</td>
<td>21 of 71</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>30%</td>
</tr>
<tr>
<td>4.</td>
<td>Parents Must be Held Accountable</td>
<td>27 of 45</td>
<td>—</td>
<td>27 of 45</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>60%</td>
</tr>
<tr>
<td>5.</td>
<td>Pre-conceived Notions of Guilt</td>
<td>34 of 50</td>
<td>14 of 21</td>
<td>48 of 71</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>68%</td>
</tr>
</tbody>
</table>

\(^a\)Five of the 21 peremptory challenges and stand asides were for reasons other than prior knowledge about the venireman's bias.

\(^b\)The survey estimate is derived from combining several questions.

Row one of Table 2 shows that twenty-seven of fifty potential jurors admitted rather detailed knowledge of the case; in addition fourteen of the twenty-one persons rejected by the defence or the Crown were known to have knowledge of the case. Thus, forty-one of seventy-five, or fifty-five percent, indicated detailed knowledge. The survey had estimated that sixty-six percent of the community had detailed knowledge.

Row two shows that while the survey had estimated that thirteen
percent of the population had some connection to the case, the challenges and information from defence and Crown counsel indicate that about twenty-four percent had some connection. The survey did not ask respondents about personal familiarity with witnesses in the case, only about the defendants. This is probably the reason for the discrepancy.

Row three shows that the survey made an estimate of the number of persons who had expressed an opinion about the case to be thirty percent. This is the same figure as that derived from combining the answers in the challenge with the lawyers’ inside knowledge.

Comparing the survey data against juror responses, vis-à-vis the belief in parents’ accountability for their children, is more difficult. The survey estimate is based on the question about whether the mother, the father or both should be held accountable, and the spontaneous comments respondents made to this question. Nevertheless, the researcher had estimated in his affidavit that “as many as fifty percent” of the community may have held the “strict responsibility” attitudes and that this was likely to be more true of females than of males. Although a different question was asked in the challenge, Row four shows that sixty percent of the persons asked expressed the strict negligence belief and that females were more inclined to do so than males.

Row five shows that, whereas the survey had estimated that at least fifty-three percent of the community could not be impartial jurors, the calculated estimate of lack of impartiality from the various challenge questions and from information held by the defence and Crown counsel is sixty-eight percent.

It is worth emphasizing again that these comparative data must be treated very cautiously because of the lack of similarity of the two data sources. Nevertheless, it is clear that, if anything, the survey appears to have underestimated the degree of community prejudice. As mentioned earlier, the affidavit by the research psychologist submitted to the trial judge indicated that the supplementary sample of face-to-face interviews led him to a professional opinion that the telephone survey findings were a conservative estimate of the degree of prejudice in the community. Therefore, from this case study at least, there is evidence that a public opinion survey may underestimate rather than overestimate prejudice.

C. Agreement among Triers, Defence Counsel and Psychologist

An assessment of the decision-making of the triers should begin by asking what their decisions actually were. Recall from earlier discussion that the triers rendered verdicts on thirty-seven veniremen. In fourteen of these cases the verdict was that the venireman was impar-
tial. In twenty-two the verdict was that the venireman was not impartial; in the remaining instance, the triers could not agree on a verdict and the Crown subsequently stood the juror aside. Ignoring the split verdict, we can conclude that of the cases where a verdict was rendered, the triers found only thirty-eight percent of the veniremen to be impartial (fourteen of thirty-six decisions).

Recognizing that the triers made distinctions between the various veniremen, however, does not tell us much about their competence. Did they make the right distinctions? Their verdicts need to be compared to some external standard. One standard is defence counsel’s acceptance or rejection of their verdicts and another is the social psychologist’s agreement with their verdicts. Think of the problem by using the psychologist’s decisions as the comparison standard. For each venireman who was challenged, the triers could render one of two verdicts. Similarly, the psychologist also rendered one of two “verdicts” about the venireman. For each venireman tried, therefore, there are four possible outcomes: (a) triers decide impartial and psychologist decides impartial; (b) triers decide impartial but psychologist decides not impartial; (c) triers decide not impartial but psychologist decides impartial; (d) triers decide not impartial and psychologist decides not impartial. To the extent that there is agreement between the triers and the psychologist, their decisions on the veniremen should be either outcomes (a) or (d); to the extent that there is disagreement, their decisions will be reflected as outcomes (b) or (c). The four outcomes reflected by the two sets of decisions can be portrayed as a two by two table, as demonstrated in Table 3.
Table 3
Comparison of Decisions of Triers, Defence Counsel, and Psychologist

<table>
<thead>
<tr>
<th></th>
<th>Accept</th>
<th>Reject</th>
</tr>
</thead>
<tbody>
<tr>
<td>Triers' Verdict</td>
<td>Impartial</td>
<td>Not Impartial</td>
</tr>
<tr>
<td>Defence Counsel Decision</td>
<td>29%</td>
<td>0%</td>
</tr>
<tr>
<td>n=12</td>
<td>n=8</td>
<td>n=22</td>
</tr>
<tr>
<td>48%</td>
<td>52%</td>
<td>n=42</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Impartial</th>
<th>Not Impartial</th>
</tr>
</thead>
<tbody>
<tr>
<td>n=15</td>
<td>n=5</td>
<td>n=27</td>
</tr>
<tr>
<td>36%</td>
<td>12%</td>
<td>n=20</td>
</tr>
<tr>
<td>n=42</td>
<td>100%</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Defence Counsel Decision</th>
<th>Accept</th>
<th>Reject</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impartial</td>
<td>n=11</td>
<td>n=4</td>
<td>n=15</td>
</tr>
<tr>
<td>26%</td>
<td>2%</td>
<td>n=12</td>
<td>n=30</td>
</tr>
<tr>
<td>28%</td>
<td>62%</td>
<td>n=42</td>
<td>100%</td>
</tr>
<tr>
<td>36%</td>
<td>64%</td>
<td>n=27</td>
<td></td>
</tr>
<tr>
<td>10%</td>
<td>62%</td>
<td>n=26</td>
<td></td>
</tr>
<tr>
<td>2%</td>
<td>0%</td>
<td>n=26</td>
<td></td>
</tr>
</tbody>
</table>
Firstly, consider the agreement between the triers and defence counsel. Recall from earlier discussion that in six instances defence counsel withdrew their challenge after hearing the venireman’s answers to the questions. It seems very likely that the triers would have decided that these six persons were impartial. Additionally, defence counsel agreed with the triers in all twenty-two instances where the triers found the veniremen not to be impartial, that is, defence counsel would have rejected the venireman. Ignoring the one instance where the triers could not reach a verdict on the venireman, these figures give us a total of forty-two cases in which the decisions of the triers can be compared with the decisions of the defence counsel.

These data are represented in part A of Table 3 which shows both the raw number of cases in each cell plus the percentages of the forty-two cases which these numbers represent. The upper left cell shows the percentage of instances when both defence counsel and triers agreed that the venireman was impartial (twenty-nine percent) and the lower right cell shows the percentage of instances when they agreed that the venireman was not impartial (fifty-two percent). Thus, adding these two figures together we arrive at the conclusion that the overall agreement rate was eighty-one percent. The eight cases in the lower left hand corner of the cell are, however, important cases of disagreement. The triers would have accepted these persons as jurors, but defence counsel rejected them. Nevertheless, let us first turn to some other comparisons before we give these eight cases further consideration.

Consider next the agreement between the triers and the psychologist. After listening to the forty-two veniremen, the psychologist decided that fifteen of them, or thirty-six percent, were impartial, whereas twenty-seven, or sixty-four percent, were not impartial. The extent to which he agreed with the triers is described in part B of Table 3. It may be seen from the Table that the triers and the psychologist agreed that fifteen veniremen were impartial and twenty-two were not; however, there was disagreement over five veniremen, all of whom were found impartial by the triers, but not by the psychologist. Overall the agreement rate between the psychologist and triers was eighty-eight percent.

It is also useful to explore the agreement rate between the two

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40 This assumption, of course, is open to debate, but it seems reasonable in light of the other data to be presented below, namely that the psychologist too would have accepted the jurors and that the triers had a more lax standard of impartiality than either the defence counsel or the psychologist.

41 This figure includes the six instances where defence counsel withdrew their challenges as discussed, supra note 38.
criteria against which triers' decisions have been compared, namely the agreement between the defence counsel team and the psychologist. Part C of Table 3 presents these data. Following the same logic as in the other comparisons, this Table shows that defence counsel and the psychologist agreed that eleven of the forty-two veniremen were acceptable or impartial jurors and twenty-six were not, for a total agreement rate of eighty-eight percent (twenty-six percent plus sixty-two percent). It is important to note that the defence team accepted one venireman that the psychologist decided was not impartial and rejected four persons that he decided were impartial. What were the factors behind this disagreement? Subsequent comparison of notes by the defence counsel and psychologist suggests that some of this disagreement was due to different decisional criteria. The psychologist's decision was solely about the person's ability to be an impartial juror, whereas defence counsel had other considerations. In the case of the one venireman that the defence team accepted but the psychologist would have rejected, defence counsel conceded that in their estimation she was marginally prejudiced, but nine other jurors had already been seated. They felt that she would probably not be a significant person on the jury and would likely conform to the majority. Turning to the four veniremen in the upper right cell of part C of Table 3, the comparison of notes again shows considerations other than impartiality went into three of the four rejections by defence counsel. They decided that while three of these four persons probably were impartial, all three held high status occupations that might give them undue influence on the jury. In the remaining case, defence counsel simply disagreed with the psychologist, that is, believed that the person probably was not impartial. Thus, in four of the five cases defence counsel's decisions were made on grounds other than juror impartiality, specifically, grounds relating to the person's potential social influence on the jury.

These latter findings allow us to consider again the disagreement of defence counsel with the triers regarding those eight veniremen that the triers found impartial and would have seated as jurors, as discussed above regarding part A of Table 3. Like those of the psychologist, the triers' decisions were only supposed to be based upon a consideration of whether the prospective juror was impartial, not the other considerations which prompted defence counsel's decisions. Thus, those three

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42 Here we can expand our sample size to include cases where defence counsel exercised their peremptory challenges without allowing the triers to render a verdict and also the one venireman for whom the two triers could not reach a verdict. Thus the final sample size was fifty.

43 This does not mean that other considerations did not enter into the decisions that they rendered, such as whether they simply liked or disliked the person regardless of his or her impartial-
veniremen whom the defence considered to be impartial, but who were rejected on other grounds, can be added as instances of agreement. The result of adding these three cases to the six trier verdicts with which the defence was content, and the six cases where we speculate that the triers would have made a finding of impartiality, yields a total of fifteen veniremen out of twenty. Thus, the agreement rate between defence and triers on these crucial instances was fifteen out of twenty, precisely the same agreement rate as that between the psychologist and the triers.

In summary, the agreement rate among the three separate decision-makers — triers, defence counsel and psychologist — can be compared in two ways: agreement regarding all veniremen who were challenged and agreement regarding just those persons whom the triers would have seated as jurors. The agreement rate on the former is remarkably high between all three decision-makers: on average the three sources agreed about eighty-eight percent of the time. The agreement rate drops to seventy-five percent when we consider only those veniremen that the triers would have seated. It appears that the triers utilized a less stringent standard in deciding what it means to be impartial than that used by defence counsel and the psychologist. Nevertheless, the bottom line is that triers rejected many persons who would have been seated as jurors if the challenges had not taken place. These verdicts concurred with those of the defence counsel and the psychologist.

D. Effectiveness of a Judicial Query

Finally, we can consider the effectiveness of the judge's request that biased jurors step forward and identify themselves. As noted earlier, the trial judge made an address to the whole panel requesting that any person who had a bias or a connection to the case come forward. Four persons did so. Two had direct ties to the case and two admitted that they were biased in other ways. The data previously presented makes it very clear that far more than four persons on the panel were biased, yet they did not identify themselves at that time. The judge's request, therefore, was not effective in getting biased persons to come forward.

Because many judges apparently have faith in the effectiveness of an address to the whole panel, it is worthwhile to consider some hypotheses to explain why the converse is true. Firstly, some members of
The panel did not know who the witnesses would be. They became aware of the witnesses' identities only after they were seated in the witness box and shown a copy of the witness list. Secondly, many of them were apparently not aware of what the judge meant by his question about being biased. The nature of bias began to be apparent to veniremen and triers only after defence counsel put their questions to the individual veniremen and they thought about their prejudices in depth. Thirdly, some veniremen may have been aware that they harboured bias, but they were hesitant to step forward and appear different from other panel members. There are strong pressures to remain anonymous in group settings such as those typified by the courtroom. Furthermore, an admission of prejudice may be perceived as a confession of weakness of character, especially when the other panelists remain seated and give the appearance of not holding biases against the accused. Fourthly, some members of the panel, who were aware of their biases, may have wanted to be selected as jurors to ensure the conviction of the defendants. In fact, both defence and Crown counsel peremptorily challenged or stood aside certain persons who, to the knowledge of counsel, had made statements to acquaintances that they planned to vote for conviction, if chosen as jurors. It is not possible to determine the extent or degree to which each of these hypotheses explain the failure of biased persons to step forward.

Possibly in some cases, a judicial request to the panel might be effective. However, even if it is seldom effective it may not matter too much in the ordinary, typical criminal case. The Iutzi case, however, was not ordinary or typical insofar as pre-trial prejudice was concerned. It is clear that, at least in this instance, the request to step forward was not substantially effective in eliminating biased persons.

IV. SUMMARY AND CONCLUSIONS

This empirical analysis of the challenge for cause in R. v. Iutzi provides information bearing on a number of issues regarding pre-trial prejudice. To the extent that we can generalize from a single case study, four conclusions seem justified. First, some jurors will candidly reveal their prejudices when they are challenged under oath. Second, there is evidence that a telephone survey of the community may yield a reliable estimate of community prejudice regarding a particular case. Third, there is evidence that triers are reasonably competent in distinguishing between veniremen who are and who are not impartial.

44 See Vidmar, supra note 39; Hans and Vidmar, supra note 6.
Fourth, a judicial address to the total panel requesting biased persons to come forward is not an effective technique for eliminating prejudiced persons. From the perspective of modern psychological assessment techniques, the challenge for cause process, as prescribed under Hubert, is a rather rough and primitive instrument. It might be compared to a net that has a substantial number of holes in it. Yet, even with these holes, the net appears adequate to snare at least many of the persons who are not indifferent between the Queen and the accused.

The findings also bear upon the normative issue surrounding the challenge for cause insofar as it served the ends of justice in this particular case. We can never know, of course, what verdict a jury composed of unchallenged veniremen would have reached. We do know that after listening to over six weeks of evidence the jury found the father not guilty of murder, but found the mother guilty of the lesser included charge of manslaughter. We do know that three different sets of decision-makers — the triers, the defence counsel team and the psychologist — all concluded that a very substantial number of veniremen on the panel could not have served as impartial jurors. We are left with the speculation that a jury selected without a challenge might well have returned a different verdict.

There is also the issue of court efficiency. Some, including the present authors, would argue that matters of court efficiency should be given no consideration in circumstances as important as a murder trial. On the other hand, many judges, politicians and members of the public do express concern about the price of justice. These persons may assert that challenge for cause is too time consuming and costly. Fears are expressed that jury selection could take weeks. In the present instance, a rather extensive challenge consumed less than one and one-half days of court time, and it was a small percentage of the total time devoted to the trial. Critics may still consider one and one-half days to be extravagant, but at least there is a figure upon which normative judgments can be argued.

The present research, with the various limitations that we have noted, is far from a definitive answer to the issues involved in the challenge for cause. But such data is preferable to opinions proffered without empirical facts. At the very least, this research note shows the direction in which empirical issues regarding the challenge for cause — and other remedies for pre-trial prejudice — may be assessed.