Juror Conduct Drawing Upon "Common Sense and Everyday Experience" Held Not Improper Even Though It Includes Outside Observations Material to Issue in Point at Trial

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problem, which already has been used in another state, is a system that increases the state's role in monitoring and supplementally financing local educational expenditures. It is suggested that such a reform would account for the constitutional significance of the right to education and would alleviate the practical difficulties that the current financing scheme has failed to remedy.

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DEVELOPMENTS IN NEW YORK LAW

Juror conduct drawing upon "common sense and everyday experience" held not improper even though it includes outside observations material to issue in point at trial

Traditionally, evidence of the conduct and statements of a juror during the course of deliberations is not admissible to impeach a duly rendered verdict. This rule has yielded, however, when-

N.Y.S.2d at 656-59 (Fuchsberg, J., dissenting); Board of Educ. v. Nyquist, 94 Misc. 2d at 490-94, 518-19, 408 N.Y.S.2d at 617-18, 634; see also Coons, Clune & Sugarman, Educational Opportunity: A Workable Constitutional Test for State Financial Structures, 57 Calif. L. Rev. 305, 316-17 (1969). Though the Nyquist Court seemingly recognized that significant inequities exist in the current educational financing scheme, see 57 N.Y.2d at 38, 439 N.E.2d at 363, 453 N.Y.S.2d at 647-48, its decision may be attributable to the fact that it has been the general "judicial practice to refuse to enter decrees" that would meet with "excessive cost or risk of crisis" in their enforcement. Carrington, supra note 117, at 1252. Furthermore, it has been noted that, with regard to equal protection attacks on property-based educational funding schemes, "it would be difficult to imagine a case having a greater potential impact on our federal system . . . ." 411 U.S. at 44. Thus, it is suggested that the Nyquist Court's application of the rational basis standard partially was based on its hesitancy to disrupt the status quo.

See infra note 162.

163 See Robinson v. Cahill, 69 N.J. 449, 467-68, 355 A.2d 129, 139 (1976). In Robinson, the New Jersey Supreme Court upheld the constitutionality of a statutory public school financing scheme that complied with the mandates of the education clause contained in the state constitution. Id. at 458-68, 355 A.2d at 133-39. This funding system generally increased the state's role in public educational finance by permitting it to monitor local expenditures, detect inadequacies and, where necessary, either increase budgets beyond the amounts locally determined or increase state aid to supplement insufficient local budgets. Id. at 458-67, 355 A.2d at 133-38. Such a system grants broad discretionary power to the commissioner and board of education. Id. It also entails individual consideration of the specific needs and circumstances existing in the various school districts. Id. Although this scheme provides for flat state grants per pupil, the element of the New York system challenged in Nyquist, it does create an effective detection system to locate and remedy inadequacies in the functioning of these grants. Id.

164 See McDonald v. Pless, 238 U.S. 264, 269 (1915); Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785). In Vaise, the rule excluding testimony of jurors that tends to impeach their
ever an overt act of a juror has influenced the deliberations in such a manner as to prejudice a criminal defendant's sixth amendment rights. A verdict may be overturned, for example, on the ground

own verdict was first recognized. C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 68, at 148 n.80 (E. Cleary 2d ed. 1972); see 99 Eng. Rep. at 944. The court in Vaise concluded that testimony relating to juror misconduct is admissible only when a third person observed the particular conduct. Id. Similarly, the United States Supreme Court has stated that a new trial may not be secured by using the testimony of jurors to impeach their own verdict. McDonald v. Pless, 238 U.S. at 269. In Dalrymple v. Williams, 63 N.Y. 361 (1875), the New York Court of Appeals adopted the common-law rule, holding that affidavits "to show mistake or error of the jurors in respect to the merits, or irregularity or misconduct, or that they mistook the effect of the verdict and intended something different" are not admissible. Id. at 363. See generally E. Fisch, FISCH ON NEW YORK EVIDENCE § 305, at 204 (1977 & Supp. 1981-82); C. McCormick, supra, § 68, at 148; W. Richardson, EVIDENCE § 407, at 398-400 (J. Prince 10th ed. 1973); Mueller, Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b), 57 N.E. L. Rev. 920, 920-27 (1978).

The common-law doctrine prohibiting impeachment of a verdict through juror testimony relating to juror misconduct pervades the American judicial system, see 3 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE § 606(03), at 22 (1981), and presently is embodied in rule 606(b) of the Federal Rules of Evidence, see Fed. R. Evid. 606(b). Five policy considerations have been advanced to account for the popularity of the common-law rule. See Government of Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976). In Gereau, the court supported its preference for the common-law doctrine by observing that it "(1) discourag[e] harassment of jurors by losing parties eager to have the verdict set aside; (2) encourag[e] free and open discussion among jurors; (3) reduc[e] incentives for jury tampering; (4) promot[e] verdict finality; [and] (5) maintai[n] the viability of the jury as a judicial decision-making body." Id. at 148; see McDonald v. Pless, 238 U.S. at 267-68; People v. De Lucia, 20 N.Y.2d 275, 278, 229 N.E.2d 211, 213, 282 N.Y.S.2d 526, 529 (1967).


Overt acts of a juror may be the subject of inquiry if "they are accessible to the knowledge of all the jurors . . . ." Id. (quoting Perry v. Bailey, 12 Kan. 415, 419 (1874)). It has been contended, however, that a distinction should be drawn between the conduct of jurors during the course of deliberations, whether inside or outside the jury room, and "influences which are called into play by outside forces and which are extraneous to their deliberations." People v. De Lucia, 20 N.Y.2d 275, 282, 229 N.E.2d 211, 216, 282 N.Y.S.2d 526, 532 (1967) (Van Voorhis, J., dissenting). Nevertheless, although inquiry into the mental process employed by a juror in arriving at his conclusion is prohibited, Fed. R. Evid. 606(b); see Mueller, supra note 163, at 936-940 nn.64-86, both the federal rules and the proposed New York rules of evidence permit a juror to testify regarding any outside influence "improperly brought to bear upon any juror," Fed. R. Evid. 606(b); NEW YORK PROPOSED CODE OF EVIDENCE 606(b); see Mattov v. United States, 146 U.S. 140, 149 (1892). For example, the Supreme Court, considering the prejudicial effect of a newspaper article read to the jury by a bailiff, observed that juror testimony regarding "any extraneous influence" is admissible as long as inquiry is not made "as to how far that influence operated upon his mind." Id.; see Parker v. Gladden, 385 U.S. 363, 364-65 (1966). The Court held, therefore, that the bailiff's
that a juror's conduct revealed material evidence that was not produced at trial. Recently, however, in People v. Smith, the Appellate Division, First Department held that a verdict is not tainted if a juror draws upon everyday observations made during deliberations, notwithstanding that his observations "were material to an issue at trial and apparently colored his views." In Smith, several police officers observed the defendant and his companions hurriedly entering a “gypsy” cab in a high crime area. The officers later testified that, after they had pulled their unmarked car behind the taxicab, they noticed the defendant sitting in the back seat of the cab brandishing a gun. In order to assess the officers' credibility, a juror, at various times during the course of jury deliberations, looked into the rear windows of comment on the guilt of the defendant constituted an outside influence on the jury that violated the criminal defendant's sixth amendment rights. Mattox, 146 U.S. at 149. For other examples of outside influences that have been held to be prejudicial, see Rideau v. Louisiana, 373 U.S. 723, 731-33 (1963) (television broadcast of the filmed interrogation of defendant); People v. Durling, 303 N.Y. 382, 384-85, 103 N.E.2d 336, 336-37 (1952) (communication by jurors with prosecution witnesses through open windows of juryroom); People v. Marrero, 83 App. Div. 2d 565, 565, 441 N.Y.S.2d 12, 13 (2d Dep't 1980) (discussion of evidence with alternate jurors); People v. Whitmore, 45 Misc. 2d 506, 515-20, 257 N.Y.S.2d 787, 799-809 (Sup. Ct. Kings County 1965) (unfavorable media publicity creating a hostile environment), rev'd on other grounds, 27 App. Div. 2d 939, 278 N.Y.S.2d 706 (2d Dep't 1967). It is interesting to note that the Court of Appeals has permitted impeachment of a verdict on the theory that the ethnic prejudice exhibited in a juror's statements made him ineligible to be a juror in the first instance and, thus, his vote was a nullity. People v. Leonti, 262 N.Y. 256, 258, 186 N.E. 693, 694 (1933). Such a broad approach appears to circumvent any consideration of the sixth amendment issue.

See People v. Brown, 48 N.Y.2d 388, 395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979); Mueller, supra note 163, at 944-46 nn.100-108; see also Durr v. Cook, 589 F.2d 891, 893 (5th Cir. 1979) (juror attempted to recreate events described in testimony); Gafford v. Warden, 454 F.2d 318, 319-20 (10th Cir. 1970) (juror independently verified the closing time of a late show and the business hours of a gas station); Stiles v. Lawrie, 211 F.2d 188, 189-90 (6th Cir. 1954) (driver's manual used by jurors in negligence case); People v. Crimmins, 26 N.Y.2d 319, 322-24, 258 N.Y.S.2d 708, 709-10, 310 N.Y.S.2d 300, 301-02 (1970) (jurors made an unauthorized visit to alleged crime scene); cf. People v. Harris, 84 App. Div. 2d 63, 104-05, 445 N.Y.S.2d 520, 545-46 (2d Dep't 1981) (jurors were invited by both prosecution and defense to conduct tests in the jury room that were designed to verify trial testimony).
cars.\textsuperscript{170} Although this juror had voted for acquittal throughout the first day of deliberations, he changed his position after making such observations.\textsuperscript{171} Without a hearing, the trial court denied the defendant’s motion to set aside the verdict on the ground of juror misconduct, concluding that the juror was merely drawing upon an everyday experience to verify the police officers’ testimony.\textsuperscript{172}

On appeal, the Appellate Division, First Department affirmed.\textsuperscript{173} Justice Sullivan, writing for the majority,\textsuperscript{174} initially acknowledged that a verdict may be set aside on the ground of improper influence even if it is “well-intentioned juror conduct” that introduces evidence not contained in the record.\textsuperscript{175} The court then observed, however, that this juror’s behavior should not be classified as a calculated and contrived test of the credibility of a witness,\textsuperscript{176} but rather as a mere random observation typical of the kind of everyday experience upon which a juror is expected to draw.\textsuperscript{177} Thus, Justice Sullivan reasoned, because the juror “saw what every other juror could have seen,” he did not become an unworn witness nor place otherwise inadmissible evidence before the jury.\textsuperscript{178} The court reached this conclusion despite its recogni-

\begin{itemize}
\item \textsuperscript{170} Id. at 359, 451 N.Y.S.2d at 431.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id. at 361, 451 N.Y.S.2d at 432.
\item \textsuperscript{174} Justice Sullivan was joined by Presiding Justice Kupferman and Justice Markewich. Justice Milonas filed a dissenting opinion.
\item \textsuperscript{175} 87 App. Div. 2d at 360, 451 N.Y.S.2d at 431 (citing People v. Brown, 48 N.Y.2d 388, 399, 399 N.E.2d 51, 53, 423 N.Y.S.2d 461, 463 (1979)).
\item \textsuperscript{176} 87 App. Div. 2d at 361, 451 N.Y.S.2d at 432; see People v. Brown, 48 N.Y.2d 388, 395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979). In Brown, a police detective testified that he identified the defendant by looking through the passenger side window of a police van into the driver’s side of the adjacent car. Id. at 381, 399 N.E.2d at 52, 423 N.Y.S.2d at 462. During the trial, a juror conducted a “test,” using her own van, in order to verify the detective’s testimony, and she reported her findings to the jury. Id. at 392, 399 N.E.2d at 52, 423 N.Y.S.2d at 462-63.
\item \textsuperscript{177} 87 App. Div. 2d at 361, 451 N.Y.S.2d at 432. Justice Sullivan noted that jurors constantly are exposed to stimuli that “affect the perspective from which they view the world.” Id.; see People v. Brown, 48 N.Y.2d 388, 393, 399 N.E.2d 51, 53, 423 N.Y.S.2d 461, 463 (1979). Judge Wachtler, writing for the majority in Brown, recognized that jurors “do not live in capsules” and are not expected to “cripple their cognitive functions.” Id. Indeed, the Brown court stated that “the application of a lay jury’s collective intelligence and experience [in]... sifting evidence and reaching a verdict is regarded as a hallmark of our juridical system.” Id.; cf. C. McCormick, supra note 163, § 329, at 762 (“[j]ury may consider, as if proven, facts within the common knowledge of the community”). See generally R. McBride, THE ART OF INSTRUCTING THE JURY § 3.13, at 69 (1969); J. Dowsey, CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE § 2, at 6 (1969).
\item \textsuperscript{178} 87 App. Div. 2d at 361, 451 N.Y.S.2d at 432.
\end{itemize}
tion of the material impression that the observations made upon the juror.179

Dissenting in part, Justice Milonas noted that the juror's conduct conceivably did not involve an "'application of everyday experience.'"180 Additionally, the dissent contended, a substantial risk of prejudice might exist even if only one juror is swayed by the unauthorized test.181 Justice Milonas stated, therefore, that in view of these circumstances, the defendant was entitled to a hearing to discern the precise character of the juror's conduct.182

It is submitted that the analysis employed by the Smith court is inconsistent with the established method of examining juror misconduct. In People v. Brown,183 the Court of Appeals enunciated a three-prong test to be applied in determining whether juror misconduct gives rise to reversible error. It appears, however, that the Smith panel misinterpreted the Brown standard by focusing upon the commonplace character of the juror's conduct,184 rather than upon the resultant prejudice to the defendant.185 The unex-

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179 Id.; see supra text accompanying note 167.
181 Id. (Milonas, J., dissenting).
182 Id. (Milonas, J., dissenting).
183 48 N.Y.2d 388, 399 N.E.2d 51, 423 N.Y.S.2d 461 (1979); see supra note 176. In Brown, a police officer testified that, immediately prior to a robbery, he observed the defendant driving what later turned out to be the getaway car. 48 N.Y.2d at 391, 399 N.E.2d at 52, 423 N.Y.S.2d at 462. During the trial, a juror, who owned a Volkswagen van, tested the range of visibility from its passenger seat. Id. at 392, 399 N.E.2d at 52, 423 N.Y.S.2d at 462. Before a verdict was reached, she told the other jurors that the officer may, indeed, have seen the defendant's face from his position in the van. Id. Reversing the defendant's conviction, the Court of Appeals, enunciating a three-part test to assess juror misconduct, stated that the juror's conduct was a "conscious, contrived experimentation," that "the 'test' was directly material to a point at issue in the trial," and that there was "a substantial risk of prejudice to the rights of the defendant by coloring the views of the other jurors as well as her own." Id. at 394, 399 N.E.2d at 53-54, 423 N.Y.S.2d at 463-64.


184 See People v. Smith, 87 App. Div. 2d at 361, 451 N.Y.S.2d at 432; supra note 177.
185 See United States v. Howard, 506 F.2d 865, 869 (6th Cir. 1975); United States v. Allison, 481 F.2d 468, 472 (5th Cir. 1973), cert. denied, 416 U.S. 982 (1974); Simon v. Kuhl-
exceptional nature of the juror's conduct is merely one factor to be considered in determining the extent of prejudice, and not a threshold inquiry that forecloses evaluation of the remaining factors.\textsuperscript{186}

The Smith scenario, it is further suggested, presents a deceptively mundane example of juror misconduct. Although this particular juror apparently was well intentioned, his conduct may have substantially prejudiced the sixth amendment rights of the defendant.\textsuperscript{187} Such a consequence, together with the traditional reluctance of the judiciary to examine juror conduct,\textsuperscript{188} suggests that a preventive approach to the problem of juror misconduct would be prudent. Thus, just as jurors are instructed specifically neither to visit the scene of a crime nor to read outside accounts of the...
so too should they be admonished to refrain from independent experimentation that might affect, in any way, their perception of material issues.

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Plaintiff’s failure to use available seatbelt may be considered as evidence of contributory negligence when the nonuse allegedly causes the accident

Three general approaches have been developed to determine the effect that nonuse of an available seatbelt has upon a plaintiff’s recovery in an action for personal injuries suffered in a motor vehicle accident. New York has taken the position that although

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189 CPL § 270.40 (1971). Section 270.40 mandates that preliminary instructions relating to jury misconduct be given to the jury. *Id.* The statute provides that

[s]uch instructions must include, among other matters, admonitions that the jurors may not converse among themselves or with anyone else upon any subject connected with the trial; that they may not read or listen to any accounts or discussions of the case reported by newspapers or other news media; that they may not visit or view the premises or the place where the offense or the offenses charged were allegedly committed or any other premises or place involved in the case; and that they must promptly report to the court any incident within their knowledge involving an attempt by any person improperly to influence any member of the jury.

*Id.* It is suggested that the statute be amended to include express references to independent juror experimentation and juror conduct that reasonably may bear upon material issues.

190 Spier v. Barker, 35 N.Y.2d 444, 450, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920 (1974). One of the three approaches to the seatbelt defense is the negligence per se approach, which posits that in a personal injury action arising out of an automobile accident, in a jurisdiction that has enacted a seatbelt installation statute, the plaintiff who failed to use a seatbelt will be considered contributorily negligent as a matter of law. *See* Comment, The Seat Belt Defense: A New Approach, 38 FORDHAM L. REV. 94, 97 (1969) [hereinafter cited as Fordham Comment]; Comment, The Seat Belt Defense—A Valid Instrument of Public Policy, 44 TENN. L. REV. 119, 122 (1976). Notably, no jurisdiction has accepted the negligence per se approach, see *e.g.*, Remington v. Arndt, 28 Conn. Supp. 289, 291, 259 A.2d 145, 146 (Super. Ct. 1969); Cierpisz v. Singleton, 247 Md. 215, 227, 230 A.2d 629, 635 (1967); Miller v. Miller, 273 N.C. 228, 230, 160 S.E.2d 65, 68 (1968), since there exists no installation statute which mandates that seatbelts be worn, Comment, *supra*, at 122 & n.16; *see* N.Y. VEH. & TRAM. LAW § 383 (McKinney 1970) (requires that seatbelts be installed in every automobile manufactured after 1967, but does not require their use).

Another approach to the seatbelt defense is common-law contributory negligence, which is premised upon the belief that a reasonably prudent automobile occupant would exercise reasonable care for his own safety, and thus would use an available seatbelt. *See* Fordham Comment, *supra*, at 97. The contributory negligence approach has been adopted by a small number of jurisdictions. *See*, *e.g.*, Harian v. Curbo, 250 Ark. 610, 612, 466 S.W.2d 459, 460-61 (1971); Truman v. Vargas, 275 Cal. App. 2d 976, 981, 80 Cal. Rptr. 373, 377 (Ct. App. 1969); Bentzler v. Braun, 34 Wis. 2d 382, 385, 149 N.W.2d 626, 639 (1967). Of the courts