UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 66 | Number 3 Article 2

3-1-1988

Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified

Susan Crump

JURY MISCONDUCT, JURY INTERVIEWS, AND THE FEDERAL RULES OF EVIDENCE: IS THE BROAD EXCLUSIONARY PRINCIPLE OF RULE 606(b) JUSTIFIED?

SUSAN CRUMP†

Federal Rule of Evidence 606(b) incorporates the long-established policy of protecting the secrecy of jury deliberations. The Rule excludes the testimony of jurors concerning matters or statements arising in jury deliberations and concerning the effects of any influences upon jurors' minds in connection with a verdict or indictment. This exclusionary rule in 606(b) is excepted when testimony concerns any "extraneous prejudicial information" or "outside influence" brought before a jury. In this Article Professor Crump argues that the current structure of Rule 606(b) and the local rules in federal courts regulating jury interviews do not reflect a harmonized approach to the policy objectives which the rules purport to serve. Specifically, Professor Crump calls for a modest revision of Rule 606(b), complemented by a uniform rule governing jury interviews. This revised Rule 606(b) would retain the principle objectives of the old Rule, but would abandon the catchphrases "extraneous" and "outside," which often have steered courts down the path to "occasional injustice."

INTRODUCTION

According to juror Daniel Hardy, the jury that convicted Anthony Tanner of federal conspiracy[1] and mail fraud[2] had been " 'on one big party.' "[3] He and three other jurors had consumed among them as many as three pitchers of beer during several of the noon recesses. Two other members frequently drank mixed drinks at lunch. Still another, whom Hardy described as an "alcoholic," drank a liter of wine with lunch on three different occasions. Hardy also confessed that he and three other jurors had "smoked marijuana quite regularly during the trial." Moreover, he had observed one juror take cocaine five times during the trial, and another take it two or three times. One juror allegedly sold marijuana to another juror during the trial and took marijuana, cocaine, and drug paraphernalia into the courthouse. Not surprisingly, some of the jurors fell asleep

† Professor of Law, South Texas College of Law. A.B. 1968, University of California, Davis; J.D. 1974, University of Houston.

1. 18 U.S.C. § 371 (1982).

2. *Id.* § 1341.

3. Tanner v. United States, 107 S. Ct. 2739, 2745 (1987) (quoting Record on Appeal at 209, *Tanner* (No. 86-177)).

during presentation of the evidence.[4]

Hardy's information came to light because he contacted Tanner's attorney " 'to clear [his] conscience.' "[5] Tanner's attorney, acting in arguable defiance of a court order[6] and local rules,[7] promptly asked two private investigators to take a sworn statement from Hardy and attached it to a motion for a new trial.[8] Hardy's revelations did not necessarily warrant the setting aside of the verdict, because the governing standards quite properly are restrictive. It would have been understandable, however, if Tanner's attorney had expected that these lurid allegations would capture the judge's full attention.

The district court overruled the motion without hearing any evidence. The court reasoned that Federal Rule of Evidence 606(b) prevented jurors in Hardy's circumstances from testifying against their own verdicts.[9] The United States Court of Appeals for the Eleventh Circuit affirmed this holding.[10] Ultimately, the United States Supreme Court also affirmed, in an opinion that candidly recited the facts in Hardy's affidavit substantially as they appear above.[11] The resulting decision, *Tanner v. United States*[12] is a fascinating illustration of the ambiguous policies, unresolved conflicts, and potential for anomalous outcomes concealed in the ostensibly clear language of the evidentiary rule that excluded Daniel Hardy's testimony.

In its historical context, the *Tanner* decision is less surprising than it initially appears. From the time of Lord Mansfield until the present, courts and legislatures have zealously protected the secrecy of jury deliberations, even at the occasional expense of injustice to litigants. For example, the current codification of this principle, Federal Rule of Evidence 606(b), deems incompetent the testimony of jurors as to instances of misconduct, unless that testimony pertains

4. *Id.*

5. *Id.* (quoting Record on Appeal at 231, *Tanner* (No. 86-177)).

6. Tanner's attorney, David Best, previously had filed a motion for a new trial based on the affidavit of juror Vera Ashbul. Her affidavit alleged that several of the jurors in Tanner's trial slept during the afternoons after having drunk alcohol with their lunch. At the hearing on this motion, the trial judge ruled that Ashbul's testimony, as well as testimony from any juror attempting to impeach the verdict, was incompetent under Federal Rule of Evidence 606(b). *Id.* at 2744. The judge did, however, hear testimony from Best, who stated that on one occasion he noticed a juror was in a " 'giggly mood' " during the trial. *Id.* (quoting Record on Appeal at 170, *Tanner* (No. 86-177)). The judge also noted there had been a short conversation on the record at trial between him and one of Tanner's trial attorneys concerning whether or not jurors were sleeping during the evidence, but that this conversation was inconclusive. Based on lack of evidence, the judge overruled Tanner's first motion for a new trial and prohibited Tanner's attorneys from interviewing other jurors in an attempt to establish jury misconduct. *Id.*

7. The local rules for the United States District Court for the Northern District of Florida, where the *Tanner* case was tried, adopt the American Bar Association's Code of Professional Responsibility (now the Model Code of Professional Responsibility), which prohibits lawyers from interviewing jurors in any manner calculated to "harass" or "embarrass" jurors or their family members, or "influence their actions in future jury service." U.S. DIST. CT. N.D. FLA. R. 4(k)(1); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (1980).

8. *Tanner*, 107 S. Ct. at 2745.

9. *Id.* at 2744.

10. United States v. Conover, 772 F.2d 765, 770 (11th Cir. 1985), *aff'd sub nom.* Tanner v. United States, 107 S. Ct. 2739, 2754 (1987).

11. *Tanner*, 107 S. Ct. at 2744-45.

12. 107 S. Ct. 2739 (1987).

either to extraneous prejudicial information that was improperly brought to the jury's attention during the trial, or to improper outside influences brought to bear upon any juror.[13] Under this rule, if a juror were to misunderstand the court's instructions,[14] yield to coercion from other jurors in reaching a verdict,[15] or even render a quotient verdict,[16] his testimony establishing this misconduct would be deemed incompetent and excluded from consideration. These and similar instances of juror misconduct are shielded from inquiry after the verdict because of substantial public policy concerns for protecting the jury system. In addition, local court rules frequently restrict losing litigants from gathering information concerning misconduct from jurors.[17] Many local rules grant the trial court authority to require litigants to show "good cause" before receiving permission to interview jurors.[18] Other rules prohibit lawyers or parties from contacting jurors in a manner calculated to harass them or their families.[19]

---

13. Rule 606(b) provides:

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 that or any other juror's mind or emotions as influencing the juror to assent to or to dissent from the verdict or indictment or concerning the juror's 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 a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

FED. R. EVID. 606(b).

14. *See* Scogin v. Century Fitness, Inc., 780 F.2d 1316, 1320 (8th Cir. 1985) (evidence that verdict did not reflect intent of jury to award plaintiff a portion of damages in comparative negligence case considered incompetent); Stevens v. Cessna Aircraft Co., 634 F. Supp. 137, 143 (E.D. Pa.), *aff'd mem.*, 806 F.2d 254 (3d Cir. 1986) (evidence that jurors thought they were awarding a verdict to plaintiff in answering special interrogatories held to be incompetent).

15. *See* Jacobson v. Henderson, 765 F.2d 12, 14-15 (2d Cir. 1985) (allegations that "screaming, hysterical crying, fist banging, name calling, and . . . obscene language" was heard in the jury room during deliberations held to be incompetent evidence); United States v. Gerardi, 586 F.2d 896 (1st Cir. 1978) (allegation that a juror was persuaded by other jurors to vote for guilt held to be incompetent evidence).

16. A quotient verdict is one in which jurors determine damages in a case by adding together the amounts each juror thinks is appropriate and dividing the sum by the number of jurors deciding the case. *See* Comment, *Impeachment of Verdicts by Jurors—Rule of Evidence 606(b)*, 4 WM. MITCHELL L. REV. 417, 419-20 n.20 (1978). Most courts refuse to admit evidence of quotient verdicts, a decision which the history of Rule 606(b) supports. *See Scogin*, 780 F.2d at 1318 (bystander's affidavit stating jury foreperson told him that jury had awarded damages by using a quotient verdict held to be incompetent proof); Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920, 940 n.86 (1978); Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360, 371 (1958). *But cf.* United States v. 4,925 Acres of Land, 143 F.2d 127, 128 (5th Cir. 1944) (reversing a case in which judge instructed jury to use quotient method to arrive at a verdict, but commenting that many cases permit such a verdict to stand if method was initiated by jury, and jury approved of result independently).

17. *See, e.g.*, U.S. DIST. CT. E.D. TEX. R. 10(b) ("After a verdict is rendered but before the jury is discharged from further duty, an attorney may obtain leave of the Judge before whom the action was tried to converse with members of the jury."); *cf.* U.S. DIST. CT. M.D.N.C. R. 112(b)(4) (communication with petit jurors permitted as long as the communication does not tend to "harass, humiliate, or intimidate" the juror).

18. *See, e.g.*, U.S. DIST. CT. E.D. MO. R. 16(D) ("No attorney or any party to an action [or their representatives] shall . . . interview, examine, or question any petit juror . . . except on leave of court granted upon good cause shown.").

19. For example, the rules for the United States District Court for the Eastern District of North Carolina provide:

The substantial policy considerations that underlie Rule 606(b) include encouraging the finality of jury verdicts, conserving judicial resources by foreclosing lengthy adversary hearings on marginal claims of misconduct, and preserving the dignity of the court.[20] Rule 606(b) also encourages free and frank discussions inside the jury room, reduces juror harassment, and prevents minority jurors from agreeing to the verdict only to challenge it at a later time.[21] There are, however, substantial countervailing policies. These policies favor inquiry into truth, the appearance of fairness to litigants, and public respect for the courts.[22] The tension among these policies and the different balances that courts and legislatures have struck have led to results that not only are remarkably inconsistent, but occasionally give the appearance of unfairness.

This Article examines the justifications for these restrictions, the arguments against them, and the alternatives. Part I of the Article analyzes Rule 606(b) and its common law antecedents in terms of policy considerations and illustrative examples. Part II of the Article categorizes the more extensive restrictions local federal rules have placed on obtaining information concerning jury misconduct from jurors themselves. These local rules tend not to be formulated and enforced uniformly, but they supplement and enhance the effects of Rule 606(b). Part III examines whether the policy reasons behind each of these restrictions are justified, and whether other competing interests, as yet unconsidered in the general literature, should require a reformulation of Rule 606(b). Finally, the Article reviews and analyzes some of the alternative proposals in light of these competing interests. The Article concludes that the policies underlying Rule 606(b) are valid and important. However, a broad exclusionary principle, such

---

> [N]o attorney or party litigant shall . . . ask questions of or make comments to a member of that jury or members of the family of such a juror that are calculated merely to harass or embarrass such a juror or a member of such juror's family or to influence the actions of such a juror or a member of such juror's family in future jury service.

U.S. DIST. CT. E.D.N.C. R. 6.03; *see also* U.S. DIST CT. M.D.N.C. R. 112(b)(1) (no communication with jurors permitted "which may reasonably have the effect of influencing" the juror).

20. United States v. Schwartz, 787 F.2d 257, 261-62 (7th Cir. 1986) ("The Rule was designed both to protect the judicial process from efforts to undermine verdicts by pointing to jurors' thoughts and deliberations and to protect the jurors from being pestered by lawyers."); Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.) (unrestricted attacks would place judges in the position of "Penelopes, forever engaged in unraveling the webs they wove"), *cert. denied*, 332 U.S. 764 (1947); C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 68 (3d ed. 1984); Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 250-51.

21. McDonald v. Pless, 238 U.S. 264, 267-69 (1915); Mattox v. United States, 146 U.S. 140, 148 (1892); *Schwartz*, 787 F.2d at 262; Michaels v. Michaels, 767 F.2d 1185, 1205 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 797 (1986); United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977); People v. Hutchinson, 71 Cal. 2d 342, 348, 455 P.2d 132, 136, 78 Cal. Rptr. 196, 200, *cert. denied*, 396 U.S. 994 (1969). In fact, these policies may justify the holding in *Tanner* because there was no showing that the alleged misconduct had any serious effect on the jury's deliberations. Juror Hardy explicitly stated that he and some of his fellow jurors avoided intoxication: "[A]s far as being drunk, no we wasn't." *Tanner*, 107 S. Ct. at 2750.

22. *See* Thompson, *Challenge to the Decisionmaking Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial*, 38 SW. L.J. 1187, 1195-96 (1985). A broad exclusionary principle, such as that of Rule 606(b), may impose significant costs. In Tanner's case, the effect of Rule 606(b) was not limited to preventing the motion from succeeding; instead, it prevented defendant from fully presenting the issue of misconduct. *Tanner*, 107 S. Ct. at 2741. Furthermore, applicable rules and orders prevented Tanner's attorneys from interviewing jurors to find circumstances that might ripen the evidence of misconduct into admissible, and perhaps even sufficient, proof. *Id.* at 2744-45.

as that imposed by Rule 606(b), is inferior to a more narrowly targeted exclusionary rule, which could be coupled with rules that prevent juror harassment and instability of verdicts.

I. RESTRICTIONS ON THE TYPE OF EVIDENCE ADMITTED: JURORS AS INCOMPETENT WITNESSES OF THEIR OWN MISCONDUCT

A. *The Common Law Development*

1. The Mansfield Rule's Focus on the Untrustworthy Nature of a Juror Repudiating His Verdict

The rule preventing jurors from testifying about misconduct occurring inside the jury room initially was stated in 1787 by Lord Mansfield in the English case of *Vaise v. Delaval*.[23] The jurors in *Vaise* allegedly "tossed up" to determine their verdict in favor of the plaintiff. Lord Mansfield, drawing from other instances in which witnesses had been considered incompetent, held that jurors should not be permitted to testify as to matters involving their own misconduct.[24] Prior to *Vaise*, jurors routinely had been permitted to give affidavits as to misconduct, and there was no limit on the type of proof a court could entertain in determining whether a new trial was proper on that basis.[25]

The policy behind the Mansfield Rule was simple. If a juror during deliberations engaged in wrongful conduct, his subsequent testimony was considered untrustworthy. Courts applying the Mansfield Rule reasoned that a person who testified to his own misconduct in a judicial proceeding would be unreliable in testifying about the wrongdoing.[26] The same common law rationale previously had been applied to witnesses who retracted perjured testimony[27] or invalidated their own instruments,[28] to accomplices who testified in criminal cases,[29] and to married men who attempted to disclaim paternity on grounds of nonaccess in illegitimacy cases.[30] Common-law judges inferred reasons why such witnesses might in some instances be unreliable and then, with characteristic draconian

---

23. 99 Eng. Rep. 944 (K.B. 1785).

24. *Id.* at 944. This was known at common law as the doctrine that a "witness shall not be heard to allege his own turpitude: 'nemo turpitudinem suam allegans audietur.'" 8 J. WIGMORE, EVIDENCE § 2352, at 696 (McNaughten rev. 1961).

25. 8 J. WIGMORE, *supra* note 24, § 2352, at 696; *see, e.g.*, Norman v. Beaumont, 94 Eng. Rep. 1000 (K.B. 1744) (verdict arrived at by 11 jurors set aside); Philips v. Fowler, 92 Eng. Rep. 1190 (K.B. 1735) (verdict obtained by casting lots set aside).

26. "The notion underlying the maxim is that a person who comes upon the stand to testify that he has at a former time spoken falsely or acted corruptly is by his very confession a liar or a villain, and therefore untrustworthy as a witness." 2 J. WIGMORE, EVIDENCE § 525, at 735 (Chadbourn rev. 1979).

27. *Id.* § 527, at 737 ("self-confessed perjurer incapable of trust").

28. *Id.* § 529, at 739-40 (a person invalidating his own instrument is disqualified by reason of his interest); *see* Walton v. Shelley, 99 Eng. Rep. 1104, 1105 (K.B. 1786).

29. 2 J. WIGMORE, *supra* note 26, § 526, at 736 (confession of crime by accomplice acknowledges accomplice's turpitude and renders him incompetent and untrustworthy).

30. 7 J. WIGMORE, EVIDENCE § 2063, at 469-73 (Chadbourn rev. 1978). A related doctrine, also developed by Lord Mansfield, prevented parties from repudiating a "marriage in fact." *See id.* § 2084, at 559-62.

efficiency, simply excluded this testimony in all cases by declaring them incompetent.

As a rule of juror competency, the principle announced in *Vaise* did not directly affect the definition of jury misconduct, the grounds for new trial, or the availability of proof from other sources.[31] For example, dicta in *Vaise* suggested that if a bailiff were to view jurors deciding an issue by chance, the bailiff's testimony not only would be competent, but probably would be sufficient to require a new trial as well.[32] This reasoning led to the common-law view that inquiry into jury misconduct stops at the jury room door.

The Mansfield Rule was subject to criticism because it meant that proof of an incident of serious misconduct, even if such an incident clearly occurred, might depend on the accidental presence of an eavesdropper.[33] Furthermore, the reasoning used to support this rule did not protect any independent policy objective, such as a concern about delving too deeply into the mental processes by which jurors reach a decision, or concerns about juror privacy, harassment, or finality to litigation. Instead, the reasoning automatically imputed unreliability to the testimony by which misconduct was proved, even if the testimony in fact was reliable.

Had the sole concern of courts applying the Mansfield Rule been the untrustworthy nature of the recanting juror's testimony, the Rule probably would have died a natural death, as did other incompetency rules.[34] After all, jurors often may be more reliable sources of information about their own misconduct than eavesdroppers. Furthermore, it is internally inconsistent to permit an eavesdropper to testify when the eavesdropper himself is a probable wrongdoer. However, the Mansfield Rule was buoyed up by other policy reasons of a sounder nature, which eventually forced a redefinition of the Rule when it was imported into the United States.

2. Liberalization of the Mansfield Rule by the States

The Mansfield Rule initially was accepted in the United States as the basic rule for determining the incompetency of juror affidavits regarding jury misconduct.[35] By the middle of the nineteenth century, however, two separate but related departures from the Rule gained adherence.

---

31. 8 J. WIGMORE, *supra* note 24, § 2353, at 697-701.

32. *Vaise*, 99 Eng. Rep. at 944; *see* Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947); Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 211-12 (1866).

33. 8 J. WIGMORE, *supra* note 24, § 2353, at 698-99. Wigmore also points out that the Mansfield Rule's admission of nonjuror testimony might "tempt the parties to seduce the bailiffs to tricky expedients and surreptitious eavesdroppings . . . ." *Id.* § 2353, at 699.

34. *See supra* notes 27-30 and accompanying text; 8 J. WIGMORE, *supra* note 24, § 2353, at 696. The doctrine prohibiting a husband or wife from testifying about nonaccess in paternity cases was followed to some extent in the United States. *Compare* McKenzie v. Harris, 679 F.2d 8, 12 (3d Cir. 1982) (spouses incompetent to testify as to nonaccess) *and* Leonard v. Leonard, 360 So. 2d 710, 713 (Ala. 1978) (spouses are incompetent to testify as to nonaccess but may testify as to circumstances from which nonaccess may be inferred) *with* Cassady v. Martin, 220 Va. 1093, 1098, 266 S.E.2d 104, 106 (1980) (no longer the rule that spouse is prohibited from testifying about nonaccess).

35. *See Tanner*, 107 S. Ct. at 2746; McDonald v. Pless, 238 U.S. 264, 268 (1915); Jorgensen v.

Perhaps the most important redefinition of the Mansfield Rule came in the 1866 case of *Wright v. Illinois & Mississippi Telegraph Co.*,[36] which involved a quotient verdict. The Iowa Supreme Court, after carefully analyzing prior case law, determined that there was no "fixed principle" by which such cases had been decided;[37] nor was the court comfortable in fashioning one.[38] Nonetheless, the court felt compelled to create its own principle of broad admissibility and held that "affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room which does not essentially inhere in the verdict . . . ."[39]

In devising this test, the *Wright* court primarily was concerned with protecting the "sanctity and conclusiveness" of jury verdicts from parties and their attorneys who would attempt to influence them.[40] If the court had permitted jurors to testify as to matters about which they had exclusive knowledge, this would have created an incentive for parties and attorneys to pressure jurors into testifying contrary to the verdict, because such testimony could only be refuted with difficulty.[41] It would be relatively easy to influence a juror to testify that he misunderstood the charge or had reservations about the verdict; proof of such matters would rest primarily within the conscience of that juror alone.[42] Thus, the *Wright* court attempted to fashion a test that would require objective, verifiable proof of misconduct to prevent attacks on the verdict at the whim of a minority juror.

The *Wright* court equally favored a policy of exposing jurors who failed to perform their duties correctly whenever objective evidence revealed they had acted in violation of the law. To suppress the ability of the trial court to seek the truth in such instances would not only deny the losing litigant individual justice, but also could undermine public confidence in the jury system.[43] After balancing these policies, the court concluded that quotient verdicts were not matters essentially inhering within the conscience of an individual juror and were objectively verifiable; further, affidavits concerning the receipt of quotient verdicts

---

York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 606[03], at 606-22 (1987).

36. 20 Iowa 195 (1866).

37. *Id.* at 209.

38. The court explained, "While we do not feel entirely confident of its correctness, nor state it without considerable hesitation, . . . we are not without that assurance, which, under the circumstances, justifies us in laying down . . . [a] true rule." *Id.* at 210.

39. *Id.*

40. *Id.* at 211.

41. *See id.*

42. *See* Thompson, *supra* note 22, at 1221. Thompson observes:

> Jurors may make accommodation reluctantly and perhaps once free from the isolation and pressures of the jury room, they develop second thoughts about their accommodations and compromises. Such a juror might easily be influenced by counsel to testify that certain evidence improperly admitted, or other improper circumstances, influenced his or her decision to assent to the verdict. The finality of jury verdicts can be undermined if their validity can be easily destroyed by such testimony.

Id.

43. *See Wright*, 20 Iowa at 211.

were competent evidence.[44]

The Iowa Rule, as this holding soon was called, attracted numerous adherents. One adherent was the Supreme Court of Kansas which, in the 1874 case of *Perry v. Bailey*,[45] considered the competency of a juror affidavit alleging that a fellow juror was drunk and abusive during deliberations. Citing the rule in *Wright*[46] with approval, the court determined that a juror's affidavit detailing the drunken and abusive state of another juror during deliberations was a matter that was objectively verifiable and did not rest solely within his conscience. Therefore, the affidavit contained competent testimony.[47] The court also approved the listing in *Wright*[48] of the types of allegations that would qualify as "inhering in the verdict" and those that would not.[49] For example, the *Perry* court proposed that a juror's ignorance about the law or facts in the case, and his subsequent statements that he was improperly influenced by other jurors or that he in reality did not agree with the verdict, would inhere in the verdict and be incompetent evidence on a motion for new trial.[50] However, if a juror could show that he was approached *ex parte* by a third party in the case, or that the verdict was determined by an illegal procedure, his testimony about these matters would be competent.[51]

The second related American departure from the Mansfield Rule occurred in *Woodward v. Leavitt*,[52] which focused on the difference between extraneous influences and the effect those extraneous influences had upon a juror's thought process.[53] Using this test, the Supreme Judicial Court of Massachusetts held competent a juror's affidavit refuting a statement made by other witnesses, which alleged the juror had expressed an opinion before trial about the correctness of defendant's legal position.[54] The court, however, deemed incompetent the portion of the juror's affidavit which discussed deliberations and how the

---

44. In so holding, the *Wright* court disapproved of the Mansfield Rule's distinction between affidavits from nonjurors, which had been deemed competent evidence under the Rule, and affidavits of the jurors themselves, which were deemed incompetent. The court concluded that, if anything, jurors should be more accurate witnesses to their own misconduct than a spy. *Id.* at 211-12.

45. 12 Kan. 539 (1874).

46. *Wright*, 20 Iowa at 210 ("affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict").

47. *Perry*, 12 Kan. at 544-45.

48. *Wright*, 20 Iowa at 210.

49. *Perry*, 12 Kan. at 544.

50. *Id.*

51. *Id.* The Iowa Rule slowly gathered support in the United States and by 1969 had been adopted by at least a dozen jurisdictions: Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, Washington, Wisconsin, and the federal district courts. 8 J. WIGMORE, *supra* note 24, § 2354, at 702 n.1. By 1987, four of these states had abandoned the Iowa Rule to follow the approach of Rule 606(b). *See* N.D. R. EVID. 606(b); OHIO EVID. R. 606(B) (adding requirement that outside evidence of misconduct must be presented before a juror is allowed to testify, unless conduct involves a threat, bribe, or impropriety of a court official); TEX. R. EVID. 606(b); WIS. STAT. ANN. § 906.06(2) (West 1975). The Model Rules of Evidence and the Uniform Rules of Evidence also were patterned after the Iowa Rule. MODEL CODE OF EVIDENCE R. 301 (1942); UNIF. R. OF EVID. 41 (1953).

52. 107 Mass. 453 (1871).

53. *Id.* at 466.

54. There apparently had been several trials of the lawsuit, and the case frequently had been

juror himself voted.[55] The court in *Woodward* arrived at its decision by emphasizing that juror deliberations should be free and secret to avoid "distrust, embarrassment and uncertainty" in the verdict.[56]

3. The Federal Courts Interpret the Mansfield Rule: A History of Inconsistent Standards

The United States Supreme Court exhibited an early reluctance to abide by the harsh absoluteness of the Mansfield Rule. In the first significant federal case to consider the issue, *United States v. Reid*,[57] the Court was confronted with affidavits from two jurors in a murder case. The affidavits indicated that the jurors had read newspaper accounts of the trial prior to reaching a verdict. The jurors stated in their affidavits that these accounts had not influenced their decisions. The Court refused to determine whether these affidavits were competent testimony. Instead, it held that the newspaper articles would not have influenced a reasonable person's decision in the case, and that the juror's affidavits did not demonstrate harm.[58] Consequently, no new trial was required.

The *Reid* Court cited no authority for its decision, stated no general rule to follow, and analyzed no policy considerations. It merely advised that such affidavits should be "received with great caution," and that "cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice."[59] It is difficult to read this case without surmising that the litigants' briefs vigorously argued the adoption or modification of the Mansfield Rule, and the Court simply evaded the issue.[60]

In the next major Supreme Court case to consider the issue, *Mattox v. United States*,[61] the petitioner asked the Court to deem competent affidavits from jurors in a capital case which alleged two types of juror misconduct. First, the affidavits alleged that the bailiff had informed the jury that the petitioner previously had killed two other victims. Second, the affidavits alleged that members of the jury had read newspaper accounts of the trial during deliberations. The accounts suggested that the evidence against petitioner was strong and that he previously had been found guilty of murder.[62]

---

discussed by members of the town, including the juror himself. Three persons testified that the juror publicly had stated he believed defendant "was on the catch." *Id.* at 459.

55. *Id.* at 471.

56. *Id.* at 460.

57. 53 U.S. (12 How.) 361 (1851).

58. *Id.* at 366 ("There was nothing in the newspapers calculated to influence [the jurors'] decision, and both of them swear that these papers had not the slightest influence on their verdict."). It is somewhat surprising that the Court based its decision in part on statements in the juror affidavits which claimed that the verdict was not influenced by a consideration of these articles. Courts prior and subsequent to *Reid* have found it improper to consider affidavits of jurors that reveal those jurors' thought processes. *See, e.g.*, Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 210-11 (1866); Woodward v. Leavitt, 107 Mass. 453, 462 (1871); Whitney v. Whitman, 5 Mass. 405, 405 (1809).

59. *Reid*, 53 U.S. (12 How.) at 366.

60. The Court claimed that it was "unnecessary to . . . examine the decisions referred to in the argument." *Id.*

61. 146 U.S. 140 (1892).

62. *Id.* at 142-44.

In determining the competency of these affidavits, the Court cited with approval *Perry*, the Kansas Supreme Court case that had adopted the Iowa Rule and the "inhere in the verdict" test.[63] The Court also approved the "extraneous influence" test adopted in *Woodward*.[64] Although both tests shielded from scrutiny matters requiring inquiry into the thought processes of jurors, the two were not identical.[65] The *Woodward* test was more exclusive. It not only protected juror thought processes and deliberations, but also tended to protect the method by which jurors were induced to arrive at a verdict, because evidence of such methods would require testimony disclosing jury discussions.[66] Thus, unlike *Perry* or *Wright*, *Woodward* probably would exclude evidence of a quotient verdict or agreement to abide by a majority verdict.[67] Nonetheless, because the affidavits in *Mattox* were competent under either a *Perry* or *Woodward* analysis, the Supreme Court held that they should have been considered by the trial court in determining the motion for a new trial. The analysis in *Mattox* is typical of the confusion courts underwent when attempting to apply a coherent, unified standard of competency to juror affidavits alleging specific misconduct.

The Court in *Mattox* was willing to depart from the common law for two reasons. First, its prior decision in *Reid*[68] had hinted that the Court would recognize juror affidavits alleging misconduct when the interests of justice so demanded, although the Court had urged caution in creating those exceptions. Second, the Court believed that the interests of justice would be served particularly well by an exception that allowed jurors to testify to misconduct in which they had engaged while determining the petitioner's fate in a capital case, because an individual's life was at stake.[69] This second rationale, which stresses the prevention of jury tampering and the importance of an accurate verdict, has continued to justify a more thorough inquiry into jury behavior in criminal cases even in recent times.[70]

In the first significant civil case to raise the issue of the competency of jury

63. *Id.* at 148-49 (citing *Perry*, 12 Kan. at 545) (affidavits "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"). For a brief discussion of *Perry*, see *supra* text accompanying notes 45-51.

64. *Mattox*, 146 U.S. at 149 (citing *Woodward*, 107 Mass. at 466) ("A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind."). For a brief discussion of *Woodward*, see *supra* text accompanying notes 52-56.

65. "The *Perry* rationale distinguishes between acts that are observed and subject to corroboration by other jurors and matters privately perceived by only one juror. The *Woodward* quotation focuses on whether the testimony will reveal thought processes and deliberations." Thompson, *supra* note 22, at 1198.

66. Cases following the "extraneous matter" test frequently have found testimony of jury misconduct relating to misuse of the deliberation process to be incompetent. *See, e.g.*, Bryson v. United States, 238 F.2d 657 (9th Cir. 1956), *cert. denied*, 355 U.S. 817 (1957); Morgan v. Sun Oil Co., 109 F.2d 178 (5th Cir.), *cert. denied*, 310 U.S. 640 (1940).

67. *See* Mueller, *supra* note 16, at 926.

68. For a brief discussion of *Reid*, see *supra* notes 57-60 and accompanying text.

69. *Mattox*, 146 U.S. at 149.

70. *See* Parker v. Gladden, 385 U.S. 363 (1966) (per curiam); Remmer v. United States, 347 U.S. 227 (1954); Carlson & Sumberg, *supra* note 20, at 269; Thompson, *supra* note 22, at 1209.

affidavits, the Supreme Court in *McDonald v. Pless*[71] retreated from its analysis in *Mattox* and attempted to determine whether affidavits showing a quotient verdict were competent. After weighing the individual litigant's interest in a properly conducted trial against possible injury to the public, the Court found three overriding reasons to exclude the testimony. First, to include it would encourage jury harassment.[72] Second, it would make public, and thus discourage, what should be private: free and frank discussions within the jury room.[73] Third, to include such testimony would encourage losing litigants to tamper with jury verdicts and thus prevent finality of litigation.[74] The *McDonald* Court attempted to bolster its holding by claiming that the Mansfield Rule was almost universally followed and, therefore, demanded the result the Court reached.[75] However, the Court failed to recognize that the Mansfield Rule was concerned solely with the untrustworthy nature of juror affidavits, not the public policy considerations the Court had addressed. In addition, the Court made no mention that it had, in *Mattox*,[76] approved both the *Perry*[77] distinction between overt acts and matters that inhere in the individual conscience of the juror, and the *Woodward*[78] distinction between "internal" and "external" influences. Had the Court followed *Perry*, it is probable that the affidavits would have been deemed competent; had it followed *Woodward*, it is probable that they would not.

In a sense, it is not surprising that courts even in the same jurisdiction reached inconsistent results and emphasized different policy concerns in doing so. When the Mansfield Rule was divorced from its initial justification, numerous policies arose to allow the Rule to retain its viability. These policies were developed piecemeal, were at times contradictory, and frequently were inartfully balanced. Nonetheless, at the time proposed Federal Rule of Evidence 606(b) was under consideration in the early 1970s, all jurisdictions were in general agreement on two categories of results. First, they agreed that matters within the individual conscience of one or more jurors should remain inviolate. All jurisdictions would have excluded as incompetent a juror who testified that he failed to understand the law, misinterpreted the facts, was erroneously persuaded by fellow jurors to vote in a certain way, or did not truly agree to the verdict.[79] In other words, all courts would have excluded evidence about a juror's defective reasoning process. Second, all courts probably would have admitted evidence from jurors regarding the misconduct of a party or a court officer, and would have admitted testimony from a court officer about certain restricted

71. 238 U.S. 264 (1915).

72. *Id.* at 267.

73. *Id.* at 267-68.

74. *Id.* at 267.

75. *Id.* at 268.

76. *See supra* notes 61-70 and accompanying text.

77. *See supra* notes 45-51 and accompanying text.

78. *See supra* notes 52-56 and accompanying text.

79. *See* Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 210 (1866); 8 J. WIGMORE, *supra* note 24, § 2349, at 681-82; Mueller, *supra* note 16, at 925.

types of jury conduct.[80]

The primary differences among the various tests applied by the courts arose from the manner in which they viewed occurrences inside the jury room that did not involve testimony about the mental processes of individual jurors. Each test involved a different analysis of whether to admit evidence regarding quotient verdicts, decisions by lot, agreements to abide by majority rule,[81] juror intoxication,[82] or receipt of newspaper or third party comments to the jury.[83] Within this framework, the drafters of the Federal Rules of Evidence began their work.

B. *Rule 606(b) of the Federal Rules of Evidence*

In an effort to resolve inconsistencies in federal law, the Federal Rules Advisory Committee was charged with the duty of promulgating a uniform rule of juror competency in matters of juror misconduct. In its first proposed draft, the Advisory Committee settled on a codification of the Iowa Rule, which it believed was the trend.[84] The proposed rule provided:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any state-

---

80. 8 J. WIGMORE, *supra* note 24, § 2354, at 716.

81. Under the Mansfield Rule, a court would exclude juror affidavits alleging the verdict was reached by improper methods on the basis that juror affidavits are incompetent evidence. *See* 8 J. WIGMORE, *supra* note 24, § 2354, at 711. Under the Iowa Rule, a court generally would admit testimony of this nature. *Wright*, 20 Iowa at 210. Quotient verdicts and decisions by lot generally have been excluded from evidence in federal court. *See* Stein v. New York, 346 U.S. 156, 178 (1953); *McDonald*, 238 U.S. at 265, 269; Womble v. J.C. Penney Co., 431 F.2d 985, 989 (6th Cir. 1970).

82. Under the Mansfield Rule, a court would exclude evidence from jurors as to their own intoxication, but not evidence from third parties. *See Vaise*, 99 Eng. Rep. at 944. Under the Iowa Rule a court probably would admit such evidence, although it is far from clear. *See* Bateman v. Donovan, 131 F.2d 759, 765 (9th Cir. 1942); *Perry*, 12 Kan. at 545-46. Federal courts generally have been very reluctant to admit evidence regarding the physical or mental impairment of a juror. *See* United States v. Dioguardi, 492 F.2d 70, 78-80 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974); United States v. Pellegrini, 441 F. Supp. 1367 (E.D. Pa. 1977), *aff'd*, 586 F.2d 836 (3rd Cir.), *cert. denied*, 439 U.S. 1050 (1978).

83. Under the Mansfield Rule, a court would exclude affidavits of jurors concerning receipt of extraneous information in the jury room, but not affidavits from eavesdroppers. *See Vaise*, 99 Eng. Rep. at 944. Under the Iowa Rule, a court would admit such evidence, but exclude testimony concerning the effect it had on the jury. *See* People v. Hutchinson, 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196, *cert. denied*, 396 U.S. 994 (1969). The federal approach generally has been to admit such testimony and then determine whether it was sufficiently harmful to justify a new trial. *See* Parker v. Gladden, 385 U.S. 363, 364-66 (1966); Government of V.I. v. Gereau, 523 F.2d 140, 153-55 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976). *But see* United States v. Cauble, 532 F. Supp. 804, 809 (E.D. Tex. 1982) (concluding that juror testimony regarding exposure to news media reports was only warranted if the nature of the reports "raises serious questions of possible prejudice," and it was likely that the reports were considered by the jury), *aff'd*, 757 F.2d 282 (5th Cir. 1985).

84. The Advisory Committee explained its reasoning as follows:

> The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room.

FED. R. EVID. 606(b) historical note.

ment by him indicating an effect of this kind be received for these purposes.[85]

This proposal, however, encountered the objections of the Justice Department and Senator McClellan, who emphasized the potential abuses to which losing litigants could subject the Iowa approach.[86] The Advisory Committee's final proposal, which eventually was adopted by the Supreme Court, added the restriction, taken from *Mattox*[87] and *Woodward*,[88] that jurors were not competent to testify about any occurrences or statements made during deliberations, unless the testimony concerned extraneous prejudicial information or improper outside influence.[89] When this final version was presented by the Supreme Court to Congress, the Judiciary Committee of the House of Representatives reinstated the initial proposal embodying the Iowa Rule, because it determined that matters such as quotient verdicts could not be adequately remedied by more precise jury instructions and were a problem of sufficient magnitude to merit a broader rule of competence.[90] The Senate Judiciary Committee, on the other hand, favored the more restrictive *Woodward* approach, which would not have permitted juror testimony about any matters that had arisen during jury deliberations, except those involving "extraneous prejudicial information" and "outside influence improperly brought to bear . . . ."[91] The Joint Conference adopted the Senate version, which was passed by Congress and became Federal Rule of Evidence 606(b).[92]

During the controversial evolution of Rule 606(b), little consideration was given to the accuracy of individual jury verdicts or to the long-term effect of a judicial system that consciously suppresses evidence of malfeasance.[93] The debate focused instead on whether it was desirable to open the jury room door to permit inquiry into objectively verifiable occurrences, or whether this inquiry would lead to publicly undesirable results such as juror harassment or lack of

85. 3 J. WEINSTEIN & M. BERGER, *supra* note 35, at ¶ 606[03] (quoting FED. R. EVID. 606(b) (first proposed draft)).

86. *See* 117 CONG. REC. S33,582 (daily ed. Sept. 28, 1971) (statement of Senator McClellan). Senator McClellan articulated his objections as follows:

> My immediate fear is that proposed rule 606 would inevitably serve as an invitation to unscrupulous defense counsel and guilty defendants to bully and browbeat Federal jurors after the conclusion of the trial. . . . I have noted with growing concern the trend for ingenuous defense counsel and recalcitrant defendants to resort to any and all means they can to destroy our very system of justice.

Id.

87. *Mattox*, 146 U.S. at 149; *see supra* notes 61-70 and accompanying text.

88. *Woodward*, 107 Mass. at 466; *see supra* text accompanying notes 52-56.

89. FED. R. EVID. 606(b).

90. HOUSE COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 650, 93d Cong., 1st Sess. 9-10 (1973), *reprinted in* 28 U.S.C.S. FED. R. EVID. Appendix 1, at 167-68 (Law. Co-op. 1975) [hereinafter HOUSE REPORT].

91. SENATE COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 56 (1974), *reprinted in* 28 U.S.C.S. FED. R. EVID. Appendix 2, at 203-04 (Law. Co-op. 1975) [hereinafter SENATE REPORT].

92. H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 1-3 (1974), *reprinted in* 28 U.S.C.S. FED. R. EVID. Appendix 3, at 223-25 (Law. Co-op. 1975). For the final language of Rule 606(b), see *supra* note 13.

93. *See* SENATE REPORT, *supra* note 91; Thompson, *supra* note 22, at 1204.

verdict finality and judicial integrity. The legislative history of Rule 606(b) suggests that a fairly diffuse accommodation was obtained, and the ambiguous wording of the Rule makes it difficult to interpret.[94]

As an attempt to assist lower courts in interpreting the Rule, the Federal Rules Advisory Committee and the House Judiciary Committee, rather than defining the offending conduct specifically, gave several examples of events that in their opinions would not constitute "extraneous prejudicial information" or "improper outside influence." The Advisory Committee suggested that compromise verdicts, quotient verdicts, speculation about insurance coverage, or misunderstanding of juror instructions were not "extraneous prejudicial information."[95] The House Judiciary Committee recommended that verdicts decided by lot or chance were not to be considered among those arrived at by an "improper outside influence."[96]

A great deal of litigation followed the enactment of Rule 606(b). Courts interpreting these two key phrases struggled to fashion their own definitions to fill the void left by the Advisory Committee. For example, one court interpreted "extraneous influence" to include the receipt by jurors of news items or other " 'extra-record facts about the case,' " communications between the jurors and third parties, or partial statements by the court.[97] Other courts have construed "extraneous prejudicial information" as receipt by the jury of information, other than that received at trial, that is specific to the case. Examples include a juror who relates his impressions of personal experience,[98] the results of an experiment he conducted relevant to an issue in the case,[99] unauthorized viewings of a site,[100] or knowledge acquired from the news media.[101] Courts have recognized "improper outside influences" when there were blatant attempts to bribe, threaten, or influence jurors.[102] However, it is not clear why congressmen debating Rule 606(b) and subsequent court decisions applying it have concluded that the jury's use of a procedure based on chance is not an outside influence on the verdict.[103]

---

94. For example, one commentator has noted that if jurors were to arrive at a verdict by flipping a coin, such evidence could be construed as admissible by categorizing the method as an outside influence, contrary to the intentions of Congress. Thompson, *supra* note 22, at 1204.

95. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 266 advisory committee's note, subdivision (b) (1973).

96. HOUSE REPORT, *supra* note 90, at 167.

97. United States v. Homer, 411 F. Supp. 972, 977 (W.D. Pa. 1976) (quoting Government of V.I. v. Gereau, 523 F.2d 140, 150 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976)), *aff'd*, 545 F.2d 864 (3d Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

98. *See* Haley v. Blue Ridge Transfer Co., 802 F.2d 1532, 1534, 1538 (4th Cir. 1986).

99. *See In re* Beverly Hills Fire Litigation, 695 F.2d 207, 211-13 (6th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983).

100. Aluminum Co. of Am. v. Loveday, 273 F.2d 499, 499-500 (6th Cir. 1959), *cert. denied*, 363 U.S. 802 (1960).

101. *See* United States v. Bruscino, 687 F.2d 938, 940 (7th Cir. 1982) (en banc), *cert. denied*, 459 U.S. 1228 (1983).

102. *See* Krause v. Rhodes, 570 F.2d 563, 566-67 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); Stimack v. Texas, 548 F.2d 588, 588-89 (5th Cir. 1977).

103. *See supra* note 94 and accompanying text; 3 J. WEINSTEIN & M. BERGER, *supra* note 35, ¶ 606[04], at 606-49 to -50.

The arbitrary nature of the distinction between "inside" and "outside" influence is further demonstrated by *Government of the Virgin Islands v. Gereau*.[104] Defendant in *Gereau* attempted to present juror affidavits allegedly demonstrating that the verdict was influenced by two rumors jurors had heard from outside sources. The first rumor concerned killings that had taken place during the trial; the second alleged that the FBI was investigating the jurors' families. A third rumor, attributable to no identifiable outside source, alleged that someone was investigating the past conduct of three of the jurors themselves.[105] The United States Court of Appeals for the Third Circuit concluded that the first two rumors could only be considered extraneous influences, and thus competent evidence, if they "carried the coercive force of threats or bribery," which they did not.[106] However, juror testimony as to the third rumor could never be considered competent because it was not an "intra-jury discussion."[107] The distinction probably would seem largely academic to a juror who has heard alleged threats from whatever source, because the seriousness and credibility of the threat would seem more likely to effect the juror's decision. A rule of competency amounting to an exclusionary rule, foreclosing consideration of threats primarily based on whether their source is inside or outside the jury room, seems a blunt instrument to determine the magnitude of the influence.

More recently, the Supreme Court in *Tanner v. United States*[108] held that a continuing binge of drug and alcohol abuse, engaged in collectively by several jurors, was not an outside influence.[109] Justice O'Connor, for the majority, interpreted the internal/external dichotomy to mean that physical location was not the controlling factor: "The distinction was not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based upon the nature of the allegation."[110] The Court gave examples: a newspaper read inside the jury room was an external influence, even though it occurred physically within the confines of the room; but a juror's inability to comprehend the instructions of the court was an internal matter, even though it manifested itself in open court.[111] Having set out these illustrations, the Court identified what it considered "most significant" about the previous decisions as they applied to the case before it. The Court stated flatly that "allegations of the physical or mental incompetence of a juror [are treated] as 'internal' rather than 'external' matters."[112] The Court's examples involved juror insanity, sleep deprivation, illness, and inability to understand English.[113] The opinion did not develop the arguable distinctions between

104. 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).
105. *Id.* at 151-52.
106. *Id.* at 152.
107. *Id.*
108. 107 S. Ct. 2739 (1987); *see supra* text accompanying notes 1-12 (outlining facts in *Tanner*).
109. *Id.* at 2750.
110. *Id.* at 2746.
111. *Id.*
112. *Id.*
113. *Id.* at 2747-48.

those irregularities and the pervasive multiple-juror conduct, described as "one big party," at issue in *Tanner*.

The most troublesome aspect of this reasoning, however, is the absence of a test explaining what elements in the "nature of the allegations" make the difference between irregularities that will qualify as "external" and those that will not. Why is the influence of a multiple-juror drug and alcohol binge "internal"—like insanity—rather than "external"—like the influence of a newspaper shared by jurors?[114] The Court did buttress its reasoning by citing references in the legislative history to the policies underlying Rule 606(b) and, in one passage, to intoxication of individual jurors as excludable.[115] Here again, however, no reasonable test emerges to distinguish internal from external misconduct. The *Tanner* Court brought the matter full circle by acknowledging that " 'substantial if not wholly conclusive evidence of incompetency' " might qualify as showing external influence.[116] The opinion in *Tanner* thus leaves open the possibility that a jury composed of twelve blind drunks at the time of deliberations might be the proper subject of inquiry. But the Court compounds the confusion, because a change in the "nature of the allegation"—as opposed to a difference in degree—is difficult to perceive.

In addition, many questions still are left unanswered in the interpretation of Rule 606(b). For example, criminal cases continue to pose a special problem in the application of the Rule, because the accused in such cases has the additional constitutional protections of the sixth and fourteenth amendments.[117] Such protections arguably tilt the balance in favor of the accused's right to receive a fair trial when weighed against the public policy of reducing jury harassment and increasing verdict stability and judicial integrity.

A disturbing context involving the issue of jury misconduct in criminal cases occurs when a juror manifests racial bias during deliberations. Although racial bias is difficult to classify as either "extraneous" information or an "outside" influence under the reasoning of courts that have considered the issue, it is clear that in egregious cases the resulting misconduct might offend fundamental fairness even though the legislative history of Rule 606(b) argues for juror privacy.[118] For example, in *Smith v. Brewer*[119] petitioner sought a new trial on the basis of one juror's testimony about internal pressures to convict,

114. At least one commentator has pointed out that some courts have viewed juror intoxication as an "outside influence," rather than a matter internal to the workings of the jury deliberation process. *See* Mueller, *supra* note 16, at 952 & n.126 (citing Faith v. Neeley, 41 F.R.D. 361, 364-66 (N.D. W. Va. 1966); Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947) (dictum)).

115. *Tanner*, 107 S. Ct. at 2748-49.

116. *Id.* at 2750-51 (quoting United States v. Dioguardi, 492 F.2d 70, 80 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974)).

117. *See* Thompson, *supra* note 22, at 1209 ("Recent Supreme Court decisions have recognized an accused's constitutional rights in the decisionmaking process and cast substantial doubt on whether the rule has any applicability in criminal cases.").

118. *See* Mueller, *supra* note 16, at 942 n.93. Mueller argues that "egregious racial or ethnic prejudice" exhibited by jurors might be barred by Rule 606(b): "[S]uch proof arguably goes to the 'effect' of something upon the minds of such jurors, or the 'mental processes' of these jurors. On the other hand, it is again at least arguable that such considerations amount to 'outside influence' as to which impeaching evidence should be allowed." *Id.* at 942.

racial remarks made during deliberations, and a comparison by one of the jurors with a previous jury experience.[120] The United States District Court for the Southern District of Iowa concluded that Rule 606(b) deemed evidence of internal pressures and racial bias incompetent, but received evidence of a juror's comparison of the case with another trial.[121] The court speculated, however, that if the racially biased remarks were likely to have prejudiced the case, the court might have considered such testimony competent, notwithstanding the apparent import of Rule 606(b).[122]

The difficulty with Rule 606(b) is that it embodies a delicate political compromise camouflaged by ambiguous language, rather than an expression of consistent policy considerations. The Rule actually conceals the accommodation, struck first by the Advisory Committee and then by Congress, between an accurate process for seeking truth and a stable jury system. These two considerations often diverge; when they do, the words of the Rule actually distract the court from examining the underlying policies that might provide guidance in close cases. Meanwhile, courts continue to confuse the issue of competency of juror testimony with the question whether the alleged misconduct merits remedial action, and they stretch the language of the Rule to allow for more liberal interpretation in criminal cases.

II. RESTRICTIONS ON INFORMATION-GATHERING AND JUDGING OF INFORMATION ON JURY MISCONDUCT

A. *The Trial Court's Ability to Suppress Posttrial Investigation of Jury Misconduct*

Prevention of posttrial juror harassment or persuasion is frequently identi-

119. 444 F. Supp. 482 (S.D. Iowa), *aff'd*, 577 F.2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978).

120. *Id.* at 485. The internal pressure to convict consisted of several jurors who repeatedly "screamed and . . . yelled" at the recalcitrant juror, asking, "What's wrong with you? Are you blind that you can't see the evidence on the table? And is there anything wrong in your personal love? Do you love your Bible? If you do, you know there are some things in there, some facts that you have to accept." Another juror argued that "the evidence in a prior murder trial on which he sat as a juror was not as strong as that in petitioner's case, 'but we got a conviction.' " One other juror recalled an earlier trial in which petitioner's lawyer, a black man, had "gotten down on the floor." The juror relating the story stated that "it really was quite funny." A different juror then mimicked the lawyer, "strutting," imitating a black minstrel, and using a black dialect to repeat some of the things the petitioner's lawyer had said during the trial. *Id.*

121. *Id.* at 487-88, 490. The court held that jurors' applying strong pressure for conviction on other jurors has traditionally been considered incompetent evidence under Rule 606(b). The court noted that, when the trial judge polled the jury, the recalcitrant juror remained silent, thus assenting to the verdict. *Id.* at 487-88. The court also reasoned that the juror's remark comparing the case under consideration with another trial in which he had been involved raised the question whether jurors received extraneous information, but that its effect on the verdict was "de minimis" because the juror recited no "factual analogies between the two cases" and it was an "isolated, offhand remark." *Id.* at 490-91.

122. *Id.* at 490. The court interpreted the legislative history of Rule 606(b) as rejecting a standard that would permit inquiry into objective matters that were discussed in the jury room. However, the court cited McDonald v. Pless, 238 U.S. 264 (1915), for the proposition that " 'there might be instances in which such testimony of the juror could not be excluded without "violating the plainest principles of justice." ' " *Brewer*, 444 F.2d at 490 (quoting *McDonald*, 238 U.S. at 268-69). For discussion of *McDonald*, see *supra* text accompanying notes 71-78.

fied as one of the most important policies that legitimately supports American adaptations of the Mansfield Rule, including Rule 606(b).[123] But Rule 606(b), like the Mansfield Rule, is primarily a rule of competency[124] or, in other words, an evidentiary exclusionary rule. As such, it is related only indirectly to the problems of juror harassment or persuasion. Nothing in its language guides a court in determining the real issues related to posttrial harassment—that is, whether and under what conditions losing litigants should be permitted to conduct exploratory posttrial juror interviews, or whether and under what conditions courts should allow follow-up investigations once preliminary information about misconduct appears.[125] Yet these difficulties are not impervious to solution. In actuality, the former problem is resolved in part by local federal rules; the latter problem is discussed in case law. The results, however, are not uniform.

1. Local Rules Granting the Trial Court Authority to Supervise the Investigation of Jury Misconduct

The local rules that govern the investigation of jury misconduct in federal district courts, including those that explicitly require prior trial court approval, vary substantially. For example, a local rule of the Middle District of Louisiana tersely provides that "[a]bsent an order of the Court, no juror shall be interviewed by anyone at any time concerning the deliberations of the jury."[126] The rules of the Northern and Southern Districts of Mississippi, on the other hand, include a more comprehensive directive:

> *Communication with Jurors.* Upon the return of a verdict by the jury in any civil or criminal action, neither the attorneys in the action nor the parties may, in the courtroom or elsewhere, express to the members of the jury their pleasure or displeasure with the verdict. After the jury has been discharged, neither the attorneys in the action nor the parties shall at any time or in any manner communicate with the jury or any member thereof regarding the verdict. Provided, however, that if any attorney believes in good faith that the verdict may be subject to legal challenge, such attorney may apply ex parte to the trial judge for permission to interview one or more members of the jury regarding any fact or circumstance claimed to support such legal challenge. If satisfied that good cause exists, such judge may grant permission for the attorney to make the requested communication and shall prescribe the terms and conditions under which the same may be conducted.[127]

Local rules also vary considerably in other respects. Although most rules specif-

123. *Tanner*, 107 S. Ct. at 2747-48; *McDonald*, 238 U.S. at 267; United States v. Schwartz, 787 F.2d 257, 262 (7th Cir. 1986); Michaels v. Michaels, 767 F.2d 1185, 1205 (7th Cir. 1985); Government of V.I. v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); United States v. Dioguardi, 492 F.2d 70, 79-80 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974).

124. 3 J. WEINSTEIN & M. BERGER, *supra* note 35, ¶ 606[04], at 606-25.

125. 3 J. WEINSTEIN & M. BERGER, *supra* note 35, ¶ 606[06], at 606-64 to -68.

126. U.S. DIST. CT. M.D. LA. R. 16A(5).

127. U.S. DIST. CT. N.D. MISS. R. 1(b)(4); U.S. DIST. CT. S.D. MISS. R. 1(b)(4).

ically prohibit attorneys from contacting jurors without court approval after a verdict is rendered,[128] several require that this approval be obtained before the jurors are discharged.[129]

To obtain approval, some local rules mandate the filing of a written petition with the trial court,[130] but most do not.[131] Regardless of whether a written petition to interview is required, a few local rules require the judge to set appropriate limitations on the inquiry before granting an attorney leave to interview a juror.[132] In most other jurisdictions, the trial judge is not required to set limitations on the inquiry but probably may do so under her implied authority to prevent juror harassment.[133]

Local rules also may be distinguished on the basis of whether they prohibit only the attorneys from contacting jurors, or whether that prohibition extends to parties, friends, and representatives of persons involved in the litigation.[134] A few local rules permit juror contact through written interrogatories,[135] although most rules contemplate oral questioning. Surprisingly, many rules do not address the question whether opposing counsel must be notified of a petition to interview.[136] Several rules, however, specifically grant opposing counsel an opportunity to be heard as to whether leave should be granted.[137]

Perhaps the most striking difference in local rules is between those rules

---

128. *See, e.g.*, U.S. DIST. CT. N.D. TEX. R. 8.2(e); U.S. DIST. CT. W.D. TENN. R. 19; U.S. DIST. CT. W.D. WASH. R. 47(b); U.S. DIST. CT. N.D. W. VA. R. 1.19. *But see* U.S. DIST. CT. E.D.N.C. R. 6.03 (prohibiting only contacts calculated to harass or embarrass juror or influence future jury service).

129. *See, e.g.*, U.S. DIST. CT. E.D. TEX. R. 10(b); *cf.* U.S. DIST. CT. D.C. R. 115(b) (if no request made before discharge, permission will be granted only "for good cause shown in writing").

130. *See, e.g.*, U.S. DIST. CT. S.D. ALA. R. 12; U.S. DIST. CT. KAN. R. 23A.

131. *See, e.g.*, U.S. DIST. CT. N.D. MISS. R. 1(b)(4); U.S. DIST. CT. S.D. MISS. R. 1(b)(4); U.S. DIST. CT. W.D. TENN. R. 19; U.S. DIST. CT. N.D. W. VA. R. 1.19.

132. U.S. DIST. CT. N.D. MISS. R. 1(b)(4); U.S. DIST. CT. S.D. MISS. R. 1(b)(4); U.S. DIST. CT. W.D. TENN. R. 19. The local rules for the District of Columbia permit the district judge to require that any juror be questioned "only in the presence of the court." *See* U.S. DIST. CT. D.C. R. 115(b).

133. *See, e.g.*, U.S. DIST. CT. N.D. W. VA. R. 1.18; U.S. DIST. CT. S.D. OHIO R. 5.6.

134. The following jurisdictions prohibit only parties or their attorneys from contacting jurors: U.S. DIST. CT. D.C. R. 115(b); U.S. DIST. CT. N.D. MISS. R. 1(b)(4); U.S. DIST. CT. S.D. MISS. R. 1(b)(4); U.S. DIST. CT. E.D. TEX. R. 10. The following jurisdictions specifically extend the prohibition to representatives of the parties or attorneys seeking contact: U.S. DIST. CT. KAN. R. 23A ("lawyers, . . . their agents or employees"); U.S. DIST. CT. W.D. LA. R. 16 ("attorney or any party[,] . . . investigator or other person acting for him"); U.S. DIST. CT. E.D.N.C. R. 6.03 ("attorney or party litigant[,] . . . investigator or any person acting for [him]"); U.S. DIST. CT. MD. R. 25A ("attorney or party, . . . through any investigator or other person acting for him"); U.S. DIST. CT. E.D. MO. R. 16(D) ("attorney or any party . . . or . . . any other person"); U.S. DIST. CT. N.J. R. 19(B) ("attorney or party[,] . . . investigator or other person acting for such attorney or party"); U.S. DIST. CT. S.D. OHIO R. 5.6 ("attorney[,] . . . any investigator or other person acting for him"); U.S. DIST. CT. M.D. TENN. R. 12(h) ("attorney, party, or representative"); U.S. DIST. CT. W.D. TENN. R. 19 ("attorney, party, or representative"); U.S. DIST. CT. N.D. W. VA. R. 1.19 ("party, his agent or his attorney or any other person acting for them").

135. *See* U.S. DIST. CT. ARIZ. R. 12(b); U.S. DIST. CT. WYO. R. 411.

136. In fact, at least one set of local rules specifically permits litigants to apply *ex parte* to the court for permission to interview jurors after the trial. U.S. DIST. CT. N.D. MISS. R. 1(b)(4); U.S. DIST. CT. S.D. MISS. R. 1(b)(4).

137. *See, e.g.*, U.S. DIST. CT. N.D. W. VA. R. 1.19; *cf.* Remmer v. United States, 347 U.S. 227, 230 (1954) (case remanded to the district court to conduct a hearing "with all interested parties permitted to participate").

that require the moving attorney to show good cause before being allowed to interview jurors[138] and those that set no standard for the trial judge to follow.[139] In good cause jurisdictions the rules do not indicate how a losing litigant can show good cause without first conducting the interview he is petitioning to obtain.[140] Presumably, a chance remark overheard by a party, physical evidence of misconduct left in the jury room, or testimony from nonjury witnesses might constitute good cause, although appellate opinions do not directly address this issue and tend to uphold the trial court's exercise of discretion without reasoned analysis.[141] Nonetheless, by impliedly requiring a fully independent source before leave to interview is granted, the local rules that require good cause often indicate that the existence of proof cannot be investigated unless the existence of some proof already is known.

2. Jurisdictions With No Local Rules Concerning Jury Interrogation

In the few federal jurisdictions that have no local rules prohibiting a losing litigant from interviewing jurors after trial, the appellate courts have developed principles to govern trial court actions. For example, the United States Court of Appeals for the Fifth Circuit observed that it historically has required a showing of specific instances of misconduct before requiring the trial judge to allow interrogation.[142] Motions for leave to interview that are mere "fishing expeditions" based on the hope of impeaching the verdict have been disallowed in favor of protecting the jury from harassment, saving the courts from time-consuming and futile proceedings, and increasing the certainty of verdicts.[143]

Other jurisdictions, such as the United States Court of Appeals for the Second Circuit, have declined the invitation to formulate guidelines governing the entire subject of postverdict interrogation of jurors, but have granted the trial judge the authority to direct that all interrogation be conducted under court

138. *See, e.g.*, U.S. DIST. CT. KAN. R. 23A; U.S. DIST. CT. E.D. MO. R. 16(D); U.S. DIST. CT. N.J. R. 19(B); U.S. DIST. CT. S.D. OHIO R. 5.6.

139. *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108 (1980) ("the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service") *and* U.S. DIST. CT. E.D.N.C. R. 6.03 (prohibition against asking questions "calculated merely to harass," "embarrass," or "influence" jurors or their families) *with* U.S. DIST. CT. E.D. TEX. R. 10(b) (granting attorney right to obtain leave of court to interview jurors after verdict, but setting no standard by which such leave should be granted).

140. *See, e.g.*, U.S. DIST. CT. W.D. LA. R. 16 (prohibiting attorneys from contacting jurors without showing good cause to do so); U.S. DIST. CT. N.D. MISS. R. 1(b)(4) (prohibiting attorneys from contacting jurors unless attorney "believes in good faith that the verdict may be subject to legal challenge").

141. *See, e.g.*, O'Rear v. Fruehauf Corp., 554 F.2d 1304, 1309-10 (5th Cir. 1977); United States v. Riley, 544 F.2d 237, 242 (5th Cir. 1976) ("Historically, interrogations of jurors have not been favored by federal courts except where there is some *showing* of illegal or prejudicial intrusion into the jury process."), *cert. denied*, 430 U.S. 932 (1977).

142. *See* Haeberle v. Texas Int'l Airlines, 739 F.2d 1019, 1021 (5th Cir. 1984); *see also* Maldonado v. Missouri Pac. Ry., 798 F.2d 764, 769 (5th Cir. 1986) ("the party seeking to question jurors post-verdict must make a 'preliminary showing of misconduct' ") (quoting Wilkerson v. AMCO Corp., 703 F.2d 154, 186 (5th Cir. 1983)), *cert. denied*, 107 S. Ct. 1571 (1987).

143. Big John, B.V. v. Indian Head Grain Co., 718 F.2d 143, 150 (5th Cir. 1985) (citing Wilkerson v. AMCO Corp., 703 F.2d 184, 185-86 (5th Cir. 1983)).

supervision.[144] The Second Circuit Court of Appeals has expressly afforded the trial court broad discretion to control the manner of inquiry.[145] In this regard, it has specifically approved of trial court orders that have required the postverdict jury questioning to be done in open court.[146] The Second Circuit has also approved orders that have allowed depositions when opposing counsel has been given the right to object to improper questions, and orders that have passed in advance on the questions to be propounded.[147] Occasionally, courts have even suggested that postverdict interviews of jurors by trial counsel are unethical and have found it necessary to restrict the process by injunction.[148] In sum, there is little uniformity among jurisdictions either with or without local federal rules, although a trial judge probably can be confident of appellate approval if he directs any postverdict interrogation of jurors to be conducted under his supervision.[149]

3. American Bar Association Standards

To complicate the problem, numerous district courts have published rules adopting the American Bar Association's Model Code of Professional Responsibility, which contains standards of conduct governing posttrial jury interrogation.[150] Disciplinary Rule 7-108 of the Code provides:

> After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.[151]

However, countervailing considerations are such that this provision raises as many questions as it answers. The American Bar Association (ABA) Committee on Professional Ethics, in Formal Opinion 319, interpreted this provision as being in harmony with the lawyer's duty zealously to represent his client. In pursuit of such representation, the ABA Committee wrote that a lawyer "must

144. Miller v. United States, 403 F.2d 77, 81-82 (2d Cir. 1968); United States v. Brasco, 385 F. Supp. 966, 970 n.5 (S.D.N.Y. 1974), *aff'd*, 516 F.2d 816 (2d Cir.) (per curiam), *cert. denied*, 423 U.S. 860 (1975).

145. *See* King v. United States, 576 F.2d 432, 439 (2d Cir.), *cert. denied*, 439 U.S. 850 (1978).

146. *See* Miller v. United States, 403 F.2d 77, 82 (2d Cir. 1968) (citing Remmer v. United States, 347 U.S. 227 (1954)).

147. *See id.*

148. United States v. Driscoll, 276 F. Supp. 333, 339-40 (S.D.N.Y. 1967).

149. *See* United States v. Brasco, 516 F.2d 816, 819 n.4 (2d Cir.) (per curiam), *cert. denied*, 423 U.S. 860 (1975).

150. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-29 to -31 (1980). This canon has been redrafted as Rule 3.5(b) of the MODEL RULES OF PROFESSIONAL CONDUCT, which states:

> RULE 3.5 Impartiality and Decorum of the Tribunal
>
> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person except as permitted by law; or
>
> (c) engage in conduct intended to disrupt a tribunal.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5(b) (1987).

151. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (1980).

have the tools for ascertaining whether or not grounds for a new trial exist."[152] Thus, the opinion concluded that "it is not unethical for [the lawyer] to talk to and question jurors [as long as the lawyer does not] harass, entice, induce or exert influence on a juror to obtain his testimony."[153]

This formulation largely begs the question because it does not distinguish the point at which well-intended but persistent interrogation, designed to improve a losing litigant's position, should give way to considerations of jury harassment, verdict finality, and judicial integrity. Furthermore, the ABA Rule and Formal Opinion 319 do not identify the procedures by which the court should prevent, consider, or redress violations. A partial answer to these questions can be found in *United States v. Driscoll*,[154] a decision that preceded adoption of Rule 606(b), in which defense counsel hired a private investigator to question jurors about how they reached their verdict. The investigator had conducted telephone conversations with three of the jurors and a personal interview with a fourth. On the Government's petition for an injunction against these activities, the United States District Court for the Southern District of New York held that an injunction should issue, because the "apparent . . . purpose was . . . 'to browse among . . . thoughts [of the jurors] in search of something to invalidate their verdict.' "[155] Despite defense claims that such browsing would substantially contribute to improving defense counsel's legal abilities, the court concluded that the duty of zealous representation does not imply the authority to conduct exploratory posttrial interviews of jurors in the absence of concrete indications of misconduct.[156] In other words, the court's concern for protecting the integrity of the jury system prevailed over the litigants' interests in zealous representation.

Generally, however, courts have not distinguished these two objectives to any great extent. Most cases refuse to give great weight to the trial technique improvement argument in favor of protecting jurors from the pressure of public disclosure of their deliberations.[157] Nonetheless, the American Bar Association's standards have created conflict in interpreting the extent to which information admissible under Federal Rule of Evidence 606(b) should be investigated, especially in those jurisdictions in which Canon 7 or its successor in the Model Rules of Professional Conduct is enforced by statute or court rule.

B. *Procedures for Determining Misconduct*

Just as there are no uniform rules governing the acquisition of evidence of jury misconduct through posttrial jury interviews, there are no rules specifically governing the procedure for reviewing evidence of misconduct once

152. ABA Comm. on Professional Ethics and Grievances, Formal Op. 319 (1968).
153. *Id.*
154. 276 F. Supp. 333 (S.D.N.Y. 1967).
155. *Id.* at 338 (quoting State v. LaFera, 42 N.J. 97, 106-07, 199 A.2d 630, 635 (1964)).
156. *Id.*
157. *See, e.g.*, Haeberle v. Texas Int'l Airlines, 739 F.2d 1019, 1021-22 (5th Cir. 1984) (denial of motion to interview jurors to educate counsel upheld).

presented.[158] The usual way in which allegations of juror misconduct are presented is through a motion for a new trial.[159] However, the time limitations on this particular procedural device are relatively short,[160] and because some misconduct comes to the attention of litigants months or even years after the verdict, courts have permitted parties to make a case for a new trial by means of attacks on the judgment.[161] The party making a preliminary showing usually is granted a hearing at the discretion of the trial court.[162] This hearing is a constitutional requirement in criminal cases.[163] Occasionally, the matter has been resolved *in camera*,[164] but often it is conducted in court in the presence of counsel for both sides and juror-witnesses.[165]

The burden of demonstrating both misconduct and harm under Rule 606(b) is on the moving party,[166] but under some circumstances that party is aided by presumptions of prejudice. For example, improper communication between jurors and any third party in criminal cases frequently has been found presumptively prejudicial, with the burden shifting to the government once the communication has been established to show that the contact was harmless.[167] On occasion, when confronted with especially blatant attempts to influence a jury, courts also have held certain kinds of misconduct presumptively prejudicial in civil cases,[168] but these holdings are the exception.

---

158. Mueller, *supra* note 16, at 960.

159. FED. R. CIV. P. 59; FED. R. CRIM. P. 33; *see* Holden v. Porter, 405 F.2d 878, 879 (10th Cir. 1969) (per curiam).

160. In a civil case, motions for new trial must be filed within ten days after entry of judgment. FED. R. CIV. P. 59. In a criminal case, such motions must be filed within seven days of judgment, unless based on newly discovered evidence. FED. R. CRIM. P. 33. At least one court has held that improper communications between a juror and a third party during deliberations is newly discovered evidence for purposes of FED. R. CRIM. P. 33. *See* Holmes v. United States, 284 F.2d 716, 719 (4th Cir. 1960); United States v. Mitchell, 410 F. Supp. 1201, 1202 (D.D.C. 1976), *aff'd*, 559 F.2d 31 (D.C. Cir.), *cert. denied*, 431 U.S. 933 (1977).

161. *See* FED. R. CIV. P. 60(b); 28 U.S.C. § 2255 (1982). Rule 60(b)(2) provides that a motion for relief of judgment made within one year after judgment is allowed on the ground of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." FED R. CIV. P. 60(b)(2). In addition, Rule 60(b) permits a party to bring an independent action for relief at any time after judgment. *Id.*

162. United States v. Chiantese, 582 F.2d 974, 978 (5th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979); United States v. Hendrix, 549 F.2d 1225, 1227-29 (9th Cir.), *cert. denied*, 434 U.S. 818 (1977).

163. Remmer v. United States, 347 U.S. 227, 229 (1954).

164. The practice of holding such hearings *in camera* was not deemed reversible error when the appellant was unable to show prejudice as a result of such a hearing. *See* United States v. Parker, 549 F.2d 998, 1000 (5th Cir. 1977). However, dicta frequently has indicated that the better practice is to conduct the hearing with express consent of counsel or with counsel present. *Id.*; *see also* United States v. Bufalino, 576 F.2d 446, 450-51 (2d Cir. 1978) (rejecting claim that defendant was denied his rights where judge held *voir dire* of jurors in chambers after counsel agreed not to be present), *cert. denied*, 439 U.S. 928 (1978).

165. *See Remmer*, 347 U.S. at 230.

166. Maldonado v. Missouri Pac. Ry., 798 F.2d 764, 769 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1571 (1987); Martinez v. Food City, Inc., 658 F.2d 369, 373 (5th Cir. 1981); Government of V.I. v. Gereau, 523 F.2d 140, 148, 153-54 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

167. *Remmer*, 350 U.S. at 379; Mattox v. United States, 146 U.S. 140, 150 (1892); United States v. Doe, 513 F.2d 709, 711 (1st Cir. 1975); United States v. Ferguson, 486 F.2d 968, 971 (6th Cir. 1973).

168. *See* Haley v. Blue Ridge Transfer Co., 802 F.2d 1532, 1535 (4th Cir. 1986); Hobson v. Wilson, 737 F.2d 1, 48-49 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); Krause v. Rhodes,

In the majority of cases, however, the trial judge must make a determination unaided by presumptions and without any inquiry into the actual effect of the alleged extraneous prejudicial information or improper influences on the jury.[169] Courts have correctly reasoned that because losing litigants are prohibited from presenting evidence of the mental or emotional processes of jurors, the trial judge should likewise be barred from making such inquiries and may only determine prejudice by drawing reasonable inferences.[170] In short, the trial judge must attempt to reach a subjective conclusion based on objective facts. Although this approach is not entirely satisfactory, it has the advantage of consistency.

In summary, the gap left by Rule 606(b) between regulating jury interviews and judging the degree of prejudice once a hearing is obtained has been filled to some degree by an overlay of local federal rules, the ABA Model Code of Professional Responsibility, and decisional law. There appears to be a trend toward liberally granting interviews subject to supervision by the court.[171] There also appears to be a trend toward new trials in criminal cases upon a lesser showing of prejudice that may result from jurors' exposure to extraneous prejudicial information or improper influences, because of a criminal defendant's additional constitutional protections.[172] However, when viewed as a whole, the process of investigating and judging jury misconduct is not uniform and sometimes is irrational. This result follows from the absence of policy-related guidelines in interpreting Rule 606(b) and from the effort, embodied in that Rule, to regulate conflicting goals by an ambiguously worded exclusionary principle enunciated in terms of witness competence.[173]

III. THE RULE 606(b) EXCLUSIONARY PRINCIPLE, JURY INVESTIGATION RULES, AND PUBLIC POLICY: SUGGESTIONS FOR REVISION

Courts and commentators seldom have analyzed seriously the interdependence of Rule 606(b) and local rules regulating jury interviews. In fact, the two kinds of rules should work in harmony, as parts of a single effort to achieve the policy goals of each. Part of the difficulty with Rule 606(b) is that it does not reflect a harmonized approach. Furthermore, consistent application of the Rule is impeded by Congress' adoption of catchphrases originating in early decisions, rather than language that would narrow and focus the unavoidable policy choices. For these reasons, it would be desirable to redraft both Rule 606(b) and

570 F.2d 563, 567-68 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978). However, there is a general presumption that the verdict is valid. United States v. Robbins, 500 F.2d 650, 653 (5th Cir. 1974).

169. Maldonado v. Missouri Pac. Ry., 798 F.2d 764, 769 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1571 (1987); Martinez v. Food City, Inc., 658 F.2d 369, 373 (5th Cir. 1981); United States v. Howard, 506 F.2d 865, 869 (5th Cir. 1975).

170. *See Howard*, 506 F.2d at 869.

171. *See* Rushen v. Spain, 464 U.S. 114 (1983); Smith v. Phillips, 455 U.S. 209 (1982).

172. *See Rushen*, 464 U.S. at 118-19.

173. One commentator has noted, "The attempt to effectuate significant policy considerations affecting vital substantive rights by rules of competency is like trying to eat soup with a fork. Although by proper manipulation some nourishment can be supplied, the process is hit or miss with substantial and unacceptable side effects." Thompson, *supra* note 22, at 1221-22.

the procedural rules with which it operates, so that they would work in a unified manner and better reflect their underlying goals.

A. *The Policies at Issue*

1. Prevention of Juror Harassment and Postverdict Persuasion

Rule 606(b) and its antecedents often were justified by the need to prevent undue juror harassment[174] and postverdict persuasion.[175] These actually are separate concerns. First, every juror—whether strong-minded or weak-minded, whether in the minority or in the majority—should be free of offensive, inquisitional contacts.[176] Second, there is the possibility that losing attorneys effectively may be able to retry their cases by pressuring jurors who were reluctant to join in the verdict in the first place. Such pressure could cause reluctant jurors to recall differently or to attach a different significance to events during deliberations.[177] Although Rule 606(b) has been justified by these considerations, such a justification is unpersuasive. As an exclusionary principle, Rule 606(b) actually is a poor vehicle for achieving the goals of avoiding juror harassment and postverdict persuasion because the Rule addresses them only indirectly, and rules regulating jury investigation are likely to be far more effective in this regard.

2. Efficient Allocation of Judicial Resources, and Judicial Integrity

Trial judges may accurately conclude that their time is inappropriately used if they are frequently called on to decide marginal jury misconduct claims. The energy and motivation of a skillful trial lawyer who has lost a jury trial is not to be underestimated. An adverse jury verdict is a painful event, combining personal rejection and professional failure with injury to the client who relied on the lawyer. The losing trial lawyer, therefore, may have an unusually strong inclination to search vigorously for misconduct, attribute the loss to it, and construct arguments maximizing the effect of marginal violations, even as she searches her own mind for the cause of the verdict. For these reasons, open reception of evidence of jury misconduct would consume judicial resources inefficiently. Furthermore, the result would pressure the judiciary on a policy consideration separate from the merits of the case. Because instances of minor jury misconduct are common, judges who freely heard them would frequently be placed in the position of finding violations but denying new trials. The American revisions of the Mansfield Rule are supported by the theory that repeated decisions of this kind would undermine judicial integrity.[178] Because this policy has some

174. *See Tanner*, 107 S. Ct. at 2747; McDonald v. Pless, 238 U.S. 264, 267-68 (1915) ("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."); Government of V.I. v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

175. *See* Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947).

176. *See Gereau*, 523 F.2d at 148.

177. *See* Mattox v. United States, 146 U.S. 140, 148 (1892).

178. *See Tanner*, 107 S. Ct. at 2747-48; People v. Hutchinson, 71 Cal. 2d 342, 348-50, 455 P.2d

importance and in any event has undeniably affected the jurisprudence, it should be openly recognized and integrated into new trial decisions based on jury misconduct. Thus, unlike the concern for jury harassment or persuasion, the policies of judicial efficiency and integrity can be protected only by an exclusionary rule that prevents the waste of judicial resources and reduces forced decisions about new trials.

3. Verdict Stability

An additional policy favors the stability of verdicts and judgments.[179] It is important that the judicial process succeed in resolving disputes, a goal that cannot be accomplished if the process is subject to unattainable standards. The United States Court of Appeals for the Second Circuit has stated the point succinctly:

> [I]t would be impracticable to impose the [requirement] of absolute perfection that no verdict shall stand unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test.[180]

The granting of new trials based on jurors' mental processes is prohibited because it would be anathema to stability; indeed, the setting aside of jury verdicts on any but the most egregious grounds would cost more in terms of stability and finality than it could possibly gain. For these purposes, neither an exclusionary rule nor restriction of jury investigation is absolutely necessary, although those approaches may work toward the goal by narrowing even the possibility of new trials. The more direct means of accomplishing this goal would be a procedural rule limiting new trials to instances of egregious misconduct.

4. Fairness, Perceived Fairness, and Accuracy in the Sense of Rational Truth-Seeking

A sensible approach also must take into account the policies opposing restrictions on investigation or evidence of jury misconduct. First, the trial process must be fair, and provide the parties with adequate opportunity to redress miscarriages of justice.[181] Second, and perhaps more importantly, the process must be perceived as fair by participants and observers. This objective implies that the ability to gather and present evidence in an ostensibly fair proceeding

---

132, 136-37, 78 Cal. Rptr. 196, 200-01, *cert. denied*, 396 U.S. 994 (1969); *see also* Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 888-92 (1983) (cited in *Tanner*, 107 S. Ct. at 2748) (supporting idea that postverdict scrutiny of jury misconduct undermines community trust in the judicial system).

179. *Tanner*, 107 S. Ct. at 2747-48 (citing Government of V.I. v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); United States v. Dioguardi, 492 F.2d 70, 79-80 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974)).

180. Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947).

181. *See* Carlson & Sumberg, *supra* note 20, at 271; Concannon, *Impeaching Civil Verdicts: Juror Statements as Prejudicial Misconduct*, 52 J. KAN. B.A. 201, 201-02 (1983).

has cathartic value. Last, there is the goal of accuracy.[182] Because this goal pertains to the decision on the merits, and an inquiry into jury misconduct is a step removed from the merits, accurate determination of new trial issues does not lead automatically to accurate determination of the issues at stake in the underlying litigation. Nevertheless, at some point improper influence or misconduct becomes sufficiently serious to interfere with the merits of a case. These countervailing objectives indicate that an exclusionary rule preventing proof of serious misconduct, or a rule preventing the investigation that would discover it, would be dysfunctional.

Interestingly, both the policies supporting restrictions on investigation or evidence of jury misconduct and the countervailing policies—although arguably conflicting in close cases—lead to the same conclusion. Instances of egregious misconduct or influence should be subject to investigation, proof, and decision, but lesser incidents should not be. In order to reach this result, Congress and the courts must coordinate the various rules and design different but more consistent standards.

B. *Narrowing but Retaining the Exclusionary Rule of 606(b)*

Exclusionary rules serve at least three different purposes. First, they may serve the judicial objective of a rational search for truth by excluding unreliable evidence, or by encouraging attorneys to present their evidence in the form that is most amenable to testing and evaluation. The hearsay rules,[183] certain competency principles,[184] and the application of Federal Rule of Evidence 403 to exclude unduly prejudicial evidence are examples. Second, an exclusionary rule may conserve judicial resources. Thus, Rule 403 allows the judge to exclude cumulative evidence, or evidence that will occasion an undue consumption of time.[185] Third, exclusionary rules are sometimes designed to achieve collateral

182. *See* People v. Hutchinson, 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196, *cert. denied*, 396 U.S. 994 (1969).

183. FED. R. EVID. 801-804; *see* C. MCCORMICK, *supra* note 20, § 244, at 725.

184. *See* C. MCCORMICK, *supra* note 20, §§ 61-69. The early common law had rigid and sometimes irrational rules for preventing certain witnesses from testifying. For example, the common law deemed incompetent persons who were insane, who had no religious beliefs, who had been convicted of a crime, or who were married to a party. The basis for these exclusions lay in the common-law theory that such witnesses, because of their possible bias or deficient mental or moral condition, were likely to give inaccurate or even perjured testimony. Under modern rules of evidence, such as Rule 601, all witnesses are deemed competent and cannot be disqualified on the grounds of religious belief, conviction of a crime, or having a connection with the litigation as a party, interested person, or spouse of a party or interested person. FED R. EVID. 601 advisory committee note. Nonetheless, trial courts have the discretion to disqualify a witness who is too young or too mentally infirm to tell the truth or coherently narrate events. In addition, many state jurisdictions still recognize the Dead Man's Statute as disqualifying a surviving party from testifying against the estate of the deceased concerning a transaction or communication with the deceased. G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 4.3 (2d ed. 1987). Thus, even in modern times, the policy of exclusion of unreliable evidence still supports the finding that certain narrow categories of witnesses are incompetent to testify.

185. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. McCormick concludes that "time-consumption is the fundamental reason to exclude relevant evidence." C. MCCORMICK, *supra* note 20, § 185, at 546 n.34.

purposes. The exclusionary rule that is an outgrowth of the fourth amendment to the Constitution is an example,[186] and to a lesser extent so is the parallel rule associated with the fifth amendment.[187] These principles are designed not to serve the goal of a rational search for truth, or the policy of judicial efficiency, but rather to enforce notions of proper police conduct and judicial integrity.[188] When exclusionary rules are used for collateral purposes, they can have great costs and can be inefficiently related to their objectives;[189] consequently, they should be narrowly tailored to achieve their purposes.

The exclusionary principle reflected in Rule 606(b) has been justified as serving each of these purposes. The Rule originated out of concern by common-law judges about unreliability, and continues to be supported by arguments respecting judicial efficiency and integrity, as well as the collateral purposes of preventing juror harassment, persuasion, and verdict instability. Rule 606(b) should be narrowly focused to achieve those purposes it actually can achieve.

1. The Disadvantages of Exclusionary Rules: A Blunderbuss Rather than a Scalpel

It may be useful to compare the exclusionary principle underlying Rule 606(b) with the exclusionary rule that is used in criminal cases as a means of enforcing the fourth amendment. The original justification for the latter exclusionary rule was to deter "official lawlessness in flagrant abuse [of the Constitution]."[190] By excluding the fruits of this kind of lawlessness, the courts presumably would deter future police misconduct and would, in effect, police the police.[191] Additionally, the Supreme Court believed that judicial integrity was impaired when courts allowed convictions to be based on tainted evidence obtained by the same governments of which the courts were a part.[192] Thus, from its onset the exclusionary rule in criminal cases had as its moving force the theories of deterrence of illegal police conduct and the protection of judicial integrity—purposes collateral to the goal of fair and accurate resolution of disputes.

Dissatisfaction with the fourth amendment exclusionary rule as a means of accomplishing these purposes has produced criticism throughout its history. The criticisms, although controversial, have sought to demonstrate that the rule cannot and does not accomplish its primary purpose of deterring illegal police

186. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

187. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

188. *Mapp*, 367 U.S. at 658-59 (1961) (exclusionary rule in search and seizure cases designed to deter illegal police conduct); *see also Miranda*, 384 U.S. at 467 (exclusionary rule in cases involving involuntary confessions by criminal defendants designed to deter coercion of confessions by police).

189. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215, 215 (1978).

190. *Mapp*, 367 U.S. at 655.

191. United States v. Leon, 468 U.S. 897, 916 (1983); Elkins v. United States, 364 U.S. 206, 223 (1960) (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("to declare that the Government may commit crimes in order to secure the conviction of a private criminal" would be far worse than to let the criminal go free)).

192. *See Mapp*, 367 U.S. at 660; *cf.* Olmstead v. United States, 277 U.S. 438, 470 (1927) (Holmes, J., dissenting) ("[F]or my part, I think it a less evil that some criminals should escape than that the Government should play an ignoble part.").

conduct.[193] Furthermore, there have been indications that the exclusionary rule has disproportionate costs, in terms of both inaccurate results and loss of public respect, relative to any benefits it produces.[194] In particular, notions of judicial integrity may be advanced by the exclusion of evidence produced by flagrant misconduct,[195] but when the same rule is applied to objectively reasonable searches conducted in good faith, it creates a widespread public belief that the criminal law is a mass of dysfunctional technicalities, a belief which thereby undermines judicial integrity.[196] It also has been argued that efficiency and accuracy are impaired by unavoidable complexity and frequent changes in the law governing an exclusionary principle. Thus, decisions in certain areas related to the fourth amendment (such as searches pursuant to automobile stops) have become diffuse, obscure, and difficult to predict.[197]

With these difficulties in mind, the Supreme Court granted certiorari in *Massachusetts v. Sheppard*[198] and its companion case, *United States v. Leon*.[199] Both cases arose out of searches that resulted from warrants which later were

193. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 678 (1970) (empirical study showing absence of deterrent effect and describing rationale as " 'fig leaf phrases used to cover naked ignorance' ") (quoting W. DURANT, THE STORY OF PHILOSOPHY 101 (1926)); S. SCHLESINGER, EXCLUSIONARY INJUSTICE 50-57 (1977); *cf.* COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, Rep. No. CGD-79-45 (Apr. 19, 1979) (GAO study); NATIONAL INSTITUTE OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982) (showing absence of deterrent effect). *Contra* United States v. Janis, 428 U.S. 433, 450-52 n.22 (1976) ("[n]o empirical researcher, proponent or opponent of the rule has yet been able to establish with any assurance whether the rule has a deterrent effect even in situations in which it is applied"); Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398 (1979) (arguing that rule does deter illegal police conduct).

194. *See* United States v. Leon, 468 U.S. 897, 907 (1984) (" 'unbending application of the exclusionary rule sanction to enforce ideals of governmental rectitude would impede unacceptably the truth finding functions of judge and jury' ") (quoting United States v. Payner, 447 U.S. 727, 734 (1980)); Stone v. Powell, 428 U.S. 465, 491 (1976) (indiscriminate application of the exclusionary rule may generate disrespect for the law and administration of justice).

195. *See, e.g.*, Davis v. Mississippi, 394 U.S. 721 (1969) (excluding from evidence fingerprints of defendant who was jailed after a dragnet arrest of anyone remotely suspected of having committed a crime); Beck v. Ohio, 379 U.S. 89 (1964) (excluding from evidence "numbers game tickets" taken from petitioner after he was arrested, when probable cause consisted solely of petitioner having a previous conviction).

196. One Supreme Court case recognized this danger:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

Synder v. Massachusetts, 291 U.S. 97, 122 (1934).

197. The fragmentation of search and seizure opinions is illustrated by the syllabus to one Supreme Court decision:

> Stewart, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II-B, II-C, and III, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, JJ., joined. . . . Powell, J., filed an opinion concurring in part and concurring in the judgment, in which Burger, C.J., and Blackmun, J., joined. . . . White., J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, JJ., joined.

United States v. Mendenhall, 446 U.S. 544, 546 (1980). These divisions are not unusual in search and seizure law. *See* Rose v. Lundy, 465 U.S. 509 (1982); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

198. 468 U.S. 981 (1983).

199. 468 U.S. 897 (1983).

found defective.[200] The lower courts had held the searches unconstitutional according to applicable law. In both instances, however, the Supreme Court recognized what has been termed the "good faith exception to the exclusionary rule" and admitted the fruits of the searches because the officers had acted in a manner that was both objectively reasonable and subjectively in good faith.[201] Significantly, the Court arrived at this determination by reasoning that the policies underlying the exclusionary rule were not served by its broader application. When the officer's objective conduct is reasonable, excluding the evidence will not affect his future conduct " 'unless it is to make him less willing to do his duty.' "[202] The *Leon* Court also was concerned with the costs that were borne by society when evidence was suppressed, and commented that "unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of judge and jury."[203] The Court reasoned that when law enforcement officers act in good faith and their transgressions have been minor, the magnitude of the benefits that would be conferred on the guilty defendant would offend basic concepts of criminal justice, creating disrespect for the law.[204]

A rule excluding evidence of jury misconduct or improper influence, such as Rule 606(b), should be subject to the same analysis, even though the costs and benefits are different in character. In particular, if the rule results in the exclusion of evidence of serious misconduct in a way that does little to protect against juror harassment, judicial inefficiency, verdict instability, or other objectives of exclusion, it should be revised. In this regard, the blanket exclusion of nonextraneous misconduct and improper influences that do not happen to originate outside the courtroom is dysfunctional for two reasons. First, the terminology of Rule 606(b) has an ambiguous relationship to policy objectives; and second, in some instances the terminology actually may contradict those objectives.

---

200. In *Leon*, the district court found the search warrant defective because it lacked probable cause. *Id.* at 904. The lower court applied a two-pronged test for probable cause as set out in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). A Supreme Court case, decided after the lower court decisions in *Leon*, abandoned this two-pronged test in favor of an approach that took into account the "totality-of-the-circumstances." Illinois v. Gates, 462 U.S. 213, 230 (1983); *see Leon*, 468 U.S. at 904 & n.5. Despite the application of the two-pronged test, the district court in *Leon* recognized that the officer had gone to a "Superior Court judge and got a warrant [and] obviously [had] laid a meticulous trail. Had surveilled for a long period of time, and . . . consulted with three Deputy District Attorneys before proceeding himself," and was acting in good faith in making the search and seizure. *Leon*, 468 U.S. at 904 n.4. In *Sheppard* the Court found a defect in the technical language of the warrant. The warrant's preprinted language authorized a search for controlled substances, but the officer's affidavit requested a warrant to search for a murder weapon and property of the victim thought to be in defendant's possession. *Sheppard*, 468 U.S. at 984-87.

201. *See Leon*, 468 U.S. at 922-23; *Sheppard*, 468 U.S. at 988; *see also* Illinois v. Krull, 107 S. Ct. 1160, 1167-68 (1987) (good faith exception applies to evidence "obtained by an officer acting in objectively reasonable reliance on a statute" even though statute is subsequently held unconstitutional).

202. *Leon*, 468 U.S. at 920 (quoting Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)); *see Krull*, 107 S. Ct. at 1167-68.

203. *Leon*, 468 U.S. at 907-08 (citing United States v. Payner, 447 U.S. 727, 734 (1980)).

204. *Id.* at 908 (citing Stone v. Powell, 428 U.S. 465, 490-91 (1976)).

For example, a decision reached by jurors heavily under the influence of alcohol should be subject to examination, irrespective of whether one considers intoxication to be an inside or an outside influence. The seriousness of the influence and its objectively reasonable effect on the jury's verdict, rather than its characterization, ultimately should be the determinant of a new trial. In *Tanner* the Supreme Court appears to have acknowledged this view, at least in the hypothetical situation of serious intoxication, even though it purported to follow Rule 606(b).[205] The tacit recognition that the exclusionary rule's costs would outweigh its benefits in such a situation underlies this dictum. Another example is that in which a majority juror or jurors, exasperated by the perceived (or actual) unreasonableness of a fellow juror in the minority, threatens him with violence inside the jury room.[206] A committee of the American Bar Association recently has voted to recommend an exception to Rule 606(b) for precisely such a case.[207] The point is not whether a threat of violence by one juror against another contains "extraneous" information or whether it is an "outside" influence. Rather, the point is that an exclusionary rule such as the competency principle embodied in Rule 606(b), which would prevent evidence of the occurrence even from being presented, is excessively costly.

2. Tailoring Rule 606(b) to Exclude Nonauthoritative Deliberation Remarks: Revision or Construction?

Congress should adopt an exclusionary principle broader than the Iowa Rule[208]—which inadequately protected judicial resources and integrity—and yet one narrower than current Rule 606(b). The core concern of exclusion, in this instance, is to prevent lengthy and complex hearings that reconstruct extensive jury deliberations, merely because of a random and relatively harmless inappropriate remark. Such a competency rule, however, should not exclude matters that pervade the jury's deliberations with serious distractions from the evidence or the charge, whether they originate outside or inside the jury room. Nor should this exclusionary principle be used in an indirect attempt to regulate jury interrogation or to assure verdict stability; instead, those concerns should be addressed directly, by uniform rules of jury interrogation and by specific principles governing when new trials are required.

---

205. The allegations in *Tanner* did "not suffice to bring this case under the common-law exception allowing postverdict inquiry when an extremely strong showing of incompetency has been made." *Tanner*, 107 S. Ct. at 2750; *see also* United States v. Dioguardi, 492 F.2d 70, 80 (2d Cir.) ("But absent . . . substantial if not wholly conclusive evidence of incompetency, courts have been unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of a losing party."), *cert. denied*, 419 U.S. 873 (1974).

206. *See* Government of V.I. v. Gereau, 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); United States v. Grieco, 261 F.2d 414 (2d Cir.) (per curiam), *cert. denied*, 359 U.S. 907 (1959); Carlson & Sumberg, *supra* note 20, at 274 ("The authors urge, however, that creative state evidence committees consider an additional exception: A juror may impeach his own verdict by proving that a threat or act of violence was brought to bear on him to reach that verdict.").

207. AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION COMMITTEE ON RULES OF CRIMINAL PROCEDURE AND EVIDENCE, THE FEDERAL RULES OF EVIDENCE: A FRESH REVIEW AND EVALUATION AT RULE 606(B) (1988) (Rothstein Report).

208. *See supra* text accompanying notes 36-56 (outlining adoption of Mansfield Rule by state courts and development of Iowa Rule).

These considerations suggest that juror testimony should be incompetent unless it relates to overt matters that authoritatively inject facts not contained in the evidence, or principles of decision not within the applicable law, into the jury's deliberation. Mere speculation about the existence of an unsupported fact, or a random improper remark that other jurors do not acknowledge, would not meet this test. The requirement of Rule 606(b) that the information be extraneous embodies in part this concept of authoritativeness. "Extraneous" information implies there is a concrete identifiable source that is more likely to be harmful, as opposed to juror speculation, which should not be cognizable in a motion for a new trial. The use of a law dictionary in the courtroom, containing different nuances from those in the charge, may or may not be considered extraneous if used within the jury room itself, but it has significant potential for harm, principally because of its authoritativeness. Similarly, the concern over improper influences on jurors is not merely whether such influences come from within the jury room or without; instead, the concern is over whether the threat or inducement is of a kind that is likely to have a serious and improper effect on the average juror. The notion of "outside" influence, again, is tangentially related to this concern. Bribes or threats are more likely to come from third parties than from fellow jurors; but, if a verdict results from serious offers by jurors to do violence on their fellow jurors or to give them bribes, such evidence should not be excluded merely because it occurs inside the jury room.

These considerations suggest a reformulation of Rule 606(b) that would allow examination of misconduct involving the injection of "authoritative information seriously conflicting with the law or the facts in the case." This phrase would be used as an aid in interpreting the current requirement of extraneous information.[209] Similarly, this Article suggests that evidence about improper influences should be examined if it purports to demonstrate a kind of influence that is "likely to affect the average juror seriously and in a substantially improper way."[210] This formula would help to interpret the requirement, in cur-

209. Under this definition, the following examples of juror misconduct would probably be considered admissible if, in the trial court's opinion, they could have seriously affected the verdict:

(1) Jurors taking unauthorized evidence or other sources of extra-record information into the jury room;

(2) Jurors conducting unauthorized experiments that do not include a reasonable examination of evidence already admitted;

(3) Jurors making investigations on their own outside the courtroom;

(4) Jurors reading about the case through news media accounts; or

(5) Jurors relating specific and personally acquired knowledge concerning the case or the parties to other jurors.

210. Under this definition, the following types of jury misconduct would probably be considered admissible if, in the trial court's opinion, they could have seriously affected the verdict:

(1) Contact, other than casual, between jurors and third parties other than court personnel by witnesses, or other persons seeking to influence their verdict;

(2) Contact, other than casual or in the lawful discharge of official duties, by court personnel, including the judge, bailiff, attorneys, or other court functionaries or their agents, seeking to influence them in an unlawful manner;

(3) Collective juror intoxication;

(4) Offers to bribe a juror; or

(5) Threats against a juror by another juror or a third party.

rent Rule 606(b), of an outside influence.

Interestingly, this proposed revision of Rule 606(b) appears to bear some resemblance to the reasoning of federal courts when they have construed the Rule, although the resemblance is fragmentary. In *Government of the Virgin Islands v. Gereau*,[211] for example, the United States Court of Appeals for the Third Circuit held juror testimony competent to the extent that it reported specific threats from identifiable outside entities, but the court excluded consideration of a more diffuse rumor that jurors were unable to attribute to a specific source. The court undertook this analysis in an effort to construe the meaning of the phrase, "improper outside influence"; however, the true thrust of the court's reasoning was to consider whether the nature of the improper influence was such that it was likely to affect the typical juror in a serious way. More recently, the Supreme Court in *Tanner* disallowed evidence of impairment of jurors' reasoning faculties by alcohol and drugs, but left open the possibility that serious intoxication, to the point of "incompetency," might require the setting aside of a verdict.[212] Analysis of whether the influence was outside or inside the jury room was unrelated to the amount of alcohol and drugs consumed, and would produce the same result irrespective of whether the jury was collectively and deeply intoxicated or whether a single juror was slightly tipsy. The Court acknowledged, in fact, that it is the "nature of the allegation" that controls, rather than the location from which the information or influence originates.[213] Thus, although the Court reached its result by a purported construction of Rule 606(b), it actually did so by an analysis that incorporates some features of the one proposed in this Article.

This result in the decisions gives rise to the speculation that sound interpretation of Rule 606(b), rather than its revision, might be all that would be necessary to bring the law into harmony with the underlying policies. The difficulty, however, is that *Gereau* and *Tanner* are ambiguous guides to the lower courts because they purport to be based on the words of the Rule rather than on an analysis similar to the one this Article proposes—an analysis that more closely effectuates proper underlying policies. Furthermore, the broad exclusion in *Tanner*—which extended not only to any presentation of evidence but also to any further *investigation*—is difficult to accept, even if the narrow holding can be justified on the ground that consideration of the available information did not warrant a new trial. This outcome should have been reached by a rule denying a new trial, rather than by an exclusionary principle that forbids even the inquiry when such lurid evidence of misconduct exists. For all of these reasons, a minor revision of the Rule—perhaps a requirement that the court consider the factors here suggested whenever it distinguishes outside from inside misconduct—would improve its enforcement in the lower courts, as would definitive Supreme Court interpretation along these lines.

211. 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

212. *Tanner*, 107 S. Ct. at 2750.

213. *Id.* at 2746.

C. *Uniform and Effective Rules to Reduce Juror Harassment and Verdict Instability*

The revision of Rule 606(b) suggested above would tailor it to the purposes that should be accomplished by a rule of exclusion. Specifically, it will prevent the waste of judicial resources on minor allegations of misconduct. By excluding juror testimony unless it meets such standards, such a revision will reduce the threat to judicial integrity that might otherwise be produced by the acknowledgement of misconduct on which the court refuses to act because of its minor effect. This revision also will have some effect on the prevention of juror harassment, because attorneys will be less motivated to question jurors persistently about relatively minor misconduct. Likewise, it will serve the goal of verdict stability by excluding the possibility of new trials based on less than egregious misconduct. However, the proposed revision of the exclusionary principle will not serve these policies as they should be served. Nor should it; the point is that the policies cannot be served adequately by a mere exclusionary rule.

Instead, these policies should be addressed by rules of procedure. To the extent it is deemed necessary, a uniform rule of jury investigation should be enacted,[214] and it should be supplemented by local rules congenial to the method of operation of local judges and workable in the context of the local bar. At a minimum, it seems appropriate for Congress to adopt Federal Rules of Civil and Criminal Procedure preventing juror interviews, except as authorized by the court, and providing the court with clear authority to regulate the subjects and manner of investigation. In addition, it may be wise to impose a requirement of good cause, which by implication means that the attorney must begin with some indication of misconduct or improper influence rather than with the hope that a "fishing expedition" will uncover a problem. Such a standard seems preferable to unguided discretion, which resulted in a prohibition of inquiry in *Tanner*. Finally, to the extent a revised Rule 606(b) and rules regulating jury interviews do not protect jury stability, that policy goal should be addressed by rules requiring a showing of egregious misconduct coupled with either presumed harm or a showing of actual harm. This standard can be implemented by evolution from current decisional law.

---

214. The uniform rule of jury investigation should prohibit an attorney, a party, or anyone acting on their behalf from contacting a juror by any means. If a juror sua sponte contacts the attorney for the losing party, the winning party, or anyone who could act in their interests, the attorney when he receives the information should be required to make a written application to the court, with formal notice to opposing counsel, stating the grounds for the alleged misconduct and requesting the court to grant permission for further investigation. If an attorney comes into possession of information concerning juror misconduct other than from a juror and he wishes to contact members of the jury for further investigation, he should likewise be required to make a written application to the court. On formal notice to opposing counsel, the court should conduct a hearing.

The court should not grant an attorney the right to interview jurors except for good cause shown. "Fishing expeditions" or a desire to improve trial technique should not be grounds for interviewing jurors. If the court believes that good cause has been demonstrated, it should have wide discretion to determine what form the interview might take. The court might require, for example, that the interview be conducted on the record in open court with opposing counsel present, by written questions approved of by the court in advance, or by any other method the court believes will prevent juror harassment.

CONCLUSION

Exclusionary rules are useful for ensuring reliability of evidence or preventing waste or distraction of a court's time. When they are used, however, for other collateral purposes their effectiveness decreases, and a point is rapidly reached at which their costs exceed their benefits. So it is with Rule 606(b). The policy choices it embodies are obscured by the language of the Rule, and many of its purported objectives are better addressed by existing alternatives. Indeed, the costs of the Rule would in many cases outweigh its advantages if the Supreme Court had not used principles outside its language to interpret it. This expedient, however, has the disadvantage of obscuring the governing principles.

An exclusionary rule that would free the courts from hearing and deciding new trial claims based on relatively minor misconduct is justified. Thus, the principle embodied in Rule 606(b) should be retained. It should be reformulated, however, to permit examination both of authoritative injection of information inconsistent with the evidence or law, whether or not it is "extraneous," and influences that would likely affect the typical juror in a seriously improper way, whether they originate inside or outside the jury room. The remaining concerns of juror harassment, improper postverdict persuasion, and verdict stability should be addressed directly through a uniform rule governing jury investigation and grants of new trials. In fact, these recommendations may coincide to some degree with the manner in which courts are now interpreting Rule 606(b). However, the modest revision suggested here would be preferable, because if the current language of the Rule remains in place, it continually will distract from the Rule's objectives.