

4-15-1977

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Recommended Citation

Paul Jeffrey Wallin *To Impeach Or Not To Impeach: The Stability of Juror Verdicts in Federal Courts*, 4 Pepp. L. Rev. Iss. 2 (1977)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol4/iss2/6>

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To Impeach Or Not To Impeach: The Stability of Juror Verdicts in Federal Courts

The general rule prohibiting juror impeachment of verdicts was first established almost two hundred years ago.¹ However, during the last century this general prohibition has come under increasing attack.² This comment will attempt to trace the history of the rule preventing juror impeachment of verdicts, the policies behind the general rule, the inroads that have been made toward liberalizing it and the possible effect two recent developments may have on the future of the rule, namely, Federal Rule of Evidence 606(b)³ and the United States Supreme Court decision in *Parker v. Gladden*.⁴

Prior to 1785 the accepted rule was that jurors were competent to impeach their own verdicts, either in person or by affidavit.⁵ However, when the highly respected Lord Mansfield decided, in the case of *Vaise v. Delaval*⁶ that a juror should not be allowed to impeach his own verdict either by the use of testimony or by affidavit, the English rule underwent a complete reversal.⁷ It was not long before the Mansfield doctrine, as it came to be called, was the accepted rule in the American courts as well.⁸

In the *Vaise* decision Mansfield refused to consider a juror affidavit to impeach a verdict that had been reached "by lot." His reasoning was based on the theory that "a witness shall not be heard to allege his own moral turpitude."⁹ Mansfield had

1. *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).

2. For discussion of various commentaries concerning the decision in *Vaise v. Delaval*, see ABA Project on Minimum Standards for Criminal Justice, Trial by Jury 166-69 (1968).

3. 3 Weinstein, Weinstein's Evidence 606-23 (1975).

4. 385 U.S. 363 (1966).

5. 8 Wigmore, Evidence § 2352, at 696 (McNaughton rev. 1961); 3 J. Weinstein, Weinstein's Evidence § 606(04) at 606-23 (1976).

6. 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).

7. 3 Weinstein, Weinstein's Evidence 606-23 (1975).

8. *Id.*

9. 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).

already applied this doctrine to other areas of the law.¹⁰ According to Professor Wigmore however, the holding was made with "no basis for precedent."¹¹

Although the theory behind Lord Mansfield's general rule has completely disappeared today, the rule's continued existence has led to much confusion in cases where a juror has shown that his own verdict was irregular.¹² As the policy behind the general rule against juror impeachment dissipated courts were faced with a dilemma. They could either revert to the prior rule and once again allow jurors to testify as to the irregularities in their verdicts or they could continue to uphold the rule by finding a new rationale to support it. The courts chose to follow the latter course.¹³

Even the most severe critics of the general rule agree that there are sound reasons "to protect in some measure the finality of verdicts."¹⁴ While some of the federal circuit courts have given their own reasons for adhering to the rule,¹⁵ the United

10. For example, Mansfield had already barred married persons from testifying to non-access in bastardy cases and testimony by the drawer of commercial paper.

11. 8 Wigmore, Evidence § 2352, at 696 (McNaughton rev. 1961) "Up to Lord Mansfield's time and within a half decade of his decision in *Vaise v. Delaval*, the unquestioned practice had been to receive jurors' testimony or affidavits without scruple."

12. *Kilmes v. United States*, 263 F. 2d 273, 274 (D.C. Cir. 1959); 8 Wigmore, Evidence § 2352, at 696 (McNaughton rev. 1961).

13. *Stein v. New York*, 346 U.S. 156, 178 (1953); *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915).

14. *McCormick*, Evidence § 68, at 154 (1st ed. 1954); 3 J. Weinstein, Weinstein's Evidence § 606(04) at 606-23 (1976).

15. *Second Circuit*:

United States v. Green, 523 F.2d 229, 235 (2d Cir. 1975):

This Court on a number of occasions has stressed that the strong public interest in the integrity of jury verdicts and the protection of jurors from harassment requires that investigation into the subjective motivations and mental processes of jurors not be permitted;

United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962):

The court listed its reasons for application of the rule as follows: 1. Jurors should not be subjected to harassment. 2. Courts ought not to be burdened with large numbers of applications, mostly without merit. 3. Chances of tampering with jury would be increased. 4. Verdicts would become uncertain.

Third Circuit:

Government of Virgin Islands v. Gereau, 523 F. 2d 140, 148 (3d Cir. 1975) *cert. denied*, 96 S.Ct. 1119 (1976):

The rule was formulated to foster several public policies: (1) discouraging harassment of jurors by losing parties eager to have the verdict set aside; (2) encouraging free and open discussion among jurors; (3) reducing incentives for jury tampering; (4) promoting verdict finality; (5) maintaining the viability of the jury as a judicial decision making body.

Fourth Circuit:

Hawkins v. United States, 244 F.2d 854, 856 (4th Cir. 1957):

States Supreme Court in *McDonald v. Pless*¹⁶ set forth the practical considerations and policies for maintaining the rule which have been cited with approval by numerous federal courts. The high court stated:

The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what happened in the jury room.

But let it once be established that verdicts solemnly made and publicly returned can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used the result would be to make what was intended to be a private deliberation; the subject of constant public investigation; to the destruction of all frankness and freedom of discussion and conference.¹⁷

It would introduce elements dangerous to fairness and impartiality in the judicial process to allow jurors to impair their verdicts after they have dispersed and opportunity has been given for the operation of influences that had been carefully guarded against in the courtroom.

Fifth Circuit:

United States v. Howard, 505 F.2d 865, 868 n. 3 (5th Cir. 1975):

The evolved law represents an accommodation of conflicting policies: on the one hand, the interest in stability of jury verdicts and the protection of jurors from harassment (cite omitted); on the other hand, the prevention of injustice arising from unfair trial.

Sixth Circuit:

United States v. Chereton, 309 F.2d 197, 201 (6th Cir. 1962):

Courts have not favored inquisitions of jurors feeling that jurors may be intimidated, vexed or harassed thereby and that the practice might lead to dangerous consequences of jury tampering with the result that no verdict would be safe.

Eighth Circuit:

United States v. Schroeder, 433 F.2d 846, 851 (8th Cir. 1970), *cert. denied*, 400 U.S. 1024 (1971):

After a jury has given its verdict, has been polled in open court and has been discharged, an individual juror's change of mind or claim that he was mistaken or unwilling in his assent to the verdict comes too late.

Ninth Circuit:

United States v. Stacey, 475 F.2d 1119, 1121 (9th Cir. 1973):

The reason for a rule barring a juror from testifying concerning his own mental processes—frankness and freedom of discussion in the jury room—applies with equal force to testimony by other jurors concerning objective manifestations of those processes.

16. 238 U.S. 264 (1915).

17. *Id.* at 267-68; Stein v. New York, 346 U.S. 156, 178 (1953); United States v.

The choice between redressing injury to the private litigant and avoiding the public injury which may result from allowing jurors to impeach their verdict is no longer considered an easy one by the United States Supreme Court, particularly when a court is faced with a claimed violation of a defendant's constitutional rights in a criminal case.

In *Parker v. Gladden*¹⁸ the Court, without expressly mentioning the prior ban against juror impeachment of verdicts, held that the defendant was entitled to a new trial because prejudicial comments had been made to the jurors by the bailiff. The Court based its decision on the fact that the defendant's sixth amendment right to confront all witnesses against him was denied because he was not allowed to question the bailiff. Applying a similar rationale, nothing would prevent a court from holding that a defendant is denied his right to confront all witnesses against him if a juror raises facts not introduced in evidence at trial during deliberations. This possibility was recognized in *United States ex rel Owen v. McMann*,¹⁹ where a juror mentioned to other members of the jury during deliberations that the defendant had been in trouble all of his life, that he had been suspended from the police force and that he had a bad character. The Court of Appeals for the Second Circuit, recognizing that the defendant was not granted an opportunity to cross-examine the juror discussed the holding in *Parker*²⁰ as follows:

The invocation of the confrontation clause in *Parker* was entirely appropriate to shield the defendant from comments to the jury by one whose statements, if admissible at all, could have properly been received only from the witness stand, subject to the procedural safeguards which the sixth amendment requires.²¹

However, the court was quick to qualify its support of the *Parker v. Gladden* decision as it related to a juror's misconduct in the jury room:

But so far as we know, the Court has never suggested that jurors, whose duty it is to consider and discuss the factual material properly before them become "unsworn witnesses" within the scope of the confrontation clause simply because they have considered any factual matters going beyond those of record. To resort to the metaphor that the moment a juror passes a fraction of an inch beyond the record evidence, he becomes an "unsworn witness" is to ignore centuries of

Dioguardi, 492 F.2d 70, 79 n. 11 (2d Cir. 1974); Loney v. United States, 151 F.2d 1, 5 (10th Cir. 1945); Rogers v. Meeks, 385 F.Supp. 593, 598 (W.D. Ark. 1974); United States v. Nystrom, 116 F.Supp. 771, 777 (W.D. Pa. 1953).

18. 385 U.S. 363 (1966).

19. 435 F. 2d 813 (2d Cir. 1970).

20. *Parker v. Gladden*, 385 U.S. 363 (1966).

21. 435 F.2d at 817.

history and assume an answer rather than to provide the basis for one.²²

It is evident from the above analysis of the problem that the United States Supreme Court, through its decision in *Parker v. Gladden*, may have dealt a death blow to the Mansfield rule²³ as it pertains to criminal cases where the jurors consider facts not in evidence which are brought into the jury room by a juror. To illustrate this point one need only cite *United States v. McKinney*.²⁴ In that case the jurors considered as extra-record testimony a prejudicial newspaper article brought into the jury room by one of the jurors. The Court of Appeals for the Fifth Circuit, after citing both *Parker* and *Owen*, was of the opinion that the simple fact that the jurors go beyond the record evidence does not automatically render the violating juror an unsworn witness against the defendant. Instead, the court held the proper test to be whether there was a significant possibility that the defendant was prejudiced by the juror misconduct.²⁵ This holding is critical, for in making a determination as to whether or not the defendant was prejudiced sufficiently to warrant a new trial the court must receive and consider the juror affidavit. This is contrary to the general rule. As was stated by the New York Court of Appeals in *People v. De Lucia*:²⁶

However, where the Supreme Court holds that a particular series of events, when proven, violates a defendant's constitutional rights, implicit in that determination is the right of the defendant to prove facts substantiating his claim.²⁷

The New York Court of Appeals analysis of *Parker* appears to be the correct approach to the problem. A defendant's right of confrontation is no less violated when a juror becomes the "unsworn witness" against him than when the unauthorized statements to the jurors are made by a plaintiff. If this conclusion is correct, the *Parker* decision will have accomplished a

22. *Id.*

23. The Mansfield rule is the general rule against impeachment of verdicts by juror testimony or affidavit.

24. 429 F.2d 1019 (5th Cir. 1970).

25. *Id.*, at 1026.

26. 20 N.Y.2d 275, 229 N.E.2d 211 (1967). In *People v. De Lucia*, jurors made an unauthorized view and reported their "extra-record findings" to the other jurors. The court held *Parker v. Gladden* required the consideration of the juror affidavits.

27. 20 N.Y. 2d at 278, 229 N.E. 2d at 213.

partial abrogation of the Mansfield rule²⁸ via the sixth amendment right of confrontation.²⁹

To this point this comment has centered on the potential demise of the Mansfield rule. It should be noted, however, that with a few exceptions discussed herein the rule does survive as the prevailing view in the circuit courts.³⁰ The major exception which has developed was first stated by the United States Supreme Court in *Mattox v. United States*.³¹ In that case, the high court for the first time distinguished between juror testimony as to "extraneous influences"³² which had come to bear upon the jury during its deliberations and evidence as to the operation of such influences upon the juror's minds.³³ In *Mattox*, the court cited a decision by the Supreme Judicial Court of Massachusetts,³⁴ and laid out the general rule and its exceptions as follows:

... on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors, as to the motives or influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a jurymen may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a jurymen may testify in denial or explanation of acts or declarations outside of the jury room where evidence of such acts have been given as grounds for a new trial.³⁵

Since the *Mattox*³⁶ decision, circuit courts have frantically searched for an adequate definition of "extraneous influence." Instead the courts have come up with two lists. One list consists of those acts of interference with the jury's function which fall under the "extraneous influence" exception. The other list includes interferences and misconduct which remain within the

28. See *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (1785).

29. It should be noted that if *Parker v. Gladden* is extended to include jurors as "unsworn witnesses" against the defendant, this extension would only apply to juror testimony in criminal cases.

30. *United States v. Kohne*, 358 F. Supp. 1046, 1051 (W.D. Pa. 1973).

31. 146 U.S. 140 (1892).

32. The types of juror misconduct included under this definition are listed in *Government of Virgin Islands v. Gereau*, *infra*. n. 48.

33. Courts are unanimous in their decisions that juror affidavits will not be admissible to show the effect certain extraneous influences may have had upon the ultimate verdict of the jurors. When such influences are shown, the court must consider what effect such juror interference would have had on the minds of the average reasonable jury. As was stated in *United States v. Crosby*, 294 F.2d 928 (2d Cir. 1961), *cert. denied* 368 U.S. 984 (1962): "Even though presumably the jurors themselves know best, the question is determined . . . on the basis of the nature of the matter and its probable effect on a hypothetical average jury"; 294 F.2d at 950.

34. *Woodward v. Leavitt*, 107 Mass. 453 (1851).

35. 146 U.S. at 148-49.

36. *Id.* at 140.

general rule. In the recent case of *Government of Virgin Islands v. Gereau*,³⁷ the Court of Appeals for the Third Circuit divided the two categories as follows:

"Extraneous influence" has been construed to cover publicity received and discussed in the jury room,³⁸ consideration by the jury of evidence not admitted in the court,³⁹ and communications or other contacts between jurors and third persons, including contacts with the trial judge outside the presence of the defendant and his counsel.⁴⁰ By contrast, evidence of discussions among jurors, intimidation or harassment of one juror by another⁴¹ and other intra-jury influences⁴² on the verdict is within the rule, rather than the exception, and is not competent to impeach the verdict.⁴³

Other examples of extraneous influence include juror drunkenness,⁴⁴ bribery,⁴⁵ threats among members of the jury or from third persons,⁴⁶ receiving incompetent documents or privately interviewing a party.⁴⁷ Thus, while the circuit courts may have found it difficult to define the term "extraneous influence" they have found it very easy to embrace the *Mattox* exception.⁴⁸

37. 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 96 S. Ct. 1119 (1976).

38. *Marshall v. United States*, 360 U.S. 310 (1959); *Mattox v. United States*, 146 U.S. 140 (1892); *United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972); *United States v. McKinney*, 429 F.2d 1019 (5th Cir. 1970); *United States v. Kum Seng Seo*, 300 F.2d 623 (3d Cir. 1962).

39. *United States ex. rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970); *Farese v. United States*, 428 F.2d 178 (5th Cir. 1970) and cases cited therein at 180-81.

40. *Parker v. Gladden*, 385 U.S. 363 (1966) (bailiff expressed opinion on case to jurors); *Remmer v. United States*, 347 U.S. 227 (1954) (attempted jury tampering not revealed to defendant or counsel by trial judge); *United States ex. rel. Tobe v. Bessinger*, 492 F.2d 232 (7th Cir. 1974) (bailiff in answer to jury queries directed to judge told jury they must deliberate until they reached a verdict); *Truscott v. Chaplin*, 403 F.2d 644 (3d Cir. 1968) (inquiry by judge whether jury close to verdict); *United States v. Gersh*, 328 F.2d 460 (2d Cir. 1964) (phone calls to juror); *Wheaton v. United States*, 133 F.2d 522 (8th Cir. 1943) (bailiff instructed jury).

41. *United States v. Blackburn*, 446 F.2d 1089 (5th Cir. 1971); *United States v. Stoppelman*, 406 F.2d 127 (1st Cir. 1969); *United States v. Kafee*, 214 F.2d 887 (3d Cir. 1954).

42. *United States v. Kohne*, 358 F. Supp. 1046 (W.D. Pa. 1973) and cases cited therein.

43. *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149-50 (3d Cir. 1975), *cert. denied*, 96 S. Ct. 1119 (1976).

44. *Faith v. Neely*, 41 F.R.D. 361 (N.D.W. Va. 1966).

45. *Remmer v. United States*, 347 U.S. 227 (1954); *United States v. Rakes*, 74 F. Supp. 645 (E.D. Va. 1947).

46. *Miller v. United States*, 403 F.2d 77 (2d Cir. 1968).

47. *Jorganson v. York Ice Machinery Corporation*, 160 F.2d 432 (2d Cir. 1947).

48. *Remmer v. United States*, 347 U.S. 227 (1954); *Government of Virgin*

As the courts began to adopt the exception, they also began to draw distinctions as to the types of juror testimony which would remain under the prohibition of the Mansfield rule. One general statement was that jurors would not be allowed to impeach their verdict as to any matters that "inhered in the verdict."⁴⁹ While courts continue to recite this phrase as grounds for rejection of juror affidavits, few courts have ever taken the time to explain its true meaning. The term "inhere in the verdict" has developed to include those matters which pertain to jurors mental processes within the confines of the jury room. It is argued that to allow such juror testimony would lead to retrospective falsification by jurors as well as harassment of jurors by losing parties.

A slightly more definitive approach has been taken by courts which will not allow jurors to testify as to the subjective effects of the intrusions upon their mental processes.⁵⁰ This approach is similar Wigmore's statement that jurors will not be heard as to their "state of mind" during deliberations.⁵¹ The policy behind this "mental process" or "state of mind" approach is clear.⁵² If losing parties were allowed a new trial based on juror's statements that certain prejudicial information did affect their verdict, jurors would cease to have a day's rest until they gave in to defeated litigants demands that they testify to such influence.

Islands v. Gereau, 523 F.2d 140, 149 (3d Cir. 1975), *cert. denied* 96 S. Ct. 1119 (1976); *United States v. Dioguardi*, 492 F.2d 70, 79, n.12 (2d Cir. 1974); *United States v. Butler*, 317 F.2d 249, 262 (8th Cir. 1963); *Walker v. United States*, 298 F.2d 217, 226 (9th Cir. 1962); *United States v. Grieco*, 261 F.2d 414, 415 (2d Cir. 1959); *United States v. Furlong*, 194 F.2d 1, 4-5 (7th Cir. 1952); *Wheaton v. United States*, 133 F.2d 522, 526 (8th Cir. 1943); *Lancaster v. United States*, 39 F.2d 30, 33 (5th Cir. 1930).

49. *Hyde v. United States*, 225 U.S. 347, 383 (1911); *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975), *cert. denied*, 96 S. Ct. 1119 (1976); *Hawkins v. United States*, 244 F.2d 854, 856 (4th Cir. 1957); *Bryson v. United States*, 238 F.2d 657, 665 (9th Cir. 1956); *Young v. United States*, 163 F.2d 187, 188 (10th Cir. 1947); *United States v. Kohne*, 358 F. Supp. 1046, 1052 (W.D. Pa. 1973); *Castaldi v. United States*, 251 F. Supp. 681, 684 (E.D. Mo. 1966).

50. *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975), *cert. denied*, 96 S. Ct. 1119 (1976); *United States v. Green*, 523 F.2d 229, 235 (2d Cir. 1975); *United States v. Howard*, 505 F.2d 865, 868 (5th Cir. 1974).

51. 8 Wigmore, *Evidence* § 2349, at 691 (McNaughton rev. 1961).

52. Rothstein, *Federal Rules of Evidence*, Appendix § 606(b) (1973) at 78 states:

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of the jurors and invite tampering and harassment. The authorities are in virtual accord in excluding the evidence.

Also see United States v. Grieco, 261 F.2d 414, 415 (2d Cir. 1959) where the court held:

It is not possible to determine mental processes of jurors by the strict tests available in an experiment in physics; we have to deal with human beings, whose opinions are inevitably to some extent subject to emotional controls that are beyond any accessible scrutiny.

This could lead to the ultimate perversion of the concept of the "sanctity of the jury room."⁵³ This same rationale has prohibited juror testimony as to juror arguments which were improper⁵⁴ as well as testimony as to the motives or influences which affected the deliberations.⁵⁵

Another exception to the general prohibition against juror impeachment recognized by many federal courts is that jurors may testify as to overt acts which are known to the other jurors.⁵⁶ This overt act exception was recognized as long ago as 1915, when in *McDonald v. Pless*,⁵⁷ the United States Supreme Court stated:

. . . by statute in some states, and by decisions in a few others, the jurors affidavit as to an overt act of misconduct, which was capable of being controverted by other jurors was made admissible. And, of course, the argument in favor of receiving such evidence is not only very strong, but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such conduct.⁵⁸

As with the "extraneous influence exception" the federal courts have had a difficult time in determining what qualifies as an "overt act." The methods used by the federal courts in applying these two exceptions are developed by the following analysis of cases pertaining to specific areas of jury misconduct.

A. *Juror Misunderstanding of Jury Instructions*

In *United States v. Stacey*,⁵⁹ within twenty minutes after the guilty verdict was returned three of the jurors approached counsel for defendant and informed him that if they had known that intent was a necessary element of the crime of counterfeiting they would have voted to acquit the defendant. The defendant requested that the judge conduct an evidentiary hearing based on this juror information. The Court of Appeals for the Ninth Circuit refused to grant defendant's request and cited the majority rule; to wit:

53. *Rakes v. United States*, 169 F.2d 739, 745-46 (4th Cir. 1948).

54. *Williams v. United States*, 3 F.2d 933, 936 (6th Cir. 1925).

55. *United States v. Green*, 523 F.2d 229, 235 (2d Cir. 1975); *United States v. Butler*, 317 F.2d 249, 262 (8th Cir. 1963); *United States v. Furlong*, 194 F.2d 1, 5 (7th Cir. 1952).

56. *Gafford v. Warden*, 434 F.2d 318 (10th Cir. 1970).

57. 238 U.S. 264 (1915).

58. *Id.* at 268.

59. 475 F.2d 1119 (9th Cir. 1973).

After a verdict is returned a juror will not be heard to impeach the verdict when his testimony concerns his misunderstanding of the court's instructions.⁶⁰

The *Stacey* decision is the most recent federal case dealing with a juror misunderstanding of jury instructions and follows a long line of cases reaching similar results.⁶¹ Professor Wigmore's work on the law of evidence is in accord with the *Stacey* decision⁶² as is the latest amendment to the Federal Rules of Evidence.⁶³ The uniformity upon this question is due to two factors. Many federal courts do not consider juror misunderstanding of instructions to be misconduct. Other federal courts refuse to accept affidavits from jurors to this effect because they feel that to do so would be to consider the mental processes of the jurors during their deliberations.

B. Juror Misunderstanding of the Law

The majority rule in the federal courts is that a juror is incompetent to impeach his verdict by testifying that he did not understand the law involved in the case.⁶⁴ In *United States v. Cherton*,⁶⁵ the defendant based his motion for new trial upon the affidavits of four jurors. The jurors stated that they believed they had found the defendant guilty of conspiracy. However, the judge had dismissed the conspiracy count prior to giving the case to the jury for its consideration. The Court of Appeals for the Sixth Circuit refused to admit the juror affidavits, clearly stating a distinction between a mistake by the entire jury as to the nature of the verdict announced in open court and a mistake by individual jurors. The court held:

It is one thing for jurors to make a unanimous mistake in respect to a matter actually submitted to them. It is something entirely different for individual jurors to claim that they found defendant guilty of an offense which was never submitted to them for their determination.⁶⁶

The distinction between mistake by one juror and mistake by

60. *Id.* at 1121.

61. *Walker v. United States*, 298 F.2d 217 (9th Cir. 1962); *Medina v. United States*, 254 F.2d 228 (9th Cir. 1958); *Bryson v. United States*, 238 F.2d 657 (9th Cir. 1956); *United States v. Parelus*, 83 F. Supp. 617 (Haw. 1949).

62. 8 Wigmore, *Evidence*, § 2349 at 690 (McNaughton Rev. 1961).

63. Rothstein, *Federal Rules of Evidence*, Appendix § 606(b) (1973) at p. 78: "Thus testimony or affidavits of jurors have been held incompetent to show misinterpretation of instructions."

64. *James v. United States*, 191 F.2d 472 (D.C. Cir. 1951) (juror felt he could not change his vote); *United States v. Nystrom*, 116 F. Supp. 771 (W.D. Pa. 1953) (Juror believed that in criminal case majority rule controlled and therefore he changed his vote).

65. 309 F.2d 197 (6th Cir. 1962).

66. *Id.* at 201.

the entire jury was also considered by the Court of Appeals for the Tenth Circuit in *Young v. United States*.⁶⁷ In that case the court held:

The rule (against impeachment of juror verdicts) . . . does not prevent the reception of evidence of jurors to show that through mistake, the real verdict on which agreement was reached in the jury room was not correctly expressed in the verdict returned in open court. . . . (But) . . . jurors cannot be heard to testify that while the substance of the verdict returned into court was understood, it was predicated upon a . . . misrepresentation of the law.⁶⁸

In *United States v. Crosby*,⁶⁹ one of the jurors, by affidavit, claimed that he had misinterpreted a guilty plea by another defendant to implicate Crosby. The juror stated that this had, in fact, influenced his verdict. The Court of Appeals for the Fifth Circuit rejected the juror's affidavit.

This reluctance to accept juror affidavits in the area of misunderstanding of law also stems from the fear that otherwise an examination of the mental processes involved in the jurors' deliberations would be required.

C. Juror Misunderstanding of or Failure to Consider Certain Evidence

Unanimous agreement concerning this question follows the decision in *United States v. Dressler*.⁷⁰ In that case juror affidavits were presented to the court to show that the jury failed to consider certain evidence introduced at trial. The Court of Appeals for the Seventh Circuit refused to consider such affidavits. The court equated accepting such juror testimony with allowing jurors to testify that they had not understood or paid attention to jury instructions.⁷¹

D. Juror Claims of Harassment or Pressure by Other Jurors

While the general rule is that jurors may not impeach a verdict by testimony that they were pressured or coerced into finding the defendant guilty⁷² this rule is by no means settled. In *John-*

67. 163 F.2d 187 (10th Cir. 1947).

68. *Id.* at 189.

69. 294 F.2d 928 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962).

70. 112 F.2d 972 (7th Cir. 1940).

71. *Id.* at 979.

72. *United States v. Khone*, 358 F. Supp. 1046 (W.D. Pa. 1973). See 8 Moore's

son v. Hunter,⁷³ a black juror claimed that she had been intimidated by the eleven white jurors to vote for conviction. The court admitted that if the allegation of the juror was true the defendant would be entitled to a new trial, but the court denied a motion for new trial on the ground that the juror was incompetent to testify as to any such pressure.

The *Johnson v. Hunter* decision represents the traditional approach to the problem. It is a blatant example of the possible injustice caused when a court accepts established rules blindly without fully considering the realities of the situation.

The more reasonable approach in cases where a juror alleges coercion on the part of a fellow juror is to determine, by the use of the juror affidavit alone, what degree of coercion is being alleged. If the judge decides that the affidavit claims that only normal pressures and intra-jury influences came to bear, then the judge would be justified in refusing to conduct an evidentiary hearing based on such affidavit.⁷⁴ However, if the affidavit alleges that the juror was actually threatened with physical violence or was told that if she did not change her vote she would have to appear before the judge and would be fined,⁷⁵ then justice would require the court to accept the affidavit and conduct an evidentiary hearing to determine the credibility of the juror's statements.⁷⁶ The court would then be in a position to determine if such juror misconduct required a new trial.

E. Jurors Claims of Fatigue, Exhaustion, Inability to Think Clearly

When a juror claims that he was incapable of performing his jury duty adequately because of personal, emotional or physical factors, the prevailing view is not to admit such testimony.⁷⁷ Two federal district court cases illustrate different ways to deal with this problem. In *United States v. Ross*,⁷⁸ the defendant's motion for new trial was based in part upon the affidavit of one juror that she was upset during deliberations because her hus-

Federal Practice, § 31:08, at 31-55-6; 8 Wigmore, Evidence 2345-56 (McNaughton rev. 1961); Wright, Federal Practice and Procedure, § 554 at 493-94.

73. 144 F.2d 565 (10th Cir. 1944).

74. *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 151 (3d Cir. 1975), cert. denied, 96 S. Ct. 1119 (1976).

75. *Crenshaw v. United States*, 116 F.2d 737 (6th Cir. 1940).

76. *Gafford v. Warden*, 434 F.2d 318, 321 (10th Cir. 1970).

77. ABA Project on Minimum Standards for Criminal Justice, Approved Draft, Trial by Jury, § 5.7, commentary following section provides: "a juror would not be permitted to testify that he was induced to agree to a verdict because his wife was ill and he was anxious to get home."

78. 203 F. Supp. 100 (E.D. Pa. 1962).

band had been in a serious auto accident prior to trial. The argument by defendant was that due to the juror's emotional state she was not able to exercise her best judgment. The district court judge denied the motion after interrogating the juror and satisfying himself that she was not hampered by her personal problems. Thus, in this case the judge did accept the juror affidavit, and conducted his own evidentiary hearing before denying the motion for new trial.

In *United States v. Kohne*⁷⁹ the juror affidavit stated that the cots in the hotel room where the jurors were quartered were bad and that the juror was worried during the trial that his erratic heater might explode. The court was not impressed by the juror's complaints and stated:

(The jurors) urgent desire to go home because of the erratic heater and the hotel cot are not sufficient grounds to impeach the verdicts.⁸⁰

The court in *Kohne* is guilty of the common offense of saying one thing and doing another. While stating that it would not accept the juror affidavit to impeach the verdict, the court did in fact consider the affidavit denying the motion for a new trial only after determining the sufficiency of this juror grievance.

F. Juror Prejudice

When a juror by affidavit states that a fellow juror made prejudicial remarks about the defendant during deliberations the courts are faced with a difficult problem. Must the courts always ignore the affidavit, regardless of the derogatory nature of the alleged remarks; or may the juror's affidavit be admitted under certain circumstances? Unless the alleged prejudice amounts to a showing that the juror perjured himself during voir dire, the prevailing view appears to be that the affidavit will not be admitted.⁸¹

The exception to this general prohibition occurs where the juror affidavit is offered to prove that the offending juror had pre-conceived notions as to the defendant's guilt or personal knowledge of the facts of the case. Under these limited conditions the affidavit may be admissible to show that the juror lied

79. 358 F. Supp. 1046 (W.D. Pa. 1973).

80. *Id.* at 1050.

81. 8 Wigmore, Evidence § 2354, at 712 (McNaughton rev. 1961).

during voir dire examination.⁸² However, the distinction between the rule and its exception with regard to juror prejudice is difficult to apply. Where it is alleged that one of the jurors stated that the defendant must be guilty because of his long hair or because of his religion it would seem clear that the defendant has not been tried before a truly unbiased jury. On the other hand, to require every verdict to be by an entirely unbiased jury would be to set an unrealistic standard.⁸³ As was stated by the Court Appeals for the Second Circuit in *Jorgenson v. York Ice Machinery Corporation*:⁸⁴

... it would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon the evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test; and although justice may require as much, the impossibility of achieving it has induced judges to take a middle course, for they have recognized that the institution could not otherwise survive; they would become Penelopes, forever engaged in unraveling the web they wove. Like much else in human affairs, its defects are so deeply enmeshed in the system that wholly to disentangle them would quite kill it.⁸⁵

Two cases dealing with prejudicial juror remarks illustrate that the federal court system has become reconciled to the proposition that a totally unbiased jury may only exist in constitutional law textbooks. In *Young v. United States*⁸⁶ an affidavit was submitted which alleged that a juror had stated that the defendant was a bad man and that he was a member of the syndicate. Relying on the traditional maxim that a juror will not be heard to impeach his verdict as to matters which inhere in it, the court refused to admit the affidavit.⁸⁷ In *Bates v. Dickson*⁸⁸ the defendant, by petition for habeas corpus, alleged that he was denied a fair trial because of one of the jurors statements during deliberations that the defendant was a member of the "rat-pack" gang. Standing firm behind the general rule the court refused to admit the juror affidavit.

The above cases indicate how convenient the federal courts find Mansfield's general rule against juror impeachment. By reference to the rule they can avoid the responsibility of deciding whether in fact the defendant was given a fair and impartial trial. Others argue that, although it may appear that defendants in a criminal case are being denied a fair trial by application of

82. 3 J. Weinstein, *Weinstein's Evidence* 606(04) at 606-35 (1976).

83. *Jorgenson v. York Ice Corporation*, 160 F.2d 432 (2d Cir. 1947).

84. *Id.*

85. *Id.* at 435.

86. 163 F.2d 187 (10th Cir. 1947).

87. *Id.* at 188-89.

88. 226 F. Supp. 983 (N.D. Cal. 1964).

this rule, such a sacrifice is necessary if the institution of trial by jury is to survive. Nonetheless, a system which allows a person to lose his or her liberty without inquiry being made into whether that person has had a fair trial may not be worthy of survival. In balancing these two principles we are reminded by Judge Weinstein, of the Eastern District of New York, in his work on the Federal Rules of Evidence that:

it seems better to draw the line in favor of juror privacy; in the heat of juror debate all kinds of statements may be made which have little effect on outcome, though taken out of context they seem damning and absurd.⁸⁹

G. Compromise and Majority Vote Verdicts

*Hyde v. United States*⁹⁰ is the spoken word of the United States Supreme Court on whether jurors may impeach their verdict by affidavits which state that the verdict was a product of either a compromise or majority vote. In *Hyde*, jurors admitted that they had agreed to vote for conviction on one count only after receiving concessions from other jurors on other counts. Citing the basic warning against allowing what was intended to be a private deliberation to become a constant subject of public investigation, the high court refused to allow the juror affidavits. The *Hyde* decision has been followed by the federal circuit and district courts.⁹¹ The lone dissenting voices on the topic are those of Professor Wigmore⁹² and of the American Bar Association's Committee on Minimum Standards.⁹³ It is unfortunate that the Federal Rules of Evidence, Section 606(b)

89. 3 J. Weinstein, *Weinstein's Evidence* 606(04) at 606-36 (1976). See Rothstein, *Federal Rules of Evidence*, Appendix § 606(b) (1973) which states: "Permitting jurors to air each statement made by their fellow jurors would surely undermine the values the Rule is designed to protect."

90. 225 U.S. 347 (1911).

91. *Young v. United States*, 163 F.2d 187 (10th Cir. 1947); *Loney v. United States*, 151 F.2d 1 (10th Cir. 1945); *United States v. Kohne*, 358 F. Supp. 1046 (W.D. Pa. 1973).

92. 8 Wigmore, *Evidence* § 2350 (McNaughton rev. 1961).

93. The American Bar Association Project on Minimum Standards for Criminal Justice, Trial by Jury section, felt that an explicit exception to the general Mansfield rule was required to permit jurors to testify as to compromise, majority or quotient verdicts. Rule 5.7 under that section provides: "(a) Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of any juror or concerning the mental processes by which the verdict was determined (b) the Limitations in subsection (a) shall not bar evidence concerning whether the verdict was reached 'by lot'." (emphasis added by author).

did not clear up this dispute, remaining silent upon the issue of compromise or majority vote verdicts.⁹⁴

H. Juror Intoxication

While the current federal case law on this area is sparse, both *Faith v. Neely*⁹⁵ and the Federal Rules of Evidence⁹⁶ are in accord that a juror will be permitted to testify if one of the jurors was intoxicated during the deliberations.

A strong argument can be made that the federal view on intoxication is inconsistent with its view on individual juror prejudice. The reason given for allowing a juror to testify that one of the jurors was intoxicated during deliberation is that one under the influence of alcohol becomes mentally clouded to the point where he cannot make an intelligent determination as to the guilt or innocence of the accused. When a juror has a certain prejudice⁹⁷ and he makes that prejudice known to the other jurors in the jury room, he also cannot make an intelligent, unbiased determination as to the guilt or innocence of the accused. Yet, juror testimony is admitted for intoxication, while testimony as to prejudice is generally excluded. The rationale behind this disparity may rest in the fact that courts are of the opinion that a "prejudiced person" will be able to cast aside those prejudices when determining the guilt or innocence of the accused while an intoxicated juror has placed himself in a situation where he will not be able to do so. Another possible explanation is based on the internal/external distinction. A juror's prejudices, once revealed, become an "internal" part of the jury deliberations, and therefore no affidavits are allowed as to such prejudice. A juror's intoxication is an "external influence" that came to bear on the juror and therefore is subject to juror affidavit.

I. Juror Offer or Acceptance of a Bribe

The leading case on this point is *Remmer v. United States*.⁹⁸ In that case it was learned by defendants after trial that one juror had been approached by a person who offered him a bribe if he would make certain that the jurors returned a not guilty verdict. Without expressly making reference to the general rule against juror impeachment, the United States Supreme Court

94. 3 J. Weinstein, Weinstein's Evidence 606(04) at 606-41 (1976).

95. 41 F.R.D. 361, 366 (N.D.W. Va. 1966).

96. 3 J. Weinstein, Weinstein's Evidence 606(04) at 606-31 (1976).

97. E.g., when a juror is anti-black or anti-long hair, etc.

98. 347 U.S. 227 (1954).

held that an evidentiary hearing was required to determine the prejudice that may have been caused by the bribe offer. It is evident that the *Remmer* decision rested on the conclusion that offering a bribe to a juror qualifies as an "extraneous influence" within the exception to the Mansfield rule.⁹⁹

J. Threats to Jurors

One of the leading exceptions to the Mansfield rule is that jurors may testify as to threats made to them by third parties. Such an interference with jury deliberations is the most obvious example of an extraneous influence. This conclusion was reached by the Court of Appeals for the Second Circuit in *Miller v. United States*¹⁰⁰ and has also been adopted by the Federal Rules of Evidence.¹⁰¹

K. Unauthorized Views by Jurors

The federal courts have not been faced with this type of juror misconduct frequently. When the problem has arisen, however, the policy has been to consider such conduct as an "overt act" and thereby allow the juror affidavit to impeach the verdict.¹⁰² In *Gafford v. Warden*¹⁰³ a juror's affidavit was offered by the defendant as a basis for a new trial. The affidavit stated that a fellow juror had made an unauthorized view of the gas station mentioned in the testimony to ascertain whether the gas station was open at the time stated at trial. The Court of Appeals for the Tenth Circuit considered the United States Supreme Court holdings in both *Parker v. Gladden*¹⁰⁴ and *Mattox v. United States*¹⁰⁵ and held:

We are concerned with overt acts, . . . the journey to the gas station to ascertain whether it had been open at the claimed time . . . We believe that the affidavit of Juror Field must be considered.¹⁰⁶

In reaching this conclusion the court was aware that this juror probably became an "unsworn witness" against the defendant

99. Also see *United States v. Rakes*, 74 F. Supp. 645 (E.D. Va. 1947).

100. 403 F.2d 77, 83, n.11 (2nd Cir. 1968).

101. 3 J. Weinstein, *Weinstein's Evidence* 606(04) at 606-31 (1976).

102. *Id.* at 606-32.

103. 434 F.2d 318 (10th Cir. 1970).

104. 385 U.S. 363 (1966).

105. 146 U.S. 140, 148-9 (1892).

106. 434 F.2d at 320.

when he made the unauthorized view and then returned to report his findings to the other jurors.¹⁰⁷ The court also made a clear distinction between "overt acts" and the "personal consciousness" of a juror, explaining:

Although the personal consciousness of a juror cannot be explored and one juror cannot on the basis of non-accessible thoughts and feelings overturn the decision of the jury, overt acts which are susceptible to the knowledge of other jurors may be established by the evidence of a juror.¹⁰⁸

L. Juror Experimentation

Only one recent federal case has spoken to the question of improper juror experimentation in the jury room.¹⁰⁹ In *United States v. Beach*¹¹⁰ the defendant was on trial for perjury. Beach had stated that he did not know illegal gambling was taking place in his home. Evidence presented at trial showed that adding machines were being used in his home to further this illegal operation and that therefore he must have heard them. The machines were admitted into evidence, but they were not played for the jury. During deliberations the jurors requested that an electrical cord be brought into the jury room. The request was granted and the juror affidavit stated that the jurors then proceeded to conduct an experiment with the machines to test their noise level. The results of such an experiment would not have been accurate since in the jury room no padding was used under the machines, while testimony at trial had shown that such padding had been used to lessen the noise when the machines were in operation in the defendant's home.

The question before the Court of Appeals for the Fourth Circuit was whether a juror affidavit could be admitted in an attempt to impeach the verdict. In deciding to admit the affidavit the court spoke of the policy behind allowing jurors to testify as to overt acts of misconduct. They stated:

... But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct the remaining eleven can deny; one cannot disturb the action of twelve; it is useless to tamper with one, for the eleven can be heard. Under this view of the law the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one.¹¹¹

107. The court extended the holding in *Parker v. Gladden*, 385 U.S. 363 (1966) to include juror misconduct inside the jury room and juror misconduct in conducting unauthorized views.

108. 434 F.2d at 320.

109. *United States v. Beach*, 296 F.2d 153 (4th Cir. 1961).

110. *Id.*

111. *Id.* at 160.

The fourth circuit cited Professor Wigmore as authority for its decision.¹¹² With the *Parker v. Gladden*¹¹³ holding coming shortly after *Beach* the viability of the *Beach* decision appears to have been strengthened.

M. Media Influence on Juror Verdicts

While some federal courts have refused to allow jurors to impeach their verdict by affidavits to show media interference,¹¹⁴ the more sensible approach is to the contrary.¹¹⁵ In *United States v. Reid*¹¹⁶ the United States Supreme Court was asked to determine the admissibility of affidavits from two jurors to the effect that a newspaper article concerning the case had been sent to a fellow juror. This fellow juror admitted that he had read the article during deliberations to refresh his memory. The Supreme Court neatly sidestepped the issue with the following comment:

It would perhaps hardly be safe to lay down any general rule upon the subject. Unquestionably such evidence ought always be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice.¹¹⁷

Since the *Reid* decision an increasing number of circuit courts have found that to disallow juror affidavits would violate the "plainest principles of justice". For example, in *United States v. Crosby*¹¹⁸ the court's opinion was that if the juror affidavit stated that a juror had read a prejudicial newspaper account of the case, or other media item, such affidavit should be received. Likewise, in *United States v. Kum Seng Seo*¹¹⁹ affidavits were submitted which showed that some jurors had come in contact with a highly prejudicial newspaper article which included statements that defendant was held on a very high bail and that the illegal narcotics were found in the defendant's room. Implicit in the court's granting of a new trial was the belief that such juror affidavits were admissible to impeach the

112. 8 Wigmore Evidence § 2352-53 (McNaughton rev. 1961).

113. 385 U.S. 365 (1966).

114. *Moore v. United States*, 125 F.2d 143 (5th Cir. 1942).

115. *United States v. Kum Seng Seo*, 300 F.2d 623 (3d Cir. 1962); *United States v. Crosby*, 294 F.2d 928 (2d Cir. 1961).

116. 12 How. 361 (1851).

117. *Id.* at 366.

118. 294 F.2d 928 (2d Cir. 1961).

119. 300 F.2d 623 (3d Cir. 1962).

verdict under the "extraneous influence exception." Both Professor Wigmore¹²⁰ and the Federal Rules of Evidence¹²¹ are in accord with this holding.

N. Juror Consideration of Facts Not In Evidence

No area of law better reflects the maxim "it would . . . hardly be safe to lay down a general rule on the subject"¹²² than does the topic of juror consideration of facts outside the record. Many federal courts have refused to admit such testimony relying on the Mansfield rule.¹²³ Even after the United States Supreme Court had carved out its "extraneous influence exception"¹²⁴ many courts continued to adhere to prior decisions by drawing a dividing line between what was and what was not an "extraneous influence." The most convenient line to draw was that between influences that came to bear on the jury from within the jury room and those which intruded upon the jurors from without.¹²⁵ After this approach came under attack for failing to confront the real problem¹²⁶ defenders of the Mansfield rule began to adopt a highly realistic approach.¹²⁷

In *United States v. McMann*,¹²⁸ when discussing the problem of juror consideration of extra-record facts, the court attempted to put the problem in proper perspective:

. . . we suspect there are many cases where jurors make statements concerning the general credibility or incredibility of the police, the need of backing them up even when there is reasonable doubt or putting brakes on them when there is none, the desirability of overcoming reasonable doubt because of the repugnance of particular crimes or of yielding to less than reasonable doubt because of their insignificance and concerning other matters that would invalidate a judgment if uttered by a judge. . . . Yet this is the very stuff of the

120. 8 Wigmore, Evidence § 2354(c), at 703 (McNaughton rev. 1961).

121. 3 J. Weinstein, Weinstein's Evidence 606(04) at 606-32 (1976).

122. *United States v. Reid*, 12 How. 361, 366 (1851).

123. *Parsons v. United States*, 188 F.2d 878 (5th Cir. 1951); *Young v. United States*, 163 F.2d 187 (10th Cir. 1947); *United States v. Dressler*, 112 F.2d 972 (7th Cir. 1940); *Ramsey v. United States*, 27 F.2d 502 (6th Cir. 1928).

124. *Mattox v. United States*, 146 U.S. 140 (1892).

125. *United States v. Furlong*, 194 F.2d 1, 5 (7th Cir. 1952). *Also see* Rothstein, Federal Rules of Evidence, Appendix § 606(b) (1973) where it is stated: ". . . (s)ubstantial authority refuses to allow a juror to disclose irregularities in the jury room, but allows his testimony as to irregularities occurring outside."

126. Certainly a defendant's right to a fair trial cannot be determined on the sole basis of whether his rights were violated within the jury room or 50 feet outside that "sanctuary."

127. *United States ex rel. Owens v. McMann*, 435 F.2d 813, 818 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *United States v. McKinney*, 429 F.2d 1019 (5th Cir. 1970); *Jorgenson v. York Ice Machinery Corporation*, 160 F.2d 432 (2d Cir. 1947).

128. 435 F.2d 813 (2d Cir. 1970).

jury system, and we have recognized . . . that the standards for judges and jurors are not the same.¹²⁹

Other authorities defending the rule prohibiting juror testimony regarding consideration of extra-record testimony include Professor Wigmore¹³⁰ and the Federal Rules of Evidence.¹³¹

While the tide appears to be turning in favor of admitting such testimony, recent federal court decisions still uphold the traditional rule.¹³² Several recent cases, however, have begun to accept juror affidavits concerning the jury's consideration of facts not in evidence, some of them based on the "extraneous influence exception."¹³³ Other courts believe that such misconduct violates the defendant's sixth amendment right of confrontation.¹³⁴ One case that has taken this latter approach is *United States v. Thomas*.¹³⁵ In that case the jurors' affidavits stated that one of the jurors had tried to influence the verdict based on an inadmissible newspaper article. The court held:

. . . we support the approach outlined in the American Bar Association's Project on Minimum Standards for Criminal Justice Relating to Trial by Jury, Section 5.7(c) Approved Draft, 1968, which states that a juror's testimony or affidavit shall be received when it concerns whether matters not in evidence came to the attention of one or more jurors, under circumstances which would violate the defendant's constitutional right to be confronted with the witnesses against him.¹³⁶

In *Downey v. Peyton*,¹³⁷ the Court of Appeals for the Fourth Circuit admitted similar juror affidavits claiming that the jurors were not testifying about their mental impressions or what went on in the jury room but only whether events not introduced in evidence were discussed in the jury room. The court in allowing the affidavits held:

Such a factual inquiry is sanctioned in *Rees v. Peyton*, 341 F.2d 859 (4 Cir. 1965). There, it is stated that "a juror may after verdict be queried

129. *Id.* at 817-18.

130. 8 Wigmore, Evidence § 2354 (McNaughton rev. 1961).

131. 3 J. Weinstein, Weinstein's Evidence 606(04) at 606-39 (1976).

132. *United States v. Sanchez*, 380 F. Supp. 1260 (N.D. Tex. 1973).

133. *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975), *cert. denied* 96 S. Ct. 1119 (1976); *Downey v. Peyton*, 451 F.2d 236 (4th Cir. 1971).

134. *United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972); *Gafford v. Warden U.S. Penitentiary*, 434 F.2d 318 (10th Cir. 1970).

135. 463 F.2d 1061 (7th Cir. 1972).

136. *Id.* at 1064.

137. 451 F.2d 236 (4th Cir. 1971).

as to information, whether documentary or oral in nature, introduced into the jury room but not put before them at trial.¹³⁸

PROPOSAL BY WARREN BURGER

In 1959, the Court of Appeals for the District of Columbia Circuit made an unprecedented attack on the practicality of the Mansfield approach to the juror impeachment question.¹³⁹ The court's response to the problem was drastic, in that the opinion called for the acceptance of all juror affidavits. What makes the decision even more notable is its author, the current Chief Justice of the United States Supreme Court, Warren Burger, who at that time was serving as a circuit court judge.

In the decision, Judge Burger noted that when faced with juror impeachment of verdict questions federal courts were saying one thing and doing another. He explained:

Courts have again and again ostensibly endorsed Mansfield's rule against the use of juror's statements, but it appears, that almost without exception, where it has been said that a juror's affidavit or testimony is "inadmissible" the court has in fact considered what the juror has said but rejected it as insufficient.¹⁴⁰

Burger concurred with Judge Learned Hand in his opinion that this approach to the problem was simply "an easy escape from embarrassing choices."¹⁴¹ Judge Burger suggested his solution to the juror impeachment problem in these words:

The crux of the problem would be more clear if we regard the issue not as the admissibility of the juror's affidavit but rather its sufficiency for purposes of impeaching the verdict. We should not dispose of this case on the ground of admissibility. Rather we should view it as Judge Hand did and consider what the affidavit says, and assuming its truth for these purposes then decide whether it should lead to reversal.¹⁴²

This approach while deserving of merit, has not been adopted by the federal courts generally. This is either because Burger failed to consider the effect of his proposal on the policy behind the current rule¹⁴³ or because of the general resistance to change throughout the federal court system.

138. *Id.* at 239.

139. *Kilmes v. United States*, 263 F.2d 273 (D.C. Cir. 1959).

140. *Id.* at 274.

141. *Jorgenson v. York Ice Machinery Corporation*, 160 F.2d 432, 435 (2d Cir. 1947).

142. *Kilmes v. United States*, 263 F.2d 273, 274 (D.C. Cir. 1959).

143. Harassment of jurors, finality of verdicts, sanctity of jury room; *see* note 18.

THE EFFECT OF THE PASSAGE OF FEDERAL RULE
OF EVIDENCE 606(B)

Congress has spoken as to the proper course for the federal courts to follow when faced with various types of juror misconduct with the passage of section 606(b) of the Federal Rules of Evidence.¹⁴⁴ Due to its critical importance to the direction of the law in this area the rule is presented in full below:

(b) Inquiry into validity of verdict or indictment

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.¹⁴⁵

In debate over the final wording of section 606(b) the House of Representatives version was more liberal than that of the Senate. The House version would have allowed jurors to testify as to objective matters occurring during deliberations, such as misconduct by another juror or a compromise verdict. The Senate version did not allow such juror testimony, but it did permit jurors to testify as to whether extraneous prejudicial information was improperly brought to the jury's attention.¹⁴⁶ After much discussion the Conference Committee adopted the Senate version.¹⁴⁷

The purpose of the Federal Rule is clear. As stated by Judge Weinstein,¹⁴⁸ 606(b) "seeks to reach an accommodation between policies designed to safeguard the institution of trial by jury and policies designed to insure a just result in the individual case."¹⁴⁹ The values sought to be promoted by the Rule include freedom

144. 3 J. Weinstein, Weinstein's Evidence 606(04) at 606-01 (1976).

145. *Id.*

146. Conference Report, H.R. Rep. No. 93-1597, Congressional Report, H 11930 (daily edition, December 14, 1974). See 3 J. Weinstein, Weinstein's Evidence 606(04) at 606-9-10 (1976);

147. *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149 n.20 (3d Cir. 1975), *cert. denied*, 96 S. Ct. 1119 (1976); 3 J. Weinstein, Weinstein's Evidence 606(04) at 606-9 (1976).

148. In his work on the Federal Rules of Evidence.

149. 3 J. Weinstein, Weinstein's Evidence 606(04) at 606-24 (1976).

of deliberation, stability and finality of verdicts and protection of jurors against harassment and embarrassment.¹⁵⁰ However, it is recognized that immunizing the verdict against all inquiry can lead to irregularity and injustice.¹⁵¹

Although Federal Rule of Evidence 606(b) was adopted in January, 1975, it has already stirred controversy. Legal scholars are attempting to determine its effect upon the existing case law. At least one recent circuit court has concluded that "the rule as adopted, tracked existing case law."¹⁵² The manner in which the Rule deals with various problems discussed in this comment will show whether or not that court's conclusion is accurate.

The Federal Rule supports the almost unanimous opinion of the federal courts that a juror is barred from testifying as to the motives or mental processes by which the jurors reached their verdict.¹⁵³ Rule 606(b) also follows case law in prohibiting jurors from testifying that they misunderstood juror instructions,¹⁵⁴ misunderstood the law involved,¹⁵⁵ or disregarded or failed to understand certain evidence presented at trial.¹⁵⁶ It is silent on whether evidence of compromise or majority vote verdicts will be excluded. At least one leading scholar in the field has taken the position that such evidence should not be allowed to come from the jurors.¹⁵⁷ Furthermore, the scholars are in disagreement over whether 606(b) permits juror testimony that they considered facts not in evidence during the deliberations.¹⁵⁸

The Federal Rule does allow jurors to testify that they were exposed to threats¹⁵⁹ or bribes,¹⁶⁰ that members of the jury conducted an unauthorized view¹⁶¹ or experiment,¹⁶² and that media

150. Rothstein, *Federal Rules of Evidence*, Appendix § 606(b) (1973).

151. *Id.* at 78.

152. *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149 (3d Cir. 1975), *cert. denied*, 96 S. Ct. 1119 (1976).

153. 3 J. Weinstein, *Weinstein's Evidence* 606(04) at 606-23 (1976).

154. *United States v. Stacey*, 475 F.2d 1119 (9th Cir. 1973).

155. *United States v. Chereton*, 309 F.2d 197 (6th Cir. 1962).

156. *United States v. Dressler*, 112 F.2d 972 (7th Cir. 1940).

157. 3 J. Weinstein, *Weinstein's Evidence* 606(04) at 606-41 (1976).

158. *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 149 n.20 (3d Cir. 1975), *cert. denied*, 96 S. Ct. 1119 (1976), cites the Congressional Conference Report on the passage of Federal Rule of Evidence section 606(b) as follows: "The Conference adopts the Senate amendment (which) . . . does not permit juror testimony about any matter occurring during the course of the jury's deliberations." However, Judge Weinstein is of the opinion that juror consideration of facts not in evidence is not barred by the new rule.

159. *Miller v. United States*, 403 F.2d 77, 83 n.11 (2d Cir. 1968).

160. *Remmer v. United States*, 347 U.S. 227 (1954).

161. *Gafford v. Warden, U.S. Penitentiary*, 434 F.2d 318 (10th Cir. 1970).

162. *United States v. Beach*, 296 F.2d 153 (4th Cir. 1961).

accounts came before them.¹⁶³

It is apparent that Federal Rule of Evidence 606(b) fails to adequately tackle the impeachment problem. While it permits juror testimony to impeach a verdict where majority case law has done so, and prohibits such testimony where courts have refused to do so in the past, in the areas of compromise verdicts and consideration of facts not in evidence, where the courts have been divided, the new rule offers no solution. While Congress claims to have reached an accommodation between the conflicting policies of safeguarding the jury trial system and insuring a just result in individual cases, in effect it has done nothing more than codify existing case law.

Congress must make another attempt to give the federal courts some guidance in the area of juror impeachment of verdicts. When they begin their task it is recommended that they give serious consideration to the realistic approach taken by Chief Justice Burger, in *Kilmes v. United States*,¹⁶⁴ before he was elevated to the high court. In recommending that Congress require federal courts to consider all juror affidavits relating to jury misconduct this author is aware of the possible "Pandora's Box" that this solution may open. Many of the reasons consistently given for perpetuation of the traditional rule will have to be dealt with. Juror harassment, juror falsification of affidavits and the proliferation of new trials when reversible juror misconduct is shown are serious problems without current answers.

However, these problems of "expediency" can no longer stand in the way of a defendant's right to a fair trial in the federal court system. When a juror affidavit alleging some type of juror misconduct is presented to the court, the judge must be required to consider it. If, after doing so, the judge finds that even if the allegations made are accurate no denial of a fair trial has been shown he can be obliged to deny the motion for a new trial at that juncture. If, however, the judge determines that a new trial is warranted if the allegations in the affidavit are correct, he should be required to conduct an evidentiary hearing to ex-

163. *United States v. Kum Seng Seo*, 300 F.2d 623 (3d Cir. 1962); *United States v. Crosby*, 294 F.2d 928 (2d Cir. 1961).

164. 263 F.2d 273 (D.C. Cir. 1959).

amine the jurors and determine their credibility. Based on the findings at that hearing, the judge can make his final determination as to whether a new trial is warranted. This is the basic approach proposed by Warren Burger nearly twenty years ago.¹⁶⁵ It remains a plausible solution to the jury misconduct question today. While this approach does not solve the problems anticipated by those who adhere unthinkingly to the Mansfield rule, such problems can no longer stand in the way of the criminal defendant's right to a fair trial in federal court.

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165. *Id.*