Nebraska Law Review

Volume 45 | Issue 1 Article 8

1966

The Impact of the Vicinage Requirement: An Empirical Look

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Leading Article

THE IMPACT OF THE VICINAGE REQUIREMENT: AN EMPIRICAL LOOK

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I. INTRODUCTION

Perhaps the late Dean Ames and many of his contemporaries would have blanched at what follows. Naturally it is here hoped otherwise. Indeed, just cataloging the legal research undertakings of such men would be supererogatory and presumptuous. Still, research-wise, legal professional orientations have unmistakably lately undergone marked change. It is no longer professionally adequate to teach chiefly out of the law library. For good or ill, (teachers spending the bulk of their time acting like Diogenes is no unmixed blessing), legal academicians largely now study what happens and then teach or preach in field research terms.

Of course, what appears here does not compare with the exhaustive empirical works recently published or currently in progress under the aegis of such foundations as The American Bar[1] or Vera[2]. This is rather an introductory sampling article drawn from data generated by what is now familiarly known as the University of Chicago Jury Project.[3] The Jury Project, of course,

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* Professor of Law, University of Toledo. The writer is deeply indebted to Professor Harry Kalven, Jr. of the University of Chicago Law School for seeing many points which would not otherwise herein appear. Unfortunately, the name of the judge who made this undertaking possible cannot be revealed. Suffice it to say that he is a man deeply concerned about the administration of justice and one of the finest judges currently sitting on a federal bench.

1 See, *e.g.*, Hazard, *The Research Program of the American Bar Association*, 51 A.B.A.J. 539 (1965); LA FAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1964). See also SHERRY, THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES (1955).

2 See, *e.g.*, NAT'L. CONFERENCE ON BAIL AND CRIMINAL JUSTICE INTERIM REP. (1965); BAIL IN THE UNITED STATES: 1964 (1964). See also POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963); and the various authorities cited in LOCKHART, KAMISAR & CHOPER, CONSTITUTIONAL CRIMINAL PROCEDURE 96 (1964); and PAULSEN & KADISH, CRIMINAL LAW AND ITS PROCESSES, 931-33 and 1044-47 (1962).

3 See generally Broeder, *Plaintiff's Family Status as Affecting Juror Behavior: Some Tentative Insights*, 14 J. PUB. L. 131 (1965); Broeder, *Voir Dire Examination: An Empirical Study*, 38 So. CAL. L. REV. 503 (1965); Broeder, *The Negro in Court*, 1965 Duke L.J. 19; Broeder, *Previous Jury Trial Service Affecting Juror Behavior*, 506 Ins. L.J. 138 (1965) (reprinted by Matthew Bender in 1965 PERSONAL INJURY JOUR-

was made possible by a generous Ford Foundation grant to the University of Chicago Law School.[4] The author was associated with the Project from 1953-1956.

Undertaken during this period was a study of twenty-three consecutively tried jury trials in a federal district court in the Midwest. The author personally observed all of such trials from beginning to end. All but a few lawyers serving in them were intensively interviewed, and with the court's permission, 225 jurors participating in such cases were interviewed. The ordinary juror interview ran two and one-half hours.

Obviously, valid statistical generalizations cannot be drawn from an undertaking so limited. At the same time, experimental data concerning jurors, however accurate and insightful, possess an indefinable sterile strain. Accordingly, while the cases in question are few and all different, hopefully what follows in some small way supplements the large body of largely experimental Jury Project data shortly scheduled for publication.[5]

Insofar as the data presented herein are concerned, there were

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NAL); Broeder, *University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959); Broeder, *The Jury Project*, 26 S.D.B.J. 133 (1957); and Broeder, *Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954). See also Broeder, *Jury*, 13 ENCYCLOPEDIA BRITANNICA 205 (1963 ed.).

According to the 1950 census, the approximate population of the three cities in which court was held was 120,000.

[4] For Jury Project data generally, see Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 24 Ins. Counsel J. 368 (1957). See also Meltzer, *A Projected Study of the Jury as a Working Institution*, 387 ANNALS 97 (1953).

For other Jury Project publications, see ZEISEL, KALVEN AND BUCHHOLZ, DELAY IN THE COURTS (1959); Kalven, *A General Analysis of and Introduction to the Problem of Court Congestion and Delay*, ABA SECT. INS. N. & C. L. 322 (1963); Kalven, Zeisel and Buchholz, *Delay in the Court*, 15 RECORD of N.Y.C.B.A. 104 (1960); Kalven, Zeisel and Buchholz, *Delay in the Court*, 8 U. CHI. L. REV. 23 (1959); Kalven, *The Jury, the Law and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958), reprinted in 7 U. CHI. L. REV. 6 (1958); Zeisel & Callahan, *Split Trials and Timesaving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963); Zeisel, *Splitting Liability and Damage Issue Saves 20 Per Cent of the Court's Time*, ABA SECT. INS. N. & C. L. 328 (1963); Zeisel, Kalven & Buchholz, *Is the Trial Bar a Cause of Delay?* 43 J. AM. JUD. SOC'Y. 17 (1959).

[5] Jury Project books on criminal justice and on the impact of the Durham Rule are scheduled for almost immediate publication. See Durham v. United States, 237 F.2d 760 (D.C. Cir. 1956). Durham v. United States, *supra* of course, holds that the criminal insanity test is "mental disease or defect." See generally, De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339 (1955).

sixteen civil cases and seven criminal cases. For obvious reasons, all names and places herein mentioned have been changed.

II. THE DATA

Specifically, the purpose here is to describe the use made by jurors of the assorted store of information one acquires about his neighborhood by living there—local community customs, problems and affairs, local geography—and of the jurors' contacts with other community members, many of whom get involved in jury trials as parties, lawyers, witnesses, or jurors. How important was the vicinage requirement in the cases studied?[6] The discussion has five parts, each dealing with a separate aspect of the question, viz., juror out-of-court knowledge of or acquaintance with (1) local conditions, (community problems, locations, directions, etc.); (2) the parties; (3) the witnesses; (4) the lawyers; and (5) the other jurors. An effort is made throughout to indicate the extent to which such matters were elicited on *voir dire*.

A. Juror Knowledge of Local Conditions

Juror knowledge of local conditions played a part in the decisions reached in ten of the fourteen civil cases in which the subject was investigated and in three of the seven criminal cases studied.[7] The subject was not investigated either in *White*, a personal injury case settled just after the judge instructed the jury, in *Phillips # 1*[8], another personal injury case where the jurors were not interviewed until two and one-half years after the trial, nor in another personal injury case otherwise exhaustively studied. *Turner* and *Thomas* are the only personal injury cases in which such knowledge, though made the subject of inquiry, did not seem to play a part, a circumstance which in *Turner* is most probably

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[6] The importance of the vicinage requirement, along, of course, with other matters, was recently highlighted by Swain v. Alabama, 85 Sup. Ct. 824 (1965). See also United States v. Barnett, 376 U.S. 681 (1964); Green v. United States, 356 U.S. 165 (1958). See generally, Paulsen and Kadish, *op. cit. supra* note 2, at 1101 et. seq. As the aforementioned authorities deal principally with the contempt power and jury trials, the classic study on the meaning and impact of venue and vicinage problems, together with their interrelationship, remains, Blume, *Jury Selection Analyzed: Proposed Revision of Federal System*, 42 Mich. L. Rev. 831 (1944). Also see authorities cited therein.

[7] The facts of the various cases are not herein set forth except insofar as they are necessary to explain a particular point.

[8] This was a personal injury and property damage action resulting from a two truck collision. The case was tried twice, the first highly unjustified verdict having been upset by the Circuit Court of Appeals.

explained by the fact that the accident giving rise to the litigation occurred thousands of miles from the vicinage. Of the four criminal cases in which such knowledge was apparently of no importance, three—*Williams*,[9] *Goodman*[10] and *Brown*[11]—were cases where proof of defendant's guilt was overwhelming and where the deliberations lasted approximately one-half hour. *Meyer*,[12] however, as will later be shown,[13] was different.

(1) *Personal Injury Cases*

The relative impact and importance of "vicinage type" knowledge materially varied from case to case. In the two *Ford*[14] cases, for example, the only such knowledge of importance was that several jurors were familiar with the road upon which the accident occurred, realized that it was "unusually narrow" and accordingly concluded that defendant's employee was driving too fast. Similarly, familiarity with the intersection constituting the scene of the accident in *Sutter* was a factor causing at least nine of the eleven jurors personally interviewed to conclude that defendant was not negligent. Particularly was this true of two jurors who knew of numerous other accidents at such intersection, caused, they had "heard," by persons, (such as plaintiff), driving onto the preferential highway without properly gauging the speed of oncoming vehicles, (such as defendant's vehicle). Mention was made of this in the juryroom, although with what effect is unknown. However, no such evidence was adduced at the trial.

A more striking illustration of the use made by jurors of their familiarity with the scene of the accident is afforded by *Phillips # 2*.[15] Stillman, the strongest pro-defendant juror, claimed to have driven over the scene "hundred of times" and was the only juror allegedly familiar with the scene. This accordingly provided Stillman with the foundation for the best of his several

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[9] This was a Mann Act case. Defendant was charged with transporting his wife across a state line in order to place her in a house of ill-fame.

[10] This was a Dyer Act prosecution.

[11] This was likewise a Dyer Act prosecution.

[12] Meyer was also prosecuted under the Dyer Act.

[13] See text at pp. 106-07 *infra*.

[14] *Ford* was a personal injury case involving two trucks. The first trial resulted in a hung jury, the second in a substantial plaintiff's verdict. Plaintiff's major claim was for property damage losses.

[15] *Phillips*, like *Ford*, was tried twice. Defendant's judgment in the first trial was reversed by the Circuit Court of Appeals. Retrial resulted in a substantial plaintiff's verdict. The litigation is exhaustively reviewed in a forthcoming article in the Natural Resources Journal.

tenuous jury room arguments that defendant was not liable, namely, that the center-lane of the three-lane highway in question was raised two inches and that this explained why defendant's employee failed to turn into such lane after observing a possible obstruction in the lane in which he was traveling, an argument which struck two jurors as possessing "considerable force." Stillman claimed that his knowledge of the scene was one of the most important factors militating against liability. Here, as in *Sutter*,[16] no evidence was introduced bearing upon the truth of the proferred information, and the question was at no time referred to by counsel.

However, the examples thus far considered, though important for individual jurors, seem to have had little, if any, impact upon the verdict. Living in the vicinage was, however, vitally important in *Grey, Drake*[17] and *Field*, all personal injury actions.

Plaintiff in *Grey* was an assembler for Electronics, Inc. where Juror Forest was employed as an engineer. Another juror, Burns, a grocer, worked as an Electronics, Inc. laborer for several years during World War II. Both men were accordingly incensed at defendant's lawyer for having persuaded an Electronics, Inc. plant physician to produce certain X-ray pictures of plaintiff's chest taken by such doctor prior to the accident. This action, they felt, was a gross breach of propriety. As Juror Burns put it: "I wouldn't want that physician testifying against me if I was involved in a lawsuit. Those examinations are supposed to be confidential." Both men admitted that their feelings in this regard caused them to increase damages. Defendant's federal personal injury pre-discovery rights, it appears, are not in practice always an unmixed blessing.

Several *Drake* jurors were employed by large local industrial concerns and accordingly "knew" that it was "standard practice" for company representatives to contact injured workmen who, after being ordered to return to work by a local company physician, failed to do so. Such jurors therefore concluded that defendant's "main negligence" consisted in failing to contact plaintiff under such circumstances. Damages were therefore increased to punish defendant and to preserve local industrial "standards of care" concerning injured workmen.

Knowledge of local conditions was important in various ways in *Field*. Thus one juror, Foreman Grimsby, a steel fabricator and employer of several truck drivers, was aware of the local truck-

[16] See text at 102 *supra*.

[17] See text immediately following.

driver wage-scale, knowledge which he used in calculating plaintiff's damages, plaintiff's intestate having been employed as a truck driver in the locality. No evidence was adduced on the subject during the trial. Grimsby explained his damage formula to fellow jurors but with what effect is unknown. Grimsby also employed his knowledge of prevailing local wages for unskilled labor, this being a "relevant" consideration in figuring the amount of damages to a *Field* property-damage plaintiff, one of the elements of such plaintiff's damages—as Grimsby erroneously understood the instructions—being the value of plaintiff's labor in repairing his damaged vehicle. Such knowledge, communicated to his fellows during the deliberations, undoubtedly raised damages. No evidence was introduced on this subject either and, even if proferred, would not, under applicable local law, have been admissible.

Smyth, another *Field* juror, (a farmer favoring extremely low damages), differed with Grimsby concerning the local truck-driver wage-scale. While saying nothing on the subject during the deliberations, he thought that "they [truckdrivers] around where they [*i.e.*, deceased and plaintiff-wife] live don't get no $1.70 an hour like Mr. Grimsby said," and accordingly discounted Grimsby's statement and reduced the amount of damages he personally was willing to award. Smyth was also aware of the cost of raising children on a farm, had in fact raised a child on a farm only a few miles from the farm upon which plaintiff's children would be raised, and knew and argued that such costs ("no more than $10.00 a week per child") were low vis-a-vis city child-raising costs. This argument undoubtedly reduced damages. Smyth's information was also not in evidence.

Knowledge of local conditions in *Peters* and *Rose* (personal injury cases) was much more important than any evidence introduced during the trial of such cases. In *Peters*, most jurors were aware of the location of Richfield City (consisting largely of bars and burlesque places) both with reference to Pershing City from which plaintiff was returning at the time of the accident and Lewisville, where the accident occurred. Nothing was said about Richfield City during the trial. But, as Juror Blair phrased the notion: "He [plaintiff] was proceeding from the west towards the east, whereas if he had *really* been coming from Pershing City he would have been coming . . . [the other way] . . . . I don't know whether he stopped in Richmond or not, but I do know that it took him an hour and forty-five minutes to come seven miles."

Several jurors, however, were not as judicious and actually concluded that plaintiff stopped for drinks in Richmond.

Second, Mrs. Snell, another *Peters* juror, was personally acquainted with: (1) a young Polish girl (not a witness) whose

marriage plaintiff had been celebrating for the twelve hours just prior to the accident and (2) with the amount of liquor which had been ordered for the celebration, "gallons and gallons." Mrs. Snell's knowledge in this regard caused her to view with complete disbelief plaintiff's testimony that he had only drunk "a couple of beers" at the celebration and was extremely important in causing her to vote against liability. However, Mrs. Snell did not impart her knowledge to her fellow jurors during the deliberations ("that would have been improper"), although she did inform one juror privately, Mrs. Stoner, a close personal friend with whom she traveled to and from court during the trial. Mrs. Stoner, who sustained a nervous breakdown in part on account of her jury service, refused to be interviewed.

Again, most of the *Peters'* jurors were familiar with the street in Lewisville upon which the accident occurred. This was important for it was plaintiff's contention that he was injured in an "unmarked crosswalk" the existence of which, under the court's instructions, depended upon the existence of an "intersection." The existence of an "intersection," in turn, depended upon whether a certain lane provided for traffic at the place where plaintiff attempted to cross the street "conflicted with" or "merged into" another lane provided for certain other traffic. If plaintiff was found to be within an unmarked crosswalk, defendant had a higher degree of care. Several jurors used their personal knowledge to conclude that no "intersection" and hence "no unmarked crosswalk" existed. However, certain others, also familiar with the scene, felt that plaintiff was within an "unmarked crosswalk" because they knew that pedestrians frequently cross the street where plaintiff said he crossed. "There is a bus stop there and the people getting off always cross there." This, while legally irrelevant, was highly influential. A related point is that Juror Weed purposefully refrained from driving over the scene because several of his fellow jurors in a railroad accident case tried a week before had criticized him for visiting the railroad crossing constituting the scene of the accident in that case. The railroad crossing in question, incidentally, was approximately twenty miles from Weed's home. He visited it on the evening of the first day of trial, and, after doing so, concluded that defendant railroad was not liable. As this case ended with a directed verdict for defendant, the jurors were not personally interviewed.

Several *Rose* jurors were familiar with the highway at the scene of the accident, a twenty-five miles per hour speed zone on U.S. Highway # 13, in Prescott, State X, and, furthermore "knew," as one of the jurors phrased it, "that those trucks barrel through

Prescott every Sunday morning." The startling consequence was these jurors' conclusion that plaintiff should not prevail because he, as a long-time Prescott resident, was contributorily negligent in walking onto the highway knowing the speed at which truck drivers proceed through the town on Sundays. Such notion was repeatedly stated during the deliberations. The uncontradicted evidence showed that defendant's employee was traveling forty miles per hour.

(2) *Criminal Cases*

Though knowledge of local conditions was a factor in proportionately more of the civil than of the criminal cases studied, there is no doubt that such knowledge, when a factor in the criminal cases, was more important.[18] One criminal-case defendant was convicted and one ultimately acquitted in part on account of such knowledge, while a third, who was acquitted, narrowly missed having to undergo another trial.

The first of the three cases was *Meyer*, a Harrison Act case. Several of the jurors, residents of the city where defendant allegedly possessed and sold narcotics, were familiar with the location of the tavern at which such alleged sale and possession occurred and accordingly "knew" that defendant lied when testifying that he did not know of the tavern. This was because defendant gave as his address a house and street number these jurors knew was located only two blocks from the tavern. Two *Meyer* jurors realized this on the first day of the trial, but, in order to make sure, checked the tavern's location against defendant's address that evening on their way home and subsequently imparted such information to their fellow jurors during the deliberations. This was the primary reason for defendant's conviction. Without it, most jurors opined, an acquittal or a hung jury would probably have resulted.

Of less importance to Meyer's conviction, although still a factor, was the realization of all *Meyer* jurors that dope peddling was one of the community's most pressing problems. Indeed, the husband of one juror, Mrs. Temple, was a vigorous member of a

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[18] The United States Supreme Court may decide this year whether an unauthorized view of the scene of a crime by the jurors deprives a criminal defendant of a fair trial. The state court held that although such a view was improper it was not "such an impropriety as to require the granting of a new trial. . . ." People v. Delucia, 15 N.Y.2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377 (1965) *appeal pending* 34 L.W. 3016 n.195 (1965). The effect on the vicinage requirement of a decision invalidating the view is a matter of prophecy.

local crime commission whose principal activity at the time of trial was an anti-dope campaign. The teenager son of another juror, Stillman, was offered a marijuana cigarette approximately one week prior to trial, a circumstance, it seems clear, causing Stillman to vote for acquittal on the first ballot in order to show his "impartiality." Neither the Temple or Stillman experience was elicited on *voir dire,* although Stillman stated during his interview that he should "perhaps have spoken up and disqualified myself, I felt so strongly about the incident." Stillman's silence was probably due to his love of jury service on criminal cases and to the status such service gave him among his fellow employees at "the plant."

The second case is *Ward,* a prosecution of an ex-East Parma police officer for stealing a box of trousers from a post office. One of the jurors, Mrs. Edmonds, a resident of East Parma, "knew" that the East Parma police force was "rotten from the top right down to the bottom" and that "you can't believe anything good that is said about them, because it isn't true and you should believe everything bad, because it's probably true, and then some." She "knew" this both from personal experience in dealing with the East Parma police (she once bribed them to release her husband from a serious criminal charge and had frequently bribed them on behalf of her "Equality Party" precinct constituents) and from "just living here and talking to people." This was important because defendant's main defense was that the Government's star witnesses, all East Parma police officers, were "out to get him" because he had opposed their illegal mechanations before being discharged from "the force." Mrs. Edmonds' poor opinion of "the force" was her main reason for wanting to acquit. She, along with two of her colleagues, hanged the jury. Defendant was acquitted on retrial.

Mrs. Edmonds freely expressed her opinion of "the force" during the deliberations (without, however, referring to its basis), but her argument had no effect upon pro-conviction jurors. Her "knowledge," of course, was not elicited on *voir dire.* Interestingly, the United States Attorney in Lewisville, where *Ward* was tried, had for several years followed the policy of peremptorily challenging all East Parma veniremen. Though this policy was not followed in *Ward,* since *Ward* and because Government counsel interviewed one of the *Ward* jurors, it is again in force.

As it turned out, Mann Act defendant Cooper got an acquittal. But just barely. Two jurors, Mrs. Logan and Mrs. Cornel, were active anti-vice campaigners, staunch conservatives, and fully aware of the political and social conditions giving rise to the prose-

cution, namely, that the liberals in control of St. Francis County, where defendant was tried, consistently refused to arrest prostitutes. They knew, also, that the instant prosecution was initiated by the United States Attorney on the petition of several residents of St. Francis County and that defendant's conviction was necessary if such county's disorderly houses were to be closed. This was an important consideration inducing both women originally to vote for conviction and for Mrs. Logan to hold out for five hours.

However, so far as two other *Cooper* jurors were concerned, living in the vicinage was in part responsible for defendant's acquittal. Jurors Bean and Frank were Roman Catholics and knew both the location and familiar name of St. Francis County's largest Roman Catholic church, "The Sanctuary" (where defendant claimed he was reforming), and accordingly supposed that Government counsel was likewise aware of this. These men were incensed with Government counsel (and with the Government's case against defendant), when counsel ridiculed defendant's inability to give the Church's formal name and its address. For they did not know specifically of such matters either and felt that counsel's statements were intended as "slurring references" to the Roman Catholic Church.

B. Juror Contacts with Parties

Such contacts existed and affected the thinking and behavior of one or more jurors in three cases, *Thomas, Grey,* and *Field,* all personal injury actions. In none of these cases were such contacts elicited on *voir dire* although in one instance the nature of the contact was squarely covered by *voir dire* questioning. This was *Thomas* where one juror, Powers, had once been involved in a railroad-crossing accident with one of defendant's freight trains. Though, in Power's opinion, the accident was solely due to his own negligence, the railroad had "generously" reimbursed him for all of his out-of-pocket expenses. "They treated me fairly, too fairly, from the point of view of the railroad's stockholders." Accordingly, Powers "knew" that defendant would not welch on any "honest or even half-way honest" obligation and that plaintiff's claim must have been, as contended by defense counsel, completely fraudulent. There seems little doubt, notwithstanding Power's denial, that his prior relationship with defendant was one of the factors causing him originally to vote against liability. Especially is this true in view of his silence when the venire was asked whether anyone had ever had any dealings with either of the litigants and whether anyone had been involved in a "serious" accident.

Juror Sumners in *Grey*, a personal injury case, was well acquainted with plaintiff's mother, father, and brother and had even attended high school with plaintiff though he had never actually met her. Sumners was an executive at the bank at which the plaintiff's family did business. Furthermore, he knew of the "unfortunate circumstances" surrounding plaintiff's marriage to a Congressman's son (only the bare fact that plaintiff was divorced was in evidence) and that she had been badly treated and was forced to endure numerous personal indignities. While Sumners denied that such knowledge had any effect upon his thinking, the fact that an obviously conservative bank executive should prove to be plaintiff's most forceful juryroom champion and favor higher damages than any other juror save one is unusual. The point is strengthened by the circumstance that Sumners remained silent when the venire were asked whether anyone was acquainted with plaintiff.

In addition to Sumners, Mrs. Woods, another *Grey* juror, while personally unacquainted with plaintiff or any of her friends or relatives, did know of her "unfortunate marriage" and discussed it with Sumners during trial. However, the effect of her knowledge in this regard is not known.

Smyth, a *Field* juror, while personally unacquainted with the property-damage plaintiff in such case,[19] was aware of such plaintiff's "outstanding reputation as an honest businessman" and, accordingly, placed great importance upon his testimony. Both men were engaged in different aspects of the grain business. Smyth failed to disclose his indirect contact with plaintiff on *voir dire*.

C. Juror Contacts with Witnesses

Such out-of-court contacts are known to have existed and to have played a part in the thinking of one or more jurors in four of the eleven civil cases in which such contacts were investigated. None of the criminal case jurors was acquainted with any witnesses. In none of the civil cases were such contacts elicited on *voir dire*.

The contact's effect was minimal in but one case, *Sutter*. Here, Juror Ives was personally acquainted with one of defend-

[19] There were many plaintiffs in *Field*. Basically, however, the case was a wrongful death action for the benefit of the surviving widow and two baby girls. A complete account of the *Field* trial is shortly scheduled for publication by Little-Brown and Co.

ant's witnesses and with his family. According to Ives, "None of them is very reliable. I wouldn't base anything on what any of them said unless there was some other basis for doing so." Accordingly, Ives was led to "throw out" the witness' testimony, which went to the heart of defendant's defense, namely, that plaintiff drove into a preferential highway without stopping for the stop sign on an intersecting nonpreferential highway. However, Ives concluded that defendant was not liable on other grounds.

The situation differed in the remaining three cases. Thus in *Drake*, an FELA case, Juror Harper's chance acquaintance with two defense medical experts probably raised the level of plaintiff's award by several thousand dollars. This was because Harper had contacted both just prior to trial in order to remedy a severe back pain and had been told that the cause of his pain, "like the cause of most back pains," could not objectively be determined. In view of the doctors' statements *to him*, Harper viewed with complete disbelief their positive witness-stand assertions that plaintiff's back pains, if he had any, were solely attributable to an osteo-arthritic condition. It was generally agreed among the jurors that Harper's statements during deliberations caused a substantial increase in damages.

Juror acquaintance with medical witnesses likewise played an important part in *Phillips # 2*.[20] The effect of Juror Ring's acquaintance with one of plaintiff's doctors and with defendant's doctors in such case is elsewhere reported.[21] Suffice it to say here that such contacts, by an odd combination of circumstances, were a major cause of plaintiff's high verdict. Aside from Mrs. Ring, the only other juror in any way acquainted with a witness was Stillman, who, like Mrs. Ring, strongly favored defendant's doctors, knew of them "by reputation" and had "heard nothing but good about them." Whether this had any effect upon Stillman's thinking is doubtful. However, his strong views regarding plaintiff's injuries paralleled those of the defendant's doctors. And Stillman referred to the "excellent reputations" of defendant's doctors during the deliberations as a reason why his colleagues should ignore the conflicting testimony of plaintiff's principal medical witness.

Peters, another personal injury case, provides one final example. Foreman Preston was acquainted with defendant's star eye-

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[20] See note 15 *supra*.

[21] See Broeder, *Voir Dire Examination: An Empirical Study*, 38 So. CAL. L. REV. 503 (1965).

witness, Officer O'Day, who, in substance, blamed the accident on plaintiff's contributory negligence. O'Day's parents ran a grocery store where Preston's parents shopped when he was a child. Even then, thirty-five years before, O'Day was "on the force" and Preston knew that he was "honest". O'Day's testimony coupled with his failure to arrest defendant at the scene of the accident was conclusive for Preston. He described such testimony and such failure to arrest as the most influential factors inducing him to vote for defendant. Significantly also, Preston stated that the heated and angry cross-examination of O'Day by plaintiff's counsel was the "thing . . . [he] liked least about the trial." While Preston communicated his knowledge that O'Day was "honest" to his fellow jurors during the deliberations, the effect of this is unknown.

D. Juror Contacts with Attorneys

One or more jurors was acquainted with a lawyer in eight of the twelve civil cases in which the subject was investigated. In criminal cases such contacts were proportionately less numerous; they existed in but two of the seven cases studied. For the most part, juror-lawyer contacts were elicited on *voir dire* although several striking examples of conscious concealment also appear.

Rose, a personal injury action, was the only case in which a juror-lawyer acquaintance seems to have had absolutely no effect, such contact having been established on *voir dire*.

The situation in *Sutter*, another personal injury case, was as follows: One juror, Evans, was acquainted with counsel for both sides, such fact having been elicited on *voir dire*. Another juror, Moore, was acquainted with plaintiff's counsel. This fact was also elicited by counsel. A third juror, Mrs. Learner, was defense counsel's neighbor who, though present at the table, did not actively participate in the trial. Mrs. Learner did not reveal this fact, though clearly required to by *voir dire* questioning. Evans, it developed, had no use for plaintiff's counsel, had for years regarded him as a "windbag" while he had always admired defense counsel. Evans was strongly for defendant. Juror Moore, on the other hand, who liked plaintiff's counsel, bent backwards to see that Evans' client did not prevail and was defendant's most forcible juryroom advocate.

Grey presents two clear-cut examples of conscious concealment. One juror, Mrs. Woods, private secretary to the president of a large local bank, had occasionally been present in her employer's office in connection with matters with which her employer

and defense counsel were concerned, and, as a result, had an extremely high regard for such attorney's ability. While the effect of this upon her thinking is unknown, her silence when asked whether anyone was acquainted with defendant's attorney coupled with her low damage position vis-a-vis the other jurors is interesting, to say the least.

The second example is afforded by the *voir dire* silence of Foreman Ball in *Grey*. While freely admitting an acquaintance with counsel for both sides during his personal interview, he said nothing when questioned about the subject on *voir dire*. Plaintiff's counsel, it should be noted, resided in Ball's small town. Defense counsel lived and worked in a fairly distant metropolis. Ball favored extremely large damages vis-a-vis the other jurors.

Juror Smyth, in *Field*,[22] was acquainted with one of defendant's attorneys, "know him to speak to," as he phrased it on *voir dire*. The consequence appears to have been twofold. First, Smyth was more influenced by his lawyer friend's arguments than by those of any other lawyer. And, second, "friendly" defense counsel spent fifteen minutes of his closing argument talking about "not talking as a lawyer, but as a friend and neighbor," an "argument," Smyth said, which was "very well taken." Smyth favored lower damages than any other juror and almost hung the jury.

Foreman Preston in *Peters*[23] was acquainted with counsel for both sides, a fact established on *voir dire*. The *voir dire* picture, however, was inaccurate, for it conveyed the impression that Preston knew one as well as the other. Actually, Preston barely knew plaintiff's counsel while he and defense counsel had once occupied apartments in the same building for several years during the depression, were good friends, had often entertained one another and had even been friendly opponents for a local ping-pong championship, the outcome of which Preston still remembered, including the score of each game. Preston was defendant's most vigorous juryroom champion.

Admittedly, the effects of most of the above-considered juror-lawyer contacts are problematical. The imprint of such contacts in the three remaining civil cases, however, is unmistakable.

Thus, Mrs. Tims, a *Turner* juror,[24] was defense attorney's Godmother and a close personal friend both of the attorney and

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[22] See note 18 *supra*.

[23] See text at pp. 104-05 *supra*.

[24] See text at pp. 101-02 *supra*.

family. All attended the same church for years, though Mrs. Tims, a religious person, attended more regularly. None of this was elicited on *voir dire.* The consequence of the relationship was two-fold. First, defense counsel spent three-fourths of his closing argument time quoting from the Bible and talking about the "Golden Rule" (an appeal to his Godmother's religiosity) which was said to have special applicability in cases where a passenger-guest sues his motorist-driver friend (as Mrs. Tims put it, "turns coat on his friend"). And, second, that such argument (and such relationship with defense counsel) had a decisive impact upon Mrs. Tims' thinking. She was strongly, even violently, pro-defendant.

Mrs. Carter, an apparently honest and intelligent *Phillips # 1* juror, alleged by sworn affidavit filed in connection with plaintiff's motion for a new trial, that an alternate juror, one Polsky informed the jurors during the trial of various nefarious activities and litigation with which plaintiff's counsel had once been concerned, that Polsky was prejudiced against plaintiff's counsel both because he was a Jew and for other reasons unknown to Mrs. Carter and that he inflamed the jurors against plaintiff and his lawyer by charging that plaintiff's lawsuit was an insidious conspiracy to defraud. Although Polsky was unfortunately never interviewed, interviews with other *Phillips # 1* jurors provide strong evidence both that he made the statements attributed to him by Mrs. Carter and that such statements influenced the verdict. In this connection, it should be noted that the repeated objections of plaintiff's counsel designed to keep plaintiff's insurance protection from being disclosed gave Polsky's statements a greater potentiality for harm than they would probably otherwise have possessed.

The third and last civil case is *Phillips # 2.* As established on *voir dire,* Juror Stillman was acquainted with lawyer Paxton, counsel for one defendant, and with Casper, counsel for another. The three were fellow Masons. Stillman's relationship with Paxton apparently had no effect. However, the impact of the Stillman-Casper acquaintance, though indirect, is well established. For it set the stage for the charge, advanced by Juror Cody, that Stillman was siding with defendant solely because of his friendship with Casper. A major juryroom argument resulted which almost came to blows but which seems also to have prompted Stillman to change his vote. All but one juror (in addition to Stillman) stated that the incident was the major unanimity-producing factor.

Cooper and *Ward* were the only criminal cases involving juror-lawyer contacts. Several *Cooper* jurors knew of defendant's

counsel by reputation, counsel having been the Democratic candidate for United States Senator in the election just preceding the trial. However, such knowledge, with one possible exception, apparently had no effect. The possible exception is Mrs. Cornel. During trial, she inquired of numerous friends whether defense counsel was an "ordinary criminal lawyer" or a "respectable lawyer" who just happened to be taking a criminal case. The inquiries established defense counsel's "respectability," a factor, it seems, in causing Mrs. Cornel ultimately to abandon her position that defendant was guilty.

From the point of view of juror-lawyer relationships affecting the verdict, *Ward* is undoubtedly the most enlightening of the cases. *Voir dire* developed only that Juror Tyler was "acquainted" with Government counsel and that Juror Edmonds knew defense counsel "to speak to" but that both could act impartially. Neither juror appears to have been able to do so. In fact, Tyler was a close friend and bowling companion of Government counsel, not just an "acquaintance." Strongly pro-acquittal in the juryroom (he along with Mrs. Edmonds and another hung the jury), several *Ward* jurors opined that Tyler's position was in part attributable to his friendship with Government counsel, *i.e.*, he attempted to be "too fair" to defendant.

The effect of Mrs. Edmond's "knew him to speak to" relationship with defense counsel was just the opposite. The whole truth was that Mrs. Edmonds was a long-time admirer of defense counsel, had worked with him in politics, and had been in his home in connection with "Equality Party" affairs. A Negro, Mrs. Edmonds also admired him for remaining in East Parma when Negroes began moving there in large numbers. She also admired him as a lawyer, stating in the juryroom that he would never represent a guilty client. "Springer is honest." Doubtless, her feeling towards defense counsel was one of her major reasons for hanging the jury. Retrial resulted in an acquittal.

E. Juror Contacts with Other Jurors

One or more jurors were previously acquainted in nine of the twelve civil cases in which such matters were investigated and in three of the seven criminal cases studied. With the exception of one criminal case, the relationships in question unfailingly left their mark. In none of the cases was the existence of any such relationship elicited on *voir dire*.

In three of the cases, however, *Turner*, *Drake*, and *Brown*, (all personal injury actions), the only apparent effect of such previous contacts was to influence the election of particular per-

sons as foreman.[25] Such contacts also influenced the election of the foreman in three other cases, but had other effects also, as discussed below.

So far as the civil cases are concerned, the situation, other than as affecting the election of particular persons as foremen, was as follows. In *Ford # 1*, Miss Statler, a clerical worker at *ABC* Steel, had formerly worked under the direct supervision of Juror King, an *ABC* engineering executive, and had an extremely high regard for his intelligence. This, she said, caused her to abandon her initial juryroom position that defendant was not liable.

Jurors Stillman, Robbins, Land, and McGee (*Ford # 2*) were good friends and fellow political workers, formed a tight but unsuccessful coalition to raise damages and attempted, more successfully, to dominate the deliberations, thus angering other jurors and making for a very inharmonious discussion. Jurors Sealy and Ives were closely acquainted in *Sutter*. The latter (by extra-jury room discussion) was instrumental in causing Sealy to change his vote.

The situation in *Grey* was more complicated. Three interrelationships were involved. Most important was the long-time feud between two jurors, Mrs. Knight and Mrs. Woods. The pair quarreled bitterly throughout the trial and, in the deliberations, made "impolite" remarks about one another which raised a significant note of tension overcome only through the charm of the jury foreman. Mrs. Knight and Juror Vernon, another *Grey* juror, were also previously acquainted, a fact which seems, for a variety of reasons, to have prompted the former to raise her personal damage estimate. Juror Simms appears to have had the same effect upon Juror Price. The former was Juror Price's banker and had his respect and admiration, along with an overdue mortgage.

The effect of the Juror Sweet-Leslie relationship in *Field* is also noteworthy. Mrs. Sweet, an Electronics, Inc. tabulator operator, once worked under Leslie's direct supervision; Leslie was Electronics, Inc.'s Superintendent of Customer Engineering. Similarly, in *Phillip's # 2*, Juror Scott, a prominent businessman, was a long-time, although casual acquaintance of Juror Bonham, having often borrowed money from the bank of which Mrs. Bonham was vice-president. While Scott was obviously not influenced by Mrs. Bonham, the latter admitted that she was "considerably influenced" by Scott's argument that "if we had to make a mistake it

[25] A forthcoming essay on this subject is shortly scheduled for publication.

was better to err on the side of awarding too much rather than too small an amount." Mrs. Bonham also commented that she and her husband had "always thought very highly of Mr. Scott, both as a businessman and as a public-spirited citizen," and that, as "Mr. Scott was no radical, but a conservative business man and thought that . . . [plaintiff] was entitled to all that money, perhaps there was, after all, something to be said for that point of view."

Thomas (another personal injury case) is more complicated. First, Juror Block was previously acquainted both with Juror Rex, whom she detested, and with Juror Lawton, whom she liked. Rex, in turn, to the extent that he had ever thought about Mrs. Block, returned the compliment. The pair became involved in a heated deliberation's argument which in no small degree contributed to its disharmony. The effect of the Block-Lawton relationship, as described by the former, was as follows:

> I walked beside him [Lawton] the night the jury went out, [*i.e.*, to deliberate]. He had been kind of siding with the buzzards, Powers and Rex. I made a point of walking close to John [Lawton]. They had been saying the railroad was not responsible. I told him, 'John, you know it was a railroad accident as plain as the nose on your face!' But he was over with the big shots trying to be hard like they were. But I knew he wasn't that way. He is a working-man and he has had a lot of sickness.

More important from the point of view of affecting the verdict in *Thomas*, however, was the pre-trial friendship between Mrs. Brill, the strongest pro-defendant juror, and Mrs. Trainer, the most intelligent and articulate of the jurors favoring plaintiff. Both were executive officers in the state's American Legion Auxiliary. This friendship was an important factor prompting Mrs. Brill ultimately to change her vote. In addition, Mrs. Brill was a distant cousin of Foreman Benton, knew of his "desire to avoid a hung jury" and opined that he was principally responsible for avoiding a hung jury.

The situations in *Phillips # 1, Peters,* and *Rose* (all personal injury cases) were unique. Several of the women jurors in *Phillips # 1* were well-acquainted, having worked closely together at church and PTA functions. Though the data are inadequate, such pre-trial relationships were apparently potent factors in prompting a highly unjustified verdict for defendant.[26]

Mrs. Snell was the common inter-juror denominator in *Peters*. A close personal friend of Juror Stoner—both were high ranking local conservatives—the two were inseparable during the trial,

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[26] See text immediately following.

traveled to and from court in the same car and thoroughly discussed the case during such trips. The consequence was that Mrs. Stoner, a nervous, sensitive person, did just what Mrs. Snell told her, Mrs. Snell having special juror expertise by way of previous jury service in the local circuit court. Mrs. Snell was, in addition, distantly related to Juror Sherman, who, like Mrs. Stoner, was also extremely nervous and shy. Mrs. Snell was Sherman's liaison to the other jurors during the deliberations. Saying nothing to the jurors as a whole, Sherman would privately address occasional questions to Mrs. Snell who, in turn, would propound them to the jurors as a body.[27]

The relationship in *Rose* (a wrongful death action) was between Jurors Cox and Mrs. Edmonds, both of whom were Negro residents of East Parma. Well-acquainted prior to trial—both were active participants in East Parma civic affairs, particularly politics—they ate lunch together during the trial and, in general, kept close company throughout. They did not, however, get along, the major trouble stemming from Mrs. Edmond's outspoken civil rights attitude as contrasted with Cox's policy of "gradualism." Things came to a head during one of the noon recesses when Mrs. Edmonds wanted Cox to join her in crashing one of Lewisville's "all-white" restaurants, Cox refusing. The pair engaged in a heated personal battle during the deliberations. Mrs. Edmonds at one point charged Cox with perjury for failing to make a *voir dire* disclosure of the fact that he was once an insurance broker.

The few inter-juror relationships present in the criminal cases were, so far as could be determined, insignificant other than in connection with the election of particular persons as foremen.[28]

III. CONCLUSION

If the foregoing data are any criteria, the importance of living in the vicinage seems obvious. It shaped the course of adjudication in some way in almost every case studied. Most memorably for the author, it sent a man to jail in *Meyer*,[29] set another free in

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[27] Two other *Peters* jurors, Mrs. Glen and Mrs. Pratt, were also previously acquainted. Indeed, they were practically next-door-neighbors. Furthermore, Mrs. Pratt gave piano lessons to Mrs. Glen's daughter. However, this relationship apparently had no effect.

[28] Considerable data were collected on the factors responsible for the election of particular jurors as foremen. Such data are elsewhere presented.

[29] See text at pp. 106-07 *supra*.

Ward,[30] helped avoid a hung jury in *Phillips # 2*[31] and materially increased the size of plaintiff's award in *Drake*.[32]

Another point is the degree to which the lawyers in the cases studied, at least when judged by their performances on *voir dire*, failed to anticipate the effects of knowledge derived from the vicinage. In some instances, of course, they did anticipate and ask questions. Several examples of conscious concealment appear. More often, however, and particularly with reference to whether the jurors were previously acquainted, such matters were ignored. In view of the materials and with reference to the permitted scope of lawyer participation on *voir dire* in the court where the data were collected, such conduct appears unjustified. The more philisophical (but admittedly more meaningful) reflections on the importance of having our jurors live in the neighborhood are best here left alone.

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[30] See text at p. 107 *supra*.

[31] See text at pp. 102-03 and p. 110 *supra*.

[32] See text at p. 103 *supra*.