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JUROR PRIVILEGE: THE ANSWER TO THE IMPEACHMENT PUZZLE?

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COMMENT

JUROR PRIVILEGE: THE ANSWER TO THE IMPEACHMENT PUZZLE?

I. INTRODUCTION

The right to a jury trial, as embodied in the sixth and seventh amendments to the United States Constitution,[1] is an essential part of the contract made between citizen and government. One staunch supporter called this right "the glory of English law . . . [,] the most transcendant privilege which any subject can enjoy or wish for, that he not be affected either in his property, his liberty, or his person, but by unanimous consent of twelve of his neighbors and equals."[2] The jury trial has been praised not only as a means necessary for the administration of justice,[3] but also as an avenue for the expression of public law.[4] Despite such praise, the jury trial recently has come under increasing attack. Critics of the process have found juries ill suited to handle the enormous volume of civil litigation[5] and much less competent than judges are at factfinding.[6] In the face of growing criticism, "a deep commitment to the use of laymen in the administration of justice"[7] has survived at least in form if not always in substance.[8]

If the jury process is to survive, its integrity must be protected. While several procedures have been employed to assure that the jury reaches a proper result,[9] little has been done to as-

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1. *See* U.S. CONST. amends. VI & VII.

2. 3 BLACKSTONE COMMENTARIES 378.

3. Railroad Co. v. Stout, 84 U.S. (17 Wall) 657, 664 (1875).

4. A. TOCQUEVILLE, DEMOCRACY IN AMERICA 280-87 (Phillips Bradley ed. 1945). Some commentators believe that the doctrine of comparative negligence was created by juries. Rather than bar a contributorily negligent plaintiff recovery, juries would consciously decrease the damages awarded. *See* Fleming, *Foward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976).

5. *See* Peck, *Do Juries Delay Justice?*, 18 F.R.D. 455 (1956).

6. J. FRANK, LAW AND THE MODERN MIND 180-91 (1930).

7. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 3 (1966).

8. The use of judgments notwithstanding the verdict, FED. R. CIV. P. 50(b), is one example of the preservation of the jury trial without regard to the verdict. Further examples are illustrated by a liberal view toward judicial summary and comments on the evidence.

9. FED. R. CIV. P. 49 provides for special verdicts and general verdicts accompanied by answers to interrogatories. The use of the rule may be illustrated

sure that the result is achieved through a logical process. Devices used after a verdict has been rendered serve to check the jurors as factfinders.[10] For example, both special verdicts and general verdicts accompanied with interrogatories are methods by which juries particularize certain precise details of their factfinding.[11] By contrast, any attempt to monitor the process used by the jury to reach a verdict is suspect because it challenges the presumption that the discourse of twelve jurors will render a more just result than the thought process of a single judge.[12]

Traditionally, an attack on the verdict based on juror misconduct was combatted by the privileged communications rule.[13] Generally, the privileged communications rule protects the votes and verdict deliberations of the jurors by affording them a privilege not to disclose that information. Thus, juror affidavits or testimony are inadmissible to impeach the verdict.[14] This rule has been undergoing sustained and vigorous modification.[15] Thus, when a litigant attacks the verdict because the jurors improperly reached the verdict either by casting lots or by accepting bribes,[16] the juror privilege analysis has been excluded as a method for determining the admissibility of a juror's testimony or affidavit.

Although no court or scholar has advocated the outright aban-

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this way: the court may ask the jury if they found the plaintiff contributorily negligent. In a state barring comparative negligence, the judge can assure a proper result at law by receiving an honest answer to this question. *See* text accompanying note 4 *supra*. Another device used by the court is a poll of the jury to ensure that a unanimous verdict has been reached when such a verdict is required by law.

10. *See* note 9 *supra* and accompanying text.

11. FED. R. CIV. P. 49.

12. Railroad Co. v. Stout, 84 U.S. (17 Wall) 657, 664 (1875):

> [t]welve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

Id.

13. *See* T.W. HUGHES, AN ILLUSTRATED TREATISE ON THE LAW OF EVIDENCE 301-02 (3d ed. 1907).

14. Clark v. United States, 289 U.S. 1, 12 (1933).

15. *See* notes 139-144 *infra* and accompanying text.

16. These are only two types of juror misconduct. Others include juror misuse of evidence, misunderstanding the judge's instructions, and basing the verdict on ethnic prejudice. *See* notes 149-53 *infra* and accompanying text.

donment of the privileged communications rule,[17] the case most often cited to support modification of the rule is *Clark v. United States*.[18] Though *Clark* easily might have avoided an explanation of this juror privilege,[19] Justice Cardozo, writing for the Supreme Court, "[was] moved by the desire to build securely for the future."[20] By analogy to the attorney-client privilege, his opinion attempted to identify those circumstances in which the juror privilege applies.[21] This view, however, aimed at preventing judicial shortsightedness, has left courts and commentators with a plethora of ambiguous exceptions.

The availability of other exclusionary doctrines has contributed to the demise of the juror privilege.[22] The cases since *Clark* generally are satisfied to cite *Clark* as an explanation of the policy reasons for excluding juror testimony rather than as an exposition of a principle available for application to a given case.[23] Certainly, Congress was moved to abandon the privilege notion at least partly by the lack of a supporting body of American law.[24] In the absence of any apparent legal support, the courts have relied on the imaginary threshold to the jury room[25] and the vague notion of a juror's "mental processes"[26] to determine when to admit and when to exclude juror evidence to impeach the verdict. These bases are used

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17. *But see* United States *ex. rel* Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971). The court stated, "although what Wigmore calls Mr. Justice Cordozo's 'eloquent exposition of the policy' of the supposed privilege in that case seems in fact to leave little but the name." *Id.* at 820 n.7.

18. 289 U.S. 1 (1933).

19. The juror in *Clark* was not being questioned regarding the verdict. The issue in *Clark* centered on a bribe taken by the juror before she became a juror. Thus, as to the central issue, no privilege could fairly be invoked. *Id.* at 17-18.

20. *Id.* at 19.

21. *Id.* at 15.

22. There are three other exclusionary doctrines. The parol evidence rule limits any inquiry about the verdict to the verdict itself, as the final written embodiment of any previous discussions. *See* notes 68-72 *infra* and accompanying text. Lord Mansfield's rule provides that a juror may not allege his own turpitude. Vaise v. Delaval, 99 Eng. Rep. (1 T.R.) 944 (K.B. 1785). For an explanation of Lord Mansfield's rule, *see* notes 32-38 *infra* and accompanying text. The third method used to exclude juror testimony is public policy, most eloquently stated by Judge Lamar in McDonald v. Pless, 238 U.S. 264, 267-68 (1914). For an explanation of the public policy exclusion, *see* notes 47-57 *infra* and accompanying text.

23. *See, e.g.*, Government of V.I. v. Gereau, 523 F.2d 140, 149 n.21 (3rd Cir. 1975); United States *ex rel.* Owen v. McMann, 435 F.2d 813, 820 n.7 (2d Cir. 1970). *But see* Pessin v. Keeneland Ass'n, 298 F. Supp. 593, 596 (E.D. Ky. 1969).

24. *See* text accompanying note 79 *infra*.

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

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

in rule 606(b) of the Federal Rules of Evidence.[27] They aptly illustrate the widespread problems of definition encountered by the courts when applying rule 606(b).[28] The privilege doctrine, however, still has some defenders.[29] Ultimately, the policies articulated in favor of the no-impeachment rule are those policies supporting the juror privilege.

The no-impeachment rule, also known as the exclusionary rule, is the modern method used to admit or exclude juror evidence. It is embodied in rule 606(b) of the Federal Rules of Evidence.[30] It is the thesis of this comment that the privilege doctrine is the best method for applying this no-impeachment concept. Although commentators have recognized the privilege as an antiquated exposition of policy, they have not attached enough weight to the requisite components to establish the privilege. Where the privilege exists, the effects of juror misconduct already have been minimized.[31] Thus, privilege remains the *sine qua non* of an equitable result. In short, the privilege doctrine furthers the interests of fair trials and truth-seeking without retreating from a commitment to protect the integrity of the jury system.

Part II of this comment describes the historical foundation of the juror privilege. This history will define the privilege and will illustrate its usefulness. In part III, the privilege will be incorporated into rule 606(b) of the Federal Rules of Evidence, thus illustrating its effectiveness as the primary doctrine for applying the no-impeachment rule. Finally, this comment will discuss the use of the privilege to remedy any constitutional conflicts between the sixth amendment and the no-impeachment rule.

II. HISTORICAL ORIGIN OF THE NO-IMPEACHMENT RULE

Lord Mansfield, in *Vaise v. Delaval*,[32] articulated the principle that jurors may not impeach their own verdict. Lord Mansfield extended the maxim that "no person should be heard to allege his

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27. *Id.*

28. *See* text following note 144 *infra*.

29. T. W. HUGHES, *supra* note 13, at 301; 8 J. WIGMORE, EVIDENCE § 2346, at 678-79 (McNaughton rev. ed. 1961).

30. *See* text accompanying note 108 *infra*.

31. The privilege minimizes the prospective effect of juror misconduct by balancing the harm of disclosure of juror evidence against the rights of litigants; the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit gained for the correct disposal of litigation. 8 J. WIGMORE, *supra* note 29, § 2346, at 688.

32. 99 Eng. Rep. (1 T.R.) 944 (K.B. 1785).

own turpitude"[33] to cover the case of alleged juror misconduct during the deliberations:[34]

> [t]he court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every case the Court must derive their knowledge from some other source such as some person having seen the transaction through a window or by some other means.[35]

Before *Vaise*, common practice was to receive juror affidavits alleging misconduct.[36] The Mansfield rule, although prompted by policy considerations, was not described as a policy decision until twenty years later.[37]

Lord Mansfield's exclusionary rule was accepted widely in the United States. The rule protected the secrecy of juror deliberations and exempted jurors from liability for misconduct and improper grounds for decision. Both interests protected by Lord Mansfield's rule were regarded as "[h]ighly important to the independence and freedom of . . . [juror] decisions."[38] The Supreme Court demonstrated an early reluctance to bar all juror testimony concerning juror misconduct. In *United States v. Reid*,[39] the Court, while affirming the lower court's refusal to accept juror affidavits of juror misconduct,[40] stated: "[i]t would perhaps hardly be safe to lay

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33. The doctrine was used chiefly by Lord Mansfield to prevent drawers of commercial paper from alleging usury as a defense. Walton v. Shelley, 99 Eng. Rep. (1 T.R. 296) 1104, 1107 (K.B. 1786). To a lesser degree, the doctrine was used to bar married persons from testifying to nonaccess in cases involving the legitimacy of children. Goodright v. Moss, 98 Eng. Rep. (2 Corp. 591) 1257 (K.B. 1777).

34. In that case, Lord Mansfield refused to entertain the affidavits of two jurors, who alleged that the jury had tossed up to reach the verdict. 99 Eng. Rep. at 944.

35. *Id.*

36. *See* 8 J. WIGMORE, *supra* note 29, § 2353, at 697.

37. Owen v. Warburton, 127 Eng. Rep. (1 B.P.N.R. 326) 489, 491 (C.P. 1805). In this case Lord Mansfield said:

> [t]he affidavit of a juryman cannot be received. It is singular indeed that almost the only evidence of which the case admits should be shut out; but, considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him.

Id.

38. Hannum v. Belchertown, 37 Mass. (19 Pick.) 311 (1837).

39. 53 U.S. (12 How.) 361 (1851).

40. The Court was willing to accept a juror affidavit which alleged that a news-

down any general rule upon this subject. Unquestionably, such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse [affidavits] without violating the plainest principles of justice."[41] The judiciary has followed the sentiment expressed in *Reid* and has developed exceptions to Lord Mansfield's strict rule.[42] The exceptions permit a juror to testify to certain kinds of misconduct, notably matters that do not "inhere in the verdict."[43] Juror testimony, however, still remains the exception to the majority rule barring juror impeachment of the verdict.[44]

The early American repudiation of the rigid Mansfield rule forced the judiciary to articulate a different basis for its new rule. Essentially, Lord Mansfield's total bar to juror impeachment came to reflect a trio of considerations necessary for a just decision.[45] Public policy, the parol evidence rule, and juror privilege combine to form these considerations. Modern case law in this area has relied largely on public policy with little or no attention to the other two doctrinal foundations of the rule.[46]

A. *Public Policy*

Originally, the public policy argument focused on protecting the privacy of the jury. The Supreme Court, in *McDonald v. Pless*,[47] set out these policy rationales:

> [b]ut let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the

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paper article, not entered into evidence, had been considered by the jury, but had not prejudiced the juror. *Id.* at 366.

41. *Id.*

42. Ten states do not follow the Mansfield rule, but have developed variations of it. These include Iowa and Ohio. A growing list of states, currently 17, have adopted comprehensive codes of evidence based on the Federal Rules of Evidence. *See* M. BERGER & J. WEINSTEIN, WEINSTEIN'S EVIDENCE § 606 (Supp. 1979).

43. Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 210 (1866). *See* note 60 *infra*.

44. *See* McDonald v. Pless, 238 U.S. 264, 267 (1915).

45. Dean Wigmore noted:

> [b]ut this rule of thumb [a juror may not impeach his own verdict] is in itself neither strictly correct as a statement of the acknowledged law nor at all defensible upon any principle in this unqualified form. It is a mere shibboleth and has no intrinsic significance whatever. It has reference to a group of rules deducible from three general and independent principles which must be examined separately.

8 J. WIGMORE, *supra* note 29, § 2346, at 677.

46. *See* text accompanying note 141 *infra*.

47. 238 U.S. 264 (1915).

> testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.[48]

Both courts[49] and commentators[50] have recognized that perfect jury performance is impossible. Shielding the jury from external influences, however, remains critical in protecting the less-than-absolute integrity of the jury system. The no-impeachment rule accomplishes this goal in two ways. The rule disallows constant public scrutiny of jury verdicts, thereby fostering free and frank discussion.[51] In fact, the judiciary usually chooses to protect the jury rather than to redress a private litigant's injury when an unfavorable verdict has been rendered due to juror misconduct.[52] Sec-

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48. *Id.* at 267-68.

49. Judge Learned Hand, writing for the majority of the Second Circuit stated:

> it would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test; and although absolute justice may require as much, the impossibility of achieving it has induced judges to take a middle course, for they have recognized that the institution could not otherwise survive. . . .

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

50. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 71.9, at 310-11 (2d ed. 1977).

> If it is true—as it well may be—that few verdicts could withstand a test which rigorously requires every juryman to perform his function ideally, then the system should not be preserved by forcibly concealing that fact. Rather, it should be justified on other grounds which admit this truth and see value in popular participation in the judicial process, in the good sense of the overall view of the dispute formed collectively by a group of laymen, or even in taking into account the community's sense of justice—of what the law ought to be and sometimes is not.

51. 238 U.S. at 267. *See* Rakes v. United States, 169 F.2d 739 (4th Cir.), *cert. denied*, 335 U.S. 836 (1948).

> If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occured in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room.

Id. at 745.

52. 238 U.S. at 267.

ond, the exclusionary rule reduces the opportunities for third-party tampering with the jury.[53] An unsure juror cannot become the pawn of a defeated party seeking reversal of the verdict.[54] The rule minimizes the ability of a third party to corrupt the juror and thereby influence postverdict juror testimony.[55]

Concurrent with protection of the jury is protection of the verdict. The right of litigants to finality in their litigation presupposes a verdict not subject to appeal or collateral attack based on allegations of juror misconduct.[56] Further, "the courts ought not to be burdened with large numbers of applications mostly without real merit . . . [;] verdicts ought not to be so uncertain."[57]

While the no-impeachment rule was based on the public policy rationales discussed above, the exceptions to the rule were grounded in other, conflicting policy rationales. The first significant modification of the Mansfield rule was articulated by the Supreme Court of Iowa in *Wright v. Illinois and Mississippi Telegraph Co.*[58] The new rule would permit the court to consider juror affidavits

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53. Mattox v. United States, 146 U.S. 140, 142-43 (1892) (bailiff's comments to the jury and a newspaper article circulated among the jury in a murder trial were admitted to impeach the verdict); United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977) (affidavit by juror that during trial he realized that defendant was one of the men wanted in connection with shooting of two Federal Bureau of Investigation agents was incompetent to impeach the verdict); Government of V.I. v. Gereau, 523 F.2d 140, 148 (3rd Cir. 1975), *cert. denied*, 427 U.S. 917 (1976) (conversation between juror and matron could be proved by juror as extraneous influence); United States v. Howard, 506 F.2d 865, 868-69 n.3 (5th Cir. 1975) (reversing denial of new trial motion based upon affidavit by one juror that another had stated that defendant had been in trouble two or three times before); Miller v. United States, 403 F.2d 77, 82 (2d Cir. 1968) (affirming injunction against ex parte interviews conducted on behalf of parties with jurors).

54. Mueller, *Juror's Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920, 924 (1978). *See also* United States v. Chereton, 309 F.2d 197 (6th Cir. 1962), *cert. denied*, 372 U.S. 936 (1963) (court properly refused to examine jurors following the submission of affidavits by four jurors two years after the trial alleging that the defendant had been convicted on the wrong charges).

55. Hyde v. United States, 225 U.S. 347, 382-84 (1912) (court refused to conduct juror examination regarding a compromise verdict); Mattox v. United States, 146 U.S. 140, 148 (1892). *See also* note 37 *supra*.

56. Note, *Impeachment of Verdicts by Jurors—Rule of Evidence 606(b)*, 4 WM. MITCHELL L. REV. 417, 442 (1978).

57. United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962) (proof that juror erroneously considered guilt of one codefendant was rejected).

58. 20 Iowa 195 (1866). The uncontradicted affidavits of four jurors stated that the jury's verdict in this tort action was a quotient verdict.

concerning matters that did not "inhere in the verdict itself,"[59] facts independent of the verdict. The juror's personal impressions were inadmissible while communications from third parties to jurors were admissible.[60] The court rested its unprecedented decision on several grounds. Facts independent of the verdict are susceptible to corroboration by the other jurors, and thus the testimony of one juror cannot disturb the verdict rendered by twelve. Obviously, the personal impressions of a juror cannot be corroborated.[61] The *Wright* court also rejected the hypocrisy of Lord Mansfield's approach, which allowed the court to receive an eavesdropper's rather than the juror's testimony.[62] Finally, implicit in the court's decision was the elevation of a policy protecting individual litigants above the policy supporting jury protection:

> [a] juror should not be heard to contradict or impeach that which, in the legitimate discharge of his duty, he has solemnly asseverated. But when he has done an act entirely independent and outside of his duty and in violation of it and the law, there can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced by such unlawful act.[63]

This liberal minority view has transformed the issue of juror impeachment into a battle between conflicting interests. The Iowa formulation[64] has found some support in various arenas.[65] The United States Congress, however, flatly rejected the Iowa approach as the uniform rule when it was proposed by the House during the hearings on rule 606(b) of the Federal Rules of Evidence.[66] Further, one state, after careful consideration, rejected the Iowa rule,

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59. *Id.* at 210.

60. *Id.* The court mentioned several instances in which the affidavits of jurors would involve matters that "inhere in the verdict": (1) Failure of a juror to assent to the verdict; (2) misunderstanding the court's instructions or the testimony or pleadings; (3) undue influence experienced by one juror from coercion by another; and (4) mistakes in a juror's calculations or judgment.

61. *Id.* at 211.

62. *Id.* at 211-12.

63. *Id.* at 212.

64. *See* text accompanying note 59 *supra*.

65. The Iowa rule is followed in Florida, FLA. STAT. ANN. § 90.607(2)(b) (West 1979) and Kansas, KAN. STAT. § 60-444(a) (1976). The rule has also been incorporated in the MODEL CODE OF EVID. R. 301 (1942) and the UNIFORM R. OF EVID. 41 (1953).

66. *See* text accompanying notes 122-126 *infra*.

believing that "any abrogation or modification of the [Mansfield] rule would entail far worse consequences than its enforcement."[67]

The public policy rationale is a double-edged sword; both support for private litigants and protection of the jury system, mutually exclusive goals, may be articulated in public policy terms. Merely balancing one against the other begs the question. Surely, the flexibility of such an approach is warranted, but the dubiety of decision, coupled with the flimsiness of legal precedent and reasoning, forms a weak base for a juror impeachment rule.

B. *Parol Evidence Rule*

The second principle supporting the modern exclusionary rule is the parol evidence doctrine:

> [t]he principle is that where the existence and tenor of the jural act—i.e., an utterance to which legal effects are attached—are in issue, the outward utterance as finally and formally made, and not the prior and private intention, is taken as exclusively constituting the act . . . and therefore where the act is required . . . to be made in writing, the writing is the act. . . .[68]

Thus, the jury's final utterance in writing, the verdict, is the act. The jury's discussions and deliberations, much like prior contract negotiations, cease to have legal significance once the final agreement takes written form.[69] The verdict becomes "the sole embodiment of the jury's act"[70] and "the best evidence of . . . [its] belief."[71]

Little weight has been attached to this supporting notion for the exclusionary rule. The inherent weakness in the argument concerns the relationship between the parties. In a contractual setting, the parties negotiating the agreement are the parties ultimately bound by the contract. In the case of a jury verdict, however, the party bound by the verdict is not a negotiating party but is the defendant, a third party. Some courts recognize the potential for harm to innocent third parties and allow juror evidence to explain the verdict.[72]

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67. Emmert v. State, 127 Ohio 235, 242, 187 N.E. 862, 868 (1933) (juror affidavits stating that bailiff led them to believe that judge wanted a guilty verdict and that they would be sequestered if they failed to reach a verdict were admissible).

68. 8 J. WIGMORE, *supra* note 29, § 2348, at 679.

69. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 40 (1970).

70. 8 J. WIGMORE, *supra* note 29, § 2349, at 681.

71. Murdock v. Sumner, 39 Mass. (22 Pick.) 156, 157 (1839).

72. *In re* Sugg, 194 N.C. 638, 643, 140 S.E. 604, 606 (1927).

C. *Privilege*

The privilege doctrine, as noted earlier, has received little recognition as a foundation for the modern exclusionary rule.[73] The doctrine suggests that the jury's deliberations are protected from disclosure unless the privilege is waived.[74] The courts have not rested their juror impeachment decisions on the privilege concept. Its mention in dictum, however, suggests the important tradition of the doctrine.[75] Four elements are required to establish the privilege:

> 1) The communications must originate in a *confidence* that they will not be disclosed.
> 2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> 3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
> 4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal at litigation.[76]

Although the public policy factors supporting the privilege have been given central importance in the area of juror impeachment, the privilege alone has not been perceived as sufficiently crucial to justify the modern exclusionary rule.[77] This lack of recognition is probably due to an "inveterate but vague tradition."[78]

III. THE MODERN EXCLUSIONARY RULE

A. *Federal Judicial Response*

Like the state courts, the federal courts lacked a comprehensive body of case law to support their juror impeachment decisions. Four Supreme Court cases decided over a period of sixty years did not clarify the subject.[79]

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73. *See* notes 22-31 *supra* and accompanying text.

74. 8 J. WIGMORE, *supra* note 29, § 2346, at 678-79.

75. Woodward v. Leavitt, 107 Mass. 453, 460 (1871); Matter of Cochran, 237 N.Y. 336, 340, 143 N.E. 212, 213 (1924).

76. 8 J. WIGMORE, *supra* note 29, § 2285, at 527 (emphasis deleted).

77. Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 253 (1977).

78. 289 U.S. at 13.

79. McDonald v. Pless, 238 U.S. 264 (1914); Hyde v. United States, 225 U.S. 347 (1911); Mattox v. United States, 146 U.S. 140 (1892); United States v. Reid, 53 U.S. 361 (1865).

The initial Supreme Court confrontation with the issue of juror impeachment in *United States v. Reid*[80] demonstrated an early reluctance to set down a general rule.[81] In *Reid*, the Court found it unnecessary to establish a general rule because "we are of [the] opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial."[82]

The Supreme Court in *Mattox v. United States*[83] merely added to the confusion by promulgating standards for decision without regard to the scope of these standards. The case concerned a murder conviction which was appealed because of the bailiff's comments to the jury and the circulation among the jurors of a newspaper account of the trial.[84] The Court labeled affidavits disclosing these events as admissible because they concerned an "extraneous influence"[85] and found affidavits which "inhere in the verdict" to be inadmissible.[86] The Court relied on two state supreme court decisions[87] which added no new substantive dimension to the law. *Mattox* merely emphasized the virtue of the corroboration element[88] when juror misconduct was based on overt acts.[89]

The Supreme Court declined two new opportunities to complete the central task of defining the standards called "extraneous influence" and "inhere in the verdict." In *Hyde v. United States*,[90] the Court affirmed the lower court's denial of a juror examination regarding a compromise verdict[91] by relying on the "inhere in the verdict" standard.[92] The Court was presented with a second opportunity in *McDonald v. Pless*,[93] a case involving a quotient ver-

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80. 53 U.S. (12 How.) 361 (1851).
81. *See* notes 39-41 *supra* and accompanying text.
82. 53 U.S. at 366.
83. 146 U.S. 140 (1892).
84. *Id.* at 142-44.
85. *Id.* at 149.
86. *Id.*
87. Perry v. Bailey, 12 Kan. 539 (1874); Woodward v. Leavitt, 107 Mass. 453 (1871).
88. 146 U.S. at 149.
89. *Id.*
90. 225 U.S. 347 (1911).
91. A compromise verdict is: "One which is reached only by the surrender of conscientious convictions on one material issue by some jurors in return for a relinquishment of matters in their like settled opinion on another issue, and the result is one which does not hold the the approval of the entire panel." BLACK'S LAW DICTIONARY 250 (5th ed. 1979).
92. 225 U.S. at 383-84.
93. 238 U.S. 264 (1915).

dict.[94] Again, the Court declined to draw some boundaries for its new terms of art:

> without attempting to define the exceptions, or to determine how far such evidence might be received by the judge on his own motion, it is safe to say that there is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict.[95]

The Court concluded that only in the "gravest and most important cases"[96] should the rule be violated. The Court's articulation of the strong public policy reasons for protecting the jury,[97] coupled with the Court's reference to a legislative reluctance to modify or repeal the law,[98] places *Mattox* in a dubious posture. Allowing jurors to impeach their verdict only in grave and important cases[99] probably has much more to do with the capital nature of *Mattox*[100] than it has to do with that particular brand of juror misconduct.[101] Thus, any reliance on *Mattox* for the proposition that the Supreme Court approves of the standards "inhere in the verdict" or "extraneous influence" is questionable.

The Supreme Court used a different approach to the juror impeachment problem in *Clark v. United States*.[102] For the first time, using a helpful analogy to the attorney-client privilege,[103] the Supreme Court articulated a juror privilege and an exception to that privilege:

> [f]or the origin of the privilege we are referred to ancient usage, and for its defense to public policy. Freedom of debate might be

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94. A quotient verdict is "one resulting from agreement whereby each juror writes down the amount of damages to which he thinks the party is entitled and such amounts are then added together and divided by the number of jurors." BLACK'S LAW DICTIONARY 1130 (5th ed. 1979).

95. 238 U.S. at 269.

96. *Id.*

97. *Id.* at 267. *See* text accompanying note 48 *supra*.

98. 238 U.S. at 268.

99. *Id.* at 269.

100. In *Mattox*, the defendant was on trial for murder. 146 U.S. at 141.

101. The jurors alleged that the bailiff had made questionable comments to the jury during deliberations, and also alleged that a newspaper account of the trial, not entered into evidence, had been circulated among them prior to their reaching a verdict. *Id.* at 142-43.

102. 289 U.S. 1 (1933).

103. *Id.* at 15.

> stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published in the world. The force of these considerations is not to be gainsaid. But the recognition of a privilege does not mean it is without conditions or exceptions.[104]

The privilege was found not to exist in *Clark* because the juror was deceitful on voir dire, thereby violating the postulate of the privilege of a "genuine relation, honestly created and honestly maintained."[105] This case represents the final Supreme Court word on the issue of juror impeachment before the enactment of rule 606(b) and has been cited with approval since *Clark* in criminal[106] and civil[107] cases alike.

B. *Federal Legislative Response*

Congress enacted the Federal Rules of Evidence in 1975. Rule 606(b) of the Federal Rules of Evidence is the federal codification of the common-law exclusionary rule:

> [u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may this affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.[108]

The confused state of juror impeachment law prior to the enactment of rule 606(b) resulted in a House-Senate battle regarding what the rule should be. Thus, the legislative history of rule 606(b)

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104. *Id.* at 13.

105. *Id.* at 14.

106. Burton v. United States, 175 F.2d 960 (5th Cir. 1949) (case involved criminal conspiracy).

107. Pessin v. Keeneland Ass'n, 298 F. Supp. 593 (E.D. Ky. 1969); United States v. Nixon, 418 U.S. 683 (1974).

108. FED. R. EVID. 606(b) [hereinafter referred to as Rule 606(b)]. Rule 606(b) was amended by Act of Dec. 12, 1975, Pub. L. No. 94-149, § 1(10), 89 Stat. 805 (1975), which substituted "which" for "what" in the last sentence as a technical correction.

is more an explanation of what the rule is not rather than what the rule is.

The Advisory Committee's initial construction of rule 606(b) embodied a broader exclusionary principle.[109] Although the language conformed to the language of the present rule, the application was significantly different. The advisors believed that the Iowa rule[110] represented the trend toward the exclusionary rule.[111] Accordingly, jurors were precluded from testifying about "the effect of anything upon the juror's mind or emotions"; and jurors were allowed to testify about any act or statement occurring during the deliberations.[112] The final draft forwarded by the Advisory Committee to the Supreme Court, however, was modified to reflect the majority sentiment, which barred juror testimony about matters that occur during deliberation.[113]

These modifications were prompted by concern over the jury verdict's vulnerability to attack[114] and fear of undue harassment of jurors.[115] Essentially, conflict arose over two issues: First, inquiry into what happens in the jury room;[116] and second, the Advisory

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109. 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.

FED. R. EVID. 606(b) (Prelim. Draft Mar. 31, 1969), *reprinted in* 46 F.R.D. 161, 289-90 (1969).

110. *See* notes 58-63 *supra* and accompanying text.

111. H.R. Rep. No. 93-650, 93rd Cong., 2d Sess. 9-10 (1974), *reprinted in* 28 U.S.C.A. FED. R. EVID. 247-48 (1975).

112. *Id.*

113. The majority rule in the United States was not the Iowa rule, but a narrower rule which barred juror testimony about statements which occurred during deliberations.

114. Letter of Aug. 12, 1971, Sen. McClellan to Judge Maris, 117 Cong. Rec. 33,642, 33,645 (1971).

115. *See* Letter of Aug. 9, 1971, Dep. Att'y Gen. Richard G. Kleindienst to Judge Maris, 117 Cong. Rec. 33,648 (1971).

116. [A]s I read the present draft of Rule 606, it would go further and permit the impeachment of verdicts by inquiry into, not the mental processes themselves, but what happened in terms of conduct in the jury room.

The mischief in this Rule ought to be plain for all to see. Judges need not explain their verdicts beyond the judgment and the opinion. Were it possible to overturn a decision because, in fact, it was not based on precedent, but bias, and this was an issue that could be litigated, it would indeed be brought before the courts. Present law, as I read it, wisely prohibits this sort of inquiry before it starts with jurors as it is unthinkable with judges . . . I do not believe it would be possible to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a

Committee's acceptance of the Iowa formulation[117] as the majority rule.[118] The Committee's final draft barred juror evidence that concerned the effect of anything on a juror's mind or emotion, his mental processes, as well as testimony about any matter or statement made during the jury deliberations.[119] Jurors were permitted to testify to jury irregularities that involved "extraneous prejudicial information" and "outside influence."[120] The Supreme Court forwarded this formulation of the rule to Congress.

The confusion that predated the Advisory Committee's original formulation[121] remained extant. The House believed that the original committee draft, which embraced the Iowa rule, was the sounder approach.[122] Both the House Judiciary Committee and its Special Committee on Reform of the Federal Criminal Laws recommended the broader version to the House.[123] Conversely, the

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post-trial hearing into the conduct of the juror's deliberations.

Id. at 33, 654-55.

117. *See* notes 58-67 *supra* and accompanying text.

118. Letter of Aug. 9, 1971, Dep. Att'y Gen. Richard G. Kleindienst to Judge Maris:

> [w]e disagree with the comment in the Advisory Committee's Note, that there is a trend toward allowing jurors to testify about everything but their own mental process . . . Strong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations. Recent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations on the instances in which jurors may be questioned about their verdict.

117 Cong. Rec. 33,648, 33,654-55 (1971).

119. *See* Draft of FED. R. EVID. 606(b), 56 F.R.D. 183, 265 (1973).

120. *Id.*

121. *See* notes 109-113 *supra* and accompanying text.

122. *See* Letter from Prof. Ronald L. Carlson to Rep. William Hungate:

> [t]he committee's 1969 preliminary draft allowed inquiry into objective juror misconduct . . . and the quotient verdict was not insulated from attack. This approach was continued in the 1972 draft, the last draft circulated to the public before submission to the Supreme Court. Then in 1972, apparently just prior to submission to the Court, the committee did a turn-about and limited juror testimony to "outside" influences, insulating from attack jury misconduct which occurs inside the jury room. The committee's first notion was the sounder approach.

Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 145, 163-64 (1974).

123. The committees believed that the Supreme Court version of Rule 606(b) would bar juror testimony of a quotient verdict or testimony about a drunken juror. H.R. REP. NO. 93-650, 93rd Cong., 2d Sess. 9-10 (Nov. 15, 1974), *reprinted in* 28 U.S.C.A. FED. R. EVID. 247-48 (1975).

Senate Judiciary Committee, persuaded by the public policy interests articulated in *Pless*,[124] preferred the Supreme Court version of the rule.[125] The narrow exclusionary rule endorsed by the Senate was the formulation chosen by the Conference Committee.[126]

The legislature attempted to accommodate the policies which protect the jury system and those policies designed to ensure a fair trial in light of serious malfunctions in the jury's deliberative process. This balance is embodied in rule 606(b). Essentially, the rule is a restatement of the majority position reflected in the preceding case law. The rule, however, reflects a choice and a decision to support a narrow exclusionary rule rather than the broad Iowa rule. Further, the legislative history clearly buttresses public policy as the sole foundation for the exclusionary rule.[127] Nevertheless, the ultimate result of the rule is a set of new labels without parameters or guides to application. The old labels for admissible juror evidence, "extraneous influence" and "overt acts," became "extraneous prejudicial information" and "outside influence." The former version of inadmissible evidence, "inhere in the verdict," was recast in terms of "affecting mental processes." This lack of specific language was the mechanism used by the drafters to foster case-by-case development of the law.[128] The previous one hundred year development of a body of case law which lacked a cogent foundation had resulted in the confusion and imprecision that confronted Congress. Rule 606(b), while clarifying a few matters,[129] had the same result.

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124. 238 U.S. at 267-68. *See* text accompanying note 22 *supra*.

125. S. REP. NO. 1277, 93d Cong. 2d Sess. 13-14 (1974):

> [a]s it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly motivated ex-jurors.
>
> Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606(b) should not permit any inquiry into the internal deliberations of the jurors.

126. H.R. CONF. REP. NO. 93-1597, 93rd Cong. 2d Sess. 8 (1974), *reprinted in* 28 U.S.C.A. FED. R. EVID. 248 (1975).

127. *Id.*

128. *Id.*

129. *See* text accompanying note 127 *supra*.

IV. THE PRIVILEGE APPROACH

A. *The Juror Privilege*

The arguments and votes of jurors are protected from disclosure unless their privilege is waived.[130] As noted earlier, there are four requisite elements to establish this privilege.[131] The fourth prong of the privilege suggests the appropriate public policy inquiry: the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal at litigation.[132] Thus, the recognition of a juror privilege does not mean it is absolute and without exceptions.

Essentially, exceptions may be secured by three mechanisms within the privilege. First,

> [t]he privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth.[133]

Second, and most unlikely, the community may decide that the privacy and secrecy of jury deliberations are unnecessary to promote a just and honest jury system.[134] Finally, the court may determine through a balancing process that other policies raised by the particular case are more important.[135]

Just as promulgating a privilege does not extinguish its exceptions, designating the privilege's exceptions does not renounce the privilege. The doctrine was born in 1670 in *Bushnell's Case*[136] "with its historic vindication of the privilege of jurors to return a

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130. 289 U.S. at 12.

131. *See* text accompanying note 76 *supra*.

132. 8 J. WIGMORE, *supra* note 29, § 2346, at 678-79.

133. 289 U.S. at 14.

134. The third prong of the privilege requires that the relation must be one which in the opinion of the community ought to be sedulously fostered. 8 J. WIGMORE, *supra* note 29, § 2285, at 527.

135. The fourth prong of the privilege requires that the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal at litigation. *Id.*

136. 124 Eng. Rep. (135 Vaughan) 1006 (C.P. 1670). In that case the jurors found a verdict of acquittal, and in doing so did not follow the judge's instructions. They were fined and imprisoned but were discharged on habeas corpus. *Id.*

verdict freely according to their conscience."[137] This ancient principle, transformed into statutory form, had the same effect:

> A juror shall not be questioned [for any verdict rendered by him], and is not subject to any action, or other liability civil or criminal, . . . in an action in a court of record, or not of record, . . . except by indictment, for corrupt conduct, [in rendering such verdict,] in a case prescribed by law.[138]

The juror's privilege seldom is used to decide juror impeachment problems. The juror's ability to waive his privilege and testify about matters that public policy rationales demand remain silent is one noted problem that deters judicial recognition of the privilege.[139] One commentator noted another problem: "what is said between jurors is seldom relevant upon a new trial and what is disclosed in an affidavit is usually not in the nature of communication, but rather a statement of misconduct which is not always protected by the principle of privilege."[140] Moreover, the Court and Congress have preferred to use public policy grounds for the exclusionary rule.[141] It is difficult, however, to distinguish those public policy arguments from the fourth part of the privilege, which balances the benefit to the litigant against the potential harm to the jury system.[142] Nevertheless, the juror privilege has been abandoned as a tool for decision in the juror impeachment area. One reason for this lack of recognition is an interpretation of the leading case, *Clark*,[143] as limited to its facts.[144]

B. *Application of the No-Impeachment Rule*

A dissection of rule 606(b) shows that the exclusionary principle protects: (1) Any matter or statement occurring during the course of the jury's deliberations; (2) the effect of anything upon his or any other juror's mind or emotions; and (3) the juror's mental processes.[145] As noted earlier, Congress deliberately cast the rule

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137. 289 U.S. at 16.
138. N.Y. CIV. RIGHTS LAW § 14 (McKinney 1976).
139. Carlson & Sumberg, *supra* note 77, at 253.
140. Note, *Impeachment of Jury Verdicts*, 53 MARQ. L. REV. 258, 263 (1970).
141. *See* note 127 *supra* and accompanying text.
142. *See* note 135 *supra* and accompanying text.
143. 289 U.S. at 1.
144. United States *ex rel.* Owen v. McMann, 435 F.2d 813, 820 n.7 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).
145. *See* note 30 *supra*.

in broad terms to promote case-by-case development of the law. The categories clearly are redundant. As a result of both this redundancy and the lack of specific language in the rule, courts have decided the impeachment issue without assigning the fact pattern to one of the three categories above. The exceptions to the rule are equally ambiguous. Juror impeachment of the verdict is allowed on the issues of "extraneous prejudicial information"[146] and "outside influence."[147]

1. Inadmissible Juror Evidence

Rule 606(b) takes as its form the rule disallowing juror impeachment and two major exceptions.[148] In all the following instances the juror's testimony would be excluded under both rule 606(b) and the privilege approach: (1) When one or more jurors misused any portion of the evidence in the case;[149] (2) when one or more jurors speculated on matters of common knowledge not raised during the trial;[150] (3) when a juror exchanged his vote on one issue to gain another juror's support on a different issue;[151] (4) when the jury delivered a quotient verdict, a verdict arrived at by adding together each juror's assessment of the damages and dividing that amount by the number of jurors;[152] and (5) when a juror speculated that the defendant would receive a suspended sentence or a quick parole.[153] This evidence is excluded by rule 606(b) because it concerns the jury's deliberative process and the juror's mental process. In contrast, juror evidence in these fact patterns would be excluded by the privilege through balancing the possible harm to the litigant against the possible harm to the jury process. Because perfect jury performance is an unreal expectation, any kind of juror misconduct must be examined in that context. Disclo-

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

147. *Id.*

148. *Id.*

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

150. Gault v. Poor Sisters of St. Frances, 375 F.2d 539 (6th Cir. 1967) (foreman's suggestion to the jury to compare soundness of business policy of keeping pregnant woman on her job past her seventh month of pregnancy, with a policy allowing women to work through their seventh month of pregnancy was inadmissible to impeach the verdict).

151. Hyde v. United States, 225 U.S. at 347.

152. McDonald v. Pless, 238 U.S. at 264.

153. Klimes v. United States, 263 F.2d 273 (D.C. App. 1959) (proper to deny new trial despite a juror affidavit alleging that another juror stated that the accused probably would be sentenced to probation and would not go to prison anyway).

sure of juror communication in any of the above situations would promote restricted and inhibited discussion. Ultimately, that ill could cause the greatest damage to the jury system. It would force each individual juror to think in a vacuum without the aids of consensus and argument. Thus, the process easily could be abolished in favor of automatic nonjury trials.

Rule 606(b) and the privilege, however, part company in several other instances. Under rule 606(b) juror evidence that the jury set a time limit for its deliberation is inadmissible.[154] Clearly, this is a circumstance, under rule 606(b), where such information was predetermined as nonprejudicial if not trivial. Thus, the method of analysis assumes that if the matter is unimportant no inquiry is necessary. This juror conduct fits into one of the exclusionary categories "[if] any matter or statement occur[s] during the . . . deliberations. . . ."[155] Under the privilege approach, however, the slight, adverse impact this information would have upon the policies bolstered by rule 606(b) would weigh in favor of admitting the juror evidence. Inquiry into this kind of conduct would help further the result so staunchly defended by the rulemakers, a rational and just jury verdict. Unfortunately, this kind of fact situation aptly illustrates the general approach of rule 606(b): To try to preserve the remaining vestiges of a jury process without a prospective view toward improvement. Under the privilege approach, information about setting a time limit would be admissible because the jury system cannot possibly be harmed if such conduct is exposed.[156]

The result under rule 606(b) and the privilege approach would differ when a juror misunderstands[157] or ignores the judge's instructions[158] or misunderstands the requirement of a unanimous verdict.[159] These fact patterns fit into the "mental processes" cate-

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154. Capella v. Baumgartner, 59 F.R.D. 312 (S.D. Fla. 1973) (motions for new trial denied when plaintiff suggested that the jury may have agreed to reach a verdict by a certain time and hour).

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

156. *See* note 135 *supra* and accompanying text.

157. Poches v. J.J. Newberry Co., 549 F.2d 1166 (8th Cir. 1977), (after verdict was returned for defendant in a product liability suit, evidence that one juror tried to convince the other jurors to find for the plaintiff because many things on the market are substandard was inadmissible to support misunderstanding of judge's instructions concerning assumption of risk and product misuse).

158. Capella v. Baumgartner, 59 F.R.D. 312 (S.D. Fla. 1973).

159. United States v. Homer, 411 F. Supp. 972 (W.D. Pa.), *aff'd*, 545 F.2d 864 (3d Cir. 1976), *cert. denied*, 431 U.S. 954 (1977) (that jury did not hear instruction that verdict had to be unanimous was impermissible to impeach the verdict).

gory of rule 606(b),[160] which excludes juror evidence on this question.[161] Any chilling effect an inquiry into this kind of misunderstanding would have on freedom of debate in the jury room[162] would be vastly mitigated by the openness fostered between judge and jury. Jurors would feel more comfortable to ask the judge for another explanation, thus enabling them to reach a just verdict. After balancing the various interests, the privilege approach would deem this information admissible.

A third problem faced by rule 606(b) and by the case law development of the exclusionary principle[163] is that of categorization without thought to the specific set of circumstances at bar: any juror evidence of a compromise verdict is barred by the rule.[164] Thus, testimony that a juror traded his vote on liability for lower damages[165] and testimony that a juror agreed to anything so that he could leave for vacation on time[166] are both excluded by the same rule barring juror evidence of a compromise verdict. Both rule 606(b) and the privilege agree on the exclusion of juror evidence in the first situation. Compromise and bargaining are important parts of the jury process, and such a line would be difficult and dangerous to draw.[167] On balance, jury protection is more important than diclosure. The exclusion of evidence concerning the second situation, however, is merely matching the result with an exclusionary label, "compromise verdict." This kind of labeling does violence to the jury system. It counteracts the instruction given to jurors to use a rational process and thwarts any attempt to criticize that kind of conduct in the future.

A corollary to the categorization problem is the difficulty of fitting a particular circumstance into one category of rule 606(b) or another. The most prevalent dilemma in this area surfaces when

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

161. Often times a juror examination on this question is unnecessary due to the devices used in Rule 49 of the FED. R. OF CIV. P., special verdicts and general verdicts accompanied by interrogatories. *See* note 10-11 *supra* and accompanying text.

162. 289 U.S. at 13.

163. *See* notes 128-29 *supra* and accompanying text.

164. *Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. 9 (1974).

165. Vizzini v. Ford Motor Co., 72 F.R.D. 132 (D.C. Pa. 1976) (note from one juror stating that during the damage phase of the trial, another juror believed that the jury's answers to the interrogatories would negate all blame and thus, traded his vote on negligence for lower damages was impermissible to impeach the verdict).

166. Poches v. J.J. Newberry Co., 549 F.2d 1166 (8th Cir. 1977).

167. *See* notes 196-98 *infra* and accompanying text.

the verdict is apparently a result of racial or ethnic prejudice.[168] It is difficult to label this evidence excludable under the "mental process" category or admissible under the "outside influence" category. The privilege approach offers two methods of dealing with the prejudice situation. If the juror lied about his biases or prejudices on voir dire, the privilege will not protect him because the relation was not honest.[169] Alternatively, as a general proposition it may be true that judicial inquiry into juror prejudice cleanses and purifies the jury process. Within the context of the jury system, however, no juror is likely to enter the deliberative process without personal biases. Thus, the balance in favor of the jury or litigant can go either way. The approach of rule 606(b), to attach one of its dogmatic labels to this kind of juror evidence, is fruitless.[170] The focus of the inquiry must rest on whether, in the particular case, the juror's prejudice offended the principles of fundamental fairness afforded the litigants.

One further weakness in rule 606(b) has been identified by the commentators: "[T]hat a threat or act of violence was brought to bear [by one juror] upon . . . [another juror] to reach that verdict."[171] Concern has been expressed correctly that such evidence of a threat would be barred by rule 606(b). Under the privilege approach, such evidence would be admissible under the same guiding principle which admits evidence that a juror lied on voir dire[172] or accepted a bribe.[173] This rigorous coercion of one juror by another negates the basic postulate of the privilege, the creation of an honest relation.[174]

The preceding section considered the divergence of result and process between the modern federal rule and the juror privilege. The different outcomes are due largely to a focus on particulars

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168. Smith v. Brewer, 577 F.2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978) (evidence that a juror mimicked black defense counsel and black defendant was inadmissible to impeach the verdict); United States *ex rel.* Daverse v. Hohn, 198 F.2d 934 (3rd Cir. 1952), *cert. denied*, 344 U.S. 913 (1953) (denying habeas corpus relief to petitioner, who alleged that one juror was prejudiced against Italians); Cherensky v. George Washington-East Motor Lodge, 317 F. Supp. 1401 (E.D. Pa. 1970) (new trial denied despite fact that plaintiff was told by one juror that the verdict was based on anti-Semitic prejudice).

169. 289 U.S. at 14.

170. *See* text accompanying *notes* 163-64 *supra*.

171. Carlson v. Sumberg, *supra* note 77, at 274.

172. *See* notes 206-211 *infra* and accompanying text.

173. *Id.*

174. 289 U.S. at 14.

rather than labels and to a view toward prospective policy concerns rather than only present jury protection. The process of measuring one policy against another via a rational framework is valuable in mitigating the judge's uncircumscribed and discretionary power to overturn jury verdicts and order new trials. The problems of labeling and categorization and of unbridled judicial power will resurface in the next section. The next section, however, will focus on the confusion between the different constitutional mandates for criminal and civil trials and the different brands of juror misconduct.

2. Admissible Juror Evidence

The two major exceptions to rule 606(b) are showing "extraneous prejudicial information" and "outside influence."[175] Agreement on result between the rule and privilege is scant on the first exception and almost unanimous on the second.

Essentially, the "extraneous prejudicial information" exception concerns extra-record or inadmissible evidence considered by the jury to reach its verdict.[176] As such, this evidence directly conflicts with a criminal defendant's sixth amendment confrontation rights. The sixth amendment guarantees an impartial jury and the right to confront witnesses.[177] The development of the law governing juror testimony in the criminal situation has resulted in a cogent analysis focusing on the particular issue in the case.[178]

The Supreme Court addressed this sixth amendment issue in *Parker v. Gladden*,[179] where defendant sought an appeal based on statements made by the bailiff to the jury.[180] By condemning defendant, the bailiff became a witness against him. Because his "testimony" did not originate "from the witness stand in a public courtroom where there is full judicial protection of the defendant's [confrontation rights],"[181] a constitutionally mandated trial was lacking.[182] Although the issue of admissibility of juror evidence was

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175. *See* text of Rule 606(b) in note 30 *supra*.

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

177. Coleman v. Alabama, 399 U.S. 1, 12 (1970).

178. *See* text accompanying note 199 *infra*.

179. 385 U.S. 363 (1966).

180. The trial court found that the bailiff's comments, in the presence of the jury were: "Oh that wicked fellow, he is guilty and if there is anything wrong [with the verdict] the Supreme Court will correct it." *Id.* at 363-64.

181. *Id.* at 364.

182. *Id.*

not directly addressed in *Parker*,[183] the bailiff's comments involved such a high probability that prejudice would result that the trial was found "inherently lacking in due process."[184]

The judiciary interpreted *Parker* as creating a "newly articulated federal right."[185] Thus, in *People v. Delucia*,[186] the Second Circuit reversed the lower court decision, which relied on the Mansfield rule, that a juror cannot impeach his own verdict.[187] On remand, the juror affidavits alleging an unauthorized juror visit to the scene of the crime were held admissible to impeach the verdict because the subject matter constituted an inherently prejudicial outside influence: "[when] the Supreme Court holds that a particular series of events, when proven, [violated] a defendant's constitutional rights, in that determination is the right of the defendant to prove facts substantiating his claim."[188] The court's confrontation clause rationale, however, evolved into a more specific inquiry into "the nature of what has infiltrated to the jury and the probability of prejudice."[189] The ultimate result has been to protect juries and criminal defendants alike.

This new approach crystallized in *United States* ex rel. *Owen v. McMann*.[190] Unlike *DeLucia* and *Parker*,[191] this case did not involve an outside force but involved comments made by one juror to another about defendant's past record.[192] After an evidentiary hearing, the district court set aside the conviction based on the deprivation of defendant's constitutional confrontation rights.[193] The court of appeals affirmed the decision but not the process.[194] Judge Friendly noted that jurors do not become unsworn witnesses within the scope of the confrontation clause the moment they

183. The Court did consider the affidavit of one juror which supported the trial court's finding that the communication was prejudicial to the defendant. In reversing the Oregon Supreme Court, the juror evidence considered was a statement by the juror that she was prejudiced by the bailiff's remarks. *Id.* at 365 n.3.

184. *Id.* at 365.

185. United States *ex rel.* Owen v. McMann, 373 F.2d 759, 762 (2d Cir. 1967).

186. 15 N.Y.2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377, *cert. denied*, 382 U.S. 821 (1965), *on reargument*, 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967).

187. *Id.* at 296, 206 N.E.2d at 325, 258 N.Y.S.2d at 378.

188. People v. DeLucia, 20 N.Y.2d at 279, 229 N.E.2d at 214, 282 N.Y.S.2d at 531.

189. United States *ex rel.* Owen v. McMann, 435 F.2d 813, 818 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971).

190. *Id.*

191. *See* text accompanying notes 180 and 188 *supra*.

192. 435 F.2d at 815.

193. *Id.* at 815-16.

194. *Id.* at 817-18.

"[pass] a fraction of an inch beyond the record of evidence. . . ."[195] The *Owen* approach recognizes the impossibility that a jury could ever be "a laboratory, completely sterilized and free from any external factors"[196] and that no constitutional deprivation results when "jurors with open minds were influenced to some degree by community knowledge. . . ."[197] Jury consideration of this kind of information was part of the rationale for the constitutionally protected right to a jury trial.[198]

This inquiry, articulated in *Owen*, found further support in the Fifth Circuit:

> [w]e cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. . . . Nevertheless, while the jury may leaven its deliberation with its wisdom and experience, in doing so it must not bring extra facts into the jury room. In every criminal case we must endeavor to see that jurors do not [consider] in the confines of the jury room . . . specific facts about the specific defendant then on trial.[199]

Thus, the resolution of the juror impeachment issue in criminal situations resembles the privilege approach. Resolution is not dependent on proper or improper labeling but rather on a balance between possible harm to the jury system and the need for particular information to fulfill constitutional mandates. The problem arises, however, when this balance is applied cavalierly to civil cases without regard to the particular issues raised.

Reliance by the civil judiciary on the criminal juror impeachment standard, coupled with a congressional attitude to shuttle civil cases through the courts, has resulted in disparate results in the area of the "extraneous prejudicial information" exception. Unfortunately, civil cases have applied the label "extraneous prejudicial information" without considering its meaning. In civil cases the term includes matters specifically noted in the criminal cases as outside the "extraneous prejudicial information" category. Thus, evidence that jurors have consulted general books about drug traffic[200]

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195. *Id.* at 817.

196. *Id.*

197. *Id.* (quoting Rideau v. Louisiana, 373 U.S. 723, 733 (1963) (Clark, J., dissenting)).

198. *Id. See also* Broeder, *The Impact of the Vicinage Requirements: An Empirical Look*, 45 NEB. L. REV. 99, 101 (1966).

199. United States v. McKinney, 429 F.2d 1019, 1022-23 (5th Cir.), *cert. denied*, 401 U.S. 922 (1970) (emphasis deleted).

200. Paz v. United States, 462 F.2d 740 (5th Cir.), *cert. denied*, 414 U.S. 820

and driver manuals[201] has been admissible. Further, jury verdicts have been overturned based on the presence of inadmissible evidence without an inquiry to determine prejudice.[202] Surely, if criminal courts faced with a constitutional mandate require evidence of prejudice before overturning the verdict, civil courts are under no less of an obligation.

The approach in civil cases has been to categorize such things as "unauthorized experiment"[203] or "accidentally discovered evidence"[204] as "extraneous prejudicial information." The effect of this process is to delete the word "prejudicial" and make the exception include only "extraneous information." As clearly noted in *Owen*: "[t]here is no rational distinction between the potentially prejudicial effect of extra-record information which a juror enunciates on the basis of the printed word and that which comes from his brain."[205] Thus, the extraneous nature of extra-record information is not nearly as important as its potential for prejudice. The privilege approach would take the juror's knowledge and apply the balancing process: Protection of the jury versus the litigant's right to a fair trial with the focus on possible prejudice rather than on the particular brand of juror misconduct.

The second major exception to the exclusionary rule permits juror impeachment of verdicts when evidence of an improper outside influence is shown.[206] Essentially, this exception is applied in cases of juror bribes,[207] threats to jurors,[208] and juror use of narcotics.[209]

(1973) (new trial granted where books on drug traffic, drug problems, and people involved with drugs were found in the jury room as allowed by the judge).

201. Stiles v. Lawrie, 211 F.2d 188 (6th Cir. 1954) (new trial ordered when driver manual was used by jury to determine speed of vehicle from length of skid marks).

202. United States v. Michener, 152 F.2d 880 (3d Cir. 1945) (allowing all corporate records in court to be received in evidence although they contained inadmissible notations was error even though no prejudice could be determined).

203. D. LOUISELL & C. MUELLER, 3 FEDERAL EVIDENCE 135 n.57 (1979).

204. *Id.* at 135 n.56.

205. 435 F.2d at 820.

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

207. Remmer v. United States, 347 U.S. 227 (1954) (new trial ordered when jury foreman was approached with a bribe); Jorgensen v. York Ice Mach. Corp., 160 F.2d 432 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947) (mentioned bribery as a matter upon which juror affidavits may be received (dictum)).

208. Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978) (new trial ordered when juror and his family had been threatened three times and juror had been and his family had been threatened three times and juror had been assaulted).

209. Jorgensen v. York Ice Mach. Corp., 160 F.2d 432 (2d Cir.), *cert. denied*, 322 U.S. 764 (1947).

The privilege approach is in accord with these results. Any matter or event that may impugn the juror's honesty negates the privilege.[210] This rubrick also may be used effectively to uncover evidence of one juror coercing another[211] or of an insane juror.[212]

V. CONCLUSION

Juror impeachment notions sprouted from a serious concern for protecting the jury system's privacy. A jury free from scrutiny and criticism is the traditional model capable of rendering rational and just jury verdicts. When a litigant challenges the jury's verdict, he raises doubts about the process and the factors used by the jurors to reach their verdict. Further, a litigant's challenge reminds the court of his rights and, by implication, the need to consider these rights as part of the decision to admit or exclude juror evidence.

Originally, Lord Mansfield's rule raised a total bar to juror impeachment of the verdict. This rule was modified by Congress to allow juror impeachment in certain circumstances. Congress's attempt in rule 606(b) of the Federal Rules of Evidence to accommodate the conflicting interests of jury and litigant protection has failed. The broad language of rule 606(b), specifically designed to foster case-by-case development of juror impeachment law, paradoxically has raised further barriers to the accommodation process.

Cases arising since the enactment of rule 606(b) have defined three vague categories within the rule. The rule sets out three categories where juror evidence is excluded: (1) Any matter or statement occurring during the deliberations; (2) the effect of anything upon a juror's mind or emotions; and (3) the juror's mental process. The courts, however, have been unable to discern the parameters of each exclusion. In addition, due to the broadness of each category many courts have been content merely to label the particular juror misconduct. This same problem applies to the two exceptions in rule 606(b) which admit juror evidence upon a showing of: (1) Extraneous prejudicial information or (2) outside influence. The problems of vagueness in the rule and eager labeling by the courts have resulted in disparate decisions in particular and the lack of a cogent doctrine in general.

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210. 289 U.S. at 14.

211. *See* text accompanying notes 171-74 *supra*.

212. United States v. Dioguardi, 492 F.2d 70, 80 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974) ("absent substantial if not wholly conclusive evidence," courts are unwilling to subject jurors to a hearing on mental condition).

Congress promulgated rule 606(b) to resolve conflicting interests. It is improper to apply the rule without reference to the policies that originally prompted the juror impeachment rule. To facilitate the implementation of these policies, Congress and the courts should adopt a juror privilege approach for juror impeachment problems. Recognition that a process is required to balance these policies is an important first step. The fourth prong of the privilege, which balances protection of the jury against the desire for a fair disposal of litigation, is the keynote of this process.

Rather than label particular brands of juror misconduct, the courts should address the policies presented. The value of delineating one policy over another through a rational balancing process is substantial. The balancing approach of the privilege would result in more consistent and fair decisions. The use of this approach would mitigate the judge's discretionary power to overturn verdicts. Further, the privilege approach considers prospective improvement of and potential harm to the jury system, unlike rule 606(b) which deals only with present concerns. The courts and Congress must act in a manner parallel to the reality of a crumbling jury system, a system without proper guidelines or encouragement to reach a just verdict. Merely buttressing a crumbled building is insufficient when a new foundation is required.

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