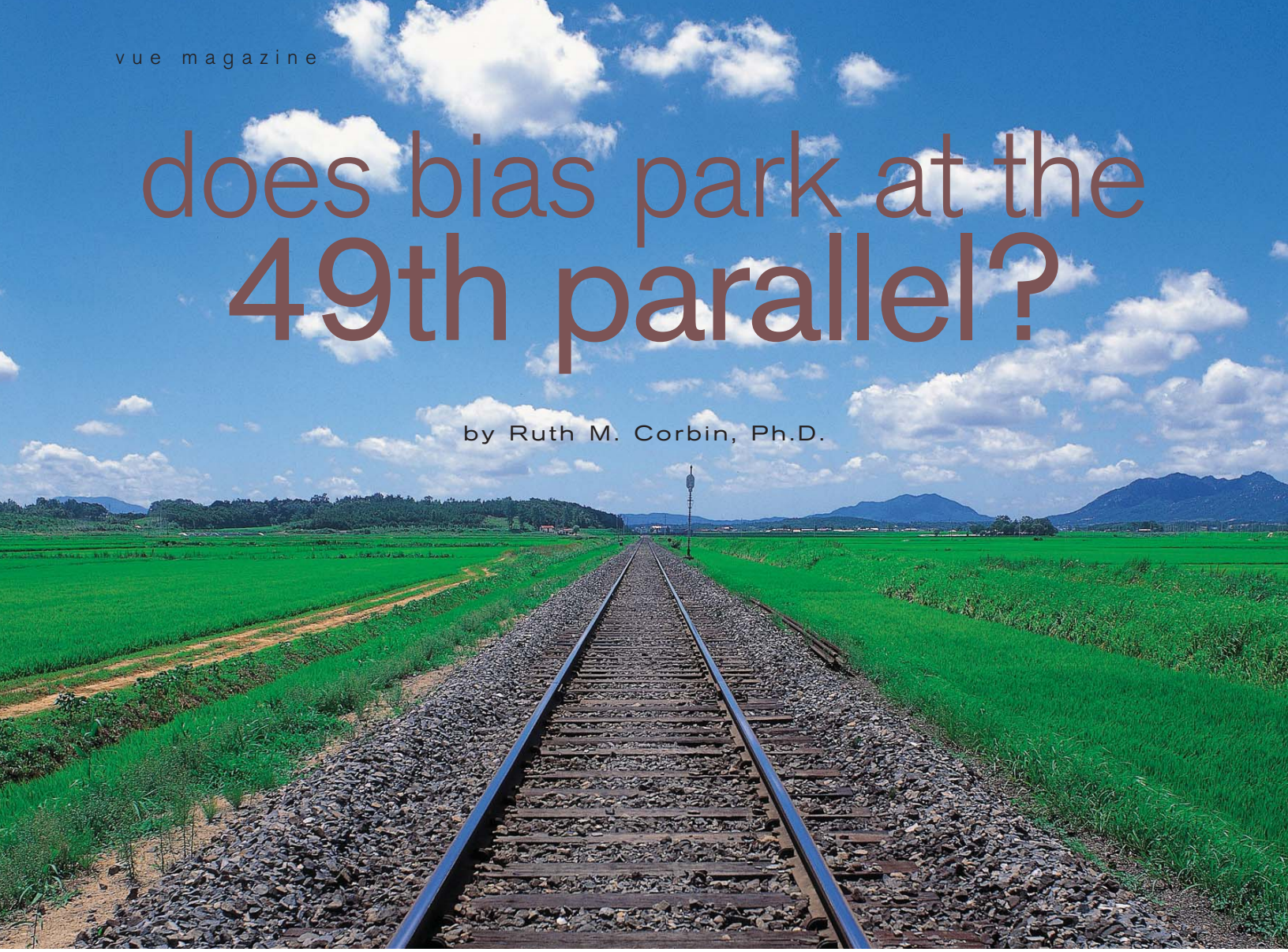
does bias park at the 49th parallel?

by Ruth M. Corbin, Ph.D.



Trial by jury is one of the cornerstones of Canada's criminal justice system. Survey research finds important applications to jury selection for criminal trials. Canadian law recognizes that members of a jury must be unbiased, "indifferent between the Queen and the accused."[1] Unlike the United States, the presumption made in Canadian criminal law is that jurors are unbiased and can be impartial. But bias may creep into potential jurors' judgments, bias in the form of a predisposition to believe that the defendant is more likely guilty than innocent. Bias may arise, for example, from pre-trial publicity, from racial prejudice[2], from connection to the victims, or from revulsion to the circumstances of the case. If there are grounds for concern about any such bias, an accused has access to at least three remedies: requesting a trial by judge alone, requesting a change of venue for the trial if the prejudice is localized in the immediate community, or requesting a so-called "challenge for cause" of prospective jurors. This article reviews briefly these three remedies in Canadian law and how survey research has played a role. The article further observes the low frequency with which these remedies are granted, relative to the United States, and calls for policy-makers to review the social science evidence that calls into question the presumption of "the impartial juror."

TRIAL BY JUDGE ALONE

One remedy for the prospect of a biased jury in murder trials is trial by judge alone. Agreement of the Crown in Canada (counsel for the government of the people) is usually required to be able to dispense with a jury.[3] If the Crown disagrees, a motion with supporting reasons or evidence may be brought before the court. In November 1991, Colin McGregor was accused of killing his estranged wife with a crossbow in broad daylight on an Ottawa street. The killing sparked an avalanche of publicity, exacerbated by the broader public sentiment regarding female victims of male violence. Mr. McGregor's lawyer used survey evidence to argue successfully for a trial by judge alone. The survey revealed high awareness of the murder, high concern about crime and

violence against women, and a pre-existing bias against McGregor's intended defence of insanity.[4]

CHANGE OF VENUE

Pre-trial publicity or local prejudice may make it unlikely that an unbiased jury can be assembled in the jurisdiction where the crime was committed. Change of venue entails seeking a jurisdiction where a body of unbiased jurors is more likely to be found. Survey evidence can be tendered to help with decisions on whether pre-trial publicity has hurt the chances for assembling a fair jury, or whether other sources of community sentiment would induce social pressure among jurors to decide one way rather than another. In *R. v. Theberge*[5], James Theberge of Timmins, Ontario was accused of murdering 17 year old Susan Hall. The Timmins' newspaper, *The Daily Press,* had published fifteen different stories about the murder. The judge found that the articles themselves were objective and not prejudicial to the accused. However, other evidence emerged that concerned him. The victim's father was a local doctor who saw more than 400 patients per month. He was also on retainer for the town's biggest corporate employer. A survey of 250 people demonstrated significant community empathy toward the doctor and bias toward the accused. Thirty-three percent (33%) of those surveyed admitted to a biased predisposition, and an additional 18% claimed to have an open mind when their other responses indicated they did not. It was noteworthy that these persisting indications of prejudice were uncovered by a survey conducted about three years after the crime had occurred.

CHALLENGE FOR CAUSE

Courts may turn down requests for a change of venue or trial by judge alone, but still give weight to evidence (produced by survey or otherwise) about the potential for jury bias. In such cases, the Court may be amenable to a request for "challenge for cause." Challenge for cause entails questioning potential jurors about possible prejudices they may hold, requesting their exclusion on those grounds. Such challenges have been common in many American jurisdictions, and American lawyers are known to take a great deal of license in the nature of their questioning to potential jurors. The factors that would permit challenge for cause have been more restricted in Canada. One factor is racial prejudice. An accused who is a member of a visible minority is more likely than others to obtain the Court's allowance for challenge for cause. The existence of sensational pre-trial publicity may also provide the basis for challenge for cause. Survey evidence was used to support a motion for challenge for cause in *R. v. Bernardo.*[6] Paul Bernardo was accused of first-degree murder of two teenaged girls. Survey evidence commissioned by his lawyer established that many members of the public were pre-disposed to believe that Bernardo had killed the girls, and that his wife, Karla Homolka could not have been directly involved in the murders. A notable percentage of survey respondents said directly that they would not be able to keep an open mind as a juror. This evidence of community bias was part of the basis for both the defence and Crown obtaining a wider latitude in questioning potential jurors than would otherwise have been permitted.

THE STATUS OF SURVEY USE TODAY

Although surveys are well suited to the assessment of community attitudes, the use of surveys for determining jury bias is much less prevalent in Canada than in the United States. There are several reasons why this appears to be so. When surveys have been offered to the Court, the Crown has almost always vigorously opposed them. The second is the unusually high standard of proof which courts have demanded, seemingly reluctant to permit survey evidence to override the fundamental presumption of jury impartiality in Canadian law. A third reason is the limited resources of Legal Aid. In a large fraction of criminal cases, the defence of the accused is funded by legal aid. The high labour cost of surveys is typically beyond its budgetary tolerance. This collection of circumstances might ordinarily be acceptable as a product of a uniquely Canadian legal and policy environment. However, given that both Canada and United States seek an exemplary standard of fairness in their jury system, the inconsistency of approach to jury selection is curious. It is logically implausible that Canadian jury candidates should be psychologically wired to be unbiased and impartial while American jury candidates are psychologically wired to be biased and partial. Surely, the set of assumptions about predisposition to bias of a jury pool should be similar. To appreciate the logical conundrum, one need only recall that the populations of both countries include a sizable proportion of immigrants from the same international origins. Do all the impartial immigrants come to Canada and the partial ones go to the States? Which country's assumption about the risk of jury bias is more likely to be true?

THE MORE PLAUSIBLE ASSUMPTION IS POTENTIAL FOR BIAS RATHER THAN INSTINCTIVE IMPARTIALITY

As psychologists have learned, bias is an inevitable human characteristic, hardwired into how our brains analyze and judge new situations. Bias is not necessarily negative. It helps the brain to lend order to the world around us. Bias in this context has been defined as "a human predisposition to make interpretations based on past experience – to try to fit new stimuli and information into one's already developed system for looking at the world."[7] Sometimes biases affect the judgments that people render as jurors,

and sometimes they can be set aside. However a study by Kassin and Wrightsman demonstrated that in the majority of cases, a juror's reaction to evidence was "filtered" through personal predispositions. One of the authors concluded that "pretrial beliefs and values may influence or even overwhelm the evidence presented in court."[8] Thus it would be unrealistic to presume that biases can always be set aside.

Where a juror begins with a bias toward the accused, new evidence revealed during trial may not necessarily incline the juror to a more objective opinion. That is, entrenched attitudes cannot necessarily be modified through evidence. The literature on attitude measurement shows that if newly presented arguments by counsel fall too far outside of a person's "latitude of acceptance" he or she may reject those arguments, and rely all the more on his/her original opinion.[9]

Instructions from the judge to the jury are assumed to mitigate or remove the risk of bias. Jurors are directed explicitly to keep an open mind and to rely only on the evidence they receive at trial. But the complex instructions may not be fully understood, and jurors may substitute their own view of acceptable criteria for assessing the facts of the case.[10] Studies of the effect of judges' instructions have demonstrated that in certain instances where juror biases exist, judicial admonishments may be ineffective in combating such biasses.[11]

Unless they are asked directly about their predispositions, people may be reluctant to volunteer them. This is because of the "demand characteristics" of given situations, in which people may perceive that it is inappropriate to volunteer reluctance to serve on the jury, or may feel it is socially unacceptable to admit to bias, or may be intimidated by the authority figures in the courtroom.[12]

THE SURPRISING PROBABILITY OF A ROGUE JUROR

All of the research cited above is about the discovery of some people's biases in some situations. For average persons, in an average trial, Canadian law presumes, there is a good chance that they will be able to fulfill their oath to remain open-minded throughout the delivery of evidence. Thus, except in special circumstances (the presumption continues), there should be no need to resort to the cumbersome process of challenge for cause.

Even if such optimism about people's ability to be impartial were justified, the application of everyday statistics demonstrates a surprisingly high likelihood that a biased juror would be selected. Assume that the relative ability to keep an open mind as a juror in a criminal trial is distributed normally (as are most attributes), with the 5% outliers beyond three standard deviations being those who are likely to exhibit a higher than normal degree of bias. If a jury is selected from the population, without asking questions through challenge for cause that would tease out these outliers, the probability that at least one such biased person would end up on a jury of 12 people is 46%. You have to do the math to convince yourself that it's really that high. That is, using everyday assumptions about the variations in human behaviour, if only one in twenty people in the population holds a prejudice or bias that would affect the right of the accused to a fair trial, there is a 46% chance that such a person would end up on the jury, in the absence of a screening process which would weed out such a person in advance.

Through jury simulations and one-on-one interviews, I have learned that many good Canadians, while determined to try to remain open-minded, would find certain accused so despicable, or the victim so egregiously wronged, that they readily admit they would likely be predisposed toward a guilty verdict from the outset of a trial. Many wrongly assume that they will be asked in advance of being selected for jury duty about whether they can keep an open mind. Only if "challenge for cause" is permitted will they have a chance to explain their bias and be excused on that ground.

While social science has raced ahead in its discovery of human hard-wiring for bias, the law of jury selection in Canada has remained largely unchanged. Parliamentary law-makers may want to check the literature.

[1] *Criminal Code*, Section 638

[2] Racial bias is one of the few established grounds for challenging potential jurors on their ability to keep an open mind, as articulated in *R. v. Parks,* (1993), 24 C.R. (4th) 81, affirmed in the reiterated in 1998 decision of the Supreme Court of Canada in R. V. Williams.

[3] i.e. for murder cases, and other indictable offences under S. 469 of the *Criminal Code.*

[4] *R. v. McGregor* (1992), 14 C.R.R. (2d) 155 (Ont. Gen. Div.)

[5] March 16, 1995, *Doc. Cochrane* 2666-90 (Ont. Gen. Div.)

[6] May 15, 1995, *Doc.* 274/94 (Ont. Gen. Div.)

[7] Wrightsman, L.S., Nietzel, J. T. and Fortune, W.H. *Psychology and the Legal System.* Pacific Grove California: Brooks/Cole Publishing Company, 1994, p. 312.

[8] *Ibid,* p. 314

[9] Gordon, R. *Forensic Psychology.* Tucson, Arizona: Lawyers and Judges Publishing Company, 1975, p. 109.

[10] Litan, R. E., (ed.), Verdict. *Assessing the Civil Jury System.* Washington D.C.: The Brookings Institution, 1993, at p. 9.

[11] Vidmar, N., *"Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials," in Law and Human Behavior.* February 1997.

[12] Demand characteristics and social desirability are well-documented in the psychology literature as sources of behavioural influence.

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