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By Christopher B. Mueller*

Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)†

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The Hatter looked at the March Hare, who had followed him into the court, arm-in-arm with the Dormouse. "Fourteenth of March, I think it was," he said.

"Fifteenth," said the March Hare.

"Sixteenth," said the Dormouse.

"Write that down," the King said to the jury, and the jury eagerly wrote down all three dates on their slates, and then added them up, and reduced the answer to shillings and pence.

—Carroll, Alice in Wonderland

I. INTRODUCTION

In the trial of the Knave for stealing tarts, a jury of none-too-wise "creatures" (by which Alice meant "animals" and "birds")

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† This article is adapted from the manuscript for 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE §§ 282-284 & 286-292 (forthcoming in 1979; volume one was published in 1977, and volume two in 1978).

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write down their names early, in fear of forgetting them later; thereafter, they alternately misuse the evidence (adding dates to get "shillings and pence"), take ex parte cues from Alice (who, sensibly enough, advises that a nonsense poem offered in evidence has not "an atom of meaning"), and ignore the proceedings (consider the hapless Lizard, who sat "with its mouth open, gazing up into the roof").

If this fiction became fact, the defendant might hope to obtain reversal of an ensuing conviction for a number of reasons. Probably he could not, however, hope to enlist the aid of any juror to establish either the first or the third kind of misconduct described above if it occurred during deliberations: By longstanding common law tradition, a juror may not attest to such misconduct, and the same result would obtain in federal court under Rule 606(b) of the Federal Rules of Evidence.¹ The same may also be said in the fifteen states, including Nebraska, which had adopted counterparts to the Federal Rules of Evidence as of the fall of 1978.² As to the second kind of misconduct described above (taking ex parte cues from an outsider), Rule 606(b) would allow the testimony or affidavit of a juror,³ although this fact would be but cold comfort to the Knave, since the advice of Alice in the Carroll story was the most sensible counsel given at the trial.

The exclusionary doctrine restricting use of testimony or affidavits by jurors to show jury misconduct is often summed up in the maxim that a juror "cannot impeach his verdict." In fact, however, the maxim oversimplifies: Sometimes such proof may be received; sometimes not.

Rule 606(b) attempts to draw the necessary lines between the kinds of misconduct which a juror's testimony or affidavit may es-

1. On testimony or affidavits by jurors to establish misuse of evidence, see note 66 & accompanying text infra. On inattentiveness of a juror as a basis to impeach a verdict, see note 75 infra.

2. States which have adopted their own versions of the Federal Rules of Evidence include Arizona, Arkansas, Florida, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Wisconsin, and Wyoming. The situation in Florida is uncertain, but the author has been advised that the legislature there has postponed the effective date of the Florida Evidence Code to July, 1979. For the versions of Rule 606(b) in effect in these states, see notes 55-58 & accompanying text infra.

The author is advised that the Federal Rules are under consideration for possible adoption in Illinois, Vermont, and Washington. The Rules were approved by the Supreme Court of Ohio, but later disapproved by the Ohio Legislature.

3. On testimony or affidavits by jurors to establish contact during jury deliberation between jurors and witnesses or other outsiders, see notes 131-41 & accompanying text infra.
tablish, and the kinds which it may not. It addresses not only verdicts rendered by petit juries, but also indictments returned by grand juries. Briefly, as to matters occurring during deliberations, such proof may be received to establish the improper receipt of "prejudicial information" or to show improper "outside influence," but not otherwise. As it turns out, "not otherwise" covers a good deal of ground. The task of this article is to examine the lines drawn by Rule 606(b), and to illustrate—for illustration in this area seems more telling than analysis—the kinds of cases which fall on either side of the various lines which have been drawn.

Part II of this article briefly describes the common law antecedents and rationale of the exclusionary doctrine. It also describes the evolution of Rule 606(b), from the Advisory Committee's early draft to the rule finally adopted by Congress. Part III considers the operation of the rule in connection with impeachment of verdicts—taking up separately the cases in which the proof is excluded by virtue of the rule, the cases in which such proof may be received under exceptions to the rule, and the cases in which such proof may be received simply because the matters in question occurred before or after deliberation and therefore lie beyond reach of the rule. Part III also considers the procedural problems which surround the impeachment of jury verdicts. Finally, Part IV considers briefly the problem of impeachment of indictments by means of testimony or affidavits from grand jurors.

II. THE BASIC EXCLUSIONARY PRINCIPLE

A. Rationale, Common Law Origins, Scope

Obviously a doctrine preventing jurors from impeaching their own verdicts is convenient. As Judge Learned Hand said of the common law principle, "it offers an easy escape from embarrassing choices": That is, it helps avoid the need to decide what kinds of irregularities in the decision-making process should suffice to upset a verdict, and it submerges ultimate questions concerning the value of the jury system simply by keeping the imperfections out of sight.

Convenience, however, is no justification for the principle. It runs against the grain of a democratic society to sanction a deliberate attempt to hide from view the imperfections of its institutions. To borrow from Professors James and Hazard—

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.5

Modern authorities occasionally recognize the crux of the point made above, frankly acknowledging the impossibility of completely isolating the jury's deliberative process from the unwanted influence of external factors.6

There are, however, valid and powerful reasons7 which support the exclusionary principle. The Supreme Court long ago singled out two reasons as being most important. First, the exclusionary principle is necessary to prevent jurors from being "harassed and beset by the defeated party in an effort to secure... evidence of facts which might establish misconduct sufficient to set aside a verdict."8 Second, the exclusionary principle is necessary to prevent "what was intended to be private deliberation" from being made subject to constant public scrutiny, "to the destruction of all


"[T]he 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...."


In Owen, the court stated:

"The touchstone of decision... is thus not the mere fact of infiltration of some molecules of extra-record matter, with the supposed consequences that the infiltrator becomes a "witness" and the confrontation clause automatically applies, but the nature of what has been infiltrated and the probability of prejudice."

435 F.2d at 818.

7. King v. United States, 576 F.2d 432, 438 (2d Cir. 1978) (summarizing the points made in Dioguardi and Crosby infra); Government of Virgin Islands v. Ger- eau, 523 F.2d 140, 148 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976) (citing as policies underlying the rule "(1) discouraging harassment of jurors by losing parties eager to have the verdict set aside; (2) encouraging free and open discussion among jurors; (3) reducing incentives for jury tampering; (4) promoting verdict finality; (5) maintaining the viability of the jury as a judicial decision-making body"); United States v. Dioguardi, 492 F.2d 70, 79-80 (2d Cir.), cert. denied, 419 U.S. 873 (1974) (quoting with approval United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962), which stated: "juries themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain").

frankness and freedom of discussion and conference."

To these may be added a third and fourth reason: Third, allowing unrestricted attacks by jurors upon their verdicts would so undermine the finality of verdicts as to threaten the system itself; judges "would become Penelopes, forever engaged in unraveling the webs they wove." It is one thing to permit review on the basis of the record, by post-trial motion and appeal; it is quite another to extend review to the deliberative processes of the jury. Such extension would amount to a whole new dimension of scrutiny which would correspondingly reduce the measure of finality which verdicts and judgments now achieve.

Fourth, allowing unrestricted attacks by jurors upon their verdicts invites tampering with the process which would be difficult to detect. A single juror who reluctantly joined in a verdict is likely to be sympathetic to the overtures of defeated parties, and to be persuadable to the view that his own consent rested upon false or impermissible considerations; the truth will be hard to ascertain. In the process, the trier itself will be tried, all at the behest of a dissatisfied party aided by the second thoughts of a vaguely uncomfortable juror.

The roots of the common law exclusionary doctrine are commonly traced to the opinion of Lord Mansfield in *Vaise v. Delaval*, which announced what amounted to a blanket rule of exclusion leading to the shorthand expression, "a juror may not impeach his own verdict." Lord Mansfield saw his rule as a simple application of the principle that "no person should be heard to allege his own turpitude," and impeachment of jury verdicts was but one of several instances in which he applied this unfortunate notion. The doctrine of *Vaise v. Delaval* found widespread acceptance in the United States, but seldom in its strict (or blanket)

9. Id. at 267-68.
11. United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977) ("A central purpose of the rule of juror incompetency is the prevention of fraud by individual jurors who could remain silent during deliberations and later assert that they were influenced by improper considerations."); Government of Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976) (quoted in note 7 supra); United States v. Howard, 506 F.2d 865, 868-69 n.3 (5th Cir. 1975).
13. The quoted maxim, translated loosely from the Latin *nemo turpitudinem suam allegans audietur*, was apparently applied in other circumstances, such as to prevent married persons from testifying as to nonaccess in cases involving legitimacy of children, and to prevent drawers of commercial paper from alleging usury as a defense. See 8 J. WIGMORE, EVIDENCE § 2352 (McNaughton rev. 1961).
Many jurisdictions reduced and refined it substantially, recognizing the true bases for the principle and following a balancing approach, taking into consideration the need for jurors' testimony to help correct flawed verdicts in some circumstances. Two different departures from the strict form of the rule have been detected in the American common law tradition.

The "Iowa rule," labeled as such by Wigmore because of a prominent case from that jurisdiction, emphasizes a distinction between matters which "essentially inhere in the verdict itself," as to which the statements or testimony of a juror may not be received, and any "independent fact," as to which such statements or testimony may be received. In the former category, calling for exclusion of the proof, the Iowa court cited evidence that a juror did not assent to the verdict, that he misunderstood the pleadings, testimony or instructions in the case, that he was unduly influenced by the statements of his fellow jurors, and that he was mistaken in his calculations or judgment. In the latter category, calling for reception of the proof, the Iowa court cited evidence that a juror was improperly approached by a party, his agent or attorney, that witnesses communicated with jurors out of court concerning the merits, and that the verdict was reached by quotient or chance. A leading Kansas case emphasized that jurors could only testify to "overt acts," and seemed concerned to permit only proof of forms of objective misconduct which more than one juror could verify. "Independent fact" and "overt act" did not, how-

14. Until adopting the Federal Rules in 1976, Arkansas adhered to a strict form of the common law rule. By statute, it barred examination of a juror except on the question whether the verdict was reached "by lot." See former Ark. Stat. Ann. § 43-2204 (1964). See also the egregious case of Brock v. State, 237 Ark. 73, 371 S.W.2d 539 (1963) (defendant admitted shooting the deceased with a shotgun but claimed self-defense; one juror would have testified that another had gone to a store and brought back a card indicating the number of shells used in the shooting while the evidence showed that more shells were found in the body of the decedent than the card said that one shell contained, the juror would have testified that the jury found that defendant had shot decedent more than once, which apparently influenced the rejection of the defense; the juror's testimony was excluded).


17. Id. at 210-12.

18. Id. at 210.

ever, reach discussions during jury deliberations, unless these conveyed extrarecord personal knowledge of a juror concerning the case.\textsuperscript{20}

A second departure from the strict rule of \textit{Vaise v. Delaval} turned upon a distinction between “the actual effect of . . . extraneous matter upon jurors’ minds,” as to which testimony or statements by a juror would not be received, and the “extraneous matter” itself, as to which such evidence would be received.\textsuperscript{21} This approach found support in federal authority,\textsuperscript{22} and it has been interpreted as requiring exclusion of evidence of quotient verdicts,\textsuperscript{23} decisions to abide a majority vote,\textsuperscript{24} misinterpretation of instructions,\textsuperscript{25} or misuse of evidence.\textsuperscript{26} Under this approach, however, proof may be made of improper contact with the bailiff\textsuperscript{27} or parties,\textsuperscript{28} or the introduction of unauthorized evidence into the jury room.\textsuperscript{29}


\textsuperscript{21} Woodward v. Leavitt, 107 Mass. 453, 466 (1871) (“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.”); State v. Kociolek, 20 N.J. 92, 98-100, 118 A.2d 812, 815-16 (1955) (leading opinion by Judge [now U.S. Supreme Court Justice] Brennan). See also Mattox v. United States, 146 U.S. 140, 149 (1892). In \textit{Mattox}, the Court purported to quote \textit{Leavitt} to the effect “that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a jurymen may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.”

\textsuperscript{22} Mattox v. United States, 146 U.S. 140, 149 (1892) (quoted in the preceding note).

\textsuperscript{23} McDonald v. Pless, 238 U.S. 264 (1915). See also note 86 & accompanying text infra.


\textsuperscript{25} Bryson v. United States, 238 F.2d 657, 665 (9th Cir. 1956), \textit{cert. denied}, 355 U.S. 817 (1957). See also note 63 & accompanying text infra.

\textsuperscript{26} Morgan v. Sun Oil Co., 109 F.2d 178, 180 (5th Cir. 1940) (alleged jury use for substantive purposes of prior statements by a witness admissible only for impeachment purposes). See also note 86 & accompanying text infra.

\textsuperscript{27} Parker v. Gladden, 385 U.S. 363 (1966). See also note 135 & accompanying text infra.

\textsuperscript{28} Washington Gas Light Co. v. Connolly, 214 F.2d 254, 257 (D.C. Cir. 1954). See also note 136 & accompanying text infra.

\textsuperscript{29} Stiles v. Lawrie, 211 F.2d 188, 190 (6th Cir. 1954) (driver’s manual in personal injury suit arising out of automobile accident). See also note 104 & accompanying text infra.
The exclusionary principle, regardless which form it takes, purports to regulate the manner of proof, and not to set the grounds upon which verdicts may be impeached. Thus, there is authority which allows the testimony of an eavesdropper to matters as to which the testimony of a juror could not be received, as well as cases which hold that circumstantial evidence of jury misconduct may be received.

B. Enactment and Approach of Rule 606(b)

As enacted by Congress, 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 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, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Dissected, this provision may be seen as defining the exclusionary principle in terms of context, kind of evidence, and thrust or subject of the evidence. The context is any "inquiry into the validity of a verdict or indictment." The kind of evidence barred is testimony by a juror, his affidavit, or any proof of his out-of-court statement on a matter as to which his testimony would be barred. The thrust or subject of evidence excludable under the rule includes (1) any "matter" occurring or "statement" made during deliberations, (2) the "effect" of anything upon the "mind or emotions" of any juror, and (3) the "mental processes" of the juror whose testimony, affidavit, or statement is offered.

The exclusionary principle is qualified by two major exceptions, which are defined in terms of thrust or subject. The first is "extraneous prejudicial information... improperly brought to the jury's attention," and the second is "outside influence... improperly brought to bear upon any juror." Obviously these excep-

30. Consolidated Rendering Co. v. New Haven Hotel Co., 300 F. 627, 629 (D. Conn. 1924) (implying in passing that bailiff could testify); Reich v. Thompson 346 Mo. 577, 142 S.W.2d 466 (1940) (testimony by eavesdropping court clerk received to impeach verdict). See Annot., 129 A.L.R. 803 (1940).
31. Central of Georgia Ry. v. Holmes, 223 Ala. 188, 134 So. 975 (1931) (papers in jury room examined to determine whether jury had improperly read an instruction which had not been given them).
32. FED. R. EVID. 606(b).
33. Id.
tions substantially qualify the first of the three out-of-bounds subjects noted above—"matter[s]" occurring and "statement[s]" made during deliberations—for these may be proved to the extent they reveal extraneous information or outside influence.

It was not always so.

In the process of drafting Rule 606(b), the Advisory Committee began with a simple and narrow exclusionary principle. In the form originally proposed, Rule 606(b) read:

Inquiry into Validity of Verdict or Indictment. 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 statement by him indicating an effect of this kind be received for these purposes.34

The exclusionary principle embodied in this language reached only the "effect of anything" on the "mind or emotions" of a juror, and the "mental processes" of jurors. It contained no exceptions. This language was retained in the Advisory Committee's subsequent draft.35

Under pressure from Senator McClellan36 and the Justice Department,37 however, the Advisory Committee introduced substantial changes38 into the final draft, which was submitted to the Supreme Court, and then transmitted without further modification by the Court to Congress. This changed version expanded the exclusionary principle to reach not only the "effect of anything" and the "mental processes" of jurors, but also "any matter or statement


We 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.

The Memorandum proposed revised language substantially identical to that ultimately adopted, but not including the reference contained in Rule 606(b) to "outside influence."

38. See Draft of Rule 606 (November, 1972), 56 F.R.D. 183, 264-65 (1972) (the form of the rule transmitted to Congress, and also the form of the revised definitive draft as submitted to the Court).
occurring during the course of the jury's deliberations.\textsuperscript{39} However, this changed version also introduced the two crucial exceptions for “extraneous prejudicial information” and “outside influence.”\textsuperscript{40} The net effect of this change was to expand the rule's exclusionary impact substantially. That is, the two exceptions to the principle introduced in the changed version affect only the new category added to the exclusionary principle—any “matter” occurring or “statement” made during deliberations—and this new category is far broader than the two exceptions. In sum, the matters as to which no affidavit or testimony of a juror may be received became much broader under the changed than under the original version of the rule.

It was the broader version of the exclusionary principle which the Court transmitted to Congress and which Congress ultimately enacted.

In the interim, however, the House of Representatives sought a return to the narrower exclusionary principle and the language originally proposed by the Advisory Committee. It was the House Subcommittee to which the new Rules were referred, perhaps influenced by the advocacy of Professor Carlson, who proposed this return to the original draft.\textsuperscript{41} Carlson, referring to the Court's broader version of the rule, argued:

\begin{quote}
Proposed rule 606(b) seeks to resolve the extent to which jurors may be used to expose wrongdoing by other jury members in overturning a jury verdict. A rule allowing such evidence is necessary. The better reasoned cases permit such testimony, and much wrongdoing in arriving at judgments has been exposed. See those cases in which jurors placed a bet on the outcome of a case, or where a jury member consumed half a pint of whisky during deliberations, cited in Ladd & Carlson . . . . Leading decisions favoring the admission of juror testimony to expose jury misconduct include \textit{People v. Hutchinson} . . . (proof of overt acts of misconduct allowed; proof of subjective reasoning process of juror which cannot be corroborated disallowed); \textit{Wright v. Illinois} & \textit{Miss. Tel Co.} . . . (original case in this line of authority).

The proposed federal rule allows juror testimony but limits such testimony to improper “outside influence,” e.g., an extraneous newspaper account of the trial which is brought into the jury room and read by one juror to the other. The kind of misconduct cited in the prior paragraph of this letter is insulated from attack. So also is one major form of jury misconduct in personal injury cases, the quotient verdict.
\end{quote}

\textsuperscript{39} \textit{Id.} at 265.

\textsuperscript{40} \textit{Id.}

To illustrate, in a civil damage suit, the jury is unable to agree on a verdict. They decide that each juror should write down on a slip of paper the amount to which the plaintiff is entitled, divide by 12, and that will stand as the jury's verdict. Eleven jurors put "0" on their slips: the twelfth juror, who has been holding out for the plaintiff, puts down $480,000, the full amount of the plaintiff's demand. The jury's verdict now stands as an award of $40,000 to the plaintiff, even though the overwhelming majority of the jurors found no liability at all on the part of the defendant.

As in the case of the scope of cross-examination problem, the federal advisory committee's original thinking in the area of jury inquiry was superior to the final product now before Congress. The committee's 1969 preliminary draft allowed inquiry into objective jury misconduct... and the quotient verdict was not insulated from attack. This approach was continued in the 1971 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.\textsuperscript{42}

The House went along with the narrower exclusionary principle favored by Carlson, the House Subcommittee, and in the end by the House Judiciary Committee. On the floor, Representative Hungate supported this version:

\begin{quote}
[T]here is effective authority on both sides of the issue and the Judicial Conference supported the [House Judiciary] committee version in which we would seek to prohibit the quotient verdict... .
\end{quote}

The [House Judiciary] committee view is supported by various associations, such as Association of the Bar of New York, the Chicago Bar Association, and the Judicial Conference made no objection.

Thirteen states favor the [House Judiciary] committee version: California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, Washington, and Wisconsin.\textsuperscript{43}

The Senate balked. Its own Judiciary Committee amended the rule to return to the broader exclusionary principle proposed by the Advisory Committee and the Court.\textsuperscript{44} The Senate view prevailed in the end; the House/Senate Conferences endorsed the broader principle,\textsuperscript{45} and it was enacted.

During the original House consideration of Rule 606(b), an unsuccessful attempt was made on the floor to reject the House Judiciary Committee's version of the rule.\textsuperscript{42} The House version was supported by various associations, such as Association of the Bar of New York, the Chicago Bar Association, and the Judicial Conference made no objection.\textsuperscript{43}

Fourteen states favor the House version: California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, Washington, and Wisconsin.\textsuperscript{45}

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\textsuperscript{42} Letter from Ronald L. Carlson, then Associate Dean and Professor of Law, University of Iowa, to Representative William Hungate (Feb. 27, 1973), set forth at \textit{House Hearings}, supra note 41, at 389-90 (citing \textit{People v. Hutchinson}, 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196 (1969); \textit{Wright v. Illinois & Miss. Tel. Co.}, 20 Iowa 195 (1866); M. LADD & R. CARLSON, CASES AND MATERIALS ON EVIDENCE 266-67 (1972)). The Iowa rule described in Professor Carlson's letter is considered further in notes 15-20 & accompanying text supra.

\textsuperscript{43} 120 CONG. ROLL. 2375 (1974).

\textsuperscript{44} \textit{See S. REP. NO. 1277, 93d Cong., 2d Sess. 13-14 (1974).} The change in language first appeared in the Senate Print of H.R. 5463, dated October 11, 1974.

\textsuperscript{45} \textit{See H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 8 (1974).}
ciary Committee's proposal, and to adopt by amendment to the committee's bill the broader exclusionary principle which was to prevail in the end. The attempt produced the following speech and dialogue, which shed significant light upon congressional understanding of the rule ultimately enacted:

Mr. WIGGINS. Mr. Chairman, this amendment would retain the current limits on the permissible grounds for impeaching jury verdicts, permitting such impeachment only in situations in which outside attempts to influence a jury's deliberations are alleged to have taken place.

Rule 606(b), as it is now drafted provides that a juror may be permitted to testify, in an attack upon a verdict or indictment, on matters involving the internal deliberations of the jury as opposed to the current practice of allowing testimony only as to the existence of outside influences. This presents a disturbing invitation to regularized attempts to obstruct justice after trial through the importuning of jurors to criticize the deliberations of their fellow jurors. The change would open the door to persistent posttrial harassment and intimidation of jury members by losing parties seeking to reverse verdicts that heretofore would have been considered final. As such, the current draft of the rule constitutes a most ill-advised policy.

The traditional stance adopted by the courts in this regard has been to permit impeachment of a jury verdict only in instances of extraneous influence or pressure. For example, reversals have been based upon a showing that a bailiff expressed opinions to jurors as to the guilt of a defendant (Parker v. Gladden . . .) and that police witnesses against a defendant were also in charge of and conversed with jurors while supervising their sequestration. (Turner v. Louisiana . . .) Similarly, reversal of a conviction has been deemed appropriate when sequestered jurors, while still undecided, were shown to have perused a newspaper article unfavorable to the defendant. (Mattox v. United States . . .) The understandable rationale for permitting jurors to give evidence as to such outside influences lies in a fundamental concern that the jury deliberation should be wholly independent and based only upon evidence developed at the trial. See Turner v. Louisiana . . .

However, contrary to the Judiciary Committee's proposed expanded rule, jurors have not generally been permitted to testify as to the substance or the process of their deliberations or to their method of reaching a verdict. See McDonald v. Pless . . . (concerning an allegation of an improper quotient verdict); Hyde v. United States . . . (concerning an allegation of a compromise verdict arranged among the jurors); Bryson v. United States . . . (concerning an allegation that the jury had not understood the meaning of the term "affiliated," which played a part in the case).

While the adverse effects of such occurrences as quotient and compromise verdicts are not to be ignored or accepted as inevitable, their eradication is better sought through the formulation and development of more precise and lucid predeliberation jury instructions than through the nullification of the jury's final decision.

Therefore, I suggest that the House of Representatives would be better advised to adopt this amendment which would maintain the current well reasoned practice of drawing the line, as to permissible verdict impeachment, between allegations of extraneous influences and allegations of incorrect internal deliberation procedures.
Mr. DENNIS. I thank the gentleman for yielding.

Under the amendment which the gentleman proposed, if one of the jurors was alleged to have stated in the jury room to the others that he had made up his mind and it did not make any difference how long he stayed there, he was going to vote a certain way, would it be possible for the other jurors to give affidavits to that effect after the vote was brought in?

Mr. WIGGINS. Under the proposed rule or under my rule?

Mr. DENNIS. Under your amendment.

Mr. WIGGINS. In my opinion, it would not.

Let me say I am not insensitive to the problem. If you have a juror who will not discuss the issues as he should, I think it is wholly appropriate for the foreman of that jury to take that fact back to the judge and see the juror is properly instructed. If in fact he fails to comply with those instructions, the foreman can then take that fact back to the judge and the matter can be corrected by the new trial at that time.

... Mr. DENNIS. Under your proposed amendment, would it be possible to take the affidavit or testimony of the jurors that they had added up their several votes and divided by 12 and arrived at a quotient decision?

Mr. WIGGINS. In my opinion, that would not be the appropriate subject of inquiry under my amendment. In saying that, I say to my friend from Indiana I am not insensitive to the problem of the quotient verdict, but the further problem is whether we should open up the jury negotiations for an inquiry into that subject or whether the problem of the quotient verdict should be addressed by the court in giving instructions to the jury at the outset.

Mr. DENNIS. A[m] I correct that under the committee version as it appears in the bill the matter of a quotient verdict, or the juror who had made up his mind, could be attacked through the testimony of other jurors as the bill now stands?

Mr. WIGGINS. I believe that is within the intent of the language of 606(b) to make such an inquiry proper.46

As enacted, Rule 606(b) rather closely resembles the second of the two common law versions of the exclusionary principle previously described.47 In one respect, however, Rule 606(b) seems broader than any version of the common law doctrine, for it appears to bar evidence of any sort as to a statement by a juror concerning deliberations of the jury, so long as the juror himself would be barred from making the same statement in the form of testimony in court. This, at least, is the apparent meaning of the second sentence of Rule 606(b), which seems to bar "[the juror's] affidavit or [any] evidence of any statement by him" concerning a matter to which the juror could not testify.48

47. See text accompanying notes 15-20 supra.
48. The quoted language could be interpreted to reach only the juror's own evidence (whether by testimony or affidavit) of his or her own statements, and not evidence in the form of testimony by others. It seems likely that the
Like the common law doctrine, Rule 606(b) does not by its terms address the grounds upon which impeachment of a verdict or indictment is permitted. It purports to regulate only the manner of proof. As a practical matter, however, both the common law doctrine and Rule 606(b) impose what amounts to limits upon the ground of permissible impeachment of verdicts and indictments. That is the obvious result of a rule which significantly restricts use of the only sure source of information as to occurrences during the jury's deliberations. Even a conclusion that the principle is substantive in nature would not, however, raise serious Erie problems, inasmuch as regulating the security of federal verdicts and indictments is legitimately a matter for federal law to control.\(^49\)

Rule 606(b) does not address the question whether a lawyer or any party may approach a juror after a verdict has been rendered in order to obtain information which might be useful in any subsequent effort to impeach a verdict. The Code of Professional Responsibility imposes what amounts to minimal protections\(^50\) against approaches of this sort by lawyers connected with the case in question. There are also provisions in some local rules which

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judge, in ruling upon a motion for a new trial under FED. R. CIV. P. 50 or FED. R. CRIM. P. 33, may consider evidence which might otherwise be subject to hearsay objections, even though no provision in the Rules of Evidence makes them expressly inapplicable in such proceedings.


50. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108 provides inter alia:

\[(D)\] 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. \[(E)\] A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror. \[(F)\] All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror. \[(G)\] A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror, or a member of his family, of which the lawyer has knowledge.

See also A.B.A. OPINIONS OF THE COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 319 (1967) ("a lawyer, in his obligation to protect his client, must have the tools for ascertaining whether or not grounds for a new trial exist and it is not unethical for him to talk to and question jurors"; however, the lawyer must not "harass, entice, induce or exert influence on a juror to obtain his testimony"; nor should he "flatter or fawn" over a juror).
restrict such approaches. Occasionally courts have suggested that post-verdict interviews of jurors by trial counsel are unethical, or have found it necessary to restrict this process through injunction.

New Uniform Rule 606 is substantially identical to Federal Rule 606, although the order of the language of subdivision (b) has been changed. This new Uniform Rule has been adopted by several states, and a number of other states follow Federal Rule 606, although often with seemingly insignificant local variations. Still other states have adopted a version of Federal Rule 606 with significant differences. Nevada follows substantially the version of

51. See, e.g., D. Wyo. R. 18(b):

Interviews with jurors after trial are prohibited except on condition that the attorney or party involved file with the Court written interrogatories, together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for new trial. Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed may then be granted. Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories.


53. See text accompanying notes 162-64 infra.

54. Uniform Rule of Evidence 606.


56. Me. R. Evid. 606 (omitting from subdivision (b) the final phrase “for these purposes”); Minn. R. Evid. 606 (following Rule 606 verbatim); Neb. Rev. Stat. § 27-606 (Reissue 1975) (in its counterpart to the final sentence of subdivision (b), changing the phrase “concerning a matter about which he would be precluded from testifying” to “indicating an effect of this kind”); N.M. Stat. Ann. § 20-4-606 (Supp. 1975) (in first sentence of subdivision (b), changing “extraneous” to “outside”; in last sentence, deleting phrase “for these purposes”); Okla. Evid. Code 606(b) (1978) (following Rule 606(b) verbatim); S.D. R. Evid. 606(b) (adding initial proviso, “[e]xcept as otherwise provided by statute”); Wis. Stat. Ann. § 906.06 (West 1975) (deleting phrase “for these purposes”).

57. Ariz. R. Evid. 606 (first sentence of subdivision (b) deletes all references to “indictment” and contains language limiting its applicability to a verdict “in a civil action”); Fla. Stat. Ann. § 90.607(2)(b) (West Supp. 1978) (“Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.”); Mich. R. Evid. 606 (first sentence tracks first sentence of Fed. R. Evid. 606(a); second sentence makes clear that no objection is necessary to preserve the point; there is no counterpart whatever to Rule 606(b), apparently because it was felt that the question of impeachment of verdicts is substantive); Rules of Evidence, Mont. Rev. Code Ann. R. 606 (Cum. Rules Pam.
Rule 606 originally proposed by the Advisory Committee, containing the narrow exclusionary principle.58

III. IMPEACHING VERDICTS UNDER RULE 606(b)

A. The Basic Exclusionary Principle Applied

The context in which Rule 606(b) operates—"inquiry into the validity of a verdict or indictment"—clearly suggests that the rule will play a significant role in connection with motions for a new trial under Rule 59 of the Federal Rules of Civil Procedure and Rule 33 of the Federal Rules of Criminal Procedure.59 It is also to be expected that the exclusionary principle will be called into play in motions for relief from a judgment or order under Rule 60 of the Federal Rules of Civil Procedure and with collateral attacks upon a criminal conviction under 28 U.S.C. § 2255.60

The thrust or subject of the evidence covered by Rule 606(b)'s exclusionary principle includes (1) any "matter" occurring or "statement" made during deliberations (unless it fits within one of two exceptions discussed elsewhere61), (2) the "effect" of anything upon the "mind or emotions" of any juror, and (3) the "mental processes" of the juror whose testimony, affidavit, or statement is offered. Obviously these three categories overlap. A juror could hardly describe his own "mental processes" without revealing the "effect" of something upon his "mind or emotions." And evidence of a "statement" made during deliberations may tell something of "mental processes" or the "effect" of something upon the "mind or emotions."

A point of central importance in these descriptive phrases is this: It would have been hard to paint with a broader brush, and in terms of subject, Rule 606(b)'s exclusionary principle reaches everything which relates to the jury's deliberations, unless one of the exceptions applies. Because of this overlap, and because the categories, taken together, cover so much ground, no systematic effort is made to assign the examples listed below to one category

59. See generally notes 158-59 & accompanying text infra.
61. See text accompanying notes 100-108 & 124-41 infra. See also text accompanying notes 142-54 infra (situations beyond reach of the exclusionary principle).
or another. Where the context and kind of evidence are those described in Rule 606(b), proof to the following effects is excludable thereunder:

1. that one or more jurors ignored or misunderstood instructions or interrogatories to the jury;
2. that one or more jurors ignored or misunderstood the applicable substantive law;
3. that one or more jurors misused any portion of the evidence in the case;
4. that one or more jurors held it against the accused that he failed to take the stand.

62. See text accompanying notes 32-34 supra.
64. Smallwood v. Pearl Brewing Co., 489 F.2d 579, 602 n.30 (5th Cir.), cert. denied, 419 U.S. 984 (1974); Vizzini v. Ford Motor Co., 72 F.R.D. 132, 134-36 (E.D. Pa. 1976), rev'd on other grounds, 569 F.2d 754 (3d Cir. 1977) (note from juror during damage phase of trial to effect that another juror had believed that answers to interrogatories during liability phase would negate all blame and result in "draw" and that consequently the two jurors disagreed as to the amount of damages; while new trial was given on damage issue, no new trial was necessary on liability, for this information could not be used under FED. R. Evm. 606(b) to impeach verdict on liability).
65. See Poches v. J.J. Newberry Co., 549 F.2d 1166, 1169 (8th Cir. 1977) (in products liability suit in which jury returned verdict for defendant, proof could not be received that one juror thereafter stated that plaintiff had definitely proved that a certain lawnmower was substandard and not up to specifications but had worked to convince other jurors to vote against plaintiff anyway, since many things on the market are substandard); Capella v. Baumgartner, 59 F.R.D. 312, 315 (S.D. Fla. 1973).
66. United States v. Crosby, 394 F.2d 928, 949 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962) (proof that juror erroneously considered guilty of one codefendant, established by plea during first week of trial, as indicative of guilt of other codefendants, and that this affected the verdict, rejected); Morgan v. Sun Oil Co., 109 F.2d 178, 180 (5th Cir. 1940) (rejecting proof by testimony of jurors that they considered certain ex parte written statements taken into the jury room as substantive evidence, although the statements were received only for impeachment purposes).
67. United States v. DiCarlo, 575 F.2d 952, 960 (1st Cir. 1978) (claim that jury considered defendant's failure to testify flew in "the face of the familiar principle that a verdict may not be impeached by a juror's testimony"); Cunningham v. United States, 356 F.2d 494, 455 (5th Cir. 1966) (trial court properly refused to allow counsel to examine jurors on discussion of defendant's failure to testify in his own behalf, since a juror will not be heard to impeach his own verdict); Davis v. United States, 47 F.2d 1071 (5th Cir. 1931); Williams v. United States, 3 F.2d 333 (6th Cir. 1923).

Cf. Dickinson v. United States, 421 F.2d 630, 631-32 (5th Cir. 1970) (letter
5. that one or more jurors improperly speculated upon extrarecord matters of common knowledge, such as the impact of insurance upon the judgment (or of the judgment upon insurance rates), or the impact of contingent fees or taxes in the case;

6. that one or more jurors improperly speculated that the accused would be released on probation, or that he would quickly be paroled;

7. that one or more jurors compromised principles out of concern over personal matters in order to make an early end to deliberations, or gave in to pressure from others

from juror to counsel after trial stating that juror had relied, *inter alia*, upon fact that defendant had not taken stand, “does not reach the dignity of a showing that jurors discussed the failure to testify”; court would intimate no view upon question whether such a showing would constitute ground for new trial).

68. Gault v. Poor Sisters of St. Frances Seraph of Perpetual Adoration, 375 F.2d 539, 548-51 (6th Cir. 1967) (soundness of business policy of keeping pregnant woman on job past sixth or seventh month of pregnancy, compared to practice of bank, as related by foreman to rest of jury, against allowing women to work after seventh month of pregnancy; the court stated: “[T]his is very close to representing the sort of information about commonly known facts of life which jurors are supposed to possess and to bring to their consideration of the case.” In any event, this item of discussion did not prejudice the result or constitute reversible error).


70. Gault v. Poor Sisters of St. Frances Seraph of Perpetual Adoration, 375 F.2d 539, 548-51 (6th Cir. 1967) (discussion of amount of recovery which would go to plaintiff’s attorney did not amount to “extraneous influences” or “improper approach” or “communication” from outsider).

71. *Id.* at 548-51 (discussion of income tax plaintiff might have to pay out of recovery did not amount to “extraneous influences” or “improper approach” or “communication” from outsider).

72. Klimes v. United States, 263 F.2d 273 (D.C. Cir. 1959) (proper to deny new trial upon basis of affidavit submitted by one juror stating, *inter alia*, that another juror stated that probably the accused would get probation and would not have to go to prison anyway).

73. Poches v. J.J. Newberry Co., 549 F.2d 1166, 1169 (8th Cir. 1977) (affidavit of juror foreman to effect that he hurried deliberations in order to depart on trip “may well have been inadmissible” under FED. R. Evid. 606(b), and was in any event not inconsistent with disclosure he made to the judge at trial, at which time appellant made no objection); United States v. Green, 523 F.2d 229, 234-35 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976) (evidence in form of juror’s affidavit to effect that jury reached a compromise verdict because two jurors insisted that they would depart on vacation trips on following day regardless what happened did not warrant a new trial); Castleberry v. N.R.M. Corp., 470 F.2d 1113, 1116-18 (10th Cir. 1972) (court properly excluded affidavit of juror to effect that she agreed to go along with other jurors only because she believed the jury would be kept in deliberations indefinitely otherwise); Jorgensen v. York Ice Mach. Corp., 160 F.2d 432 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947) (affidavits revealing that jury agreed to abide majority vote in or-
and cast votes against better judgment or without being truly persuaded;\(^7\)

8. that one or more jurors was inattentive during trial or deliberations, sleeping or thinking about other matters;\(^7\)

9. that one or more jurors erred in calculating the amount of an award,\(^7\) or miscast his vote in a tenor opposite to that intended\(^7\) (although an error in reporting the verdict may

der to secure release so that jury foreman could return home, since he had learned on last day of trial that his son had been killed in military action, did not justify new trial). See also United States v. Kohne, 358 F. Supp. 1046, 1048-50 (W.D. Pa.), aff'd, 487 F.2d 1395 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974) (see note 74 infra).

74. United States v. Blackburn, 446 F.2d 1089, 1090-91 (5th Cir. 1971), cert. denied, 404 U.S. 1017 (1972) (where juror telephoned associate of defendant after verdict and stated that the foreman had "harassed them pretty strong," but thereafter denied this allegation, it was proper to deny defense request for court to interrogate other jurors because verdict could not be impeached by fact that juror may have been influenced by improper remark of fellow juror); United States v. Schroeder, 433 F.2d 846, 851 (8th Cir. 1970) (verdict could not be impeached on basis of affidavit by juror stating that he felt the defendant to be not guilty, and that "he voted for conviction against his will"; juror had indicated his assent to verdict when jury was polled); United States v. Betancourt, 427 F.2d 851, 854 (9th Cir. 1970) (statement by woman juror that she had been "convinced" by other jurors to find defendant guilty as charged, though she was convinced defendant did not intend to defraud, and that she had cried, could not be received to impeach the verdict); United States v. Stoppelman, 406 F.2d 127, 133 (1st Cir.), cert. denied, 395 U.S. 981 (1969) (jury foreman's affidavit that he voted only "under pressure" rejected); United States v. Grieco, 261 F.2d 414 (2d Cir. 1958), cert. denied, 359 U.S. 907 (1959) (assertions of juror, by letter and testimony, that another juror abused her so that she was shaken, crying, and upset did not constitute ground for new trial); Johnson v. Hunter, 144 F.2d 555, 557 (10th Cir. 1944) (black juror could not testify that the eleven white jurors intimidated him to vote guilty, although proof of the fact would invalidate the verdict); Smith v. Brewer, 444 F. Supp. 482, 488-89 (S.D. Iowa 1978) (habeas corpus petition arising out of state court conviction denied, court cited Fed. R. Evid. 606(b) for proposition that juror may not impeach verdict by testifying that other jurors pressured her to change her vote, especially where juror did not indicate any dissent when jury polled); United States v. Kohne, 358 F. Supp. 1046, 1048-50 (W.D. Pa.), aff'd, 487 F.2d 1395 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974) (denying new trial where one juror indicated physical coercion from others, but the former was an able-bodied trucker and construction worker, and court found threats were "empty ones, expressive of impatience, exasperation and frustration"; testimony that same juror was anxious to get home because of concern over a gas heater, and over his dogs and cat, would also be insufficient to impeach verdict, court cited proposed Fed. R. Evid. 606(b)).


76. See 8 J. Wigmore, supra note 13, § 2349.

77. York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., 447 F.2d 786, 794 (5th Cir. 1971) (no error in refusing to amend judgment; affidavit by jury foreman stating that jury intended verdict to run against dealership corporation as well as certain individuals fell within rule that a single juror cannot impeach verdict of the whole jury); United States v. Chereton, 309 F.2d 197, 200-01 (6th
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be proved, or does not agree with or believe in the verdict, or that the verdict was the result of mistake or prejudice.

10. that a juror traded his vote upon one issue or as to one party in order to obtain the support of another juror as to some other issue or party;

11. that the jury agreed upon a time limit for deliberations;

12. that the jury misunderstood the requirement of a unanimous decision, or agreed to abide the vote of a majority, or of a number less than that necessary for a proper verdict.

Cir. 1962) (petition for writ of error coram nobis properly rejected, where it rested upon claim that jurors had meant to convict upon different counts from those stated in the verdict and panel had been polled as a group in open court, and no juror indicated confusion); Vizzini v. Ford Motor Co., 72 F.R.D. 132, 134-36 (E.D. Pa. 1976), rev'd on other grounds, 569 F.2d 754 (3d Cir. 1977) (proof that juror was shocked to find that his vote would result in imposing all liability on defendant rejected).

78. See text accompanying notes 149-53 infra.

79. United States v. Lustig, 555 F.2d 737, 746 (9th Cir. 1977) (after verdict has been received, affidavit of juror repudiating verdict would not be received); Klimes v. United States, 263 F.2d 275 (D.C. Cir. 1959) (affidavit stating, inter alia, that at no time including the present did juror have an abiding conviction of defendant's guilt would not suffice to impeach verdict); United States v. Homer, 411 F. Supp. 972, 978 (W.D. Pa. 1976) (proof that juror was shocked to find that his vote would result in imposing all liability on defendant rejected).

80. Poches v. J.J. Newberry Co., 549 F.2d 1166, 1169 (8th Cir. 1977) (verdict "was a product of mistake or prejudice").

81. Id. at 1169. But see note 93 & accompanying text infra.

82. Stein v. New York, 346 U.S. 156, 178 (1953) (court will not accept disclosure by juror of "compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue" [citing Hyde infra]); Hyde v. United States, 225 U.S. 347, 392-93 (1912) (proof that jurors who believed all defendants should be convicted agreed with jurors who believed all should be acquitted to trade the conviction of one for the acquittal of another properly rejected); United States v. Dye, 508 F.2d 1226, 1232 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975) (court properly denied counsel's request for a voir dire of the jury on basis of statement that a juror was induced to vote guilty with respect to two defendants he thought to be innocent in exchange for votes by others to acquit other defendants).

83. Capella v. Baumgartner, 59 F.R.D. 312, 314-15 (S.D. Fla. 1973) (motions for new trial and for permission to interview jurors denied, where plaintiff suggested, inter alia, that jury may have agreed to give in by a certain time or hour in arriving at verdict).

84. United States v. Homer, 411 F. Supp. 972, 978 (W.D. Pa. 1976) (that juror did not hear instruction that verdict had to be unanimous, did not all agree with verdict, and did not understand what they were doing when asked questions at time of poll, were all impermissible impeachment of the verdict).


See United States v. Howard, 507 F.2d 559, 561 n.3 (8th Cir. 1974) (dictum)
13. that the jury arrived at the sum to be awarded by adding together the amounts which each juror thought appropriate and dividing by the number of jurors—rendering the classic "quotient verdict."\(^8\)

Clearly the above list is illustrative rather than exhaustive.\(^8\) There are indications that Rule 606(b) reaches statements by jurors during deliberations even when accidentally discovered by (or inadvertently made to) court or counsel.\(^8\)

Rule 606(b) is fully applicable with respect to a verdict which disposes of only some (but less than all) issues in a case. It bars impeachment of such verdicts to the same extent that it bars impeachment of verdicts finally disposing of all issues. Thus, Rule

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(statement by foreman that jury was not unanimous in finding of guilt could not be received to impeach verdict).

But cf. United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977) (charge that jury could find defendant guilty on a particular count if all agreed that defendant was guilty of some acts but were unable to agree as to particular acts violated defendant’s constitutional rights; examination of this instruction did not amount to impermissible impeachment of jury verdict).

But cf. United States v. 4.925 Acres of Land, 143 F.2d 127, 128 (5th Cir. 1944) (‘Quotient verdicts have been generally denounced 'gambling verdicts' and this is an improper method to be used by jurors in arriving at a verdict.” Instruction to arrive at verdict by quotient method, given after jury advised judge that it was unable to agree upon an amount, was reversible error.).

86. House debate indicates that Rule 606(b) bars proof by jurors of a quotient verdict. See text accompanying note 42 (arguments for the House revision of the rule, which ultimately went down in defeat, emphasized an intent to allow impeachment of quotient verdicts), and note 46 (argument for the Court's version of Rule 606(b), which was ultimately enacted, stressed that impeachment of quotient verdicts should not be permitted) supra.


87. See, e.g., 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 FBI agents in an unrelated incident was incompetent to impeach verdict under Rule 606(b), where it was not contended that juror voiced his suspicion to others on the jury; no error in refusal to authorize counsel to subpoena remaining jurors).

88. Domeracki v. Humble Oil and Refining Co., 443 F.2d 1245, 1247 (3d Cir.), cert. denied, 404 U.S. 883 (1971) (scratch paper accidentally discovered attached to verdict, indicating to judge that jury may not have followed his instructions, could not be considered to impeach verdict); Vizzini v. Ford Motor Co., 72 F.R.D. 132, 135-36 (E.D. Pa. 1976), rev’d on other grounds, 569 F.2d 754 (3d Cir. 1977) (communication from jury to judge indicating possible lack of unanimity in verdict could not be received).
606(b) applies to a verdict on the issue of liability, where this is tried separately from the issue of damages in civil cases pursuant to Rule 42 of the Federal Rules of Civil Procedure, and should likewise apply to verdicts on any other issues which are similarly severed.\textsuperscript{89} It also applies to a verdict rendered in a criminal case which relates to one or more (but less than all) defendants or charges, where such a verdict is returned pursuant to Rule 31 of the Federal Rules of Criminal Procedure.\textsuperscript{90}

Probably Rule 606(b) requires exclusion of proof by the testimony or affidavit of a juror that a verdict was reached by chance or lot.\textsuperscript{91} Such proof goes to a "matter" occurring during deliberations.

\textsuperscript{89} Vizzini v. Ford Motor Co., 72 F.R.D. 132, 136 (E.D. Pa. 1976), rev'd on other grounds, 569 F.2d 754 (3d Cir. 1977) (after verdict had been returned finding liability, and jury had retired to deliberate damages, a juror wrote a note stating that another juror believed that answers to interrogatories would result in a "draw," and that consequently the jury disagreed as to damages; the rule against impeachment of verdicts by jurors applied).

\textsuperscript{90} United States v. Hockridge, 573 F.2d 752, 757-59 (2d Cir. 1978) (in the interests of finality, Fed. R. Evid. 606(b) should be applied to a partial verdict returned in a criminal case pursuant to Rule 31 of the Federal Rules of Criminal Procedure; here the jury convicted several defendants, and then retired to consider the cases of several others; while thus deliberating, one juror advised judge that she had felt "railroaded" at the last minute on the earlier verdicts; another said she had voted to convict because of "verbal attack"; no subsequent indications were received, from these or any other jurors; Fed. R. Evid. 606(b) barred this evidence from use for impeachment purposes).

\textsuperscript{91} See Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 50 (1974) (statement of Professor Cleary). Professor Cleary testified:

To the extent that the Court's rule insulates verdicts from attack on the ground that they were reached by chance or other irregularities during deliberations, the Court's rule removes the incentive to bribe, threaten or otherwise bring pressure on jurors to testify that irregularities occurred. The Court's rule thus goes farther in assuring the stability of verdicts and in protecting jurors from harassment or possible harm.

The contrast drawn here is between the "Court's rule," which ultimately prevailed, and the House version, which was a throwback to the Advisory Committee's original proposal, and which was ultimately rejected. See text accompanying notes 36-45 supra.

\textit{Cf.} Rules of Evidence, MONT. REV. CODES ANN. R. 606 (Cum. Rules Pam. 1977) (rearranging subdivision (b) of the rule, and adding language making clear that the affidavit or testimony of a juror may be received on the question whether any verdict was affected "by a resort to the determination of chance"); Rules of Evidence, N.D. CENT. CODE R. 606 (Supp. 1977) (like Montana, adding language making clear that the affidavit or testimony of a juror may be received on the question "whether the verdict of the jury was arrived at by chance"); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY § 5.7 (1968) (in proposed rule substantially similar to Rule 606(b), a provision expressly permitting proof that verdict "was reached by lot" is included; implication is that without such a provision, evidence would have to be excluded; Rule 606(b) contains no similar provision).
tions, and amounts to an indication of the "mental processes" underlying the verdict. However, verdicts resting on chance or lot do greater violence to the ideal of decision by the collective wisdom of the community than does the quotient verdict, for the latter contains elements of thought, and may well approximate the bargaining process which would otherwise go forward. Decision by chance or lot represents the negation of a rational process. And it is at least arguable that the flip of a coin amounts to "outside influence" in the sense of introducing a decisive force which lies beyond the evidence and beyond the mental processes of the jury.

Serious and sensitive problems may arise if it can be made to appear that a verdict was the product of egregious racial or ethnic prejudice. If proof to this end depends upon the testimony or statements of one or more jurors after the verdict, Rule 606(b) stands as a potential bar, since such 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.

The uncertainties reflected in the two previous paragraphs reflect a looseness in the terms of the rule, which may in the end prove necessary and valuable if cases of such difficulty arise.

92. See F. James & G. Hazard, supra note 5, § 7.19; Comment, supra note 20, at 371-72.

93. United States ex rel. Daverse v. Hohn, 198 F.2d 934, 937-38 (3d Cir. 1952) (denying habeas corpus relief to petitioner sentenced to death in state criminal proceeding; petitioner, of Italian extraction, alleged that one juror was prejudiced against Italians; apparently federal judge examined juror, who denied under oath racial prejudice or prejudging petitioner's case; no error); Smith v. Brewer, 444 F. Supp. 492, 498-90 (S.D. Iowa 1978) (habeas corpus from conviction of black defendant in state court denied; juror offered to testify that another juror had mimicked defense counsel, who was black, and also sought to mimic black manners; this evidence would not be receivable under Rule 606(b), but court acknowledged that there can be no dogmatic rule in this area, and that proof of racial bias in the jury room might offend fundamental fairness if it prejudiced a defendant); Cherensky v. George Washington-East Motor Lodge, 317 F. Supp. 1401, 1403-04 (E.D. Pa. 1970) (new trial denied, despite fact that after discharge of jury, plaintiff was told by one juror that verdict was based on anti-Semitic prejudice; "rule of nonimpeachment of jury verdict governs the case at bar," especially since it was a civil action, juror had opportunity to bring to light jury misconduct in open court, but did not do so even though she did note her disagreement with the jury, and where she twice reaffirmed her verdict).

Cf. Johnson v. Hunter, 144 F.2d 565 (10th Cir. 1944) (black juror could not testify that the eleven white jurors intimidated him to vote guilty, although proof of the act could invalidate the verdict). See generally Annot., 91 A.L.R.2d 1120 (1963); Annot., 48 A.L.R.2d 971 (1956).

94. Cf. United States v. Reid, 53 U.S. (12 How.) 361, 366 (1851). In Reid, the Court stated:
Clearly the counsel of the rule, however, is to be conservative in the approach to such problems and to err upon the side of exclusion rather than receipt of evidence in close cases.

It has been suggested that Rule 606(b) would be improved by a provision to the effect that a juror may impeach his verdict by giving evidence “that a threat or act of violence was brought to bear upon him to reach that verdict.” There is no doubt that Rule 606(b) in its present form permits impeachment by proof of threats or acts of violence directed at any juror by forces outside the jury room, but concern has been expressed that threats or violence by one juror against another should also be provable by testimony or affidavits from jurors, and it is likely that in its present form Rule 606(b) would block such proof. While some jurisdictions have considered counterparts to Rule 606(b) which would permit juror testimony or affidavits along this line, no jurisdiction to date has enacted such a rule.

B. Exceptions to the Basic Principle

1. Showing Extraneous Prejudicial Information

The first exception to the basic exclusionary principle of Rule 606(b) permits impeachment of verdicts by proof that the jury improperly received during deliberations “extraneous prejudicial information.” Reasonably read, this exception paves the way to impeach jury verdicts by evidence of any sort of information which might have affected the verdict if it was conveyed to the jury through extrarecord sources, unless the information was in the nature of “common” or “regional” knowledge. A fact which falls in either of the latter categories may be judicially noticed, and the

It would perhaps hardly be safe to lay 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 by jurors] without violating the plainest principle of justice. It is however unnecessary to lay down any rule in this case . . . .

Newspaper reports, read by jury, were held not prejudicial because they did not influence the verdict. Reid was cited with approval on this point in Mattox v. United States, 146 U.S. 140, 147-48 (1892).


96. See text accompanying notes 124-25 infra.

97. See Robinson & Reed, A Review of the Proposed Michigan Rules of Evidence, 56 Mich. St. B.J. 21, 29 (1977) (the subject of impeachment of verdicts was ultimately left out of Mich. R. Evid. 606 altogether), and proposed-but-rejected Ohio R. Evid. 606, cited in 50 Ohio B. 231, 240 (1977) (the Ohio legislature acted to block adoption of the proposed Ohio Rules; the matter may be reconsidered).

98. See the discussion of Rule 201 in 1 D. Louisell & C. Mueller, Federal Evi-
jury may also take it into account in reaching a verdict.

On the question whether to permit impeachment of a verdict, it makes no difference that the "extraneous" matter could have been introduced into evidence. Juries should not decide cases on the basis of admissible matters which were not in fact admitted, and accordingly a matter may be "prejudicial" within the meaning of Rule 606(b) even if it would not have been excluded on the ground of "unfair prejudice" under Rule 403 had it been offered at trial.99 The point is to insure, as far as reasonably possible, that juries will reach verdicts on the basis of information known to the parties in litigation, and to provide the party whose case is negatively affected by the data a chance to probe and rebut.

This exception for "extraneous prejudicial information"100 makes way for impeachment of verdicts by evidence of the following kinds:

1. that one or more jurors had acquired specific personal knowledge concerning the parties or controversy prior to trial which might affect the verdict,101 although some authority, which must be considered suspect in light of the

99. FED. R. EVID. 403.
100. See generally Annot., 58 A.L.R.2d 556 (1958).
101. United States v. Howard, 506 F.2d 865 (5th Cir. 1975) (reversing denial of new trial motion based upon affidavit by one juror that another juror had stated that defendant had been in trouble two or three times before; this amounted to "extrinsic factual matter" even though a juror was the source, rather than a bailiff or some third person; judge could not, however, consider proof from any juror as to the effect which such information might have had upon other jurors); Downey v. Peyton, 451 F.2d 236, 239-40 (4th Cir. 1971) (reversing denial of habeas corpus and remanding for evidentiary hearing on question whether jury had learned of rumors that defendant had previously beaten a guard; proof that such rumors were reported would not require jurors to give evidence upon their evaluation of the case); United States ex rel. Owen v. McMann, 435 F.2d 813, 817-18 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1971) (affirming grant of writ of habeas corpus from state court conviction of robbery, assault, and larceny, where testimony and affidavits by jurors indicated that "unfavorable incidents" in defendant's life had been related to jury by several jurors; under such circumstances, the conviction denied due process).
language of the rule, requires that the knowledge, if possessed originally by only one juror, be passed along to other jurors during deliberations;\(^\text{102}\)

2. that one or more jurors conducted during deliberations an extrarecord investigation into the parties or controversy, especially if the results were shared with the rest of the jury;\(^\text{103}\)

3. that the jury took to its deliberations unauthorized objects, such as books,\(^\text{104}\) or discovered such objects accidentally among objects properly received in evidence and taken to the deliberations;\(^\text{105}\)

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102. Cf. United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977) (defense contention that a single juror realized in mid trial that defendant was involved in another crime did not justify request for permission to subpoena remaining jurors; there was no allegation that this realization was mentioned to others in jury room; there must be "overt acts susceptible to the other jurors' knowledge").

103. Gafford v. Warden, 434 F.2d 318, 319-20 (10th Cir. 1970) (affidavit by one juror, to effect that one or more others had checked the time a late show ended and that a juror went to a gas station to determine whether it was open at a time stated by a witness, established grounds for hearing to determine whether conviction of defendant violated sixth amendment rights to an impartial jury and to confront witnesses).

104. Bates v. Preble, 151 U.S. 149, 158 (1894) (whole memorandum book sent to deliberations, when only part was admissible and rest contained inadmissible matter bearing upon the issue; rest of book should have been "sealed up or otherwise protected from . . . inspection"); Paz v. United States, 462 F.2d 740, 746 (5th Cir. 1972), cert. denied, 414 U.S. 820 (1973) (books on drug traffic, drug problems, and people involved with drugs found in jury room during trial of narcotics charges; judge advised jury that it could read the books but not discuss them; case remanded with order to grant new trial unless evidentiary hearing showed no reasonable possibility that books affected verdict); Stiles v. Lawrie, 211 F.2d 188, 190 (6th Cir. 1954) (driver manual used by jury in negligence case, apparently to determine speed of vehicle from length of skid marks; new trial ordered); Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), cert. denied, 322 U.S. 764 (1947) (dictum) ("receiving incompetent documents" requires new trial).

Cf. United States v. Michener, 152 F.2d 880, 885-86 (3d Cir. 1945) (allowing all corporate records in court to be received in evidence, although containing inadmissible notations, reversible error, although court could not determine what effect such material might have had on the jury).

105. Farese v. United States, 428 F.2d 178, 181-82 (5th Cir. 1970) (in prosecution for interstate transportation of false and fraudulent security, an attache case containing freshly laundered shirts was received in evidence and taken to deliberations; in a pocket, jury discovered $750 in cash; conviction reversed); United States v. Brandenburg, 155 F.2d 110, 113 (3d Cir. 1946) (along with prescriptions properly admitted in evidence in a narcotics prosecution were three which were inadvertently admitted and which contained hearsay statements; new trial ordered).
4. that the jury conducted an unauthorized experiment in the jury room, going beyond mere examination or scrutiny of physical objects properly taken into the deliberations;  

5. that one or more members of the jury had an unauthorized view of the premises in litigation during deliberations; and  

6. that information which might have affected the verdict made its way into the jury room during deliberations through any of the media, such as newspaper, radio, or television.  

106. United States v. Beach, 296 F.2d 153, 158 (4th Cir. 1961) (prosecution for perjury in connection with defendant's sworn testimony that he had not heard certain adding machines in operation; prejudicial error to send drop cord to jury at its request, where the adding machines had been sent to jury room and apparent purpose of cord was to test the noise they made). But cf. Taylor v. Reo Motors, Inc., 275 F.2d 699, 705 (10th Cir. 1960) (dismantling of allegedly defective heat exchanger was not improper). See Annot., 95 A.L.R.2d 351 (1964).  

107. United States ex rel. De Lucia v. McMann 373 F.2d 759 (2d Cir. 1967) (unauthorized view during state prosecution for attempted burglary and related offenses; state court had refused to consider the misconduct because of rule against jury impeachment of verdicts; federal court dismissed petition for habeas corpus to allow state court time to reconsider in light of intervening United States Supreme Court decision; thereafter in People v. De Lucia, 20 N.Y.2d 275, 229 N.E.2d 211, 222 N.Y.S.2d 526 (1967), the New York court admitted the evidence of the unauthorized view); United States v. Kansas City, 157 F.2d 459, 462-63 (8th Cir. 1946) (new trial denied after unauthorized view in condemnation action; because photographs had been received and view could have shown little more, no presumption of prejudice arose); Kilgore v. Greyhound Corp., So. Greyhound Lines, 30 F.R.D. 385, 388-89 (E.D. Tenn. 1962) (after verdict for defendant in suit arising out of car-bus collision, plaintiff produced affidavits of two jurors stating that another had visited scene of accident, sought to reconstruct facts, and investigated a Greyhound bus, and then related his findings to the jury; court heard testimony by the latter, but concluded that his "ill-advised extracurricular activities" did not give rise to a presumption jury was improperly influenced and denied new trial). See Annot., 11 A.L.R.3d 918 (1967); Annot., 58 A.L.R.2d 1147 (1958). See also Gafford v. Warden, 434 F.2d 318, 320 (10th Cir. 1970) (jurors checking time late show ended and visiting gas station to check whether it was open at a certain time established grounds for hearing to determine whether defendant's sixth amendment rights to impartial jury and to confront witnesses violated).  

108. Mattox v. United States, 146 U.S. 140, 151 (1892) (newspaper; new trial granted); United States v. Reid, 53 U.S. (12 How.) 361, 366 (1851) (newspaper; conviction affirmed); Bulger v. McClay, 575 F.2d 407 (2d Cir. 1978) (habeas corpus relief from state conviction, resting upon failure of state judge to hold adequate hearing after attorney's affidavit revealed jury consideration of newspaper article); United States v. Reynolds, 573 F.2d 242, 245 (5th Cir. 1978) (judge asked jury after polling the verdict whether they had heard or read news accounts concerning a witness; this was proper, and denial of new trial was proper where any prejudicial accounts did not affect jurors); United States v. Thomas 463 F.2d 1061, 1064-65 (7th Cir. 1972) (newspaper; failure to
IMPEACHMENT OF VERDICTS

It has been observed that it is simply impossible to require the jury room "to be a laboratory, completely sterilized and freed from any external factors."\(^9\) Realistically, courts could not treat proof of the infiltration of any and all prejudicial information, or of any and all outside influences, as mandating a new trial. In fact, the party seeking to set aside a verdict cannot succeed unless it appears that the information or influence had a prejudicial impact upon the verdict,\(^1\) and not all information or outside influences will be considered prejudicial. As one distinguished court has observed:

"[T]here are still sections of the country where it might be impossible to find twelve jurors who were totally ignorant about a defendant. Moreover, to allow verdicts to be attacked merely for casual jury-room references on the basis of matters not in evidence would add unduly to the already fragile state of criminal convictions."\(^5\)

Similar sentiments have been expressed by others.\(^6\) It is, of course, true that the fact that testimony or affidavits by jurors may conduct hearing where juror indicated that article was discussed and argued about during deliberations required grant of new trial); United States v. McKinney, 429 F.2d 1019, 1023-31 (5th Cir. 1970) (prettrial newspaper publicity concerning defendant; remanded for evidentiary hearing as to potential prejudice); United States v. Kum Seng Seo, 300 F.2d 623 (3d Cir. 1962) (juror found newspaper article about defendant's trial, and passed it around jury shortly before vote on verdict; trial judge examined two jurors and denied new trial motion; reversed).

110. See note 170 & accompanying text infra.

In McKinney, the court stated:

All must recognize, of course, that a complete sanitizing of the jury room is impossible. We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system, and we cannot and should not excommunicate them from jury deliberations. Nevertheless, while the jury may leaven its deliberations 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 "testify" in the confines of the jury room concerning specific facts about the specific defendant then on trial. Our adversary system presupposes courtroom testimony only and must reject the transfixion of testimony adduced beyond the judicial aegis. To the greatest extent possible, all factual testimony must pass through the judicial sieve, where the fundamental guarantees of procedural law protect the rights of those accused of crime.

429 F.2d at 1022-23.
be received to demonstrate that "extraneous prejudicial information" made its way into the jury room does not mean that such proof may be offered of the effect which such information had upon any juror, or upon the jury as a whole.113

That one or more members of the jury took into account matters of common or regional knowledge during deliberations should not be a ground to impeach the verdict. In a case involving the question of the value of legal services, the Supreme Court held long ago:

It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of inquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty and probably come to a wrong conclusion, if, controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb. Other persons besides professional men have knowledge of the value of professional services; and, while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable.114

This language distinguishes "particular facts" from "general knowledge of the subject of inquiry." Often this distinction is easily drawn; sometimes it is very difficult.

Regional knowledge which is peculiar to the jurors of a particular area, and which comes from the routine experiences of life in that area, often constitutes "general knowledge" which the jury

may properly consider. Indeed, one purpose of the customary vicinage requirement is to secure a jury possessed of this kind of understanding. Jurors sitting in New York City may be expected to bring to bear their knowledge of traffic movement, customs, and general street conditions in deciding a negligence case arising from an urban intersection collision; jurors sitting in Los Angeles may be expected to bring to bear their understanding of standard residential tract construction in the climatic and geologic conditions of southern California in deciding a suit by a homeowner against a builder on account of a sagging floor or a cracked wall.

On the basis of empirical study of jurors, Professor Broeder reports that jurors in fact bring to bear far more specific knowledge of local conditions than that exemplified above. Some of the instances he describes arguably qualify as "general knowledge" and a juror's testimony on such points would be excluded under Rule 606(b) as reflecting only that juror's "mental processes" if offered to impeach a verdict—for example, that dope peddling is one of the community's most pressing problems (a factor in a conviction on a narcotics charge); that trucks "barrel through" town on Sunday morning (apparently misused to conclude that plaintiff was contributorily negligent in stepping into the street); that a particular road was narrow (hence that defendant's employee was driving too fast); or that a particular intersection was the site of numerous accidents caused by the failure of drivers entering a thoroughfare properly to gauge the speed of oncoming vehicles (hence that defendant, driving on the thoroughfare, was not negligent).

Other instances of regional knowledge described by Professor Broeder seem to cross the line into the realm of "particular facts," and probably amount to "extraneous prejudicial information" within the meaning of Rule 606(b)—for example, that a particular tavern was only two blocks from defendant's residence, as determined by one juror through personal investigation during trial and related to the other jurors during deliberations (apparently becoming the basis to conclude that defendant lied when he testified that he had never heard of the tavern in question); that the center lane of a three-lane highway was raised two inches (thus explaining why defendant's employee failed to move to that lane when observing an obstacle in the lane in which he was driving); or that a vast quantity of liquor was ordered for a local wedding (apparently forming the basis to conclude that plaintiff's testimony that he had drunk only "a couple of beers" was unworthy of belief).

The use of what may best be described as "specialized knowledge" also presents difficulties. In one case cited by Professor Broeder, a juror knew the local wage scale for truck drivers, and utilized it in computing plaintiff's damages, where plaintiff's intestate had been a truck driver in the area. Specialized knowledge, known personally to one or more jurors, has occasionally formed the basis for impeachment of verdicts.\textsuperscript{116} There is force, however, in the suggestion that there is a high probability that at least one person on any given jury will have some kind of specialized knowledge which will be useful in resolving the dispute, hence that juries which include such persons are not in any sense "unrepresentative."\textsuperscript{117}

There is no clear indication in federal decisions whether a jury should be instructed to take into account common knowledge in reaching its verdict. A standard work includes an instruction which contains the following language:

Anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.\textsuperscript{118}

This instruction emphasizes the formal evidence in the case, acknowledging the propriety of resort to general knowledge only in an oblique reference at the end to "experience." There is little authority on point,\textsuperscript{119} and most of what there is comes from state courts. Some decisions support the proposition that the jury may be told to consider common knowledge gleaned through the everyday experiences of life,\textsuperscript{120} or even personal knowledge of a general sort, though not necessarily shared with mankind in general, when

\begin{itemize}
  \item Texas Employers' Ins. Ass'n v. Price, 336 S.W.2d 304 (Tex. Civ. App. 1960) (in workman's compensation suit, jury found total and permanent disability where plaintiff's own witnesses indicated only partial and permanent disability; defendant obtained new trial on basis of testimony by juror that he had related to jury on basis of personal experience that employers would not hire persons with obvious injuries, so that plaintiff should receive total and permanent disability).
  \item Comment, supra note 20, at 367.
  \item 1 E. Devitt & C. Blackman, Federal Jury Practice and Instructions § 11.11 (3d ed. 1977).
  \item See generally Annot., 144 A.L.R. 932 (1943).
  \item Marshall v. State, 54 Fla. 66, 71, 44 So. 742, 743 (1907) (No error to instruct: "You will bring to bear upon the consideration of the evidence in this case . . . all that common knowledge of men and affairs, which you, as reasonable men have and exercise in the every day affairs of life."); State v. Bjelkstrom, 20 S.D. 1, 104 N.W. 491 (1905).
\end{itemize}
gleaned from firsthand rather than hearsay sources.121 Others either find it reversible error to give such instructions, or approve of instructions which seek to limit the attention of the jury to the formal evidence introduced in the case.122 The difference among the cases is mostly one of emphasis rather than substance, as appears in the decisions which seek to strike a balance between a stress on formal evidence and a recognition of the reality of general knowledge and experience as a factor in the decision.123

2. Showing Outside Influence

The second and last exception to the basic exclusionary principle of Rule 606(b) permits impeachment of verdicts by evidence that “any outside influence was improperly brought to bear upon any juror." The purpose of this language is to permit proof of external pressures which might affect the verdict or interfere with the deliberative processes in a way which would distort the verdict. It should make no difference in this particular instance whether the information improperly imparted to the jury was pertinent.

The present exception paves the way for impeachment of verdicts by proof of serious and blatant efforts to interfere with the jury’s deliberations, such as attempts to bribe jurors124 or to

121. Solberg v. Robbins Lumber Co., 147 Wis. 259, 133 N.W. 28 (1911) (approving instruction that jurors may use such general practical knowledge as they may have, regardless whether the knowledge be common to all jurors; trial judge had emphasized that jurors could use personal knowledge not based upon hearsay).

122. State v. Henderson, 217 Iowa 402, 404, 251 N.W. 640, 641 (1933) (disapproving instruction that jury might use its “knowledge of values and of affairs generally” and need not rely “wholly upon the opinions of the witnesses” in prosecution for defrauding an insolvent bank in which defendant’s knowledge of condition of bank was element of case); Commonwealth v. Vanderpool, 367 Mass. 737, 328 N.E.2d 833 (1975) (approving instruction to jury to consider the evidence presented in the courtroom and nothing else; apparently an attempt to discourage jury from considering the sudden illness of defendant, which occurred in court during testimony of prosecution witness).

123. Brown v. State, 80 Wyo. 12, 25-26, 336 P.2d 794, 798-99 (1959) (no error to instruct that in weighing the evidence “it is within the province of the jury to take into consideration your own knowledge and experience" where jury was also instructed to decide case only upon evidence and not to discuss anything else; court would have preferred instruction allowing jury to consider “their knowledge and experience in common with mankind in general”).

124. Remmer v. United States, 347 U.S. 227 (1954) (upon being advised by jury foreman that he had been approached and told he might profit by a verdict for the defendant, the court should hold a hearing in which both prosecution and defense might participate to determine whether prejudice has resulted; error to resolve the matter through an FBI investigation and an ex parte hearing with the prosecution); Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), cert. denied, 332 U.S. 764 (1947) (dictum) (mentioning “brib-
threaten them or their families.125

Occasionally, this exception also paves the way for proof by the affidavit or testimony of a juror that one or more jurors became intoxicated during deliberations.126 Verdicts are seldom upset upon this ground, however, and modest consumption of alcohol by jurors at mealtime or other occasions when it is unlikely to affect

ery" as a matter upon which affidavits of a juror may be received); Stone v. United States, 113 F.2d 70, 76-78 (6th Cir. 1940) (attempt by third person, not at instigation of either the defendant or the government, to bribe a juror; reversal required, for the conduct raised a presumption of prejudice which the government did not rebut).

125. Krause v. Rhodes, 570 F.2d 563, 566-70 (6th Cir. 1977) (where record showed juror and his family had been threatened three times and juror had been assaulted once, a new trial was required; trial judge should have held a hearing to determine whether juror should be excused and whether the other jurors had heard about the threats and assault); Stimack v. Texas, 548 F.2d 588 (5th Cir. 1977) (grant of habeas corpus relief from state conviction affirmed, where jurors testified after verdict that they had received phone calls from someone identifying himself as defense counsel and stating that jurors would be killed by Mafia if jury failed to return not guilty verdict).

Cf. Gold v. United States, 352 U.S. 985, 985 (1957) (new trial awarded where, in connection with prosecution for filing a false noncommunist affidavit, it appeared that FBI agents contacted families of some jurors, ostensibly to determine whether they had received propaganda literature; court considered this to be "official intrusion into the privacy of the jury" and found that it makes no difference that the intrusion was "unintentional"); United States v. Gersh, 328 F.2d 460, 463-64 (2d Cir. 1964) (where defense failed to request hearing after court announced that witness and jury forewoman had received anonymous phone calls, there was no right to a new trial; defense should have sought affidavits of jurors to raise more clearly the issue of prejudice).

But cf. Government of Virgin Islands v. Gereau, 523 F.2d 140, 152 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976). In Gereau, the court stated that rumors of other killings and of an FBI investigation would not constitute "extraordinary influences" merely by virtue of having an "outside source," but would have to have "coercive force" as well. These rumors were too "nebulous" and seemed to have been regarded as coming only from other jurors; therefore, they were not "coercive or intimidating."

126. Faith v. Neely, 41 F.R.D. 361, 364-66 (N.D.W. Va. 1966) (on basis of one juror's affidavit that another was guilty of misconduct, court submitted questionnaire to all jurors; on basis of both affidavit and responses to questionnaire, court concluded that juror had not become so intoxicated as to lose control of his faculties; court considered rule against impeachment of verdicts, but without trying to formulate an exception it simply concluded that there was precedent for such interrogation of jurors in cases of misconduct such as that alleged); Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), cert. denied, 332 U.S. 764 (1947) (dictum) (mentioning drunkenness as an irregularity which requires a new trial).

Cf. Baker v. Hudspeth, 129 F.2d 779, 782 (10th Cir.), cert. denied, 317 U.S. 681, rehearing denied, 317 U.S. 711 (1942), rehearing denied, 318 U.S. 800 (1943) (habeas corpus relief from state conviction denied where petitioner asserted, inter alia, that jurors used intoxicating liquors during deliberations, but court found that nothing in record suggested "that any juror was intemperate, or that his conduct was unbecoming to a gentleman").
deliberations will not amount to cause for a new trial.\textsuperscript{127} It seems that the use of hallucinogenic or narcotic drugs during deliberations should similarly be provable, although the author has seen no reported cases on the subject. A juror should probably also be able to testify that he or another member of the panel became suddenly and seriously ill during deliberations, although a minor stomach upset or headache is not ground to upset a verdict.\textsuperscript{128} Probably a juror's statement, affidavit, or testimony showing that any juror was insane or mentally afflicted during deliberations, should also be receivable under Rule 606(b).\textsuperscript{129} However, a student work which surveyed this problem concluded that in no reported case has a verdict been upset for this reason.\textsuperscript{130}

More often, the outside-influence exception is invoked in cases involving improper extrajudicial contacts between third persons

\begin{footnotesize}
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\item See generally cases collected in Annot., 7 A.L.R.3d 1040 (1966).
\item Cf. United States v. Kafes, 214 F.2d 887, 889 (3d Cir. 1954) (indigestion of jury forewoman, requiring Alka Seltzer and resulting in her inability to participate in deliberations for "a portion of the time," did not require a new trial; trial judge interviewed juror in question, who declared that she was not incapacitated); United States v. Pleva, 66 F.2d 529, 533 (2d Cir. 1933) (setting aside conviction where juror advised the trial court during deliberations that he was suffering acutely from asthma and bladder problems, and indicated that he was assenting in verdict solely out of concern for his own wellbeing; court found that his vote "was but the result of coercion even though no coercion was intended," and it expressly declined to indicate an opinion on the result if the information had come to light only after a verdict had been returned).
\item United States v. Dioguardi, 492 F.2d 70, 76-81 (2d Cir.), cert. denied, 419 U.S. 873 (1974) (after conviction of securities fraud, defendant received letter from juror asserting clairvoyant powers; seven psychiatrists opined that the letter indicated "hallucinatory tendencies, symptoms of possible psychosis, paranoia, and grandiosity, and in general an inability to appreciate reality without fantasizing"; these "horseback uninformed opinions" did not justify further inquiry; the policy against inquiry into state of mind of jurors could be overcome by proof of adjudication of insanity prior to jury service, but "absent such substantial if not wholly conclusive evidence," courts are unwilling to subject jurors to a hearing on mental condition); Peterman v. Indian Motorcycle Co., 216 F.2d 289, 293 (1st Cir. 1954) (trial judge properly denied new trial motion upon rejecting losing party's offer to prove that one juror had depressed and suicidal periods, that he had undergone treatment for anxiety reaction to psychic episode expressed by "auditory hallucinations," and that he had been under psychiatrist's care for extended period with little prospect of an early end to his difficulties); United States v. Hohn, 198 F.2d 934, 937-38 (3d Cir. 1952) (habeas corpus relief from state conviction carrying death penalty denied despite allegations that one juror suffered from "a mental disease of the paranoid type and a prejudiced and fixed opinion and tendency to falsehood"; this was not the same thing as alleging insanity, for thrust of allegations was that juror was "prejudiced" and of a "fixed opinion"; court below did not err in rejecting allegations that juror had anti-Italian prejudice, on basis of examination of juror).
\end{enumerate}
\end{footnotesize}
and one or more jurors.\textsuperscript{131} Many such contacts are of course inevitable, since courts are not well-equipped to secure complete separation of the jury from all outsiders. Even if the jury is sequestered during deliberations, such contacts may not lead to reversal, and in most cases it is necessary to show more than the contact alone to secure a new trial.\textsuperscript{132} As is discussed herein-after, however, in many instances the party seeking a new trial is assisted by a presumption of prejudice.\textsuperscript{133} In any event, proof may be received of contact between jurors and (1) the court itself,\textsuperscript{134} or the bailiff or other functionary of the court,\textsuperscript{135} (2) the parties or

\textsuperscript{131} See generally Annot., 98 L. Ed. 656 (1954); Annot., 62 A.L.R. 1466 (1929); Annot., 34 A.L.R. 103 (1925); Annot., 22 A.L.R. 254 (1928).

\textsuperscript{132} United States v. Bufalino, 576 F.2d 446, 451 (2d Cir. 1978) (where evidence showed only laughs, stares, rebuffed efforts to start conversations, entry into jury's bathroom following plumbing breakdown elsewhere in building, all involving outsiders, there was no indication that the contacts involved the matter in dispute; no presumption of prejudice arose, and there was no error in denying new trial motion); United States v. Brasco, 516 F.2d 816, 819, cert. denied, 423 U.S. 860 (1975) (appellant not entitled to new trial where he failed to show that violation of sequestration order by jurors related to the matter pending).

\textsuperscript{133} See notes 173-74 & accompanying text infra.

\textsuperscript{134} United States v. Walls, 577 F.2d 690, 698 n.12 (9th Cir. 1978) (while juror's affidavit could be received to show the fact that another juror had conferred with the judge, both counsel had been present in the conference, and both obviously knew about it; court cites \textit{Fed. R. Evid.} 606(b)); Truscott v. Chaplin, 403 F.2d 644, 645 (3d Cir. 1968) (but here appellant failed to object or make an appropriate pre-verdict motion, so claim of error would not be considered).

\textsuperscript{135} Parker v. Gladden, 385 U.S. 363, 364-65 (1966) (where bailiff said to one juror in presence of others that defendant was "wicked" and "guilty," and that if anything were wrong with a conviction the Supreme Court would correct it, the conviction was inherently lacking in due process, and violated rights of confrontation and cross-examination); Mattox v. United States, 146 U.S. 140, 151 (1892) (new trial required where jurors' affidavits related that bailiff had told jury that this was third person defendant had killed); Government of Virgin Islands v. Gereau, 523 F.2d 140, 153-55 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976) (conversation between juror and matron could be proved by juror as "extraneous influence," but in this case matron's statement that jury should hurry up so she could get home was not prejudicial, since it did not affect juror's vote and was not related to the rest of the jury); United States \textit{ex rel. Tobe v. Bensinger}, 492 F.2d 232, 237-39 (7th Cir. 1974) (affirming grant of petition for habeas corpus where bailiff advised jury \textit{ex parte} that it had to keep deliberating and reach a verdict, since "any influence which emphasizes the importance of agreement to the exclusion of the dictates of conscience is coercive and prejudicial"); United States v. Brumbaugh, 471 F.2d 1128, 1129-30 (6th Cir.), cert. denied, 412 U.S. 918 (1973) (conversation in which bailiff inquired of juror how deliberations were going, and commented that it is always "some woman or something" which holds things up was properly found by trial judge, upon examination of juror immediately thereafter, to be non-prejudicial, where conversation was not related to other jurors); Wheaton v. United States, 133 F.2d 322, 326-27 (8th Cir. 1943) (advice by bailiff to jury on need to reach a verdict, the independence of the various counts, and the
persons aligned with any party (such as attorneys or officers or employees), \(^{137}\) (3) witnesses, who are of course often associated with the cause of one party or the other, \(^{138}\) or (4) any other outsider who seeks in some way to influence deliberations. \(^{139}\) Often
proof has been received of the presence of outsiders in the jury room, including alternate jurors and court functionaries.\textsuperscript{140} The present exception does not reach cases of coercion of one juror by others, which by definition do not constitute "outside" influence.\textsuperscript{141}

C. Situations Beyond Reach of the Basic Principle

Verdicts may be set aside or altered out of concern over the conduct or probable thought processes of the jury in many circumstances which lie beyond reach of Rule 606(b). Often the rule simply does not come into play because courts are willing to take corrective action without seeking evidence of any kind from a juror; sometimes it does not apply even where such evidence is sought, because the juror's testimony relates to matters occurring either before or after the jury's deliberations.

The first category, requiring no testimony or affidavit by a juror, is broad indeed. Rule 606(b) in no way affects the grant of a new trial under Rule 33 of the Federal Rules of Criminal Procedure or Rule 59 of the Federal Rules of Civil Procedure on account of (1) improper appeals to passion or prejudice in the argument of counsel,\textsuperscript{142} (2) passion or prejudice manifested in the verdict itself (as

\textsuperscript{140} United States v. Allison, 481 F.2d 468, 472 (5th Cir. 1973) (presence of alternate juror in jury room by stipulation of parties; case remanded to determine whether alternate "in any way participated in the jury deliberations, or if any regular juror was deterred in the free exercise of his independence of thought, expression, or action"); Little v. United States, 73 F.2d 861, 864 (10th Cir. 1934) (new trial required where court stenographer went to jury room and read the court's instructions; "a mistake in the reading of a shorthand symbol which defense counsel would instantly detect, an unconscious or deliberate emphasis or lack of it, an innocent attempt to explain the meaning of a word or a phrase, and many other events which might readily occur, would result in irremediable prejudice").

\textsuperscript{141} Cf. Turner v. Louisiana, 379 U.S. 466 (1965) (continuous contact during deliberations between jury and two deputy sheriffs who were also prosecution witnesses, and were present in jury room from time to time, amount to violation of due process rights). \textit{But cf.} Truscott v. Chaplin, 403 F.2d 644, 645 (3d Cir. 1968) (presence of alternate juror at noon meal with jury subsequent to delivery of charge but before commencement of deliberations did not require new trial).

\textsuperscript{142} See generally note 74 & accompanying text supra.

Leathers v. General Motors Corp., 546 F.2d 1083, 1086 (4th Cir. 1976) ("Golden Rule" argument "that the jury should so do unto the plaintiff as they would wish it to be done to them"; new trial ordered); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 283-86 (5th Cir. 1975) (arguments calculated to prejudice opponent); Mileski v. Long Island R.R., 499 F.2d 1169, 1172-74 (2d Cir. 1974) (form of per diem and unit-of-time argument for computing damages; tactic generally disapproved, but trial judge has discretion in this area; here judgment affirmed where defendant raised no objection at the time); Koufakis v. Carvel, 425 F.2d 892, 900-05 (2d Cir. 1970) (comparison of defendants to Mafia in
indicated, for example, by excessive or inadequate verdicts), failure properly to follow the judge's charge (as indicated, for example, by excessive or inconsistent verdicts), or (4) a compromise verdict, if the fact of compromise can be discerned on the face of the verdict itself. And of course it is true that verdicts may be upset for error in the receipt or exclusion of evidence, and in these cases invariably the question is whether the error affected the verdict (necessarily meaning that it affected the thought processes of the jurors).

The second category, involving the use of testimony or affidavits by jurors relating to matters occurring before or after deliberations, is much narrower. By its terms Rule 606(b) is simply inapplicable. The most likely form of pre-deliberative conduct which may be proved through the affidavit or testimony of a juror is giving false answers on voir dire, though it should be added that

143. Ajax Hardware Mfg. v. Industrial Plants Corp., 569 F.2d 181, 184 (2d Cir. 1977) (while record would not sustain finding that verdict was an improper compromise, it was proper to order a new trial, since verdict was inadequate; suit was for liquidated sum, and jury awarded less than half the sum sought).

144. Cf. Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245, 1247 (3d Cir.), cert. denied, 404 U.S. 883 (1971) (while new trial may be granted if jury has not followed judge's instructions, in this case the only evidence to this effect was papers prepared by juror during deliberations which the judge accidentally saw; these could not be considered because of the no-impeachment rule); Lansburgh & Bro. v. Clark, 127 F.2d 331 (D.C. Cir. 1942) (verdict for husband on his derivative claim and against wife; defense moved for judgment against husband or new trial in husband's case; judgment affirmed only because defense failed to move for new trial on all issues, and court would not seek to determine which inconsistent judgment was wrong).


145. Hatfield v. Seaboard Air Line R.R., 396 F.2d 721, 724 (5th Cir. 1968) (where jury's findings on special interrogatories were in plaintiff's favor, but jury awarded nominal damages, the misconduct contaminated the whole verdict, and a new trial would be required on all issues); Southern Ry. v. Madden, 235 F.2d 198, 204 (4th Cir. 1956).


147. Cf. United States v. Pleva, 66 F.2d 529, 533 (2d Cir. 1933) (setting aside verdict where juror had complained during deliberations of illness and, after verdict reached but before it was recorded, made it known that he agreed solely because of illness; court notes that it is "not dealing with a situation in which a verdict has been regularly returned and recorded with nothing at the time to show that it was other than the unanimous agreement of the jurors"). But cf. Vizzini v. Ford Motor Co., 72 F.R.D. 132, 136 (E.D. Pa. 1976), rev'd on other grounds, 569 F.2d 784 (3d Cir. 1977) (rule against impeachment applied to liability verdict where jury had retired to consider damages).
attacks on verdicts based upon this ground seldom succeed. The most likely post-deliberative conduct which may be proved by the affidavit or testimony of a juror is erroneously reporting the verdict, or reporting a verdict which was never agreed to by the requisite number. (In both civil and criminal cases, unanimity is required for a verdict in federal court, although the parties may

148. United States v. Robbins, 500 F.2d 650, 652 (5th Cir. 1974). Robbins involved the prosecution of a physician for unauthorized and knowing distribution of controlled substances. Silent acquiescence implying negative answers to questions whether any juror's close friends had had negative experiences with substances in question and whether any juror had had negative experiences with doctors did not call for a new trial despite the fact that one juror revealed in the jury room that her daughter contracted infectious hepatitis from a pill similar to the ones in issue, and that some jurors thought she indicated bias against the medical profession. This juror testified that she was not biased, that she judged defendant solely on the basis of evidence presented in court, and that she did not connect her daughter's experience with the evidence in the case.

Cf. Clark v. United States, 289 U.S. 1, 17-18 (1933) (falsehood on voir dire may be punished as criminal contempt, and this is not "at variance with the rule . . . that the testimony of a juror is not admissible for the impeachment of his verdict," for in this case there is no verdict to be impeached).

149. University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 547 n.43 (5th Cir. 1974) (distinguishing between effort to "interrogate a juror concerning what he meant by his verdict," which is not permitted, and a juror's affidavit "to show that the verdict delivered was not that actually agreed upon," which is allowed); Fox v. United States, 417 F.2d 84, 88-89 (5th Cir. 1969) (where juror remained mute while jury was polled one by one, and later signed affidavit that he had never voted for government in jury room but that jury was under impression that a majority was sufficient for a verdict, it was error to reject affidavit under rule against impeaching jury verdicts; affidavit of juror is admissible "to show the true verdict or that no verdict was reached at all" [collecting cases]); Young v. United States, 163 F.2d 187, 189 (10th Cir.), cert. denied, 334 U.S. 859 (1947); Freid v. McGrath, 135 F.2d 833, 834 (D.C. Cir. 1943); United States v. Canale, 163 F. Supp. 445 (E.D. Pa. 1958).

In Young, the court stated:

The rule . . . excluding testimony or affidavits of jurors to impeach the verdict . . . does not prevent the reception of evidence of jurors to show that through mistake, the real verdict on which agreement was reached in the jury room was not correctly expressed in the verdict returned into open court. Jurors cannot be heard to testify that while the substance of the verdict returned into court was understood, it was predicated upon a mistake of the testimony, a misrepresentation of the law, unsound reasons, or improper motives. But jurors are competent witnesses for the purpose of showing that through oversight, inadvertence, or mistake respecting the substance of the verdict returned into court, is [sic] was not the verdict on which agreement was actually reached in the jury room.

163 F.2d at 189.

But cf. York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., 447 F.2d 786, 794 (5th Cir. 1971) (rejecting affidavit of foreman offered to show that jury intended verdict to run against dealership corporation as well as against certain individuals).
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otherwise stipulate in civil cases.\textsuperscript{150}) Nothing in Rule 606(b) threatens the old custom of polling jury, and where a poll indicates an absence of unanimity (or support by the requisite number), either the jury should be sent out to continue deliberations or a new trial should be ordered.\textsuperscript{151} When a poll indicates that the verdict has the requisite support, it is difficult to challenge the verdict for errors in rendition,\textsuperscript{152} and of course a subsequent change of heart of one or more jurors may not be used to impeach the verdict.\textsuperscript{153}

Rule 606(b) does not prevent a trial judge from examining jurors prior to or during trial on such questions as whether they have been exposed to pretrial publicity which might be damaging to the cause of any party.\textsuperscript{154} Nor does the rule prevent the judge from

\begin{itemize}
    \item \textsuperscript{151} Sincox v. United States, 571 F.2d 876, 878-79 (5th Cir. 1978) (where juror on poll stated that he had a reasonable doubt, judge should order jury to deliberate further or dismiss it; "[a]bsent exceptional circumstances . . . there was no third option."); Castleberry v. N.R.M. Corp., 470 F.2d 1113, 1116-17 (10th Cir. 1972); Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 F.2d 224 (D.C. Cir. 1942). In Bruce, a poll of the jury raised doubt as to whether there had ever been agreement in the jury room. The court stated that the verdict should not have been received, and the jury should have been told to retire to give further consideration to the case. A statement by one juror that she now agreed to the verdict did not validate the verdict, for the question is what the jury agreed to in the jury room. A statement by another juror after the jury had been discharged and a new trial motion had been made that she, too, agreed with the verdict came "too late" and a new trial was required. See also Fed. R. Crim. P. 31(d) (providing that juries in criminal cases must be polled at request of any party, and that if poll reveals that there is not unanimity, "the jury may be directed to retire for further deliberations or may be discharged").
    \item \textsuperscript{152} Castleberry v. N.R.M. Corp., 470 F.2d 1113, 1116-17 (10th Cir. 1972) (where affidavit by juror stated that she assented to verdict during jury poll only because she did not want further confinement for deliberations, trial judge properly denied new trial motion); United States v. Chereton, 306 F.2d 197, 200 (6th Cir. 1962) (jury, polled as group, indicated unanimous consent; after discharge, it was "too late . . . for individual jurors to change their minds and claim that they were mistaken or unwilling in the assent which they gave").
    \item \textsuperscript{153} United States v. Shroeder, 433 F.2d 846, 851 (8th Cir. 1970), cert. denied, 401 U.S. 943 (1971) (after jury has given its verdict, and has been polled and discharged, "an individual juror's change of mind or claim that he was mistaken or unwilling in his assent to the verdict comes too late"); Armentrout v. Virginian Ry., 72 F. Supp. 997, 1000 (S.D.W. Va. 1947), rev'd on other grounds, 166 F.2d 400 (4th Cir. 1948) (if juror disagreed with verdict, it was his duty to say so at time of polling; not having said it then, he cannot be heard afterwards to make that claim). See also authorities cited in notes 76 & 80 supra.
    \item \textsuperscript{154} E.g., United States v. Williams, 568 F.2d 464 (5th Cir. 1978) (judge polled jury during trial to determine whether any juror had seen a television program reporting that the defendants had been previously convicted, but were being
\end{itemize}
examining the jury as to whether any of them observed or heard anything occurring during the trial which was accidental or inadvertent, or which was for any other reason not properly for the consideration of the jury.

D. Procedural Problems—Interviewing Jurors; Motions; Hearings; Burden of Proof

No rules formally govern the procedure for impeaching jury verdicts by means of statements or testimony by jurors. Certain procedural conventions have grown up around the exclusionary principle which Rule 606(b) now embodies, however, because exceptions to the principle (and areas beyond its reach) are significant enough to encourage parties dissatisfied with verdicts to enlist the aid of jurors in post-verdict attacks.

A party seeking a new trial on account of jury misconduct must ordinarily make a preliminary showing, on the basis of affidavits, that misconduct sufficient to impeach the verdict may have occurred, and that the movant has competent evidence to this effect.\(^5\) Where enough of the substance of jury misconduct comes to the attention of a party during trial to warrant a motion for a mistrial, he risks waiving any right to relief by failing to call the court's attention to the matter on the spot; one cannot sit silently by, hoping for a favorable verdict.\(^6\) The waiver notion, however, should not be interpreted to require a party to make a factual investigation during trial.\(^7\)

Usually attacks upon verdicts for jury misconduct come by way of motion for a new trial, which in civil cases must ordinarily be retried because of "erroneous testimony"; United States v. Khoury, 539 F.2d 441, 442 (5th Cir. 1976) (trial judge asked jurors in open court whether they had read newspaper article published on evening of first day of trial); United States v. Persico, 425 F.2d 1375, 1379-82 (2d Cir. 1970) (approving examination of jurors by judge during trial to determine whether jurors had been so affected by trial publicity as to render them incapable of giving defendants a fair trial).


\(^{157}\) Texas & New Orleans R.R. v. Underhill, 234 F.2d 620, 624 (5th Cir. 1956). See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-108 (providing, \textit{inter alia}, that during the trial of a case "[a] lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury").
made within ten days after entry of judgment and in criminal cases ordinarily within seven days of a guilty verdict.\textsuperscript{158} It seems clear, however, that if the facts of jury misconduct come to light only after time has run against a new trial motion, these limits do not apply, and a party may make his case for a new trial by means of collateral attack upon the judgment.\textsuperscript{159} In any case, it seems that the matter must first be raised in a district court, and not asserted for the first time on appeal.\textsuperscript{160}

Neither professional ethics nor Rule 606(b) prevents counsel for a verdict loser from interviewing jurors after trial, although local rules sometimes stand in the way.\textsuperscript{161} It is clear, however, that the trial judge may direct that any inquiry be conducted under court supervision;\textsuperscript{162} judges themselves have occasionally prepared written interrogatories for jurors,\textsuperscript{163} and in some cases courts have issued injunctions directing parties not to interview

\textsuperscript{158} See \textit{Fed. R. Civ.} P. 59; \textit{Fed. R. Crim.} P. 33. Also note the provision in \textit{Fed. R. Crim.} P. 33 authorizing a motion for a new criminal trial based on "newly discovered evidence" to be brought within two years after final judgment. \textit{Cf.} Richardson v. United States, 360 F.2d 365, 368 (5th Cir. 1966) (allegation of improper communication between juror and third person raises matter of "newly discovered evidence" within the meaning of \textit{Fed. R. Crim.} P. 33); Holmes v. United States, 284 F.2d 716 (4th Cir. 1960) (same).

\textsuperscript{159} See \textit{Fed. R. Civ.} P. 60(b)(2) (allowing a motion for relief from a civil judgment on account of "newly discovered evidence" to be brought within one year); \textit{Fed. R. Civ.} P. 60(b)(6) (allowing such a motion for "any other reason" not specified in the rule to be brought without time limit). \textit{Fed. R. Civ.} P. 60(b) also authorizes an "independent action" for relief without time limit.


\textsuperscript{160} United States v. Gersh, 328 F.2d 460, 463-64 (2d Cir. 1964) (counsel should have requested a factual hearing after trial, rather than insisting upon a new trial; appellate court would not order such a hearing where the party failed to request one, and failed to come forward with affidavits below).

\textsuperscript{161} See notes 50-53 & accompanying text \textit{supra}.

\textsuperscript{162} United States v. Brasco, 516 F.2d 816, 819 n.4 (2d Cir.), \textit{cert. denied}, 423 U.S. 860 (1975); Miller v. United States, 403 F.2d 77, 81-82 (2d Cir. 1968), \textit{modified on other grounds}, 411 F.2d 825 (2d Cir. 1969) (no basis to doubt that trial judge may "direct that any interrogation of jurors after a conviction shall be under his supervision").

\textit{Cf.} Remmer v. United States, 347 U.S. 227, 229-30 (1954) (remanded with directions to trial court to determine issues of possible jury misconduct "in a hearing with all interested parties permitted to participate"); Capella v. Baumgartner, 59 F.R.D. 312 (S.D. Fla. 1973) (request for permission to interview jurors denied, partly upon ground that request was untimely, partly upon ground that the statements sought would not be admissible).

jurors at all.164 There is no standing rule, however, requiring a party to seek the court's permission prior to approaching jurors.

A party who makes a proper preliminary showing is entitled to an evidentiary hearing,1 and in criminal cases the entitlement is of constitutional dimension.166 The trial judge has a measure of discretion167 to determine the form the hearing should take. Occa-

164. Miller v. United States, 403 F.2d 77 (2d Cir. 1968), modified on other grounds, 411 F.2d 825 (2d Cir. 1969) (affirming injunction against ex parte interviews with jurors conducted on behalf of party, but leaving open the possibility of such further inquiry as court might permit upon appropriate showing); Bryson v. United States, 238 F.2d 657, 665 (9th Cir. 1956), cert. denied, 355 U.S. 817 (1957) (approving order by trial judge prohibiting communication with jurors); United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967).

165. Remmer v. United States, 347 U.S. 227 (1954); United States v. Brown, 571 F.2d 980, 990 n.9 (6th Cir. 1978); Krause v. Rhodes, 570 F.2d 563, 569-70 (6th Cir. 1977); United States v. Doe, 513 F.2d 708, 711-12 (1st Cir. 1975); Paz v. United States, 462 F.2d 740, 746 (5th Cir. 1972), cert. denied, 414 U.S. 820 (1973); United States v. McKinney, 429 F.2d 1019, 1026 (5th Cir. 1970); Richardson v. United States, 360 F.2d 366, 369 (5th Cir. 1966); Wheaton v. United States, 133 F.2d 522, 527 (8th Cir. 1943).

166. Parker v. Gladden, 385 U.S. 363, 364-65 (1966) (sixth amendment guarantee of impartial jury, applicable to states by virtue of fourteenth amendment; Court also mentions rights of confrontation and cross-examination); Turner v. Louisiana, 379 U.S. 466 (1965) (sixth amendment guarantee of impartial jury); Bulger v. McClay, 575 F.2d 407, 410-12 (2d Cir. 1978); Gafford v. Warden, 434 F.2d 318, 320-21 (10th Cir. 1970); United States v. McMann, 373 F.2d 759, 762 (2d Cir. 1967).


[We] would not lightly assume that the jury's original role as the voice of the country may not sufficiently persist that neither the specific guarantees of an impartial jury and of confrontation nor the more general one of due process would be violated simply because jurors with open minds were influenced to some degree by community knowledge that a defendant was "wicked" or the reverse, even though this was not in evidence. . . . To resort to the metaphor that the moment a juror passes a fraction of an inch beyond the record evidence, he becomes "an unsworn witness" is to ignore centuries of history and assume an answer rather than to provide the basis for one.

435 F.2d at 817-18.

167. United States v. Brown, 571 F.2d 980, 990 (6th Cir. 1978) (where juror stated that his spouse had received a threat but that he had not passed this information along to other jurors, judge must have discretion not to interrogate the other jurors; the interrogation itself might pass along to them the fact of the threat, and create a situation appropriate for a mistrial); United States v. Parker, 549 F.2d 998, 1000 (5th Cir. 1976) (judge has discretion as to "extent and type of investigation"); United States v. Khoury, 539 F.2d 441, 443 (5th Cir. 1976) (judge has discretion as to "type of investigation"); United States v.
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sionally the matter has been resolved in camera, but usually a hearing is conducted in court with counsel for both parties present, as well as juror-witnesses. The moving party has the burden of demonstrating misconduct, but the question whether the misconduct affected the verdict cannot be resolved by asking jurors why they voted as they did or what information they took into account; their testimony or affidavits can establish no more than the occurrence or nature of any overt acts and the number of jurors who knew about or participated in them. The question whether prejudice resulted must be resolved by drawing inferences: "Though a judge lacks even the insight of a psychiatrist, he must reach a judgment concerning the subjective effects of objective facts without benefit of couch-interview introspections." A presumption often comes to the aid of the moving party and the court, since many kinds of misconduct are considered presumptively

Wilson, 534 F.2d 375, 379 (D.C. Cir. 1976) (judge has discretion to determine "what manner of hearing, if any, is warranted").

168. United States v. Bufalino, 576 F.2d 446, 450-51 (2d Cir. 1978) (judge conducted in camera interviews of jurors to determine whether contact with outsiders would affect their deliberations; court found that counsel agreed not to be present during interviews, but suggested that in future it would be well for trial court to secure express consent to such interviews); United States v. Parker, 549 F.2d 998, 1000 (5th Cir. 1977) (hearing in camera without defense counsel present; better practice would have been to have the attorneys present; here no prejudice); United States v. Wilson, 534 F.2d 375, 379 (judge scheduled meeting with juror and both counsel; juror did not appear and counsel did not subpoena juror thereafter; proper to deny new trial motion).


170. Government of Virgin Islands v. Gereau, 523 F.2d 140, 148, 153-54 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976) (movant must produce competent evidence and establish grounds recognized as adequate to overturn verdict; the verdict will still stand unless the movant has been prejudiced by the misconduct); United States v. Bufalino, 576 F.2d 446, 451 (2d Cir. 1978) (presumption that contact between outsiders and jurors affected verdict did not come into play where the contact did not involve the matter pending before the jury; under these circumstances, no right to new trial absent a showing of prejudice by the defendant); United States v. Brasco, 516 F.2d 816, 819 (2d Cir.), cert. denied, 423 U.S. 860 (1975) (appellant failed to show that violations of court's sequestration order related to the matter pending; he was not entitled to new trial, because presumption of prejudice arises only where such contacts do relate to the matter pending).

Cf. United States ex rel. Owen v. McMann, 435 F.2d 813, 818 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1971) (touchstone of decision in connection with habeas corpus proceeding is not fact that extrarecord matter has infiltrated, but "the nature of what has been infiltrated and the probability of prejudice").

But see notes 173-74 and accompanying text infra.


prejudicial, especially in criminal but also sometimes in civil cases.\textsuperscript{173} There are occasional intimations that all the moving party must show is that one juror was involved in or affected by the misconduct in question.\textsuperscript{175} In light of the unanimity requirement which obtains in both the civil and the criminal side of the docket, this view seems sound. Occasionally, however, courts have cited the fact that only one juror was involved in the misconduct as a reason for affirmation of the judgment.\textsuperscript{176} Clearly, it is proper to excuse a juror, if misconduct affecting him is discovered during the trial,

\textsuperscript{173} Remmer v. United States, 347 U.S. 227, 229 (1954) ("any private communication, contact, or tampering, directly or indirectly" is presumptively prejudicial; burden rests "heavily upon the government" to establish that the contact was "harmless to the defendant"); Mattox v. United States, 146 U.S. 140, 150 (1892) (private communications, possibly prejudicial, between jurors and third persons invalidate the verdict unless their harmlessness is made to appear); Government of Virgin Islands v. Gereau, 523 F.2d 140, 153-54 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976) (communications between jurors and matron; government discharged its burden of proving lack of prejudice to defendant); United States v. Doe, 513 F.2d 709, 711 (1st Cir. 1975) (private communications between jurors and others presumptively prejudicial); United States \textit{ex rel. Tobe} v. Bensinger, 492 F.2d 232, 237-39 (7th Cir. 1974) (failure of trial judge to hold proper hearing resulted in presumption of prejudice from evidence of \textit{ex parte} advice from bailiff remaining unrebutted); Richardson v. United States, 360 F.2d 366, 369 (5th Cir. 1966) (allegation that juror engaged in private conversation with prosecution witness gave rise to a rebuttable presumption of prejudice [collecting authorities]); Wheaton v. United States, 133 F.2d 522, 526-27 (8th Cir. 1943) (communication between jurors and third parties are presumptively prejudicial).

\textsuperscript{174} Krause v. Rhodes, 570 F.2d 563, 566-69 (6th Cir. 1977) (threats on life of juror and on his family, accompanied by physical assault upon juror, were presumptively prejudicial; court failed to hold a hearing, but advised the jury as a whole of the threats; because of the problem of "fading memories and natural reluctance of a juror to admit that he had been improperly influenced," court would order a new trial instead of a belated hearing); Stiles v. Lawrie, 211 F.2d 188, 189-90 (6th Cir. 1954) (when juror's affidavit or testimony indicates that the jury received improper information—here a highway department manual—the law presumes that prejudice has resulted).

\textsuperscript{175} Krause v. Rhodes, 570 F.2d 563, 569 (6th Cir. 1977); Stone v. United States, 113 F.2d 70, 77 (6th Cir. 1940).

\textsuperscript{176} United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977) (described in note 102 supra); Government of Virgin Islands v.
and to appoint an alternate in his stead, at least where the other jurors have not learned of the incident in question.\textsuperscript{177}

A number of reforms\textsuperscript{178} have been proposed, though none has been adopted. The thrust of these has been to place post-verdict interrogation of jurors under the court's control, but to allow such interrogation more or less as a matter of right. As one student work argued: "A showing of cause requirement forces the defendant or his attorney to question the jurors outside of court in order to obtain evidence sufficient to demonstrate cause. The latter requirement presents the same dangers as exist when there is unrestrained questioning."\textsuperscript{179} A distinguished court, urged by an urban bar association to formulate guidelines to govern the process of post-verdict interrogation of jurors, declined to do so.\textsuperscript{180} The process, then, remains largely unregulated.

IV. IMPEACHING INDICTMENTS UNDER RULE 606(b)

Rule 606(b) speaks to the impeachment not only of verdicts, but of indictments, imposing the same limitations upon use of affidavits and testimony by jurors in each context.\textsuperscript{181} Impeachment of indictments is a less frequent occurrence, however, because indictments are vulnerable to attack upon far fewer grounds than verdicts.

\textsuperscript{177} United States v. Brown, 571 F.2d 980, 987, 991 (6th Cir. 1978) (juror whose wife was threatened during trial was properly replaced by alternate juror after court determined that juror had not related to other jurors the fact of the threat). \textit{Cf.} Krause v. Rhodes, 570 F.2d 563, 566-69 (6th Cir. 1977) (trial judge stated he would excuse a juror who was threatened during trial, but the juror was not dismissed, and the judge did not question him; the juror should have been questioned to see whether he had been affected in the performance of his duties, and excused unless there was no probability of this; if other jurors had been affected by learning of the threats, a mistrial would have to be considered).


\textsuperscript{180} Miller v. United States, 403 F.2d 77, 81 (2d Cir. 1968), \textit{modified on other grounds}, 411 F.2d 825 (2d Cir. 1969) ("Such an enterprise, which would involve considering a great variety of situations, would require the kind of collaborative effort by judges, prosecutors, defense lawyers and legal scholars that has produced the American Bar Association's useful series of Standards for Criminal Justice.").

\textsuperscript{181} Little has been written on this particular problem. \textit{See generally} 8 J. WIGMORE, supra note 13, \$ 2364; Annot., 110 A.L.R. 1023 (1937) (both out-of-date treatments).
It is of course no accident that an indictment by a grand jury is relatively more immune from attack. The function of a grand jury is to determine not guilt or innocence, but probable cause to believe that an offense has been committed and that defendant has committed it. To this end, the grand jury plays both investigative and protective roles—acting as both sword and shield. Speaking of the former, the Supreme Court observed:

“When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation.” . . . A grand jury investigation “is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.” . . . Such an investigation may be triggered by tips, rumors, evidence offered by the prosecutor, or the personal knowledge of the grand jurors. 182

Describing the protective role of the grand jury, the Supreme Court stated:

Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will. . . . It cannot effectively operate in a vacuum. It has been said that the "ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute." 183

Largely because of the differences between grand and petit juries, the Supreme Court in a series of decisions has gone far to insure that indictments will seldom be set aside for the kinds of irregularities which routinely result in reversals of judgments based on jury verdicts. Thus, in Costello v. United States 184 the Court held in 1956 that an indictment based wholly upon hearsay was not for that reason vulnerable. Two years later in Lawn v. United States 185 the Court was unanimous in deciding that the defendant was not entitled to a preliminary hearing, on the basis of mere suspicion, to determine whether the grand jury had relied upon evidence obtained by a previous grand jury in violation of defendant's fifth amendment rights. In United States v. Blue, 186 decided in 1966, a unanimous Court cited Costello and Lawn for

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the proposition that if evidence obtained in violation of defendant's fifth amendment rights were presented to the grand jury which returned the indictment, that would not be ground to abate the prosecution or require a new indictment, although the accused could require exclusion from trial of any fruits obtained from such evidence. And in 1974, the Supreme Court in United States v. Calandra187 held that the exclusionary rule of the fourth amendment does not apply in grand jury proceedings. It seems fair to conclude, as the Court itself has concluded, that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence . . . ."188 (It is of course true that the Rules of Evidence do not apply in grand jury proceedings, by virtue of Rule 1101(d)(2).)

Since not all attacks upon indictments involve affidavits or testimony by grand jurors, Rule 606(b) does not always bear upon the impeachment problem.169 Among those attacks which do or might involve affidavits or testimony by grand jurors, there is only one which can be approached with any certainty at all. The others are uncertain, either because it is unclear whether the ground itself suffices as the basis of attack, or because it is unclear whether a juror's affidavits or testimony may establish the ground, or for both reasons.

The one point of certainty is this: Proof of an "unauthorized presence"190 during grand jury proceedings—which seems to mean the presence of any person other than the grand jurors, the prosecutor, the testifying witness, and an official stenographer—suffices to set aside an indictment even if no prejudice can be shown.191 There is no room to doubt that the affidavit or testimony of a grand juror may be received on this point under Rule 606(b).192

188. Id. at 345. The Court added that indictments are not subject to attack "even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination" and cited Lawn v. United States, 355 U.S. 339 (1958). Thereafter, however, the Court made clear that although the grand jury "may consider incompetent evidence," it may not violate the fifth amendment rights of a witness by compelling him to testify in violation of those rights. See United States v. Cady, 567 F.2d 771, 776 (8th Cir. 1977); United States v. Kysar, 459 F.2d 422, 424 (10th Cir. 1972); United States v. Fox, 425 F.2d 996, 1000-01 (9th Cir. 1970).
See generally Annot., 37 A.L.R.3d 612 (1971); Annot., 100 L. Ed. 404 (1956).
192. United States v. Borys, 169 F. Supp. 366, 367 (D. Alas. 1959) (affidavit of grand juror received). See also note 140 & accompanying text supra (affidavit of
On the question whether an indictment may be quashed upon proof that less than the requisite twelve grand jurors voted to return the “true bill,” it is clear that this ground suffices but unclear whether it may be established by affidavit or testimony of a grand juror. Proof may be available from other sources, such as the minutes, which are probably disclosable under Rule 6 of the Federal Rules of Criminal Procedure to the extent necessary to check this point. Affidavits or testimony should also be receivable in this instance, although the language of Rule 606(b) does not satisfactorily suggest this conclusion.

On the question of impact by media publicity, it seems certain that grand jurors may by affidavit or testimony establish that such publicity came to their attention. It is unlikely that this fact will suffice to quash an indictment, however, and one authority reports that no indictment has so far been dismissed on this

petit juror may be received to show presence of outsider during deliberations).

193. Gaither v. United States, 413 F.2d 1061, 1068-71 (D.C. Cir. 1969) (signature by foreman of grand jury could not convert indictment, admittedly not seen by whole grand jury, into one properly supported by twelve grand jurors as required by FED. R. CRIM. P. 6).

194. United States v. Bally Mfg. Corp., 345 F. Supp. 410, 421 (E.D. La. 1972) (claim that only foreman thought that true bill should be returned could be easily checked by examining the “concurrence slip” filed with the indictment, which clerk could allow defendants to examine pursuant to court order; only if this proof were unavailable would it be necessary to consider propriety of alternative proof).

195. Minutes are not always kept, although there is a discernible trend toward making and keeping written records of grand jury proceedings. See generally Annot., 25 A.L.R. Fed. 723 (1975).

196. United States v. Bullock, 448 F.2d 728, 729 (5th Cir. 1971) (FED. R. CRIM. P. 6(c) requires foreman of grand jury, or a designee, to record the number of grand jurors concurring in the finding of every indictment, and to file this record with the court clerk; defendant should have a right to inspect the required record or, if such record was not properly maintained, “to have access to some method of substituted proof” in order to verify that FED. R. CRIM. P. 6(f)’s requirement of 12 jurors to return an indictment was met).

But see generally 3 Moore’s FEDERAL PRACTICE ¶ 6.05 (2d ed. 1977); 1 C. Wright, supra note 188, § 108 (both reporting that courts seldom grant defense motions to inspect grand jury minutes); Annot., 3 A.L.R. Fed. 29 (1970).

197. This is the result of Rule 606(b) as applied to petit jurors; the same should hold, by the terms of the rule, with respect to grand jurors. See note 108 & accompanying text supra.


Cf. Beck v. Washington, 369 U.S. 541 (1962) (insufficient showing of prejudice from pre-indictment publicity to support a constitutional attack upon state indictment, assuming that Constitution requires that if a state grand jury is used, it must be unbiased).
Verdicts may be impeached on a showing, which may be by the affidavit or testimony of a juror, that "extraneous prejudicial information" was injected into the deliberations of the jury. The same may probably not be said of indictments. Although Rule 606(b) authorizes receipt of affidavits or testimony by grand jurors to this effect, probably such proof will not suffice to dismiss an indictment. The Supreme Court has remarked frequently that grand jurors may take action on the basis of personal knowledge, and instructions to this effect have even been approved. Barring an extreme case, which would smack of prosecutorial misconduct or a runaway grand jury, in which a fundamental part of the case rested upon extrarecord information brought to bear upon the decision by the jurors themselves, it seems that the use of such information constitutes no ground for complaint.

Though neither inadequacy nor incompetency of the evidence presented, nor even the use of extrarecord information, suffices to impeach an indictment, there are shortcomings in the proof presented which do suffice. Where the prosecution, possessed of adequate and competent proof, resorts instead to the use of hearsay, this tactic may be seen as a form of prosecutorial misconduct.

200. See text accompanying notes 98-123 supra.
201. United States v. Calandra, 414 U.S. 338, 344 (1974); United States v. Dionisio, 410 U.S. 1, 15 (1973) ("The [grand] jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge."); Branzburg v. Hayes, 403 U.S. 665, 701 (1972) (quoted in text accompanying note 182 supra); Hale v. Henkel, 201 U.S. 43, 60-62 (1906); Goodman v. United States, 108 F.2d 516, 519-20 (9th Cir. 1939) ("In a broad sense grand jurors themselves are witnesses; for a grand jury may act upon knowledge acquired either from their own observations or from the evidence of witnesses given before them."); United States v. Smyth, 104 F. Supp. 283, 297-99 (N.D. Cal. 1952) (grand jurors "can act of their own knowledge or on testimony which comes to them through witnesses"); persons who give information "need not have been grand jurors or witnesses or under prescribed or other oath"; there is "no requirement anywhere that everyone who makes a communication to a grand juror must be sworn").
202. Field, J., Charge to the Grand Jury, 30 F. Cas. 992, 994 (C.C.D. Cal. 1897) (No. 18,255): Some of you, also, may have personal knowledge of the commission of a public offense against the laws of the United States, or of facts which tend to show that such an offense has been committed .... If you are personally possessed of such knowledge, you should disclose it to your associates .... We, therefore, instruct you that your investigations are to be limited: ... third, [to such matters as] may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or fourth, may come to your knowledge from the disclosures of your associates.
upon which an indictment may be set aside.\footnote{203} As a leading opinion suggested, this practice should be discouraged because it undermines the grand jury's protective role by deceptively placing before it a smooth and well-integrated case lacking the "rough edges" and weaknesses that would appear if the prosecutor presented firsthand proof. It also undermines the rights of the accused by lessening the chance that the grand jury transcript will yield testimony useable to impeach prosecution witnesses at trial.\footnote{204} (In this particular circumstance, it is unlikely that affidavits or testimony by grand jurors will be needed to raise the impeaching evidence, since the transcript of the grand jury proceedings, as compared to the events subsequently occurring at trial, will be the proof.) Although there seem to be no modern federal cases in point, there remains a possibility that an indictment may still be impeached where no evidence has been produced.\footnote{205}

Probably other forms of prosecutorial misconduct—as well as misconduct by the grand jury itself—will also suffice to require dismissal of an indictment. The Supreme Court's defense of indictments has presupposed an unbiased grand jury and a prosecutor acting in the public interest—not a mechanism returning indictments out of a vindictive or malicious spirit.\footnote{206} Some kinds of prosecutorial misconduct, such as improper argument to the jury,\footnote{207} will also suffice to impeach indictments\footnote{208} although most cases hold that where sufficient evidence underlies the indict-
ment, it will not be set aside for improper prosecutorial argument. And there are other sorts of prosecutorial misconduct which can call for dismissal of indictments. Arguably conduct of this sort constitutes "outside influence" within the meaning of Rule 606(b), and should be susceptible to proof by affidavits or testimony of grand jurors. It is harder to fit misconduct by the jurors themselves into this mold, but in cases involving personal bias or ethnic or racial prejudice of a demonstrable and egregious nature, arguably such conduct should be provable by means of affidavits or testimony by grand jurors.

Although Rule 6(e) of the Federal Rules of Criminal Procedure obligates grand jurors not to disclose matters occurring during deliberations unless "directed" or "permitted" by the court to do so, the rule contemplates that such permission may be given "at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." The Advisory Committee indicated its view that there was no collision between the two provisions,

cutor invalidated indictment where jury indicted one defendant on basis of insufficient evidence, and it appeared that the misconduct affected the jury). Cf. United States v. Remington, 208 F.2d 567, 574 (2d Cir. 1953), cert. denied, 347 U.S. 913 (1954) (L. Hand, J., dissenting: even though usual rule is that indictment will be sustained despite misconduct if there is sufficient evidence, "this rule should not excuse oppression and deceit in procuring the indictment").

209. United States v. Riccobene, 451 F.2d 586, 587 (3d Cir. 1971) (prosecutor's improper comment connecting defendant with organized crime did not invalidate the indictment where there was "an abundance of competent evidence" supporting it); United States v. Bruzgo, 373 F.2d 383, 386 (3d Cir. 1967) (prosecutor's use of abusive language and threats toward witness did not invalidate indictment, in light of the sufficient evidence which the jury had to consider); United States v. Rintelen, 235 F. 787, 794 (S.D.N.Y. 1916) ("A plea based on the conduct of the district attorney before the grand jury should be adjudged insufficient unless it clearly shows prejudice to the defendant and indicates that the alleged irregularities affected the action of the grand jury.").

210. United States v. Doss, 545 F.2d 548, 552 (6th Cir. 1976) (use of grand jury process to question witness on transactions for which secret indictments of the witness had already been obtained; clear purpose was to question an indicted defendant without his counsel present, and without his knowing the nature of the proceedings already commenced, thus violating fifth and sixth amendment rights); United States v. Hodge, 496 F.2d 87, 88 (5th Cir. 1974) (if superseding indictment was based upon informal unsworn hearsay statements by prosecutor summarizing record underlying earlier indictment returned by a different grand jury, and no sworn testimony was received, the indictment should be dismissed).

211. A similar problem arises in the context of verdicts, and the bulk of authorities exclude juror's affidavits or testimony concerning racial or ethnic prejudice. See note 93 & accompanying text supra.

212. FED. R. CRIM. P. 6(e).
since the latter "does not relate to secrecy and disclosure."\textsuperscript{213} In fact, however, the obligation of secrecy will often impede efforts to obtain affidavits or testimony by grand jurors. Although the Supreme Court has indicated that after the grand jury's work is completed "disclosure is wholly proper where the ends of justice require it,"\textsuperscript{214} motions seeking court orders lifting the veil of secrecy usually fail.\textsuperscript{215}

V. CONCLUSION

With respect to the impeachment of verdicts, Rule 606(b) resolves many issues. Jurors cannot give evidence of resorting to the "quotient" method of reaching verdicts, misusing evidence, misunderstanding or misapplying instructions, internal pressures by one or more jurors upon others to produce agreement, vote trading arrangements, and so forth. They can, however, attest to unauthorized experiments or views, the receipt of threats from outsiders, or contact with parties or witnesses. Other points are less certain. Jurors probably cannot give evidence of resort to chance for reaching a verdict, or of the operation of ethnic or racial prejudice in the jury room, but a certain looseness in the terms of Rule 606(b) leaves some room to reach a contrary result in extreme cases.

With respect to impeachment of indictments under Rule 606(b), only one point seems clear: Grand jurors may reveal an "unauthorized presence" in the jury room. Other points remain murky. Indictments are far more immune from attack than verdicts, and there is little law on the subject. While Rule 606(b) applies the selfsame exclusionary principle to indictments, with exceptions, that applies to verdicts, determining the kind of attack which might succeed becomes a much more important question in this context, and the rule does not address it.

In sum, Rule 606(b) amounts to a modern but conservative restatement of an old principle. Between the need, on the one hand, for jurors' affidavits or testimony to uncover flaws in the process by which particular verdicts or indictments were returned, and the need, on the other hand, to protect against harassment of jurors by disappointed litigants and to protect the privacy of jury deliberations, the rule strikes the balance in favor of protection in most cases. Under exceptions to the rule, jurors may attest to the im-

\textsuperscript{214} United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940).
\textsuperscript{215} See 8 MOORE'S FEDERAL PRACTICE \textsuperscript{\$} 6.05 (2d ed. 1977); 1 C. Wright, \textit{supra} note 189, \textsuperscript{\$} 106.
proper intrusion of "extraneous prejudicial information" and "outside influences," and the rule does not reach pre- or post-de-deliberative conduct by jurors, but essentially continues in effect a broad and longstanding exclusionary principle.