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Attacking Jury Verdicts: Paradigms for Rule Revision

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The rule that a juror cannot impeach his own verdict has been applied inconsistently by the courts. This article describes the majority rule, known as the Mansfield or no-impeachment rule, and examines its origin and supporting policies. It then presents minority rules, questions posed by post-verdict interviewing of jurors, and procedural problems that accompany the impeachment of verdicts. The article also analyzes the recent erosion of the Mansfield rule and suggests that an exception to the rule should be made to allow a juror to impeach his own verdict by proving that he was threatened.

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Author's Note: Ed Cleary's work in the field of evidence can be described as monumental. After enactment of the Federal Rules of Evidence, he performed a great service as he travelled the country instructing the bar and legal educators on the nuances of the new code. I came into close contact with Ed as we shared the rostrum on numerous such occasions. It was apparent that his personality and his professional work were characterized by several common attributes—tolerance, receptiveness to worthwhile new ideas, and above all thoroughness and attention to detail.

His performance as Reporter for the Federal Advisory Committee on Rules of Evidence was outstanding. The Advisory Committee's explanatory notes contain substantial scholarly content, discussing and amplifying principles incorporated in the rules. The full impact of the rules is yet to be felt, as more and more states adopt evidence codes based on the federal pattern. Ed Cleary's imprint on federal and state law—including the law which forms the focus of this article—is an indelible one.

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I. INTRODUCTION

A juror cannot impeach his own verdict.[1] Over the years, this rule of law, simple on its face, has been more confusing than helpful.[2] As one commentator has stated, it is "a legal half-truth that means one thing to a Texas lawyer and another to a New York lawyer; one thing in a federal court and another in a state court . . . ."[3] This article will analyze the current disarray in the law of jury verdict impeachment and will suggest a means of imposing order where there is now disorder.

Section II explains the majority rule, known as the Mansfield or no-impeachment rule, and examines its origin and underlying policies. Section III investigates deviations from the rule, paying particular attention to the Iowa, federal, and the Ohio rules. Several courts now follow one of these liberal rules because of their dissatisfaction with the rigidity of the Mansfield rule. Section IV considers procedural issues and the problems presented by post-verdict interviewing of trial jurors in jurisdictions which allow impeachment of verdicts. Section V analyzes recent trends which have eroded the Mansfield rule. The article concludes that a new exception to the Mansfield rule should be made to allow a juror to impeach his own verdict by proving that a threat or act of violence was brought to bear against him to reach that verdict.

II. THE RULE AGAINST IMPEACHMENT OF JURY VERDICTS

It is commonplace for a court to state that a juror will not be heard to impeach his own verdict.[4] This maxim originated in Lord Mansfield's extension of the doctrine that a person shall not be heard to allege his own turpitude.[5]

1. McDonald v. Pless, 238 U.S. 264, 267 (1915) (Lamar, J.); Hyde v. United States, 225 U.S. 347, 384 (1912), *citing* Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1886); Luna v. Beto, 474 F.2d 95 (5th Cir.), *cert. denied sub nom.* Luna v. Estelle, 414 U.S. 845 (1973); Complete Auto Transit, Inc. v. Wayne Broyles Eng'r Corp., 351 F.2d 478, 480 (5th Cir. 1965); Lohr v. Tittle, 275 F.2d 662, 667 (10th Cir. 1960); Young v. United States, 163 F.2d 187, 188 (10th Cir.), *cert. denied*, 332 U.S. 770 (1947); Davis v. United States, 47 F.2d 1071, 1072 (5th Cir.) (per curiam), *cert. denied*, 284 U.S. 646 (1931); Moore v. United States, 1 F.2d 839, 841 (9th Cir.), *cert. denied*, 267 U.S. 593 (1924); 3 B. JONES, EVIDENCE: CIVIL AND CRIMINAL § 20:58, at 727-28 (6th ed. 1972); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 68, at 148-49 (2d ed. 1972); 8 J. WIGMORE, EVIDENCE § 2345, at 677 (rev. ed. J. McNaughton 1961).
2. Pope, *The Mental Operations of Jurors*, 40 TEX. L. REV. 849, 849 (1962). *See* Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.) (L. Hand, J.) ("[J]udges again and again repeat the consecrated rubric which has so confused the subject . . . ."), *cert. denied*, 322 U.S. 764 (1947); Note, *Admissibility of Jurors' Affidavits to Impeach Jury Verdict*, 31 NOTRE DAME LAW. 484, 484 (1956); 53 IOWA L. REV. 1366, 1367 (1968).
3. Pope, *supra* note 2, at 849.
4. *See* cases cited at note 1 *supra*.
5. 8 J. WIGMORE, *supra* note 1, § 2352, at 696; 47 MICH. L. REV. 261, 264 (1948). The principle was a favorite of Lord Mansfield's. *See* Walton v. Shelly, 1 T.R. 296, 99 Eng. Rep. 1104, 1107

Prior to the Mansfield proclamation, the practice in early English law had been that a court accepted a juror's affidavit without hesitation.[6] For example, in *Norman v. Beamont*,[7] the court noted:

> [W]here the objection [to a judgment] could not appear on the record, [it] always admitted of [juror] affidavits; as in respect to a misbehaviour of any of the jury, or any declaration made by any of them . . . either before or after the verdict to show that a juryman was partial.[8]

In 1785, however, in *Vaise v. Delaval*,[9] the defendant asked the King's Bench to set aside the verdict, based on an affidavit of two jurors who swore that the jury, divided in its opinion, "tossed up," and found for the plaintiff.[10] Ignoring precedent, Lord Mansfield rejected the affidavit of the jurors: "The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor . . . ."[11] Rather, he concluded, the court must derive its knowledge of improper conduct from an independent source.[12]

Under the Mansfield rule, the essential question is not whether certain jury activity is fatal to the verdict, thereby justifying the complainant's demand for a new trial, nor whether an irregularity in the deliberations can be proven at all. Rather, the rule addresses itself to the question of whether a juror shall be allowed to testify to misconduct committed by his own jury panel.[13] The Mansfield rule distinguishes sharply between the testimony of a juror and that of an outsider.[14] Although a juror would be forbidden to file an affidavit or testify about an irregularity in the jury room, "some person having seen the transaction through a window, or by some such other means"[15] would be allowed to testify in court or file an affidavit concerning it. The distinction is drawn even to the extreme of allowing a bailiff who breaches his official duties

(1786) ("But what strikes me is the rule of law founded on public policy . . . that no party who has signed a paper or a deed shall ever be permitted to invalidate that instrument which he hath so signed."). *See also* Goodright v. Moss, 2 Corp. 591, 98 Eng. Rep. 1257 (1777).

6. *E.g.*, Aylett v. Jewel, 2 Black. W. 1299, 96 Eng. Rep. 761 (1779); Philips v. Fowler, Barnes 441, 94 Eng. Rep. 994 (1735); Dent v. Hertford, 2 Salk. 645, 91 Eng. Rep. 546 (K.B. 1696); Metcalfe v. Deane, Cro. Eliz. 189, 78 Eng. Rep. 445 (Q.B. 1590). *See also* cases cited in 8 J. WIGMORE, *supra* note 1, § 2352, at 696. *But see* Smith v. Cheetham, 3 Cai. R. 56, 59 (N.Y. 1805).
7. Willes 484, 125 Eng. Rep. 1281 (C.P. 1744).
8. *Id.* at 487, 125 Eng. Rep. at 1282.
9. 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).
10. *Id.*
11. *Id.*
12. *Id.* *See* note 15 *infra* and accompanying text.
13. 8 J. WIGMORE, *supra* note 1, § 2353, at 697-98.
14. *Id.* at 697.
15. Vaise v. Delaval, 1 T.R. 11, 11, 99 Eng. Rep. 944, 944 (K.B. 1785).

by invading the secrecy of the jury room to testify about irregularities he observed.[16]

Although its historical roots are in England, the Mansfield rule has flourished in America. In fact, despite criticism from both commentators[17] and courts,[18] it remains the majority rule governing American jury verdicts.[19] Although one reason for its widespread acceptance has been the prestige and authority of Lord Mansfield,[20] there are, as Dean Wigmore has noted, other reasons for its continued vitality:

> [T]his rule of thumb is in itself neither strictly correct as a statement of the acknowledged law nor at all defensible upon any principle in this unqualified form. It is a mere shibboleth and has no intrinsic signification whatever. It has reference to a group of rules deducible from three general and independent principles which must be examined separately . . . .[21]

The three "general and independent" principles which support the rule are public policy, the doctrine of privileged communications, and the parol evidence rule.

A. Public Policy

The public policy rationale for barring a juror's affidavit is based on three

16. *See, e.g.*, Reich v. Thompson, 346 Mo. 577, 142 S.W.2d 486 (1940); Wright v. Abbott, 160 Mass. 395, 36 N.E. 62 (1894).
17. *See, e.g.*, 8 J. WIGMORE, *supra* note 1, §§ 2353 & 2354; Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 597-98 (1956). Note, *Chance and Quotient Verdicts*, 37 VA. L. REV. 849, 856-58 (1951). *See generally* Note, *Judgment by Your Peers? The Impeachment of Jury Verdicts and the Case of the Insane Juror*, 21 N.Y.L.F. 57 (1975).
18. *See, e.g.*, Consolidated Rendering Co. v. New Haven Hotel Co., 300 F. 627, 628 (D. Conn. 1924); People v. Hutchinson, 71 Cal. 2d 342, 348, 455 P.2d 132, 136, 78 Cal. Rptr. 196, 200 (Traynor, C.J.), *cert. denied*, 396 U.S. 994 (1969); Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 211 (1886); Perry v. Bailey, 12 Kan. 415, 418 (1874); Schwindt v. Graeff, 109 Ohio St. 404, 405, 142 N.E. 736, 737 (1924) (Marshall, C.J., dissenting); Crawford v. State, 2 Yer. 60, 68, 10 Tenn. 54, 61 (1821).
19. Ten states do not follow the Mansfield rule, but have developed variations of it. They are: Florida, Iowa, Kansas, New Jersey, Ohio (which follows the *aliunde* rule, discussed at notes 117-23 *infra* and accompanying text), Oregon, Tennessee, Texas, Washington, and Wisconsin. 8 J. WIGMORE, *supra* note 1, § 2354, at 702 n.1.

    By February 1977, six states had adopted comprehensive codes of evidence based on the Federal Rules of Evidence: Arkansas, Maine, Nebraska, Nevada, New Mexico, and Wisconsin. 2 FED. RULES EVID. NEWS 77-9 (Feb. 1977). North Dakota became the seventh state to adopt an evidence code patterned after the federal rules, 2 FED. RULES EVID. NEWS 77-17 (March 1977), and Minnesota became the eighth. 2 FED. RULES EVID. NEWS 77-41 (June 1977). The ninth state to embrace the federal rule pattern was Montana. MONT. R. EVID. 101 *et seq.* Effective September 1977, Arizona became the tenth state to adopt rules of evidence similar to the federal rules. *See* RULES SUP. CT. ARIZ. (West Supp. 1977-78). The Ohio Legislature failed to enact a proposed code of evidence which contained a provision partially modeled on FEDERAL RULE 606(b). *See* notes 117-23 *infra* and accompanying text. *See generally* discussion of the federal rule at notes 83-116 *infra* and accompanying text.
20. Note, *Admissibility of Jurors' Affidavits to Impeach Jury Verdict*, 31 NOTRE DAME LAW. 484, 484 (1956).
21. 8 J. WIGMORE, *supra* note 1, § 2345, at 677.

distinct factors, one of which is the finality of jury verdicts.[22] Some authorities have claimed that without the Mansfield rule, there would be protracted litigation—a trial to challenge a trial—resulting in instability of verdicts[23] and diminished public respect for trial by jury.[24]

Secrecy of the jury's deliberations is the second public policy basis for the rule.[25] Indeed, the United States Supreme Court has stated that the no-impeachment rule is based on a policy that opts for the lesser of evils in "choos[ing] between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room."[26] The rule is designed to promote "free discussion and interchange of opinion among jurors"[27] since, theoretically, a juror will feel more at liberty to voice his opinions if he knows he is insulated from public scrutiny.[28]

The third public policy argument is that the rule lessens the temptation for the losing party to tamper with the jury after it has reached a verdict.[29] Without the rule, jurors might be "harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict."[30]

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22. Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 212 (1866); C. MCCORMICK, *supra* note 1, § 68, at 148.
23. Kollert v. Cundiff, 50 Cal. 2d 768, 773, 329 P.2d 897, 900 (1958).
24. Caldwell v. E.F. Spears & Sons, 186 Ky. 64, 71, 216 S.W. 83, 85 (1919); State v. Best, 111 N.C. 638, 645, 15 S.E. 930, 933 (1892); State v. Gardner, 30 Ore. 569, 570-71, 371 P.2d 558, 560 (1962).
25. Clark v. United States, 289 U.S. 1, 13 (1933) (Cardozo, J.) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."); Rakes v. United States, 169 F.2d 739, 745 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948); NLRB v. Botany Worsted Mills, 106 F.2d 263, 264 (3rd Cir. 1939); Emmert v. State, 127 Ohio St. 235, 244-45, 187 N.E. 862, 866 (1939); Comment, *New Trial—Misconduct of Jurors*, 15 TEX. L. REV. 101 (1936); Comment, *Impeachment of Jury Verdicts by Jurors: A Proposal*, 1969 U. ILL. L.F. 388; 53 IOWA L. REV. 1366, 1367 (1968).
26. McDonald v. Pless, 238 U.S. 264, 267 (1914). Judge Frank, in Skidmore v. Baltimore & O.R.R., 167 F.2d 54 (1948), vividly described the courts' determination to shield the jury room:

> The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi. Both stand on the same foundation—a presumption of wisdom. The court protects the jury from all investigation and inquiry as fully as the temple authorities protected the priestess who spoke to the supplient votary at the shrine.

Id. at 60.
27. Sandoval v. State, 151 Tex. Crim. 430, 434, 209 S.W.2d 188, 190 (1948).
28. McDonald v. Pless, 238 U.S. 264, 267-68 (1915).
29. *Id.* at 267; Mattox v. United States, 146 U.S. 140, 149-50 (1892); Haight v. Turner, 21 Conn. 593, 596 (1852); People v. Pizzino, 313 Mich. 97, 105, 20 N.W.2d 824, 827 (1945); State v. Kociolek, 20 N.J. 92, 98, 118 A.2d 812, 815 (1955) (Brennan, J.) *noted in* Annot., 58 A.L.R.2d 545 (1958); Grenz v. Werre, 129 N.W.2d 681, 692 (N.D. 1964); State v. Adams, 141 Ohio St. 423, 427, 48 N.E.2d 861, 863 (1943).
30. McDonald v. Pless, 238 U.S. at 267.

These public policy rationales are open to criticism. A juror may be the sole witness to misconduct. Consequently, rejection of his affidavit can result in the exclusion of the only evidence available to prove the alleged misconduct.[31] In addition, a rule which allows testimony by an outside person who witnessed the transaction "through the window"[32] may place the integrity of jury deliberations in greater jeopardy than they would be under a more open rule. A modern effect of the Mansfield rule could well be to encourage surveillance of juries by outside investigators, a special danger in an age in which sophisticated means of electronic snooping have been developed.

The no-impeachment rule may also induce losing parties to pressure bailiffs or other court officers to reveal whether they observed improper jury practices during the trial or deliberations. The rule may also tempt a party to arrange for a court official to observe and secure evidence from the jury room for future use in the party's motion for a new trial.[33]

The stability of jury verdicts has been frequently mentioned as a policy supporting the no-impeachment rule. However, courts in jurisdictions that have adopted more liberal rules have not reported extended litigation over jury verdicts. The experience in those states discredits the fear that admission of juror affidavits would result in widespread insecurity of jury verdicts[34] and calls into question the rationale for the rigid rule.

B. The Doctrine of Privileged Communications

The second general principle which supports the rule prohibiting a juror from impeaching his own verdict is the evidentiary concept of privileged communications.[35] A juror may invoke the privilege because communications

31. *See* Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947). *See also* Consolidated Rendering Co. v. New Haven Hotel Co., 300 F. 627, 628 (D. Conn. 1924). *But see* Rakes v. United States, 169 F.2d 739, 745-46 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948).

32. Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). *See* notes 12-15 *supra* and accompanying text.

33. In Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964), the North Dakota Supreme Court stated that to allow jurors to impeach their own verdict would "subject [them] to influences by corrupt parties in an effort to have them impair their verdict after they had ceased to act as jurors." *Id.* at 692, *citing* State v. Forrester, 14 N.D. 335, 103 N.W. 625 (1905). *See also* Consolidated Rendering Co. v. New Haven Hotel Co., 300 F. 627, 629 (D. Conn. 1924), *citing* Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866); Note, *Judgment by Your Peers? The Impeachment of Jury Verdicts and the Case of the Insane Juror*, 21 N.Y.L.F. 57, 57-58 (1975).

34. People v. Hutchinson, 71 Cal. 2d 343, 350, 455 P.2d 132, 137, 78 Cal. Rptr. 196, 201 (1969) (Traynor, C.J.), *cert. denied*, 396 U.S. 994 (1969), *citing* Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360, 372 n.78 (1958); Note, *Chance and Quotient Verdicts*, 37 VA. L. REV. 849, 862 (1951).

35. Clark v. United States, 289 U.S. 1, 12-19 (1932); 8 J. WIGMORE, *supra* note 1, § 2346, at 678-79; Note, *Impeachment of Jury Verdicts*, 53 MARQ. L. REV. 258, 263 (1970). *See also* Burton v. United States, 175 F.2d 960, 965 (5th Cir.), *cert. denied*, 338 U.S. 909 (1949).

in the jury room meet its requirements.[36] One of those requirements is that the communications be exchanged privately. Secrecy is essential if the jury is to achieve its purpose—a verdict determined by "a process of careful examination, reflection, and deliberation."[37] Because the decision is entitled to the most careful consideration,[38] jurors are generally privileged to have the thoughts and views they expressed in the jury room remain free from forced disclosure either on the witness stand or by affidavit.[39]

Despite its admitted relevance to jurors' deliberations, the privilege has not been important in excluding jurors' affidavits relating to jury misconduct. There are two reasons for this. First, the privilege is personal to the juror; so, he can waive it voluntarily.[40] Thus, voluntary submission of an affidavit vitiates the privilege. Second, a juror may not employ the privilege to conceal illegal behavior.[41]

C. The Parol Evidence Rule

The third major argument in support of the no-impeachment rule is the doctrine of parol evidence.[42] Dean Wigmore has written:

> [W]here the existence and tenor of a jural act . . . are in issue, the outward utterance as finally and formally made, and not the prior and private intention, is taken as exclusively constituting the act . . . and therefore where the act is required . . . to be made in writing, the writing is the act.[43]

Under the parol evidence rule, the outward utterance is the act. Accordingly, the jury's arguments, expressions, and deliberations which precede the verdict are merged into and support it. "[T]he verdict, in which all [the jurors] concur, must be the best evidence of their belief . . . and therefore must be taken to be

36. Clark v. United States, 289 U.S. 1, 12-13 (1932); 8 J. WIGMORE, *supra* note 1, § 2346, at 664-65. The four fundamental conditions necessary to the establishment of a privilege against the disclosure of communications are:

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

8 J. WIGMORE, *supra* note 1, § 2285, at 527.

37. Comment, *Brown v. Commonwealth: The Court Balks on Quotient Verdicts*, 62 KY. L.J. 243, 243 (1973), *citing* Louisville & N. R.R. v. Marshall, 289 Ky. 129, 158 S.W.2d 137; *See also* Comment, *Impeachment of Jury Verdicts by Jurors: A Proposal*, 1969 U. ILL. L.F. 388, 392.
38. 8 J. WIGMORE, *supra* note 1, § 2346, at 678.
39. *Id. See also* The King v. Kahalewai, 3 Haw. 465 (1873).
40. Note, *Judgment by Your Peers? The Impeachment of Jury Verdicts and the Case of the Insane Juror*, 21 N.Y.L.F. 57, 65 (1975), *citing* 8 J. WIGMORE § 2346.
41. Clark v. United States, 239 U.S. 1, 14 (1933) (Cardozo, J.).
42. 8 J. WIGMORE, *supra* note 1, § 2348.
43. *Id.* at 679.

conclusive.''[44] The principle is similar to the situation in which prior negotiations of contracting parties cease to have legal significance once a final agreement is reduced to writing and signed.[45] However, even courts which strictly reject jurors' affidavits make an exception based on the parol evidence rule. They admit a juror's affidavit to correct clerical errors in the written verdict—such as errors in recording the verdict or miscalculation by the jury in computing the amount of damages—because this is not considered impeachment of the verdict itself.[46]

Although Dean Wigmore claims that ''a jury's verdict is one of the most important acts illustrating the application of [the parol evidence] principle,''[47] courts have not used this rationale widely in rejecting juror affidavits.[48] Perhaps they comprehend the parol evidence rule solely in terms of written instruments, such as contracts. In any event, courts which broadly reject juror testimony typically rely on the public policy arguments already reviewed or merely repeat the shibboleth that a juror cannot impeach his verdict. However, courts which purportedly *prohibit* the admission of a juror's affidavit to impeach his own verdict may nonetheless admit a juror's affidavit if it *explains* his verdict.[49]

D. Summary

The effect of the Mansfield rule has been to erect a tight shield around the jury room, thereby insulating the jury's deliberations from post-verdict public scrutiny. Blanket rejection of juror affidavits under the no-impeachment formulation has resulted in instances of obvious injustice to a losing litigant. On the other hand, unlimited acceptance of jurors' affidavits would undoubtedly produce many effects which the rule is designed to avoid: undue prolongation of litigation,[50] instability of verdicts,[51] and potential interference with jury deliberations.[52] Not unexpectedly, a limited number of jurisdictions have

44. Murdock v. Sumner, 39 Mass. 156, 157 (1839).
45. *See* J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 40 (1970). *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 25 & 26 (1973).
46. Young v. United States, 163 F.2d 187, 189 (10th Cir.), *cert. denied*, 332 U.S. 770 (1947), *cert. denied*, 334 U.S. 859 (1949); Consolidated Rendering Co. v. New Haven Hotel Co., 300 F. 627, 631 (D. Conn. 1924); Bauer v. Kummer, 70 N.W.2d 273, 276 (Minn. 1955); Kennedy v. Stocker, 116 Vt. 98, 101, 70 A.2d 587, 589-90 (1950).
47. 8 J. WIGMORE, *supra* note 1, § 2346, at 679.
48. *See* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 5.7 (May 1968 Draft).
49. *In re* Sugg, 194 N.C. 638, 640, 140 S.E. 604, 606 (1927); 2 B. JONES, *supra* note 1, § 20:58, at 730.
50. Note, *Impeachment of Jury Verdicts*, 53 MARQ. L. REV. 258, 263 (1970).
51. *See* note 23 *supra* and accompanying text.
52. *See* notes 25-30 *supra* and accompanying text.

developed compromise rules between the extremes of comprehensive acceptance and wholesale rejection of juror affidavits.[53]

III. DEVIATIONS FROM THE MANSFIELD RULE

Representative of court decisions which split from the Mansfield tradition are those fashioned in Iowa and California. A pathbreaking opinion by the Iowa Supreme Court in the mid-1800's led a number of jurisdictions away from the no-impeachment rule. California ultimately embraced the Iowa philosophy, which takes a liberal approach to verdict impeachment. The liberal rule has been styled the Iowa rule, or alternately the Iowa-California rule, by certain commentators. Cases from both of these states will be analyzed because of their importance to that pattern of decisions which favors the impeachment process.

While these state developments were occurring federal law took uncertain directions, vacillating between harsh and liberal standards. The course of federal decisions will be charted, a discussion concluded by reference to Federal Rule of Evidence 606(b). The federal rule, in its commendable attempt to stabilize and unify federal practice, represents a more moderate break from the Mansfield tradition than the Iowa rule. Finally, Ohio's development of a specialized and rather unique departure from the strict Mansfield pattern will be noted.

A. The Iowa Rule

An early Iowa decision, *Wright v. Illinois & Mississippi Telegraph Co.*,[54] initiated the retreat from the Mansfield rule.[55] In *Wright*, the defendant filed a motion for a new trial based on the affidavits of four jurors, alleging that the jury used a quotient verdict to determine the amount of the plaintiff's damages.[56] The Iowa Supreme Court, after exhaustively reviewing the relevant case law,[57] concluded that "each case has been decided, not on any recognized or fixed principle, but upon its own supposed merits, according to individual views of the judge delivering the opinion of the court . . . ."[58] Arguing that it

53. For a compilation of the jurisdictions which have adopted alternatives to the Mansfield rule, *see* note 19 *supra*.
54. 20 Iowa 195 (1866).
55. An earlier, although less influential attack was mounted in Crawford v. State, 2 Yer. 60, 10 Tenn. 54 (1821), in which the Tennessee Supreme Court condemned the rule.
56. 20 Iowa at 197. A quotient verdict is "an agreement by the jurors to the verdict-reaching procedure of adding together sums representing each individual juror's judgment as to the amount of damages to be awarded or penalty to be exacted, and dividing the total by the number of jurors." Note, *Chance and Quotient Verdicts*, 37 VA. L. REV. 849, 851 (1951).
57. The Iowa Supreme Court discussed in detail 14 Iowa cases and 15 decisions rendered by the courts of other jurisdictions. 20 Iowa at 198-209.
58. *Id.* at 209.

could find no general rule to follow,[59] the court then fashioned its own formulation: "[A]ffidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially *inhere in the verdict* itself . . . ."[60]

The court articulated three reasons in support of its position. First, it argued that matters personal to a juror are incapable of verification by objective proof.[61] Although such matters are therefore inappropriate grounds for impeachment of jury verdicts, a fact alleged by a juror which is independent of the verdict "can be readily and certainly disproved by his fellow jurors."[62] Second, the court noted that receipt of affidavits identifying independent juror misconduct would have the salutary effect of "purify[ing] the jury room, by rendering such improprieties capable and probable of exposure."[63] The court could find no sensible reason to hear testimony from persons outside the jury room, but refuse to admit testimony from those persons, the jurors, who had been present during the deliberations and had personally observed the alleged misconduct.[64] The court's third rationale was that it should not protect a juror who had failed to perform his duties correctly:

> [W]hen [the juror] has done an act entirely independent and outside of his duty and in violation of it and the law, there can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced by such unlawful act.[65]

The Iowa rule directly contradicted Lord Mansfield's position that a juror is forbidden to submit an affidavit impeaching the verdict.[66] The Iowa formulation placed primary importance on the quality of the jury's decision-making

59. The court stated:
> Under such circumstances, it is, of course, impossible to deduce a general rule from, or state one that will be consistent with, all the cases. Indeed, in the midst of such conflict in the adjudicated cases, no court would be justified in laying down, if possible, a rule based upon principle, and resting a case thereon, regardless of the former adjudications.

Id. at 209-10.

60. *Id.* at 210 (emphasis added).
61. *Id.* at 210-11. *Accord*, Hyde v. United States, 225 U.S. 347, 382-84 (1911); Mattox v. United States, 146 U.S. 140, 148-49 (1892).
62. 20 Iowa at 211.
63. *Id.*
64. While it is certainly illegal and reprehensible in a juror, to resort to lot or the like to determine a verdict, which ought always to be the result of a deliberate judgment, yet such resort might not evince more turpitude tending to the discredit of his statement than would be evinced by a person not of the jury, in the espionage indicated by Lord Mansfield and necessary to gain a knowledge of the facts to enable him to make the affidavit.

Id. at 211.

65. *Id.* at 212.
66. *See* notes 13-16 *supra* and accompanying text.

process and made that process amenable to scrutiny by the court. Thus, the Iowa court carefully sought to submit the legal process to the exposure of injustice rather than unalterably maintain the security of the jury room from attacks on the verdict.[67]

A key to understanding the Iowa rule lies in appreciating which matters do, and which matters do not, "inhere in the verdict." Although there is some disagreement over the precise meaning of the phrase,[68] matters that inhere in the verdict usually are deemed to be those which are personal to the juror, such as his mental operations, emotions, and personal reactions to the arguments of counsel.[69] Other major elements which courts have found to inhere in the verdict are:

1) a misunderstanding of the trial court's instructions;
2) acquiescence in the verdict only because of the persuasive influence of another juror;
3) discussions of the evidence during jury deliberations;
4) a juror's view that the verdict was predicated on mistake;
5) assent because of a juror's weariness or illness;
6) a juror's personal motives for assenting to a verdict.[70]

Accordingly, these circumstances have been deemed inappropriate grounds for attacking jury verdicts. After the Iowa rule was announced in 1866, it slowly attracted adherents and by 1969 had been adopted by about a dozen jurisdictions.[71] Furthermore, rule 301 of the Model Code of Evidence[72] contained a provision similar to the Iowa formulation.

67. 44 YALE L.J. 516, 517-18 (1935). This determination to reorder the priorities, which is contrary to the policy enunciated by Lord Mansfield, was followed by the United States Supreme Court in McDonald v. Pless, 238 U.S. 264 (1915). *See* note 26 *supra* and accompanying text.

68. *Compare* State v. Lorenzy, 59 Wash. 308, 311, 109 P. 1064, 1066 (1910) ("inheres" means "lost in" or "covered by" the verdict), *with* Perry v. Bailey, 12 Kan. 415, 419 (1874) ("inheres" means "resting in the personal consciousness of one juror").

69. *See, e.g.*, Board of Trustees Eloy Elem. School Dist. v. McEwen, 6 Ariz. App. 148, 153-54, 430 P.2d 727, 732-33 (1967); Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, 210 (1866); Kincaid v. Wade, 196 Kan. 174, 178, 410 P.2d 333, 337 (1966); Rhodes v. Liberty Welding Works, 391 S.W.2d 796, 798-99 (Tex. Ct. App. 1965); Howard v. Bolin Warehouse, Inc., 422 S.W.2d 489, 495 (Tex. Ct. App. 1967). *See also* 53 IOWA L. REV. 1366, 1368 (1968).

70. For a detailed listing of cases supporting each proposition, see 8 J. WIGMORE § 2354; Note, *supra* note 35, at 265. *See also* Note, *Judgment by Your Peers? The Impeachment of Jury Verdicts and the Case of the Insane Juror*, 21 N.Y.L.F. 57, 61 (1975).

71. For a listing of the jurisdictions which have adopted the Iowa rule, *see* note 19 *supra*.

72. Whenever any act, event or condition known to a member of a petit or grand jury is a subject of lawful inquiry, any witness, including every member of the jury, may testify to any material matter, including any statement or conduct or condition of any member of the jury, whether the matter occurred or existed in the jury room or elsewhere, and whether during the deliberations of the jury, or in reaching or reporting its verdict or finding, or in any other circumstances, except that upon an issue as to the validity of a verdict or indictment no evidence shall be received concerning the effect which anything had upon the mind of a juror as tending to cause him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was reached.

MODEL CODE OF EVIDENCE rule 301 (1942). The Uniform Rules also incorporated an impeachment provision:

In 1969, a prestigious addition was made to the jurisdictions which adopted the Iowa approach to impeachment of jury verdicts. In *People v. Hutchinson*,[73] a landmark opinion authored by Chief Justice Roger Traynor, the California Supreme Court overturned prior California law and adopted a much more open rule, citing the vintage Iowa decision, *Wright v. Illinois & Mississippi Telegraph Co.*[74]

Hutchinson involved the appeal of a young man who had been convicted of possession of marijuana.[75] After the jury returned its verdict, the defendant filed a motion for a new trial based on a juror's affidavit which alleged misconduct by the bailiff.[76] In his affidavit, the juror maintained that when the jurors inquired about dinner, the bailiff responded: "If you go out to eat, you will be locked up overnight."[77] Apparently hoping that the jury would conclude its deliberations quickly, the bailiff reportedly reentered the jury room and angrily stated: "[I]f you knew what was going on out there, you would be shivering in your boots."[78] The trial court rejected the juror's affidavit and denied defendant's motion for a new trial because jurors "can't impeach their own verdict."[79]

On appeal, the California Supreme Court reversed the decision and held that jurors are competent witnesses to prove objective facts to impeach a verdict.[80] In reaching this result the court weighed two competing considerations: the prevention of unstable verdicts, fraud, and harassment of jurors, on the one hand, against the desirability of providing the losing party with relief from wrongful jury conduct.[81] The court found that "the wrong to the individual cannot be considered the lesser of two evils"[82] and adopted the liberal rule.

> Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

UNIFORM RULE OF EVIDENCE 41 (1953). *See* note 107 *infra*.

73. People v. Hutchinson, 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196 (Traynor, C.J.), *cert. denied*, 396 U.S. 994 (1969). California courts have continued to follow the Hutchinson approach. *See, e.g.*, People v. Lee, 38 Cal. App. 3d 749, 113 Cal. Rptr. 641 (1974); Clemens v. Regents of Univ. of Cal., 8 Cal. App. 3d 1, 87 Cal. Rptr. 108 (1970).
74. 20 Iowa 195 (1886).
75. 71 Cal. 2d at 343, 455 P.2d at 133, 78 Cal. Rptr. at 197.
76. *Id.* at 346, 455 P.2d at 134, 78 Cal. Rptr. at 198.
77. *Id.* at 346 n.1, 455 P.2d at 134 n.1, 78 Cal. Rptr. at 198 n.1.
78. *Id.*
79. *Id.* at 346, 455 P.2d at 134-35, 78 Cal. Rptr. at 198-99.
80. *Id.* at 351, 455 P.2d at 137, 78 Cal. Rptr. at 201. In the course of this analysis, Chief Justice Traynor noted that the Mansfield rule was "almost universally assailed by the commentators as without foundation in logic or policy." *Id.* at 346-47, 455 P.2d at 135, 78 Cal. Rptr. at 199. The commentators referred to are listed in footnote 2 of the opinion.
81. *Id.* at 348, 455 P.2d at 136, 78 Cal. Rptr. at 200.
82. *Id.* at 349, 455 P.2d at 136, 78 Cal. Rptr. at 200.

B. The Federal Response

The Supreme Court has vacillated in its treatment of whether the affidavits of jurors which impeach the verdict ought to be received.[83] In *United States v. Reid*,[84] the first case to raise the issue, the Court was hesitant to adopt the Mansfield rule with its inflexible rigidity:

> 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 without violating the plainest principles of justice.[85]

Forty-one years later, the Court again confronted the question in *Mattox v. United States*.[86] There the defendant, who had been convicted of murder, filed a motion for a new trial,[87] in support of which he offered affidavits of two jurors who alleged that statements by the bailiff had prejudiced the jurors and that a newspaper not formally admitted into evidence had been circulated in the jury room.[88] From *Perry v. Bailey*,[89] an opinion of the Supreme Court of Kansas, the Court quoted:

> Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony . . . . But as to overt acts, they are accessible to the knowledge of all the jurors . . . . [The jurors' affidavits] tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one.[90]

The Court also highlighted language from *Woodward v. Leavitt*,[91] an opinion of the Massachusetts Supreme Court:

> [A] juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room . . . .[92]

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83. *Compare* Mattox v. United States, 146 U.S. 140 (1892) ("juryman may testify to any facts bearing upon the question of the existence of any extraneous influence"), *with* McDonald v. Pless, 238 U.S. 264 (1915) ("losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict").
84. 53 U.S. (12 How.) 361 (1851).
85. *Id.* at 366.
86. 146 U.S. 140 (1892) (Fuller, C.J.).
87. *Id.* at 141.
88. *Id.* at 142-44.
89. 12 Kan. 539 (1874).
90. 146 U.S. at 148-49, *quoting* Perry v. Bailey, 12 Kan. 539, 545 (1874).
91. 107 Mass. 453 (1871).
92. 146 U.S. at 149, *citing* Woodward v. Leavitt, 107 Mass. 453 (1871).

The opinion curtly stated that the Court "regard[ed] the rule thus laid down as conformable to right reason and sustained by the weight of authority."[93] The Court then found that the affidavits revealed conduct properly subject to exposure, so that exclusion of the affidavits by the trial court constituted reversible error.[94] However, there is a significant difference between the two formulations quoted by the opinion,[95] for which the Court fails to account. As a result, some federal courts have applied the "inhere in the verdict" rule,[96] based on the Kansas formulation, while others have employed the "extraneous act" standard,[97] based on the Massachusetts opinion.

In *McDonald v. Pless*,[98] the Court's third and perhaps most important decision on the issue, the Court appeared to retreat slightly from the liberal *Mattox* approach. *McDonald* was a suit brought to collect $4,000 owed for legal services. The jury, which found for the plaintiff, used a quotient verdict to determine the amount of damages to be awarded.[99] The defendant made a motion for a new trial and alleged at a hearing on the motion that the trial court erred in refusing to allow a juror to testify about the deliberations.[100] The Court of Appeals for the Fourth Circuit affirmed the trial court's decision.[101] On appeal, the Supreme Court, after reviewing the *Reid* and *Mattox* opinions, "recognize[d] that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.' "[102] The Court found nothing unique in the facts of the case before it, however, to justify a departure from the general rule that a party cannot use a juror's affidavit to impeach the verdict.[103]

93. 146 U.S. at 149.
94. *Id.*.
95. *See* Note, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360, 361-62 (1958).
96. *See, e.g.*, Farmers Co-Op. Elev. Ass'n Non-Stock v. Strand, 382 F.2d 224, 230 (8th Cir.), *cert. denied*, 389 U.S. 1014 (1967); Complete Auto Transit, Inc. v. Wayne Broyles Eng'r Corp., 351 F.2d 478, 482 (5th Cir. 1965); Northern Pac. Ry. v. Mely, 219 F.2d 199, 202 (9th Cir. 1954); Rakes v. United States, 169 F.2d 739, 745 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948); Young v. United States, 163 F.2d 187, 188 (10th Cir.), *cert. denied*, 332 U.S. 770 (1947), *cert. denied*, 334 U.S. 859 (1949); Liggett & Meyers Tobacco Co. v. Imbraguglia, 73 F. Supp. 909, 910-11 (D. Md. 1947).
97. *See, e.g.*, Lohr v. Tittle, 275 F.2d 662, 667 (10th Cir. 1960); Stiles v. Lawrie, 211 F.2d 188, 190 (6th Cir. 1954); Wheaton v. United States, 133 F.2d 522, 526 (8th Cir. 1943); Southern Pac. Co. v. Klinge, 65 F.2d 85, 88 (10th Cir.), *cert. denied*, 290 U.S. 657 (1933); United States v. 120,000 Acres of Land, 52 F. Supp. 212, 213 (N.D. Tex. 1943); Womble v. J.C. Penney Co., 47 F.R.D. 350, 355 (E.D. Tenn. 1969) (memorandum), *aff'd*, 431 F.2d 985 (6th Cir. 1970).
98. 238 U.S. 264 (1915). For a later opinion, decided without citation to the *McDonald* case, see Remmer v. United States, 350 U.S. 377 (1956) (conviction reversed because juror subjected to "extraneous influences"). The *Remmer* decision is discussed in Krause v. Rhodes,— F.2d— (6th Cir. 1977) (Kent State civil damage case).
99. 238 U.S. at 265.
100. *Id.* at 265.
101. McDonald v. Pless, 206 F. 263 (4th Cir. 1913), *aff'd*, 238 U.S. 264 (1915).
102. 238 U.S. at 268-69. The Court stated that "[t]his might occur in the gravest and most important cases." *Id.* at 269.
103. *Id.* at 269.

The *McDonald* Court, refusing to bar juror testimony completely, thus left open the possibility that jury misconduct could be shown by juror affidavit where "the plainest principles of justice" demand such use.[104] Generally, the federal circuit and district courts have been more liberal than the *McDonald* Court in applying standards for overturning jury verdicts and have followed one of the two formulations enunciated in *Mattox*.[105]

In an effort to resolve the inconsistencies and general state of disarray in the federal law of jury impeachment, the Federal Rules Advisory Committee promulgated Proposed Federal Rule of Evidence 606(b).[106] Congress ultimate-

104. *Id.*

105. *See* notes 96 & 97 *supra* and accompanying text. *But see* Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.) (finding that an agreement to abide by the vote of the majority is of no greater impropriety than the quotient verdict which was sustained in *McDonald*), *cert. denied*, 332 U.S. 764 (1947).

106. PROP. FED. R. EVID. 606(b) provided:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 387 (1971). For a discussion of proposed rule 606(b), see Curtiss, *Competency (Rules 601-609)*, in *Symposium: Proposed Federal Rules of Evidence*, 23 FED. INS. COUNSEL 1, 66-67 (Spring 1973).

The original draft of rule 606(b) would have permitted broad inquiry into jury misconduct, since it would not have severely limited evidence of the jury's deliberations or method of reaching a verdict as is done by present rule 606(b), quoted at note 107 *infra*. Professor Ronald L. Carlson traced the drafting history in a letter to the House subcommittee which considered the provision:

> 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, *Cases and Materials on Evidence* 266-267 (Callaghan & Co. 1972). Leading decisions favoring the admission of juror testimony to expose jury misconduct include *People v. Hutchinson*, 455 P.2d 132 (Cal. 1969) (proof of overt acts of misconduct allowed; proof of subjective reasoning process of juror which cannot be corroborated disallowed); *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866) (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.
>
> . . . .
>
> . . . [T]he 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 (see *People v. Hutchinson*, *supra*) 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. That approach has proved effective in numerous states where it is in use; it should also be remembered that

ly approved it, albeit with some modification, and the enacted version now provides a unifying formula for federal courts.[107]

Under rule 606(b), a federal court may admit a juror's affidavit or hear a juror's testimony when "extraneous prejudicial information was improperly brought to the jury's attention or [when] any outside influence was improperly brought to bear upon any juror."[108] In its report, the House Judiciary Committee had recommended a rule similar to the Iowa rule.[109] The Senate Judiciary Committee, however, suggested a more restrictive formulation which would not permit juror testimony about any matters which had arisen or statements which were made during the jury deliberations, with the two major exceptions that were incorporated in the enacted version of the rule.[110] The Joint Conference adopted the Senate version, which was then passed by Congress.[111]

What kind of misconduct in the jury room is recognized under the federal rule as a proper ground for a juror's affidavit? A federal court could, for example, receive an affidavit of a juror alleging that in its deliberations the jury used newspaper clippings that had not been introduced into evidence.[112] The clippings would constitute extraneous information improperly brought to the

post-trial interviews of jurors are controlled by rules of professional ethics. See the ABA and American College of Trial Lawyers rules cited in Ladd & Carlson, *supra* at 266-67.

Proposed Rules of Evidence: Hearings before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary, 93d Cong., 1st Sess. 389 (Feb.-March 1973).

107. FED. R. EVID. 606(b) provides:

> Upon any 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 to 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 what he would be precluded from testifying be received for these purposes.

108. FED. R. EVID. 606(b), quoted at note 107 *supra*.

109. H.R. Rep. No. 93-650, 93d Cong., 2d Sess. 10 (1974). The Iowa rule is discussed at notes 54-82 *supra* and accompanying text.

110. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 13 (1974).

111. A discussion of the various forms of the rule as it advanced from the Supreme Court Advisory Committee draft to its final form appears in J. WALTZ, THE NEW FEDERAL RULES OF EVIDENCE 87-90 (1975).

112. *See* Carlson, *Impeaching Jury Verdicts*, 2 LITIGATION 31, 33 (Fall 1975). A situation similar to the one hypothesized in the text arose in United States v. Kum Seng Seo, 300 F.2d 623 (3d Cir. 1962), where a juror distributed a newspaper clipping containing information about the trial to the other jurors just before they voted on the guilt or innocence of the defendant. *Id.* at 623-24. The Court of Appeals for the Third Circuit reversed the defendant's conviction, remanded the case with the direction to grant a new trial, and held that a new trial should be granted in federal criminal cases when it is shown that members of the jury have read news accounts containing inadmissible and inaccurate facts prejudicial to the defendant. *Id.* at 625-26. *See also* United States v. Vita, 294 F.2d 524 (2d Cir.), *cert. denied*, 369 U.S. 823 (1961); Holmes v. United States, 284 F.2d 716 (4th Cir. 1960).

jury's attention.[113] Or, a juror's affidavit alleging that he was approached by an interested party during trial would be admissible to impeach the verdict.[114] This latter situation would fall within the exception for outside influence improperly brought to bear upon the jury. The rule does not, unfortunately, permit review of quotient verdicts.[115] Consequently, a quotient verdict remains insulated from attack in federal court.[116]

C. *The Ohio Rule*

Ohio courts employ a unique approach, known as the *aliunde* rule, to determine whether a juror's affidavit may be admitted to impeach a jury verdict.[117] The *aliunde* rule permits a third party's conduct inside or outside the jury room, as well as a juror's conduct *outside* the jury room, to be proper subjects of a juror's affidavit to impeach a verdict.[118] However, the Ohio formula does not allow inquiry into juror conduct during deliberations. The conduct of jurors in the jury room remains free from public scrutiny.

Although the rule has significant exceptions not found in the rigid Mansfield rule, it is still open to many of the criticisms that have been made of the latter. Commentators have criticized the rule, for example, for cordoning off most of the activity in the jury room from close inquiry, ignoring evidence from the most reliable source, the jurors.[119]

In 1977, Ohio considered enacting a comprehensive, new evidence code.[120] Proposed Ohio Rule of Evidence 606(b)[121] was patterned after federal rule

113. Carlson, *supra* note 112, at 33.

114. *Id. See generally* Lohr v. Tittle, 275 F.2d 662 (10th Cir. 1960); Liggett & Myers Tobacco Co. v. Imbraguglia, 73 F. Supp. 909 (D. Md. 1947). For a recent example of the outside influence which resulted in reversal of a judgment, see Krause v. Rhodes,—F.2d—(6th Cir. 1977).

115. *See* FED. R. EVID. 606(b), quoted at note 107 *supra*. *See also* the discussion at note 106 *supra*. North Dakota, in enacting rule 606, added a phrase to allow exposure of jury verdicts "arrived at by chance." N.D. R. EVID. 606 (1977), *discussed in* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 25-26 (Supp. 1977).

116. Rule 606(b) provides that statements made during a jury's deliberations are not reportable, except to show extraneous prejudicial information or improper outside influence.

117. *See* Emmert v. State, 127 Ohio St. 235, 187 N.E. 862 (1933); Schwindt v. Graeff, 109 Ohio St. 404, 142 N.E. 736 (1924); Goins v. State, 46 Ohio St. 457, 21 N.E. 476 (1889); Kent v. State, 42 Ohio St. 426 (1884); Farrer v. State, 2 Ohio St. 54 (1853).

118. Emmert v. State, 127 Ohio St. 235, 246-47, 187 N.E. 862, 867 (1933).

119. *See* Note, *Judgment by Your Peers? The Impeachment of Jury Verdicts and the Case of the Insane Juror*, 21 N.Y.L.F. 57, 63-64 (1975); 44 YALE L.J. 516, 517-18 (1935).

120. The Ohio Supreme Court filed the Proposed Ohio Rules of Evidence with the General Assembly in January 1977. *See* 50 OHIO BAR 231 (1977).

121. PROP. OHIO R. EVID. 606(b) provided:

> 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. 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 on any

606(b), but it had a supplementary provision which in effect retained much of the potentially unjust *aliunde* limitation.[122] The new rule would have allowed a court to receive an affidavit of a juror alleging that extraneous influence was exerted on, or extraneous information was used by, a jury, but only after outside evidence of such acts had been presented. The Ohio Legislature recently rejected the proposed evidence code *in toto*, however, and the common law *aliunde* rule remains in effect.[123]

IV. PROCEDURAL ASPECTS OF IMPEACHMENT AND INTERVIEWING PROBLEMS

A. *Procedural Aspects of Impeachment*

In jurisdictions which allow a juror to impeach his own verdict, a party alleging juror misconduct should be aware of several procedural considerations. Initial problems for trial counsel arise in determining the procedural vehicle to employ in an attack based on alleged improprieties, and in creating a proper record which demonstrates to the court that there has been serious juror misconduct. This is usually accomplished by filing a motion for a new trial.[124] The motion should be in writing; it must set forth the grounds relied on in demanding a new trial; and it should contain specific allegations of the alleged misconduct.[125] A juror's affidavit frequently accompanies the motion,[126] and a juror's testimony may supplement the affidavit if the court holds a hearing on the motion for a new trial.[127]

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juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes.

50 OHIO BAR at 240.

122. In most cases the new Ohio rule would allow juror testimony only after "some outside evidence of that act or event [of juror misconduct] has been presented." *See* note 121 *supra*.

123. For a discussion of the rejection of the proposed Ohio rule, *see* notes 171-74 *infra* and accompanying text.

124. *See, e.g.*, Holden v. Porter, 405 F.2d 878 (10th Cir. 1969) (per curiam); Farmers Co-Op. Elev. Ass'n Non-Stock v. Strand, 382 F.2d 224 (8th Cir.), *cert. denied*, 389 U.S. 1014 (1967); Rakes v. United States, 169 F.2d 739 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948).

125. *See* Carlson, *supra* note 112, at 33 for a summary of the procedures to be followed to file a motion for a new trial.

126. *See, e.g.*, Mattox v. United States, 146 U.S. 140 (1892); Farmers Co-Op. Elev. Ass'n Non-Stock v. Strand, 382 F.2d 224 (8th Cir.), *cert. denied*, 389 U.S. 1014 (1967); Complete Auto Transit, Inc. v. Wayne Broyles Eng'r Corp., 351 F.2d 478 (5th Cir. 1965); Northern Pac. Ry. v. Mely, 219 F.2d 199 (9th Cir. 1954); People v. Hutchinson, 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196 (Traynor, C.J.), *cert. denied*, 396 U.S. 994 (1969).

127. *See, e.g.*, Holden v. Porter, 405 F.2d 188 (6th Cir. 1954); Chambers v. United States, 237 F. 513 (8th Cir. 1916); Farmers Co-Op. Elev. Ass'n Non-Stock v. Strand, 382 F.2d 224, 230-31

The trial court has wide discretion in deciding whether a motion for a new trial should be granted.[128] Many cases announce a rule that before a new trial is ordered, the complaining party must show that prejudice occurred which influenced the outcome of the trial.[129] Such appears to be the general test. However, the United States Court of Appeals for the Sixth Circuit recently decided that where outside influence is directed at a juror in a pending case, the verdict should be overturned unless it is made reasonably certain that the jury was not influenced. The decision, *Krause v. Rhodes*,[130] involved civil claims by or relating to persons injured and killed at Kent State University on May 4, 1970. A jury verdict in favor of all of the defendants was reversed because of outside threats reportedly made against a juror and his family.

A juror's affidavit or testimony is properly limited to a description of the alleged misconduct which the jurisdiction recognizes as an appropriate ground for overturning a jury's verdict. For example, in federal court a juror's affidavit might describe an incident in which deliberating jurors read a newspaper clipping about the case when that news report had not been introduced into evidence.[131] On the other hand, a juror's affidavit describing the effect of a

(8th Cir.), *cert. denied*, 389 U.S. 1014 (1967); Southern Pac. Co. v. Kinge, 65 F.2d 85 (10th Cir.), *cert. denied*, 290 U.S. 657 (1933). *See also* 16 BUFFALO L. REV. 217, 220 (1965).

128. Farmers Co-Op. Elev. Ass'n Non-Stock v. Strand, 382 F.2d 224, 230-31 (8th Cir.), *cert. denied*, 389 U.S. 1014 (1967); Southern Pac. Co. v. Kinge, 65 F.2d 85, 88 (10th Cir.), *cert. denied*, 290 U.S. 657 (1933). *See also* 16 BUFFALO L. REV. 217, 220 (1965).

129. Wheaton v. United States, 133 F.2d 522 (8th Cir. 1943); Roberts v. United States, 60 F.2d 871 (4th Cir. 1932); People v. Johnson, 110 N.Y. 134, 17 N.E. 684 (1888). *See generally* Chambers v. United States, 237 F. 513 (8th Cir. 1916). In Remmer v. United States, 350 U.S. 377 (1956), the Court noted that in a criminal case, private contacts with a juror are deemed presumptively prejudicial.

130. —F.2d— (6th Cir. 1977). Among other cases, the *Krause* decision cited Remmer v. United States, 347 U.S. 227 (1954), and Stiles v. Lawrie, 211 F.2d 155 (6th Cir. 1954), in support of its conclusion that the plaintiffs were entitled to a new trial because the verdict was returned by a jury, at least one of whose members had been threatened and assaulted during the trial by a person interested in its outcome. Pointing out that the burden of proof question is not settled by federal rule 606, the *Krause* court marshalled numerous authorities to support the proposition that outside communication with a juror about a pending trial should be deemed presumptively prejudicial. The court adverted to decisions which apply a similar "test of harmlessness" when another form of improper influence appears, that involving jury consideration of incompetent documents which have not been received in evidence.

The *Krause* case is notable for another point, the correct procedural handling of a claim that a juror was subjected to outside influence. When a juror himself reports such attempted influence during a trial, the trial court might question the juror and perhaps others on the panel to determine the extent of probable influence. Court rulings have not been uniform on whether a juror may be interrogated, after a verdict, about the effect of extraneous influences on him, the *Krause* court noted. The opinion then virtually mandates such an inquiry before a motion for new trial is denied: "No litigant should be required to accept the verdict of a jury which has been subjected to such an intrusion in the absence of a hearing and determination that no probability exists that the jury's deliberations or verdict would be affected." — F.2d at —.

131. *See* cases cited at note 112 *supra*.

novel argument by counsel would be prohibited because it would not fall within either of the two recognized grounds for attack.[132]

B. *The Interviewing Problem*

A second issue involves the question of whether an attorney has the right to conduct post-trial interviews of jurors for the purpose of discovering grounds to support a motion for a new trial.[133] While organized bar groups and trial lawyer associations believe such a right exists,[134] some courts prohibit post-trial juror interviews.[135] These prohibitions seem at odds with the spirit of the American Bar Association Code of Professional Responsibility, Ethical Consideration 7-29, which provides:

> After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to personal feelings of the juror.[136]

Post-verdict interviewing of jurors as contemplated by the Code of Professional Responsibility is one of the most direct ways for counsel to discover

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132. The two exceptions, or grounds for attack upon a verdict, are set forth in note 106 *supra*. The influence of a final argument would fall in the category of the mental operations and emotional reactions of the juror in arriving at a result. Consequently, an affidavit would be excluded under federal rule 606(b). *See* Advisory Committee's Note, FED. R. EVID. 606(b).

133. Carlson, *supra* note 112, at 33.

134. AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT § 19(c) (1972); Carlson, *supra* note 112, at 33.

135. *See, e.g.*, U.S. DIST. CT. E.D. MO. R. XVI (1975):

> No petit juror shall be required to give any information concerning any action of the jury, unless specifically ordered to do so by the court. No attorney or any party to an action shall himself or through any other person interview, examine, or question any petit juror, relative, friend, or associate thereof, either during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of court granted upon good cause shown.

In Rakes v. United States, 169 F.2d 739 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948), the court stated:

> [The] rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice . . . . [A] searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it.

Id. at 745-46. *See also* Northern Pac. Ry. v. Mely, 219 F.2d 199 (9th Cir. 1954); United States v. 120,000 Acres of Land, 52 F. Supp. 212 (N.D. Tex. 1943); Palmer, *Post-Trial Interview of Jurors in the Federal Courts—A Lawyer's Dilemma*, 6 HOUS. L. REV. 290 (1968).

136. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-29 (1974).

violations of rule 606(b). As Chief Justice Traynor observed in *People v. Hutchinson*,[137] there is little reason to believe that permitting proof of overt misconduct by juror affidavit would encourage post-verdict tampering with the jury.[138] Additional support for post-verdict interviewing by counsel can be found within Federal Rule of Evidence 606(b) itself. Surely Congress did not include specific grounds for impeaching a jury verdict in rule 606(b) only to bar interviews designed to discover whether those grounds are present. The legislative history of the rule does not indicate that an incongruous result of this kind was intended by the drafters of the code.[139] In fact, it may be forcefully argued that rule 606(b) overrules *sub silentio* local federal court rules to the extent that they prohibit post-verdict interviews of jurors by counsel.

Certainly there is some potential in the interviewing procedure for juror harassment by attorneys or their agents.[140] The correct approach, however, is for the courts to adjudicate on an ad hoc basis individual instances of over-reaching by counsel. A blanket rule barring all post-verdict contacts with jurors, including those that are discreet and non-harassing, constitute judicial overkill.

V. EROSION OF THE MANSFIELD RULE: CONSTITUTIONAL, STATUTORY, AND OTHER INCURSIONS

An important question remains: Will courts continue to apply the Mansfield rule, or will they increasingly open the jury room to purifying scrutiny? Some courts are developing new exceptions to the no-impeachment rule for civil cases, and recently enacted codes of evidence are broadly replacing the rule in both civil and criminal litigation in other jurisdictions.[141] However, the most dramatic developments have been in the constitutional area. They point to the probable demise of the Mansfield rule, at least where activities in the jury room deprive an accused of his constitutional rights in a criminal prosecution.

137. 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196, *cert. denied*, 396 U.S. 994 (1969).
138. *Id.* at 350, 455 P.2d at 137, 78 Cal. Rptr. at 201.
139. *See* H.R. Rep. No. 93-650, 93d Cong., 2d Sess. 1 (1974); S. Rep. No. 93-1277, 93d Cong., 2d Sess. 1 (1974).
140. Carlson, *supra* note 112, at 33. For a lengthy and thorough discussion of the issue, *see* Miller v. United States, 403 F.2d 77 (2d Cir. 1968), *modified*, 411 F.2d 825 (2d Cir. 1969). *See also* United States v. Crosby, 294 F.2d 928 (2d Cir. 1961); United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967), *rev'd on other grounds*, 399 F.2d 135 (2d Cir. 1968); note 30 *supra* and accompanying text.
141. Exceptions to the no-impeachment rule for civil cases are discussed at notes 161-63 *infra*. For a list of the jurisdictions which have enacted comprehensive codes of evidence modeled on the Federal Rules of Evidence, *see* note 19 *supra*.

A. Constitutional Mandates

The sixth amendment of the United States Constitution guarantees that an "accused shall enjoy the right to a . . . trial, by an impartial jury [and] be confronted with the witnesses against him . . . ."[142] Expansive interpretation of this amendment portends the end of the Mansfield rule.[143] In *Parker v. Gladden*,[144] for example, the defendant relied on a juror's affidavit in filing post-conviction relief. The basis of the defendant's petition was that the bailiff, assigned to shepherd the sequestered jury, communicated prejudicial information about the defendant to the jury.[145] After citing *Turner v. Louisiana*[146] for the proposition that " 'evidence developed' against a defendant shall come from the witness stand in a public courtroom,"[147] the United States Supreme Court held that the statements of the bailiff constituted outside influence which reached the jury in violation of the sixth amendment.[148] The conviction was then reversed.[149] Thus, the Court recognized that juror testimony revealing violations of constitutional rights must be considered by the courts.

The Georgia Supreme Court recently extended this principle to an instance of "unauthorized view" in *Watkins v. State*.[150] Two jurors had made an unauthorized visit to the scene of a robbery to reenact part of the crime and related their findings to the full jury.[151] The trial court denied the defendant's motion for a new trial, which was based on affidavits of three jurors which pointed to this misconduct. The trial judge relied on the strict Mansfield prohibition, "rooted deeply in Georgia law,"[152] that a juror cannot impeach his own verdict.[153]

On appeal, the Georgia Supreme Court stated that "there are constitutional limitations [to the no-impeachment rule] which must be recognized to preserve

142. U.S. CONST. amend. VI.
143. *See, e.g.*, Groppi v. Wisconsin, 400 U.S. 505 (1971); Shepard v. Maxwell, 384 U.S. 333 (1966); Pointer v. Texas, 380 U.S. 400 (1965); Turner v. Louisiana, 379 U.S. 466 (1965).
144. 385 U.S. 363 (1966) (per curiam).
145. *Id.* at 363-64. The trial court found that the bailiff stated to one of the jurors in the presence of the other jurymen: "Oh that wicked fellow [referring to defendant], he is guilty." *Id.* at 363 (footnote omitted). On a second occasion, the bailiff said to another juror: "If there is anything wrong [in finding the defendant guilty], the Supreme Court will correct it." *Id.* at 364 (footnote omitted). The bailiff was right!
146. 379 U.S. 466 (1965).
147. *Id.* at 472-73.
148. 385 U.S. at 364.
149. *Id.* at 366.
150. 237 Ga. 678, 229 S.E.2d 465 (1976).
151. *Id.* at 683, 229 S.E.2d at 469.
152. *Id.* at 683, 229 S.E.2d at 470. In fact, the rule is so deeply embedded in Georgia law that the state legislature has codified it by statute. GA. CODE ANN. § 110-109 (1973) provides that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict."
153. 237 Ga. at 683, 229 S.E.2d at 469-70.

the fundamental concept of a fair trial.[154] The court found that the two jurors who made the unauthorized visit had become unsworn witnesses against the defendants in violation of the sixth amendment, and that the constitutional violation required reversal of the jury's verdict.[155] In reaching this position, the court reasoned that "the intentional gathering of extra judicial evidence, highly prejudicial to the accused, by members of the jury and the communication of that information to the other jurors in the closed jury room is inimical to our present jury trial system."[156] An evolving principle is clear. While courts may choose to ignore reports of jury misconduct in other situations, this posture is unacceptable in criminal cases. Where the misconduct deprives a defendant of his sixth amendment rights, courts must consider the misconduct even if evidence of it comes from a member of the jury.

B. Statutory Replacement

The influence of the Federal Rules of Evidence, which became effective July 1, 1975,[157] is being felt in many states. Within little more than two years of their effective date, at least ten states had enacted comprehensive evidence codes patterned after the federal rules.[158] Many of these state codes contained provisions similar to federal rule 606(b), thereby allowing attacks on jury verdicts by juror affidavits.[159] Since some of these states had previously maintained rigid rules against such attacks, the result has been further erosion of support for the Mansfield rule.[160] As more states embrace the federal rules, a

154. *Id.* at 684, 229 S.E.2d at 470.
155. *Id.*
156. *Id.* The New York Court of Appeals confronted a similar fact situation in People v. DeLucia, 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967). There, members of a New York City jury had made an unauthorized visit to the scene of the crime with the purpose of reenacting the crime. The appeals court relied on Parker v. Gladden, 385 U.S. 363 (1966), to hold that "these jurors became unsworn witnesses against the defendants in direct contravention of [defendants'] right, under the Sixth Amendment, 'to be confronted with the witnesses' against them." 20 N.Y.2d at 279, 229 N.E.2d at 214, 282 N.Y.S.2d at 530. In reaching this position the court argued that the danger to the jury system that would result from overturning the verdict was minimal compared with the more easily proven prejudice to the defendant. *Id.*
157. Federal Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, § 1, 88 Stat. 1926-48 (codified at 28 U.S.C. (1975)).
158. The ten states are listed at note 19 *supra*.
159. For the text of FED. R. EVID. 606(b), *see* note 107 *supra*.
160. Arkansas, for example, had rigidly adhered to the no-impeachment rule. *See* Burns v. Vaughan, 216 Ark. 128, 224 S.W.2d 365 (1949); Post v. State, 182 Ark. 66, 30 S.W.2d 838 (1930); Wallace v. State, 180 Ark. 627, 22 S.W.2d 395 (1929). However, that state has recently enacted a comprehensive evidence code patterned after the Federal Rules of Evidence. ARK. STAT. ANN. § 28-1001 (1976). Consequently the no-impeachment rule is no longer in effect there, but has been supplanted by a provision employing language nearly identical to federal rule 606(b). Nevada had also followed the Mansfield rule. *See* Wilson v. Perkins, 82 Nev. 42, 409 P.2d 976 (1966); Kaltenborn v. Bakerink, 80 Nev. 16, 388 P.2d 572 (1964); State v. Lewis, 59 Nev. 262, 91 P.2d 820 (1939). But a new evidence code has replaced

trend which seems certain to continue, and enact provisions patterned after rule 606(b), the existence of the Mansfield rule may indeed be threatened.

C. *Other Exceptions*

Courts adhering to the no-impeachment rule have found it, like so many rules of law, too broadly drawn to cover the diverse situations which arise under it. Consequently, courts have developed exceptions to the rule to correct obvious injustices which would otherwise occur. In several jurisdictions, courts have held that affidavits or testimony of jurors are admissible where the juror on voir dire examination intentionally concealed his bias or prejudice against the moving party.[161] In addition, some courts have admitted affidavits of jurors even in the absence of intentional concealment if the moving party exercised reasonable diligence on voir dire examination, but still failed to discover the juror's bias.[162] The latter appears to be the better rule since it recognizes that the harm to the defeated party does not come from the juror's state of mind on voir dire examination, but from the biased mind deliberating in the jury room.[163]

VI. A NEEDED ADDITION TO THE IMPEACHMENT RULES

This article has reviewed the no-impeachment rule, the Iowa doctrine, the federal response, and the Ohio *aliunde* rule. It is noteworthy that several states have engrafted variations onto the basic patterns, indicating that courts and legislatures are willing to create, when appropriate, exceptions to the general rules. These exceptions have developed when public policy arguments in connection with particular jury-related misconduct militated strongly in favor of receiving a juror's affidavit, notwithstanding the obstacle that the rule in the jurisdiction does not generally permit such impeachment.

There have been a number of appeals based on jurors' affidavits alleging threats or acts of violence in the jury room.[164] When a threat or act of violence

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the no-impeachment rule by a provision modeled on federal rule 606(b). NEV. REV. STAT. § 50.065 (1975).

161. *See, e.g., In re* Mesner's Estate, 77 Cal. App. 2d 667, 176 P.2d 70 (1947) (California at this time was operating under the Mansfield rule); Williams v. Bridges, 140 Cal. App. 537, 35 P.2d 407 (1934); West Chicago St. R.R. v. Huhnke, 82 Ill. App. 404 (1889); McNally v. Walkowski, 85 Nev. 696, 462 P.2d 1016 (1969). *See also* 3 B. JONES, *supra* note 1, § 20:58, at 733. For a general discussion of the issue of intentional concealment of bias or prejudice on voir dire examination, see Annot., 48 A.L.R.2d 971 (1956).

162. *See* Shipley v. Permanente Hospitals, 127 Cal. App. 2d 417, 274 P.2d 53 (1954).

163. Annot., 48 A.L.R.2d 971, 973 (1956). A second exception to the no-impeachment rule has developed which allows the admission of a juror's affidavit or testimony to show that the verdict was reached by chance. A number of states have even enacted statutes to prohibit this practice by juries. *See, e.g.*, ARK. STAT. ANN. § 43-2204 (1964); CAL. CIV. PROC. CODE § 657 (Deering) (1973); N.D.R. CIV. PROC. 59(b).

164. *See, e.g.*, Government of Virgin Islands v. Gereau, 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); United States v. Blackburn, 446 F.2d 1089 (5th Cir.), *cert. denied*, 404

occurs among jurors, the conduct is apparently immune from post-verdict attack in jurisdictions where the Mansfield rule is still in effect.[165] Furthermore, courts in jurisdictions which have enacted Federal Rules of Evidence provisions may be hard-pressed to stretch the language of rule 606(b) to call this conduct "outside influence."[166] Nevertheless, a threat or act of violence by one juror against another may deprive a litigant of his right to a fair determination of the verdict.

It is important to the successful functioning of the jury, the cornerstone of the American judicial system,[167] that it achieve a just result through careful reflection and deliberation. Threats or acts of violence are antithetical to this process. Consequently, there should be an exception to the general rules for such untoward behavior in the jury room. The Evidence Rules Committee of Michigan recognized a need for such an exception.[168] The committee included in its preliminary draft proposal a provision allowing trial courts to admit a juror's affidavit based on a threat or act of violence in the jury room:

> 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, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention *or whether a threat or act of violence* or any outside influence was improperly brought to bear upon any juror.[169]

U.S. 1017 (1971). United States v. Betancourt, 427 F.2d 851 (5th Cir. 1970); United States v. Stoppelman, 406 F.2d 127 (1st Cir. 1969), *cert. denied*, 395 U.S. 981 (1971); United States v. Grieco, 261 F.2d 414 (2d Cir.), *cert. denied*, 359 U.S. 907 (1958); Des Jardins v. State, 515 P.2d 181 (Alas. 1976); State v. Cipriano, 24 Ariz. App. 478, 539 P.2d 952 (1975); State v. Forsyth, 13 Wash. App. 133, 533 P.2d 847 (1975).

165. Under the Mansfield rule a court will probably reject the juror's affidavit either because there are no grounds recognized by the court as appropriate to attack a jury's verdict, or because a juror cannot testify to fight sequences which are visible only to the jurors themselves. *See* notes 4-16 *supra* and accompanying text.

166. Unless the grounds for the juror's affidavit can come within one of the two exceptions, a federal court will refuse to accept a juror's affidavit. *See* FED. R. EVID. 606(b), quoted at note 107 *supra*.

167. Comment, *Impeachment of Jury Verdicts by Jurors: A Proposal*, 1969 U. ILL. L.F. 388. *But see* Skidmore v. Baltimore & O. R.R., 167 F.2d 54, 56 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948) ("Some revaluation of the jury system seems not unjustified in the light of the fact that ours is the only country in the world where it is still highly prized."); J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 110, 116, 135-36 (1963).

168. Michigan courts were familiar with the problem of one juror being intimidated by other jurors. *See, e.g.*, People v. Van Camp, 356 Mich. 593, 97 N.W.2d 726 (1959).

169. PROP. MICH. R. EVID. 606(b), *published in* N.W.2d (Mich. Ed. Jan. 26, 1977) (emphasis added). Michigan had originally used the Mansfield rule to exclude all jurors' affidavits. *See*

The suggested exception, however, was eliminated when the entire provision on juror impeachment was deleted from the proposed Michigan Rules of Evidence.[170]

A second jurisdiction, Ohio, faced this problem and included in its proposed evidence code a special exception permitting a juror to testify about any threats made against him:

> 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 on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any *threat*. . .[or] *any attempted threat* . . . .[171]

The isolation of this issue seems wise. The Ohio exception would allow a juror's affidavit that alleges a threat or act of violence, perhaps otherwise inadmissible, to be received by the reviewing court. Since "[t]he law presumes that the jury was composed of fair-minded persons and that their verdict expressed their honest judgment,"[172] this exception would help to ensure that the jury reaches its verdict by an appropriate process. The Ohio Legislature recently rejected the entire package of proposed evidence rules,[173] but it is

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Sharp v. Merriman, 108 Mich. 454, 66 N.W. 372 (1896). *See also* Mandjiak v. Meijer's Super Markets, Inc., 364 Mich. 456, 110 N.W.2d 802 (1961); Halperin Bros. & Davis Co. v. Fidelity & Cas. Co., 219 Mich. 600, 189 N.W. 65 (1922); Trudell v. Pearll, 219 Mich. 514, 189 N.W. 61 (1922); Spencer v. Johnson, 185 Mich. 85, 151 N.W. 684 (1915). In 1968, however, the Michigan Supreme Court reviewed the issue and adopted the rule set out in Mattox v. United States, 146 U.S. 140 (1892), discussed at notes 86-97 *supra* and accompanying text. *See* People v. Moreland, 12 Mich. App. 483, 163 N.W.2d 257 (1968); People v. Hagle, 67 Mich. App. 608, 242 N.W.2d 27 (1976).

170. Robinson & Reed, *A Review of the Proposed Michigan Rules of Evidence*, 56 MICH. ST. B.J. 21, 29 (1977). It was ultimately decided that the whole subject of competency of a juror to impeach his own verdict was a substantive question. Proposed rule 606(b) was eliminated, and the cited clause was thus removed from consideration. *Id.*

171. PROP. OHIO R. EVID. 606(b), *cited in* 50 OHIO BAR 231, 240 (1977). The Ohio proposal also contained a special provision on bribes. *See* note 121 *supra*.

172. Grenz v. Werre, 129 N.W.2d 681, 693 (N.D. 1964). Although no all-encompassing definition of a fair trial can be given, the Mississippi Supreme Court commented perceptively:

> Perhaps no precise definition can be given [a fair trial], but it certainly must be one where the accused's legal rights are safeguarded and respected. There must not only be a fair and impartial jury and a learned and upright judge to instruct the jury and pass upon the legal questions, but *there ought to be an atmosphere of calm* . . . .

Floyd v. State, 166 Miss. 15, 39, 148 So. 226, 232 (1933) (emphasis added).

173. The Report of the Ohio Joint Judiciary Subcommittee specified eight reasons in support of its recommendation that the proposed rules not be accepted, the major one being that there had been insufficient time for an exhaustive study of the proposed rules to be made. None of the eight reasons questioned the merits of proposed rule 606(b). *See* REPORT OF THE JOINT SUBCOMMITTEE TO THE HOUSE AND SENATE JUDICIARY COMMITTEES ON THE PROPOSED OHIO RULES OF EVIDENCE (1977).

expected that the rejected rules will be resubmitted to the legislature.[174] Hopefully any code which is ultimately enacted will contain the prudent special exception to rule 606(b).

The need for a provision similar to that suggested in the Proposed Ohio Rules of Evidence and the early Michigan draft is not illusory. A number of cases involving allegations of misconduct in the jury room have arisen.[175] Illustrative is *United States v. Grieco*,[176] in which the defendant filed a motion for a new trial based on claims by a juror that she was coerced into concurring in a verdict as a result of abusive and threatening conduct by another juror.[177] The Court of Appeals for the Second Circuit rejected the defendant's motion, arguing that "[i]t [was] not possible to determine mental processes of jurors . . . ."[178] In *United States v. Blackburn*,[179] the Court of Appeals for the Fifth Circuit also rejected a losing party's petition for a new trial that raised related problems. The court reasoned: "The jury should not be exposed to post-verdict fishing expeditions into their mental processes with the hope that something will turn up."[180]

These decisions reflect the courts' reluctance to order a new trial based on alleged intimidation.[181] Even where threats or force are fully proven, there is serious doubt whether they constitute recognized grounds to overturn a verdict. Courts in jurisdictions that strictly employ the Mansfield rule will probably automatically reject the juror's affidavit; courts in jurisdictions that employ the Iowa rule, for example, may reason that the threats inhere in the verdict, and consequently are not an appropriate basis upon which to found juror testimony in an attempt to impeach the verdict.

VII. CONCLUSION

Modern rules patterned after rule 606(b) of the Federal Rules of Evidence are replacing the antiquated Mansfield rule, which rejects use of a juror's affidavit to impeach the jury verdict. Rule 606(b) stands for the principle that verdicts are open to limited attack where serious injustice to a party occurred

174. Telephone Conversation with Robert Manning, Legislative Liaison for the Ohio State Bar Association, Columbus, Ohio (May 19, 1977).
175. *See* cases cited at note 164 *supra*.
176. 261 F.2d 414 (2d Cir.) (per curiam), *cert. denied*, 359 U.S. 907 (1958).
177. *Id.*
178. *Id.* at 415-16.
179. 446 F.2d 1089 (5th Cir.), *cert. denied*, 404 U.S. 1017 (1971).
180. *Id.* at 1091, *citing* Dickinson v. United States, 421 F.2d 630, 632 (5th Cir. 1970).
181. *See* United States v. Blackburn, 446 F.2d 1089 (5th Cir.), *cert. denied*, 404 U.S. 1017 (1971); United States v. Betancourt, 427 F.2d 851 (5th Cir. 1970); Johnson v. Hunter, 144 F.2d 565 (10th Cir. 1944); State v. Cipriano, 24 Ariz. App. 478, 539 P.2d 952 (1975).

during the trial process. The federal rule has made a major contribution to the law, and provides a satisfactory model for the states to follow. The authors urge, however, that creative state evidence committees consider an additional exception: A juror may impeach his own verdict by proving that a threat or act of violence was brought to bear on him to reach that verdict.