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PART I

Introduction and Contextualization

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1

Insiders, Outsiders, Injuries, and Law

MARY NELL TRAUTNER

INTRODUCTION

One central theme of law and society scholarship is that people's ideas about law and the decisions they make to mobilize law are shaped by community norms and cultural context. But this has not always been taken for granted. Among the first empirical pieces to articulate what now seems obvious about the contextual expression of law was David Engel's 1984 article in the *Law & Society Review*, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community." Since its publication, his article has been a core work in the field, so influential and widely cited that it is now commonly considered to be part of the law and society "canon."[1]

Why would an article about personal injury and contract litigation be titled "The Oven Bird's Song"? David Engel's love of literature inspired him to invoke Robert Frost's poem as a metaphor for people's use of the law as a response to their perceptions of social change. The article's memorable title underscores the enduring value of this signature contribution to the law and society movement. The product of intensive fieldwork, Engel's research revealed that residents in a rural Illinois community perceived and behaved in ways that underscored contested cultural issues regarding personal injury, dispute resolution, social change, and law. He spent years interviewing litigants and a wide cross-section of community members, new and established and with varying characteristics, about how they resolved disputes and chose (or did not choose) to use the law in the process. He also carefully mined local court records for instances of personal injury and contract litigation. By linking the first-hand accounts of residents with a careful study of court data,

[1] Seron, Carroll, Susan Bibler Coutin, and Pauline White Meeusen. 2013. "Is There a Canon of Law and Society?" *Annual Review of Law and Social Science* 9: 287–306.

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Engel created a landmark ethnographic study that revealed the cultural contours of law and rendered individuals' responses to it unavoidable and obvious.

Engel discovered that most longtime majority residents of "Sander County" – the insiders – typically resolved their (many) disputes informally, rather than taking legal action against one another. In contrast, "outsiders" (newcomers and some nonwhite residents), whose community ties and personal relationships were fewer and less robust than those of the "insiders," often turned to law when faced with a grievance or dispute. Such use of law by "outsiders" resulted in a major point of critique and disparagement from "insiders," which Engel reveals was really more about nostalgia and resisting change to the status quo than the use of law per se.

The chapter authors in *Insiders, Outsiders, Injuries, & Law* argue that Engel's article succeeds so brilliantly because it integrates such a wide variety of significant issues and themes. Engel's seminal work addresses cultural anxiety, cultural transformation, attitudes about law, dispute processing, legal consciousness, the rule of law, rights mobilization, inclusion and exclusion, inequality, and the haves and have-nots. Accessible to undergraduate and graduate students alike, even after thirty years, "The Oven Bird's Song" still resonates with new audiences. And in a populist era of American and global politics, Engel's insights about insider nostalgia and outsiders/social change are perhaps even more relevant than ever (a point that several contributors in this volume underscore).

After the thirtieth anniversary of the publication of "The Oven Bird's Song," a diverse committee of legal scholars – Lynn Mather, Alfred Konefsky, Anya Bernstein, Samantha Barbas, and I – organized a symposium to examine the intellectual context within which Engel's article was written, its insights into law and the legal process, the pedagogical opportunities and challenges presented by the work, and the continuing influence of "The Oven Bird's Song" on law and society scholarship. Scholars from across the country and around the world convened in Buffalo for a conference held at the University at Buffalo's Baldy Center for Law & Social Policy in October 2015. Most of the chapters in this volume arose from the conference presentations, supplemented by two additional chapters specifically prepared for this collection.

A central feature of this volume is its interdisciplinary and multi-focal nature. Scholars from law, political science, history, sociology, anthropology, and global studies explore how rights, legal consciousness, immigration, contracts, the legal profession, jury decision-making, and the body are situated not only in legal doctrine and legal practice, but also, as Engel demonstrated, in culture, history, and society. The relationship that Engel explored between

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the use of law and the cultures and politics of different communities has been extended because of its contemporary salience to a wide range of policy issues. Together, the chapters provide new insights and provide readers a way to see and understand the open-ended possibilities in "The Oven Bird's" challenging hypotheses and provocative omissions.

The following chapter includes the original article as it appeared in *Law & Society Review*. Subsequent chapters share a focus on the insider/outsider dichotomy, the reluctance to make legal claims, and a forward-looking consideration of where the field is headed next.

Part I of the volume contextualizes Engel's article. Barbara Yngvesson begins with an examination of the significance of the interpretive turn in shaping sociolegal studies, and how this turn allowed researchers to focus on lived experiences and explain "non-events" such as the decision not to sue. Alfred Konefsky situates "The Oven Bird's Song" in the intellectual context of the early 1980s Buffalo Law School where, after delivering an early version of the analysis as his job talk, Engel completed writing the manuscript.

Part II features work that uses Engel's article as a window into the legal system and legal process itself. Anna-Maria Marshall demonstrates how "The Oven Bird's Song" laid the foundation for legal consciousness studies while simultaneously anticipating some of the significant debates in that tradition. By analyzing the legal significance of what individuals think and do, Marshall argues, Engel demonstrated that law is a thread that runs through the everyday lives of ordinary people. Lynn Mather turns her focus to the legal profession and considers how the perceptions of law, legal conduct, and changing social context that affected Sander Country residents so profoundly are also reflected in the ways lawyers screen cases and construct legal cases. She gives special attention to the lawyers representing the "outsiders" in Sander County, and compares them to other lawyers in the United States who have sought to use law to promote particular causes or interests in times of social change. Valerie Hans reviews research on jury decision-making in tort cases, exploring whether the hostility to personal injury plaintiffs and the tendency to blame injury victims that Engel discovered decades ago are reflected in contemporary jurors' responses. Hans shows that jurors believe there are many unjustified lawsuits. The jurors she discusses express concern about greedy plaintiffs, a decline in personal responsibility, and exaggeration of injuries – attitudes that lead to over-attribution of plaintiff fault and minimization of injury. Hans closes her chapter by reflecting on the lessons of "The Oven Bird's Song" for jury trial advocacy. Finally, Stewart Macaulay reflects on what Engel's article reveals about contracts and contract law. Sander County residents disapproved of people who sued others for injuries in tort actions, but accepted that

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contract actions were legitimate because, with few exceptions, "a deal is a deal." Macaulay adds "a footnote" to "The Oven Bird's Song," showing that while there are indeed disincentives to using legal rights in many contexts, there is an imprecise cultural norm in some contexts that calls for one party in a contract not to sue but, rather, to work out an acceptable solution to the other party's problems in performing.

Engel's work challenges the popular notion that justice – and, by extension, law – is somehow blind or neutral to differences in social statuses. Otherwise, why does it matter for law if people are "insiders" or "outsiders" in society? Chapters in Section 3 grapple with this question, exploring how gender, race, immigration status, social class, and other forms of difference influence not only the decisions that people make about law, but also how others respond to those decisions. Eve Darian-Smith draws on fifteen years of research with Native American communities to illustrate how they are perceived as a new group of "outsiders," using law to redress wrongs and fight enduring discrimination. Michael McCann's analysis of the import of Engel's essay focuses on workers and other relatively rights-less outsider groups, opening up a variety of questions about the possibilities as well as the significant obstacles to subaltern mobilization of rights in, and especially, beyond courts, through politics. Jamie Longazel shows how some of the central arguments in "The Oven Bird's Song" align with and are enhanced by developments in Critical Race Theory, focusing on how immigrants as "outsiders" in a small town – Hazelton, Pennsylvania – resemble the outsiders of Engel's Sander County. Longazel's analysis shows how the White majority uses criminalization not simply to stereotype immigrants as crime-prone but rather to draw a "line of demarcation" that validates the personhood of some while stripping it from others. In this way, racialized criminalization troublingly becomes a tool used to construct eligibility for rights and resources that many find especially "valuable" in the context of economic uncertainty. Anne Bloom's chapter speculates on the contributions of Engel's work to deeper understanding how changing conceptions of bodily identity, especially in terms of gender, aging, and disability, might shape the future of tort law. She argues that the desire to adopt "outsider" identities and to become "irresponsible" (or at least less responsible) matter underlies contemporary bodily identity practices, particularly as they relate to gender and disability. Renée Cramer closes out this section by engaging the sense of familiarity students have with the spatial and temporal aspects of Engel's classic article, and takes seriously their stories about places like Sander County. In developing this theme, Cramer's chapter examines the implications this comfort has for students' politics – their willingness to accept a narrative of tort reform as necessary, their acceptance of risk as indeed

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a "part of life," their deep (and paradoxical) distrust of professionalism, and their articulation of the divide between outsiders and insiders.

Section 4 considers "The Oven Bird's Song" contributions to understanding conflict and law outside the United States. Yoshitaka Wada modifies and develops Engel's perspective to improve understanding of the complex relationships among cultural values, the nature of community and relationships, and the meaning of suing behavior in automobile dispute resolution in Japan. He uses the concept of "imagined communities" to clarify the characteristics of Japanese communities, the structure of the judicial system, and legal consciousness to illustrate the wider possibility of applying Engel's insights beyond American borders. Anya Bernstein draws on "The Oven Bird's Song" to understand government administrators and community activists in Taipei, "insider" groups who are reluctant to use the law to justify – or even to enforce – their positions. Much like the residents of Sander County, she finds that these Taipei insiders saw recourse to the law as a failure of other, more legitimate forms of social ordering such as interpersonal relations and shared values – not dissimilar from the informal dispute resolution typically pursued by Sander County insiders. Annie Bunting questions whether the themes of "The Oven Bird's Song" translate to the Canadian context, given cultural differences in how Canadians and Americans think about insiders and outsiders, and, for that matter, how national cultures might shape perceptions of legitimate uses of the law. She presents us an opportunity to think about legal pluralism and parochialism in law and society research on both sides of the border.

David Engel concludes with a brief social history of his thinking and writing of the work that inspired the 2015 conference and this volume, but gives more attention to new directions that remain to be explored, particularly with regard to the central topic of "The Oven Bird's Song," personal injuries. Engel argues that the comparative and interpretive perspectives that emerged in law and society research thirty years ago can still be usefully deployed in a broader effort to understand why injuries remain such a serious social problem in our country, why injuries are widely misunderstood, and why the law has been so ineffective in redressing the inequalities and hardships that injuries inflict on those who are least able to deal with them.

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2

The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*

DAVID M. ENGEL**

In "Sander County" Illinois, concerns about litigiousness in the local population tended to focus on personal injury suits, although such cases were very rarely brought. This article explores the roots of these concerns in the ideology of the rural community and in the reactions of many residents to social, cultural, and economic changes that created a pervasive sense of social disintegration and loss. Personal injury claims are contrasted with contract actions, which were far more numerous yet were generally viewed with approval and did not give rise to perceptions of litigiousness or greed. The distinction is explained in terms of changing conceptions of the community itself and in terms of the problematic relationships between "insiders" and "outsiders" in Sander County.

* The title refers to Robert Frost's poem "The Oven Bird," which describes a response to the perception of disintegration and decay not unlike the response that is the subject of this paper:

> There is a singer everyone has heard,
> Loud, a mid-summer and a mid-wood bird,
> Who makes the solid tree trunks sound again.
> He says that leaves are old and that for flowers
> Mid-summer is to spring as one to ten.
> He says the early petal-fall is past
> When pear and cherry bloom went down in showers
> On sunny days a moment overcast;
> And comes that other fall we name the fall.
> He says the highway dust is over all.
> The bird would cease and be as other birds
> But that he knows in singing not to sing.
> The question that he frames in all but words
> Is what to make of a diminished thing.

From *The Poetry of Robert Frost*, edited by Edward Connery Lathem. Copyright 1916, © 1969 by Holt, Rinehart and Winston. Copyright 1944 by Robert Frost. Reprinted by permission of Holt, Rinehart and Winston, Publishers.

** I am deeply grateful to the residents of "Sander County" for their generous participation in this study.

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I. INTRODUCTION

Although it is generally acknowledged that law is a vital part of culture and of the social order, there are times when the invocation of formal law is viewed as an anti-social act and as a contravention of established cultural norms. Criticism of what is seen as an overuse of law and legal institutions often reveals less about the quantity of litigation at any given time than about the interests being asserted or protected through litigation and the kinds of individuals or groups involved in cases that the courts are asked to resolve. Periodic concerns over litigation as a "problem" in particular societies or historical eras can thus draw our attention to important underlying conflicts in cultural values and changes or tensions in the structure of social relationships.

In our own society at present, perhaps no category of litigation has produced greater public criticism than personal injuries. The popular culture is full of tales of feigned or exaggerated physical harms, of spurious whiplash suits, ambulance-chasing lawyers, and exorbitant claims for compensation. Scholars, journalists, and legal professionals, voicing concern with crowded dockets and rising insurance costs, have often shared the perception that personal injury litigation is a field dominated by overly litigious plaintiffs and by trigger-happy attorneys interested only in their fee (Seymour, 1973: 177; Tondel, 1976: 547; Perham, 1977; Rosenberg, 1977: 154; Taylor, 1981; Gest et al., 1982; Greene, 1983).

To the mind agitated by such concerns, Sander County (a pseudonym) appears to offer a quiet refuge. In this small, predominantly rural county in Illinois, personal injury litigation rates were low in comparison to other major categories of litigation[1] and were apparently somewhat lower than the personal

I would also like to thank the following friends and colleagues who read and commented on this article at one stage or another in its development: Richard L. Abel, James B. Atleson, Guyora Binder, Donald Black, Marc Galanter, Fred Konefsky, Virginia Leary, Richard O. Lempert, Felice J. Levine, John Henry Schlegel, Eric H. Steele, Robert J. Steinfeld, and Barbara Yngvesson. I am also grateful to Linda Kosinski for her skill and patience in typing and retyping the manuscript.

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[1] By "litigation" I mean simply the filing of a formal complaint in the civil trial court, even if no further adversarial processes occur. The annual litigation rate for personal injuries was 1.45 cases filed per 1,000 population as compared to 13.7 contract cases (mostly collection matters), 3.62 property-related cases (mostly landlord-tenant matters), and 11.74 family-related cases (mostly divorces). All litigation rates are based on the combined civil filings for 1975 and 1976 in the Sander County Court. Population figures are based on the 1970 census and are therefore somewhat understated. That is, the actual litigation rates for 1975–1976 are probably lower than those given here.

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injury rates in other locations as well.[2] Yet Sander County residents displayed a deep concern with and an aversion toward this particular form of "litigious behavior" despite its rarity in their community.[3]

Those who sought to enforce personal injury claims in Sander County were characterized by their fellow residents as "very greedy," as "quick to sue," as "people looking for the easy buck," and as those who just "naturally sue and try to get something [for] . . . life's little accidents." One minister describing the local scene told me, "Everybody's going to court. That's the thing to do, because a lot of people see a chance to make money." A social worker, speaking of local perceptions of personal injury litigation, particularly among the older residents of Sander County, observed: "Someone sues every time you turn around. Sue happy, you hear them say. Sue happy." Personal injury plaintiffs were viewed in Sander County as people who made waves and as troublemakers. Even members of the community who occupied positions of prestige or respect could not escape criticism if they brought personal injury

[2] McIntosh reports a rate of approximately 6 tort actions per 1,000 population in the St. Louis Circuit Court in 1970. He does not state what proportion of these involved personal injuries (McIntosh, 1980–81: 832). Friedman and Percival (1976: 281–82) report 2.80 and 1.87 cases filed per 1,000 population in the Alameda and San Benito Superior Courts (respectively) in 1970 under the combined categories of "auto accidents" and "other personal injuries." The two California courts had original jurisdiction only for claims of $5,000 or more, however, while the Sander County figures include personal injury claims of all amounts. Friedman and Percival do not indicate what proportion of the auto accident cases involved personal injuries as opposed to property damage only. Statewide data for California and New York, compiled by the National Center for State Courts (1979: 49, 51) for tort cases filed in 1975, also tend to indicate litigation rates higher than Sander County's. However, these aggregate litigation rates are understated in that they exclude filings from smaller courts of limited jurisdiction in both states and are overstated in that they fail to separate personal injury cases from other tort actions. Litigation rates for tort cases filed per 1,000 population in 1975 are: California, 3.55 and New York, 2.21 (but in 1977, when additional lower court dockets were included in the survey of tort cases filed, the rate reported for New York more than doubled to 4.47; see National Center for State Courts, 1982: 61). In comparing the Sander County litigation rates to those in other cities or states, it should also be remembered that, because Sander County was quite small, the *absolute number* of personal injury actions filed in the county court was also very small compared to more urban areas.

[3] I use the term "community" somewhat loosely in this discussion to mean the county seat of Sander County and the surrounding farmlands. Since Sander County is rather small, this takes in most of the county. There are a handful of very small towns elsewhere in the county. Although they are not far from the county seat and are linked to it in many ways, it is probably stretching things to consider them part of a single "community." I should add that the problem of defining the term "community" as a subject of empirical study has vexed social scientists for many years, and I aspired to no conceptual breakthrough in this regard. My interest was in finding a research site where the jurisdiction of the court was roughly congruent with a social unit comprising a set of meaningful interactions and relationships.

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cases to court. When a minister filed a personal injury suit in Sander County after having slipped and fallen at a school, there were, in the words of one local observer:

> [A] lot of people who are resentful for it, because . . . he chose to sue. There's been, you know, not hard feelings, just some strange intangible things. . . .

How can one explain these troubled perceptions of personal injury litigation in a community where personal injury actions were in fact so seldom brought? The answer lies partly in culturally-conditioned ideas of what constitutes an injury and how conflicts over injuries should be handled. The answer is also found in changes that were occurring in the social structure of Sander County at the time of this study and in challenges to the traditional order that were being raised by newly arrived "outsiders." The local trial court was potentially an important battleground in the clash of cultures, for it could be called on to recognize claims that traditional norms stigmatized in the strongest possible terms.[4]

II. SOCIAL CHANGES AND THE SENSE OF COMMUNITY

Sander County in the late 1970s was a society that was strongly rooted in its rural past yet undergoing economic and social changes of major proportions. It was a small county (between 20,000 and 30,000 population in the 1970s), with more than half its population concentrated in its county seat and the rest in several much smaller towns and rural areas. Agriculture was still central to county life. Sander County had 10 percent more of its land in farms in the mid-1970s than did the state of Illinois as a whole, but the number of farms in Sander County had decreased by more than one-third over the preceding twenty years while their average size had grown by almost half. Rising costs, land values, and taxes had been accompanied by an increase in the mechanization of agriculture in Sander County, and the older, smaller farming operations were being rapidly transformed. At the same time, a few large manufacturing plants had brought blue collar employees from other areas to work (but not always to live) in Sander County. Also, a local canning plant had for many years employed seasonal migrant workers, many of whom

[4] Hostility toward personal injury litigation as a form of "hyperlexis" may also have been influenced in Sander County by mass media treatment of this form of legal claim. Yet the attitudes and antagonisms I describe had deep roots in the culture of Sander County itself as well as in the popular culture of the country as a whole. A critical appraisal of the hyperlexis literature, which parallels this discussion in some respects, is found in Galanter (1983).

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were Latinos. In recent years, however, a variety of "outsiders" had come to stay permanently in Sander County, and the face of the local society was gradually changing.

To some extent these changes had been deliberately planned by local leaders, for it was thought that the large manufacturing plants would revitalize the local economy. Yet from the beginning there had also been a sense of foreboding. In the words of one older farmer:

> A guy that I used to do business with told me when he saw this plant coming in down here that he felt real bad for the community. He said, that's gonna be the end of your community, he said, because you get too many people in that don't have roots in anything. And I didn't think too much about it at the time, but I can understand what he was talking about now. I know that to some extent, at least, this is true. Not that there haven't been some real good people come in, I don't mean that. But I think you get quite a number of a certain element that you've never had before.

Others were more blunt about the "certain element" that had entered Sander County: union members, southerners and southwesterners, blacks, and Latinos. One long-time rural resident told us, "I think there's too many Commies around. I think this country takes too many people in, don't you? . . . That's why this country's going to the dogs." Many Sander County residents referred nostalgically to the days when they could walk down Main Street and see none but familiar faces. Now there were many strangers. An elderly woman from a farming family, who was struggling to preserve her farm in the face of rising taxes and operating costs, spoke in troubled tones of going into the post office and seeing Spanish-speaking workers mailing locally-earned money to families outside the country. "This," she said, "I don't like." Another woman, also a long-time resident, spoke of the changing appearance of the town:

> [It was] lots different than it is right now. For one thing, I think we knew everybody in town. If you walked uptown you could speak to every single person on the street. It just wasn't at all like it is today. Another thing, the stores were different. We have so many places now that are foreign, Mexican, and health spas, which we're not very happy about, most of us. My mother was going uptown here a year ago and didn't feel very well when she got up to State Street. But she just kept going, and I thought it was terrible because the whole north side of town was the kind of place that you wouldn't want to go into for information or for help. Mostly because we've not grown up with an area where there were any foreign people at all.

There was also in the late 1970s a pervasive sense of a breakdown in the traditional relationships and reciprocities that had characterized life in Sander County. As one elderly farmer told me:

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> It used to be I could tell you any place in Sander County where it was, but I can't now because I don't know who lives on them. . . . And as I say in the last 20 years people don't change work like they used to— or in the last 30 years. Everybody's got big equipment, they do all their own work so they don't have to change labor. Like years ago . . . why you had about 15 or 20 farmers together doing the exchange and all.

Many Sander County residents with farming backgrounds had warm memories of the harvest season, when groups of neighbors got together to share work and food:

> When we had the threshing run, the dining room table it stretched a full 17 feet of the dining room, and guys would come in like hungry wolves, you know, at dinner time and supper again the same thing. . . . And they'd fire the engine up and have it ready to start running by 7:00. . . . You know, it was quite a sight to see that old steam engine coming down the road. I don't know, while I never want to be doing it again, I still gotta get kind of a kick out of watching a steam engine operate.

And all could remember socializing with other farming families on Saturday evenings during the summertime. In the words of two long-time farmers:

A: Well, on Saturday night they used to come into town, and the farmers would be lined up along the sidewalk with an ice cream cone or maybe a glass of beer or something. . . .
B: If you met one to three people, you'd get all the news in the neighborhood. . . .
A: If you go downtown now, anytime, I doubt if you'll see half a dozen people that you know. I mean to what you say sit down and really, really know them.
B: You practically knew everybody.
A. That's right, but you don't now.
B: No, no, no. If you go down Saturday night . . .
A: Everything is dead.

III. THE STUDY

I shall argue in this article that perceptions of personal injury claims in Sander County were strongly influenced by these social changes as local residents experienced them and by the sense that traditional relationships and exchanges in the community were gradually disintegrating.[5] I cannot say that the frequent

[5] The sense of social change and disintegration in Sander County helped crystallize a set of values opposed to personal injury litigation. These values were almost certainly rooted in long established norms, but the targets of their expression and the intensity with which they were asserted may have been new. This article focuses on how and why such values came

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condemnation of personal injury litigation elsewhere in the United States is linked to a similar set of social processes, but investigation in other settings may disclose some parallels. The sense of community can take many forms in American society, and when members of a community feel threatened by change, their response may be broadly similar to the kind of response I describe here.

My discussion is based on fieldwork conducted from 1978 to 1980. Besides doing background research and immersing myself in the community and in the workings of the Sander County Court, I collected data for the study in three ways: (1) A sample of civil case files opened in 1975 and 1976 was drawn and analyzed.[6] (2) Plaintiffs and defendants in a subsample of these civil cases were contacted and interviewed in broad-ranging, semi-structured conversations.[7] (3) Strategically placed "community observers" were identified and interviewed at length. These were individuals who had particular insights into different groups, settings, occupations, or activities in the community.[8] Discussions with them touched on various aspects of the community, including the ways in which the relationships, situations, and problems that might give rise to litigated cases were handled when the court was not used. The insights derived from the community observer interviews thus provided a broader social and cultural context for the insights derived from the court-based research.

Personal injuries were one of four major substantive topics selected to receive special attention in this study.[9] It soon became apparent, however, that personal injuries were viewed quite differently from the other topics, and

to be expressed and acutely felt in the late 1970s by many Sander County residents. See note 19 *infra*.

6 A 20% sample was taken for the years 1975–1976 within each of 12 civil categories mandated by the Administrative Office of the Illinois Courts: (1) Law (claim over $15,000), (2) Law (claim $15,000 or less), (3) Chancery, (4) Miscellaneous Remedies, (5) Eminent Domain, (6) Estates, (7) Tax, (8) Municipal Corporations, (9) Mental Health, (10) Divorce, (11) Family, (12) Small Claims. After the sample was drawn, the cases were reclassified into the substantive categories referred to throughout this article.

7 Parties in 66 cases were interviewed. Wherever possible, all parties to each case were included. Particular attention was given to the individuals themselves, the relationship between them, and to the origin, development, and outcome of each case.

8 Among the 71 community observers were judges, lawyers, teachers, ministers, farmers, a beautician, a barber, city and county officials, a funeral parlor operator, youth workers, social service workers, various "ordinary citizens" from different segments of the community, a union steward, a management representative, agricultural extension workers, doctors, a newspaper reporter, the members of a rescue squad, and others.

9 The other three substantive areas were injuries to reputation, contracts, and marital problems.

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the differences appeared to be related to the fundamental social changes that were taking place in Sander County. Focusing on personal injuries in this article makes it possible to examine the role played by formal law in mediating relationships between different groups in a changing society and to consider why the rare use of formal legal institutions for certain purposes can evoke strong concern and reaction in a community. The answer, I shall suggest, lies in the ideological responses of longtime residents of Sander County whose values and assumptions were subjected to profound challenges by what they saw as the intrusion of newcomers into their close-knit society.

IV. INJURIES AND INDIVIDUALISM

For many of the residents of Sander County, exposure to the risk of physical injury was simply an accepted part of life. In a primarily agricultural community, which depended on hard physical work and the use of dangerous implements and machinery, such risks were unavoidable. Farmers in Sander County told many stories of terrible injuries caused by hazardous farming equipment, vehicles of different kinds, and other dangers that were associated with their means of obtaining a livelihood. There was a feeling among many in Sander County –particularly among those from a farming background – that injuries were an ever-present possibility, although prudent persons could protect themselves much of the time by taking proper precautions.

It would be accurate to characterize the traditional values associated with personal injuries in Sander County as individualistic, but individualism may be of at least two types. A rights-oriented individualism is consistent with an aggressive demand for compensation (or other remedies) when important interests are perceived to have been violated. By contrast, an individualism emphasizing self-sufficiency and personal responsibility rather than rights is consistent with the expectation that people should ordinarily provide their own protection against injuries and should personally absorb the consequences of harms they fail to ward off.[10]

It is not clear why the brand of individualism that developed over the years in Sander County emphasized self-sufficiency rather than rights and remedies, but with respect to personal injuries at least, there can be no doubt that this had occurred. If the values associated with this form of individualism originated in an earlier face-to-face community dominated by economically self-sufficient farmers and merchants, they remained vitally important to many

[10] This distinction between the two types of individualism emerged from an ongoing dialogue with Fred Konefsky, whose contribution to this conceptualization I gratefully acknowledge.

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of the long-time Sander County residents even at the time of this study. For them, injuries were viewed in relation to the victims, their fate, and their ability to protect themselves. Injuries were not viewed in terms of conflict or potential conflict between victims and other persons, nor was there much sympathy for those who sought to characterize the situation in such terms. To the traditional individualists of Sander County, transforming a personal injury into a claim against someone else was an attempt to escape responsibility for one's own actions. The psychology of contributory negligence and assumption of risk had deep roots in the local culture. The critical fact of personal injuries in most cases was that the victims probably could have prevented them if they had been more careful, even if others were to some degree at fault. This fact alone is an important reason why it was considered inappropriate for injured persons to attempt to transform their misfortune into a demand for compensation or to view it as an occasion for interpersonal conflict.

Attitudes toward money also help explain the feelings of long-time residents of Sander County toward personal injury claimants. While there might be sympathy for those who suffered such injuries, it was considered highly improper to try to "cash in" on them through claims for damages. Money was viewed as something one acquired through long hours of hard work, not by exhibiting one's misfortunes to a judge or jury or other third party, even when the injuries were clearly caused by the wrongful behavior of another. Such attitudes were reinforced by the pervasive sense of living in what had long been a small and close-knit community. In such a community, potential plaintiffs and defendants are likely to know each other, at least by reputation, or to have acquaintances in common. It is probable that they will interact in the future, if not directly then through friends and relatives. In these circumstances it is, at best, awkward to sue or otherwise assert a claim. In addition, in a small community one cannot hide the fact of a suit for damages, and the disapproving attitudes of others are likely to be keenly felt. Thus, I was frequently assured that local residents who were mindful of community pressures generally reacted to cases of personal injury, even those that might give rise to liability in tort, in a "level-headed" and "realistic" way. By this it was meant that they would not sue or even, in most cases, demand compensation extrajudicially from anyone except, perhaps, their own insurance companies.[11]

[11] I heard of only a few cases where injured persons negotiated compensatory payments from the liability insurance of the party responsible for their harm. In these cases expectations (or demands) appeared to be modest. One involved a woman who lived on a farm. When visiting a neighbor's house, she fell down the basement stairs because of a negligently installed door,

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Given the negative views that local juries adopted toward personal injury cases, terms such as "realistic" for those who avoided litigation were indeed well chosen. Judges, lawyers, and laypersons all told me that civil trial juries in the county reflected – and thus reinforced – the most conservative values and attitudes toward personal injury litigation. Awards were very low and suspicion of personal injury plaintiffs was very high. A local insurance adjuster told me:

> [T]he jury will be people from right around here that are, a good share of them will be farmers, and they've been out there slaving away for every penny they've got and they aren't about to just give it away to make that free gift to anybody.

And one of the leading local trial lawyers observed:

> [T]here's a natural feeling, what's this son of a bitch doing here? Why is he taking our time? Why is he trying to look for something for nothing? . . . So I've got to overcome that. That's a natural prejudice in a small [community], they don't have that natural prejudice in Cook County. But you do have it out here. So first I've got to sell the jury on the fact that this man's tried every way or this woman's tried every way to get justice and she couldn't. And they now come to you for their big day. . . . And then you try like hell to show that they're one of you, they've lived here and this and that.

The prospects for trying a personal injury case before a local jury, he concluded, were so discouraging that, "If I can figure out a way not to try a case in [this] county for injury, I try to."

Where there was no alternative as to venue, potential plaintiffs typically resigned themselves to nonjudicial settlements without any thought of

fractured her skull, was unconscious for three days, and was in intensive care for five days. As a result of the accident she suffered a permanent loss of her sense of smell and a substantial (almost total) impairment of her sense of taste. Her husband, a successful young farmer, told me that their own insurance did not cover the injury. Their neighbor had liability insurance, which paid only $1000 (the hospital bills alone were approximately $2500). Nevertheless, they never considered seeking greater compensation from their neighbor or the neighbor's insurance company:

> We were thankful that she recovered as well as she did. . . . We never considered a lawsuit there at all. I don't know what other people would have done in the case. Possibly that insurance company would have paid the total medical if we would have just, well, I have a brother who is an attorney, could have just wrote them a letter maybe. But, I don't know, we just didn't do it, that's all.

Further discussion of the role of insurance in the handling of personal injuries in Sander County appears in the next section.

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litigation. And, as I have already suggested, for many in the community the possibility of litigation was not considered in any case. One woman I spoke with had lost her child in an automobile accident. She settled the case for $12,000 without filing a claim, yet she was sure that this amount was much less than she could have obtained through a lawsuit. She told me that since she and her family knew they were going to stay permanently in the community, the pressure of the local value system foreclosed the possibility of taking the matter to court:

> One of the reasons that I was extremely hesitant to sue was because of the community pressure. . . . Local people in this community are not impressed when you tell them that you're involved in a lawsuit. . . . That really turns them off. . . . They're not impressed with people who don't earn their own way. And that's taking money that they're not sure that you deserve.

Others had so internalized this value system that they followed its dictates even when community pressures did not exist. A doctor told me that one of his patients was seriously burned during a trip out of state when an airline stewardess spilled hot coffee on her legs, causing permanent discoloration of her skin. This woman refused to contact a lawyer and instead settled directly with the airline for medical expenses and the cost of the one-week vacation she had missed. Regarding the possibility of taking formal legal action to seek a more substantial award, she said simply, "We don't do that." This same attitude may help to explain the apparent reluctance of local residents to assert claims against other potential defendants from outside Sander County, such as negligent drivers or businesses or manufacturers.

Thus, if we consider the range of traditional responses to personal injuries in Sander County, we find, first of all, a great deal of self-reliant behavior. Injured persons typically responded to injuries without taking any overt action, either because they did not view the problem in terms of a claim against or conflict with another person or because membership in a small, close-knit community inhibited them from asserting a claim that would be socially disapproved. Some sought compensation through direct discussions with the other party, but such behavior was considered atypical. When sympathy or advice was sought, many turned to friends, neighbors, relatives, and physicians. The County Health Department, the mayor, and city council representatives also reported that injured persons occasionally sought them out, particularly when the injuries were caused by hazards that might endanger others. In such cases, the goal was generally to see the hazard removed for the benefit of the public rather than to seek compensation or otherwise advance personal interests.

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V. INSURING AGAINST INJURIES

Persons who had been injured often sought compensation from their own health and accident insurance without even considering the possibility of a claim against another party or another insurance company. As a local insurance adjuster told me:

> We have some people that have had their kid injured on our insured's property, and they were not our insured. And we call up and offer to pay their bills, because our insured has called and said my kid Tommy cracked that kid over the head with a shovel and they hauled him off to the hospital. And I called the people and say we have medical coverage and they are absolutely floored, some of them, that it never even crossed their minds. They were just going to turn it in to their own little insurance, their health insurance, and not do anything about it whatsoever, especially if [Tommy's parents] are close friends. . . .

By moving quickly to pay compensation in such cases before claims could arise, this adjuster believed that she prevented disputes and litigation. It helped, too, that the adjuster and the parties to an accident, even an automobile accident, usually knew each other:

> In Chicago, all those people don't know the guy next door to them, much less the guy they had the wreck with. And right here in town, if you don't know the people, you probably know their neighbor or some of their family or you can find out real quick who they are or where they are.

The contrast between injuries in a face-to-face community and in a metropolis like Chicago was drawn in explicit terms:

> I think things are pretty calm and peaceful as, say, compared to Chicago. Now I have talked to some of the adjusters in that area from time to time and I know, well, and we have our own insureds that go in there and get in an accident in Chicago, and we'll have a lawsuit or at least have an attorney . . . on the claim within a day or maybe two days of the accident even happening. Sometimes our insured has not any more than called back and said I've had a wreck but I don't even know who it was with. And before you can do anything, even get a police report or anything, why you'll get a letter from the attorney. And that would never, that rarely ever happens around here.

This adjuster estimated that over the past 15 years, her office had been involved in no more than 10 automobile-related lawsuits, an extraordinarily low number compared to the frequency of such cases in other

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jurisdictions.[12] Of course, once an insurance company has paid compensation to its insured, it may exercise its right of subrogation against the party that caused the accident, and one might expect insurance companies to be unaffected by local values opposing the assertion or litigation of injury claims. It is not entirely clear why insurance companies, like individuals, seldom brought personal injury actions in Sander County, but there are some clues. This particular adjuster, who had grown up in Sander County, shared the local value system. Although she did not decide whether to bring suit as a subrogée, she may well have affected the decisions of her central office by her own perceptions and by her handling of the people and documents in particular cases. Furthermore, her insurance company was connected to the Farm Bureau, a membership organization to which most local farmers belonged. The evident popularity of this insurance carrier in Sander County (over 75 percent of the eligible farm families were estimated to be members of the Farm Bureau; it is not known how many members carried the insurance, but the percentage was apparently high) meant that injuries in many cases may have involved two parties covered by the same insurance company.

Occasionally, an insurance company did bring suit in the name of its insured, but given the unsympathetic attitudes of local juries, such lawsuits seldom met with success in Sander County. The adjuster mentioned above told me of a farm worker from Oklahoma who was harvesting peas for a local cannery. He stopped to lie down and rest in the high grass near the road and was run over by her insured, who was driving a pick-up truck and had swerved slightly off the road to avoid a large combine. When the fieldworker's insurance carrier sought compensation, the local adjuster refused, claiming that the injured man should not have been lying in the grass near the road and could not have been seen by her insured, who, she insisted, was driving carefully. The case went to trial and a jury composed largely of local farmers was drawn:

> I was not even in there because our lawyers that represent us said, how many of those people do you know out there? And I said, I can give you the first name of everybody on the jury. He said, you stay over there in the library . . . don't let them see you. . . . So I stayed out in my little corner and listened to what went on and we won, we didn't pay 5 cents on it.

[12] In Sander County as a whole, the litigation rate for automobile-related personal injury cases in 1975–76 was 0.88 cases each year per 1,000 population. For *all* automobile-related tort actions, including those where there was no personal injury claim, the litigation rate was 1.87 cases per 1,000 population. In the absence of reliable or meaningful comparative data, it is difficult to say how low or high these county-wide rates are; but my hunch is that these are rather low for a jurisdiction in which no-fault approaches were *not* used for motor vehicle cases.

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Thus, even a lawsuit involving insurance companies on both sides was ultimately resolved in a manner that accorded with traditional values. The insurance companies' knowledge of jury attitudes in Sander County undoubtedly affected their handling of most injury cases.

VI. LAWYERS AND LOCAL VALUES

Sander County attorneys reported that personal injury cases came to them with some regularity, although they also felt that many injury victims never consulted an attorney but settled directly with insurance companies for less than they should have received. When these attorneys were consulted, it was by people who, in the opinion of the attorneys, had real, nonfrivolous grievances, but the result was seldom formal legal action. Most personal injury cases were resolved, as they are elsewhere (Ross, 1970), through informal negotiation. Formal judicial procedures were initiated primarily to prod the other side to negotiate seriously or when it became necessary to preserve a claim before it would be barred by the statute of limitations. The negotiating process was, of course, strongly influenced by the parties' shared knowledge of likely juror reaction if the case actually went to trial. Thus, plaintiffs found negotiated settlements relatively attractive even when the terms were not particularly favorable.

But expectations regarding the outcome of litigation were probably not the only reason that members of the local bar so seldom filed personal injury cases. To some extent Sander County lawyers, many of whom were born and raised in the area, shared the local tendency to censure those who aggressively asserted personal injury claims. One attorney, for example, described client attitudes toward injury claims in the following terms: "A lot of people are more conducive to settlement here just because they're attempting to be fair as opposed to making a fast buck." Yet this same attorney admitted that informal settlements were often for small amounts of money and were usually limited to medical expenses, without any "general" damages whatever.[13] His characterization of such outcomes as "fair" suggests an internalization of local values even on the part of those whose professional role it was to assert claims on behalf of tort plaintiffs.

[13] This is particularly striking since Laurence Ross' observation of insurance company settlement practices in automobile accident cases suggests that general damages are a standard part of the settlement "package" and are rather routinely calculated "for the most part. . . [by] multiplying the medical bills by a tacitly but generally accepted arbitrary constant" (Ross, 1970: 239).

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The local bar was widely perceived as inhospitable to personal injury claimants, not only because there were few tort specialists but because Sander County lawyers were seen as closely linked to the kinds of individuals and businesses against whom tort actions were typically brought. Although plaintiffs hired Sander County attorneys in 72.5 percent of all non-tort actions filed locally in which plaintiffs were represented by counsel, they did so in only 12.5 percent of the tort cases.[14] One lawyer, who was frequently consulted by potential tort plaintiffs, lived across the county line in a small town outside of Sander County. He told me, "I get a lot of cases where people just don't want to be involved with the, they perceive it to be the hierarchy of Sander County. . . . I'm not part of the establishment."

Thus, even from the perspective of insurance company personnel and attorneys, who were most likely to witness the entry of personal injury cases into the formal legal system in Sander County, it is clear that the local culture tended in many ways to deter litigation. And when personal injury cases were formally filed, it usually was no more than another step in an ongoing negotiation process.

Why was the litigation of personal injury cases in Sander County subjected to disapproval so pervasive that it inhibited the assertion of claims at all stages, from the moment injuries occurred and were perceived to the time parties stood at the very threshold of the formal legal system? The answer, I shall argue, lies partly in the role of the Sander County Court in a changing social system and partly in the nature of the personal injury claim itself.

VII. THE USE OF THE COURT

In the recent literature on dispute processing and conflict resolution, various typologies of conflict-handling forums and procedures have been proposed. Such typologies usually include courts, arbitrators, mediators, and ombudsmen, as well as two-party and one-party procedures such as negotiation, self-help, avoidance, and "lumping it" (see, e.g., typologies in Abel, 1973; Felstiner, 1974; Steele, 1975; Nader and Todd, 1978; Black and Baumgartner, 1983;

[14] These figures are from a sample of cases for the years 1975-1976. See note 6 *supra*. From these data alone one cannot conclude that Sander County attorneys were less often *approached* by potential personal injury plaintiffs, since the data consist only of cases that were filed and tell us nothing about cases brought to an attorney but not filed. We know that Sander County attorneys were sometimes reluctant to bring such actions even when approached by prospective plaintiffs. Attorneys elsewhere, particularly those who were tort specialists, may not have shared this reluctance and may have filed a higher proportion of the Sander County claims that were brought to them.

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