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CHALLENGE TO THE DECISIONMAKING PROCESS—FEDERAL RULE OF EVIDENCE 606(b) AND THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL

by

*Peter N. Thompson**

SINCE Lord Mansfield's day courts have jealously guarded the secrecy of jury deliberations by a competency rule limiting juror testimony on post-trial motions for new trial. Although courts cite the interest in juror privacy—encouraging free and robust debate and avoiding juror harassment—as justification for the rule, the primary concern is to ensure the finality of jury verdicts. Recent studies,[1] as well as published opinions, document the obvious, that lay jurors frequently discuss improper matters in the jury room and base their decisions in part on improper considerations. Thus, too close a look at jury deliberations will reveal improprieties in a large number of cases, damaging the finality and public acceptance of jury verdicts.

The proper role of the lay jury in resolving litigation has evoked constant controversy and concern.[2] The omission of explicit recognition of the right to jury trial spurred the debate leading to the Bill of Rights[3] and nearly

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1. *See* P. LERMACK, MATERIALS ON JURIES AND JURY RESEARCH: AN ANNOTATED BIBLIOGRAPHY.

2. Much of the controversy results from concern over jurors' ability to deal efficiently and effectively with the complexity of modern litigation. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1079 (3d Cir. 1980); *In re* United States Fin. Sec. Litig., 609 F.2d 411, 427-31 (9th Cir. 1979); Decker, *The Right to Trial by Jury: Old English Law Supports a Complexity Exception to the Seventh Amendment*, 11 SETON HALL L. REV. 31, 40-43, 45-52 (1980); Devitt, *Should Jury Trial Be Required in Civil Cases? A Challenge to the Seventh Amendment*, 47 J. AIR L. & COM. 495, 497-500 (1982); Dittman, *The Right to Trial by Jury in Complex Civil Litigation*, 55 TUL. L. REV. 491, 498-500 (1981); Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues*, 69 CALIF. L. REV. 1, 2-5 (1981).

3. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 662 (1973); *see also* A. HAMILTON, THE FEDERALIST 611-26 (1880); 2 M. FARRAND,

frustrated the ratification of the Constitution.[4] The institution of the jury is now prominently preserved in the Constitution,[5] and the jury has become a central feature in the American system of justice. Along with the flag and the American eagle, the jury system is a revered symbol of the American way of life to such an extent that to question the jury system or to engage in activity that might alter its function can be deemed "un-American" and can precipitate investigation by a United States Senate subcommittee concerned with internal security.[6] Belief in the value of trial by jury takes on mystical, if not religious, tones[7] that remain universally shared by most Americans.

The exalted status of the jury clouds reasoned debate about the propriety of particular aspects of jury practice. Courts avoid close scrutiny of juror deliberations by using Mansfield's arbitrary rule that jurors are incompetent to give evidence to impeach their verdict.[8] The rule is codified in part by Federal Rule of Evidence 606(b) and reflects a policy judgment that the interest in accurate and rational decisionmaking is subservient to the interest of finality. Lord Mansfield's rule, therefore, is consistent with the view that the constitutional right to jury trial represents a commitment to democratic decisionmaking and not necessarily a commitment to finding the truth.

Recent decisions by the United States Supreme Court, however, cast substantial doubt on the validity of the evidentiary rule. First, the Court has recognized that the accused's constitutional rights extend to the decisionmaking process of the jury.[9] Second, the Supreme Court has recently focused on the impact of alleged error on the decision by the jury as a primary concern in appellate review, encouraging post-trial interrogation of jurors.[10] This outcome-oriented approach is used both in deciding whether alleged

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THE FRAMING OF THE CONSTITUTION 587 (1913) (debates in the federalist convention); Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 293 (1966).

4. A. HAMILTON, *supra* note 3, at 614; J. ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 544 (2d ed. 1836); Henderson, *supra* note 3, at 295; Wolfram, *supra* note 3, at 667.

5. Jury trial rights are specifically protected by U.S. CONST. art. III, § 3, & amends. VI & VII.

6. *See Hearings on Recording of Jury Deliberations Before the Subcomm. to Investigate the Administration of the Internal Security Act of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. (1955) (investigation in response to tape recording of several jury deliberations in actual trials as part of jury project conducted by the University of Chicago Law School).

7. An early Second Circuit decision described the jury process as follows:

> 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 [sic] votary at the shrine.

Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 60 (2d Cir. 1948); *see also* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 317 (7th ed. 1956) (when jury system first introduced in England, jury verdicts were considered to have inscrutability of judgments of God).

8. Vaise v. Delaval, 99 Eng. Rep. 944, 944 (K.B. 1785). Congress has also impeded inquiry into the deliberation process. After the hearings referred to *supra* note 6, Congress passed 18 U.S.C. § 1508, precluding tape-recording of jury deliberations. 18 U.S.C. § 1508 (1982) (current version).

9. Parker v. Gladden, 385 U.S. 363, 364 (1966).

10. Rushen v. Spain, 104 S. Ct. 453, 456-57, 78 L. Ed. 2d 267, 273-74 (1983); Smith v. Phillips, 455 U.S. 209, 212-18 (1982).

error amounts to constitutional error[11] and in an expanded application of the harmless error analysis.[12] The Court has required post-trial hearings to ascertain, as a factual matter, whether a particular juror was improperly influenced by the alleged error.[13] Consequently, how and why jurors react in general, as well as how the jurors acted in the particular case, become the focus of post-trial and appellate litigation. This approach reflects a view of the jury as an organ of truth, but substantially undermines the policy interests underlying the evidentiary rule purportedly limiting such testimony.

The Court must reconcile its approach to post-trial review of error in criminal cases with the underlying policy giving rise to Federal Rule of Evidence 606(b). The reconciliation must begin with an analysis of the jury trial rights as guaranteed by the Constitution and a clear view of whether the central purpose of the institution of the American jury is a search for truth or an exercise in democratic decisionmaking.

I. HISTORICAL EVOLUTION OF THE JURY

The jury is an ancient, yet continually evolving, institution. Its origins can be traced to the ancient Greeks and Egyptians,[14] but the Germanic inquisition introduced into England by the Norman Conquest is credited as the precursor of the modern jury.[15] Although now viewed as a populist institution of liberty, the jury was originally a tool of the royalty.[16] A judge appointed by the king would select members of the community, presumably those familiar with the facts involved in the controversy. The jurors would promise to answer truthfully questions interposed. The king used the inquisition to inventory land for taxing purposes in preparation of the Doomesday Book in about 1080. At the discretion of the king the inquest could be used in other matters as well. It was used to resolve title to property and the king's litigation, and the king lent it to private parties to resolve disputes. The inquisition jurors, usually twelve in number, were in effect witnesses.[17] In a rural society with sparse population, official acts and business were conducted in public. Everybody knew everyone's business. The jurors, therefore, relied on their personal knowledge about the case.[18] If necessary the

11. Smith v. Phillips, 455 U.S. 209, 217 (1982).

12. Rushen v. Spain, 104 S. Ct. 453, 455-56, 78 L. Ed. 2d 267, 273 (1983).

13. Rushen v. Spain, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983); Smith v. Phillips, 455 U.S. 209 (1982).

14. *See* W. FORSYTH, HISTORY OF TRIAL BY JURY 7, 12-13 (1852); L. MOORE, THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY 1-4 (1973).

15. 1 W. HOLDSWORTH, *supra* note 7, at 303; F. MAITLAND & F. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 51-58 (1915); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 47 (1898). *But cf.* Press-Enterprise Co. v. Superior Ct., 104 S. Ct. 819, 822, 78 L. Ed. 2d 629, 635 (1984) (origin of public trial in England precedes Norman Conquest).

16. Early commentators explained the origins of the jury trial as follows: "[T]rial by jury was rather French than English, rather royal than popular, rather the livery of conquest than a badge of freedom." F. MAITLAND & F. MONTAGUE, *supra* note 15, at 46.

17. 1 W. HOLDSWORTH, *supra* note 7, at 312-13, 317.

18. F. MAITLAND & F. MONTAGUE, *supra* note 15, at 56-58; 1 W. HOLDSWORTH, *supra* note 15, at 317-19.

early jury was empowered to conduct an investigation to develop facts.[19] As society evolved and became more complex, the role of the jury changed to the more modern concept of impartial arbiters of the facts, and witnesses provided the evidence for resolution by jurors.

As trial by ordeal and compurgation died out, trial by jury emerged as the predominant institution for resolving disputes.[20] The jury flourished in England even as its use diminished in other parts of the continent.[21] A jury trial looms as one of the important rights guaranteed by the Magna Carta and was firmly entrenched in the English justice system during the colonization of America. When King James I granted the Virginia Charter in 1606, the Charter guaranteed the right to trial by jury. The Virginia Charter set a pattern for the governance of the other colonies in North America.[22]

Although the general shape of the jury trial right varied substantially in England and among the various colonies, the basic right to a trial by one's peers, which might be limited to landowning peers, was an important right to the colonists. The failure to include a provision for jury trial in civil cases caused considerable concern in the debates about the adoption of the Constitution.[23]

The jury trial has flourished as an institution in the United States, while its use in England has diminished.[24] Despite its popular appeal, the jury system is frequently criticized.[25] The system is cumbersome, expensive, and unpre-

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19. F. JAMES, CIVIL PROCEDURE § 7.2 (2d ed. 1977).

20. J. THAYER, *supra* note 15, at 69.

21. 1 W. HOLDSWORTH, *supra* note 7, at 315-17.

22. Hyman & Tarrant, *Aspects of American Trial Jury History*, in THE JURY SYSTEM IN AMERICA 24-26 (R. Simon ed. 1975).

23. L. MOORE, *supra* note 14, at 105-06; Henderson, *supra* note 3, at 295; Hyman & Tarrant, *supra* note 22, at 31; Wolfram, *supra* note 3, at 657.

24. The deemphasis of the civil jury trial in England was instigated by three parliamentary acts: The Judicature Acts of 1873-75, the Juries Act of 1918, and the Emergency Provisions Act of 1939. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 51 (1977); *see* W. CORNISH, THE JURY 76 (1968); Holtzoff, *Modern Trends in Trial by Jury*, 16 WASH. & LEE L. REV. 27, 38 (1959). The Judicature Acts of 1873-75 allowed parties to waive a jury and the court to dispense with a jury in chancery cases and in more complex cases. The Juries Act of 1918 was enacted in response to the manpower shortage created by World War I. This act dismissed the use of juries except in cases of fraud, libel, slander, false imprisonment, seduction, malicious prosecution, breach of promise to marry, divorce, or probate. Finally, the Emergency Provisions Act, passed in response to a manpower shortage created by World War II, virtually abolished the civil jury trial. Nokes, *The English Jury and the Law of Evidence*, 31 TUL. L. REV. 153, 155-58 (1956). In 1955 only 49 of the 70,000 civil cases tried were tried to a jury. *Id.* at 159-60. By 1958 the proportion of jury trials represented two percent of all trials. Haines, *The Disappearance of Civil Juries in England, Canada and Australia*, 4 DEF. L.J. 118, 119 (1958). Expense is an important factor in the decline of the jury in England. *Id.* at 120; Higginbotham, *supra*, at 55-56. Contingent fees are illegal; thus, the parties bear the cost of litigation. Trial by judges reduces the cost and is, as a result, the favored procedure. *Id.*; Holtzoff, *supra*, at 38. In addition, the English jury lacks constitutional protection. Higginbotham, *supra*, at 50-51. The Parliament, through the various acts noted above, had the power to restrict or abolish the jury. The judiciary is granted very little judicial review, so it is considerably less active politically than the American judiciary. The jury, therefore, is not needed as a democraticizing force to encourage public acceptance of acts of judicial review. *Id.* at 52, 59-60.

25. Criticism of the jury system is not a new phenomemon. *See, e.g.*, Dead, *Trial by Jury*, 17 AM. L. REV. 398, 399-400 (1883), in which the author stated:

dictable; all of these factors tend to encourage litigation. Furthermore, complicated issues of modern society do not easily lend themselves to resolution by lay persons in an adversary proceeding. The ability to adapt the institution of the jury to accommodate changes in modern society is impaired by the Supreme Court's decision in *Dimick v. Schiedt*.[26] The Court in *Dimick* held that the jury trial rights provided in the Bill of Rights must be measured by the scope of the jury trial in England in 1791,[27] the year of the enactment of the Bill of Rights.[28]

The Court has countenanced some change in the historic functioning of the jury. For example, the Supreme Court has recently addressed state innovations relating to the constitutional requirements for jury size[29] and unanimity[30] of jury verdicts. Furthermore, litigants are asking the courts to address numerous other issues concerning the makeup and functioning of the jury.

Part of the reason that the institution of the jury is controversial is the varied and diverse expectations of what the institution encompasses. What began as a tool, used by the state to carry out accurately and efficiently the laws imposed on the people, has evolved into a protector of the people and a check against governmental tyranny. The concept of the jury as an institution designed and dedicated to the truth and the efficient effectuation of the laws is at odds with the historic driving force behind the institution of the jury in the United States. Community sense of justice, not truth, was the primary concern of our forefathers. The main concerns about the inclusion of a right to jury trial in the Constitution stemmed not from a fear that the judiciary would inaccurately enforce the law, but more from a hope that a lay jury might choose not to enforce the law if the law were unjust or offended the local community sense of justice.[31] Along with a distrust of power, economic self-interest may have been a major motivation for instituting the right to trial by jury in civil cases. A period of rapid deflation, spurred by a reduction in paper money, followed the Revolutionary War, leaving a number of patriots in substantial debt. Many hoped that local jurors would be more sympathetic to local debtors when the foreign creditors

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> Still in these days of progress and experiment, when everything is on trial at the bar of human reason or conceit, it is quite the fashion to speak of jury trial as something that has outlived its usefulness. Intelligent and well-meaning people often sneer at it as an awkward and useless impediment to the speedy and correct administration of justice, and a convenient loop-hole for the escape of powerful and popular rogues. Considering the kind of jury trials we sometimes have in the United States, it must be admitted that this criticism is not without foundation.

26. 293 U.S. 474 (1935).

27. *Id.* at 487.

28. Wolfram, *supra* note 3, at 639-44.

29. *See* Ballew v. Georgia, 435 U.S. 223 (1978); Williams v. Florida, 399 U.S. 78 (1970).

30. *See* Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972); *see also* Burch v. Louisiana, 441 U.S. 130, 139 (1979) (conviction by six-person jury for nonpetty offenses held to violate sixth and fourteenth amendments when jury verdict is not unanimous).

31. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

came to collect.[32]

The jury today is revered as an institution that dispenses community justice on an ad hoc basis. Its greatest moment is frequently said to have occurred at the trial of John P. Zenger, when the jury steadfastly refused to convict the patriot journalist in clear violation of the court's instruction as to the applicable law.[33] On the other hand, the strong social interest in truth, consistency, and uniformity cannot be ignored. These conflicting policies have produced a constant struggle between the jury trial viewed as a process for dispensing community justice and as an institution for rational, objective, and predictable decisionmaking. The conflict is frequently "between the people's aspirations for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges."[34]

The judiciary's struggle to control the jury is as old as the jury system. In the original jury trials, if jurors violated their oaths to return a true verdict, they could be tried for something akin to perjury. A writ of attaint could be issued, and the jurors would be tried by a second and larger jury of twenty-four. If they were convicted, the jurors could lose their property and serve a year in prison. Even after the writ of attaint fell into disuse, petit jurors could be fined or imprisoned for bringing in improper verdicts, particularly if the jury "improperly" acquitted a criminal defendant.[35] In the sixteenth century the Star Chamber exercised control over juries and punished jurors when verdicts were contrary to the weight of the evidence.[36] This practice was not ended until 1670, when the famous *Bushell's Case*[37] was decided. The court in *Bushell's Case* reasoned that jurors were judges of the facts; if they were required to find the facts as advocated by the judge, a jury was unnecessary.[38] Only if the jurors acted dishonestly or corruptly should they be subject to sanction. The writ of attaint, although infrequently used, was an appropriate check on dishonest jurors. Although the writ of attaint was abolished in 1825,[39] an occasional juror still is prosecuted for perjury or contempt of court.[40] Nonetheless, the struggle to keep jury verdicts within acceptable bounds continues.

Other, more traditional methods for addressing perceived inaccuracy in jury verdicts include orders for new trial, judgment notwithstanding the verdict, and remittitur.[41] Numerous devices are imposed prior to verdict to

32. Wolfram, *supra* note 3, at 675-76.

33. *See* J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER (1963); L. RUTHERFORD, JOHN PETER ZENGER (1970).

34. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 615 (1939).

35. 1 W. HOLDSWORTH, *supra* note 7, at 341-43; J. THAYER, *supra* note 15, at 138.

36. Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670); *see* 1 W. HOLDSWORTH, *supra* note 7, at 343-47; T. PLUCKNET, A CONCISE HISTORY OF THE COMMON LAW 134 (5th ed. 1956).

37. Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670).

38. *Id.*

39. 1 W. HOLDSWORTH, *supra* note 7, at 342.

40. *See* Clark v. United States, 289 U.S. 1 (1933); *see also* Rushen v. Spain, 104 S. Ct. 453, 455-56, 78 L. Ed. 2d 267, 273-74 (1983).

41. For a general discussion of remedial measures employed by courts to correct jury error, see F. JAMES, *supra* note 19.

assist the jury in reaching the court's view of the correct and accurate result. These now traditional means for controlling the jury range from the use of burdens of proof, presumptions, instructions, and comments, to the more intrusive directed verdicts. Furthermore, the exclusionary rules of evidence have evolved in an effort to limit the jurors' exposure to matters that might mislead them in their deliberations.

The interest in accuracy and predictability is substantial and frequently in conflict with the concept of ad hoc community justice. The disparate views of the proper functioning of the jury create a schizophrenia of sorts, resulting in conflicting and irreconcilable decisions by the courts. For example, the jury is revered as a democratic institution independently dispensing justice, disregarding the mandates of unfair laws, and serving as a check against overzealous prosecutors or biased judges. Jurors, however, are required to swear an oath to uphold the law and are usually not informed of their historic role and the power of nullification.[42] Although the United States Supreme Court has recognized the traditional role of the jury as a check on governmental tyranny, recent decisions suggest a trend focusing on truth and accuracy as the predominant considerations in evaluating the role of the jury.[43]

In *Duncan v. Louisiana*[44] the Court elaborated on the purpose of the jury trial in criminal cases, stating that "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[45] The Court acknowledged the criticism that juries cannot adequately understand evidence or determine fact issues and that "they are unpredictable, quixotic, and little better than a roll of dice."[46] The Court responded by citing studies indicating that jurors do understand the evidence and come to sound conclusions. The Court further stated that when the jurors come to a different conclusion from the conclusion reached by the trial judge, this difference can be explained by the jury's serving the very purposes for which it was created.[47] Accuracy and truth are presumably secondary considerations. Recent decisions, however, indicate a greater concern for the quality or accuracy of the decision.

An example of the Court's progress toward truth and accuracy as a primary concern of proper jury functioning is revealed in the series of cases

42. Sparf v. United States, 156 U.S. 51 (1895); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972). One court stated: "Any arguably salutary function served by *inexplicable* jury acquittals would be lost if that prerogative were frequently exercised . . . ." United States v. Washington, 704 F.2d 489, 494 (D.C. Cir. 1983) (emphasis in original).

43. *See* Brown v. Louisiana, 447 U.S. 323 (1980); Ballew v. Georgia, 435 U.S. 223 (1978).

44. 391 U.S. 145 (1968). The Court in *Duncan* determined that trial by jury in a criminal case is fundamental to the American scheme of justice and is guaranteed by the fourteenth amendment to criminal defendants in state courts. *Id.* at 149.

45. *Id.* at 156.

46. *Id.* at 157.

47. *Id.* The court was referring to the exercise of juror nullification, in which jurors disregard the applicable law if its application would be unjust.

addressing jury size and unanimity. In *Williams v. Florida*[48] the Court determined that Florida's use of a six-person jury did not violate the constitutional guarantee of a trial by jury. The Court noted that the fundamental purpose of the jury trial is the prevention of governmental oppression.[49] A jury, the court stated, is interposed between the accused and the accuser to provide commonsense judgment of a group of laymen, who determine guilt or innocence[50] and thereby ensure a verdict based on community participation and shared responsibility. The Court concluded that these goals can be achieved through a six-member jury and, almost as an afterthought added that the jury's reliability as a factfinder is not likely to be influenced by its size.[51]

In *Apodaca v. Oregon*[52] the Court held that nonunanimous verdicts do not impair the right to jury trial because unanimity does not materially contribute to the exercise of the jury's common sense judgment. As long as the jury consists of a cross-section of the community with a duty and the opportunity to deliberate and the jury is free from outside attempts at intimidation, then the judgment of the jury is valid.[53] The Court recognized that nonunanimity would produce convictions when juries would otherwise be hung, but it found this difference in result insignificant from a constitutional perspective.[54]

By 1977, however, the Supreme Court became increasingly concerned with the accuracy and reliability of the jury as a factfinder. In *Ballew v. Georgia*,[55] an obscenity trial, the defendant challenged a state court conviction returned by a five-person jury. In determining that five-person juries are unconstitutional, the Court focused on the accuracy of five-person juries.[56] The Court listed its concerns as follows:

(1) Empirical studies indicate that smaller juries impede effective group deliberation, lead to inaccurate factfinding, and incorrectly apply the common sense of the community.
(2) The data raises doubts about the accuracy of results by smaller panels.
(3) Fewer hung juries would result, and this change would inure to the benefit of the state and to the detriment of the defendant.
(4) The smaller panel would reduce minority participation on the panel.
(5) Different-sized panels might reach different results in a small percentage of cases, but nationwide this percentage constitutes a large number of cases.[57]

Based on these concerns, the Court concluded that "any further reduction

48. 399 U.S. 78 (1970).
49. *Id.* at 100.
50. *Id.*
51. *Id.* at 100-01.
52. 406 U.S. 404 (1972).
53. *Id.* at 410-11.
54. *Id.* at 411.
55. 435 U.S. 223 (1978).
56. *Id.* at 245.
57. *Id.* at 232-37.

that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance."[58]

The thrust of the Court's opinion in *Ballew* centered on the accuracy of factfinding, the accuracy in representing community values, the accuracy in result, and the consistency in result of the five-person jury. The greater concern for accuracy in *Ballew* was a response to the great outpouring of data and studies stimulated by the *Williams* decision.[59] The concern could also be explained by the first amendment implications of the *Ballew* obscenity trial. The risk of inaccurate factfinding and inconsistent obscenity prosecutions could have a substantial chilling effect on free speech. In any event, the Court's conception of the jury as an institution dedicated simply to checking arbitrary or oppressive government action is expanded. The concern for accuracy in factfinding, accuracy in the application of community judgment, and predictability and reliability are now highlighted in the Court's concept of the proper role for the American jury.

The heightened concern for truth and accuracy as a basic ingredient of the jury function is apparent in *Brown v. Louisiana*,[60] in which the Court determined whether *Burch v. Louisiana*[61] should be given retroactive effect. The court in *Burch* held that nonunanimous six-person jury verdicts are unconstitutional in serious criminal offenses.[62] In *Brown* Justice Brennan concluded that the *Burch* decision implicated aspects of the "fairness of the trial—the very integrity of the fact-finding process."[63] The purpose of a trial is to determine truth, and since the jury has been entrusted with the responsibility for determining truth in serious criminal cases, any practice that would prevent the jury from performing that function poses a threat to the truth-determining process.[64] Applying the standard of *Linkletter v. Walker*,[65] the Court held that *Burch* should be given retroactive effect.[66]

II. Juror Misconduct

Perhaps the greatest area of conflict between the view of the jury as an institution dispensing community justice on an ad hoc basis, as opposed to an organ of truth, arises in post-trial challenges to a verdict based on juror misconduct or impropriety. Litigants seeking post-trial relief because of juror misconduct or other impropriety in the decisionmaking process put substantial strain on the ability to accommodate principles of fairness and justice with the interest in the efficient workings of our adversary system. If

58. *Id.* at 239.
59. *See id.* at 231 n.10 and authorities cited therein.
60. 447 U.S. 323 (1980).
61. 441 U.S. 130 (1979).
62. *Id.* at 139.
63. 447 U.S. at 334 (quoting Linkletter v. Walker, 381 U.S. 618, 639 (1965)).
64. 447 U.S. at 334 (citing Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966)).
65. 381 U.S. 618 (1965).
66. 447 U.S. at 334. The decision is particularly interesting because the Court previously had refused to treat *Duncan v. Louisiana* retroactively in DeStefano v. Woods, 392 U.S. 631 (1968). *See* 447 U.S. at 334, 335 n.13.

the trial process is viewed simply as a check on governmental tyranny, this goal is fulfilled by giving lay jurors some leeway in deciding a case free from undue governmental or outside coercion. The manner in which jurors actually decide the case should be of little concern.

On the other hand, objective, rational decisionmaking is the cornerstone of procedural due process and equal protection under the laws of the United States. Notice, the opportunity to be heard[67] by a tribunal unbiased in fact and appearance,[68] and a decision rationally based on the evidence, and frequently on specific required findings of fact,[69] must be accorded to individuals who have had their lives or property affected by the decision. Furthermore, our society places a high value on open proceedings subject to public scrutiny.[70] Secrecy and arbitrary decisionmaking is antithetical to our due process society, yet ironically secrecy[71] and arbitrary decisionmaking[72] is thought to be essential for the operation of the American jury.[73]

Frequently the accommodation between these competing interests is avoided by limiting access to proof of jury room deliberations. For example, many different types of juror misconduct would justify overturning a jury verdict, but the parties are limited by local or federal rules in the type of evidence that they can use to establish the misconduct. Much of the litigation in this area, therefore, is limited to procedural concerns about the extent to which jurors can testify about their actions. The more substantive questions relating to the proper functioning of the jury are not addressed. By not permitting a litigant to develop the proof that the verdict was improperly rendered, the accommodation is made in favor of jury autonomy at the expense of truth or rational decisionmaking.

The threshold decision limiting juror testimony is the English case of *Vaise v. Delaval*.[74] In *Vaise* juror affidavits were offered to prove that the

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67. Garner v. Louisiana, 368 U.S. 157, 169 (1961); *see* Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Eisen v. Carlilse & Jacquelin, 417 U.S. 156, 174 (1974); Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969); Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

68. Peters v. Kiff, 407 U.S. 493, 502 (1972); Turner v. Louisiana, 379 U.S. 466, 472 (1965); Irvin v. Doud, 366 U.S. 717, 722 (1961); *In re* Murchison, 349 U.S. 133, 136 (1955); Tumey v. Ohio, 273 U.S. 510, 531 (1927).

69. *E.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation case); Board of Regents v. Roth, 408 U.S. 564 (1972) (alleged unconstitutional termination of employment); *see* FED. R. CIV. P. 52; FED R. CRIM. P. 23(a).

70. Chief Justice Burger once stated: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980); *see also* Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 822, 78 L. Ed. 2d 629, 635 (1984) (juror selection a presumptively public process).

71. Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 61 (2d Cir. 1948).

72. For example, when jurors return inconsistent verdicts no remedy is provided. The assumption is that the jurors exercised their nullification power. *See* Duncan v. Louisiana, 391 U.S. 145, 147 (1967); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 514 (Criminal 2d 1982) and cases cited therein.

73. *Compare In re* Express-News Corp., 695 F.2d 807 (5th Cir. 1982) (court could not limit journalists from post-verdict interviews), *with* United States v. Davila, 704 F.2d 749 (5th Cir. 1983) (court could limit litigant's post-verdict juror interviews).

74. 99 Eng. Rep. 944 (K.B. 1785).

jurors "being divided in their opinion, tossed up"[75] to determine the winner of the suit. Lord Mansfield stated:

> The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor, but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means.[76]

Although the decision was contrary to English precedent and based on the outdated concept that a witness should not be permitted to allege personal turpitude,[77] it has been seized upon by American courts as the basis for authority in limiting post-trial juror testimony.[78]

American courts justify limiting jury testimony on the grounds that limitation is necessary to maintain finality of jury verdicts and to avoid harassing, intimidating, or tampering with jurors. Such a restriction also protects the privacy and confidentiality of jury deliberations, which ensures free exchange of ideas and finality of the jury decision.[79] Wigmore offers an additional justification.[80] He maintains that "[t]he verdict of a jury is an operative act, like a will or a contract or a judgment, and the parol evidence rules govern . . . ."[81] Consequently, the verdict is the act of legal significance; the thought processes, motives, or beliefs of individual jurors are immaterial considerations.[82] Jurors can neither contradict nor explain the verdict. Only if the jurors violate essential forms of behavior in arriving at the verdict[83] or the verdict incorrectly represents the assent of all the jurors can the verdict be challenged.[84]

The Supreme Court has struggled with the extent to which juror testimony or affidavit can be used on a motion for new trial. In *United States v. Reid*[85] two jurors submitted affidavits stating that they had improperly read newspaper accounts of the proceedings. In speaking for the Court, Justice Taney refused to establish a clear rule to deal with the problem and urged a case-by-case analysis. Without deciding whether the affidavits should be admissible, the Court considered the impact of the alleged misconduct on the jury verdict. Relying in part on a sworn statement from one of the jurors that the papers did not have the slightest influence on his verdict, the Court concluded that even if the affidavits were credited, they would be insufficient to justify a new trial.[86]

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75. *Id.*
76. *Id.*
77. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2352 (McNaughton rev. 1961).
78. *Id.*
79. *See* Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 250-53; FED. R. EVID. 606(b) advisory committee note.
80. 8 J. WIGMORE, *supra* note 77, § 2345.
81. *Id.*
82. *Id.* §§ 2349-50.
83. *Id.* §§ 2352-54.
84. *Id.* §§ 2355-56.
85. 53 U.S. 361 (1851).
86. *Id.*

The same issue was raised again in 1892 in the sensational murder trial of Clyde Mattox.[87] After his conviction the defendant offered juror affidavits stating that during the deliberations the bailiff had remarked to the jurors that "this was the third fellow he [defendant] has killed,"[88] and that a newspaper account of the trial was introduced in the jury room.[89] After discussing *Reid* the Court concluded that the public policy that forbids the impeachment of jury verdicts by the affidavits, depositions, or sworn statements of jurors may in the interest of justice create an exception to its own rule, but great caution must be used in such situations.[90]

The Court reviewed what it perceived to be a recognized distinction between what may and what may not be established by juror testimony. The Court quoted from *Perry v. Bailey*[91] as follows:

> 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; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors.[92]

Apparently without recognizing a conflict, the Court also embraced the approach taken by the Massachusetts Supreme Court in *Woodward v. Leavitt*[93] and stated:

> [O]n 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 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.[94]

The *Perry* rationale distinguishes between acts that are observed and subject to corroboration by other jurors and matters privately perceived by only one juror. The *Woodward* quotation focuses on whether the testimony will reveal thought processes and deliberations. Under both of these views the affidavits in *Mattox* were admissible to impeach the verdict.

The Court further elaborated on the evidentiary value of these affidavits. "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to ap-

87. Mattox v. United States, 146 U.S. 140 (1892).
88. *Id.* at 142.
89. *Id.* at 142-43.
90. *Id.* at 148.
91. 12 Kan. 539, 545 (1874).
92. 146 U.S. at 148 (quoting Perry v. Bailey, 12 Kan. 539, 545 (1874)).
93. 107 Mass. 453 (1871).
94. 146 U.S. at 149 (quoting Woodward v. Leavitt, 107 Mass. 453, 453 (1871)).

pear."[95] The affidavits, therefore, were admissible and established a prima facie case for reversal. The court concluded that the information was not harmless and required a new trial.[96] The *Mattox* Court also noted that the affidavits did not include statements from the jurors indicating the extent to which they were influenced by the communications. This type of statement would be improper under either of the rules cited by the Court.

Without discussion, the Court in *Hyde v. United States*[97] adopted the *Perry* rule as the proper approach. The Court stated that jurors' testimony should not be allowed to prove matters that inhere in the verdict and depend solely on the jurors' testimony.[98] Ostensibly applying the rule, the Court rejected affidavits indicating that the jurors entered into a compromise when some jurors agreed to vote guilty for one codefendant if the others jurors would vote innocent for another. The convicted defendant had also argued that the trial judge coerced the jurors into reaching the verdict. The extent to which the judge coerced individual jurors is a matter that inheres in the verdict. If the jurors reached a verdict by improper agreement, however, the agreement is not a private matter resting "in the personal consciousness of one juror." Such an agreement is an act that could be corroborated and testified to by a number of jurors; thus the Court appears to misapply the stated rule.

In *McDonald v. Pless*[99] the Court again confronted the issue of the extent to which juror misconduct can be established by the testimony or affidavits of jurors. In *McDonald* the defendant moved to set aside the decision on the ground that the jury reached a quotient verdict.[100] At the hearing on the motion one of the jurors was sworn as a witness, but the trial court refused to permit him to testify. In affirming the lower court, the Supreme Court agreed that if the juror misconduct, a quotient verdict, could be established by competent evidence, the defendant would be entitled to a new trial.[101] The Court reasoned, however, that the lesser of two evils would be to exclude the evidence.[102] The Court stated that to allow verdicts to be set aside by the testimony of participating jurors would cause all verdicts to be evalu-

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95. 146 U.S. at 150.

96. *Id.* at 151. This holding by the Court was an alternative one. The Court also determined that a new trial was required because of the improper exclusion of exculpatory evidence.

97. 225 U.S. 347 (1912).

98. *Id.* at 384. The Court purported to rely on Gottlieb Bros. v. Jaspar & Co., 27 Kan. 770 (1882), and Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866).

99. 238 U.S. 264 (1915).

100. A quotient verdict is a decision wherein the verdict is arrived at by dividing by twelve the sum total of each juror's estimate of what the verdict should be. For a further discussion of quotient verdicts, see 70 AM. JUR. 2D *Trial* § 1135 (1975).

101. 238 U.S. at 267.

102. *Id.* The *McDonald* Court further stated:

> When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

Id.

ated to discover jury misconduct.[103] Because of this result,

> [j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.[104]

The Court was again reluctant to adopt a single rule and recognized that instances may arise in which testimony of the juror could not be excluded without "violating the plainest principles of justice."[105] The public interest in finality in litigation, avoidance of jury harassment and tampering, and maintenance of the confidentiality of juror deliberation outweighed the litigant's interest to have this case properly decided by the jury. The Court distinguished the case in which the juror testimony is used to impeach a verdict from the situation in which juror evidence is supplied to prosecute jurors for misconduct. In the latter case only the juror privilege would limit evidence of the happenings in the jury room, and this privilege can be waived.[106]

The scope of the juror privilege was the issue in *Clark v. United States*.[107] In *Clark* the lone juror who held out for acquittal in a criminal prosecution was charged with contempt for not fully answering questions on voir dire about her previous employment with the defendant and for stating on voir dire that she was unbiased, when in fact the evidence indicated that she was not. Juror discussions and votes were admitted to establish the misconduct, and the Court discussed whether it could properly rely on this information. The Court noted that the issue is different from the cases limiting evidence to impeach verdicts and does not implicate the issues raised in *Bushell's Case*,[108] which established the independence of jurors to disagree with the trial judge. The Court concluded that the substantial need for privacy of juror deliberations must yield to "the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption."[109] The Court distinguished misconduct on voir dire from misconduct during deliberations,[110] although both issues implicate the concern for privacy of jury deliberations.[111] When the issue involves lying on voir dire, as opposed to subsequent juror misconduct, the balance is tipped in favor of disclosing the evidence to ascertain the facts. This distinction cannot be explained by any concern for the accuracy of the final decision. Misconduct on

103. *Id.* at 267-68.
104. *Id.*
105. *Id.* at 269.
106. *Id.*
107. 289 U.S. 1 (1933).
108. Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670).
109. 289 U.S. at 16.
110. *Id.* at 18.
111. The Court argued that the threat of revealing juror communications evidencing criminal conduct would not chill the free debate among jurors of "integrity and reasonable firmness." *Id.* at 16.

voir dire as well as misconduct during deliberations could have a similar impact on the outcome of the litigation and the accuracy of the decision.

In *Remmer v. United States*[112] the Court again addressed the question of jury misconduct. During the trial an unidentified individual attempted to bribe the jury foreman, who in turn, reported the improper contact to the trial judge. The judge informed the prosecuting attorney, and the FBI conducted an investigation. The trial judge decided that no further action was necessary. The defendant discovered the incident after he was convicted and moved for a new trial. The trial court denied the motion without a hearing. The United States Supreme Court held that the trial judge committed error in handling the matter ex parte and remanded the matter to the trial judge to determine whether the contact constituted harmless error.[113]

On remand the trial judge considered only the impact of the FBI investigation and concluded that the investigation was entirely harmless. The case went before the Supreme Court a second time. Justice Minton considered the juror's testimony about how the incident affected him and stated that the juror was indeed affected because he was very disturbed and troubled from the date he was contacted until after the trial ended.[114] The Court vacated the judgment and remanded the case for a new trial.[115] Consistent with *Reid*, but inconsistent with *Mattox* and *Hyde*, the Court focused on juror evidence about the effect of the outside influence on the thought processes and decision of the jurors.

Remmer can be distinguished from the previous cases since in *Remmer* the outside influence was discovered by the trial judge prior to the close of the case. The rule limiting impeachment of jury verdicts is not implicated prior to the delivery of the verdict. In essence, the error complained of was that the trial judge erred in not disclosing the contact to counsel and by conducting the investigation ex parte. Subsequent decisions by the Court, however, have not drawn this distinction, but have followed *Remmer* by permitting juror testimony on the issue of the effect that the outside influence had on the jurors' deliberation and vote. For example, in *Parker v. Gladden*[116] petitioner's wife started to investigate the circumstances of the jurors' deliberations in her husband's case two years after the verdict was rendered. She discovered that while the jury was sequestered, the bailiff stated to several jurors, "Oh that wicked fellow [petitioner] he is guilty,"[117] and to another, "If there is anything wrong [in finding petitioner guilty] the Supreme

112. 350 U.S. 377 (1956).

113. Remmer v. United States, 347 U.S. 227, 229-30 (1954).

114. 350 U.S. at 381. See also Gold v. United States, 352 U.S. 985 (1957) (per curiam), in which the Supreme Court affirmed the grant of a new trial because of "official, [but unintentional] intrusion into the privacy of the jury." *Id.* While defendant was being tried for perjury in filing a false noncommunist affidavit, FBI agents investigating another case of a false noncommunist affidavit contacted three members of the jury or their families to inquire whether they received any "propaganda" literature. 237 F.2d 764, 775 (D.C. Cir. 1956). The trial judge conducted a hearing and dismissed two of the jurors.

115. 350 U.S. at 381.

116. 385 U.S. 363 (1966).

117. *Id.*

Court will correct it."[118] In a per curiam opinion the Supreme Court held that the bailiff's improper conduct violated the accused's sixth amendment right to a trial by an impartial jury and his right to confrontation.[119] Considering a juror's affidavit that she in fact was prejudiced by the statements, the Court further concluded that the violation was prejudicial.[120]

In *Parker* the Supreme Court once again failed to establish a clear rule for dealing with the problem of impeachment of juror verdicts. The determination that the comments violated the sixth amendment, however, substantially complicated the resolution of the issue in future cases. Based on *Parker* the criminally accused has constitutional support and a federal forum for the claim that misconduct of jurors should be freely investigated and developed as evidence for a new trial unfettered by federal or state procedural limitations restricting juror testimony. Second, the standard of review of the potential misconduct is affected once constitutional error is established. The burden is on the state to prove that the misconduct was harmless beyond a reasonable doubt and not on the appellant to prove that it was prejudicial.[121]

In the *Parker* dissent Justice Harlan anticipated some of these problems, stating that "though I believe unintentionally, the Court's opinion leaves open the possibility of automatically requiring a mistrial on constitutional grounds whenever any juror is exposed to any potentially prejudicial expression of opinion. . . . The potentialities of today's decision may go far beyond what, I am sure, the Court intends."[122] Justice Harlan, who did not necessarily view the sixth amendment as directly applicable to the states through the fourteenth amendment, analyzed the problem under the doctrine of fundamental fairness implicit in the due process clause of the fourteenth amendment.[123] Justice Harlan viewed the contacts as inconsequential and the evidence of prejudice to be trivial.[124]

III. FEDERAL RULE OF EVIDENCE 606(b)

Although the Supreme Court has been reluctant to adopt a single rule to deal with the scope of evidence in juror misconduct cases, the several rulemaking bodies involved in the development of the Federal Rules of Evidence each recommended a specific rule.[125] Eventually Federal Rule of Evidence

118. *Id.* at 364.
119. *Id.* at 366.
120. The Court concluded alternatively that the unauthorized conduct of the bailiff "involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id.* at 365 (citing Estes v. Texas, 381 U.S. 532, 542-43 (1965)).
121. Chapman v. California, 386 U.S. 18, 24 (1967); *see* Mattox v. United States, 146 U.S. 140, 149 (1892).
122. 385 U.S. at 368-69.
123. *Id.* at 367.
124. *Id.* at 368.
125. Judge Friendly in his testimony, on the other hand, urged that no rule be adopted and the issue be left to case-by-case development. *House Hearings before the Special Subcomm. on Reform of Federal Criminal Laws of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 250 (1973) (testimony of Henry J. Friendly, Chief Judge, U.S. Ct. of Appeals, 2d Cir.).

606(b) was enacted.[126] The debate on rule 606(b) centered largely on the extent to which jurors could testify about misconduct in the jury room, such as agreeing to a quotient verdict. The preliminary draft of the Supreme Court Advisory Committee[127] included a rule prohibiting juror testimony or affidavit on "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 concerning his mental processes in connection therewith."[128] This approach, consistent with the portion of the *Perry* decision quoted by the Supreme Court in *Mattox*,[129] is sometimes referred to as the Iowa rule and would permit jurors to testify about improper acts done in the jury room, such as quotient verdicts or decisions by lot. The Advisory Committee's final draft of the rule,[130] which was promulgated by the Supreme Court,[131] added the restriction that jurors could not testify as to "any matter or statement occurring during the course of the jury's deliberations."[132] The rule provided an exception permitting jurors to testify as to "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."[133]

The Advisory Committee Notes give no explanation for the change. The Advisory Committee might have been influenced[134] by the strenuous objections raised by the Justice Department and Senator McClellan that the original proposed rule would make jurors susceptible to harassment and damage the finality of jury verdicts.[135] After hearings before a subcommittee of the Judiciary Committee chaired by Representative Hungate, the House of Representatives reinstated the substance of the original Advisory Committee proposal, which permitted jurors to testify about objective misconduct that

126. See generally 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 606-2 to -9 [hereinafter cited as WEINSTEIN'S EVIDENCE] for a discussion of legislative history of rule 606(b).

127. *Reprinted in* 46 F.R.D. 161, 289 (1969).

128. *Id.* at 289-90.

129. *See supra* notes 91 & 92 and accompanying text.

130. 56 F.R.D. 183, 265 (1972). The rule provides:

> 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.

131. *See* Order Promulgating the Federal Rules of Evidence, 56 F.R.D. 184 (1972).

132. *Id.* at 265.

133. *Id.*

134. *See House Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the Comm. on the Judiciary*, 93d Cong., 1st Sess. 179-80, 191 (1973) (statements of Charles R. Halpern and George T. Frampton on behalf of the Washington Council of Lawyers); *see also id.* at 127 (statement of the Comm. on Federal Courts, the Association of the Bar of the City of New York).

135. *See* 117 CONG. REC. 33582 (1971).

they observed, whether it took place outside or inside the jury room.[136] The Senate in turn adopted the more restrictive rule,[137] as recommended by the Supreme Court Advisory Committee and promulgated by the Supreme Court, and the Conference Committee eventually adopted the Senate version.[138]

Throughout the debate little concern was expressed about the accuracy of jury verdicts, litigants' rights, or society's interest in accurate, reliable jury verdicts. The implications of *Parker v. Gladden* or *Remmer v. United States* are practically ignored. The Advisory Committee Notes obliquely refer to *Parker*, but give no suggestion as to how to reconcile the accused's constitutional rights with the evidentiary rule limiting a juror's competency.[139]

A great deal of litigation has implicated rule 606(b). The rule has proven to be difficult to apply, thereby, encouraging more litigation. The rule reflects the political process that produced the Federal Rules of Evidence. It is not based on consistent policy considerations centering on the accuracy or even the proper functioning of the jury, but on principles of accommodation. The thrust of the Advisory Committee rationale is that to disallow inquiry into jury misconduct might be unjust, but to allow too much inquiry might result in unacceptable ramifications; a compromise, therefore, results. No strong, underlying policy basis provides guidance in the close case as to how the rule should be interpreted.

Second, the rule is awkwardly phrased and is apparently intended to be given an interpretation that is inconsistent with the plain meaning of its language. Presumably any information that is used by the jurors to decide the case could be classified as extraneous if it did not come from the admitted evidence and the juror's general knowledge. To the extent that the juror's decision is based in all or part on a particular predisposition toward a party's race, age, sex, facial hair, economic status, personal belief about facts not introduced into evidence, or improper understanding of the law, the verdict would appear to be based on extraneous prejudicial information or outside influence. A verdict based on chance, such as flipping a coin, would likewise be an outside influence.

Nonetheless, the legislative history urges a more restrictive reading of the language, but no clear definition is given. The Supreme Court Advisory Committee defines by example, listing compromise verdicts,[140] quotient verdicts,[141] speculation about insurance coverage,[142] misinterpretation of in-

136. REPORT OF THE COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 650, 93d Cong., 1st Sess. 9-10 (1973).

137. REPORT OF THE COMM. ON THE JUDICIARY OF THE SENATE, S. DOC. NO. 1277, 93d Cong., 2d Sess. 56, *reprinted in* Federal Rules of Evidence (1975).

138. Conference Report, 120 CONG. REC. 33941 (1974).

139. FED. R. EVID. 606(b) advisory committee note.

140. Hyde v. United States, 225 U.S. 347, 382 (1912).

141. McDonald v. Pless, 238 U.S. 264, 269 (1915).

142. Holden v. Porter, 405 F.2d 878, 879 (10th Cir. 1969); Farmers Coop. Elevator Ass'n v. Strand, 382 F.2d 224, 230 (8th Cir.), *cert. denied*, 389 U.S. 1014 (1967).

structions,[143] mistake in returning verdicts,[144] and improper inference from a codefendant's guilty plea[145] as matters that are not subject to juror testimony. Statements by a bailiff or introduction of a prejudicial newspaper account[146] into the jury room, however, are appropriate matters of inquiry.

The distinction between improper outside influences and improper internal influence is difficult and largely arbitrary. The distinction was addressed in *Government of Virgin Islands v. Gereau*,[147] in which defendant maintained that jurors heard certain rumors that improperly influenced the verdict. The extraneous information included true rumors about killings that took place during the trial, false rumors broadcast over a radio station that the FBI was investigating the families of jurors, and unattributed rumors that the FBI was investigating past conduct of three jurors. The trial judge attributed the first two rumors to outside sources but because no evidence about the source of the third rumor was available, the trial judge ruled that this rumor must have been generated among the jury and not from an outside source.[148] Jurors, therefore, could testify about the first two rumors, but not the third.

On appeal the court agreed that only the rumors attributed to outside sources could be considered as possible outside influences.[149] In a discussion that combines the competency of the evidence question with the issue of whether a new trial should be granted, the court concluded that the rumors about the FBI investigation of jurors should not be considered extraneous influences for the purpose of impeaching the verdict.[150] The court reasoned that since the rumors were not attributable to any source and were only tangentially related to the issues in the case, they did not carry the coercive force of a bribe or a threat.[151] The sixth amendment considerations were not implicated because the accused was not tried using evidence from extrajudicial sources. The integrity of the court was not put in jeopardy because the rumors did not emanate from a governmental source or through failure on the part of the court. Finally, permitting unattributed rumors to be sufficient evidence to impeach verdicts would substantially undermine the finality of jury verdicts, particularly in small communities. The confusion of the competency of juror testimony issue with the issue of whether the alleged incident merits remedial action blurs analysis, but is invited by the language in the rule.

According to the rule jurors can testify that extraneous information was improperly brought to their attention only if it was prejudicial information. Before the court determines that a juror is competent to testify about the extraneous information improperly before the jury, the court must presuma-

143. Farmers Coop. Elevator Ass'n v. Strand, 382 F.2d 224, 230 (8th Cir.), *cert. denied*, 389 U.S. 1014 (1967).
144. United States v. Chereton, 309 F.2d 197, 201 (6th Cir. 1962).
145. United States v. Crosby, 294 F.2d 928, 949 (2d Cir. 1961).
146. Mattox v. United States, 146 U.S. 140, 140 (1892).
147. 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).
148. 523 F.2d at 152.
149. *Id.*
150. *Id.*
151. *Id.*

bly determine that the information was prejudicial. Obviously, to determine whether the information is prejudicial the court must consider the substance and source of the statement to decide whether the juror is competent to testify about the statement's substance and source. After a determination that the extraneous information is prejudicial and the juror is competent to testify about the matter, the court must consider the testimony and then decide whether exposure to the prejudicial information necessitates a new trial or was harmless error. To determine whether the prejudicial information was harmless error, the court must decide whether the information was likely to or did prejudice the jury.[152]

Obviously the concept of prejudice varies depending on whether the court is deciding the basic competency question under rule 606(b) or, after the evidence is deemed competent, deciding whether a new trial should be granted. Clearly the assessment of prejudice on the competency issue must be made with respect to potential prejudice and could be made by an offer of proof. Nonetheless, if the judge must consider the substance of the proposed testimony before ruling on the competency question, much of the policy underlying the implementation of the rule is thwarted. The privacy of the deliberative process is destroyed, jurors are subject to scrutiny by losing litigants, and the public is apprised of a potential flaw in the truth-finding mechanism of the court process. Only the interest of finality is protected, because the misconduct will give rise to a new trial only in rare circumstances.

If the alleged misconduct involves improper influence and not extraneous information, the rule does not require that the court make a preliminary finding of prejudice or potential prejudice before a juror is competent to testify. In encompassing outside influence, the rule presumably contemplates attempts by third parties to influence the result by bribes, threats, or other means. This activity poses the most serious threat to the proper operation of the jury system. A commitment to decisionmaking by lay citizens contemplates certain risks. Decisions will not be made by experts in the law and sciences, or necessarily in a rational step-by-step efficient decisionmaking process. The decision will be the result of a group deliberation, the group being composed of citizens with various experiences in life, various abilities to reason and assimilate, and various political, personal, and philosophical perspectives. Supporters of the evidentiary rule are willing to take the risk that these lay jurors might make mistakes in the deliberation process or that they might choose conscientiously to disregard the law or fact. The rule's supporters are not willing to risk a jury decision dictated or influenced by an outside source brought to bear specifically on the trial.

IV. FEDERAL COURTS' APPLICATION OF RULE 606(b)

The application and interpretation of rule 606(b) has generated considera-

152. Parker v. Gladden, 385 U.S. 363, 368 (1966); United States v. Horton, 646 F.2d 181, 186 (5th Cir. 1981); United States v. Williams, 613 F.2d 573, 575 (5th Cir. 1980) (en banc).

ble litigation in both the trial and appellate courts. While lower federal courts generally attempt to apply the rule as written, recent Supreme Court decisions raise questions about the validity of the rule, at least in criminal cases. The rule applies only to impeachment of verdicts; issues concerning misconduct at voir dire,[153] or issues of misconduct or impropriety that are addressed prior to accepting the verdict,[154] are not affected by this rule.[155] As to these matters the trial court may, and in most cases should, make an encompassing examination of the jurors to determine the nature of any misconduct and its impact on the jurors or their future deliberations and verdict.[156]

Federal appellate courts have construed rule 606(b) to permit juror testimony in numerous situations, including cases in which a juror: (1) consulted a dictionary[157] or other book;[158] (2) compared evidence in the present case with evidence in another murder case in which a juror had served;[159] (3) conducted a library investigation to determine that defendants could easily have discovered the fictitious nature of an alleged corporation;[160] (4) engaged in conversation with the bailiff[161] or judge;[162] (5) received improper exhibits[163] or newspaper articles in the jury room;[164] (6) witnessed a government investigator testify at trial and subsequently play tapes in the jury room;[165] (7) experienced exposure to possible jury tampering;[166] or (8) con-

153. Rogers v. McMullen, 673 F.2d 1185, 1190 (11th Cir. 1982) (on voir dire examination juror, a minor, misrepresented that she was 21 years of age).

154. United States v. Freedson, 608 F.2d 739 (9th Cir. 1979); United States v. Gerardi, 586 F.2d 896 (1st Cir. 1978) (juror changed mind one-half hour after verdict accepted); *see also* Traver v. Meshrity, 627 F.2d 934, 941 (9th Cir. 1980) ("Once a verdict has been delivered and accepted in open court, and the jury is polled and discharged, jurors may not claim that their assent was mistaken or unwilling."); *cf.* Mount Airy Lodge Inc. v. Upjohn Co., 96 F.R.D. 378, 381 (E.D. Penn. 1982) (testimony that all jurors agree "that through inadvertence, oversight or mistake the verdict announced was not the verdict on which agreement had been reached" is not an impeachment of verdict but a reformation).

155. *See* United States v. Robinson, 645 F.2d 616 (8th Cir.) (juror can testify on mistrial motion based on publicity or tampering) (citing 3 WEINSTEIN'S EVIDENCE, *supra* note 126, § 606[04], at 606-32), *cert. denied*, 454 U.S. 75 (1981).

156. United States v. Bohr, 581 F.2d 1294, 1302 (8th Cir. 1978), *cert. denied*, 439 U.S. 958 (1978); 3 WEINSTEIN'S EVIDENCE, *supra* note 126, ¶ 606[05], at 606-39 to -45.

157. United States v. Duncan, 598 F.2d 839, 866 (4th Cir. 1979).

158. United States v. Bassler, 651 F.2d 600, 601-02 (8th Cir. 1981) (jurors consulted *Robert's Rule of Order*).

159. Smith v. Brewer, 444 F. Supp. 482, 491 (D.C. Iowa), *aff'd*, 577 F.2d 466 (1978).

160. United States v. Bagnariol, 665 F.2d 877, 888 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982).

161. United States v. Weiner, 578 F.2d 757, 765 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978).

162. United States v. Williams, 613 F.2d 573, 575 (5th Cir.) (ex parte communication between juror and trial court), *cert. denied*, 449 U.S. 849 (1980).

163. United States v. Bruscino, 687 F.2d 938, 940 (7th Cir.) (en banc), *cert. denied*, 459 U.S. 1228 (1982); United States v. Friedland, 660 F.2d 919, 928 (3d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

164. United States v. Bruscino, 687 F.2d 938, 940 (7th Cir.) (en banc), *cert. denied*, 459 U.S. 1228 (1982); *see also* United States v. Horton, 646 F.2d 181, 188-89 (5th Cir.) (juror influenced by media in general), *cert. denied*, 454 U.S. 970 (1981).

165. United States v. Freeman, 634 F.2d 1267, 1269-70 (10th Cir. 1980).

166. United States v. Moten, 582 F.2d 654, 664-66 (2d Cir. 1978).

ducted an independent investigation.[167]

The courts have interpreted the rule to preclude juror testimony when the jurors allegedly: (1) misunderstood the instructions;[168] (2) intentionally disregarded the instructions;[169] (3) considered defendant's failure to take the witness stand;[170] (4) coerced and harassed fellow jurors;[171] (5) never intended to unqualifiedly vote guilty or were confused by the proceedings;[172] (6) entered a compromise or quotient verdict;[173] (7) based the verdict on secret beliefs or prejudices unrelated to the law or facts;[174] or (8) wrote a love letter to the United States attorney inviting her to lunch.[175] Further, the federal courts have precluded jurors' testimony on the issue of their mental processes in arriving at a verdict,[176] their intention in answering a special interrogatory,[177] the effect on jurors of nonuniformed marshalls stationed in the courtroom for security purposes,[178] and the way a jury deadlock was broken.[179]

The Federal Circuit Courts of Appeals have attempted to apply the rule without questioning whether the rule properly accommodates society's interest in finality, confidentiality, and fair trial. Thus, most opinions attempt to interpret the rule's language in light of its legislative history.

Several issues of particular importance remain unresolved and clouded by recent decisions by the Supreme Court. Whether jurors are incompetent to testify about a bias manifested during deliberations is unresolved. Once mis-

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167. *In re* Beverly Hills Fire Litig., 695 F.2d 207, 213-14 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 2090, 77 L. Ed. 2d 300 (1983).

168. United States v. D'Angelo, 598 F.2d 1002, 1003-05 (5th Cir. 1979); United States v. Stacey, 475 F.2d 1119, 1121 (9th Cir. 1973).

169. United States v. D'Angelo, 598 F.2d 1002, 1003 (5th Cir. 1979).

170. United States v. Friedland, 660 F.2d 919, 927-28 (3d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); United States v. Edwards, 486 F. Supp. 673, 674 (S.D.N.Y.), *aff'd*, 633 F.2d 207 (2d Cir. 1980).

171. United States v. Freedson, 608 F.2d 739, 741 (9th Cir. 1979); United States v. Marques, 600 F.2d 742, 747 (9th Cir. 1979); *cert. denied*, 444 U.S. 1019 (1980); Simmons First Nat'l Bank v. Ford Motor Co., 88 F.R.D. 344, 347-48 (E.D. Ark. 1980); Smith v. Brewer, 444 F. Supp. 482, 487 (S.D. Iowa), *aff'd*, 577 F.2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978).

172. United States v. Jelsma, 630 F.2d 778, 779 (10th Cir. 1980); United States v. Weiner, 578 F.2d 757, 764 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978).

173. United States v. Campbell, 684 F.2d 141, 151-52 (D.C. Cir. 1982); United States v. Marques, 600 F.2d 742, 746 (9th Cir. 1979), *cert. denied*, 444 U.S. 1019 (1980).

174. United States v. Campbell, 684 F.2d 141, 151-52 (D.C. Cir. 1982).

175. United States v. Beltempo, 675 F.2d 472, 481 (2d Cir.), *cert. denied*, 457 U.S. 1135 (1982).

176. Carson v. Polley, 689 F.2d 562, 570-71 (5th Cir. 1982) (consideration of inadmissible evidence); United States v. Campbell, 684 F.2d 141, 151 (D.C. Cir. 1982) (compromise verdict); United States v. Brooks, 677 F.2d 907, 912 (D.C. Cir. 1982) (subconscious prejudice); United States v. Vincent, 648 F.2d 1046, 1050 (5th Cir. 1981) (coercive effect of *Allen* charge); United State v. Duzac, 622 F.2d 911, 913 (5th Cir.) (prejudice), *cert. denied*, 449 U.S. 1012 (1980); United States v. Bohr, 581 F.2d 1294, 1302 (8th Cir.) (sympathy for victim), *cert. denied*, 439 U.S. 958 (1978); *see also* Poches v. J.J. Newberry Co., 549 F.2d 1166, 1169 (8th Cir. 1977) (letter from nonjuror exposing decision-process of jurors after jury-foreman had relayed process to him may be inadmissible under rule 606(b)).

177. Brewer v. Jeep Corp., 546 F. Supp. 1147, 1157-58 (D.C. Ark. 1982), *aff'd*, 724 F.2d 653 (8th Cir. 1983).

178. United States v. Gambina, 564 F.2d 22, 24 (8th Cir. 1977).

179. Wilkerson v. Amco Corp., 703 F.2d 184, 185-86 (5th Cir. 1983).

conduct or impropriety is established, the extent to which jurors may testify about the impact the misconduct or impropriety had on the verdict is likewise unclear.[180]

Recent Supreme Court decisions have recognized an accused's constitutional rights in the decisionmaking process and cast substantial doubt on whether the rule has any applicability in criminal cases. A straightforward interpretation of the rule in light of the legislative history would preclude juror testimony on issues of bias or evidence of the impact that misconduct had on the jury's verdict. A bias or predisposition to resolve a case in a particular manner or to view facts from a particular perspective reflects on thought processes and mental impressions. Futhermore, the most direct inquiry into thought processes or mental impressions is to ask jurors what impact certain conduct or statements had on their verdict. Recent Supreme Court decisions, however, justify such an inquiry, despite the language and the policy behind the rule. The Supreme Court has not reconciled its decisions with the conflicting policy considerations and the language of the evidentiary rule.

Lower federal courts have considered the bias issue. The federal district court in *Smith v. Brewer*[181] addressed the issue of juror bias. The petitioner in *Smith* sought habeas corpus relief on the grounds of juror misconduct. A juror testified about internal pressures, racial overtones, and a comparison by one of the jurors with a previous jury experience. The federal district court concluded that rule 606(b) precluded evidence of the internal pressures and the racial bias, but permitted evidence of the juror's comparison with the previous trial.[182] The court noted that bias manifested in the jury room is difficult to characterize as either an outside or inside influence.[183] Relying on the legislative history of the rule, the court concluded that "it seems better to draw [the line] in favor of juror privacy."[184] The court focused on the concept of prejudice, however, stating that if "an offer of proof showed that there was a substantial likelihood that a criminal defendant was prejudiced by the influence of racial bias in the jury room, to ignore the evidence might very well offend fundamental fairness."[185] The court held that the evidence of bias was incompetent in this case because it was unlikely to have been

180. *Compare* United States v. Bagnariol, 665 F.2d 877, 884-85 (9th Cir. 1981) (juror not competent to testify about impact of misconduct), *cert. denied*, 456 U.S. 962 (1982); United States v. Horton, 646 F.2d 181, 188 & n.3 (5th Cir.) (same), *cert. denied*, 454 U.S. 970 (1981); United States v. Geer, 620 F.2d 1383, 1385 (10th Cir. 1980) (same); United States v. Duncan, 598 F.2d 839, 866 (4th Cir.) (same), *cert. denied*, 444 U.S. 871 (1979), *with In re* Beverly Hills Fire Litig., 695 F.2d 207, 213 (6th Cir. 1982) (jurors may testify about impact), *cert. denied*, 103 S. Ct. 2090, 77 L. Ed. 2d 300 (1983); Government of Virginia Islands v. Gereau, 523 F.2d 140, 148-50 (3d Cir. 1975) (same), *cert. denied*, 424 U.S. 917 (1976).

181. 444 F. Supp. 482 (S.D. Iowa), *aff'd*, 577 F.2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978).

182. 444 F. Supp. at 490.

183. *Id.* at 489 (citing 3 WEINSTEIN'S EVIDENCE, *supra* note 126, ¶ 606[04] (1976)).

184. 444 F. Supp. at 489 (quoting 3 WEINSTEIN'S EVIDENCE, *supra* note 126, ¶ 606[04], at 606-36). Juror privacy was no longer an issue since the witness testified about events in the jury room at the hearing.

185. 444 F. Supp. at 490 (citing McDonald v. Pless, 238 U.S. 264, 268-69 (1915)).

prejudicial.[186] The court next concluded that the discussion about previous juror service was admissible under rule 606(b), but did not justify a new trial because petitioner failed to show that he was prejudiced by the discussion.[187]

In *Carson v. Polley*[188] the Fifth Circuit also left open the possibility that bias or prejudice can be a proper subject matter for juror testimony on a post-trial motion. In *Carson* the court concluded that a letter written by a juror during deliberations, exposing views that would not be proper matter for jury deliberation or reliance, reveals thought processes and not matters admissible under rule 606(b).[189] The court stated that "[w]hile jurors may reach a verdict because of secret beliefs that have little to do with law or facts, such matters are not the proper subject of inquiry after verdict."[190] The court suggested, however, that a juror letter revealing substantial prejudice or bias could be competent evidence and serve as the basis for granting a new trial.[191]

The *Carson* opinion did not refer to the 1980 decision of a different panel in the Fifth Circuit in *United States v. Duzac*.[192] During the deliberations the trial judge in *Duzac* received the following message: "There are certain prejudices among this jury due to prior personal experiences that prevent us from arriving at a unanimous decision on Count 1 . . . ."[193] After his conviction, the defendant unsuccessfully sought a new trial based on jury misconduct. On appeal the Court of Appeals for the Fifth Circuit affirmed, holding that the matters complained of could not impeach the jury verdict and stating:

> Here, there is no evidence that any external influence was brought to bear on members of the jury. The prejudice complained of is alleged to be the product of personal experiences unrelated to this litigation. The proper time to discover such prejudices is when the jury is being selected and preemptory challenges are available to the attorneys. Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations.[194]

V. SUPREME COURT EXPANSION OF SCOPE OF JUROR TESTIMONY

The Supreme Court in *Smith v. Phillips*[195] discussed the use of post-trial juror testimony to prove juror bias. In *Phillips* a juror contacted the district attorney's office during the trial and applied for a job with the office. The

186. 444 F. Supp. at 490.
187. *Id.* at 491. In deciding the competence question, the court did not consider the threshold question of prejudice.
188. 689 F.2d 562 (5th Cir. 1982).
189. *Id.* at 580-81.
190. *Id.* at 581 (citing United States v. D'Angelo, 598 F.2d 1002, 1005 (5th Cir. 1979)).
191. 689 F.2d at 581-82 (citing King-Size Publications, Inc. v. American News Co., 194 F. Supp. 109 (D.N.J.) (letter from juror after verdict demonstrated sufficient prejudice to grant new trial), *cert. denied*, 368 U.S. 920 (1961)).
192. 622 F.2d 911 (5th Cir. 1980).
193. *Id.* at 913.
194. *Id.*
195. 455 U.S. 209 (1982).

prosecutors who were trying the case were apprised of the application. The prosecutors ensured that no one from their office responded to the juror's application, but concluded that informing the court or opposing counsel was unnecessary. The juror had previously disclosed on voir dire that he had an interest in law enforcement and that he had previously applied for employment with a federal drug enforcement agency. The district attorney learned of the juror's application after the verdict. He conducted an investigation to verify the facts and then informed the court and defense counsel. At a hearing on the motion to set aside the verdict, the juror was interrogated and testified that "I swore on oath to listen to the evidence and to render a verdict on that evidence. I did so."[196] When asked if the prospect of employment with the district attorney in any way affected his verdict he replied, "That didn't enter my mind; I didn't think about it that way."[197] The trial court concluded that the juror's letter was "an indiscretion but, in the light of his voir dire, in no way reflected a premature conclusion as to the defendant's guilt, or prejudice against the defendant, or an inability to consider the guilt or innocence of the defendant solely on the evidence."[198]

The court also held that a new trial should not be granted on the grounds of government misconduct.[199] The court concluded that the events giving rise to the motion did not influence the verdict.[200] The conviction was affirmed without opinion by the Appellate Division of the Supreme Court,[201] and the New York Court of Appeals denied leave to appeal.[202] Several years later, the petitioner filed a writ of habeas corpus in the United States District Court for the Southern District of New York.[203] The district court granted the writ, concluding that "the average person in [the juror's] position would believe that the verdict of the jury would directly affect the evaluation of his job application."[204] The Court of Appeals for the Second Circuit affirmed by a divided vote.[205] The Supreme Court granted certiorari and reversed.[206]

Justice Rehnquist delivered the opinion of the Court and discussed separately the issues of juror misconduct and prosecutorial misconduct. According to Justice Rehnquist, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."[207] To resolve a claim of juror bias, the trial

196. People v. Phillips, 87 Misc. 2d 623, 618, 384 N.Y.S.2d 906, 911-12 (Sup. Ct. 1975), *aff'd mem.*, 384 N.Y.S.2d 715 (App. Div. 1976).

197. 384 N.Y.S.2d at 912.

198. *Id.* at 915.

199. *Id.* at 917.

200. *Id.* at 918.

201. 384 N.Y.S.2d 715 (App. Div. 1976).

202. 386 N.Y.S.2d 1039 (1976).

203. 485 F. Supp. 1365 (S.D.N.Y. 1980).

204. *Id.* at 1371-72.

205. 632 F.2d 1019 (2d Cir. 1980). The decision of the court of appeals is based on the finding that the prosecution's failure to disclose violated due process. *Id.* at 1023-24.

206. 455 U.S. 209 (1982).

207. *Id.* at 217.

court should hold a hearing in which the defendant can prove actual bias.[208] The Court affirmed the trial judge's conclusion that this case involved no actual bias.[209]

In reaching this conclusion, the Court did not distinguish between questions of bias raised prior to trial, when prospective jurors should be excused for bias, and questions raised after the trial, when the issue is whether a new trial should be granted because of a biased juror.[210] The Court also did not reconcile its opinion with Federal Rule of Evidence 606(b) and the cases or rationale upon which the rule is premised.

In a concurring opinion, Justice O'Connor agreed that a post-trial hearing is necessary to resolve an allegation of juror bias:

> A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case.[211]

Justice O'Connor stated that extreme situations might justify a finding of implied bias.[212] The Court could imply bias if a juror is an actual employee of the prosecuting agency, a close relative of one of the participants in the trial or the criminal transaction, or a participant or witness to the transaction.[213] Justice O'Connor relied on *Leonard v. United States*,[214] in which the Court held that jurors were automatically disqualified from sitting on a trial when they heard the trial court announce the defendant's guilty verdict on a similar charge.[215] According to Justice O'Connor, the majority opinion did not foreclose a finding of implied bias in an appropriate case.[216]

Justice Marshall authored a dissent in which Justices Brennan and Stevens joined. Initially, Justice Marshall distinguished juror bias from the concept of prejudice. According to Justice Marshall, the Court:

> has required inquiry into prejudice even when there was no evidence that a particular juror was biased; has regarded the absence of a balanced perspective, and not simply the existence of bias against defendant, as a cognizable form of prejudice; has not always required a particularized showing of prejudice; and has strongly presumed that contact with a juror initiated by a third party is prejudicial.[217]

Because the juror had a clear conflict of interest that would "inevitably dis-

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208. *Id.* at 215.

209. *Id.* at 218. The Court noted that in this federal habeas corpus action the trial judge's findings are presumptively correct according to 28 U.S.C. § 2254(d) (1982). 455 U.S. at 218.

210. The court relied on Chandler v. Florida, 449 U.S. 560 (1981); Dennis v. United States, 339 U.S. 162 (1950); Frazier v. United States, 335 U.S. 497 (1948); and United States v. Wood, 299 U.S. 123 (1936). All involved the standard for pretrial challenges to prospective jurors.

211. 455 U.S. at 222.

212. *Id.*

213. *Id.*

214. 378 U.S. 544 (1964) (per curiam).

215. *Id.* at 545.

216. 455 U.S. at 228.

217. *Id.*

tort his perspective on the case,"[218] Justice Marshall maintained that the Court's holding was inconsistent with the historical recognition of the right to trial by an impartial jury.[219] Second, according to Justice Marshall the post-trial hearing was not adequate to protect petitioner's rights.[220] Justice Marshall argued that the probability of bias was strong and the post-trial hearing is ineffective to reveal the bias.[221] If the bias were intentional, the juror would probably not admit to it; if the bias were unconscious, an examination of the juror would not reveal the bias.[222] Justice Marshall, therefore, agreed with the federal district court's use of an implied bias standard in this case.[223]

All of the Justices agreed that the conduct in this case could constitute a due process violation depriving the defendant of his right to a fair and impartial jury. Six of the Justices concluded that the conduct justified a post-trial hearing to determine the extent to which the juror's action affected the juror's thought processes. The defendant had a meticulous and lengthy voir dire in which he clearly revealed his interest in a law enforcement career. The case did not involve lying at voir dire, criminal contempt, criminal juror misconduct, or outside pressure put on a juror. The juror chose to submit the application and chose to put himself in the potential situation of conflict. The extent to which this choice had an impact on his thought processes or vote should not be the subject of competent testimony under rule 606(b).[224]

In *Phillips* the Court held that to establish a violation of due process the accused must prove actual bias.[225] Certainly it would be inconsistent with the concept of due process to preclude the accused, through rules of competency, from proving bias by juror testimony. The federal policy expressed in rule 606(b) of protecting jurors from harassment and assuring finality must give way to the protection of the accused's constitutional rights. *Phillips* apparently justifies an intrusive investigation into juror motivations and thought processes when the defendant properly raises a valid issue of juror bias in a criminal case.

Justice Rehnquist relied heavily on *Remmer* for the proposition that a hearing to determine actual bias is the appropriate way to deal with these allegations.[226] *Remmer*, however, was not premised on constitutional principles and was decided prior to the adoption of the Federal Rules of Evidence.[227] As in *Remmer*, the Court could have chosen a narrower ground to decide the case and perhaps can still limit the impact of these cases in the future. In both cases the misconduct or improper conduct was discovered

218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 229.
222. *Id.* at 230.
223. *Id.* at 231-32.
224. Although the case began as a state prosecution, because the case involved a federal constitutional question, federal competency rules were applicable. FED. R. EVID. 601 & 1101.
225. 455 U.S. at 215.
226. *Id.* at 217.
227. *See supra* notes 112-15 and accompanying text.

by the government prior to the final verdict by the jury. If, of course, the trial judge in either case had undertaken a preverdict examination of the alleged misconduct, the proper and necessary act would be to inquire individually whether the jurors could still be fair and impartial. Rule 606(b) would not bar such an inquiry. Prior to final judgment, the interest in finality is better served by making the inquiry. If the juror is unfit to serve, an alternate might be available[228] or the parties might agree to a decision by fewer jurors. The Court in *Phillips*, however, refused to distinguish between a hearing after the verdict and one prior to the verdict.

The Supreme Court again addressed the issue of juror bias in *Rushen v. Spain*.[229] The respondent in *Rushen* was convicted of two counts of murder and of conspiracy to escape from San Quentin.[230] The prosecution's theory of the case was that respondent, a member of the Black Panthers, and five other prisoners were involved in an escape organized by the Black Panther Party. During the escape attempt three prisoners and three corrections officers were killed. At the voir dire of prospective jurors, Patricia Fagan testified that "she had no personal knowledge of violent crimes—as a witness, victim, or otherwise—and that she did not associate the Black Panther Party with any form of violence."[231] Fagan was chosen and served as a juror for this seventeen-month trial. During the trial, Fagan remembered that one of her childhood friends was murdered by a member of the Black Panthers. This very murder became a subject of inquiry at trial, and this discussion apparently refreshed Fagan's recollection.[232] Fagan, agitated by the recollection, met twice with the trial judge. According to the Supreme Court, she assured the trial judge on each occasion that the events would not affect her disposition of the cases.[233] After the trial, respondent's counsel learned of the ex parte meetings and moved for a new trial.[234] At the hearing for a new trial Fagan testified that "she had not remembered her friend's death during *voir dire*, and that her subsequent recollection did not affect her ability impartially to judge respondent's innocence or guilt."[235] She admitted telling other jurors that she knew the murder victim, but she denied making remarks about the Black Panther Party.[236] According to the majority opinion, Fagan also repeatedly testified that the recollection of the incident did not

228. Three alternative jurors were available in *Phillips*. 455 U.S. at 213.

229. 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) (per curiam).

230. The murder convictions were based on a theory of vicarious liability. *Id.* at 464 n.8, 78 L. Ed. 2d at 283 n.8.

231. *Id.* at 454, 78 L. Ed. 2d at 271.

232. The defense maintained that the murderer of Fagan's friend was the informant in the police plot to organize the break-out and ambush the defendants in an attempt to cripple the Black Panther Party.

233. 104 S. Ct. at 454, 78 L. Ed. 2d at 271.

234. *Id.* at 464, 78 L. Ed. 2d at 283. Respondent, the only Black Panther among the six defendants, was the only defendant convicted on the murder charges. Three defendants were acquitted of all charges, and two others were convicted of assault. *Id.*

235. *Id.* at 454, 78 L. Ed. 2d at 272.

236. *Id.*

affect her impartiality.[237]

The trial judge denied the motion for new trial, stating that the ex parte communications to the judge "lacked any significance" and that respondent suffered no prejudice.[238] The California Court of Appeals found that the communications constituted constitutional error, but were harmless beyond a reasonable doubt.[239] The federal district court granted the writ of habeas corpus, concluding that the ex parte communications between the judge and juror violated respondent's constitutional right to be present at a critical stage of the proceedings and his right to counsel.[240] The district court found that the error required automatic reversal because the absence of a record precluded an intelligent application of the harmless error standard.[241] In the alternative, the court concluded that the state could not prove that the error was harmless through a post-trial hearing.[242] The Court of Appeals for the Ninth Circuit affirmed.[243] In a per curiam opinion, the United States Supreme Court simultaneously granted the petition for certiorari and summarily vacated the judgment of the court of appeals.[244] Justices Brennan, Marshall, and Blackman filed separate dissents, and Justice Stevens concurred in the judgment.

The majority opinion is remarkable for several reasons. Relying heavily on *Smith v. Phillips*[245] and *Remmer v. United States*,[246] the majority initially held that a post-trial hearing with juror testimony is an appropriate method for determining whether this error, which the state conceded was a violation of the constitutional right to be present at critical stages and the right to counsel, constituted harmless error.[247] Second, the Court concluded that the issue of harmless error or prejudice was a question of fact.[248] The state court's judgment on the issue of juror impartiality and bias should, therefore, be affirmed unless it lacked fair support in the record.[249] Third, in reviewing the record to determine whether evidence adequately supported the conclusion that juror Fagan's presence on the jury did not prejudice re-

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237. *Id.* at 457, 78 L. Ed. 2d at 274. According to Justice Marshall, the majority mischaracterized the testimony:

> The only testimony at the hearing that pertained to their discussion of her impartiality was provided by the trial judge. His account of their conversations indicated (at most) that Fagan had assured him that she *would* remain impartial when it came time to render a verdict. . . . But nothing in the record indicates whether Fagan was able to keep her promise that she would remain unbiased.

Id. at 465 n.13, 78 L. Ed. 2d at 284 n.13 (Marshall, J., dissenting) (emphasis in original).

238. *Id.* at 454-55, 78 L. Ed. 2d at 272.

239. *Id.* at 455, 78 L. Ed. 2d at 272.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 457, 78 L. Ed. 2d at 275.

245. 455 U.S. 209 (1982). For a discussion of *Phillips*, see *supra* notes 195-228 and accompanying text.

246. 347 U.S. 227 (1954). For a discussion of *Remmer*, see *supra* notes 112-15 and accompanying text.

247. 104 S. Ct. at 456, 78 L. Ed. 2d at 273-74.

248. *Id.*, 78 L. Ed. 2d at 274.

249. *Id.* at 456-57, 78 L. Ed. 2d at 274.

spondent, the Court considered, in clear violation of rule 606(b), Fagan's testimony "that, upon recollection, the incident did not affect her impartiality."[250] In a footnote the Court misquotes the Federal Rule of Evidence by stating that: "A juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide. . . . But a juror generally cannot testify about the mental process by which the verdict was arrived."[251] The Court, therefore, rewrote rule 606(b) and, for that matter, the law in the federal courts with respect to impeachment of jury verdicts.

The Court's paramount concern was the actual impact of the constitutional error on the juror's decision to convict.[252] The broader societal interests of finality, privacy, and procedural fairness addressed and accommodated by the evidentiary rule are ignored or are, at best, secondary considerations. The Court viewed questions of juror testimony as questions of credibility to be resolved by a trier of fact, as opposed to questions relating to legal competency under the evidentiary rule.[253] This approach encourages an evidentiary inquiry into whether, and how, particular jurors were influenced by improper conduct or considerations. This case-by-case approach to resolving constitutional harmless error, juror bias, or misconduct cases has substantial implications for the role and function of the jury and the relationship and function of the trial and appellate courts. The approach also has a substantial impact on the finality of jury verdicts.

The *Rushen* case suggests a revolutionary approach to appellate review of constitutional error. To what extent should the harmless error analysis for other constitutional violations be established through juror testimony? Since the nature of the error in *Rushen* consisted of alleged juror bias and the impact of this bias on deliberations and verdict, then presumably the testimony from jurors would certainly be pertinent to the inquiry. Juror testimony, however, would be equally pertinent in other situations in which constitutional error has been established and the issue is whether the error had any impact on the jurors' verdict or deliberations.[254]

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250. *Id.* at 457, 78 L. Ed. 2d at 274. The California statute governing juror testimony is broader than the federal rule. *See* CAL. EVID. CODE ANN. § 1150(a) (West 1966). Since the rule is framed in competency terms and the error complained of is federal constitutional error, the federal evidentiary rule applied. FED. R. EVID. 601. The majority did not discuss which rule should apply, but did cite the federal rule. Justice Marshall maintained that juror Fagan gave no such testimony and her testimony was limited to "what she had known, believed, or felt at various points in the trial." *Id.* at 465, 78 L. Ed. 2d at 284; *see supra* note 237.

251. *Id.* at 457 n.5, 78 L. Ed. 2d at 274 n.5 (citations omitted).

252. One commentator stated: "[T]he Burger Court's belief [is] that the ultimate mission of the criminal justice system is to convict the guilty and let the innocent go free." C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 4 (1980); *see* Herring v. New York, 422 U.S. 853, 864 (1975) ("[T]he ultimate objective [is] that the guilty be convicted and the innocent go free.").

253. *See* 104 S. Ct. at 457 n.6, 78 L. Ed. 2d at 275 n.6 (characterizing Justice Marshall's concern for relying on juror testimony as an argument relating to the credibility, not the competency, of the evidence).

254. For example in United States v. Hasting, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983), the Court held that the prosecutor's comments about the defendants' failure to testify was harmless error in the absence of a post-trial hearing to determine the impact that these comments

In a concurring opinion, Justice Stevens recognized the danger of the majority's approach and urged that the issue should be recast to determine whether petitioner was denied due process.[255] Justice Marshall agreed with Justice Stevens, pointing out that the majority's reliance on *Smith v. Phillips* was misplaced because in *Smith* the proof of actual impairment of the jury's impartiality was the decisive factor in finding a constitutional violation.[256] The *Smith* Court ruled that only if the defendant affirmatively proves bias on the part of a juror could he establish a violation of due process. Concluding that the state court's determination that the defendant had not proved bias was supported by the record and therefore was not vulnerable to review by the district court, the majority in *Smith* held that no constitutional violation had been established.[257]

The majority in *Rushen*, however, did not distinguish between issues of jury tampering,[258] juror misconduct or bias,[259] or whether constitutional error is harmless beyond a reasonable doubt.[260] According to the majority, the procedure for dealing with each of these issues is a post-trial hearing involving juror testimony to ascertain the impact of the tampering, bias, or constitutional error on the deliberations or verdict.[261] The scope and purpose of the hearing is quite similar and apparently governed by the same principles as pretrial or preverdict voir dire; the court relies heavily on the jurors' personal statements about whether they can be or in fact were fair and impartial.[262]

The majority did not directly address the concerns that support the historical rule limiting post-trial juror testimony to impeach jury verdicts, although the interest of the litigants, the jurors, and society vary substantially depending on whether the hearing is a postverdict or a preverdict voir dire. At the pretrial voir dire the prospective jurors presumably have no personal stake in the outcome. Their obligation is to answer questions truthfully, and, as long as they answer truthfully, they will suffer no personal adverse legal consequences. The trial judge can put some trust in their statements. Furthermore, to the extent that a venireman responds that he or she cannot be fair and impartial, that juror can be dismissed with little loss of societal resources. A voir dire during the trial might raise slightly different

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had on the jurors' deliberations or vote. *Id.* at 1981-82, 76 L. Ed. 2d at 107-08. The Justices of the Supreme Court of the United States perused the voluminous record and drew their own factual inferences about the evidence, since the harmless error issue was not addressed by the lower courts.

255. 104 S. Ct. at 460-62, 78 L. Ed. 2d at 278-81.

256. *Id.* at 468-69 n.23, 78 L. Ed. 2d at 289 n.23.

257. *Id.*

258. *See* Parker v. Gladden, 385 U.S. 363 (1966); *see supra* notes 116-24 and accompanying text.

259. *See* Smith v. Phillips, 455 U.S. 209 (1982) (discussed *supra* text accompanying notes 195-228); Remmer v. United States, 350 U.S. 377 (1956) (discussed *supra* text accompanying notes 112-15).

260. 104 S. Ct. at 460, 78 L. Ed. 2d at 274.

261. *Id.*

262. For a discussion of the principles of pretrial voir dire, see *supra* notes 110-11 and accompanying text.

motivational factors since the jurors have invested time, energy, and emotions in the particular trial and might be reluctant to give testimony that would preclude continuation as a juror. In addition, depending on the availability of alternate jurors and the effect that dismissing one of the jurors might have on the other jurors, the decision to dismiss one or more jurors during the trial might have an impact on the deliberations or, in an extreme case, require a mistrial. Generally, however, the court can again trust that the juror's self-interest in remaining on the case will not color the responses to questions and can rely on the juror's statements. Furthermore, if the voir dire discloses improprieties, the impact of the improprieties might be alleviated by appropriate cautionary instructions, removal of the juror, or other steps taken by the court or counsel that would alleviate the necessity for a mistrial.

The post-trial interview of jurors, however, raises substantially different problems. If improprieties are discovered after the verdict is accepted, the remedy is either to ignore them or to grant a new trial.[263] The jurors now have a substantial self-interest in providing testimony that is consistent with the validity of their verdict. They have taken a public position on the issue and may be reluctant to provide testimony that they may have acted improperly in arriving at that position. "The human propensity for self-justification [makes it] very difficult to determine from a juror's own testimony after the verdict whether he was impartial. Certainly a juror is unlikely to admit that he had consciously plotted against the defendant during the course of the trial."[264] The jurors' reluctance might also be reinforced by the possibility that they as jurors might be subject to criminal sanctions if they acted improperly. For example, prior to testifying at the post-trial hearing in *Rushen*, the juror Fagan was warned that her testimony might disclose a violation of her oath of office as a juror and that she might face criminal prosecution if such a violation had occurred.[265] The trial judge further informed the juror that she had a right to have counsel present during the questioning and that she had the right not to incriminate herself.

Treating questions of juror bias, misconduct, or prejudice as issues of fact, to be resolved by a post-trial hearing with juror testimony, has some beneficial implications. Such an approach would encourage a full airing of the deliberation process to detect and flush out impropriety, making jurors more accountable for their actions. This approach accords the trial judge's determination of the impact of the irregularity great weight in future appeals. Appellate courts would defer to the trial judge's factual analysis, and thereby restore the reviewing court's role to a more traditional and limited appellate review. In recent years the application of the harmless error doctrine has been broadened, and courts are reluctant to apply the per se rule of reversal for constitutional error.[266] In determining on a case-by-case basis whether

263. An additional societal remedy is to prosecute a juror if the conduct amounts to contempt or perjury. *See supra* notes 107-11 and accompanying text.

264. Smith v. Phillips, 455 U.S. at 230 (Marshall, J., dissenting).

265. Rushen v. Spain, 104 S. Ct. at 464, 78 L. Ed. 2d at 284 (Marshall, J., dissenting).

266. *See, e.g.*, United States v. Hasting, 103 S. Ct. 1974, 1990, 76 L. Ed. 2d 96, 111 (1983)

the error in a particular trial was prejudicial, the appellate courts are required to review records and assess factual inferences to decide as a constitutional matter what impact any improper evidence or conduct might have had on the jury. In addition to trivializing the Constitution, the appellate function has become largely a fact-finding function in which the transcript is reviewed and evidence is reassessed. The courts must assess both the appropriate weight and the strength of various inferences to be drawn from the evidence and the possible inferences that the jury drew or might have drawn from the erroneously admitted or excluded evidence in determining what impact the error had or might have had on the deliberations and proceedings.

Treating the determination of prejudice as a factual matter to be resolved by the trial judge after a hearing and testimony from the jurors to some extent limits the appellate function to a more traditional review of the record to determine if the trial judge's determinations have an adequate basis. Second, to the extent that juror testimony can be credited, it provides more direct evidence on the impact of the error, and the court is not totally left to its imagination to determine whether the jurors were affected by the error. On the other hand, serious implications arise from the Supreme Court's recent decisions concerning post-trial hearings with jurors to determine harmless error, bias, or prejudice. The decisions in *Remmer, Smith*, and *Rushen* substantially undermine the interest in the finality and stability of jury verdicts. Although each of the decisions had the immediate result of restoring the jury verdict and trial court determination, thus superficially supporting the concept of finality and stability of trial court decisions, the implications of the decisions are to the contrary.

In assessing harmless error or prejudice without juror interview, the court is entitled to, and must in most cases, assume that the jurors acted properly, followed the instructions, and considered only properly admissible evidence.[267] The assumption is made in most cases, even when common sense indicates that the jurors could not, or did not, follow the jury instructions exactly as given. Recent studies confirm our common sense by revealing that jurors do not lose their human characteristics when asked to serve as jurors. Jurors bring to the jury room a full range of human characteristics and weaknesses that preclude a totally sterile, objective, rational analysis of

(violation of *Griffin* rule is harmless error); United States v. Morrison, 449 U.S. 361, 366-67 (1981) (violation of sixth amendment right to counsel is harmless error); Harrington v. California, 395 U.S. 250, 254 (1969) (violation of *Bruton* rule is harmless error). *See also* Connecticut v. Johnson, 103 S. Ct. 969, 74 L. Ed. 2d 823 (1983), in which a four-to-four split resulted on the issue of whether *Sandstrom* error was subject to a harmless error analysis. Justice Stevens cast the deciding vote on different grounds, affirming the Connecticut Supreme Court's decision reversing the conviction on the counts affected by the erroneous instruction. For Justice Stevens's view of the harmless error doctrine, see Rose v. Lundy, 455 U.S. 509, 543-44 (1981) (Stevens, J., dissenting).

267. "A crucial assumption underlying [the system of trial by jury] is that juries will follow the instructions given them by the trial judge." Parker v. Randolph, 442 U.S. 62, 73 (1979); *see also* R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 73, 74 (1970) ("The concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law to all material issues in the case.").

the evidence and instructions. Although the now famous Chicago Jury Study conducted by Kalven and Zeisel concluded that jurors reach the same result as the trial judge in seventy-five to eighty percent of the criminal cases studied,[268] in reaching the final decision jurors frequently take into account improper considerations. Broeder reported that extrajudicial considerations played some role in the verdict reached in eight of sixteen civil cases and four of seven criminal cases studied.[269] Many writings have discussed the impact on jurors of pretrial publicity.[270] Numerous studies indicate that factors such as sex,[271] race,[272] occupational background,[273] occupational skill,[274] physical appearance of parties,[275] severity of possible sanction,[276] past jury experience,[277] and consideration of evidence stricken from the record[278] all influence juror decisions.[279] Furthermore, many studies have concluded that a very large number of citizens eligible to be jurors believe that if a person is charged in a criminal matter he must be guilty.[280]

If the jurors are to represent a cross-section of the community, they will bring with them a cross-section of the bias, prejudices, and other shortcomings of society, along with perhaps more noble qualities. A close inquiry into the reasons why a juror reached a particular decision, or why the jury as a whole reached a verdict, will frequently reveal impropriety in the use of evidence, consideration of nonevidentiary matters, and a partial misapplication of some of the jury instructions. To have the validity of a jury verdict turn on the post-trial explanation of the individual jurors endangers the stability and finality of those jury verdicts properly entered.

Although many jurors might be influenced by self-interest when testifying

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268. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 57 (1966).

269. Broeder, *Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look*, 40 N.Y.U.L. REV. 1079 (1965).

270. *See, e.g.*, Dobbert v. Florida, 432 U.S. 282, 301-03 (1977); Sheppard v. Maxwell, 384 U.S. 333 (1966); Irvin v. Dowd, 366 U.S. 717, 725-29 (1961); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 8-3.3(c) (2d ed. 1980); Sue, Smith & Gilbert, *Biasing Effects of Pretrial Publicity on Judicial Decisions*, 2 J. CRIM. JUST. 163 (1974).

271. Mann & Strodtbeck, *Sex Role Differentiation in Jury Deliberations*, 19 SOCIOMETRY 3 (1956); Snyder, *Sex Role Differential and Juror Decisions*, 55 SOCIOLOGY & SOC. RESEARCH 442 (1971); Stephan, *Sex Prejudice in Jury Simulation*, 88 J. PSYCHOLOGY 305 (1974).

272. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 19-30.

273. Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. L. & SOC. CHANGE 1 (1973); Broeder, *supra* note 269; Hermann, *Occupations of Jurors as an Influence on Their Verdict*, 5 FORUM 150 (1970).

274. Broeder, *supra* note 269.

275. Friend, *Leaning Over Backwards: Jurors' Response to Defendants' Attractiveness*, J. COM. 124 (1974); Solender & Solender, *Minimizing the Effect of the Unattractive Client on the Jury: A Study of the Interaction of Physical Appearance with Assertions and Self-Experience References*, 5 HUMAN RIGHTS 201 (1976).

276. H. KALVEN & H. ZEISEL, *supra* note 268, at 306-12; Hester, *Effects of a Mandatory Death Penalty on the Decisions of Simulated Jurors as a Function of Heinousness of the Crime*, 1 J. CRIM. JUST. 319 (1973).

277. Broeder, *Previous Jury Trial Service Affecting Juror Behavior*, 506 INS. L.J. 138 (1965).

278. Sue, Smith & Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOLOGY 345 (1973).

279. *See supra* notes 168-79.

280. *See* NATIONAL JURY PROJECT, JURYWORK, SYSTEMATIC TECHNIQUES § 2.04 (2d ed. 1983) and studies cited therein.

about their verdict, jurors will often come forward willingly to testify that their verdict was improperly rendered. Particularly in cases in which unanimous verdicts are required, judges encourage jurors to compromise and make accommodations.[281] Jurors may make accommodation reluctantly and perhaps once free from the isolation and pressures of the jury room, they develop second thoughts about their accommodations and compromises. Such a juror might be easily influenced by counsel to testify that certain evidence improperly admitted, or other improper circumstances, influenced his or her decision to assent to the verdict. The finality of jury verdicts can be undermined if their validity can be easily destroyed by such testimony.

The Supreme Court has not squarely decided whether establishing that one of the jurors was prejudiced is sufficient to taint the entire verdict. Certain language in *Rushen* indicates that the majority might require proof that more than one juror was prejudiced. Justice Stevens's concurring opinion addressed the issue, stating that the jury's deliberations "as a whole" were biased if only one juror was improperly influenced in his deliberations.[282] In *Parker* v. *Gladden* the Court responded to the state's argument that ten of the jurors testified that they had not heard the bailiff's statements by stating that the petitioner was entitled to be tried by a full twelve impartial and unprejudiced jurors.[283]

The Court's decisions emphasizing the use of post-trial hearings enhance the motivations and responsibility of losing attorneys to conduct post-trial interviews with jurors to elicit testimony necessary to overturn the verdict. This result will have a detrimental impact on the protection of juror privacy. Some jurisdictions offer additional protection by substantially limiting the attorney's post-trial investigation of possible juror misconduct.[284] To the extent that the Court's rulings encouraging post-trial hearings and relying on juror testimony about actual bias or prejudice are premised on constitutional grounds, the federal and local evidentiary rules must be superseded. Those procedural rules that preclude counsel from investigating and developing evidence from the jurors about the potential constitutional violations are substantially suspect if not patently unconstitutional. The substantial concern for juror privacy, therefore, is largely ignored.

VI. DEMISE OF FEDERAL RULE OF EVIDENCE 606(b)

The demise of federal rule 606(b) was inevitable. The attempt to effectuate significant policy considerations affecting vital substantive rights by rules

281. *See* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS §§ 18.01, .14 (3d ed. 1977 & Supp. 1981).

282. Rushen v. Spain, 104 S. Ct. 453, 462 n.9, 78 L. Ed. 2d 469, 281 n.9 (Stevens, J., concurring).

283. 385 U.S. 363, 366 (1966) (citing State v. Murray, 164 La. 883, 888, 114 So. 721, 723 (1927) (new trial required because of deputies' statements to jurors although nine jurors testified that deputies did not attempt to influence their judgment and ten jurors voted to convict when only nine votes were necessary to convict)).

284. *See generally* 3 WEINSTEIN'S EVIDENCE, *supra* note 126, ¶ 606[06]; Palmer, *Post-Trial Interview of Jurors in the Federal Courts—A Lawyer's Dilemma*, 6 HOUS. L. REV. 290 (1968) (describing severe limitation on lawyer examination of jurors).

of competency is like trying to eat soup with a fork. Although by proper manipulation some nourishment can be supplied, the process is hit or miss with substantial and unacceptable side effects.

The competency rules originally centered on considerations of protecting the court from suspect testimony, thus adding to the truth-finding function of the trial.[285] Although a few remnants of traditional competency rules remain, the clear trend, which is almost complete now, is to abrogate rules of competency.[286] The Federal Rules of Evidence follow this trend by substantially liberalizing the law of competency in federal courts, leaving rule 606(b) as an anomaly.[287] The policies behind the rule, which are the interest in the privacy of the deliberations, avoiding juror harassment, and finality, must, however, be addressed.

The interest in juror privacy is cited as an important consideration in the proper functioning of the jury and has been relied on as justification for the limited competency of jurors in post-trial hearings. Jurors must be free to engage in robust debate without fearing governmental or public reprisals for the views expressed in the debate.[288] The line between the exercise of the traditional power of juror nullification and contempt of court or violation of the juror's oath to uphold the law is not at all clear, particularly to lay jurors. If the essential role of the jury is to serve as a check on governmental tyranny in the exercise of the laws, then the jurors must be free from government scrutiny and possible retaliation. Of course if the main concern is rational decisionmaking, that jurors must act in accordance with their oaths to return the result that is indicated only from admissible evidence and straightforward application of the laws, then perhaps we must require more accountability on the part of the jurors.

The interest in rational decisionmaking does not totally preclude the protection of confidentiality of juror communications. In other contexts the protection of the confidentiality of communications is recognized as necessary to the proper functioning of a particular relationship essential to our society. Thus, communications from clients to lawyers,[289] executive advisors to the President of the United States,[290] or informants to the prosecutor[291] or journalists[292] are afforded protection by the courts in the form of an evidentiary privilege. The distinction between privilege and competency,

285. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 61 (E. Cleary 2d ed. 1972).

286. *Id.* §§ 61-71; 3 WEINSTEIN'S EVIDENCE, *supra* note 126, ¶ 601[03].

287. FED. R. EVID. 601-606 & 601 advisory committee note.

288. *See supra* notes 91-103 and accompanying text.

289. Upjohn Co. v. United States, 449 U.S. 383, 389-97 (1981).

290. United States v. Nixon, 418 U.S. 683, 705-06 (1974) (privilege gave way, however, to legitimate needs of judicial process).

291. Roviaro v. United States, 353 U.S. 53, 58-60 (1957).

292. *See* Riley v. City of Chester, 612 F.2d 708, 713-15 (3d Cir. 1979); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977). *But see* Branzburg v. Hayes, 408 U.S. 665 (1972) (absolute privilege denied in criminal trial); Caldero v. Tribune Publishing Co., 98 Idaho 288, 562 P.2d 791 (journalist had no privilege against disclosure of identity of expert source), *cert. denied*, 434 U.S. 930 (1977).

however, is substantial.[293] In the first place privileges, which are based on protection of confidential communications, can be waived if the owner of the privilege no longer is concerned about maintaining the confidentiality of the communication.[294] Second, with few exceptions,[295] the privilege is generally not absolute and gives way when the information claimed to be privileged directly affects a criminal prosecution or the assertion of an accused's constitutional rights.[296] Juror privilege, not juror incompetency, should be the proper vehicle to protect the interest in privacy and confidentiality of juror deliberations.[297]

A second concern is that free availability of juror testimony to impeach verdicts will encourage harassment and intimidation of jurors. Although the precise nature of this concern is rarely developed,[298] it appears to be comprised of several different notions. First, jurors should not be bothered by persistent investigators insisting on repeated interviews that may lead to extended hearings in which the jurors are witnesses or are required to sign affidavits.[299] Second, clever investigators might take advantage of less clever lay jurors and plant ideas leading to affidavits or juror testimony shaped more by the investigator than by the juror witness.[300] Finally, jurors may be coerced or bribed into providing false testimony.[301]

Although the concerns might be genuine, and have certainly been consistently expressed by the courts and commentators, they fall short of justifying

293. C. MCCORMICK, *supra* note 285, §§ 72-73.

294. *See* Trammel v. United States, 445 U.S. 40, 43-53 (1980).

295. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 706 (1974) (state secret privilege might be absolute); Duplan Corp. v. Moulinage et Retourderie de Chavanoz, 509 F.2d 730, 733 (4th Cir. 1974) (work product protection for attorney thought processes absolute), *cert. denied*, 420 U.S. 997 (1975). The fifth amendment privilege against self-incrimination could be considered absolute although proper grant of immunity could justify compelling testimony. Kastiger v. United States, 406 U.S. 441, 443-62 (1972).

296. *See* United States v. Nixon, 418 U.S. 683, 707-13 (1974); Branzburg v. Hayes, 408 U.S. 665, 679-709 (1972).

297. *See supra* note 107 and accompanying text.

298. The advisory committee note to FED. R. EVID. 606(b) cites Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964), in support of this proposition. The submission by the Justice Department to the Standing Committee on Rules of Practice and Procedure (*see supra* notes 134-35 and accompanying text) cites Miller v. United States, 403 F.2d 77 (2d Cir. 1968), and United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967), as cases supporting the view that a broad juror incompetency rule is necessary to avoid harassment of jurors by unsuccessful litigants. Of the three cases noted above, only *Miller* even arguably involved any post-trial harassment of jurors. In *Grenz* all 12 jurors signed affidavits stating that they believed the defendant not guilty of gross negligence, contrary to their verdict. The opinion includes no mention of harassment of these jurors. In *Driscoll* the court enjoined a post-trial investigation similar to the investigation in Parker v. Gladden, 385 U.S. 363 (1966). Again nothing in the opinion indicates juror harassment in this case. In *Miller* a juror was threatened during the trial by an unknown person. The arguable post-trial harassment came about when a private investigator, described by the court as "an attractive petite blonde, twenty-two years old" conducted lengthy wide-ranging interviews with jurors. She made unannounced visits to jurors' houses and paid a second visit to three jurors who refused to be interviewed.

299. Miller v. United States, 403 F.2d 77, 82 (2d Cir. 1968).

300. In Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964), each of the 12 jurors signed a separate, but identically worded, affidavit.

301. *See* Virgin Islands v. Gerau, 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

the retention of the unique concept of incompetency of juror testimony. In the first place, the incompetency rule precludes jurors from willingly providing testimony. The jurors are also free to refuse to talk to investigators and lawyers. The trial judge should as a matter of course instruct jurors as to their rights and the juror privilege.[302] The exercise of the juror privilege would ensure that the jurors could not be compelled to talk about the proceedings absent a court order and judicial determination that the privilege is inapplicable or has been waived. Lawyers are specifically precluded from harassing jurors by the enforcement of existing ethical standards.[303] Appropriate sanctions can be leveled at an attorney who persists in bothering jurors after the juror informs the lawyer of his unwillingness to discuss the case. If the juror is aware of the right to refuse and still chooses to talk, then no harassment has occurred.

The process of interviewing jurors after a verdict does not appear to present more of an opportunity for unseemly conduct on behalf of the interviewer than the process of interviewing witnesses prior to the trial. In both cases the interviewer might act improperly and plant suggestions to the unwary witness. No one has suggested that lawyers should not interview witnesses. This concern for interviewing jurors reflects an underlying view that jury verdicts are so fragile that they can be overturned easily by a carefully worded phrase sworn to by one juror. The types of misconduct or testimony that would be sufficient to overturn a verdict should be addressed directly as a matter of substantive or perhaps constitutional policy. An improper verdict should not be artificially protected by procedural or competency rules that limit the court's access to evidence relevant to the issue of whether the verdict should be overturned. Finally, since the competency rule has numerous exceptions, and in criminal cases inquiries into constitutional violations might be appropriate despite the language of the rule, the rule does not eliminate the need for the conscientious lawyer to interview jurors to assess whether the jurors have committed misconduct and whether this particular type of misconduct is susceptible to juror testimony.

The concern for juror intimidation likewise does not support the incompetency rule. In most cases jurors are no more susceptible to intimidation when they become a witness at a post-trial hearing than they were as sitting jurors. A finely drawn competency rule is also unlikely to influence the miscreant who is set on threatening a juror. Arguably, a criminally accused might be reluctant to make a threat to a juror prior to a verdict for fear that the juror might react adversely to the accused. After the verdict, presuma-

302. Part of the court's concern in *Miller* was that "[a] juror so interviewed often does not know what he is supposed to do or supposed not to do." 403 F.2d at 82. The trial judge should fully instruct jurors about their rights so they are not placed in this situation.

303. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D), which still serves as the model for state ethical codes. Disciplinary Rule 7-108(D) states:

> After the 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.

Id.

bly the now convicted individual might believe that he has less to lose by threatening a juror. Developing a rule of competency applicable in all cases to guard against this one possibility of abuse, however, is not warranted. All participants in the prosecution of a criminal case, including the prosecutors, the judge, the investigators, and the witnesses, may be targets for threats.

An additional concern is the public pressure or ostracism that jurors might feel if the public is appraised of their expressed views or misconduct in a controversial case. The competency rule, however, is not a rule of secrecy[304] that precludes jurors from talking about their deliberations; it precludes only their testimony. Courts have been unwilling to enjoin journalists from interviewing jurors and publishing the interviews since the public has an interest in the trial proceedings.[305] The public cannot be totally precluded from the voir dire,[306] and the return of the verdict and polling of the jury is a public act. The rule of competency does not protect jurors from public attention.

The interest in finality is the most substantial concern prompting the historic rule that limits juror testimony about the deliberations and verdict. The unspoken assumption is that a close inquiry into how the jury reached its verdict will frequently reveal impropriety. The stated assumption upon which our jury trial system is based, however, is that the jurors will act properly.[307] We instruct the jury about the presumption of innocence and the burden of proof; that they are not to draw an inference from the fact that the accused did not testify; that evidence of past criminal convictions of the accused is offered only on the issue of credibility and should not be considered in determining whether the accused committed the crime with which he is charged; or that the testimony ruled inadmissible by the judge should not be considered by the jury. Although we must assume that the jury correctly abided by the instructions, few believe that jurors always do. To disprove our assumption would be to disprove the validity of the trial process upon which we rely for dispute resolution in the United States. We therefore ignore the fallacy of our assumption and block the avenue of proof to those few individuals who foolishly attempt to disprove our assumption. The great wealth of social science data providing an empirical basis for disproving our assumptions, the recent trend toward recognizing that the accused's constitutional rights extend to the jury decisionmaking process, and the Supreme Court's recent reliance on post-trial juror testimony all require a reevaluation of the central role of the jury in criminal cases as guaranteed by the Constitution.

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304. Senator McClellan raised the possibility of providing the same cloak of secrecy around petit juries that now protects the grand jury. *See supra* note 135.

305. United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978).

306. Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 821-25, 78 L. Ed. 2d 629, 634-40 (1984).

307. *See, e.g.*, DeWitt v. Brown, 669 F.2d 516, 523 (8th Cir. 1982); Madrid v. Mine Safety Appliance Co., 486 F.2d 856, 860 (10th Cir. 1973); Moskowitz v. Peariso, 458 F.2d 240, 244 (6th Cir. 1972).

VII. JURY TRIAL RIGHTS GUARANTEED BY THE CONSTITUTION

The view expressed by the Supreme Court that "[n]o right ranks higher than the right of the accused to a fair trial"[308] must be reconciled with the historic rule limiting the accused's access to relevant proof that his trial was tainted by juror misconduct or impropriety. This reconciliation must focus on defining or redefining the essential nature of the jury trial rights in the American trial process. If the essential feature of the jury trial is a search for the truth, based on rational and proper decisionmaking, then the interest in finality must give way when the jury's decision appears to be tainted in part by improper considerations or impropriety in the decisionmaking process. Substantial post-trial litigation focusing on the activities and deliberations of the jurors would be necessary to ensure that this constitutional right of the accused was not violated. Based on the empirical data and a review of the numerous cases in which some type of jury misconduct is documented, this approach would likely result in the discovery of impropriety or misconduct in a large number of cases. To restrict the possibility of misconduct and thereby reduce the number of new trials that might result, courts will have to give jurors better training, instructions, and perhaps even closer supervision.

The more traditional and workable concept of the constitutional role of the jury is to view it as an exercise in democratic decisionmaking. Initially, an accused is entitled to be judged by peers who are fair and impartial.[309] These peers should be permitted to decide the case free from undue government influence.[310] How or why a jury reached a particular decision is irrelevant from a constitutional perspective as long as the jurors were free from government influence and the parties had an equal opportunity in the adversary process. The latter requires the opportunity to engage in meaningful voir dire, the presentation of evidence, and confrontation and cross-examination of government witnesses. From a constitutional perspective, the way that the jurors reached the decision is of no consequence; they could have flipped a coin; used inadmissible or improper considerations, improper preconceptions, bias, or false logic; misunderstood the instructions; or used independent research or a newspaper article.[311] The key consideration should be whether the defendant received a fair opportunity to present his case to a group of lay persons who were properly selected and screened for bias and who were free to decide the case unfettered by improper government influence or outside coercion.

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308. Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629, 637 (1984).

309. Witherspoon v. Illinois, 391 U.S. 510, 514 (1968).

310. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

311. As a matter of substantive nonconstitutional law, states and federal courts should be free to implement or maintain a policy making this type of jury misconduct grounds for a new trial. A juror's exposure to an occasional newspaper article should be distinguished from the extreme case in which the publicity accompanying the trial has such an impact on the trial process as to violate the accused's right to due process. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

Improper conduct by government officials that might have the result of influencing the jury would be the most serious misconduct. Not every casual conversation between a court official and a juror, however, need result in a mistrial or reversal. As the *Rushen* Court pointed out, jurors and judges might have numerous conversations on a day-to-day basis about minor administrative matters unrelated to the issues in the case. In the *Parker* type of case, in which a bailiff makes statements to jurors reflecting directly on the guilt of an accused, the conviction should, however, not stand. The decision should be reversed even if an abundance of independent evidence could have led the jury, and does lead the appellate court, to conclude that the defendant is guilty. Even a guilty person is entitled to the basic rudiments of a fair trial, including the right to be tried by a fair and impartial jury unfettered by improper government intervention. The inquiry should not be whether this improper contact actually had an impact on the jurors' deliberations or decision, but whether government conduct of this type is inconsistent with the view of the jury trial rights expressed in the Constitution.

The issue in *Remmer* similarly would not center on whether individual jurors can articulate the extent to which they believe that FBI investigations cast a chill over their discussions and played a part in their decision to convict. The issue should be phrased in terms of whether our fundamental notion of trial by jury as a check against government tyranny was impaired by the FBI investigation of jurors. In *Rushen* the trial judge's ex parte conference with the juror was not the real concern, although the communication constituted the error that the Supreme Court addressed on appeal. The real concern, as pointed out by Justice Stevens, was that the conversations revealed a potential bias that was inconsistent with the juror's voir dire testimony. The majority addressed the issue of whether the denial of the right to counsel or the right to be present at critical stages was harmless error, but the real concern should have been whether the defendant was denied his right to a fair and impartial jury. In looking for harmless error, the Court engaged in metaphysics at a constitutional level and attempted to ascertain whether the juror's improper contacts or childhood recollections of Black Panther violence colored her subjective decision in the case. The true constitutional issue is whether a person who had a friend murdered by a Black Panther can serve as juror in the murder trial of another Black Panther consistent with the constitutional right to be tried by a fair and impartial jury. The issue is essentially the same as it would be had the juror answered accurately on voir dire and the judge had refused to dismiss her for cause.

Phillips raised an issue that spans the gap between improper government intrusion into the jury room and a potentially biased juror. The governmental misconduct basically included nonfeasance, which was the failure of the prosecutor to notify the court and the opposing counsel of an improper contact by a juror. In the background of the case it appears that some contact occurred between a government official, who was a friend of the juror, and the juror. The Court did not specifically address the implications of this contact. These facts raise the issue of whether this informal contact by a

government agent about an unrelated matter and the state's nondisclosure intrudes on the defendant's right to a jury decision unfettered by government coercion.

The main issue is raised, not by the government's action, but by the juror when he applied for the job. The juror's action does not involve a misstatement on voir dire and is of concern only because of the economic position in which it places the juror during the deliberations of the case. The independent conduct of a juror after voir dire should ordinarily neither implicate the defendant's rights to a fair or impartial jury, nor involve government or outside intrusion into the decisionmaking process. Since the juror applied to the prosecutor's office, however, and the office was apprised of the juror's conduct, the state's lack of disclosure becomes critical to the fair trial issue. The constitutional analysis, however, should not focus on the extent to which this juror's ultimate decision to convict was based on factors relating to the job application. The issue basically should be whether the defendant was deprived of his right to a fair and impartial jury when one of the jurors applied for a job with the prosecuting attorney.

This approach is precisely the one used by the Court in *McDonough Power Equipment, Inc. v. Greenwood*.[312] In this civil action petitioner claimed that a juror failed to answer truthfully a voir dire question about whether he or a member of his family had ever sustained a severe injury. Emphasizing the need for efficiency, economy, and finality, the Court pointed out that litigants are entitled to a fair trial, but not a perfect trial.[313] In affirming the decision, the Court set out the following two-tier test:

> A party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of the trial.[314]

No showing that the juror was actually biased or that his predisposition had any impact on the verdict or deliberations is required. The Court cited *Smith v. Phillips* without analyzing the opinion, but did not cite *Rushen v. Spain*, despite the issue similarities in *Greenwood* and *Rushen*. Presumably in *Greenwood* a different approach is justified because the criminal constitutional issues addressed in *Rushen* and *Phillips* are not implicated. The Court, however, did discuss whether petitioner received a fair trial in *Greenwood*. Although the interest in liberty and the stigma associated with criminal prosecutions might require some accommodation, the basic rudiments of a fair trial should be similar in civil and criminal proceedings.

Focusing on the broader issue, rather than on the factual inquiry ascertaining why jurors voted the way they did, involves a more traditional appellate function. Courts must analyze policies and reconcile numerous

312. 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984).
313. *Id.* at 848, 78 L. Ed. 2d at 669.
314. *Id.* at 850, 78 L. Ed. 2d at 671.

concerns expressed in the Constitution. A broader focus permits the appellate courts to address the key substantive issues of the proper role of the jury in our adversary system and the proper relationship between the federal and state courts and the appellate and trial courts. Once the appellate courts develop a clear policy on these issues, this policy can be uniformly and efficiently effectuated by the trial courts. In the end the change will perpetuate finality of verdicts and a greater public reception of the judicial processes protecting the basic values giving rise to the constitutional right to jury trial.

VIII. CONCLUSION

Federal Rule of Evidence 606(b), which precludes a convicted defendant from introducing evidence of juror misconduct on the ground of incompetency, cannot be reconciled with recent Supreme Court decisions recognizing the accused's constitutional rights in the decisionmaking process of the jury. The current view of the trial as essentially a truth-finding process and the emphasis on post-trial hearings of jurors to determine as a factual matter the actual impact on jurors of any alleged misconduct or error are inconsistent with the policy and language of the federal rule limiting testimony on these crucial facts. The courts and legislature must engage in a reconciliation of these competing concerns. To some extent the reconciliation process has been underway for years with the continuing examination and reexamination of the role of the jury, the voir dire, and the trial process. To resolve the problems effectively, however, the courts must engage in a comprehensive reevaluation of the essential nature of the jury trial in America. Substantive rights must be redefined and, once defined, certainly not impaired by inconsistent procedural rules. Clear distinctions must be made between constitutional rights, binding on the states and cognizable in federal courts, and other policy or procedural concerns about which the states may make their own accommodations free from scrutiny of the federal courts. The inquiry must not only involve an examination of the role of the jury as an isolated institution, but also in the context of our trial and appellate process. The examination should address the historical development and role of the jury, as well as the great wealth of recent empirical data on the workings of the jury. The interests of juror privacy and finality represented in the evidentiary rule must be considered and accommodated to the extent permitted by the prevailing view of the jury trial right provided in the Constitution.