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FREE PRESS v. FAIR TRIAL: A CONTINUING DIALOGUE

'Trial By Newspaper' And The Social Sciences

DONALD M. GILLMOR*

> I don't think we can solve our problem by shouting "free speech" and "fair trial" at each other. I think what we need is an impartial scientific investigation of this subject by an impartial agency, an agency of such stature that both the Bar and the media would respect it.[1]

A review of court opinion bearing upon the collision of competing constitutional rights, free press and fair trial, although it tells us what the law is and suggests what it ought to be, still leaves the central and essential question unanswered: what *is* the effect of trial and pre-trial publicity on jurors?

The legal profession has built its case against "trial by newspaper" without ever testing the premise that there is a direct cause-effect relationship between press reports and jury verdicts. Not even the most positivistic school of jurisprudence, with its insistence upon the application of scientific method to problems of law, has taken steps toward anchoring this particular problem on the solid foundation of empirical fact and defining it within an adequate conceptual framework.

Under the influence of such thinkers as Weber and Pound legal research no longer enjoys that majestic isolation of a half century ago; and Lord Coke's "special logic" of the law is today hardly a sufficient analytical tool. In fact, the more recent work of Pritchett and Schubert[2] may portend a revolution in legal research which will push the law well beyond the logical limits now set by its own postulates, will assimilate the objective realities of the present, and will further loosen the bonds of *stare decisis*.[3] Rule logicians must not be permitted to reduce law to a kind of legal geometry which ignores the human variables.[4] "The life of the law [is] experience," said Justice Holmes,[5] and that experience is inevitably human.

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1. Tinkham, *Fair Trial and Freedom of the Press*, 19 F.R.D. 16, 25 (1957).
2. PRITCHETT, THE ROOSEVELT COURT (1948); SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1963); SCHUBERT, CONSTITUTIONAL POLITICS (1960); JUDICIAL DECISION MAKING (Schubert ed. 1963).
3. See articles by Brown, Becker, Aubert, Ulmer, and Winick in FRONTIERS OF LEGAL RESEARCH, The American Behavioral Scientist, Dec., 1963.
4. Schur, *Scientific Method and the Criminal Trial Decision*, 25 SOCIAL RESEARCH 175 (1958).
5. HOLMES, THE COMMON LAW 1 (30th ed. 1938).

The late Jerome Frank recounts in his coruscating book, *Courts on Trial,* how the dead hand of precedent may stunt the growth of the law: in 1947 two enterprising, able and earnest law students sought to study first-hand how jurors decide cases. Their plan was to have trial judges, after a jury trial had concluded, ask the jurors to volunteer to fill out a carefully worded questionnaire, and, if they cared to, to allow themselves to be interviewed by the students. The proposal was made without success to nine judges of several different jurisdictions. One federal judge said that he did not approve a "holier-than-thou attitude toward juries," and that the project could serve "no worthy end" but would only increase differences among federal judges concerning the value of the jury system. Another, in refusing his co-operation, stated that he had never made such a study when *he* was in law school. Still another federal judge, unwilling to have jurors interrogated, said, "How they decide is their business." Two state court judges deemed the undertaking "improper." But another state court judge, enthusiastic about the study, submitted the questionnaire to the jurors in a case and gave the written answers to the students. He also granted them permission to conduct informal interviews, but reneged when he received adverse criticism from some of his colleagues.[6]

In the great reform movement which swept the common law in the nineteenth century the utilitarians sought to illuminate judicial processes. Rules, once thought to have been pronouncements from on high, were traced back to their operational origins. How the law works (the "living" law) rather than what it is (the positive law) became the primary consideration. Jeremy Bentham, for example, in his most important work, presents a most realistic appraisal of the probable influence of extraneous publication on judge and jury:[7]

> In England, publications of the cases of litigant parties are altogether unusual, and, if distributed for any such purpose as that of influencing the decision of the jury, would be liable to be treated on the footing of an offence against justice . . . . In England, the ground for the prohibition put upon these ex parte publications, is the danger of their exercising an undue influence on the minds of the jury . . . . On

6. The reluctance of the courts to comply with such requests is justified in McDonald v. Pless, 238 U.S. 264, 267-268 (1915), where the court said, in part: "When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room. . . . But let it once be . . . established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."

7. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 604 (1827).

> professional and cultivated minds, engaged by the necessity of office to procure the whole mass of evidence and argument, the premature exhibition of a part would rather be turned aside from as useless, than apprehended by anybody as dangerous. It was to the eye of the public at large, and not to the eye of . . . a judge that these statements were addressed. In what way could the probity of the judge be endangered by receiving at one time a part of those documents, the whole of which would come before him of course? Even in England, the reason on which the prohibition relies for its support has more of surface than of substance in it. The representations given by publications of this sort will of course be partial ones: the colour given to them will be apt to be inflammatory: the judgment of a jury will be apt to be deceived, and their affections engaged on the wrong side. Partial? Yes: but can anything in these printed arguments be more partial than the *viva voce* oratory of the advocates on that same side will be sure to be. The dead letter cannot avoid allowing full time for reflection: the *viva voce* declamation allows of none. The written arguments may contain allegations without proofs: true: but is not the spoken argument just as apt to do the same? When, of the previous statement given by the leading advocate, any part remains unsupported by evidence, the judge of course points out the failure: whatever effect this indication has on the jury, in the way guarding them against that source of delusion in spoken arguments, would it have less efficacy in the case of written ones?

Compare this with the superficial verbiage of less cautious commentators. An English jurist declares:[8] "It is the pride of the constitution of this country that all causes should be decided by jurors, *who are chosen in a manner which excludes all possibility of bias.*" (emphasis added) And Justice Frankfurter in his dissenting opinion in the *Stroble* case notes that:[9] "Science with all its advances has not given us instruments for determining when the impact of such newspaper exploitation has spent itself *or whether the powerful impression bound to be made by such inflaming articles* as here preceded the trial can be dissipated in the mind of the average juror by the tame often pedestrian proceedings in court." (emphasis added) Such conclusions obviate the necessity of applying scientific methods to the examination of social and constitutional conflicts.

Another judge admits that when a decision was difficult he would rely primarily on "the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial

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8. R. v. Jolliffe, 4 T.R. 285, 100 Eng. Rep. 1022 (K.B. 1787).
9. Stroble v. California, 343 U.S. 181, 201 (1952).

feet, sheds its light along the way."[10] If "hunch" is the mental mechanism of the process by which judges reach decisions, can we expect legally untrained jurors to bring any degree of objectivity to their deliberations?

If with Dean Pound we accept the view that there is much in law which is social engineering, it would seem to follow that the accumulated knowledge and methodology of the social sciences would be helpful in solving legal problems and in providing legislators with the facts of social life. Much of the substance of law is drawn from sources outside the law itself, and few valid conclusions with regard to the function of law can be reached by depending solely upon legal theory. Moreover, "the basis of any significant critique of the law must be how successfully the law actually works to achieve social ends which are desired for reasons not found in the law itself."[11] Pound says it well:[12]

> A principle gets the value as a starting point for legal reasoning from its possibility of fruitful application to actual conditions involved in litigation in the time and place. If it is limited, by its definition or by one imposed upon its interpretation, to exact meaning of words or conditions of fact which were current or existed or as they were understood when it was formulated, it loses its value for the purposes of a principle and becomes a rule. This defeats its end since a rule is fitted to precisely defined facts which may no longer obtain. Reason may be universal. But if the reasoning that is needed in order to apply the principle is tied to conditions which no longer exist nothing if left but idle and mischievous abstraction.

It should be recognized, of course, that the goal of judicial processes is not always knowledge, and that the search for "truth" is frequently suppressed by the need for victory in an adversary system. In making decisions the judge recognizes (1) that the case must be decided one way or another, whether or not the evidence is sufficient for a "scientific" conclusion; (2) that judicial fact-finders are not bound by rules of consistency, and (3) that facts may be bent by the judicial process to serve an ulterior purpose.[13]

This is not to suggest that all members of the legal profession are blind to the value of scientific method in judicial fact-finding or that lawyers conspire to subvert "truth." It does suggest, however, that the conventional logic of the law, with its dependence upon analogy, is an inadequate and naive method when the law reaches out to other disciplines to justify legislation or legal reform. One

10. Hutcheson, *The Judgment Initiative: The Function of the 'Hunch' in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1949).
11. Simpson & Field, *Law and the Social Sciences*, 32 VA. L. REV. 855, 862 (1946).
12. POUND, LAW FINDING THROUGH EXPERIENCE AND REASON 63 (1960).
13. Ulmer, *op. cit. supra* note 3, at 22.

lawyer admonishes his profession that it may better boast of its maturity and sophistication when it seeks the counsel of the sociologist and psychologist in solving the problems of publicity, the *cause celebre*, and the jury.[14]

And until it does, the free press-fair trial conflict will remain simply an issue of passionate speculation. To what extent do juries have any prior knowledge of the cases on which they sit, and what proportion of such knowledge is derived from news coverage? If the media do impinge upon the trial process, what is the degree of their influence and at what point in a trial is prejudicial publicity most deeply felt?[15] What is the effect upon jurors of news reports of (a) confessions; (b) prior criminal records; (c) expressions of opinions concerning the guilt or innocence of an accused; (d) interviews with the family of a victim; (e) the anticipated testimony of witnesses; (f) and statements that appeal to racial, religious, political or economic bias? Is the juror conscious of the effect of such reports upon him: and do his own composite predispositions override any amount of press comment? How effective are judicial instructions to a jury? Do such procedural remedies as change of venue, change of venire, continuance, and mistrial serve to diminish prejudice? Does locking up a juror until the termination of a trial further prejudice him against a defendant? Are there positive effects of publicity which may counterbalance possible negative effects; and to what extent do rumor and gossip assume the role of the press where the press is censored or restricted? Finally, do we accept Wigmore's view that "to equate the stamina of judges and jurors runs counter to one of the basic assumptions of the law of evidence—that jurors must be protected from the undue prejudice of improper evidence upon which, however, the judge may safely pass;" or shall we agree with the appellate court opinion in the *Baltimore Radio*[16] case that there are citizens possessing the same firmness and impartiality as judges?

WHAT WE DO KNOW

Because of its dramatic role and its central importance in the trial process, the American jury has been the focal point of a number of pioneering social scientific investigations. By far the most significant of these was the University of Chicago Law School Jury Project which sought to apply the methods of the behavioral sciences to a

14. Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 N.Y.U.L. REV. 810, 838 (1961).

15. Murphy & Newcombe in EXPERIMENTAL SOCIAL PSYCHOLOGY 961 (rev. ed. 1937), suggest that news reports immediately before or at the beginning of trial proceedings are most effective because of the lack of counter propaganda and specific knowledge. "The truth of the matter is that prejudice is more likely to occur at the trial than either before or after." Scott, *State Criminal Procedure, The Fourteenth Amendment and Prejudice*, 49 NW. U.L. REV. 319, 331 (1954).

16. Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A.2d 497 (1949).

systematic study of the modern jury. Directed by Harry Kalven Jr., Hans Zeisel and Fred Strodtbeck, the project was sponsored by the Ford Foundation.

Jury Project collected basic data on jury behavior through statistical analysis and refinement of existing court records, public opinion surveys, questionnaires, observation of jury behavior through post-deliberation interviews, simulated cases before experimental juries, and the recording of a limited number of actual jury deliberations. Public opinion surveys were used to determine individual attitudes toward the jury system. Other phases of the study sought to analyze the methods of jury selection and the segments of the population serving on them. Trained observers were assigned to a series of jury trials to witness the trial, to interview the judge and counsel, and with the consent of the court, to interview the jury panel at the end of the trial. Also with the approval of the court and counsel for both sides, six actual jury deliberations were recorded, the primary purpose of which was to prove or disprove the authenticity of the other investigative methods.[17]

Among the over-all purposes of the study were the following: (a) to determine to what extent the jury conceives of its function in the same way that the formal law conceives it; (b) to determine if the jury comprehends the judge's instructions; (c) to see if the jury's criteria for a verdict are consistent with those laid down by the law; (d) to see if the jury comprehends the evidence; and (e) to determine if the jury is moved by "rational" or emotional factors rooted in personality, social background, and the social situation of the courtroom, jury box and jury chambers.

As part of this study, 1500 jurors who had served in 213 different criminal cases in Chicago and Brooklyn were subjected to intensive interviewing. Among the findings was the fact that in thirty per cent of the cases the jurors were unanimous on the first ballot; and in seventy per cent of the cases there was some division of opinion on the first ballot, but in ninety per cent of these cases the majority on the first ballot always won its point. The board conclusion is that most criminal cases are decided during the trial and not during the jury deliberations.[18]

A somewhat similar conclusion was reached by Weld and Danzig in an earlier study conducted at the Cornell University Law School. Here law students were used as counsel and psychology students as jurors in a moot court setting carefully designed to create the "real" atmosphere of a trial. Unlike an actual trial, the jurors were not

17. Ferguson, *Legal Research on Trial*, 39 J. AM. JUD. SOC'Y 78 (1955).
18. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 747 (1959).

examined for their competence or impartiality, and, of course, they were not subjected to any pre-trial publicity.

The trial was divided into stages and the jury members were asked to indicate their degree of belief in guilt or innocence at each stage in the proceedings, recording their opinions before all of the evidence was heard. It was noted that their judgments fluctuated considerably throughout the proceedings. It was observed also that individuals reacted differently to the same testimony and that judgments were often affected by admiration for or antagonism toward the counselors. Even these jurors, superior in intelligence and education, did not reach decisions through a logical analysis of the case, and no juror in the study attempted to maintain an attitude of doubt on the theory that he should make no decision until he had heard all of the evidence. Juror judgments tended to fluctuate with the presentation of the testimony favoring one side or the other.

Early in the trial at least twenty-five per cent of the jurors reached a fairly definite decision—less by the proof than by their notion of what under the circumstances seemed to them "right" or just[19]—and thereafter the effect of the testimony was merely to change their certainty. In this regard, the opening and closing statements of the attorneys were important.

There was strong evidence that the jurors had reached their verdict before going into the jury room. Only one of the forty-one jurors changed his mind during the jury deliberations.

It would appear that jurors brought to the trial personal standard of evaluation, and where an attorney possessed sufficient prestige, some members of the jury would accept his opinion and maintain it as their own.[20]

In another segment of the Jury Project itself, 500 trial judges cooperated in filling out a questionnaire for each jury trial over which they had presided. Fifteen hundred criminal case questionnaires were returned. In eighty-three per cent of these cases the judge and the jury agreed on the verdict and in seventeen per cent there was disagreement. Judges, however, appeared more prone to convict than jurors, and if all defendants in the 1500 cases had been tried by a judge, the number of acquittals would have been cut in half. [21]

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19. A similar conclusion is reached by Judge Bernard Botein in TRIAL JUDGE 179 (1952): "Sometimes, jurors will follow a judge's charge on the law if it squares with their own particular home brew of the law to reach what they consider a just or sensible result."

20. Weld & Danzig, *A Study of the Way in Which a Verdict is Reached by a Jury*, 53 AM. J. OF PSYCHOLOGY 518 (1940).

21. Broeder, *op. cit. supra* note 18, at 750.

In a detailed study of the differences in decisions of juries and judges in personal injury suits, it was found that the percentage of agreement between judge and jury remained almost constant whether or not written instructions were given the jury, whether or not the judge summarized the evidence, and whether or not the judge commented on the weight of the evidence. There is a strong suggestion here that at least in personal injury suits these procedural controls make the jury neither more nor less like the judge.[22]

Edwin Schur observes that theoretically the selection of jurors is geared to selecting value-free persons, and any opinion on the case or the type of problem involved may serve to disqualify the prospective juror. But he adds:[23] "Actually, of course, we know that the selection proceeds on radically different grounds, each attorney scrupulously dedicated to the selection of those jurors whose value systems will most favor his client's cause." Jury Project noted that sixty per cent of the lawyers' voir dire time was spent in indoctrinating jurors and only forty per cent in asking questions designated to separate the favorable from the unfavorable jurors.[24]

Strodtbeck, another participant in the Jury Project investigations, also sought to evaluate the importance of sex role differentiation and social status in jury deliberations.[25] Jurors drawn by lot from the regular jury pools of Chicago and St. Louis courts were exposed to recorded trials, were asked to deliberate under the customary discipline of the bailiffs of the court, and return their verdicts. The deliberations were recorded with hidden microphones. Twelve sessions out of an original set of thirty in which jurors considered an auto negligence case were scored in terms of group interaction categories. The scorer listened to each fully transcribed deliberation and had available indications of non-verbal gestures made by an original observer. The consistency of each scorer was checked before the scoring began and re-checked periodically while the scoring was in process. The number of verbal acts originated by each juror in each category was then counted. Analysis indicated that men dominate jury deliberations, that is, they initiate long bursts of talking directed at the achievement of a verdict, and women are more likely to react emotionally to the contributions of others.

In studies conducted in Chicago, St. Louis and Minneapolis, jurors were drawn by a random process from voting registration lists. The usual bias from the fact that lawyers, doctors, teachers, policemen and local and federal employees are excused, and aliens,

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22. *Id.* at 751.
23. Schur, *op. cit. supra* note 4, at 182.
24. Broeder, *op. cit. supra* note 18, at 753.
25. Strodtbeck & Mann, *Sex Role Differentiation in Jury Deliberation*, 19 SOCIOMETRY 3 (1956); Strodtbeck, James & Hawkins, *Social Status in Jury Deliberations*, 22 AM. SOCIOLOGICAL REV. 713 (1957).

foreign visitors, migrants, and persons under twenty-one years of age do not appear on jury lists, was taken into account, the net effect being that the professions and the very low education and occupation groups are slightly under-represented.

This evaluation of social status in jury deliberations noted at the outset that in the jury situation there is not only the widespread opinion among group members that they should act toward one another as equals but also the reinforcement of the presumption of equality by the requirement that the verdict be unanimous. The latent premise of the study was that high participation in the verdict-reaching process indicates a greater ability to influence others.

The findings indicated that men in contrast with women and persons of higher in contrast with lower status occupations had higher participation, influence, satisfaction and perceived competence for the jury task. Jurors who used more of the group's limited time together were perceived by respondents to be the jurors they would choose if they were on trial. Whatever the criteria used by the groups to regulate the contribution of their members, these criteria were broadly held. The fact that some people did most of the talking did not prevent the achievement of a consensus. Again, this study suggests the continuity of status in the jury situation.

Certainly the most ambitious, the most elegantly designed, and what was to become the most controversial aspect of Jury Project was the recordings made of *real* jury deliberations in the spring of 1954 in a federal courtroom in Wichita, Kansas. With the full knowledge and consent of the judge and attorneys in a civil action, but unknown to the jurymen, a microphone was concealed in the jury chamber. In the interests of furthering legal knowledge, the recordings, though inconclusive, were played back to two hundred members of the bar at the annual Judicial Conference of the Tenth Judicial Circuit at Estes Park, Colorado, in July, 1955.

DIFFICULTIES OF JURY RESEARCH

There were no protests at this point. But three months later a story in the *Los Angeles Times* on the "bugging" of the Wichita jury room set off a nationwide outcry. Jury Project was condemned by editors, columnists and radio commentators. The Senate Subcommittee on Internal Security, chaired by Senator James O. Eastland of Mississippi and Senator William E. Jenner of Indiana, investigated with the avowed intention of seeking legislation to prevent the further use of concealed microphones. Some members of the Subcommittee even called for legal action against the researchers and everyone involved in the project, from the Ford Foundation to the consenting judges and lawyers. "The fact that

the persons who made the recordings were competent social scientists pursuing a serious study of an important American institution appeared to make no difference to the critics."[26] Few lawyers appeared to be overtly disturbed by this research, and some prominent legal figures publicly endorsed it.[27] In a letter to the Subcommittee, Dean Levi of the University of Chicago Law School said:[28]

> The use of a limited number of actual jury deliberations can contribute to the better understanding of the jury and to the improvement in instructions. By serving to validate other means of study, it can serve to improve the administration of justice so far as the rules of evidence are concerned and the speed with which trials are secured or conducted. It can serve to maintain and to continue a great American institution. This is no doubt the reason that there are distinguished and able leaders of the bar who are in favor of such a study, including the use of a limited number of actual jury deliberations under proper safeguards.

The courts would seem to have mixed feelings about this practice. In one federal case the court said:[29]

> If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. *He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice.* (emphasis added)

A few years later another federal court affirmed this position:[30] "We do hold for future guidance that it is improper and unethical for lawyers, court attaches or judges in a particular case to make public the transactions in the jury room or to interview jurors to discover what was the course of deliberation of a jury trial." The American Civil Liberties Union has also favored tightly closed jury rooms.

Noting that there was no provision of state law or constitution

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26. Burchard, *Lawyers, Political Scientists, Sociologists—and Concealed Microphones*, 23 AM. SOCIOLOGICAL REV. 686 (1958).

27. The courts had earlier engaged in this practice. In 1938, the Ruth Commission of Pennsylvania, armed with authority to subpoena, placed scores of ex-jurors on the stand and asked them to testify as to what really happens in a jury deliberation. Several ex-jurors admitted under oath that they had rendered a verdict without knowing the distinction between plaintiff and defendant. In the late 1940's, District Judge Lee Loevinger of Ramsey County, Minnesota, distributed questionaires to jurors at the end of a trial. More than 800 were returned.

28. *Hearings Before the Subcommittee on Internal Security of the Senate Committee on the Judiciary*, Preliminary Report, Oct. 12 & 13, 1955, cited in Ferguson, *op. cit. supra* note 17, at 82.

29. Rakes v. United States, 169 F.2d 739, 745-46 (2d Cir. 1948).

30. Northern Pac. Ry. v. Mely, 219 F.2d 199, 202 (9th Cir. 1954).

establishing the inviolability of the jury room, a Michigan court took the opposite view:[31]

> Just as physicians observe a living patient for research purposes, the improvement of the administration of justice necessitates the limited use of direct observation . . . . If the general practice of medicine and surgery is to progress, there must be a certain amount of experimentation carried on; but such experiments must be done with the knowledge and consent of the patient or those responsible for him, and must not vary too radically from the accepted method of procedure.

Another judge has recommended that a stenographic record be made of the jurors' discussions while they are deliberating so that the trial judge with such a record before him could learn, to some extent, whether the verdict was reached by improper means; if so he would set aside the verdict.[32]

It should be noted that few social scientists came to the defense of their colleagues, nor was there much public support for the project. Max Radin, in a prophetic statement, had said in 1940:[33] "As far as trial by battle is concerned, the lay public loves to consider a trial as a 'battle of wits' and would probably resent in any case that aroused its interest an objective and careful scientific study of the data."[34]

THE IMPACT OF PUBLICITY

Jury Project did not deal specifically with the question of measuring the impact of newspaper publicity on the jury. In a letter to Judge Herbert F. Goodrich, director of the American Law Institute, Harry Kalven, Jr., co-ordinator of Jury Project, assessed that problem:[35]

> Our materials as to the impact of newspaper publicity on the jury are even less satisfactory. *As a matter of*

31. Fortner v. Koch, 272 Mich. 273, 261 N.W. 762, 765 (1935).
32. Galston, *Civil Jury Trials and Tribulations,* 29 A.B.A.J. 195 (1943).
33. RADIN, LAW AS LOGIC AND EXPERIENCE 55 (1940).
34. As a follow-up study to the press outburst, Waldo Burchard sent 300 questionaires to each of three groups of sociologists, political scientists and lawyers. The questionnaires contained seventy propositions relating to juries, jury studies, and use of concealed devices in jury research and social science research in general. His findings indicated that political scientists and sociologists by a large majority would approve the use of concealed devices in jury research and, by implication, in social scientific research in general. Lawyers were evenly divided in approving and disapproving. Although Burchard suggsts that all three groups were at variance with editors and commentators, it does not appear from his report that the latter groups were adequetly polled. Burchard concludes: "What is needed most of all . . . are practical demonstrations of the beneficial effects of social research. Unfortunately, there are many cases, of which the jury study is one, where it is extremely difficult, if not impossible to demonstrate such effects. And in a field where tradition is strong, unless the utility of scientific knowledge can be readily established, tradition continues to hold sway." Burchard, *op. cit. supra* note 26, at 690.
35. Letter from Harry Kalven, Jr. to Hon. Herbert F. Goodrich, Director of the American Law Institute, Sept. 16, 1940 (with a copy to the author).

> *prudence we decided not to interview in major criminal cases where there was trial by newspaper. And we have been unable to think of a way of importing the stimulus of the news to our experimental jury routine.* As a result the vast majority of the cases we have studied simply do not present the problem of the newspaper. We do, however, have evidence that the jurors take with surprising seriousness the admonition not to read the paper or to discuss the case with other people . . . . Our over-all impression . . . is that the jury is a pretty stubborn, healthy institution not likely to be overwhelmed either by a remark of counsel or a remark in the press. The chief reason for this is that in most cases the jurors are initially in some disagreement and there are champions for both sides of the case in the jury room. Thus a prejudicial remark which is likely to please one side is equally likely to irritate the other and would be offset by counter-argument. But this is unfortunately only a general impression. . . . (emphasis added)

Two obstacles to the comprehensive study of the effects of pre-trial publicity on jurors are implicit in this excerpt: an adequate methodology has not yet been developed; and the judiciary has provided no assurance that it will approve of such research.

As a member of Jury Project, Dale Broeder was principally responsible for the observation of a series of twenty jury trials and the intensive court-approved interviewing of the jurors who served in them. These interviews were conducted as soon as possible after the trial. The average interview lasted one and one-half hours and a considerable number lasted for three hours or more. In all, 225 individual jurors were interviewed. Thirteen of the cases were personal injury actions, and seven were criminal cases. Of this phase of the research Broeder says:[36] "The central problem with such an undertaking . . . is that all of these cases are different; and, further, that twenty cases is not very many cases. Obviously one cannot produce findings from such data which are statistically significant. But while no conclusive answers can be provided by the technique it has at least given us some worthwhile insights."

A few isolated field studies, which are at least tangential to the free press-fair trial question, have been made in recent years. A public opinion survey taken by Cornelius Du Bois, Inc., a New York public relations firm, was attached to the motion of Alger Hiss for a change of venue on the grounds of newspaper-fostered prejudice in New York City. Of the New Yorkers questioned, 45.1 per cent said they had formed opinions on the guilt or innocence of Hiss, compared to only 33.8 per cent of those interviewed in Rutland, Vermont, to where Hiss sought to have his second trial removed.

36. Broeder, *op. cit. supra* note 18, at 756.

But there were unexpected results. In New York, 21.8 per cent of the interview sample believed Hiss to be guilty; 12.1 per cent thought him innocent: in Rutland, 23.1 per cent thought him guilty; only 5.9 per cent thought him innocent. The fact that less coverage of the case and less anti-Hiss press sentiment occurred in Rutland did not support the asserted conclusion that trial there would be more fair. "Apparently, the conservative predisposition of Vermonters was more effective in setting public opinion against Hiss than hostile newspaper publicity in New York."[37]

In 1953, Elmo Roper applied scientific principles to a legal issue. He was engaged by the NAACP to learn by a public opinion poll whether prejudice against a Negro, accused of the rape of a white woman,[38] was running higher in the Florida county in which the trial was scheduled than it was in three surrounding counties. Roper concluded that the atmosphere would be more temperate in the other counties and his findings were submitted with an application for a change of venue. But the court refused to consider this "new-fangled" approach to legal questions, characterizing the results of the survey as "hearsay."[39]

A different approach to the problem of "trial by newspaper" is suggested by a content analysis which sought to measure press performance in the 1948 Condon controversy.[40] Dr. Edward U. Condon, director of the National Bureau of Standards, had been denounced by the House Committee on Un-American Activities. Almost simultaneously he was cleared by the Department of Commerce under which his agency was established. Soon, however, he was the center of a tempest involving other Congressional committees, two executive departments, the FBI, learned, scientific, and juristic societies, eminent personages, and even the President of the United States. Subsequently, the Atomic Energy Commission attested to Condon's loyalty and he was cleared for access to restricted data.

The study focused on the press of New York City for an eight-month period covering the time from the original denunciation to

37. Note, *Contempt by Publication*, 59 YALE L.J. 534, 543 (1950). The same writer says that the effect of inflammatory reporting in large metropolitan communities, where it is most likely to occur, is especially open to question. The daily sensations that are repeated to a sophisticated population are seldom remembered. Judges in these communities find that the continuous succession of sensational reporting "in the end produce no impression. It is a common experience in the most notorious cases to meet a succession of talesmen who have read nothing of the matter, and an even more frequent occurrence to encounter those who can recall nothing of what they have read." People v. Broady, 195 Misc. 349, 90 N.Y.S.2d 864 (1949). Of course, the validity and reliability of the recall tests used as a basis for this statement may be open to question.

38. Irvin v. State, 66 So. 2d 288 (Fla. 1953), *cert. den.*, 346 U.S. 927 (1954), *rehearing den.*, 347 U.S. 914 (1954).

39. Irvin v. State, *ibid.*, is discussed in Spingarn, *Newspapers and the Pursuit of Justice*, Saturday Review, April 3, 1954, p. 9, and in Goldfarb, *op. cit. supra* note 14, at 837. For a discussion illustrating that all judges and lawyers do not think this way, see Note, *Public Opinion Surveys as Evidence: The Pollsters Go to Court*, 16 HARV. L. REV. 498 (1953), and JUDICIAL CONFERENCE OF THE U.S. COURTS, HANDBOOK OF PROCEDURE FOR THE TRIAL OF PROTRACTED CASES (1960).

40. Klapper & Glock, *Trial by Newspaper*, 180 SCIENTIFIC AMERICAN 16 (1949).

the final clearance of Condon. The verbal and pictorial content referring to the subject was classified according to objective criteria and rendered susceptible to statistical description.

Without attempting to interpret their findings, the researchers concluded that, taking the New York press as a whole, there was a preponderance of statements favorable to Condon. There was a wide variation among the nine newspapers in their treatment of the case, four appearing to be favorable to him and five unfavorable. Background material revived for use in the running news stories had the effect of building up the case against him by restating the original charges. All newspapers reported the House Committee's promise to give the accused scientist a hearing far more often than they reported its failure to do so.

In a much less complex content analysis, Martin Millspaugh[41] examined references made to the accused in four Baltimore newspapers at the time of the famous *Baltimore Radio*[42] case. James, a Negro, had been accused and allegedly had confessed to the murder of a little white girl. Three papers, which based their circulations on white readers, presented the case in terms deemed by the investigator destructive to James, while the one Afro-American newspaper stressed the mitigating background facts in a manner helpful to the cause of the defendant. The newspapers would appear to have been reinforcing already existing predispositions in both white and Negro communities.

CURRENT COMMUNICATIONS RESEARCH

The free press-fair trial conflict can also be examined in the context of research into the effects of mass communication. The limited knowledge available suggests that mass communication ordinarily does not serve as a necessary and sufficient cause of audience effects, but rather functions among and through "a nexus of mediating factors and influences."[43] Seldom, if ever, is mass communication a sole cause, but often it is a contributory agent which serves to reinforce pre-existing conditions. However, there may be certain residual situations in which mass communication seems to produce direct effects.[44] But the efficacy of mass communication, either as a contributory agent or as an agent of direct effect, is determined by the characteristics of the media and their messages, or by the communication situation, including for example, aspects of textual organization, the nature of the sources and medium,

41. Millspaugh, *Trial by Mass Media*, in PUBLIC OPINION AND PROPAGANDA 113-114 (Katz ed. 1954).
42. Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A.2d 497 (1949).
43. KLAPPER, THE EFFECTS OF MASS COMMUNICATION 8 (1960).
44. *Ibid.*

and the existing climate of public opinion.[45] This might suggest that we could profitably examine such variables as the emotional tone of crime reports, the extent of the mass medium's circulation, the depth of its readership or listenership, and the nature of the crime itself.

Reinforcement may be abetted by (1) predispositions and the related processes of selective exposure, selective perception, and selective retention; (2) the groups, and the norms of the groups to which the audience members belong; (3) interpersonal dissemination of the content of communications; (4) the exercise of opinion leadership; and (5) the nature of mass media in a "free enterprise" society.[46]

Susceptibility toward an attitude change may be inversely proportional to the intensity of the initial attitude.[47] Communication content may be more effective in influencing public opinion on new or unstructured issues.[48] Communication may be extremely effective in creating opinions on matters about which the audience is unlikely to have prior opinions, and may be capable of "inoculating" audience members, rendering them more resistant to later communications suggesting a contrary view.[49] Fear appeals may readily influence opinions.[50] A prestige source may greatly facilitate persuasion, and a source featured by the media may gain in prestige. It is a matter of "common observation that the media are regarded by many in their audience with considerable awe, and that media recognition or espousal *ipso facto* confers a degree of prestige upon the concept, person, or agency so recognized."[51] An attitude frequently changes from a subordinate to a dominant position when it is justified by the authority of print.[52] Persuasive communication which explicitly states conclusions is more likely to be effective than those which allow audience members to draw their own conclusions. Action recommendations, also, seem to be more likely followed as they are specific and explicit.[53]

There is also evidence that in critical social situations the mass media may play a more crucial role.[54]

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45. *Ibid.*
46. *Id.* at 19.
47. Tannenbaum, *Initial Attitude Toward Source and Concept as Factors in Attitude Change Through Communication*, 20 PUBLIC OPINION Q. 413 (1956).
48. Berelson, *Communications and Public Opinion*, in COMMUNICATION IN MODERN SOCIETY 496 (Schramm ed. 1948).
49. Klapper, *op. cit. supra* note 40, at 60.
50. Janis & Feshbach, *Effects of Fear-Arousing Communications*, 48 J. ABNORMAL & SOCIAL PSYCHOLOGY 78 (1958).
51. Lazarsfeld & Merton, *Mass Communications, Popular Taste and Organized Social Action*, in THE COMMUNICATION OF IDEAS, at 104 (Bryson ed. 1943).
52. WAPLES, BERELSON & BRADSHAW, WHAT READING DOES TO PEOPLE (1940).
53. Klapper, *op. cit. supra* note 40, at 130. For a summary of psychological findings, see BRADSHAW, PERSUASION (1959).
54. Cantril, *The Invasion from Mars*, in READINGS IN SOCIAL PSYCHOLOGY 619 (Newcombe & Hartley eds. 1947), and Johnson, *The "Phantom Anesthetist" of Mattoon: A Field Study of Mass Hysteria*, *id.* at 639.

Wilbur Schramm suggests that the mass media place our broad social environment in perspective, correlate society's responses to this environment, and transmit the social heritage from one generation to another. They also affect the social mores by contributing heroes and myths to the culture, and, by their power either to mention or ignore, serve as arbiters of social status. And the media assist the larger community in achieving some degree of consensus.[55]

The sociological concept of a "two-step flow of communication,"[56] although it has been substantially refined and modified,[57] posits an indirect flow of information through groups via opinion leaders and influentials who are inclined to expose themselves more frequently and more intensely than others to the mass media. The concept implies a network of individuals socially interconnected in functional groups[58] and reference groups[59] through which mass communications messages move in a patterned way; it rejects the notion of an audience as a mass of discrete, unorganized individuals linked directly to the media. The relay function of opinion leaders, however, may be less important for the sort of bulletin news of high public interest which is often received directly from the mass media.[60]

At the very least, these studies suggest that there is probably no simple and direct cause-effect relationship between pre-trial and trial press comment and jury verdicts—although the converse has been held as a law by most Anglo-American courts. They have looked "too much for the messages the media bear and too little for the ways in which the audience actively participates and shapes its experience of the media."[61] At the same time, Joseph Klapper warns that there is a danger in blindly minimizing the effects and potentialities of mass communications:[62]

> In reaping the fruits of discovery that mass media function amid a nexus of other influences, we must not forget that the influences nevertheless differ. Mass media

55. Schramm, *The Effects of Mass Communication: A Review*, 26 JOURNALISM Q. 407 (1949).

56. Katz, *The Two-Step Flow of Communication: An Up-To-Date Report on a Hypothesis*, 21 PUBLIC OPINION Q. 61 (1957).

57. See Deutschmann & Danielson, *Diffusion of Knowledge of the Major News Story*, 37 JOURNALISM Q. 345 (1960), Deutschmann & Pinner, *A Field Investigation of the Two-Stage Flow of Communication*, unpublished paper delivered at the annual meeting of the Association for Education in Journalism at Pennsylvania State University, August, 1960, and Deutschmann, *Viewing, Conversation, and Voting Intention*, in THE GREAT DEBATES (Kraus ed. 1962). These studies suggest that initial mass media information on *important* events goes directly to individuals and is not relayed to any great extent. See also ROGERS, DIFFUSION AND INNOVATIONS 98-102 (1962). For a useful review of research in this area, see Troldahl, *A Field Experimental Test of a Modified "Two-Step Flow of Communication" Model*, a paper read at the annual meeting of the Association for Education in Journalism, at the University of Nebraska, August, 1963.

58. SCHRAMM, THE PROCESS AND EFFECTS OF MASS COMMUNICATION 360 (1954).

59. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 336 (1957).

60. Deutschmann & Danielson, *op. cit. supra* note 57, at 345. For one of the best resumes of the sociological theory of mass communication, see Riley & Riley, *Mass Communications and the Social System*, in SOCIOLOGY TODAY 537 (Merton, Brown & Cottrell eds. 1959).

61. Riesman & Denney, *Do the Mass Media "Escape" from Politics?*, in READER IN PUBLIC OPINION AND COMMUNICATION 327, 332 (2d. ed. Berelson & Janowitz 1953).

62. Klapper, *op. cit. supra* note 40, at 130.

> of communication possess various characteristics and capabilities distinct from those of peer groups or opinion leaders. They are, after all, media of *mass* communication, which daily address tremendous cross-sections of the population with a single voice.

Under different conditions and in other situations, the mass media may be responsible for extensive, dramatic, and even dangerous effects.

If a tentative conclusion may be ventured at this point, it is that there is no empirical evidence to support the view that extensive, or even irresponsible, press coverage of a court case destroys the ability of jurors to decide the issue fairly. In the meantime the problem is ripe for study, and until the law loses some of its sacrosanctity, and scientifically accumulated data is available, courts and legislatures will have to act on little more than hunch and intuition.

Unfortunately, it is doubtful whether the courts, the press, and the legislatures in concert can do much to neutralize prejudicial predispositions of jurors to the point of making the criminal trial completely antiseptic. Press comment appears to make its strongest impression when conforming to stereotypes already in the public mind. For this reason, such comment may follow community bias as often as it instigates it. This would suggest that the press is particularly obligated to exercise self-restraint and moral judgment in cases involving atrocious sex crimes, especially where children are the victims, in cases of espionage or treason, and in cases where members of minority groups are before the court, for example, Negroes in many communities. Here the newspaper may act as a catalytic agent in a situation where there is already an acute sensitivity and where community prejudices are already apparent.

In the meantime, the press does not intend to divorce itself from the parade of crime and corruption in American life; and it owes a duty to society not to remain silent if it believes the judicial system has misused its power or has departed from a reasonable concept of justice. Newspaper prying has led to the exposure of corrupt judges, prosecutors, police officials and government officials, and society can ill afford to be denied such information.[63]

As a minimum, responsible segments of the press ask for a systematic study of the free press-fair trial complex before either legislation or an angry revival of the contempt power is imposed upon it.

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63. Editor & Publisher, Feb. 2, 1957, p. 48; *id.*, Dec. 7, 1957, p. 13; *id.*, Dec. 14, 1957, P. 54; *id.*, Dec. 21, 1957, P. 46; *id.*, Dec. 28, 1957, P. 44; *id.*, June 20, 1959, P. 15.

SUGGESTIONS FOR FURTHER RESEARCH

As a first step in shedding light on the vexing problem of "trial by newspaper," exploratory studies are needed to formulate relevant hypotheses consonant with social theory. The basic issue is whether the right to a fair trial can be prejudiced by news reports. Apart from what lawyers and judges may have concluded on this matter, it is by no means a settled question in the social sciences. Prejudice is said to occur when a juror's partiality is disturbed, when his judgment of the issues before him is affected either for or against any party to a trial by the intrusion of material that would not otherwise reach him.[64] An impartial jury is one which knows nothing about a case aside from what has been presented in evidence; or one which, though it has been buffeted by outside information, is able to disregard it and decide the case as if no such extraneous knowledge was available.

I. *Experiments.* Pull real jurors from jury pools and have them deliberate on recorded mock trials. Systematically vary the exposure of different juries to news reports of varying intensities (from the highly inflammatory to the highly responsible). The controlled experiment is the most objective method of measuring the effect of stimuli, an effect which may be either conscious or unconscious. Although an artificial situation, the experience of Jury Project suggests that experimental juries take their task seriously and behave much like actual juries.

If we are to attain a distribution of unbiased verdicts, the experimental trial will have to be one about which our jurors have heard nothing. Some sets of juries will then be exposed to news clippings, telecasts and broadcasts commenting on the case and then compared with the "antiseptic" sets of juries to determine if their verdicts are significantly different within a specified statistical confidence level. Also, the evidence properly introduced at the mock trial will have to be considerably less than conclusive, so that there is a high probability that without the prejudicial material the defendant would have been found not guilty. Ideally we would begin with a case in which there is both a prior criminal record and a repudiated confession, along with rather weak admissible evidence of the defendant's guilt, and one in which the nature of the crime would stir public emotions. A total of about 200 experimental trials would be required to cover all aspects of the problem and permit a variation in the intensity of the news material, the nature of the cases, and the impact of judicial instructions.

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64. Letter from Justice Bernard S. Meyer of the Supreme Court of the State of New York to Professor Maurice Rosenberg, Director of Columbia University's Project for Effective Justice, Nov. 26, 1962.

A more complex experiment, and one more difficult to plan and perform, could be constructed in the following manner:

	Experimental Group I	Experimental Group II	Control I	Control II (real jury)
1. Pre-test of attitudes based pre-trial news reports	X1	no	X1'''	no
2. Read news reports of trial	yes	yes	no	no
3. Post-test of attitudes	X2	X2''	X2'''	X2''''

The two experimental groups and control group I would ideally spend as much time in the courtroom during the course of the trial as the real jury. These three groups would also deliberate, under substantially the same conditions as the real jury, and reach a verdict. The eight-study model is necessitated by the fact that the real jury could not be given the pre-test and would be admonished by the judge not to follow press reports of the trial. The pre-test would gauge the effect of the pre-trial publicity; the post-test would seek to measure the cumulative effect of the pre-trial and trial publicity. Such an experiment would undoubtedly require the consent and co-operation of the court. Its major advantage, assuming that as many extraneous variables as possible could be controlled, would be its validity; its major problem, the randomization of the sample groups.

II. *Interviews.* Real jurors would be interviewed at the conclusion of a trial to determine what factors, including press reports, influenced their decision. Interview responses could also be compared with the same juror responses on voir dire examination to measure the effectiveness of this procedure in avoiding prejudice. The weakness of this technique, of course, is that we are not certain that we can rely on juror testimony, especially in cases which have received wide publicity. Random samples of jury pool members could be interviewed immediately before and immediately after the same trial, but before the return of a verdict, to measure community sentiment on guilt or innocence and to compare with the interviews of the actual jurors.

Interview schedules could also be designed to solicit the opinions of judges, lawyers, crime reporters, and police officials as to their estimates of the effects of news reports in either impairing or serving the administration of justice.

III. *Content Analysis.* Content analysis could be used to com-

pare the transcript of a notorious trial with the full news coverage of the trial in (a) a newspaper tending to sensationalize the proceedings, and (b) a newspaper tending to provide careful, accurate and responsible coverage. This technique could also be used to check the pre-trial coverage of a criminal case in a single newspaper, or a number of newspapers in order to determine (a) source of information, e.g., percentage from court officials, next of kin, and newspaper reporters per se, and (b) the general tenor of material from each source.

In conjunction with juror interviews, content analysis could also be used in the same sample of jurisdictions to measure the actual extent and content of news coverage, particularly in advance of the trial. This would permit the cross-analysis of two sets of data: the actual coverage, and the perceived coverage as reported by the jurors. This would tell us something about the kinds of cases where press "contamination" of prospective jurors is most frequent; and it would also provide some idea of the relative effect of varying degrees and kinds of coverage on the minds of jurors.

IV. *Participant Observation.* As a cross-check a trained researcher would involve himself with police, news reporters, and prosecutors at the outset of a criminal case. He would keep track of the origin and flow of information, and accumulate a file of media reports. Another participant observer would follow the trial and compare the daily reports in the mass media with the proceedings in court, noting information denied to the jury but available in the print or broadcast media. He would also report prejudicial information revealed to the jury but not disseminated through the media.

The above research recommendations are contained in my doctoral dissertation,[65] in a report prepared for the National Conference of State Trial Judges by the Bureau of Applied Social Research and the Graduate School of Journalism Project for Effective Justice at Columbia University,[66] and in a proposal submitted to The Brookings Institution.[67]

Beyond the immediate objectives of these research proposals loom the questions: how effective are existing procedural remedies; and is there evidence to support legislation which would restrict crime news and court reporting or otherwise limit the freedom of the press? There is a new ring of urgency to these questions: "The

65. Gillmor, *"Trial by Newspaper": The Constitutional Conflict between Free Press and Fair Trial in English and American Law* (unpublished dissertation, University Microfilms No. 62-1781). See also Gillmor, *Free Press versus Fair Trial: A New Era,* 41 JOURNALISM Q. 27 (1964).
66. *The Effects of News Media On Jury Verdicts: Examination of the Problem and a Proposal,* study prepared for the National Conference of State Trial Judges by the Bureau of Applied Social Research and the Graduate School of Journalism Project for Effective Justice, Columbia University, May 4, 1964.
67. The Brookings Institution, Government Studies, *Mass Media Coverage of Governmental Processes: Project Proposal* (1964).

burden of insuring that appropriate action is taken to establish ethical standards of conduct for the news media must also be borne . . . by State and local governments, by the bar, and ultimately by the public. The experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial."[68]

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68. REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 242 (1964).