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I. INTRODUCTION

This article is based upon data which the author acquired during the mid-1950's while participating in the University of Chicago Jury Project.[1] The appraisal of the impact of lawyers is drawn from personal ob-

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† Member, Michigan and Illinois Bars. The author is deeply indebted to Professor Harry Kalven, Jr., of the University of Chicago Law School, the Jury Project Director, for his many helpful comments and suggestions.

1. In July 1966 the first major work resulting from the University of Chicago Jury Project was published. KALVEN & ZEISEL, AMERICAN JURY (1966). There have, of course, been numerous previous Project publications. See, *e.g.*, ZEISEL, KALVEN & BUCHHOLZ, DELAY IN THE COURTS (1959). Yet, the volume by Kalven and Zeisel dwarfs anything previously written on the jury.

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); Kalven, *Report on the Jury Project of the University of Chicago Law School*, in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 155 (U. Mich. Law School 1957). See also Meltzer, *A Projected Study of the Jury as a Working Institution*, 287 ANNALS AC. OF POL. & SOC. SC. 97 (1953).

Other Jury Project publications include Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964); Kalven, *A General Analysis of and Introduction to the Problem of Court Congestion and Delay*, ABA SECT. INS. N. & C. L. 322 (1963); Kalven, *The Bar, The Court, and The Delay*, 328 ANNALS AC. OF POL. & SOC. SC. 37 (1960); Kalven, Zeisel & Buchholz, *Delay in the Court*, 15 RECORD OF N.Y.C.B.A. 104 (1960); Kalven, *The Jury, the Law and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958), reprinted in 7 U. CHI. L.S. REC. 6 (1958); Strodtbeck, *Social Process, The Law and Jury Functioning*, in LAW AND SOCIOLOGY 144 (Evan ed. 1962); 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, *Social Research on the Law: The Ideal and the Practical*, in LAW AND SOCIOLOGY 124 (Evan ed. 1962); Zeisel, *The Jury and the Court Delay*, 328 ANNALS AC. OF POL. & SOC. SC. 46 (1960); Zeisel, Kalven & Buchholz, *Is the Trial Bar a Cause of Delay?*, 43 J. AM. JUD. SOC'Y 17 (1959).

In addition, a Jury Project volume on the impact of the *Durham Rule*, SIMON, THE JURY AND THE DEFENSE OF INSANITY, is scheduled for publication late this fall. Compare Arens, Granfield & Susan, *Jurors, Jury Charges and Insanity*, 14 CATH. U.L. REV. 1 (1965). Durham v. United States, 237 F.2d 760 (D.C. Cir. 1956), 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).

Finally, a book on the civil jury, ZEISEL, KALVEN & CALLAHAN, THE JURY, THE JUDGE, AND THE CIVIL CASE, will be published in 1967.

As regards the author's own published Jury Project work, see Broeder, *The Impact of the "Scapegoat" in Jury Trials: Some Tentative Insights* (current issue of DUQUESNE L. REV. —— (1966); Broeder, *The Pro and Con of Interjecting Plaintiff Insurance Companies in Jury Trial Cases: An Isolated Jury Project Case Study*, 6 NAT. RES. J. 269 (1966); Broeder, *The Impact of the Vincinage Requirement: An Empirical Look*, 45 NEB. L. REV. 99 (1966); Broeder, *The Negro in Court*, 1965 DUKE L.J. 19; Broeder, *Previous Jury Trial Service Affecting Juror Behavior*, 1965 INS. L.J. 138, reprinted in PERSONAL INJURY ANNUAL 656 (1965); Broeder, *Occupational Expertise and Bias As Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U.L. REV. 1079 (1965); Broeder, *Plaintiff's Family Status As Affecting Juror Behavior: Some Tentative In-*

servation of 23 consecutively tried jury trials, 16 civil and 7 criminal, in a midwestern federal district court. Necessarily, all actual names and places mentioned herein have been changed.[2] All of the trials were observed from beginning to end and rapport was maintained throughout the study period with the presiding trial judge and all court personnel. With the court's permission, 225 of the jurors were interviewed shortly after the trial at their homes or places of business. The average juror-interview ran two and one-half hours. Close contact was also maintained with most of the trial lawyers. According to the 1950 census, the approximate population of each of the three cities in which court was held was 120,000.

The author was privileged to be associated with the Jury Project from 1953 to 1956 and periodically thereafter. Hopefully, most of the author's relatively minor contributions to the Project will ultimately appear as part of a final eclectic Jury Project volume now scheduled for publication in 1967. This in any event is the current plan.[3]

To draw an accurate picture of the difference the lawyers made in the cases studied is impossible. Obviously lawyers made a difference but much of it was due to the way in which they prepared, the witnesses they found, the depositions they took, and the advice they gave to their clients and witnesses. The effect of such moves—and even their existence—could not often be determined. Frequently, a juror could not express his reactions to the lawyer apart from his reactions to the case itself. Yet something of importance can be said. Many of the jurors did react to the lawyers and often stated that such reactions probably affected their thinking. A description of these reactions and of the diverse and frequently unobvious ways in which the lawyers' personalities and styles became important constitutes the major portion of what follows. This, after all, is what popularly is meant by talk of the lawyers' influence and the story even so confined contains many surprises. At times we were able to go further and to show the impact of some move which the jurors did not even associate with a lawyer or of which they could not possibly have known.

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sights, 14 J. PUB. L. 131 (1965); Broeder, *Voir Dire Examinations: An Empirical Study,* 38 So. CAL. L. REV. 503 (1965), reprinted in 3 MOD. PRAC. COMMENTATOR 270 (1965); Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744 (1959); Broeder, *The Jury Project,* S.D.B.J., Oct. 1957, p. 133; Broeder, *The Functions of the Jury: Facts or Fictions?,* 21 U. CHI. L. REV. 386 (1954).

See also Broeder, *Jury,* 13 ENCYCLOPEDIA BRITANNICA 205 (1963 ed.).

2. However, with a few minor exceptions, the various name and place changes have been kept constant throughout the author's various Project publications.

3. The author's largest single unpublished contribution to the Project consists of an exhaustive study of a single wrongful death action brought for the benefit of a young trucker's widow and her two baby girls.

The materials will be discussed in three parts. First dealt with are those cases where the jurors' reactions to the lawyers almost certainly affected their thinking on the merits. While the factors apparently responsible for the jurors' feelings are generally noted, the major purpose here is simply to show the number of cases and the variety of ways in which the jurors could fairly be said to have "tried the lawyers." The second part of the discussion is concerned with what the jurors said they liked or disliked about the lawyers with no particular regard for the importance of such likes and dislikes. The essay concludes with a representative sampling of what to the author appear to have been the lawyers' most successful and blundersome moves.

The inquiry here primarily is directed not to what the jurors thought about the lawyers, but rather to the actual way in which the lawyers seem to have influenced the final result, even, for example, by allowing the time for appeal to run out or by settling for a clearly excessive or inadequate amount. While data such as are reflected by these examples are not peculiar to jury trials, they are significant and provide a valuable additional perspective for assessing the lawyers' importance.

II. Obvious Lawyer Influence on Jurors

Liking or disliking a lawyer solely because of his personality and performance at the trial was a material factor affecting juror voting behavior in at least nine of the civil and three of the criminal cases studied. This estimate, furthermore, is conservative; one or two additional cases might arguably have been included and the figures take no account of the instances where juror behavior was affected by personal friendship with a lawyer or by knowing of his reputation. The data, in other words, strongly suggest that jurors do, to a significant degree, try the lawyers right along with their clients' cases. It must be emphasized that at this point we are concerned solely with cases where the impact of the lawyer as a person demonstrably affected juror behavior, not with cases where it might have. Only the major factors shaping the jurors' feelings with respect to the lawyers are noted at this time. The finer points are subsequently developed.

A. *Civil Cases*

Drake, an action brought under the Federal Employer's Liability Act, perhaps best illustrates the type of situation. Plaintiff was a sixty-five-year-old unskilled laborer, an obviously sick man who had not worked since the accident several years before the trial. Defendant was a large railroad. Liability was virtually conceded by defendant; the defense was that plaintiff's various claimed ailments were not the result of

the accident. Defendant was represented by two lawyers, Faust, who did the vast bulk of the work, and Newell, a local attorney, who conducted the voir dire examination of the jury and spoke for the last fifteen minutes of defendant's allotted closing argument time. No juror liked Newell; some jurors disliked him intensely. Three factors were mentioned: (1) his protracted (*vis-a-vis'* plaintiff's counsel) voir dire examination; (2) his "rudeness" to the judge when reprimanded for misstating the law on voir dire and for repetitious and improper questioning of the veniremen; and (3) his "highly uncalled-for" closing argument. But the "uncalled-for" argument overshadowed all else so far as the jurors were concerned:

> Mr. Drake is just like an old red heifer. You farmers on the jury know all about old red heifers. They don't have any value until they're hit by a railroad train. Then their value skyrockets. That's just the way it is with Mr. Drake. The only reason his lawyer tells you he's worth so much is that he's been hit by a train. Mr. Drake ought to be down at the animal husbandry department at the university where I understand they're experimenting with old red heifers.

As Newell spoke it was almost embarrassing to be present in the courtroom; plaintiff's counsel did little to improve things by commenting that Newell's remark showed the jury what had been evident to him for a long time, that defendant could not "tell the difference between an animal and a human being." The jurors, almost to a man, were incensed with Newell's argument. Particularly was this true of the industrial workers who identified with plaintiff, and the farmers and farm wives who resented the inference that Newell thought them crooked. The "red heifer" analogy was referred to several times in the deliberations as a reason for increasing damages and almost all jurors agreed that the remark cost defendant dearly. Indeed, two jurors, who favored extremely low damages *vis-a-vis'* their colleagues, said that their dislike of Newell, particularly on account of his argument, was a major factor in causing them to agree to the $25,000 verdict. In the opinion of the judge, the clerk, the law clerk as well as every other disinterested lawyer in the courtroom, the verdict was excessive by some $23,000.

The situation in *Thomas,* another FELA case, was more complicated. Plaintiff was a middle-aged locomotive engineer seeking recovery for a knee injury against the *XYZ* Ry. Co. Liability was sharply contested but the main defense was that plaintiff was a malingerer and that he, his lawyer, and most of plaintiff's witnesses were guilty of fraud and

conspiracy. Plaintiff's counsel, in turn, charged that defendant's star witness had committed perjury. The lawyers engaged in numerous bitter personal exchanges throughout the trial and to a material degree tried each other as much if not more than the issues. Defense counsel, for example, kept making sinister references to the fact that plaintiff's counsel came from another state, "a city slicker imported to tell you a cooked up story." Plaintiff's counsel retorted that he had never faced such a disreputable opponent. And so it went, throughout the trial. Indeed, the judge came close to citing defense counsel for contempt on two occasions and both lawyers, but particularly defense counsel, were repeatedly reprimanded.

In view of the situation, it is hardly surprising to find that many of the jurors were greatly influenced by their respective (and conflicting) reactions to the lawyers. In none of the cases studied did the jurors as a whole so clearly identify a litigant's case with his lawyer. All but four jurors seemed to have been in some degree affected. Statements such as the following were typical: "I wanted Holliday [plaintiff's counsel] to win." "I wanted to see that city slicker [Holliday] get what was coming to him," and at least five jurors (the four jurors favoring the highest damage awards and the juror most vigorously opposed to any recovery), expressly admitted that their attitudes towards the lawyers materially influenced their thinking on how they should vote. Interestingly, too, the four pro-plaintiff jurors just referred to expressed great regret at Holliday's failure to be present at the rendition of the verdict. They wanted to apologize for consenting to "such a low verdict" and to assure Holliday that its inadequacy was no reflection on his superb handling of the case, being instead due to the "stubborn and unreasoning" attitudes of the pro-defendant jurors.

Mrs. Brill, however, the strongest pro-defendant juror, detested Holliday, largely because of his "continual picking on" defense counsel Blankner with whom she was infatuated. The extent of this infatuation and its probable effect upon Mrs. Brill's thinking can readily be discerned from the following excerpt from her personal interview:

> I really liked Mr. Blankner. I thought he did as good a job under the circumstances, in view of the tactics of Mr. Holliday, as any lawyer could have done. On top of that I liked him personally. He comes from a fine . . . [local] family and although I don't know him or any of his family, I know they have a fine reputation. As I saw it, it was a trial between the smooth city slicker, represented by Holliday, and the poor local boy, Mr. Blankner, and I pulled for the poor local boy.

> Would you like to know what a woman juror thinks about a lawyer? Well, Mr. Blankner struck me as the kind of man whose wife doesn't take very good care of him. I wanted to take a needle and thread and sew up his pants, right there in the courtroom. They were just too long, and they hung down over his shoes like gunny sacks. And then his shoes were never shined. I felt like shaking him or putting my arm around him and telling him to shine his shoes. And then I think he wore the same shirt throughout the trial. His wife apparently does nothing for him. I wondered what kind of home life he had.

The remaining civil cases may be disposed of more briefly. The two jurors favoring the highest awards in *Field,* a wrongful death action, expressly stated that their reluctance to consent to the verdict was in material part due to a feeling that the reputation of plaintiff's counsel would be adversely affected by an award substantially lower than the sum he had requested. These jurors, both of whom played dominant roles in the deliberations, had little use for defendant or its counsel but thought very highly of plaintiff's counsel. *Peters,* an action involving a plaintiff-pedestrian suing an individual motorist, was similar. Two jurors stated that they had initially favored plaintiff on account of their reluctance to find against plaintiff's lawyer. Plaintiff's counsel was young and comparatively inexperienced, and the jurors in question very much disliked seeing him lose.

Rose, a wrongful death action, is more unique. Defense counsel, in arguing damages, simply made the point that deceased was a drunkard; that his wife (for whose benefit the action was brought) and he were separated at the time of the accident, and that he rarely, if ever, contributed anything to her support. "In short," said defense counsel, "his life wasn't worth very much." Four jurors felt nothing but ill-will against defendant on account of this remark and one of them—a religious truckdriver—was enraged. This juror, who held out for a plaintiff's verdict for several hours, said that one of his principal reasons for doing so was the callousness of defense counsel as reflected by his above-quoted remark. "I hope and pray that God will forgive him for saying that and for not realizing that we're all equal in the eyes of God." Arguing the pecuniary losses for defendant in a wrongful death action, it would appear, is often a very delicate undertaking.

A somewhat similar situation involving a defense counsel likewise played a material part in *Grey.* Defendant was a trucking company; plaintiff an attractive divorcee who worked on an assembly line for Electronics, Inc., a large local industrial concern. Several jurors said that

they increased the verdict award because of their irritation with defense counsel for having secured certain x-rays of plaintiff's chest from her Electronics company physician who had treated her for chest pains prior to the accident. One of plaintiff's complaints at the trial was "a jammed up feeling in my chest, ever since the accident." The jurors in question—a few of whom either worked or had worked for Electronics, Inc.—simply could not forgive defense counsel for having induced the company physician to betray his patient. "Those examinations are supposed to be secret. There was no excuse for such conduct [by defense counsel]."

Ford #2 and *Phillips #1*[4] are best discussed together. *Ford #2* was a case in which neither side made an objection, where counsel treated one another with the utmost respect and politeness, and where the arguments were reserved and almost (if not wholly) devoid of emotion. The principal claim was for property damage to plaintiff's truck, stipulated to be $5,000. Plaintiff's injuries were minor. Generally speaking, the jurors did not like the tea-party atmosphere; it did not comport with their notions of how a lawsuit should be tried. But the reactions in the case of at least two jurors, both who initially voted for defendant, went much deeper. Their idea was that defense counsel was intentionally lying down in return for a percentage of the verdict and that he, the plaintiff and the plaintiff's lawyer, were engaged in a conspiracy to defraud defendant and/or defendant's insurance company. The fact that the damages were stipulated appeared to them to give substance to their notion. "In an honestly contested case, the lawyers don't agree on anything." Consequently the jurors believed that the verdict should be for defendant; that the lawyers could not be trusted. Though one of these jurors changed his vote shortly after the start of the deliberations, the other held out for defendant for hours and came close to hanging the jury.

Phillips #1, while similar to *Ford #2* in that some of the jurors felt that a conspiracy was afoot, is more complex. There was a substantial personal injury claim and large stipulated property damages. Throughout the trial plaintiff's counsel ineffectually sought to keep from the jury the facts that the property-damage claims were actually owned by certain insurance companies and that plaintiff already had been partially compensated by an insurance company for his personal injuries. This, however, was an impossible task, as defense counsel repeatedly, albeit indirectly, made the jury aware of the insurance companies' interest. In the end plaintiff's counsel gave up and told the jury himself. But the

4. The *Ford* and *Phillips* cases were both tried twice. Hence the designations #1 and #2 are used. The first *Ford* trial ended in a hung jury, the second in a plaintiff's verdict. The first *Phillips* jury found for defendant. A circuit court of appeals reversed and the second trial resulted in a large verdict for plaintiffs.

conspiracy label had already been affixed to him and he was disliked because of his attempts to keep such "important data" out of the trial.[5] There seems little doubt that the defendant's verdict which resulted was due in large measure to the jurors' adverse reaction to the tactics of plaintiff's counsel. One juror, the only one ever voting for plaintiff, likewise charged that some of the jurors were prejudiced against plaintiff because his counsel was Jewish. Whether her charge was accurate, however, could not be determined. The probability is that it was not. The verdict for defendant, incidentally, was later set aside because of the jury's inconsistent answers to certain special interrogatories.

The last civil case to be noted is *Phillips #2*. Mrs. Ring, a doctor's wife, detested plaintiff's counsel and seems unquestionably to have voted for defendant, in part, on account of this feeling. Though she assigned numerous reasons for her reaction, the chief ones appear to have been that he was "far too cocky," "far too smooth," and that he had made a complete fool of one of defendant's medical witnesses, a prominent local radiologist and a respected acquaintance and colleague of her husband's. "My heart just bled for poor Dr. Johnson; he [plaintiff's counsel] had no business treating him like that! Why Dr. Johnson was shaking all over, he was so nervous." Adverse reaction to the counsel representing the one defendant who had received a *favorable verdict* in *Phillips #2*, however, was more widespread. Indeed, he was almost uniformly regarded with contempt and the two jurors initially voting for liability said that they did so in part because of their reactions. A typical comment follows:

> He was terrible. I don't see how he ever got out of law school. What a spectacle; he was a disgrace to the legal profession. He ranted, raved, shouted and never said anything and what he did say you couldn't understand, he had such a peculiar and confused way of speaking. I wouldn't hire that fellow to represent me on a traffic ticket in the magistrate's court.

B. *Criminal Cases*

Turning now to the criminal cases, it should first of all be noted that two involved no substantial possibility of an acquittal. Proof of defendant's guilt in *Goodman* and *Williams* was overpowering and there

5. On the wisdom or the lack thereof in keeping such data from the jury, see the provocative debate in Green, *Blindfolding the Jury*, 33 TEX. L. REV. 157 (1954); Gay, *"Blindfolding" the Jury: Another View*, 34 TEX L. REV. 368 (1956); Green, *A Rebuttal*, 34 TEX. L. REV. 382 (1956). See also GREGOR & KALVEN, CASES AND MATERIALS ON TORTS 680-88 (1959).

were no extenuating circumstances. Government counsel merely had to introduce the evidence to gain convictions. For the present purpose, then, these cases may be put to one side. This leaves us with *Meyer, Brown, Ward, Cooper* and *Johnson* and the jurors reactions to the lawyers as persons seem to have played an important role in all but the first two.

Cooper is the most interesting of the cases in this regard. Defendant was charged under the Mann Act with transporting his wife, Bonnie, an admitted prostitute, to engage in prostitution. The defense was that defendant did not have the alleged intent, that he had always opposed his wife's vocation; that he made the interstate journey chiefly to secure legitimate employment; that he had taken an advertising sales job shortly after the journey and had been extremely successful; that Bonnie had forever forsaken prostitution, and that he had adopted Bonnie's two illegitimate children and was taking steps to ensure that they were raised as devout Catholics. The jurors' dislike of government counsel and his strategy was a material factor in bringing about defendant's acquittal. In all, five factors were mentioned. First, government counsel had no business ridiculing defendant's employer, a respectable businessman who testified concerning defendant's business acumen and success. This "disrespectful" attitude of counsel particularly outraged the businessmen jurors. Second, several jurors resented counsel's "unnecessarily rude" examination of Bonnie. "She wasn't on trial; I don't see that there was any reason for making her tell all of the gory past details and making her cry." Third, many jurors felt counsel's argument that the church had nothing to offer persons like defendant and Bonnie to be singularly inappropriate. "That's what the Church is for." This reaction was especially pronounced in the case of one juror, a woman, whose son was a minister. Fourth, two jurors, both Catholic, felt that counsel, in ridiculing defendant's inability to give the proper name of the particular church in which the children were undergoing instruction, was making a "slurring reference to the Catholic Church." Defendant only knew the church by its common name, "The Cathedral," which was the only name by which these jurors knew it. "His [counsel's] attitude was inexcusable. That really prejudiced me against the government's case." Finally, one juror, strongly defendant-prone, was irritated with counsel for seeking to reopen the government's case in order to establish that defendant had been convicted of assault and battery many years before. "That was an obvious attempt to prejudice us; instead, it prejudiced me against [counsel] . . . and the government."

The data from *Johnson,* a Dyer Act case, likewise strongly bears the imprint of counsel's personality—in this instance, defense counsel's.

Without exception, the jurors had great respect and admiration for defense counsel and considered him to be extremely personable. "He was a dogged fighter and a sincere one; he believed in his own case. And he showed real ability, even though he was so young." This was a typical comment. The jurors did not point to any particular thing the lawyer did; he was just "very likeable" and "sincere" and a man who "fought hard for his client." If there was any one factor, it was counsel's youth in relation to his performance, which, in the judgment of disinterested lawyers present at the trial, was outstanding. The probable impact of counsel's personality on the verdict is perhaps most dramatically illustrated by the comments of the jury foreman when asked "what . . . [he] liked most about the trial." He replied: "I enjoyed watching . . . defense counsel's face when we returned our verdict of 'not guilty.' That was alone worth all the fighting in the deliberations. What a fine young man he was and a wonderful lawyer, too." The deliberations, incidentally, were extremely bitter and lasted more than six hours. Not so incidentally, the jurors' praise went to a court-appointed attorney who served without compensation. The comment of government counsel, after hearing the verdict, is illuminating: "If we had fewer court-appointed attorneys maybe we'd get some convictions around here; those . . . kids work too . . . hard; besides, the juries naturally sympathize with them."

The data from *Ward,* a larceny case, while extremely meager because only four jurors were personally interviewed, nevertheless strongly suggests the materiality of the jurors' favorable reaction to counsel for the defense. The jury hung nine to three for conviction. Two minority jurors interviewed were practically boundless in their enthusiasm, one of them, to be sure, in large part on account of her personal friendship with defense counsel, as is fully discussed elsewhere.[6] The nature of the comments of these two jurors leaves little doubt as to the importance of counel's personal influence. So far as these jurors were concerned, defense counsel was on trial as well as defendant and they were not going to allow his reputation to be sullied with a defeat. Retrial of defendant before another jury, it should be noted, resulted in an acquittal.

III. Possible Lawyer Influence on Jurors

Thus far, we have been dealing with cases where jurors were obviously affected by their reactions to the lawyers and where, for the most part, it could in a general way readily be determined why they were affected. To go beyond this, to cases where the lawyers' personalities had

6. See Broeder, *The Impact of the Vicinage Requirement: An Empirical Look,* 45 Neb. L. Rev. 99, 110, 114 (1966).

no reasonably certain impact and to a description of precisely why it was that Juror Jones did not like Lawyer Smith, is extremely difficult and in large measure impossible. Frequently the jurors were unable to state meaningfully why they liked or disliked a particular lawyer and/or whether or not they were influenced by their feelings. Often, too, the right questions were simply not asked. Finally, available data are difficult to present because of the jurors' often sharply conflicting reactions to a particular lawyer and/or his strategy. What follows, then, is a rough attempt to describe generally those aspects of the lawyer's behavior which prima facie might seem important and/or which were most often referred to by the jurors as shaping their opinions of the lawyers. In large part, the data reveals those things which the jurors indicated they did *not* like about the lawyers. The data is pitifully inadequate, however, on the question of what the jurors liked.

A. *Objections*

"Excessive objecting" was not the factor which, at the outset of the study, it was thought likely to prove.[7] In the first place, the threshold of juror tolerance of objections was very high. The jurors generally expected the lawyers to object. Indeed, some of the jurors were disappointed that there were not more objections. In one case, as we have seen,[8] the failure of the lawyers to object and wrangle over the evidence was taken by two jurors as evidence of a lawyer conspiracy to defraud defendant and/or its insurance company. *Johnson,* a Dyer Act case, is also illuminating in this regard. Several jurors referred to defense counsel's vigorous objections to certain (obviously prejudicial and irrelevant) evidence as one of the reasons they liked and admired him. A final illustration is afforded by *Field,* a six-day wrongful death action trial in which defense counsel were seemingly always on their feet objecting and making a record. Though the jurors rapidly tired of this, there was nevertheless a strong undercurrent of feeling that counsel were only doing the usual and that such strategy was to be expected. Indeed, several jurors respected the strategy notwithstanding that they did not like it and there was a slight touch of admiration for chief defense counsel in the joke shared by the jurors that he was the "most objectionable man that ever lived." In sum, he was respected for his ability "to think up so many objections and assign reasons for them."

The point just made, however, is easily overstated. Certainly most jurors serving on cases involving numerous objections grew extremely

7. The impact of "objecting" constituted the bases for one of the many experimental jury designs undertaken by the Project.

8. See text at note 4 *supra.*

tired of the practice and some jurors became positively resentful. Especially was this true where they could see no valid ground for the objection or where, though they could or thought they could divine it, were unable to see what difference the objected-to evidence would make. In such cases, as one might expect, a lawyer's excessive objecting was often assigned as a reason for disliking him. There was a feeling in such cases that the objections were solely or largely designed either to confuse the issues or needlessly to drag out the trial. Business and professional persons were the most critical in this regard. The data are also persuasive that a lawyer who objects but less frequently than his opponent gains stature in the jurors' eyes as does one who "politely" desists from offering evidence after an objection has been interposed, thus "saving time and avoiding a battle of personalities." This latter reaction was particularly apparent in *Field*[9] where plaintiff's counsel asked numerous questions which seemed expressly designed to evoke objections and then withdrew them as soon as the expected objection was forthcoming. In general, the jurors fell for counsel's strategy.

Moving away from the "picayune-type" objection to the kind intended to keep out important evidence, the situation is quite different. With the exception of *Phillips #1*, where plaintiff's counsel was disliked in large part because of his frequent but ultimately unsuccessful attempts to preclude mention of certain insurance company subrogees,[10] no instance was found of a juror disliking a lawyer merely for objecting to what fairly might be regarded as "important evidence." To be sure, the jurors did not generally like such objections, but they scarcely held it against the lawyer for making them. In some instances, however, the jurors expressed the view that the making of such an objection caused them either to attach more importance to the objected-to evidence than they probably would otherwise have done or, where the objection was sustained, to draw an unfavorable inference against the side making the objection. Thus in the *Rose* wrongful death action,[11] for example, most jurors said that the unsuccessful objections of plaintiff's counsel to evidence tending to show that plaintiff's intestate was drunk at the time of the accident caused them to give such evidence greater weight. A similar result obtained in *Field* from defense counsel's abortive attempt to preclude plaintiff's counsel from introducing a hotel registration card for the purpose of showing the amount of sleep of defendant's employee just prior to the accident. Numerous similar instances appear in the data.

9. *Field* is the wrongful death action mentioned in note 3 *supra*.
10. See text at note 5 *supra*. See also note 4 *supra*.
11. The *Rose* case is discussed earlier in the text.

Thus in certain criminal cases the jurors thought the worst of defendant where defense counsel was successful in keeping his client's criminal record from being etablished.

In concluding these informal comments, one final point deserves mention. Jurors sometimes draw wild inferences from the making of an objection. *Thomas,* an FELA action, probably affords the best example. There plaintiff's counsel successfully objected to the admission of certain x-rays purporting to be x-rays of plaintiff's knee. The basis for the objection was simply that no proper foundation had been laid, defense counsel for some reason having been unable to produce the doctor who took the x-rays. From this, several jurors drew the inference that defense counsel was deceitful in seeking to palm off x-rays of someone else's knee as the x-rays of plaintiff's knee and that the judge caught him in the act. Defense counsel, of course, would have been well advised to explain to the jury precisely what had happened. In this connection two of the criminal cases studied where defendant failed to take the stand are illuminating. Defense counsel in each case told the jury to blame him and not his client for such failure, the upshot being that the jurors did not really blame anybody, though they did, to be sure, speculate upon the reasons for counsel's decision.

Somewhat similar to *Thomas* was the situation in *Brown,* a Dyer Act case where defense counsel, with an expression of surprise, vigorously objected to the admission of certain incriminating letters allegedly written by defendant until he had a chance to examine them thoroughly. A recess was declared for this purpose. From this, the jurors inferred (perhaps correctly) that defendant had failed to tell his lawyer of the letters' existence. What hurt defendant, however, was the next step in the jurors' reasoning: A defendant who fails to disclose everything to his lawyer is more likely to be guilty than one who does. The point was repeatedly made during the deliberations and by the jurors during their personal interviews.

B. *Closing Arguments*

As one might suppose, the jurors liked and disliked a great many things about the closing arguments. The "red heifer" argument in *Drake,*[12] and the ridicule with which government counsel in *Cooper*[13] treated defendant's claim that he was raising his wife's illegitimate children as devout Catholics, have been discussed previously. The data pro-

12. The *Drake* case is discussed earlier in the text.
13. The *Cooper* case is discussed earlier in the text.

vide numerous other examples. The *Grey*[14] jurors, for example, resented the references of plaintiff's counsel to that "invisible third force" (defendant's insurance company); his comment that defendant "wouldn't have to pay the bill," and his statement that he was sorry he had "only requested $15,000 in damages." Such "direct references" to the question of defendant's insurance and ability to pay were regarded as in "bad taste." The jurors wanted more subtlety. Several of the *Thomas*[15] jurors resented the way in which plaintiff's counsel argued damages, by hurriedly assigning arbitrary amounts for items referred to as "the primary injury," pain and suffering and wage losses, writing them on a blackboard and then, purporting to add them, arriving at an ultimate damage request many thousand dollars in excess of the sum of the various individual figures he had selected. A similar reaction obtained in *Sutter* (a personal injury action against a large trucking company) toward plaintiff counsel's use of a blackboard. Counsel wrote on a blackboard each of plaintiff's various injuries, which he bluntly designated as "leg," "arm," "head," "back" and so on, and assigned to each an arbitrary figure without explanation. "Imagine, writing 'leg,' and then listing a figure; and then 'arm.' It was a ridiculous exhibition. That was no way to talk about the question. Besides, we could see that . . . [plaintiff] was badly injured; he [counsel] should have talked about liability instead of trying to enlist our sympathy, and in such a crude way."[16]

Nor did the jurors in *Peters* (where plaintiff-pedestrian was struck by defendant's family car) like the fact that plaintiff's counsel cried while describing his client's injuries—"obvious emotionalism, a grown man, crying there in front of us like a big baby." Defense counsel in *Cooper,* a Mann Act case, strutted around like a big ostrich, got too close to the jury box when he spoke and "made us feel almost like we were on trial." One of defense counsel in *Goodman,* a Dyer Act case, spoke "like he had mush in his mouth; you couldn't understand a thing he said."

Little would be gained by listing other juror complaints except to note what was doubtless the most common of all—"the straying away from the facts," the "failure of the lawyers to get right down to the

14. The *Grey* case is discussed earlier in the text.
15. The *Thomas* case is discussed earlier in the text.
16. There is, of course, considerable case law and a vast amount of legal literature on the wisdom and/or legal propriety of permitting plaintiff's counsel in personal injury cases to employ mathematical formulae in arguing damages, particularly as regards pain and suffering. See, *e.g.,* Duguay v. Gelinas, 104 N.H. 182, 182 A.2d 451 (1962); compare Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958). See generally Keeton, *Creative Continuity in the Law of Torts,* 75 HARV. L. REV. 463, 466-67 (1962); Lambert, *Comments on Recent Important Personal Injury (Tort) Cases,* 25 NACCA L.J. 47, 68 (1960). And see Annot., 60 A.L.R.2d 1347 (1958).

evidence. They talked too much in generalities." A close runner-up was the objection, so often raised to the arguments of plaintiff's counsel in civil and of defense counsel in criminal cases, that "he was overly emotional." Here, however, there is an important caveat. A fairly high threshold of tolerance for emotionalism was present in the case of many jurors and a fair number would doubtless have been disappointed had there been less of it. A lawyer who struck many as a "windbag" would for others be "entertaining," "a typical lawyer doing just about what you would expect."

It was difficult to obtain specific data on precisely what the jurors liked about the closing arguments. The following must suffice as illustrative of the data as obtainable. Praise was forthcoming most of all for the "tightly reasoned," "down to earth" argument, the kind predicated on the evidence and largely devoid of emotion. The jurors likewise placed a high premium on a lawyer's politeness to his opponent during closing argument. In the *Field* wrongful death action, and again in *Thomas* (FELA), for example, most jurors looked very favorably upon a lawyer's express exoneration of his adversary in connection with a general charge of skullduggery which he had leveled at the adversary's client and witnesses. "That was very gentlemanly of . . . [them] under the circumstances." There was a mixed reaction to the strategy adopted by plaintiff's counsel in *Phillips #2*[17] of appealing to the supposed occupational expertise of particular jurors in connection with certain technical questions the jury had to decide. Some of the jurors enjoyed being singled out by name; others exceedingly resented the practice. There was, however, uniform approval of the stratagem followed by defense counsel in several of the personal injury cases of expressing great sympathy for plaintiff's injuries before turning to the "manifest weaknesses" of plaintiff's case as to liability.

One is also struck, in looking over the data, by several innocuous comments made in closing arguments which were remembered and favorably discussed by the jurors. Thus one juror in a wrongful death case was fascinated for some reason by an easily conceived and totally unimportant explanation given by plaintiff's counsel of how a certain portion of the highway happened to be discolored (the juror spent several minutes of his personal interview commenting on the point) while another was greatly impressed with the argument of one of defense counsel that he wanted to speak to the jury as a "friend and neighbor" and not as a lawyer. A *Thomas* (FELA) juror spent several minutes discussing a comment by defense counsel that "[State X citizens] may not be the

17. See note 4 *supra*.

smoothest people in the world, but you can't put anything over on us." The juror added: "And how true that is." Several *Sutter*[18] jurors thought highly of defense counsel's strategy of moving his hand up and down seven times, to indicate how little time plaintiff allowed himself to cross the intersection where he was hit by defendant's truck. And two jurors in *Phillips #2* were infatuated with a highly confusing, indeed unintelligible, explanation of precisely why defendant's employee did not see a properly lighted truck before smashing directly into the rear of it.

A related point also bears mention. There was a striking lack of correspondence in *Sutter* between the jurors' impressions of one of the closing arguments and the reactions of the judge and other disinterested lawyers present at the trial. The argument in question was given by junior counsel for plaintiff, a young man who had not theretofore actively participated in the trial. The first time the jurors heard him speak was when he rose to address them in argument. And, so far as the judge and disinterested lawyers were concerned, the argument was a masterpiece. Plaintiff had an extremely weak case and yet it sounded, if you allowed yourself to drift along, like a clear-cut case for liability. Furthermore, you liked the lawyer and wanted him to win. Not so the jurors. The "young boy" was "far too smooth." Indeed, it was almost as if the jurors resented his presence as that of an outsider. As one of them tersely put it: "It was a mistake to have him talk; he hadn't talked up until then. Why, I was so surprised when he got up that I almost fell out of my chair." In general, the jurors liked this lawyer least "as a person" and "as a lawyer." He finished last in both rankings. It would appear that a lawyer scheduled to argue should become acquainted with his audience beforehand—for example, by examining a few witnesses.

One final point. The discussion has thus far dealt solely with what the jurors themselves said they liked and disliked about the closing arguments. No serious attempt has been made to appraise the various arguments in terms of their actual impact on the jurors and, indeed, such a task would be impossible. Apart from a few exceptional cases, the arguments were too closely bound up with the evidence and with the jurors' reactions to the lawyers' performances as a whole. Nevertheless, it should at least be said, as bearing on the importance of closing arguments from the jurors' standpoint, that their reactions to the lawyers seemed primarily to be based on their reactions to the closing arguments, and it was not uncommon for a juror to state that he liked a particular argument either "the most" or "the least" of anything occurring during his jury service. On the other hand, most jurors, when directly asked

18. The *Sutter* case is discussed more fully *infra.*

whether they were influenced by the lawyers' closing arguments, replied negatively, often adding that "we didn't need any lawyer to tell *us* what to do." And to some degree, at least, such comments had meaning. This is best shown by *Phillips #2* where plaintiff's counsel in closing argument expressly conceded his failure to establish that one of the several defendants was liable. This concession was *never mentioned* in the deliberations. Indeed, the jurors exhaustively discussed this defendant's liability and two jurors actually voted for liability and maintained this position for more than an hour.

C. *Other Aspects of the Trial*

Of the "other things" referred to by the jurors as shaping their opinions of the lawyers, the most important was lawyer rudeness or supposed rudeness to the judge. This type of conduct occurred but seldom, though when it did or when the jurors thought it did, the point was almost certain to be made by them when describing their reactions. The judge was respected and liked by the jurors and any action by a lawyer carrying even the slightest suggestion of disrespect for the judge was highly resented. The jurors expected the lawyers to defer graciously to the judge's rulings and were irritated when the expected deference was not forthcoming. The data are persuasive, particularly in *Field, Grey* and *Thomas,* that it was extremely unwise for a lawyer even to challenge a ruling, while sulking, as did government counsel in *Johnson,* was particularly resented. Conversely, extreme deference and politeness to the judge was frequently referred to as one of the reasons for liking a lawyer. This was particularly true in *Phillips #2* where plaintiff's counsel in various ways played on the jurors' respect for the judge, most memorably by his favorable, closing-argument comments on the judge's wisdom and learning and on the way in which he had conducted the trial.

The jurors also expected the lawyers to be polite and considerate of the witnesses, even, it seems clear, in the case of an obviously biased or lying witness. In *Field,* for example, several jurors unfavorably remarked on the "meanness" of plaintiff's counsel to two of defendant's star witnesses notwithstanding that both were regarded by the jurors as wholly unworthy of belief. "He didn't have to act as though he was going to kill them; we could see where the truth lay without his scowling and yelling." The situation in *Grey* likewise bears mention. Defense counsel subjected plaintiff, an attractive forty-year-old divorcee, to an extremely vigorous and sarcastic cross-examination, and, in the eyes of disinterested lawyer observers, succeeded (and could not otherwise have succeeded) in casting grave doubts on her veracity. One juror resented

the cross-examination in its entirety; counsel had no business upsetting plaintiff like that. More significant, however, was the virtually unanimous consensus among the jurors that plaintiff's numerous testimonial contradictions were to be explained on the ground that "her lawyer did a bad job in coaching her." The assumption, in other words, was that plaintiff was entitled to a certain amount of exaggeration and that it was her lawyer's job to make sure that she got away with it. Although the jurors expressed both sympathy and empathy with even the biased or lying witness, the data unfortunately reflect an unhealthy juror-public image of the lawyer and of the amount of perjury thought by citizens to be committed in our courts. The evidence supports the claim, frequently advanced in the jury-debate literature,[19] that juries are good (or bad), because they are better able to sympathize with and to understand a witness' position than judges.

It is, however, not to be supposed that the jurors generally felt that vigorous cross-examination has no place in a trial. Rather they deplored any excess and that there was usually (though by no means always) a certain degree of sympathy for the witness. The typical reaction to such an examination was mixed. The juror sympathized with the witness yet respected the lawyer for his ability to get "the whole truth" and rather enjoyed the drama. Overall, the jurors viewed the cross-examination as an extremely unpleasant ordeal for the witness and particularly so for witnesses who were also litigants. The data further suggest, as does common sense, that in some instances counsel would be well advised not to cross-examine a witness at all. Thus the failure of defense counsel in *Field* to cross-examine the widow-plaintiff in a wrongful death action was very favorably regarded by the jurors. Such restraint showed that counsel were "real gentlemen," notwithstanding their otherwise objectionable trial strategy.

Comparatively few points remain. One is that the jurors had little use for extended and searching voir dire examinations. While the subject is dealt with elsewhere at greater length,[20] it should be noted here that criticism was levelled at every lawyer who by any stretch of the imagination spent "too much time" or asked too many embarrassing voir dire questions. From the jurors' point of view, the shorter the voir dire, the more likeable the attorney.

19. See, *e.g.*, the various authorities cited in Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954).

20. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 So. CAL. L. REV. 503, 526 (1965).

Another point, also the subject of attention elsewhere,[21] is that most jurors expressed indignation at not being told of the size of plaintiff's damage request until plaintiff's closing argument. This only happened twice [*Turner* and *Peters*] but plaintiff suffered dearly in each instance. [Ordinarily, the jurors were told in plaintiff's opening statement.] Mainly, the resentment was felt simply because plaintiff's *ad damnum* was generally regarded as vital data, lacking which, the jurors felt they were "still outsiders and didn't really know what the case was all about."

The data from *Thomas, Peters* and *Phillips #2* (all personal injury actions) though inconclusive, even for the cases mentioned, cast light on the question of whether jurors react differently to out-of-state lawyers than to local counsel. Sometimes, it appears, they do. Defense counsel in *Thomas,* it will be recalled, repeatedly referred to the fact that his adversary lived and practiced in a distant metropolis, called him a "city slicker" and contrasted "all of this" with his own local background. "My father and his father before him were small town boys, practiced law right here, and my brother now represents us in Congress." Plaintiff's counsel, an extremely able attorney, replied with a general blast at his opponent's character and strategy and spent several minutes lecturing on the "evils of sectionalism"—"I thought we had ended such talk at Appomatox." Though the interchange appears to have had no effect one way or another on most jurors, two jurors held defense counsel's remarks against him whereas three others, and one in particular, were influenced in defense counsel's favor and repeatedly characterized plaintiff's counsel as "that city slicker."

The *Peters* data are more clear-cut. Seven of the ten jurors personally interviewed disliked plaintiff's counsel in part because he came from a big city "where they have a lot of ambulance chasers. I couldn't somehow get it out of my mind that he was an ambulance chaser." The point also seems to have been made in conversation among the jurors during the trial and again in the deliberations. *Peters,* unlike *Thomas,* was a case in which defense counsel made no reference to his adversary's place of residence; nor did plaintiff's counsel refer to the question.

Phillips #2 is noteworthy in this connection because of the strategy of plaintiff's counsel in seeking to avoid any prejudice against him from the fact that he lived and practiced in a distant city, the same city, incidentally, where plaintiff's counsel in *Thomas* resided. Counsel spent the last five minutes of his closing argument in praising the judge, opposing counsel, the jurors, the dignity of the proceedings and the State

21. Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744, 756-60 (1959). And see the various authorities cited in note 16 *supra.*

in general. "Nowhere have I been so well treated; nowhere have I met so many fine people in so short a period of time." The lawyer concluded by inviting the jurors to visit him whenever they were in "my town." While the effect of these remarks is unknown, no juror mentioned counsel's residence in an unfavorable way. Indeed, several expressed the sentiment that "if I was ever in trouble, that's the fellow I want to represent me, thousand miles or no thousand miles." One juror, however, opined that counsel's invitation for a visit was "certainly unnecessary." Conceivably, whatever degree of prejudice may exist against out-of-state counsel can often be thwarted by a few well-chosen words.

It is interesting to consider the number and variety of prima facie unimportant aspects of attorney demeanor and behavior apparently affecting the jurors. Many of these have been noted. Defense counsel's unshined shoes and baggy trousers in *Thomas;* the failure of counsel in *Ford #2* to object, and the failure of defense counsel vigorously to cross-examine plaintiff; the refusal of defense counsel to cross-examine the widow-plaintiff in *Field;* the successful objection of plaintiff's counsel to the admission of the x-rays of his client's knees, also in *Thomas;* the belated imparting of the damage request in *Turner* and *Peters;* the appeals by plaintiff's counsel to the supposed expertise of various jurors in *Phillips #2,*[22] and numerous others. The extent to which the jurors observed, remembered and attached weight to such prima facie insignificant actions by the lawyers, of course, is a persuasive index of the lawyers' importance in the jurors' eyes. A few additional illustrations may consequently prove of interest.

In *Field,* several jurors commented favorably on the "gentlemanly conduct" of plaintiff's counsel in permitting the elderly woman court reporter to precede him to the bench in order to take down the proceedings on an objection. The conduct of plaintiff's counsel in this regard was always contrasted with the "ungentlemanly" practice of defense counsel, who, upon making an objection, would immediately stalk to the bench and wave for the court reporter and the other lawyers to follow him. Several *Thomas* jurors disliked (one of them intensely) defense counsel's habit of running his hand through his hair and standing with his hands on his hips. Such behavior showed his "cockiness." Defense counsel was also said to have perspired too freely. Several *Sutter* jurors derived immense pleasure from the inability of defense counsel at one point to formulate unobjectionable questions. To the observer such inability was real. Indeed, the judge himself felt obliged to formulate the proper questions. But to the jurors, counsel was merely "putting on a show,"

22. See text at note 16 *supra.*

"just being a lawyer." "He obviously knew better; I got a big bang out of the incident." This, furthermore, was the general consensus of juror opinion and the incident was several times discussed during the trial. Virtually all jurors remarked on the pleasure the incident gave them when asked to state their reactions to the lawyers during their personal interviews.

Again, both in *Grey* and *Field,* several jurors commented adversely on a lawyer's fidgeting and pacing up and down, and in *Grey* of one lawyer's habit of nervously (but almost inaudibly) tapping a long yellow pencil on the counsel table whenever his adversary's witnesses were testifying. Several *Phillips #2* jurors noted the apparent and almost studied unconcern of plaintiff's counsel with the damaging testimony of his opponent's witnesses. The jurors thoroughly enjoyed watching such unconcern and contrasting it with counsel's subsequent and sometimes very dramatic cross-examinations.

The data as a whole show that jurors pay extremely close attention to the lawyers' facial expressions. The most interesting example has already been noted, namely, the reaction of the jurors to the surprised expression of defense counsel in *Brown* when the government sought to introduce certain incriminating letters. Additional if less dramatic examples were found in other cases.

A final group of illustrations are drawn from the lawyers' performances on voir dire examinations, a topic elsewhere discussed at greater length.[23] For example, the jurors noted and adversely commented in *Williams,* a Mann Act case, on government counsel's peremptory challenge of one Marks "simply because he had been the foreman of an acquitting jury. Mr. Marks was an extremely fair man; I felt that taking him off was inexcusable." Similar data were forthcoming in *Brown,* a Dyer Act prosecution, where government counsel challenged certain jurors who had served on an acquitting jury and defense counsel challenged a person who had served as foreman of a convicting jury. Adverse comment was also forthcoming for the government's peremptory challenge in *Brown* of a Negro "just because he was a Negro. The defendant was also a Negro; it didn't seem fair to me." Challenging of Negroes by defense counsel in two of the civil cases was likewise criticized.[24] Nor did the *Field* jurors like the practice of defense counsel in challenging a venireman without asking her a single question.

Hopefully the moral of the data is clear: Jurors watch lawyers like hawks.

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23. See generally Broeder, *supra* note 20.
24. See Broeder, *The Negro in Court,* 1965 DUKE L.J. 19.

IV. Successes and Blunders of Lawyers

Obviously, what the jurors said they liked and disliked about the lawyers and about the degree of influence they had is only one way of measuring their probable impact upon the decision. Often, for example, what a lawyer did not do was as important as what he did; and what he might have done never occurred to the jurors. Often, too, an important and influential move by a lawyer—a brilliant cross-examination, for example, or the production or the failure to produce certain witnesses—was simply not thought of by the jurors as having much, if anything, to do with the lawyer. Settlement strategy, of course, could not possibly be known to the jury and the same is true of a-hundred-and-one other "behind-the-scenes" moves.

While no pretense is made that the whole story of the lawyer's influence can be told—it could *never* be learned—added perspective may perhaps be gained by a consideration of what, looking back over all the data, appear to the author as the most brilliant and the most blundering of the lawyers' moves. As would be expected, however, the mistakes—or what appear in retrospect to have been mistakes—are more easily stated. Brilliant strategy is most generally a question of piece-by-piece building. The blunder in contrast stands out like a sore thumb. The presentation is thus unavoidably lopsided.

A. *Successful Moves*

An outstanding example of influential and highly successful strategy was the cross-examination by plaintiff's counsel in *Drake* of one of defendant's three obviously capable and respected medical experts. Plaintiff's major complaints were a painful backache, nausea and loss of weight and appetite. The defense was, and the expert in question testified on direct examination, that the backache was solely due to an osteoarthritic condition common to persons of plaintiff's advanced age and that plaintiff's complaints were probably due to poor teeth. The cross-examination in question went substantially as follows:

Q: What do you base your opinion on, Doctor?
A: On the x-rays I took and on the normal physical examination of his back.
Q: How long did this normal physical examination of his back take?
A: Just a few minutes.
Q: You mean you just felt around his back with your hands to see how he reacted?

A: In a crude way, I suppose you could say that.
Q: So you base your opinion entirely on the x-rays?
A: Not entirely.
Q: But almost?
A: Yes, that is only natural.
Q: And you say there's nothing wrong with him except possibly bad teeth and osteo-arthritis that had nothing to do with the accident and which could not possibly have been affected by the accident?
A: That's right.
Q: Now, Doctor, does an x-ray always show an injury to the cartilaginous tissue? Just answer yes or no.
A: No.
Q: To the ligaments?
A: No.
Q: To the nervous system?
A: No.
Q: And would an x-ray always show an inter-vertebral disc injury, an injury to this jelly-like substance between the vertebrae (pointing)?
A: No.
Q: And your examination consisted almost entirely of taking these x-rays?
A: Yes.

This concluded the cross-examination. Redirect examination established that there was not the slightest reason to believe that plaintiff suffered from any of these suggested ailments. Recross was as follows:

Q: You still admit that your opinion as to Mr. Drake's condition is based almost entirely on your examination of these x-rays?
A: Yes.
Q: But you maintain that Mr. Drake is not bothered by an injury to his ligaments or to his cartilaginous tissue or to his nervous system and that he has no inter-vertebral disc injury?
A: That is right.
Q: But, Doctor, how on earth would you know that? All you did was look at some x-rays which you admitted wouldn't tell you and you felt his back a couple of times.

A: I know, that's all.
Q: You just know! That will be all.

There was no further redirect, plaintiff's counsel failed to cross-examine either of defendant's two other experts (each of whom testified substantially as the first), and there was not a shred of evidence in the case that plaintiff suffered from any of the ailments suggested by plaintiff's counsel. Furthermore, plaintiff's evidence concerning the causal connection of his ailments with the accident was extremely, almost pitifully weak.

The impact of the cross is dramatically shown by the fact that most jurors expressed the view that it was "more than likely" that plaintiff was suffering either from a nervous condition or from an inter-vertebral disc injury attributable to the accident. Certainly this was the consensus of opinion during the deliberations.

A dramatic cross-examination of defendant's chief medical witness was likewise an important factor in bring about a resounding plaintiff's victory in *Phillips #2*. On direct examination, the doctor, a prominent local radiologist, testified that no pathology was apparent in any of the x-rays he took of plaintiff's back, and that the "curvature of the spine" apparent in the x-rays of plaintiff's expert was "only apparent, a distortion caused by the position of plaintiff's body with reference to the x-ray tubes at the time the pictures were taken." Plaintiff's counsel, on cross-examination, not only extracted the admission that the doctor had reported "a slight abnormality" in one of his own pictures to another of defendant's doctors but, far more decisive, forced him to measure each of his own pictures with a micrometer and to admit that each of the pictures when so measured showed "some degree of curvature of the spine," and that one of them had almost as great a distortion as that present in the x-rays taken by plaintiff's medical expert. The fact is that it is virtually impossible to take an x-ray picture of anyone's spine which does not show "some degree of curvature." The doctor, however, did not so state and the jurors certainly did not know it. The consensus instead was that defendant's doctor had been "totally destroyed" and that there was indeed something very seriously wrong with plaintiff's back. One of the jurors commented that "up until then [the cross-examination] I had my doubts but that convinced me that he [plaintiff] was bad off." Three others said that the cross-examination was the turning point so far as the question of damages was concerned. Although several jurors had sympathy for the doctor and felt that counsel had gone too far in making him look like a fool, eight jurors stated that the examination strongly influenced them to increase damages. The jurors had the utmost sympathy for the doc-

tor and felt that counsel had gone much too far. Yet the jurors were on the whole likewise decisively influenced by the incident in favor of plaintiff's cause.

The cross-examinations of the doctors in *Drake* and *Phillips #2* stand out. And while a considerable number of other highly effective and influential lawyer examinations appear in the data, most of them seem attributable to careful selection of witnesses and in general to the lawyers' hard work and good judgment prior to trial—effective deposition-taking, detailed investigation of the circumstances surrounding the accident and so on. Illustrative in this category is defense counsel's production and examination of a government chemist in *Rose* who had tested a sample of deceased's blood taken from his body immediately after the accident. Seldom, if ever, has a witness sold himself to a jury so successfully. A man of twenty-seven, he looked no more than fourteen, and the contrast between his appearance and his testimony was something to behold. Though not conceited, he possessed considerable self-confidence, high competence in his field and was more articulate than any of the lawyers, all of whom were articulate. And counsel's direct examination was admirably designed to make the utmost of his find. He led the witness on and on, had him explain the history of blood testing, the numerous scientific experiments in which the chemist had participated, the nature of the various scientific papers he had written, exactly how blood testing is conducted and the accuracy of the tests. The jurors thoroughly enjoyed every moment he was on the stand and his testimony that deceased was dead drunk at the time of the accident was certainly a major cause of the jury's verdict for defendant. Perhaps it would have been the same if a less impressive chemist had testified or if counsel had not had him give a lecture. The interviewer's impression, however, was contra—it was extremely difficult to get many of the jurors to discuss anything but "that chemist who looked like a little boy but who really knew his stuff and talked like a man."

Before turning from the lawyers' handling of witnesses, two other incidents, both drawn from *Field,* should be mentioned. The first consists in the calling by plaintiff's counsel of a large number of witnesses to testify that defendant had not produced, as claimed, a certain tie-rod end from defendant's tractor involved in the accident. While the fact that defendant had brought in a different tie-rod was obvious from certain pictures, the long string of plaintiff-witnesses testifying to this fact gave more body to counsel's charge that defendant was "falsifying evidence and being deceitful." The second point is a tribute to defense counsel, who, in examining defendant's employee involved in the accident, man-

aged to establish that the employee had himself been very seriously injured. This caused the foreman of the jury—and probably its most influential member—to reduce damages in an odd process whereby the employee's injuries were balanced against deceased's death. Damages were then awarded to plaintiff for the difference. Similar (what I have elsewhere termed "scapegoat")[25] reasoning was used by several jurors in two other personal injury cases.

So far as successful arguments are concerned, two examples will have to suffice. The first is from *Grey* where plaintiff's damage case was extremely weak; in fact, not one of her treating doctors appeared to testify. Plaintiff testified that they were in Florida on a vacation, "beyond the reach of a subpoena." Counsel for plaintiff spent several minutes on this testimony in argument, his central, albeit implied, point being that plaintiff could not be blamed for the non-appearance of the doctors and that the weakness of his client's damage case should therefore be overlooked. Three highly influential jurors bought the argument and were instrumental in securing a verdict several thousand dollars in excess of what the others wanted and what the judge and other disinterested lawyers present considered proper.

The second illustration is drawn from *Ford #2* and consists of a single sentence: "Mr. Ford's [plaintiff's] driving record is excellent; this was the first and only accident in which he has ever been involved." There was no evidence that this was so; only the non-objected-to statement of counsel in argument. In contrast, defense counsel made no reference to the driving record of defendant's employee nor was there any evidence concerning such record. The liability decision could easily have gone either way. The previous trial had resulted in a hung jury on this issue and there was a sharp division of opinion among the *Ford #2* jurors. The importance of counsel's statement is seen from the fact that it was a repeated theme of the deliberations over liability, that it was dealt with and thought of as evidence and that it was frequently mentioned by the jurors—including two initially siding with defendant—as one of the factors influencing them to vote for liability. It was not, however, only the statement itself that was important but the statement in relation to the failure of defense counsel to object and to tell the jury of the driving record of defendant's employee. Failure of defense counsel to object, in other words, was understood by the jurors as an admission that the statement of plaintiff's counsel was true and the jury's "lack of information" as to the driving record of defendant's employee compelled the inference

25. Broeder, *The Impact of the "Scapegoat" in Jury Trials: Some Tentative Insights* (current issue of DUQUESNE L. REV. (1966).

that it was not as praiseworthy as plaintiff's. The analogy, of course, is to the previously discussed *Brown* and *Thomas* cases where the jurors drew unwarranted conclusions from a lawyer's objections.

The final example of successful strategy is drawn from *Phillips #2*. Phillips, a trucker, had sustained apparently minor personal injuries along with considerable property damage to his tractor-trailer and cargo. The property damages were covered by insurance carried by several different companies and Phillips had also received a $2,000 workmen's compensation payment from his employer's insurance company. The companies, then, stood in plaintiff's shoes to the extent of the payments made and were, in fact, joined by defendants as involuntary party-plaintiffs. The problem for plaintiff's counsel under applicable law was whether to tell the jurors of the insurance company interests or to oppose any mention of them by defense counsel. The former course was chosen, though not without misgivings.

The wisdom of counsel's final decision was established beyond question. While the matter is exhaustively discussed elsewhere,[26] the basic point is that the jurors, after once finding liability, automatically awarded approximately $9,000 in stipulated property damages to the involuntary party-plaintiffs and then dealt with Phillip's personal injury claim as if nothing had previously been awarded to anyone. The result was an extremely high personal injury award. As one of the jurors put it:

> I think we awarded more damages because of the insurance companies. . . . We really began with our [personal injury] verdict just as if that initial $7,000 or $8,000 [it was approximately $9,000] whatever it was, had never been involved in the case. And when you have already awarded that much to insurance companies, you have to give the individual something, too.

B. *Blunders—Retrospectively Viewed*

Nowhere do the data more clearly reflect the lawyers' importance in jury trials than through the numerous obvious blunders found therein. Perhaps the sequence of cases studied is atypical in this regard. More likely it is not. Hindsight is an incalculable benefit in appraising a given performance. Apparently intelligent moves at the trial become mistakes and mistakes become gross blunders. But even so, the catalogue of serious errors is surprising. There was little excuse for many of the things which were done and not done, and there is much in the data to

26. Broeder, *The Pro and Con of Interjecting Plaintiff Insurance Companies in Jury Trial Cases: An Isolated Jury Project Case Study*, 6 NAT. RES. J. 269 (1966).

suggest that victory lies not so much in brilliant cross-examinations, good witnesses and argument as in the avoidance of some big blunder.

The presentation is in three parts. The first deals with what for want of a better term may be described as a "legal blunder," a serious error resulting either from lawyer failure to understand or properly to use an important rule of law, to request some ruling from the court or to appeal. Also included are situations where a lawyer failed adequately to explain a rule of law to the jury. The second part catalogues serious errors committed during the trial other than those covered in part one. Many of these, of course, have already been noted such as the "red heifer" argument in *Drake*. However, nothing is said of juror selection "mistakes." These are elsewhere reported.[27] A mistake, as the term is used here, means an error which could fairly, though not necessarily, have been so regarded at the trial without the benefit of lengthy post-verdict interviews. The third and last part is concerned with settlement errors and here, of course, every "error" will likewise be counter-balanced by a success when viewed from the standpoint of the other side.

1. Legal Blunders

The most obvious legal blunder was committed by plaintiff's counsel in *Stone,* a railroad crossing accident case involving several plaintiffs whose combined claims exceeded $100,000. State X law applied and the circuit court of appeals had only recently decided that such law required a directed verdict for defendant in any case where the uncontradicted evidence showed that the driver of a car could, *on a dry day,* have avoided a collision after observing the train. The decision, incidentally, reversed a contrary ruling by the trial judge presiding in *Stone*. Plaintiff's counsel had simply not read the opinion and his clients' testimony fell almost squarely within it. It was a needless admission for the driver of the car really had no notion of whether he could have stopped on a dry day; it was not a dry day, it was raining and icy. He merely said that he could in order to avoid the inference that he was driving too fast. The result was a directed verdict for defendant. Furthermore, counsel was unable to construct the only argument which could possibly have induced the judge to deny the motion, notwithstanding that the trial was postponed for an hour in order to allow time for research.

Of equal seriousness was the blunder in *Thomas,* an FELA case, where defendant's two lawyers—affiliated with different firms—inadvertently allowed the time for appeal to expire. Each lawyer thought

27. Broeder, *Voir Dire Examinations: An Empirical Study,* 38 So. CAL. L. REV. 503 (1965).

the other was appealing and neither did anything. The full amount of the judgment ($9,000) thus had to be paid notwithstanding that the chances for a reversal were good. Plaintiff's counsel sought and received an instruction that defendant's violation of the Boiler Inspection Act and/or any one of several ICC regulations issued thereunder compelled a verdict for plaintiff for the full amount of his damages with no reduction for contributory negligence. The instruction was arguably error.[28] Interestingly, however, not a single juror paid it the slightest attention. Plaintiff's counsel ran a wholly needless risk. Ironically, then, the defendant lawyers' mistake in permitting appeal time to expire precluded them from taking advantage of the plaintiff lawyers' mistake in seeking a needless and erroneous instruction.

The error in *White,* a freak auto-pedestrian case, was only slightly less gross. When plaintiff rested, her liability case was not, in the judge's private view, sufficiently strong to withstand a motion for a directed verdict. Defense counsel, however, made no such motion at this time but instead put on his own witnesses who on cross-examination so bolstered plaintiff's case that it was adequate to compel a denial of a directed verdict when defense counsel finally requested one after resting his own case. To make this crystal clear: Defendant would have won on a directed verdict had counsel made the motion at the end of plaintiff's case. Furthermore, several jurors favoring a plaintiff's verdict at the conclusion of the trial said that they would have voted for defendant had the taking of testimony ended at the conclusion of plaintiff's case.

The error in *Cooper* consisted in the failure of government counsel to request a specific instruction on the meaning of the word "induce" in the Mann Act phrase "induce, entice or compel." The government was clearly entitled to the instruction had a proper request been made. One juror, who held out for a conviction for several hours, was positive that she would have hung the jury had the instruction been given. She had no use for defendant, desired scrupulously to adhere to the law and possessed the courage of her highly moralistic convictions. She voted for acquittal only after a long and bitter battle and then because of her uncertainty over the legal meaning of "induce."

The failure of defense counsel in *Drake* to request an instruction that the award was not subject to federal income taxation should also perhaps be mentioned. While the decisions on the propriety of such an instruction are conflicting,[29] there was at that time no authoritative ruling

28. See the discussion and citation of authorities in GREGORY & KALVEN, CASES AND MATERIALS ON TORTS 225-28 (1959).

29. Currently, the leading case, which collects a host of authorities on both sides of the question, is McWeeney v. New York, N.H. & H.R.R., 282 F.2d 34 (2d Cir. 1960),

in the circuit that the instruction was improper and, indeed, the presiding judge in a later case actually gave such an instruction sua sponte. Besides, negligence case defendants (unlike plaintiffs) are usually willing if not eager to run instruction risks. In any event, the non-giving of the instruction in *Drake* cost defendant dearly. The jury, after tentatively agreeing on a verdict of $20,000, then increased the award to $25,000 in some measure because they felt that the sum awarded was taxable as ordinary income. A similar procedure was employed by the jury in *Grey,* though the amount of the increase was not nearly so great and there was no general agreement on the propriety of making it.[30]

The remaining legal mistakes, though serious, did not, *as it turned out,* affect the final result. Thus government counsel in *Johnson,* a Dyer Act case, commented directly on defendant's failure to take the stand and defense counsel moved for a mistrial. The judge, who reserved ruling at the time, later privately stated that he would have granted the motion had the jury convicted.[31] Retrial would then arguably have been barred by the double jeopardy clause.[32] Ironically, the jurors could not even remember the comment when personally interviewed.

Finally, there was the blunder of plaintiff's counsel in *Turner* which probably likewise made no difference. Plaintiff was in the service at the time of the auto-accident and thus sustained no wage losses or medical expenses. He was, however, incapacitated for a considerable period

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cert. denied, 364 U.S. 870 (1960). See generally Nordstrom, *Income Taxes and Personal Injury Awards,* 19 OHIO ST. L.J. 212 (1958); Note, 51 COLUM. L. REV. 782 (1951).

30. Of course, as Professor Kalven has many times pointed out, much Jury Project data supports the proposition that such matters as taxes, interest and lawyers' fees (concerning which juries have not traditionally and are not currently instructed) are used as bargaining mechanisms through which jurors resolve their differences over the proper amount of damages to be awarded. See, *e.g.,* BLUM & KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM—AUTO COMPENSATION PLANS 33, 35 (1965); Kalven, *The Dignity of the Civil Jury,* 50 VA. L. REV. 1055, 1068-71 (1964); Kalven, *The Jury, the Law, and the Personal Injury Damage Award,* 19 OHIO ST. L.J. 158, 163, 176 (1958).

31. Whether government counsel would have made such an argument had he not realized that his case was probably already lost is unfortunately unknown. In most cases, of course, such information could never be obtained; defendant's proof problem would ordinarily be insuperable. This is why, I suspect, many courts have refused to allow new trials where mistrials have been granted because of prosecution error. *Cf.* Downum v. United States, 372 U.S. 734 (1963); compare United States v. Tateo, 377 U.S. 463 (1964). See generally Note, 38 ST. JOHN'S L. REV. 158 (1963). Why new trials are not, as in England, barred when there is a reversal on appeal for prosecution error is something I have never been able to understand. See United States v. Gilbert, 25 Fed. Cas. 1287 (No. 1300-01) (C.C.D. Mass. 1834). Concerning the English practice, see Goodhart, *Acquitting the Guilty,* 70 L.Q. REV. 514 (1954); Williams, *Report of the Department Committee on New Trials in Criminal Cases,* 17 MOD. L. REV. 454 (1954).

32. As I have elsewhere argued, the second clause of the seventh amendment, both historically and practically, constitutes a far more appropriate vehicle than double jeopardy for barring new trials in this and similar cases. Broeder, *Wong Sun v. United States: A Study in Faith and Hope,* 42 NEB. L. REV. 483, 516, n. 121 (1963).

and the reasonable value of the medical service rendered to him by the government was fairly in the thousands. The collateral benefits rule[33] would have permitted recovery of these items. Counsel, however, was unaware of the rule and announced in his opening statement that there was "fortunately no question of wage losses and medical expenses in the case." And plaintiff's case was conducted on this basis throughout. The reason it probably made no difference is that most jurors thought that defendant was not liable and the jury rendered a verdict—after a bitter twelve-hour deliberation—for a compromise $1,500. Had plaintiff's liability case been stronger, however, the blunder would have proved costly. For all six jurors personally interviewed stated that they would unhesitantly have awarded recovery for the items had they known of the rule and been told of the reasons underlying it.[34] Lawyer unawareness of the rule is probably widespread; plaintiff's counsel in *Sutter*—where the verdict was for defendant—was similarly uninformed.

Counsel's failure to explain adequately the law to the jury had its most telling impact in *Brown,* a Dyer Act case. But for such failure, an acquittal instead of a conviction would possibly have resulted. While the government's evidence was uncontradicted that defendant—in violation of a rental agreement and without making the required payment—transported a car from one state to another and then abandoned it, the court, erroneously as it later turned out,[35] instructed the jury that the government had the burden of showing beyond a reasonable doubt that defendant had the intention permanently to appropriate the car to himself *at the same time he rented it.* On this latter point, the government's case was very weak. There were no admissions by defendant regarding his intention when he rented the car, no proof of the time he left the first (or "rental") state or the time he arrived in the other state. It could have been weeks afterwards. The rental agreement was blank concern-

33. This rule, almost universally recognized in the United States, is to the effect that a tortfeasor is not allowed to mitigate damages because the injured plaintiff has received benefits from third parties, health and workman's compensation benefits, for example. The principal case refusing to recognize the rule in the United States is Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962). Compare Daniels v. Celeste, 303 Mass. 148, 21 N.E.2d 1 (1939); Motts v. Michigan Cab Co., 274 Mich. 437, 264 N.W. 855 (1936). See generally James, *Social Insurance and Tort Liability,* 27 N.Y.U.L. REV. 557 (1952); Kalven, *The Jury, the Law, and the Personal Injury Award,* 19 OHIO ST. L.J. 158, 169 (1958) (juries in general unhappy with collateral benefits rule); Seavey, *Effect on Tort Damages of Events Occurring Before Trial,* 66 HARV. L. REV. 1237 (1953); Street, *Supervening Events and the Quantum of Damages,* 78 L.Q. REV. 70 (1962); Note, 77 HARV. L. REV. 741 (1964); Note, 63 HARV. L. REV. 330 (1948).

34. Compare Kalven, *supra* note 33, at 169.

35. United States v. Turley, 352 U.S. 407 (1957). Post-Turley cases are collected in Riley v. United States, 359 F.2d 850 (5th Cir. 1966).

ing the precise date defendant was to return the car and defendant had previously rented cars from the agency and returned them on time. Furthermore, defendant used his correct name and address in renting the car and so could easily be traced while the car itself had distinctive "drive-it-yourself" markings. Court-appointed defense counsel, extremely conscientious but very young, nervous and inexperienced—this was his first jury trial—stressed none of the above and wholly failed even to mention—let alone explain—the point of law upon which an acquittal depended. The jury convicted within a half-hour. Government counsel himself thought the verdict to be wrong, taking the position that he had not met his burden on the question of defendant's intention. Much of the force of all this would be lost had defense counsel not known the content of the court's instructions during argument. But he did. Counsel for both sides were informed of the instruction told just prior to argument.[36]

Rose affords a second illustration. Plaintiff's intestate, while attempting to cross a highway running through the center of a small town, was killed by defendant's loaded cattle truck traveling approximately forty m.p.h. in a twenty-five m.p.h. zone. Defendant virtually conceded his employee's negligence, defending instead on the ground that deceased was dead drunk at the time and, after standing motionless on the center line until the truck was almost upon him, took three or four steps across it and then leaped directly into the path of the truck in a befuddled effort to avoid being hit. The only difficulty with this position was the uncontradicted evidence that the truck was traveling very close to the highway's right shoulder until just before the accident when it swerved almost to the center line, the approximate point of impact. Because of this and because deceased never stepped across the center line until his last-second leap, it was possible to avoid the effect of his drunken condition and probable unsteadiness by arguing that his negligence, if any, was not the "proximate cause" of the accident. The argument, however, was never made; plaintiff's counsel never mentioned "proximate cause."

Several circumstances show that this was a significant blunder. First, most jurors—including the most influential member of the panel[37]—possessed an intense desire to disregard or "get around" the doctrine of contributory negligence. They regarded it as unfair both to plaintiff—

36. As a further point of interest concerning court-appointed counsel (five of the seven criminal cases involved them) none complained that he was serving without compensation. Compare Broeder, *Torts and Just Compensation: Some Personal Reflections*, 17 HAST. L.J. 217, 220-21, 252-53 (1965), and authorities therein cited.

37. The term "most influential" juror as used herein means "most influential" both as characterized by his juror colleagues and as pieced together by the author on the basis of the juror interviews *in toto*.

who was thereby deprived of all compensation—and to the community, whose interest they felt required defendant and his employee to be "punished" for the latter's negligence. Furthermore, they resented being deprived of an opportunity to state publicly the basis for their decision—that deceased's negligence barred recovery notwithstanding that defendant's employee was equally, if not more, to blame. The community interest demanded at least this much and it took a trip to the courtroom to establish that the law in its wisdom had mistakenly decreed otherwise. The point, in other words, is that the jurors searched frantically for some basis for granting plaintiff a degree of relief and for punishing defendant and his employee for the good of the community. Yet they could not find it—none of them had a firm notion of the meaning of "proximate cause," and most of them not the slightest notion although five jurors were personally willing to take the law into their own hands, only one felt able to do so in the face of the oath-violation charges repeatedly made in the deliberations. The political situation in the juryroom required a legal peg on which to hang a compromise. Had counsel supplied it in the form of "proximate cause," the result would possibly have been a verdict for plaintiff or at least a hung jury. The authority for this is no subjective hunch. It comes from the jurors themselves, two of whom emphatically stated that had they possessed the "proximate cause" peg, they would then have hung the jury rather than agree to a defendant's verdict. Several others said that plaintiff would have probably prevailed. Furthermore, the most influential juror opined that the result would doubtless have been a plaintiff's verdict for approximately $5,000.

While the data are by no means as clear, four interviews in *Peters* (pedestrian plaintiff, auto-accident case) likewise support the view that plaintiff's counsel blundered in failing to argue "proximate cause" in that case. If *Rose* and *Peters* are any criteria, "proximate cause" doctrine has great potential as a device for defeating the contributory negligence defense.

The remaining example has been discussed elsewhere[38] and can accordingly be disposed of briefly. Illustrated both by *Thomas* and *Drake,* the only FELA cases studied, the error was in the failure of defense counsel to explain clearly to the jury the proper method for computing damages. Most of the jurors in each case were in agreement regarding plaintiff's contributory negligence and understood that plaintiff's damages had therefore to be reduced. However, instead of computing the amount of such damages and agreeing even generally on the "percentage-

38. Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744, 756-60 (1959). And see note 20 and accompanying text *supra.*

extent" to which plaintiff was responsible, they simply took plaintiff's damage request and made amorphous individual deductions from such amount. In both cases the practice probably substantially increased the amount of the award.

2. Miscellaneous Lawyer Mistakes

While most of the serious and many of the not so serious non-legal blunders have already been noted, a few still remain. The most significant is drawn from *Field,* a wrongful death action, where, because of the way in which the case was tried, the ultimate issue became whether the accident occurred in the north or in the south lane of a highway. And on this issue the defendant hardly stood a chance. Plaintiff introduced strong circumstantial evidence that the accident occurred in the north lane. Defendant's evidence that it occurred in the south lane consisted almost entirely in the testimony of several alleged eye-witnesses, each of whom was thoroughly discredited on cross-examination. If defense counsel, instead of basing their case on apparently unreliable eye-witness testimony, had taken the position that the accident occurred where plaintiff said it did and argued that it occurred there because of deceased's negligence, the result—as regards damages—might have been vastly different.

The error in *Sutter* was committed by plaintiff's counsel. Plaintiff, a private motorist, was seriously injured and sought $75,000 damages which most jurors considered a reasonable sum. Defendant counterclaimed for the $1,500 damage to its tractor-trailer. The verdict was for defendant in both actions. The error consisted in counsel's failure to stress the court's instruction that defendant's employee had the duty of slowing down at the intersection in relation to the employee's express admission that he had not done so. Had counsel stressed these items, plaintiff's liability insurer would probably have saved $1,500.

A third mistake (probably the most common of any committed in the civil cases) was the failure of defense counsel in many instances to argue the question of plaintiff's damages or even so much as advert to the question. Ordinarily, the reason they did not do so was a fear that the jury would interpret the argument as an implied admission of liability. And doubtless this is at times altogether sound strategy—but probably not nearly as often as most defense counsel seem to think. Not arguing damages in terms of dollars and cents leaves the jury with nothing to go on but plaintiff's damage request. Plaintiff's request sets the entire tone of the jurors' discussion of damages. The subject is dealt with else-

where in detail.[39]

Finally, defense counsel in *Meyer,* a Harrison Act case, made no objection to the obviously incompetent and prejudicial testimony of a narcotics agent that he approached defendant to buy dope solely because he had been informed by state police officers that defendant was an addict and had for some time been under suspicion by the officers for peddling. The point was several times made in the deliberations as a reason for convicting defendant. But it was by no means decisive.

3. Settlement Errors and Successes

Though the nature of the settlement negotiations is known in a general way for nine of the civil cases studied, in only one and perhaps two can a lawyer be said to have seriously blundered. Concerning *White,*[40] however, there is no doubt. Defense counsel made a serious error in judgment. Plaintiff's liability case was pitifully weak and $7,500—the amount for which the case was settled just after the instructions to the jury—would have been liberal had liability expressly been admitted. The judge would have found for defendant and this was also the inclination of a few jurors. The highest amount favored by any juror was $5,000, most jurors favoring from $1,000 to $3,000.

Drake (FELA) only arguably involves a serious error of settlement strategy. Defendant's final offer, which plaintiff and his counsel repeatedly refused, was $2,500. The verdict was for $25,000. The judge and disinterested lawyers present would have given $2,000. Obviously, defense counsel made an error in judgment; the difficulty, of course, is that we are using hindsight. No other lawyer present, even after the unfortunate comparison of plaintiff to "an old red heifer," thought in terms of $25,000. The verdict is an object lesson in the difficulty of prediction.[41] From this standpoint perhaps, even the $7,500 settlement in *White* was reasonable.

Drake involved other settlement highlights. Defendant's first offer was $1,500 which plaintiff himself flatly turned down against the advice of his then-counsel. This occurred on the morning of the day the case was first set for trial and while the jurors were present and ready to proceed. Incensed with his counsel, plaintiff berated them and started a fistfight in the law library which was broken up by defense counsel. Plaintiff's counsel withdrew and plaintiff hired another lawyer who actually tried the case. Defendant then raised the ante to $2,500. Of the $25,000

39. Broeder, *supra* note 38.
40. The *White* case is discussed earlier in the text.
41. The *Drake* case is discussed earlier in the text.

awarded, however, plaintiff finally received only $4,000. He had signed contingent fee contracts with lawyers of whom even trial counsel had no knowledge. Litigation over the respective amounts to which plaintiff and his various lawyers past and present were entitled dragged on for more than a year, finally ending in the circuit court of appeals whose opinion—which ironically appears to be arguable—broke fresh ground in the conflict of laws area.

The settlement situations in *Field* and *Phillips* should also be noted. Defense counsel's final offer in *Field* was $25,000; plaintiff's counsel was willing to settle for $27,500. The verdict was for $52,500, later adjusted to $50,000 because of defendant's agreement not to appeal. The failure of defense counsel to accept plaintiff's offer, however, while costly to their client, can only doubtfully be branded as a blunder. The verdict was the largest in the history of the district court's division, and while plaintiff had an excellent case at the conclusion of the trial, defense counsel were obviously trading on the substantial possibility—which never materialized—that the jurors would know of and be influenced by the $15,000 limitation on death action recovery in the state where the case was tried, notwithstanding that the law of another state, which had no such limitation, governed. On the other hand, the judge would have awarded $40,000; several of the lawyers present, $75,000; and the lowest amount favored by any juror was "from $25,000 to $30,000." Most jurors favored $75,000, two of them $100,000.

The two *Phillips* cases afford still another settlement lesson. Plaintiff had an excellent liability case in both trials but the verdict in the first trial unpredictably went for defendant and seems to have thrown everything out of perspective. As reported by plaintiff's counsel:

> In this case, our thinking as to the aggregate value of the case at all times was in the neighborhood of $30,000. However, after the first trial, our sights did go down somewhat. As I recall, we had received an offer of $8,000 at about the time of the first trial which was, of course, turned down. After the reversal by the Circuit Court, the company who insured the . . . Express Company, entered into some settlement negotiations with us. However, just before the trial they wrote us and advised us that they had come to the conclusion that the accident was entirely the other party's fault and they would make no payment. During trial, however, I received an offer of $11,500 which I believe was made up of $8,000 from the Express Company and $3,500 from the other defendant. This was turned down and our demand at that time was $18,000.

> The case went to the jury on the basis of that demand and offer.
>
> After the verdict, the insurance company attempted to compromise the same and after the motion for a new trial had been denied, made an offer of $25,000 which was categorically turned down. They finally paid the verdict in full, together with interest and costs.

The amount of the payment was approximately $30,000.

The verdicts rendered in the remaining civil cases studied surprised no one and certainly not counsel. In *Brown,* for example, defendant offered $900, the nuisance value of plaintiff's claim, which plaintiff's counsel urged his client to accept. The verdict was for defendant. *Rose* and *Drake* are similar. *Ford,* where defendant offered nothing, was extremely close on liability. The first trial resulted in a hung jury, the second in a modest plaintiff's verdict of $7,500, most of which represented stipulated property-damages. Defendant had an excellent chance of prevailing, gambled and after almost winning, lost. Generally speaking, the data exhibit considerable sophistication on the part of counsel in their ability to judge the dollar value of a claim.

V. Conclusion

The approach here, of course, has necessarily been anecdotal. Twenty-three cases, furthermore, are not many cases even from which to draw anecdotes. Nevertheless, it clearly emerges that jurors sometimes do try lawyers and that even such matters as lawyer facial expressions and courtesy to elderly female court reporters sometimes have weight. It perhaps also bears repeating that the threshold of juror tolerance for objections and attorney-emotionalism was surprisingly high.

In closing, I wish to thank the extremely able presiding judge without whose extraordinary patience and cooperation this undertaking would not have been possible and to remind the reader that the data reported here constitute but a small portion of the data generated by the University of Chicago Project on the impact of lawyers in jury trials.

If the reader has gained only small additional insight into the problem of the lawyers' influence upon jurors, this article's modest purpose will have been served.