Ignorance as Bliss? - The Historical Development of an American Rule on Juror Knowledge

Edward J. Finley II
COMMENTS

Ignorance as Bliss? The Historical Development of an American Rule on Juror Knowledge

Edward J. Finley II†

The institution of trial by jury contains within itself a seeming paradox. On the one hand, jurors are likely to have some personal knowledge about a case, the parties or the witnesses because jurors are drawn from the vicinage. An ancient common law term denoting the neighborhood in which the transaction or crime took place. Black’s Law Dictionary 1405 (West, 5th ed 1979). While that might have been more true in the sixteenth century than today, one can still expect jurors from the neighborhood to come to trial with some background knowledge about the case. In fact, two recent studies reveal that jurors today rely on personal knowledge with surprising frequency.

On the other hand, the common law guarantee of a jury of “indifferent” peers seems to militate against jurors who come to trial with any personal knowledge of the case. Intuitively, one might argue that a juror with personal knowledge, at worst, will be predisposed against one side, or, at least, might decide a case contrary to the evidence presented in court. In either case, empanel-

† B.A. 1987, University of Virginia; J.D. Candidate 1991, University of Chicago.
1 An ancient common law term denoting the neighborhood in which the transaction or crime took place. Black’s Law Dictionary 1405 (West, 5th ed 1979).
2 See J.B. Thayer, A Preliminary Treatise on Evidence at the Common Law 91 (1898), and text accompanying notes 34-75.
3 See D.W. Broeder, The Impact of the Vicinage Requirement: An Empirical Look, 45 Neb L Rev 99 (1966). Utilizing data from 23 jury trials held in federal district court in the Midwest (16 civil trials and seven criminal trials), Broeder describes “the use made by jurors of the assorted store of information one acquires about his neighborhood by living there . . . .” Id at 101. He found that in ten out of 14 civil trials (two were settled and one was reversed by the Court of Appeals) and in three out of seven criminal trials juror knowledge of local conditions played a part in their verdict. Id at 101-02. See also John H. Mansfield, Jury Notice, 74 Georgetown L J 395, 396 (1985).

457
ling jurors with personal knowledge seemingly jeopardizes fair and impartial adjudication.

Lawyers and jurists have debated whether jurors should have or use personal knowledge for at least two hundred years. The American rule today, as stated by Professor Wigmore, is that a person who has any personal knowledge about the case, except of the most general nature, may not serve as a juror. Furthermore, a judgment rendered by a jury that has relied on personal knowledge can be vacated and remanded for a new trial. This Comment will explore the historical development of the American rule regarding juror knowledge.

During the late eighteenth and early nineteenth centuries, jurors often came to trial with personal knowledge about the case. In fact, most courts at that time willingly deferred to a jury's determination on the grounds that jurors might have some knowledge of their own. Courts were sensitive, however, to concerns about impartiality. All personal knowledge, therefore, was not treated uniformly.

Jurors who had knowledge obtained by direct observation or experience ("direct knowledge") were required to present their evidence in open court. Such jurors, however, were not systematically excluded from juries. Instead, courts would exclude only those

---

8 See, for example, Bushell's Case, 124 Eng Rep 1066 (CP 1670); and the discussion in John Marshall Mitnick, From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror, 32 Am J Legal Hist 201, 203 (1988).

9 See John Henry Wigmore, 6 Evidence in Trials at Common Law § 1800 at 331 (Little, Brown & Co., 1976): today jurors may use personal knowledge that is 1) of matters akin to judicial notice; 2) from a view of a site (but see limitations in § 1168); or 3) (a) notorious, (b) general, and (c) unquestioned. The requirement that knowledge is of a general nature is limited to such knowledge that is common to the "human experience." See Mansfield, Jury Notice, 74 Georgetown L J at 396 (cited in note 3). But compare A. Leo Levin and Robert J. Levy, Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum, 105 U Pa L Rev 139 (1956).

7 Wigmore, 9 Evidence § 2570 at 726 (cited in note 6).

* See text accompanying notes 76-85.
who were partial as a result of their direct knowledge.\textsuperscript{10} During the late nineteenth and early twentieth centuries, courts began systematically to exclude jurors who had any direct knowledge.\textsuperscript{11}

Nineteenth-century courts judged jurors who had knowledge about a case obtained from rumor, newspapers or repute ("vicarious knowledge") in the same way that they judged jurors' opinions. Late eighteenth- and early nineteenth-century courts excluded potential jurors only if such vicarious knowledge rendered them partial.\textsuperscript{12} At the same time, courts were particularly tolerant of jurors' use of vicarious knowledge.\textsuperscript{13} During the last third of the nineteenth century, many state legislatures passed statutes prohibiting jurors' use of personal knowledge.\textsuperscript{14} Courts nevertheless continued to apply their traditional rule, though somewhat more narrowly.\textsuperscript{15}

Part I of this Comment briefly outlines the history of the English jury until the 1760s, the background against which eighteenth-century American colonists viewed the role of the jury.

Part II, itself divided into two sections, describes the development of American rules governing the state of a juror's mind. Section A treats the rules regarding exclusion of a juror for having a prejudicial opinion. Those rules also reveal what kind of personal knowledge would render a potential juror incompetent, since opinion is naturally founded upon some knowledge. Section B treats the rules regarding use of personal knowledge, distinguishing between direct knowledge and vicarious knowledge. Because vicarious knowledge affects by far the greatest number of potential jurors and has been the subject of the most dispute recently,\textsuperscript{16} it is the focus of this section.

\section*{I. THE ENGLISH JURY BEFORE THE 1760S}

In the first English jury trials, jurors were expected to come to trial with personal knowledge.\textsuperscript{17} That is not to say that jurors possessed first-hand knowledge.\textsuperscript{18} As Maitland explained, "even in the

\textsuperscript{10} See text accompanying note 86.
\textsuperscript{11} See text accompanying note 88.
\textsuperscript{12} See text accompanying notes 34-75.
\textsuperscript{13} See text accompanying notes 89-111.
\textsuperscript{14} See note 112.
\textsuperscript{15} See text accompanying notes 117-28.
\textsuperscript{16} See, for example, Thomas Szasz, Whose Competence: Determination of Competence of Juries and Defendants, 41 Natl Rev 38 (Sept 15, 1989).
\textsuperscript{18} Mitnick, 32 Am J Legal Hist at 203-04 (cited in note 5).
early years of the thirteenth century [jurors] were not, and were hardly supposed to be, eye-witnesses." Instead, they were expected to prepare themselves for trial by seeking out and informally consulting witnesses. These jurors, as investigators, would then deliver a verdict based upon what they had learned.

Over time, both witnesses and jurors began to appear at court to be interrogated in public by the judge, and eventually witnesses testified publicly before the jury. Even then, jurors could use personal knowledge, so long as they testified in open court and the judge was satisfied that the juror was not prejudiced.

Professor Mitnick has found evidence that, from as early as 1650, English courts were willing to restrict the jury's use of personal knowledge. Some, like Professor Langbein, suggest that by the late seventeenth century there was a well-settled doctrine against jurors' use of any personal knowledge. Yet in 1670, Bushell's Case cast doubt on this interpretation when Justice Vaughan explicitly recognized a juror's right to use personal knowledge.

---

18 Frederick Pollock and Frederick William Maitland, 2 The History of English Law 628 (Cambridge, 2d ed 1899).
20 Id.
23 Mitnick, 32 Am J Legal Hist at 209-29 (cited in note 5), citing Bennett v The Hundred of Hartford, 82 Eng Rep 671, 672 (Upper Bench 1650).
25 124 Eng Rep 1066 (CP 1670).
26 Id at 1012:

Without a fact agreed, it is as impossible for a Judge, or any other, to know the law relating to that fact . . . . But the Judge, qua Judge, cannot know the fact possibly, but from the evidence which the jury have, but (as will appear) he can never know what evidence the jury have . . . . [b]eing return'd of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue . . . . though no evidence were given on either side in Court . . . . [t]hey may have evidence from their own personal knowledge . . . . that what is depos'd in Court, is absolutely false . . . . The jury may know the witnesses to be stigmatiz'd and infamous, which may be unknown to the . . . Court . . . . [the jury have viewed the site, giving them] better information . . . . See also Trial of Nathanial Reading, 7 Howell's State Trials 259, 267 (KB 1679) ("And do you challenge a juryman because he is supposed to know something of the matter? For that reason the juries are called from the neighbourhood, because they should not be wholly strangers to the fact.").
According to Vaughan's reasoning, a judge could not punish a jury for attaint\textsuperscript{28} since "they may have evidence from their own personal knowledge . . . that what is depos'd in Court, is absolutely false . . . [and] may know the witnesses to be stigmatiz'd and infamous, which may be unknown" to the court.\textsuperscript{29} Langbein has criticized this decision as "wilfully anachronistic," since he doubts that jurors at the time actually had any personal knowledge.\textsuperscript{30} Nevertheless, Vaughan's statement of the law continued in the treatises well into the middle of the eighteenth century.\textsuperscript{31}

Some have argued that Bushell's Case was simply an aberration since Vaughan primarily sought to abolish the system of attaint, using juror knowledge as a rationalization for his decision. See, for example, Langbein, 45 U Chi L Rev at 298-99, n 105 (cited in note 25) (stating that Vaughan's argument was "dishonest nonsense" and "wilfully anachronistic"); and John A. Phillips and Thomas C. Thompson, Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and Bushell's Case, 4 Law & Inequality 189, 216-17 n 145 (1986) and cases cited.

\textsuperscript{28} In old English practice, [an attaint was] a writ which lay to inquire whether a jury of twelve men had given a false verdict, in order that the judgment might be reversed . . . This inquiry was made by a grand assise or jury of twenty-four persons, usually knights, and, if they found the verdict a false one, the judgment was that the jurors should become infamous, should forfeit their goods and the profits of their lands, should themselves be imprisoned, and their wives and children thrust out of doors, should have their houses razed, their trees extirpated, and their meadows plowed up, and that the plaintiff should be restored to all that he lost by reason of the unjust verdict.

\textit{Black's Law Dictionary} 116 (West, 5th ed 1979), citing Blackstone, 3 Commentaries at *404.

The harshness of the penalty prevented the law from being executed and so Parliament enacted a statutory alternative, which imposed merely perpetual infamy and a fine. Blackstone, 3 Commentaries at *403-04, citing 11 Henry VII, ch 24, and 23 Henry VIII, ch 3 (cited in note 23).

\textsuperscript{29} Bushell's Case, 124 Eng Rep at 1012. Vaughan's arguments do not justify a juror's use of direct knowledge, but focus instead on vicarious knowledge that might be used in judging credibility or in weighing the evidence.

\textsuperscript{30} Langbein, 45 U Chi L Rev at 298-99 n 105 (cited in note 25).

\textsuperscript{31} Mitnick, 32 Am J Legal Hist at 219-20 (cited in note 5), citing many English treatises echoing Vaughan's opinion, including: John Brydall, \textit{Enchiridion Legum} 109 (1673) ("the jury . . . may find veritatem facti upon circumstances, or by witnesses, or sometimes (especially for want of manifest or probable evidence) upon their own knowledges"); John Hawles, \textit{The English-Mans Right} 29 (1680); Giles Duncombe, \textit{Trials Per Pais} 225 (6th ed 1725) ("the judge cannot fully know upon what evidence the jury give their verdict; for they may have other evidence than what is shewed in court"); John Somers, \textit{The Security of English Men's Lives} 11 (1681); William Style, \textit{Style's Practical Register} 335, 339 (4th ed 1707); Thomas Wood, \textit{An Institute of the Laws of England} 601 (3d ed 1724); Anon, \textit{A Guide to English Juries} 11 (1725); Anon, \textit{The Complete Juryman} 187 (1752); Richard Burn, 2 \textit{The Justice of the Peace and Parish Officer} 59 (1755) (British Library: 883 i 15); Geoffrey Gilbert, \textit{The Law of Evidence} 134-35 (1760) (British Library: 228 h 12); M. Bacon, 3 \textit{A New Abridgement of the Law} 778 (5th ed 1798).
By the latter part of the eighteenth century the law in England was rather well-settled that jurors were prohibited from using any private knowledge.\textsuperscript{2} In 1768, William Blackstone explained:

As to such evidence as the jury may have in their own consciences, by their private knowledge of facts, it was an antient doctrine, that this had as much right to sway their judgment as the written or parol evidence which is delivered in court. [But] this doctrine was gradually exploded . . . [and the practice] now universally obtains, that if a juror knows any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court.\textsuperscript{3}

\section*{II. The Contours of the American Rule}

American courts throughout the eighteenth and nineteenth centuries treated the question of personal knowledge as a question of the opinion it left on a juror's mind. This is a natural enough course to take: one's opinion must be founded upon what one knows. Having admitted jurors with personal knowledge, courts regulated jurors' use of personal knowledge by analyzing the source of the knowledge. Different state courts formulated the rule differently, but they essentially inquired into whether a juror's personal knowledge created an opinion that left him partial.

\textsuperscript{23} Scholars disagree on exactly when the prohibition began. Compare Mitnick, 32 Am J Legal Hist at 201, 209-26 (cited in note 5), who describes a de facto prohibition, beginning with the creation of the motion for a new trial in 1391 (\textit{Wantley v White}, Coram Rege Roll no 522, m 7 (KB 1391), reprinted in 7 Select Cases in the Court of King's Bench: Richard II, Henry IV and Henry V 80, 82 (Selden Society, 1971)) and culminating in two eighteenth-century cases that, in practice, prohibited jurors' use of personal knowledge (\textit{Dormer v Parkerhurst}, 95 Eng Rep 414 (KB 1738); and \textit{Bright v Eynon}, 97 Eng Rep 365, 366 (KB 1757)); Edward Jenks, \textit{According to the Evidence}, in Cambridge Legal Essays 191 (W. Heffer & Sons, 1926) (identifying the precise date of the modern rule as 1757 when King's Bench, in \textit{Bright v Eynon}, 97 Eng Rep 365, 366 (KB 1757), announced a general rule for ordering new trials in civil cases); Margaret C. Klingelsmith, \textit{New Readings of Old Law}, 66 U Pa L Rev 107 (1918) (no such development took place at all); and Patrick Devlin, \textit{The Judge} 126-27, 131-32, 135-36 (Oxford, 1979) (describing the development as one driven by political judges who strove to control verdicts).

\textsuperscript{24} Blackstone, 3 Commentaries at *374-75 (cited in note 23). In contrast to Vaughan's arguments, see note 27, Blackstone's statement focuses on "direct knowledge of facts." Id at *375 (emphasis added). However, even if Blackstone meant to include all personal knowledge in the prohibition, it is important to note that such jurors were not incompetent but were simply required to testify in court. Id. This was true also in American courts. See text accompanying notes 77-83.
A. Personal Knowledge and Opinion

Holding an opinion never automatically excluded a juror. Sir Edward Coke in his translation of Littleton enunciated the famous doctrine that a juror should "stand as indifferent as he stands unsworne." But that rule did not require a juror to be ignorant. After all, Coke later said that the trial ought to be held in the parish where the event occurred, because "the inhabitants whereof may have the better and more certain knowledge of the fact."

In the late eighteenth and early nineteenth centuries, American courts adhered to Coke's principle. By 1870, courts would exclude only jurors who had expressed a decided opinion on the merits of the case. Courts explained the rule in various ways. For example, the supreme court of Connecticut declared in 1788:

> It is enough in point of indifferency, that jurors have no interest of their own affected, and no personal bias, or prepossession, in favor or against either party; and not requisite that they should be ignorant of the cause, or unopinionated, as to the rules and principles by which it is to be decided.

In that case the trial court empaneled a juror who had declared an opinion that "no negro, by the laws of this state, could be holden a slave." The plaintiff, a black man who was suing several men who had seized him upon the mistaken presumption that he was a runaway slave, prevailed at trial. The Connecticut Supreme Court upheld the trial judge's decision to empanel the juror.

In the famous 1807 trial of Aaron Burr for treason, Chief Justice Marshall excluded jurors who had opinions only "if the opinion formed be on a point so essential as to go far towards a deci-

---

34 Coke Upon Littleton § 234 at 155a note d and 155b (cited in note 4).
35 Id.
36 Pettis v Warren, 1 Kirby 426, 427-28 (Conn 1788) (emphasis in original). See also Miller v Talcot, 2 Root at 117; and Case of Fries, 9 F Cases 826, 846 (D Pa 1799) ("if from his knowledge of the case, and not from ill-will to the party, [a juror] has only declared his opinion, it is no cause of challenge"). Compare the same language in W. Hawkins, 2 A Treatise of the Pleas of the Crown ch 43, § 28 at 577-78 (C. Roworth, 8th ed 1824); and Irvin v Dowd, 366 US 717, 722-23 (1960) ("It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication ... scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.").
37 Pettis v Warren, 1 Kirby at 426 (cited in note 36).
38 Id.
39 Id at 427-28.
sion of the whole case." Marshall noted that this was a tentative opinion, formed upon rumor, and therefore did not render the juror incompetent. The Chief Justice explained the concerns that were typical to courts at the time:

To say that any man who had formed an opinion on any fact conducive to the final decision of the case would therefore be considered as disqualified from serving on the jury, would exclude intelligent and observing men, whose minds were really in a situation to decide upon the whole case according to the testimony, and would perhaps be applying the letter of the rule requiring an impartial jury with a strictness which is not necessary for the preservation of the rule itself.

A transient opinion, even that the defendant was guilty, did not render the juror partial. Thus even jurors who had previously served on a jury in a case between the same plaintiff and a different insurance company arising out of the same set of facts were competent, since any opinions they had formed were hypothetical. Likewise a juror who had read about the defendant sheriff's alleged failure to account for certain funds was competent since he said that if the evidence were even it would be a hard case.

A firm opinion, however, especially if it went to the merits of the case, disqualified a juror. For example, an Illinois juror who expressed an opinion that Texas cattle would communicate disease to native cattle—the main issue in the controversy—was incompetent, despite the fact that the legislature had enacted a statute prohibiting Texas cattle for that very reason. On the latter point the court explained that a juror could not defend his fixed opinion on the grounds that the legislature had determined the question. While the legislature might have expressed its opinion, the statute was not determinative on the question of fact to be adjudged by a jury.

---

40 United States v Burr, 25 F Cases 49, 51 (Cir Ct D Va 1807).
41 Id.
42 Id.
43 Id.
44 Lycoming Fire Ins. Co. v Ward, 90 Ill 545, 546-47 (1878).
45 Gradle v Hoffman, 105 Ill 147, 152 (1882).
46 Davis v Walker, 60 Ill 452, 453-54 (1871).
47 Id.
Likewise, in an action against a toll-keeper for taking an excessive toll, a juror who had previously said that the toll charged by the defendant was unlawful and not authorized by the statute, was incompetent.48 And a juror who had said that a slander defendant “talked too much” about the plaintiff and ought to “pay for it” was also incompetent.49

Judging a potential juror’s opinions was not a simple task. Nineteenth-century courts treated some objections for opinion as principal challenges.50 In cases where the source of a juror’s knowledge was a party to the suit or a witness, one who raised a principal challenge needed no further evidence to prove partiality.

In Rollins v Ames,51 for example, the court held that the plaintiff’s magistrate52 was incompetent to serve as a juror, since it was well-known that magistrates were people who, if not unfriendly to the opposing party, were favorably disposed to the party for whom they worked.53 Likewise, the Kansas Supreme Court held incompetent a juror who was the plaintiff’s neighbor, had visited the plaintiff in the hospital and had conversed about the accident and the plaintiff’s injuries, despite the juror’s statement that he had formed no opinion except that the plaintiff had been injured by someone.54 The same was true in Alabama when a potential juror was told by the plaintiff that the defendant was trying to beat the plaintiff out of money that was rightfully his.55

In other cases, where the affiliation was more attenuated, courts required some evidence before excluding a juror. For example, Virginia’s high court rejected the argument that two jurors were prejudiced who had signed a petition requesting that the leg-

48 Blake v Millspaugh, 1 Johns 316, 318 (NY 1806).
49 Vennum v Harwood, 6 Ill 659, 661-63 (1844).
50 A principal challenge raised a fact that showed prima facie partiality. The law presumed partiality from the fact without requiring further evidence that the juror was indeed partial. Examples of principal challenges are challenges for affinity, such as being the relative or a business partner of a party. See, generally, Blackstone, 3 Commentaries at *363 (cited in note 23). See also the discussion in State v Howard, 17 NH 171, 191-92 (1845).
51 2 NH 349 (1821).
52 The case defines a magistrate as one appointed by a party to take depositions to be entered into evidence. Id at 349.
53 Id at 349, 356. The court also noted that the magistrate had heard the plaintiff’s evidence in advance and would have come to trial with prejudice. Id.
54 City of Salina v Trosper, 27 Kan 544, 552-54 (1882).
55 US Rolling Stock v Weir, 96 Ala 396 (1892). But see Chicago, Burlington & Quincy RR v Perkins, 125 Ill 127, 129-30 (1888) (juror who had heard about the accident at railroad crossing and heard neighbors discuss the facts was competent).
islature operate a ferry near the plaintiff's ferry. The evidence did not show that the jurors were disposed against the plaintiff, the court held.

Similarly, in several late nineteenth-century cases from the West, courts held that potential jurors were not disqualified in criminal cases of horse stealing merely because they belonged to various Societies to Prevent Horse Stealing. Likewise, in New York, jurors who were members of the Freemasons were not presumptively biased if one of the parties to a suit was also a Freemason and the other was not.

Several states, such as Illinois, treated objections to a potential juror's opinion, regardless of its source, under the more defential challenges for favor. A party making a challenge for favor would have to present evidence proving that the juror was partial. Thus the New Hampshire Supreme Court held that a juror's saying he had no doubt that the defendant had killed the victim and that the defendant ought to be hung without a jury was not sufficient to exclude the juror without more evidence showing ill-feeling or a fixed belief.

Opinions based on facts, the accuracy of which the juror was unsure, were also not grounds for exclusion without more evidence of partiality. For example, in an 1848 prosecution for performing...
an abortion, a juror was admitted who had had an “opinion unfavorable to the general character of the defendant, and that he had formed and still retained an impression that if what he had read in the papers was true, she had committed the act charged.” The New York high court found that the opinion was hypothetical and held that only if evidence showed that the juror’s opinion was strongly held should the juror be excluded.\(^6\)

Even a strong opinion as to the defendant’s guilt was insufficient to disqualify a potential juror if the opinion was founded on rumor and newspaper reports. The Maryland Supreme Court so held in 1879,\(^6\) explaining:

> the newspaper is now read by everyone and the press is ever ready and eager to furnish the details of crime. And although persons may upon such statements form an opinion, yet it is one in the most cases liable to qualification or modification, according to the real facts of the case.\(^6\)

And in *Mitchum v State*,\(^6\) Georgia’s high court seated a juror who had said before trial that if the testimony was what he had already heard of the facts, then the defendant was guilty, on the grounds that the statements did not evince a fixed opinion.\(^7\) It is interesting to note the court’s accusation that such statements had become devices “to evade jury duty which [are] becoming but too frequent, and meriting not only censure, but in a proper case, punishment.”\(^7\)

The distinction between fixed and transient opinions was not a very clear one, however. It required courts to dissect a potential juror’s statement for words that suggested mental conviction. Consequently, a potential juror who had said “from what he knew, he would stretch the prisoner” was incompetent because he had asserted that he “knew,” not that he had “heard.”\(^7\) Yet a juror who said that “the community ought to have taken up [the defendant], and hung him without a trial” might have been competent if he believes are true is sufficient to make juror incompetent. Knowledge itself is not objectionable; it is the opinion that renders the juror incompetent.).

\(^6\) *People v Lohman*, 2 Barb 216, 222 (NY 1848).
\(^6\) Id at 222.
\(^6\) *Waters v State*, 51 Md 430, 435-38 (1879).
\(^6\) Id at 438.
\(^6\) 11 Ga 615 (1852).
\(^7\) Id at 636.
\(^7\) Id.
\(^7\) *Monroe v State*, 5 Ga 85, 139-40 (1848).
had told the trial court that he based his statement on what he had heard about the case and not on what he knew. A juror was competent, however, who had conversed with a witness about the facts, believed the witness and formed an opinion based on what he was told, on the grounds that his opinion did not go to the guilt of the prisoner. In some cases the distinction was easy, but in most cases it depended on the court's intuition.

Lasting until the end of the nineteenth century, the resulting body of law was deferential to most opinions, especially those founded on knowledge obtained by rumor or repute. Courts empaneled jurors who knew about a case or had an opinion on the merits as long as the opinion was loosely held or obtained from rumor. Courts regularly conducted inquiries into a potential juror's opinions but seemed to require a high level of proof of partiality before excluding a potential juror.

B. Using Personal Knowledge

Since jurors with opinions based on personal knowledge were competent in many cases, the next question to consider is whether jurors could use their personal knowledge. Courts seemingly distinguished between direct and vicarious knowledge, permitting jurors to use only the latter until the end of the nineteenth century. Responding to the statutes passed in the late nineteenth century forbidding jurors from using personal knowledge, courts merely narrowed the kind and amount of personal knowledge that jurors were permitted to use.

1. Direct Knowledge.

Direct knowledge of facts results from having been a witness to some event or having experienced some fact. By 1793, a verdict could be set aside if a juror had used direct knowledge. For example, a Connecticut juror saw the plaintiff selling horses in Warren, Connecticut, on the day the plaintiff claimed to have been somewhere else. He shared this with his fellow jurors in order to discredit the plaintiff's testimony. The jury returned a verdict for the

---

73 Anderson v State, 14 Ga 709, 712, 714 (1854).

74 Thompson v People, 24 Ill 60, 66 (1860). See also Roy v State, 2 Kan 405, 408-09 (1864) (juror who lived six miles from the scene of a murder and who heard a detailed statement of the case from a neighbor was competent because he heard only rumor).

75 See, for example, Sellers v People, 4 Ill 412, 413, 416 (1842), in which a juror was held incompetent who had said that "[the defendant] would be hung, and that he ought to be hung, and that nothing could save him; that salt could not save him . . . and that there was no law to clear him."
defendant. The Supreme Court of Errors of Connecticut held that relating such knowledge warranted setting aside the verdict.\textsuperscript{76}

The rule in Tennessee in 1872 was similar. In \textit{Wade v Ordway},\textsuperscript{77} a juror who visited the scene in order to determine if the plaintiff could have seen the defendant from the floor, as he alleged, shared that information with the other jurors. The court held that the juror's use of his personal knowledge was improper.\textsuperscript{78}

The rule applied regardless of whether the jury was swayed by the information, the court went on to say, because it is a rule "long established and inflexible, to which no exception can be admitted; either in civil or criminal issues."\textsuperscript{79}

The court reasoned that a juror's direct knowledge is not presented under oath, is without any notice to those affected, and affords no opportunity for rebuttal.\textsuperscript{80} Therefore, it is extremely difficult for a court to assure the veracity of the information. The safeguards found in public testimony, subject to cross examination and given under oath, are sufficient to cure any doubts about its veracity.

Persons who had direct knowledge, however, were not incompetent to be jurors unless that knowledge left them partial. The rule laid down by Blackstone required that "if a juror know any thing of the matter in issue, he may be sworn as a witness, and give his evidence publicly in court."\textsuperscript{81} The court in \textit{Wade v Ordway} did not say that the juror had to be excluded, but required him to testify in court.\textsuperscript{82} This was the general rule in this country for most of the nineteenth century and, in some states, into the twentieth century.\textsuperscript{83}

\begin{footnotes}
\item[76] Talmadge \textit{v} Northrop, 1 Root 522, 523 (Conn 1793).
\item[77] 60 Tenn 229, 238 (1872).
\item[78] Id at 240-41.
\item[79] Id at 241, citing Sam \textit{v} State, 1 Swan 61, 65 (Tenn 1851).
\item[80] Id at 240, quoting Donston \textit{v} State, 6 Humph 275, 276 (Tenn 1845).
\item[81] Blackstone, 3 Commentaries at *375 (emphasis added) (cited in note 23).
\item[82] Wade \textit{v} Ordway, 60 Tenn at 240-41.
\item[83] See, for example, People \textit{v} Boford, 117 Cal App 2d 576 (1953); Savannah \textit{v} Quo, 103 Ga 125 (1897); Atkins \textit{v} State, 7 Ga App 201 (1909); Williams \textit{v} State, 42 Ga App 225 (1931); Curtis \textit{v} Burney, 55 Ga App 552 (1937); Tumlin \textit{v} State, 88 Ga App 713 (1953); Cramer \textit{v} Burlington, 42 Iowa 315 (1875); State \textit{v} Cavanaugh, 98 Iowa 688 (1896); Fellows Case, 5 Me 333 (1828); Handly \textit{v} Call, 30 Me 9 (1849); Hastings \textit{v} Stetson, 130 Mass 76 (1881); Hewett \textit{v} Chapman, 49 Mich 4 (1882); White \textit{v} State, 73 Miss 50 (1895); Lucas \textit{v} State, 211 Miss 339 (1951); Pennington \textit{v} Kansas C R Co., 201 Mo App 483 (1919); Chicago R I \textit{v} Collier, 1 Neb Unof 278 (1901); State \textit{v} Finch, 54 Or 482 (1909); Houwer \textit{v} Commonwealth, 51 Pa 332 (1866) (applies to both criminal and civil cases); Follansbee \textit{v} Walker, 74 Pa 306 (1873); Hull \textit{v} Seaboard, 76 SC 278 (1907); People \textit{v} Thiede, 11 Utah 241 (1895).
\end{footnotes}
In Connecticut, for example, at least until 1822, a juror was competent to serve as a witness. And in Massachusetts in the 1830s jurors were permitted to be witnesses. If a juror had direct knowledge that rendered him partial, however, the court would exclude him. This rule has been followed as recently as 1989. It is not clear how often jurors served as witnesses. It is possible that in practice jurors rarely had direct knowledge, and that those who did were excluded before trial. Jurors today are regularly excluded, however, if they have any direct knowledge.

2. Vicarious Knowledge and Judging Credibility.

Nineteenth-century courts did not flatly prohibit jurors from using vicarious knowledge. Concerns about interfering with the jury's deliberations initially led federal courts to avoid ordering new trials when it was suggested that a juror had shared vicarious knowledge with the rest of the jury. Just as in the case of direct knowledge, jurors were required to disclose any vicarious knowledge at trial under oath, but they were conspicuously not disqualified as incompetent jurors. There was, however, no systematic approach to the issue. Broadly speaking, arguments fell into two categories: practical and philosophical. The synthesis of these arguments resulted in deference toward jurors' use of vicarious knowledge when judging credibility or weighing evidence. This po-

---

84 Zephaniah Swift, Connecticut Digest of Laws 747, citing Peak. on Evidence at 10 n 2.
85 Patterson v Boston, 37 Mass 159, 166 (1838) (juror may use personal knowledge to make an appraisement of damages, but any "particular fact, bearing on the questions at issue" should be stated in open court, under oath); Murdock v Sumner, 39 Mass 156, 157 (1839) (after refusing to set aside a verdict because the jury chose to use a witness's valuation of damages instead of their own knowledge, despite an instruction that the jury could use their knowledge, the court noted that jurors may exercise "judgment" over the facts presented by witnesses and that any fact a juror knew could have been testified to in court).
86 See, for example, Chess v Chess, 1 Penr & W 32, 43 (Pa 1829) (A juror requested to be excused because he was going to be a character witness against an important defense witness. The request was granted and upheld on appeal on the grounds that, while a juror is not incompetent merely by virtue of being a witness in the same cause, if his knowledge makes him partial, then he ought to be excluded.); State v Benton, 19 NC 196, 210-11 (1836).
87 Daikovsky v Glad, 774 P2d 202, 204-06 (Alaska 1989) (a juror who knew non- incidental facts about the defendant's confusion over a land boundary in a case alleging the defendant's misrepresentation of the boundary was prejudiced and should have been excluded).
88 Wigmore, 6 Evidence § 1800 at 331; and 9 Evidence § 2570 at 726 (cited in note 6).
89 See, for example, Cherry v Sweeny, 5 F Cases 557 (DC 1808).
90 See notes 83-90. See also United States v Sears, 27 F Cases 1006, 1008 (1812) (Justice Story agreeing that jurors must disclose vicarious knowledge at trial under oath); and Mitchum v State, 11 Ga at 633 (in dicta, that jurors with vicarious knowledge of facts may be sworn).
sition was dominant until the late nineteenth century, when courts began to narrow the scope of permissible vicarious knowledge.

Practically speaking, early American juries enjoyed a great deal of laissez faire. Some courts expressed concerns about the practical limitations of any rule that prohibited a juror's use of his vicarious knowledge. The federal district court in the Eastern District of Pennsylvania was mindful of the danger of allowing jurors to "put aside all the evidence of the cause, and bring together as the foundation of their verdict, all the opinions, prejudices, rumors and hearsays, that they may call their previous and personal knowledge." But, as that court said in 1832,

```
a prohibition to the juror to avail himself of his knowledge of the subject; to his giving a verdict on any ground or for any reason he might think proper ... would have been [an] idle ... attempt to prohibit what [courts] could not prevent, for a juror may give his verdict as he wills to do, and no body has a right to question him for his reasons.92
```

Some courts, however, made principled arguments in favor of allowing jurors to use their vicarious knowledge. One of the strongest arguments for allowing jurors to use vicarious knowledge was its importance in judging credibility. This argument was nearly identical to the one advanced by Justice Vaughan nearly two centuries before.93

For example, in *Stettinius v United States*,94 the court explained that "the jury are judges as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat, of their own knowledge, that what was sworn was untrue; and possibly they might know the witnesses to be such as they could not believe."95

Likewise, in *Fox v State*,96 the court held that a judge could not act upon his personal knowledge of the character of a party or a witness because that would be "assuming ... the province of the jury; that is, the right to pass upon the credibility of the witness."97

---

92 Id.
93 *Bushell's Case*, 124 Eng Rep at 1012. See also text accompanying notes 24-26.
94 22 F Cases 1322 (Cir Ct DC 1839).
95 Id at 1329-30.
96 9 Ga 373 (1851).
97 Id at 377.
In a late nineteenth-century decision, the supreme court of Georgia held that, since jurors could choose to believe one witness over another without any more evidence,\(^8\) they could also use personal knowledge to judge the credibility of the witnesses.\(^9\) It was also reversible error not to instruct the jury to use its personal knowledge in judging the credibility of parties and witnesses.\(^10\)

A similar argument was that jurors needed to rely on personal knowledge in order to effectively weigh the evidence. Thus in the federal district court for the Eastern District of Wisconsin in 1887,\(^1\) the court held that the “jury may apply [vicarious] knowledge . . . to the matters of fact in evidence in determining the weight to be given to the opinions expressed . . . [T]hey may and should judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry; and while great weight should always be given to the opinions, honestly and candidly expressed, of those witnesses, [the jury can disbelieve them].”\(^2\)

Typical of the late eighteenth- and early nineteenth-century approach to jurors’ use of vicarious knowledge in judging credibility is the case of *M’Kain v Love*.\(^3\) The supreme court of South Carolina in 1834 heard an appeal from a jury verdict for the defendant in a trover action for a slave. The plaintiff alleged that during the jury’s deliberations, a juror inquired as to the credibility of one of the plaintiff’s witnesses. George M. Perry told his fellow jurors that he had heard that the witness was the plaintiff’s “kept mistress.”\(^4\) Several jurors admitted that this affected their decision, while others admitted no such influence.\(^5\) The high court conceded that the rule in South Carolina was that the “jury are bound to give their verdict according to the evidence.”\(^6\) But the court cautioned:

\(^8\) *Rogers v King*, 12 Ga 229, 233-35 (1852).
\(^9\) *Anderson v Tribble*, 66 Ga 584, 589 (1881) (an instruction that the jury were to judge the party’s “intelligence, his manner of testifying on the stand, and his integrity and uprightness, character for veracity, if you know what that is” was not erroneous as a matter of law); *Head v Bridges*, 67 Ga 227, 237 (1881) (same instruction as in *Tribble*, 66 Ga at 589; the court held that witnesses must be passed upon by the jury, which is why jurors come from the vicinage “as being most likely to be proved by witnesses, and charged upon persons with whose integrity and reputation they were best acquainted”).
\(^10\) *Howard v State*, 73 Ga 83 (1884).
\(^1\) *Laflin v Chicago*, W. & N. R. Co., 33 F 415, 424 (Cir Ct ED Wis 1887).
\(^2\) Id at 422.
\(^3\) 13 SC 188 (1834).
\(^4\) Id at 188.
\(^5\) Id.
\(^6\) Id. at 189.
[T]his rule must be understood, however, with some limitations. The constitution of the trial by jury pre-supposes that they will act, in some degree, from their own knowledge of the character of the parties and their witnesses. It is for this reason that the jurors are drawn from the vicinage, and any effort to restrain by rule the influence of the many collateral circumstances which enter into almost every complicated case, from having their own weight in the consideration of a jury, would be as vain as to attempt to prescribe rules for the operation of the human mind.107

The court went on to say:

[I]n nine cases out of ten, it is more than probable that all of them [jurors] cannot be wholly ignorant of the matters in dispute, or of the character of the parties and witnesses, and it is expecting too much of human nature to suppose, even if it was desirable, that this knowledge should not enter into the judgment which they pronounce on the facts. It ought to be so, for little incidents which cannot be developed in evidence, and which may be well understood by a jury, very often stamp upon a transaction its true character, and this is more particularly true with regard to credibility of witnesses.108

Echoing the arguments of Justice Vaughan in Bushell's Case, Justice Johnson noted that juries may “have evidence of their own cognizance of the matter before them, or they may find on distrust of the witnesses on their own proper knowledge” and that this is the nature of the service that jurors are asked to perform.109

Perhaps most forceful among Justice Johnson’s arguments, however, is a practical one. Assuming that jurors possess vicarious knowledge and use it, Justice Johnson explained that jurors would never reach a verdict if they were prohibited from sharing their knowledge with each other:

[An]y juror is bound to respond according to his own conscience, and if he is restrained from giving his reasons for his opinions, and each were to act from his own knowledge, it is not probable that they would ever agree.

107 M’Kain, 13 SC at 189.
108 Id (emphasis added).
109 Id.
We know from experience, that in questions admitting of any doubt, the only possible means of arriving at unanimity of opinion amongst many, is by a free interchange of thought, and to deny it to a jury would be to defeat the object of the trial by jury.\footnote{M'Kain, 13 SC at 189-90.}

Justice Johnson concluded his analysis by noting that, because the information was revealed as rumor, the juror’s use of it was not objectionable—or at least not as objectionable.\footnote{Id at 190.}


The case itself scarcely addressed the rule it abolished, but the reporter of the case wrote in the headnote, “Jurors should not be instructed that they can act upon their private and personal knowledge of the character of the witnesses . . . and it is error for the court to instruct them that they can consider such character if they know it.”\footnote{Chattanooga Railroad Co. v Owen, 90 Ga 265 (1892).}

It is possible that the Georgia Supreme Court, although wishing to avoid a trial court’s explicit instruction authorizing use of vicarious knowledge, did not attempt to disturb the jury’s right to use such knowledge. In response to the ambiguity, the Georgia leg-
JUROR KNOWLEDGE

islature joined the growing ranks of states prohibiting the use of personal knowledge.\(^{118}\)

By the early part of the twentieth century, despite nearly unanimous statutory prohibitions, some states continued to allow instructions that juries could use personal knowledge. Other states prohibited such instructions, but affirmed a juror's ability to use personal knowledge as long as it was not a substitute for evidence. In either case, a juror's ability to use personal knowledge in the twentieth century was only modestly diminished.

For example, the California Supreme Court, sitting en banc, approved of the trial judge's instruction that the jury "may and should judge of the weight and force of the evidence upon your own general knowledge of the subject of the inquiry."\(^{17}\) The supreme court of Iowa likewise decided in 1933 that an instruction that jurors use personal knowledge in assessing damages is permissible so long as their knowledge itself is not considered as a substitute for evidence.\(^{118}\)

When given an opportunity to redress its rule, the supreme court of Georgia spoke most fluently:

It was certainly error to charge the jury that, in ascertaining the value of lands . . . , they might consider not only the evidence, but their own knowledge as to the value of land in the country. Juries should decide questions of fact according to the evidence introduced before them, and their personal knowledge certainly cannot constitute part of the evidence.\(^{119}\)

But the court went on to explain:

A jury must arrive at their verdict from evidence regularly produced in the course of the trial proceedings, and may properly call to their aid their own knowledge, learning and experience, and any information gained from a view of the premises in weighing the evidence, but their verdict must be supported by evidence and cannot rest solely upon a view of the premises or their knowledge of the values of land.\(^{120}\)

\(^{118}\) Ga Code Ann § 9-10-6. It has been noted that this statute was passed in response to the court's holding in Chattanooga, 90 Ga 265.

\(^{117}\) Vallejo & Northern RR Co. v Reed, 169 Cal 545, 576-77 (1915).

\(^{118}\) In re Estate of Stencil, 215 Iowa 1195, 1197-98 (1933).

\(^{119}\) State Hwy Dept of Georgia v Andrus, 212 Ga 737, 738 (1956), quoting Gibson v Carreker, 91 Ga 617, 620 (1893).

\(^{120}\) Andrus, 212 Ga at 739.
Both excerpted portions speak as clearly to the issue of vicarious knowledge as they do to direct knowledge. In all cases, a juror may use personal knowledge of general repute or common information to buttress evidence presented in court or to evaluate such evidence. Direct knowledge had been prohibited on the grounds that it took the place of evidence that should be presented publicly at trial. The twentieth-century courts similarly limited the use of vicarious knowledge. This, however, is no more than the rule expressed as early as 1830 in *M’Kain v Love,* or in the early nineteenth-century opinion cases.

In practice, of course, any reliance on vicarious knowledge does take the place of evidence. It might follow that vicarious knowledge, like direct knowledge, should be subject to the safeguards inherent to public testimony. However, vicarious knowledge has been less troubling to courts. Courts might have made the distinction because of a belief that other jurors would have some vicarious knowledge themselves to confirm or rebut the assertion of another juror. Therefore, the need for the protections of public testimony might have become obviated.

Treating several mid-twentieth century cases, Professor Mansfield showed how modern courts still adhere to the rule established early in this century. He identified three concerns about jurors’ use of personal knowledge. Relevant among them are concerns about fair notice and reliability. He found that jury verdicts based upon one juror’s direct knowledge were consistently vitiated on the grounds of reliability, yet juries were allowed to use vicarious knowledge as the concerns for notice and reliability were substantially diminished.

Thus has the American rule developed over time, allowing jurors to use vicarious knowledge as long as that knowledge did not raise a fixed and abiding opinion about the merits of the case. Direct knowledge, on the other hand, which in character is testimony as to something that has passed before the declarant, has never been properly used by a juror. Instead, the rule as stated by Black-
stone required that the juror be sworn and give his testimony in open court, subject to cross-examination. During the nineteenth century it became settled that jurors who had direct personal knowledge were excluded as prejudiced.

CONCLUSION

This Comment has described the kinds of personal knowledge that American juries were traditionally permitted to use. A study of American sources, including statutes, cases and treatises, has revealed that American juries have never been entirely ignorant. In practice, courts have allowed a great deal of juror knowledge. To understand the depth of theory and politics at work in this evolution is to understand more fully the rules of evidence and the controversial powers juries exercise.

Early American courts relied very heavily upon a jury's ability to inject popular notions into the law. By the end of the nineteenth century, however, juries were restricted in what knowledge they could bring to the jury box. Jurors with direct knowledge were regularly excluded. However, jurors were permitted to use vicarious knowledge as long as they did not have a fixed opinion on the merits of the case. This vicarious knowledge was not subject to the same concerns for veracity as direct knowledge, which had been consistently prohibited from jury consideration from the earliest American cases. In the twentieth century, judges have applied the same rules with slightly less deference to jury knowledge.

The current debate on juror knowledge manifests itself in the discussion of related questions. In the most extreme case it can be found in the debate over whether there ought to be juries with special knowledge, such as in technical scientific cases or in complicated antitrust cases.  

Other times the subject arises in the context of jury nullification. More recently, people have questioned the propriety of empanelling ignorant jurors in cases that reach national prominence. And the question of juror knowledge always plays a role in the debates over the rules of evidence. In each case, our search for answers will prove more productive if it is conducted with a firm grounding in our country's unique experience with juries.
