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Impeachment of Jury Verdicts: Tanner and Beyond

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IMPEACHMENT OF JURY VERDICTS: *TANNER v. UNITED STATES* AND BEYOND

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INTRODUCTION

The jury, passing on the prisoner's life,
May in the sworn twelve have a thief or two
*Guiltier than him they try.***

More than three hundred years ago, William Shakespeare recognized that problems occur in the jury box. For almost as long, courts have been wrestling with the question of what to do when a problem is brought to light after the jury has returned its verdict. In 1785, Lord Mansfield wrote the opinion in the now famous case, *Vaise v. Delaval*,[1] that held that the testimony of a juror is not admissible to impeach the jury's verdict. The *Vaise* decision did not determine the matter, and courts continued to address the issue over the next two centuries, reaching conflicting results.[2] Although the enactment of Rule 606(b)[3] of the Federal Rules of Evidence in 1975 provided further guidance, the continuing difficulty of the problem is demonstrated by the United States Supreme Court's reconsideration of the issue in 1987, two years after the bicentennial of the *Vaise* decision, in *Tanner v. United States*.[4] The five to four decision in *Tanner*, however, did not resolve the problem, it only engendered heightened debate.[5]

Why, after more than two centuries of study and consideration by the courts and legal scholars alike, does the debate over the impeachment of jury verdicts persist? The problem is not one susceptible to an easy solution. If we lived in a perfect world, fair and impartial juries would be selected; they would listen to the evidence, retire to the jury room, discuss the evidence rationally in a cordial manner, follow the court's instructions, reach a just and logical verdict, accurately report that verdict and be excused. Un-

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** W. SHAKESPEARE, MEASURE FOR MEASURE, at II.i. 19.

[1] 99 Eng. Rep. 944 (K.B. 1785).

[2] *See, e.g.*, McDonald and United States Fidelity and Guar. Co. v. Pless, 238 U.S. 264 (1915).

[3] FED. R. EVID. 606(b); *see infra* note 111 (text of Fed. R. Evid. 606(b)).

[4] 483 U.S. 107 (1987).

[5] *See* Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 218-33 (1989); Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C.L. REV. 509, 520-25 (1988); Comment, Tanner v. United States: *Does Fed. R. Evid. 606(b) Foreclose Postverdict Inquiry Into Juror Intoxication?*, 10 CRIM. JUST. J. 347, 350 (1988); Rothstein, *Federal Rules of Evidence: A Fresh Review and Evaluation*, 1987 A.B.A. CRIM. JUST. SECTION, *reprinted in* 120 F.R.D. 299, 353-54 (1987).

fortunately, a myriad of problems can develop during this process, for example, a juror's untruthful response to a voir dire question may result in his improper placement on the jury. Jurors may base a verdict on rumors, newspaper accounts, or comments by court personnel. Inadmissible evidence or bias against a party may influence a jury verdict. Litigants, third parties, or even other jurors may threaten or pressure jury members to reach a certain verdict. The jury may misunderstand the court's instructions or the ramifications of its verdict. Furthermore, a jury verdict may be founded on a compromise, quotient, or even a coin toss.

Although the above examples are disturbing, many problems may usually be obviated if they are detected prior to the verdict. In most cases, courts can excuse a juror, give cautionary instructions to the jury, or take other action to eliminate these problems and thereby permit the jury to proceed with its deliberations and return an untainted verdict.[6] However, if the problem is first detected after the verdict is rendered, the damage is not easily undone. At that point the case is over; the jury has been excused, and to the parties and all the world the verdict is final. Moreover, any inquiry into the verdict may require interviewing jurors and compelling them to testify about their secret deliberations. Such an invasion of the jury room is considered antithetical to the traditions of our jury system. Undoubtedly, these inquiries present certain risks and dangers.

Conceptually, it is important to view the law governing impeachment of jury verdicts not as an evidentiary rule, but as a body of law comprised of many elements, each affecting the other. While it is true that Rule 606(b)[7] does deal with the issue directly, other principles, such as procedural rules preventing the initiation of a postverdict inquiry, limitations on the grounds for impeachment, court rules restricting contact with jurors, and the finding of harmless error, can, individually or collectively, have a more significant impact on the outcome of a particular case. This body of law, viewed as a whole, is driven by a number of policy considerations. The issue of impeachment of jury verdicts involves a tension be-

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[6] *See* Eades v. State, 75 Md. App. 411, 419, 541 A.2d 1001, 1005-06 (1988); Chandler v. U-Line Corp., 91 N.C. App. 315, 324-25, 371 S.E.2d 717, 722-23 (1988); Kornstein, *Impeachment of Partial Verdicts*, 54 ST. JOHN'S L. REV. 663, 675-76 (1980); Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920, 959-60 (1978).

[7] FED. R. EVID. 606(b); *see infra* note 111 (text of Fed. R. Evid. 606(b)).

tween two competing interests. On the one hand, a case must be decided solely on the evidence presented before a fair and impartial jury. On the other hand, there is a well-recognized need for confidentiality of jury deliberations and finality of verdicts. The merits of the first interest are obvious. A party, particularly a criminal defendant, is entitled to a verdict based solely on evidence presented to a fair and impartial jury.[8] Therefore, if it later appears that the jury was improperly influenced or considered matters outside the evidence in its deliberations, the verdict should be set aside. Such policy concerns have led many authorities to advocate the need for more liberal rules governing impeachment of jury verdicts.[9]

Congress and the courts have disregarded these calls. Instead, in deference to the need for preserving the confidentiality of jury deliberations and the finality of the verdict, they have increasingly restricted the impeachment of jury verdicts. This may, in part, be attributable to the view that the jury system can serve as a protector of our liberty only if the secrecy of deliberations is maintained. It may also reflect a concern that impeachment of jury verdicts presents a temptation to engage in one of the greatest hazards to the jury system—threats and intimidation of jurors. Furthermore, because an intimidated juror seldom will reveal the incident of intimidation, there is little chance that the corruption will be revealed. It may be that Congress and the Judiciary simply do not believe most of the allegations made in connection with attacks on jury verdicts. Whatever the reason, however, their pursuit of a more restrictive approach is undeniable.[10] It is interesting to note that the first consideration—ensuring a verdict rendered by a fair and impartial jury—appears to place greater weight on the reliability of the result in a particular case, while the second concern—verdict finality and confidentiality of jury deliberations—places greater emphasis on the integrity of the jury system as a whole. This distinction may well play a critical role in resolving the issues.

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[8] *See infra* text accompanying notes 52-60.

[9] *See, e.g.*, Alschuler, *supra* note 5, at 221-33 (advocating stricter review of juror conduct); Crump, *supra* note 5, at 511-13 (advocating narrow targeted view as most advantageous); Thompson, *Challenge to the Decisionmaking Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial*, 38 Sw. L.J. 1187, 1202-29 (1984-1985) (recognizing conflict between Rule 606(b) and sixth amendment).

[10] *See infra* notes 139-238 and accompanying text.

This Article will commence with an examination of the reasons that courts have rejected the repeated calls for revision of Rule 606(b) and the adoption of more liberal rules governing impeachment of jury verdicts. Next, it will review alternative rules and approaches which have been overlooked by many commentators. Finally, this Article will attempt to determine the impact of these concepts on future developments in this area of the law.

I. Policy Considerations Underlying Restrictions on Impeachment of Jury Verdicts

The law governing impeachment of jury verdicts is founded on certain policy considerations. As noted earlier, a tension exists between the need for confidentiality of deliberation and verdict finality, and the requirement that the case be decided solely on the evidence presented to a fair and impartial jury. Each of these competing concerns implicates a complex matrix of sub-issues requiring difficult value judgments. These judgments must be guided by public policy considerations, such as the sanctity of jury deliberations, finality in jury determinations, and the necessity of a fair trial.

A. The Sanctity of Jury Deliberations

Perhaps the most important of these policy considerations is the sanctity of jury deliberations. The United States Supreme Court has expressed concern as to whether the jury system could, in fact, survive if the deliberation process were exposed to public scrutiny after the verdict was rendered.[11] This concern is based upon several different factors; and while many of these factors are interrelated, for the purpose of this discussion, it will be helpful to examine each of them separately.

1. Exposure of Jurors to Postverdict Pressure

The courts have long believed that permitting postverdict inquiries of jury deliberations would provide a means for dissatisfied litigants to pursue, harass, or even threaten jurors in an effort to upset the verdict. As the United States Supreme Court noted in the oft-cited *McDonald v. Pless*:[12]

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[11] *See Tanner*, 483 U.S. at 120.

[12] 238 U.S. 264 (1915).

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.[13]

In order to discourage litigants from engaging in such activities, the courts have created a disincentive, which may be described as an exclusionary rule,[14] similar in principle and substance to the exclusionary rule found in the area of criminal procedure. The rule is based on the premise that litigants can be dissuaded from engaging in unlawful or improper activity by rendering evidence gained from that activity inadmissible. For example, in the area of criminal procedure this is accomplished by ruling that the fruits of unlawful conduct, such as an illegal search, are inadmissible in evidence.[15] In cases involving impeachment of jury verdicts, courts have established an analogous rule of evidence. With some exceptions, this rule provides that evidence gleaned from posttrial interviews is inadmissible.[16] It most often takes the form of a rule

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[13] *Id.* at 267-68; *see Tanner*, 438 U.S. at 120-21 (jury privacy essential to public confidence in verdict); Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1077-79 (3d Cir. 1985) (discussing policies underlying impeachment); Government of the Virgin Islands v. Gereau, 523 F.2d 140, 148-50 (3d Cir. 1975) (same), *cert. denied*, 424 U.S. 917 (1976); Crump, *supra* note 5, at 533-35 (prevention of juror harassment and postverdict persuasion cited as primary policy considerations); Kornstein, *supra* note 6, at 669-71 (discussing reasons behind impeachment); Mueller, *supra* note 6, at 922-24 (same); Note, *Impeachment of Verdicts by Jurors—Rule of Evidence 606(b)*, 4 WM. MITCHELL L. REV. 417, 440-41 (1978) (same); Comment, *To Impeach or Not to Impeach: The Stability of Juror Verdicts in Federal Courts*, 4 PEPPERDINE L. REV. 343, 344-46 (1977) [hereinafter Comment, *Stability of Jury Verdicts*] (same); Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360, 364-65 (1958) [hereinafter Comment, *Impeachment of Jury Verdicts*] (same); Comment, *Juror Privilege: The Answer to the Impeachment Puzzle?*, 3 W. NEW ENG. L. REV. 447, 453-54 (1981) [hereinafter Comment, *Juror Privilege*] (recognizing imperfections in jury performance). *But see* Alschuler, *supra* note 5, at 226-27 (arguing policy considerations do not justify impeachment rule); Thompson, *supra* note 9, at 1224-25 (same).

[14] *See* Mueller, *supra* note 6, at 922-27.

[15] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); Weeks v. United States, 232 U.S. 383, 398 (1914).

[16] *See* Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 365. "The general

rendering jurors incompetent to testify.

The courts and commentators have repeatedly recognized the importance of protecting jurors from posttrial threats and harassment.[17] Because jurors provide a vital public service in exchange for little or no compensation, it is essential that they be protected. Unlike judges, attorneys, police officers, and others familiar with the court, most jurors are largely unacquainted with the judicial process and may derive their views on the system from motion pictures, television shows, and the media. Therefore, they may be more susceptible to subtle and not so subtle pressure, at least in the eyes of a losing party. These concerns are especially legitimate in a small community where the juror may have fears about returning to the neighborhood, particularly after rendering what is viewed as an "unpopular verdict."[18]

It must also be recognized that virtually all litigants, especially criminal defendants, hold some hope of success, and many, if not most, are confident that they will prevail. Only after the verdict is announced does the reality of defeat set in. At that point, the possibly desperate litigant has very few alternatives remaining. To the unscrupulous, securing verdict impeachment evidence from a juror is perhaps the most promising and effective method of upsetting the verdict. Moreover, such a person may resort to threats and intimidation in an attempt to obtain such evidence.[19] The pernicious nature of such contact is compounded by the fact that the threats may be made anonymously, and, due to fear for personal safety or

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practice of defeating most attempts at impeachment by exclusion of jurors' testimony might be justified as a way of discouraging these attempts." *Id.* For an excellent analysis of this rule and a critique of the broad scope of Rule 606(b), see Crump, *supra* note 5, at 535-41.

[17] *See supra* note 13.

[18] *See* Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1079 (3d Cir. 1985). Recognizing this problem the *Nicholas* court stated:

> *Gereau* also reveals the risk of post-verdict inquiries. In *Gereau* the trial judge found that two jurors had given affidavits impeaching their prior verdict because of certain peer "pressures . . . to change [their] verdict" and that "the affidavits were involuntarily made out of fear." He found that one of the jurors who had given an affidavit "also had fears about returning to the community and particularly to his friends in Fredericksted."

Id. (citations omitted) (quoting Government of the Virgin Islands v. Gereau, 523 F.2d 140, 146 (3d Cir. 1975)); *see also* Note, *Public Disclosure of Jury Deliberations*, 96 HARV. L. REV. 886, 894 (1983) (arguing public disclosure negatively affects deliberations).

[19] *See Tanner*, 483 U.S. at 117 (1987). "As it stands then, the rule [FED. R. EVID. 606] would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." *Id.* at 124 (citations omitted) (quoting S. REP. No. 1277, 93d Cong., 2d Sess. 13-14 (1974)).

the safety of family members, the juror may fail to reveal the coercion to the authorities. In such situations, the perpetrator is virtually assured that the impropriety will never be discovered by the court.

Finally, if parties are permitted to interview jurors and use the information gained therefrom, there is a real possibility that both parties will feel compelled to pursue and harass jurors. The losing party will attempt to secure information that will overturn the verdict, and the prevailing party, as a precaution, will seek to secure affidavits supporting the verdict to protect it from attack. In many cases, this may lead to conflicting juror affidavits[20] and encourage a race to the jurors on the premise that the first party to interview a juror has a better chance of obtaining a favorable response.[21] For all of these reasons, the courts have protected jurors from improper postverdict pressure.

2. Suspicion of Postverdict Allegations

Generally, courts view postverdict allegations of juror misconduct with suspicion. Although this skepticism is rarely mentioned explicitly in judicial opinions, it is frequently revealed more subtly. Often, courts have noted that although the situation allegedly existed prior to the verdict, the juror made no mention of it before the verdict was returned.[22] Similarly, opinions note that rather than make a timely report, a juror waited months or even years before mentioning the problem.[23] In cases involving juror competency, courts have placed importance on the fact that neither the trial court, counsel, court personnel, nor other jurors detected the alleged problem.[24] Implicit, if not explicit, in all of these observations is the conclusion that the court simply did not believe the

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[20] *See Nicholas*, 759 F.2d at 1075-77 (discussing issues resulting from production of conflicting affidavits).

[21] In such cases, not only is the juror harassed by both parties, but he becomes the determinant figure, thereby increasing the incentive for coercion, threats, or even bribery. *See* Shamburger v. Behrens, 418 N.W.2d 299, 304 (S.D. 1988).

[22] *See Nicholas*, 759 F.2d at 1080-81; United States v. Pellegrini, 441 F. Supp. 1367, 1371 (E.D. Pa. 1977), *aff'd*, 586 F.2d 836 (3d Cir.), *cert. denied*, 439 U.S. 1050 (1978).

[23] *See Tanner*, 483 U.S. at 120 (noting that in *Nicholas*, juror's allegation of impropriety was first made one year and eight months after the verdict was returned); *see also* United States v. Piccarreto, 718 F. Supp. 1088, 1091-92 (W.D.N.Y. 1989) (complaint lodged two months after verdict).

[24] *See Tanner*, 483 U.S. at 125-27; Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1075-77; *Piccarreto*, 718 F. Supp. at 1094.

representations made by the juror.

Misgivings may also be based on concerns that are present in all cases. As a general rule, courts are inclined to reject any postverdict change in position. For example, in witness recantation cases, courts have consistently ignored witnesses' claims that they testified falsely and therefore wish to change their testimony.[25] Many of the concerns underlying the decisions in the witness recantation cases are also present in cases involving impeachment of a jury verdict. In fact, many verdict impeachment cases can be aptly described as "juror recantation" cases.

If a juror is compromised by threats or coercion, questions arise as to the veracity of anything that the juror says. Obviously then, statements or affidavits made by the juror with regard to juror misconduct are also called into question. Perhaps even more importantly, compromised jurors are likely to make false representations as to the spontaneity of their revelations or their motivations in coming forward. A juror who is induced by threats to make statements impeaching a verdict certainly will not admit that he was coerced. On the contrary, for self-protection and the protection of loved ones, the juror will claim that he came forward to correct an injustice. Thus, in most cases, it will never be known whether the juror's representations of misconduct were induced by threats or by a sincere desire to correct a mistake.[26] For this reason, the court may be suspect, not only of the substance of postverdict allegations made by jurors, but also of the representations made by the jurors concerning their motivations in coming forward.

There are other situations that can lead a juror to make incorrect statements tending to impeach the jury's verdict. It may be very uncomfortable for jurors to deal with interviews initiated by dissatisfied litigants, and jurors may make inaccurate statements to avoid a confrontation, to disassociate themselves from what is perceived to be an unpopular verdict, or simply to escape from the party's presence. A false statement may also be precipitated by bad feelings developed in the heat of jury deliberations, the notion that one's views were not respected, or even hostility towards other

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[25] *See* United States v. Massac, 867 F.2d 174, 177-79 (3d Cir. 1989); United States v. Kearney, 682 F.2d 214, 219-21 (D.C. Cir. 1982); United States v. Mackin, 561 F.2d 958, 960 (D.C. Cir.), *cert. denied*, 434 U.S. 959 (1977).

[26] *See* United States v. Howard, 506 F.2d 865, 868 n.3 (5th Cir. 1975).

jurors.[27] Furthermore, a juror may agree with a verdict at the time of the vote, but later have second thoughts about the decision, especially after being subjected to comments, criticisms, and pressures of family, friends, and the community at large.[28] While none of these circumstances should constitute grounds for upsetting a jury verdict, they could lead a juror to make incorrect statements at odds with the jury's decision.

Finally, the courts have recognized that the possibility of outright fraud by a juror exists. For example, a juror may attempt to extort money from the prevailing party under a threat that he will expose information that could be used to impeach the verdict.[29] Prevention of such fraud is one of the central purposes of the rules limiting postverdict juror testimony.[30]

3. The Chilling Effect on the Deliberative Process

The United States Supreme Court, in *McDonald v. Pless*,[31] noted its concern that public investigations into jury verdicts could lead to "the destruction of all frankness and freedom of discussion and conference."[32] Under our system, jurors weigh the evidence and arguments of counsel, hear the instructions given by the court, and then retire to the jury room to deliberate. From the often disparate views of all of the jurors, they attempt to forge a single fair and just verdict. A group can deliberate effectively only if its members feel free to express their views candidly, without fear of embarrassment or reprisal. Only in an atmosphere permitting the free exchange of ideas can specious arguments and prejudice be un-

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[27] *See Piccarreto*, 718 F. Supp. at 1092; Mueller, *supra* note 6, at 924.

[28] *See Nicholas*, 759 F.2d at 1079; Government of the Virgin Islands v. Gereau, 523 F.2d 140, 146 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

[29] *See* Shamburger v. Behrens, 418 N.W.2d 299, 301 (S.D. 1988).

[30] *Id.* at 304 (quoting United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976), *cert. denied*, 429 U.S. 1110 (1977)).

[31] 238 U.S. 264 (1915).

[32] *Id.* at 268; *see also Tanner*, 483 U.S. at 120-21 (postverdict scrutiny undermines public trust); Shillcutt v. Gagnon, 827 F.2d 1155, 1158-59 (7th Cir. 1987) (privacy essential to robust deliberations); United States v. Stacey, 475 F.2d 1119, 1121 (9th Cir. 1973) (privacy and frankness needed in jury room); Kornstein, *supra* note 6, at 669-71 (three goals: secrecy, protection, finality); Note, *supra* note 18, at 889-92 (need to shield jurors); Note, *supra* note 13 (prevent inhibition and harassment of jurors); Comment, *Juror Privilege*, *supra* note 13, at 452-54 (protection of jurors critical). *But see* Alschuler, *supra* note 5, at 226 (petit jurors under obligation to preserve confidentiality of deliberations); Thompson, *supra* note 9, at 1196-97, 1222-24 (questioning whether secrecy is essential to operation of American jury).

veiled, and well-reasoned arguments prevail.[33] Such an atmosphere requires that jury deliberations be secret, and that this confidentiality be maintained.[34]

If there is a possibility that the jury's deliberations will be exposed to public scrutiny, jurors will be less willing to express their views candidly and freely.[35] Jurors may be concerned with reprisals from members of the community who learn of their comments or advocacy of an unfavored position.[36] There is a danger that meritorious, but unpopular, views will be repressed, that the timid will not speak, and that the parties will not have the benefit of open deliberations. Even worse, jurors may feel pressured to render popular, rather than fair, verdicts.[37] Finally, members of the community may be reluctant to serve as jurors if there exists a possibility that their comments will be made public, that they will be harassed after the verdict, and that they will be called to testify on matters pertaining to their jury service and deliberations.[38] Only the secrecy of the deliberative process will ensure that the individual juror is protected in his or her effort to deliberate in a courageous, free, and candid manner.[39] For these reasons, courts have been concerned about the chilling effect that verdict impeachment may have on the deliberative process.

4. The Effect of a Hearing

Perhaps the most important issue to be decided in a case where a party is seeking to impeach a verdict is whether or not the court should hold a hearing. The benefits of a hearing are obvious. Usually, it is the best method of determining the merit of the argu-

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[33] *See supra* note 13. It is interesting to note that by prohibiting inquiry into the thought processes of jurors, the courts also have precluded inquiry into the thought processes of judges. *Cf.* Morrison v. Kimmelman, 650 F. Supp. 801, 805-07 (D.N.J. 1986) (trial judge, sitting as trier of fact, cannot be called to testify in habeas corpus proceeding).

[34] At least one commentator holds the view that protecting the secrecy of the jury room has constitutional implications. *See* Note, *supra* note 18.

[35] Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1077-78 (3d Cir. 1985); United States v. Homer, 411 F. Supp. 972, 978-79 (W.D. Pa.), *aff'd*, 545 F.2d 864 (3d Cir. 1976), *cert. denied*, 431 U.S. 954 (1977).

[36] *See supra* note 18.

[37] *See* Note, *supra* note 18, at 889-92.

[38] *Id.* at 889.

[39] *Id.* at 889-92. In *Tanner*, the Supreme Court stated: "There is little doubt that post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper jury behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." 483 U.S. 107, 120 (1987).

ment for attacking the verdict. The party seeking to impeach the verdict often will request that the court hold a hearing to determine whether the allegations are well-founded.[40] Such requests, however, are often denied.[41] The courts' positions are based on the concern that, the very holding of a hearing will give rise to risks and problems, especially if jurors are called to testify.

The problems discussed above, relating to the chilling effect that postverdict inquiries have on the deliberative process, will become particularly acute if jurors perceive that their activities may come under scrutiny at a public hearing or, even worse, that they may be called to testify and be cross-examined concerning their deliberations.[42] Also, the mere possibility that a hearing will be held may defeat the purpose behind the exclusionary rule.[43] Concerns that jurors will be exposed to threats, harassment, and pressure led to the adoption of the exclusionary rule. However, the use of information gained from postverdict juror contacts to secure a hearing that might lead to the impeachment of the verdict may render the exclusionary rule wholly ineffective. The exclusionary rule can only maintain its potency if information gained from postverdict contact with jurors is not used for any purpose, including the procurement of a hearing.

Finally, there exists a question as to whether the suspicions harbored by the courts concerning juror recantations would be confirmed or dispelled by evidence adduced at a hearing.[44] Certainly, it may be argued that jurors' allegations could be proved or disproved at the hearing, particularly if other evidence is available. However, it is quite possible that a juror who has been compromised will persist in the position induced by threats or coercion, concealing the fact that he has been threatened or pressured, and the court will thus remain unaware of the impropriety, even after a hearing.[45] There are, therefore, strong public policy reasons against holding a hearing.

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[40] *See* Andrews v. Schulsen, 485 U.S. 919, 922 (1988) (Marshall, J., dissenting); *Tanner*, 483 U.S. at 134-35 (Marshall, J., concurring in part, dissenting in part); Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1087 (3d Cir. 1985) (Garth, J., concurring in part, dissenting in part).

[41] *See Tanner*, 483 U.S. at 126-27; *Nicholas*, 759 F.2d at 1081; United States v. Dioguardi, 492 F.2d 70, 78-79 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974).

[42] *See supra* notes 32-39 and accompanying text.

[43] *See supra* notes 14-16 and accompanying text.

[44] *See supra* notes 22-30 and accompanying text.

[45] *See supra* note 26 and accompanying text.

B. *The Need for Finality*

When discussing postverdict inquiries, courts and scholars recognize that the need for finality of the verdict is an important policy consideration.[46] Confidence in the finality of verdicts is important both to the parties and to society as a whole. Public confidence in the judicial system is critical.

This consideration carries with it the notion that, at some point, litigation must end, and that the community must be able to rely on court decisions as final. Destructive uncertainty may develop if courts are viewed as indecisive, and verdicts can be attacked months or even years after the litigation has ended.[47] However, the concept of finality implicates additional, and perhaps even more significant, policy considerations.

The requirement of finality is intimately related to the ultimate objective of our system of justice—insuring that the judgments of our courts are equitable and just. If a verdict is impeached and the judgment set aside, it may be years before the case is retried. This is particularly true when the matter has been on appeal or where a juror has waited months or years before revealing the problem. It is well-recognized that, unlike fine wine, steaks, and cheese, lawsuits do not improve with age. As time passes, memories fade, witnesses become unavailable, and evidence is often lost. In most cases, parties have great difficulty marshaling their evidence for another trial. The final result may have more to do with the good fortune of a party in obtaining evidence for the second trial than the actual merits of the case.[48] Due to these problems, it is uncertain whether a later retrial is likely to result in

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[46] *See, e.g.*, *Tanner*, 483 U.S. 107, 124-25 (1987) (quoting S. REP. No. 1277, 93d Cong., 2d Sess. 13-14 (1974)) (finality essential for jury system to fuction); Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1078 (3d Cir. 1985) (same); Government of the Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975) (listing several public policies behind non-impeachment rule), *cert. denied*, 424 U.S. 917 (1976); Shamburger v. Behrens, 418 N.W.2d 299, 304 (S.D. 1988) (discussing impact of covert action finality); Crump, *supra* note 5, at 534 (discussing finality as necessary factor); Kornstein, *supra* note 6, at 669-70 n.46 (finality necessary to proper functioning of system); Mueller, *supra* note 6, at 924 (discussion of public policy considerations); Note, *supra* note 18, at 897 (same); Note, *supra* note 13, at 441-42 (same); Comment, *Juror Privilege*, *supra* note 13, at 454 (same). *But see* Alschuler, *supra* note 5, at 225-26 (need for finality of verdict does not justify rejection of probative evidence that judicial process did not function properly); Thompson, *supra* note 9, at 1225 (criticizing limitation of juror testimony about deliberation and verdict in interest of finality because close inquiry presumed to reveal impropriety).

[47] *See* Note, *supra* note 13, at 441-42.

[48] *See* Barker v. Wingo, 407 U.S. 514, 521 (1972).

a just verdict.

Another matter related to finality is the effect of impeachment of a jury verdict in criminal cases. A jury verdict of "not guilty" is final and may never be impeached under the fifth amendment principles of double jeopardy.[49] Thus, the benefit of impeaching a jury verdict in a criminal case can inure only to the defendant. This disparity in treatment may tend, at least to a limited extent, to weigh in favor of verdict finality for all parties.

The need for finality is closely related to other policy considerations. If the verdict is viewed as final, losing parties will have little incentive to threaten or harass jurors in order to elicit evidence that will upset the verdict.[50] The corresponding reduction in the risk of such improprieties will create an atmosphere conducive to the finding of a fair and equitable verdict.[51]

C. The Interests of Insuring a Fair Trial

The policies outlined above are important, persuasive, and directly related to the interest of insuring that the parties receive a fair trial. Why then should we permit impeachment of jury verdicts at all? Would it not be in the interest of justice to establish a rule prohibiting the impeachment of any jury verdict? Virtually all scholars and courts respond with a resounding "no." This response is based on strong policy considerations of constitutional dimension.

1. Generally

While the considerations discussed above may be important in ensuring that the parties receive a fair trial, the same interest may militate even more strongly in favor of impeachment of a jury verdict under certain circumstances. Under our system of justice the litigants are entitled to a fair and impartial verdict based solely on the evidence adduced at trial.[52] Therefore, if a verdict is the result of threats against jurors, outside or erroneous information provided to jurors, or other improper influences, the parties have not

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[49] *See* United States v. Ball, 163 U.S. 662, 671 (1896).

[50] *See supra* notes 13-21 and accompanying text.

[51] *See supra* notes 31-39 and accompanying text.

[52] *See Tanner*, 483 U.S. at 126; Smith v. Phillips, 455 U.S. 209, 217 (1982); Jordan v. Massachusetts, 225 U.S. 167, 176 (1912); *see also* Alschuler, *supra* note 5, at 229 (framers may have meant "trial by an impartial, awake, and unstoned jury").

received the just and impartial verdict to which they are entitled. Few would argue that the losing party should be denied a new trial if it can be unequivocally demonstrated that the verdict resulted solely from threats made against the jurors by the prevailing party.[53] The question then becomes not whether the impeachment of the verdict should be permitted, but rather, under what circumstances is impeachment of the verdict appropriate. This leads to the consideration of several constitutional issues.

2. Constitutional Requirements

Proponents of rules permitting more liberal impeachment of jury verdicts consistently have invoked the provisions of the federal Constitution, more specifically, the Bill of Rights, in support of their position. The due process clauses of the fifth and fourteenth amendments will be implicated in any consideration of this issue. As Justice Thurgood Marshall noted, the United States Supreme Court "has long recognized that '[d]ue process implies a tribunal both impartial and mentally competent to afford a hearing,' . . . 'a jury capable and willing to decide the case solely on the evidence before it.' "[54] It has also been held that the sixth amendment right to a jury trial guarantees a criminal defendant the right to a competent and unimpaired jury, and this right has been extended to the states through the provisions of the fourteenth amendment's due process clause.[55] The sixth amendment right to confrontation is also implicated on the theory that the right is violated when the jury receives information from a source that is not subject to cross-examination.[56] Thus, a litigant seeking to impeach a jury verdict can in almost all cases present an argu-

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[53] However, as previously noted this does not apply if the prevailing party is a criminal defendant. *See supra* note 49 and accompanying text.

[54] *Tanner*, 483 U.S. at 134 (Marshall, J., concurring in part, dissenting in part) (citations omitted); *see* Neron v. Tierney, 841 F.2d 1197, 1200-01 (1st Cir.) (due process requires fair trial), *cert. denied*, 488 U.S. 832 (1988); Thompson, *supra* note 9, at 1193-95, 1226-29 (suggesting broader focus on right to jury trial); Note, *supra* note 13, at 421-24 (due process argument available where impeachment impermissible).

[55] *See* Stockton v. Virginia, 852 F.2d 740, 743 (4th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989); Eades v. State, 75 Md. App. 411, 419-20, 541 A.2d 1001, 1005-06 (1988). The impeachment of jury verdicts could also implicate the seventh amendment. *See* Note, *supra* note 18.

[56] *See* Parker v. Gladden, 385 U.S. 363, 364 (1966); United States *ex rel.* Owen v. McMann, 435 F.2d 813, 817 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); Note, *supra* note 13, at 421-22; Comment, *The Stability of Juror Verdicts*, *supra* note 13, at 346.

ment that has constitutional dimensions.[57] While the right to a fair and impartial jury and the right to cross examine witnesses are not without limitation,[58] they are of great importance.

Of equal importance is the fact that parties can protect their constitutional rights only if they are permitted to take steps to determine whether any basis for jury impeachment exists. This is usually accomplished by conducting postverdict interviews of jurors. However, the courts have consistently upheld rules and orders restricting communication between parties and jurors.[59] Thus, the courts have, in effect, erected an obstacle to the protection of constitutional rights.

An argument based on the fifth, sixth, or fourteenth amendment could, however, prove to be a double-edged sword. For example a constitutional argument is also available to prevailing parties seeking to avoid the impeachment of the jury verdict. Such parties can maintain that the constitutional rights of all citizens to a fair and impartial jury require that jurors be free from postverdict inquiries. This argument is based on the policy concerns discussed above, namely, that postverdict inquiries invite jury tampering and chill jury deliberations.[60]

Although constitutional arguments may be available to both the prevailing and the losing parties, they are most frequently and most effectively advanced by the party seeking to impeach a verdict, and they are particularly cogent when asserted on behalf of a criminal defendant. Nonetheless, not even constitutional arguments advanced on behalf of criminal defendants are always successful. Their success depends on the application of the various ap-

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[57] This is particularly important to prisoners seeking postconviction relief under 28 U.S.C. §§ 2254-2255, since it can serve as the constitutional predicate for a habeas corpus petition. *See* Neron v. Tierney, 841 F.2d 1197, 1199-2000 (1st Cir.), *cert. denied*, 488 U.S. 832 (1988); Shillcutt v. Gagnon, 827 F.2d 1155, 1160 (7th Cir. 1987).

[58] *See infra* notes 233-38.

[59] *See infra* notes 221-32 and accompanying text.

[60] *See supra* notes 11-21 and accompanying text. As one commentator expressed,

> [T]he constitutional arguments cut both ways. Whenever impeachment requires jurors' testimony, the verdict could be supported by an argument that Lord Mansfield's rule, laid down in 1785, is a basic feature of the system, constituting a major block to judicial supervision of deliberations, and that it therefore was incorporated in constitutional provisions preserving the jury trial.

Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 369 (footnotes omitted); *see also* Note, *supra* note 18 ("[p]osttrial scrutiny sabotages sixth and seventh amendment values to the extent that, . . . the public's very possession of information about . . . [jurors'] deliberations may become tantamount to control over them").

proaches taken by the courts to the facts of a particular case. Therefore, it will be helpful to review the elements of the law governing the impeachment of jury verdicts.

II. The Elements of the Law of Impeachment of Jury Verdicts

The law governing the impeachment of jury verdicts is, in fact, one body of law consisting of a number of elements or approaches. These elements or approaches are interrelated, and each has an effect upon the other. This body of law is guided by the policy considerations previously discussed. For this reason, it is misleading to label one element, such as Rule 606(b) of the Federal Rules of Evidence, as dispositive. The federal rule is but a single element in this body of law, and in many cases, may not be the most important. Moreover, focusing on only one element could lead one to overlook the effect that each of these approaches has upon the others. It may even be somewhat deceptive to consider these approaches in isolation. However, for purposes of this discussion and for the sake of clarity, each element will be examined separately.

A. Declaring the Juror to Be Incompetent to Testify

One approach taken in the law on impeachment of jury verdicts is to declare that a juror is incompetent to testify to impeach the jury's verdict.[61] This is a rule of witness competency and, therefore, a rule of evidence. When a party attempts to introduce or otherwise utilize evidence derived from a juror to impeach a verdict, the evidence is subject to objection on the ground that the witness is incompetent to testify or otherwise present evidence.[62]

This approach was taken in 1785 by Lord Mansfield in the *Vaise* case,[63] and, if for no other reason than historical precedent, it has been followed to some extent in most jurisdictions.[64] The rule incorporates the theory of the exclusionary rule, which is premised on the assumption that if no use may be made of evidence

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[61] *See* Comment, *Juror Privilege*, *supra* note 13, at 450-56.

[62] *See* Kornstein, *supra* note 6, at 672-74.

[63] 99 Eng. Rep. 944 (K.B. 1785).

[64] *See* Kornstein, *supra* note 6, at 670-71; Comment, *Juror Privilege*, *supra* note 13, at 450-57; *see also* Mueller, *supra* note 6, at 924-27 (explaining *Vaise* doctrine and its exceptions); Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 360-61 (same). Several scholars and judges have been critical of Lord Mansfield's decision. *See, e.g.*, Kornstein, *supra* note 6, at 671 (views of Lord Mansfield's "hoary shibboleth").

gained by disfavored conduct, there will be an adequate disincentive to dissuade individuals from engaging in that conduct. In accordance with this principle Lord Mansfield announced the sweeping precept that a juror's testimony may not be admitted to impeach a verdict.[65]

In time it became apparent that the rule in *Vaise* was too broad and that, in order to protect the parties' rights to trial by a fair and impartial jury, some exceptions would be necessary. One approach was to rule that jurors were competent to testify as to matters concerning "external influences" that were brought to bear upon the jury's decision.[66] Under this exception, jurors were permitted to testify about threats made against jurors and information not in evidence that found its way into the jury room. Another approach, the so-called "Iowa rule," excludes all juror testimony as to matters that "essentially inhere in the verdict itself," but admits evidence of an "independent fact."[67] While these approaches have proved helpful in ameliorating injustices resulting from broad application of the *Vaise* rule, they have created new problems, particularly in defining the terms "external influence," "essentially inhere in the verdict itself," and "independent fact."[68]

The competency approach is embodied in Rule 606(b) of the Federal Rules of Evidence which provides that, with specified exceptions, jurors may not testify as to certain matters concerning jury service.[69] Under Rule 606(b), if the proffered evidence falls within the rule, the juror is incompetent to testify to impeach a jury verdict or indictment.

B. Utilization of Procedural Rules

A second approach involves the use of rules of procedure to

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[65] *See supra* notes 14-16 and accompanying text.

[66] *See, e.g.*, Parker v. Gladden, 385 U.S. 363, 364-65 (1966); Mattox v. United States, 146 U.S. 140, 152 (1892); United States *ex rel.* Owen v. McMann, 435 F.2d 813, 817-20 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); *see also* Kornstein, *supra* note 6, at 672 (external influences appropriate ground for impeachment); Mueller, *supra* note 6, at 926-27 (explaining different types of extraneous material); Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 361-62 (two types of extraneous influence exceptions).

[67] *See* Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866); *see also* Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 362-64 (same); Mueller, *supra* note 6, at 925-26 (same); Comment, *Juror Privilege*, *supra* note 13, at 454-55 (discussing *Wright* case).

[68] *See, e.g.*, *Tanner*, 483 U.S. at 117-19 (defining external influence); Government of the Virgin Islands v. Gereau, 523 F.2d 140, 152 (3d Cir. 1975) (same), *cert. denied*, 424 U.S. 917 (1976).

[69] *See infra* note 111 (text of Federal Rule of Evidence 606(b)).

ensure that the claim of the attacking party has merit. Although the tests established by these procedural rules vary, they all have the common objective of permitting postverdict inquiries only where such an inquiry is warranted.

These rules and their respective tests take many forms. Some permit a court to initiate a postverdict inquiry only upon a threshold showing of irregularity by the attacking party,[70] and some place the burden of proof on that party.[71] Others leave the decision of whether to proceed with a postverdict inquiry to the sound discretion of the court,[72] thereby permitting reversal of that decision only upon a finding of abuse of discretion.[73] Finally, the harmless error rule has been used to sustain the verdict where there has been an irregularity.[74] While each of these rules is different in form and substance, all have the effect of increasing the level of proof required to overturn a jury verdict, thus making it more difficult to do so.

It should also be noted that these rules are not mutually exclusive; there is nothing to prevent the application of several or even all of these rules to the same case.[75] Since these rules, in effect, require that the party seeking to impeach the verdict demonstrate the merits of its claim, they are primarily directed at policy concerns regarding the credibility of witnesses and other evidence. These rules do little to dissuade parties from threatening or harassing jurors after the verdict, and may in fact have the opposite effect of inducing parties to contact jurors in order to obtain the additional evidence necessary to support their claims. However, these concerns will, at least to some extent, be addressed by the evidentiary rule on competency discussed above.

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[70] *See* Neron v. Tierney, 841 F.2d 1197, 1203, 1205 (1st Cir.), *cert. denied*, 488 U.S. 832 (1988); Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1081 (3d Cir. 1985); King v. United States, 576 F.2d 432, 438 (2d Cir.), *cert. denied*, 489 U.S. 850 (1978); United States v. Dioguardi, 492 F.2d 70, 78 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974). In *Tanner*, 483 U.S. 107, 125 (1987), the Supreme Court acknowledged the possibility that Rule 606(b) may have retained a common-law exception allowing postverdict inquiry of juror incompetence when an extremely strong showing of incompetence has been made. *See id.*

[71] *Nicholas*, 759 F.2d at 1077; Shamburger v. Behrens, 418 N.W.2d 299, 302 (S.D. 1988).

[72] *Neron*, 841 F.2d at 1203; *Shamburger*, 418 N.W.2d at 303.

[73] *See* Massey v. State, 541 A.2d 1254, 1257 (Del. 1988).

[74] United States v. Hornung, 848 F.2d 1040, 1044-45 (10th Cir. 1988), *cert. denied*, 489 U.S. 1069 (1989); Shillcutt v. Gagnon, 827 F.2d 1155, 1160 (7th Cir. 1987); *cf.* Urseth v. Dayton, 680 F. Supp. 1084, 1094 (S.D. Ohio 1987) (mere finding that verdict was unsupported by evidence insufficient).

[75] *See Massey*, 541 A.2d at 1257-59.

C. *Excluding Contact with Jurors*

Courts may, by court rule or order, limit postverdict contact with jurors.[76] These rules and orders differ widely in scope and effect; they may apply to all cases or only to a particular case, and may be directed to the jurors, to the litigants, or to third-parties.[77] While the rules and orders are primarily calculated to minimize the problem of juror harassment, they can have a much broader effect.

Preventing parties from having contact with jurors will also prevent litigants from learning of incidents or situations that would constitute valid grounds for impeaching a verdict. Taken to the extreme, if the court precluded juror contact with everyone, the jury deliberations would remain hidden and verdicts would never be impeached. Such a result could raise serious constitutional issues, particularly if the rule or order were applied to members of the press.[78]

Enforcement of these rules and orders also presents an interesting issue. Violations would probably expose the individual to sanctions for contempt, but the courts are also at liberty to disregard otherwise admissible evidence gained from such contact solely because it was obtained in violation of a rule or order.[79] In spite of this, rules and orders limiting contact with jurors have gained wide acceptance on both the federal and the state levels.[80]

D. *Limiting the Grounds for Impeachment*

Limiting the grounds available for impeachment of jury verdicts is another approach.[81] Presently, there are many available grounds, such as: threats to jurors; misapprehension of jury instructions; jury mistake as to the effect of a verdict; introduction of

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[76] *See Tanner*, 483 U.S. at 126 (1987); United States v. Davila, 704 F.2d 749, 753-54 (5th Cir. 1983).

[77] *See* United States v. Sherman, 581 F.2d 1358, 1361-62 (9th Cir. 1978) (jurors have right to be free from harassment).

[78] *See In re* Express-News Corp., 695 F.2d 807, 808-11 (5th Cir. 1982) (restriction on journalistic right to gather news must be narrowly tailored); Note, *supra* note 18, at 897-904.

[79] *Tanner*, 483 U.S. at 126.

[80] *See supra* note 76.

[81] *See, e.g., Tanner*, 483 U.S. at 120-26 (limiting grounds available for impeaching verdict); Parker v. Gladden, 385 U.S. 363, 365 (1956) (same); Mattox v. United States, 146 U.S. 140, 152 (1892) (same); Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1075 (3d Cir. 1985) (same); Government of the Virgin Islands v. Gereau, 523 F.2d 140, 141 (3d Cir. 1975) (same), *cert. denied*, 424 U.S. 917 (1976).

items not in evidence into the jury room; quotient or compromise verdicts; a misunderstanding of the facts; juror incompetence due to mental problems, intoxication, or drug abuse; and unauthorized exposure to media accounts of the proceedings.

Commentators have suggested that certain grounds should be available for impeachment of jury verdicts, while others should not,[82] and at least a few courts have held that jury verdicts may be impeached *only* on recognized grounds.[83] In fact, some federal courts have held that even if the evidence is admissible under Rule 606(b), the verdict is not subject to impeachment if the grounds are not recognized.[84]

This approach is based on the view that impeachment of a jury verdict is appropriate for certain reasons or grounds and inappropriate for others.[85] For example, a court might hold that threats against a juror constitute grounds for impeachment of a jury verdict while a quotient or compromise verdict does not. In the latter case, any attempt to impeach the verdict would be immediately dismissed on the pleadings, because the ground upon which the motion is based would not be recognized.

While this approach has achieved some limited recognition, it is not without its shortcomings. It is very difficult to analyze and categorize all of the possible grounds for impeachment and thereafter decide which ones merit recognition. Also, depending on the facts of the case, a court may be inclined to recognize a ground for impeachment that was rejected under different circumstances. Finally, any attempt to group the grounds into categories will, of necessity, give rise to definitional difficulties and problems of inclusion and exclusion.[86]

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[82] *See* Note, *supra* note 13, at 442; Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 366-72.

[83] *See Nicholas*, 759 F.2d at 1078. "Any attempt to impeach a jury verdict initially encounters two evidentiary obstacles: (1) producing evidence competent to attack the verdict, and (2) *establishing the existence of grounds recognized as adequate to overturn the verdict.*" *Id.* (quoting *Gereau*, 523 F.2d at 148) (emphasis added).

[84] *Id.*; *see* United States v. Homer, 411 F. Supp. 972, 977 (1976) (although consideration of extra-record facts is prohibited, not necessary that jurors be "totally ignorant" about a case).

[85] *See* Kornstein, *supra* note 6, at 672-74; Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 366-72.

[86] *See* Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 366-72.

E. Juror Privilege

An interesting but little used approach to the problem of impeachment of jury verdicts is the concept of juror privilege.[87] This doctrine allows the juror to invoke a privilege in order to refuse to respond to inquiries concerning his jury service. Like other privileges, this privilege may be waived. In order for the privilege to exist, four elements must be present:

> 1. The communications must originate in a confidence that they will not be disclosed.
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
> 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal at litigation.[88]

By definition, the doctrine contains at least three exceptions where evidence of the privileged communication is admissible: (1) where the jury relationship is a sham and dishonestly assumed as a cover for the concealment of the truth; (2) where it is decided that the preservation of the privacy of jury deliberations is unnecessary to promote a just and honest jury system; and (3) where it is determined that, on balance, other policies raised by the case are more important.[89] The relatively broad language employed in the exceptions and the possibility of a coerced waiver may present problems in applying these concepts to particular cases.[90] Although the juror privilege approach is recognized by the United States Supreme Court[91] the doctrine has fallen into disuse.[92]

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[87] For an informative and detailed review of juror privilege, see Comment, *Juror Privilege*, *supra* note 13, at 450-75.

[88] *Id.* at 457 (citing 8 J. WIGMORE, EVIDENCE § 2285, at 527 (rev. ed. 1961)) (emphasis omitted).

[89] *Id.* at 464.

[90] *See* Comment, *Impeachment of Jury Verdicts*, *supra* note 13.

[91] *See* Clark v. United States, 289 U.S. 1, 12-19 (1933). For a discussion of the status of the juror privilege approach, see Comment, *Juror Privilege*, *supra* note 13, at 448-49.

[92] *See* Comment, *Juror Privilege*, *supra* note 13, at 448-49; *see also* United States *ex rel.* Owen v. McMann, 435 F.2d 813, 820 n.7 (2d Cir. 1970) (discussing juror privilege), *cert. denied*, 402 U.S. 906 (1971).

F. *The Parol Evidence Rule*

Finally, the parol evidence rule may be used to limit impeachment of jury verdicts. Professor Wigmore has maintained that the jury verdict is an operative act similar to a will or a contract, and therefore, the parol evidence rule applies. Since the verdict itself is the act of legal significance, the thought processes, motives, and beliefs of the individual jurors are immaterial, and jurors may neither contradict nor explain the verdict. The verdict can be challenged on only two grounds: where the jurors have violated essential rules of behavior in arriving at the verdict, or where the verdict does not correctly represent the assent of all the jurors.[93] This theory has received little acceptance or recognition.[94]

III. RULE 606(b) OF THE FEDERAL RULES OF EVIDENCE

Viewed in the context of the law of impeachment of jury verdicts, Rule 606(b) of the Federal Rules of Evidence may not be the most significant approach. However, since it is the Federal Rule of Evidence that deals directly with this issue, Rule 606(b) has received a great deal of attention and merits consideration. It is not the purpose of this Article to engage in an in-depth examination of the origins and history of the rule. Others have commendably accomplished that task.[95] However, some acquaintance with the historical background of the rule is useful.

A. *The Common-Law Background*

As we have seen, in 1785, Lord Mansfield established the rule that a juror is incompetent to impeach a jury verdict and the rule has been in effect to some extent since that time.[96] Over the years, two variations of the rule have evolved. First, an exception to the

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[93] *See* Thompson, *supra* note 9, at 1197 (citing 8 J. WIGMORE, EVIDENCE § 2345, §§ 2349-2350, §§ 2352-2356 (rev. ed. 1961)).

[94] *See* Comment, *Juror Privilege*, *supra* note 13, at 456.

[95] *Tanner*, 483 U.S. 107, 117-22 (1987); Alschuler, *supra* note 5, at 221-23; Crump, *supra* note 5, at 513-22; Schlaff, *Impeachment of Verdicts by Juror Testimony*, 61 CONN. BAR J. 215, 225-30 (1987); Thompson, *supra* note 9, at 1196-1206; Note, *supra* note 13, at 418-26; Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 360-65; Comment, *supra* note 5, at 350-55, 358-59; Comment, *Stability of Juror Verdicts*, *supra* note 13, at 343-51; Comment, *Juror Privilege*, *supra* note 13, at 450-56, 460-63.

[96] *See* Mueller, *supra* note 6, at 924-27; Thompson, *supra* note 9, at 1196-97; Note, *supra* note 13, at 418-21; Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 360-64; Comment, *Juror Privilege*, *supra* note 13, at 450-55.

rule developed that permitted juror testimony as to "external influences" allegedly brought to bear upon the jury's decision.[97] The second, known as the "Iowa Rule," excludes juror testimony as to matters that "essentially inhere in the verdict itself," but admits evidence of an "independent fact."[98]

In *Mattox v. United States*,[99] the United States Supreme Court adopted the first approach, holding that a juror would be permitted to testify in a case where the jurors had been exposed to outside information provided by a bailiff. In subsequent cases, the federal courts followed Lord Mansfield's rule, but created an exception where it was alleged that "external influences" were brought to bear upon the jury.[100] It was this tradition that led to the adoption of Rule 606(b) of the Federal Rules of Evidence in 1975.

B. The Legislative History of Rule 606(b)

The legislative history of Rule 606(b) has received a great deal of attention[101] and has been determinative in deciding some issues related to the impeachment of jury verdicts.[102] In the preliminary draft of Rule 606(b), the Supreme Court Advisory Committee incorporated the broader policy of the Iowa Rule, permitting a juror to testify as to statements or acts occurring during deliberations and precluding only testimony concerning the effect that such statements or acts had on the juror's mind or the decision.[103] The final draft of the Advisory Committee sent to Congress followed the common-law principles reflected in the federal approach proscribing testimony concerning events that occurred during the

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[97] *See supra* note 66 and accompanying text.

[98] *See supra* note 67 and accompanying text.

[99] 146 U.S. 140 (1892).

[100] *See Tanner*, 483 U.S. at 117 (1987) (alleged use of narcotics and alcohol by jurors); Smith v. Phillips, 455 U.S. 209, 212 (1982) (juror in criminal trial submitted employment application to District Attorney's office); Parker v. Gladden, 385 U.S. 363, 363-64 (1966) (bailiff's comments on defendant); Remmer v. United States, 347 U.S. 227, 228 (1954) (bribe offered to juror); *McDonald*, 238 U.S. at 265-69 (quotient verdict rendered by jury); Hyde & Schneider v. United States, 225 U.S. 347 (1912) (compromise verdict).

[101] Mueller, *supra* note 6, at 927-32; Thompson, *supra* note 9, at 1202-05; Note, *supra* note 13, at 424-26; Comment, *Stability of Jury Verdicts*, *supra* note 13, at 365-66; Comment, *Juror Privilege*, *supra* note 13, at 460-63.

[102] *See Tanner*, 483 U.S. at 122-25.

[103] *See* FED. R. EVID. 606(b) (prelim. draft Mar. 31, 1969), *reprinted in* 46 F.R.D. 161, 289-90 (1969); *see also* FED. R. EVID. 606(b) (rev. draft March 15, 1971), *reprinted in* 51 F.R.D. 315, 386-87 (1971).

course of deliberations. This draft retained the common-law exception permitting juror testimony on external influences that were brought to bear upon any juror.[104]

In its version, the House of Representatives reverted to the Advisory Committee's preliminary draft's incorporation of the Iowa Rule.[105] However, this revision was rejected by the Senate, which adopted the more restrictive common-law version.[106] The narrower Senate approach was adopted by the Conference Committee and ultimately enacted.[107]

This legislative history is important for several reasons. From a broad perspective, the debate and final result clearly reflect an intent on the part of Congress to adopt a more restrictive approach in formulating the provisions of Rule 606(b).[108] Also, the extensive debate, correspondence, and reports developed during the legislative process provide a fertile area for developing arguments in particular cases.[109] Finally, and perhaps most importantly, arguments based on the legislative history are particularly convincing.[110]

C. *The Terms and Nature of Rule 606(b)*

Rule 606(b) of the Federal Rules of Evidence embodies the common-law doctrine that, with certain exceptions, a juror may not furnish evidence to impeach a jury's verdict.[111] Specifically, the

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[104] *See* FED. R. EVID. 606(b) (amended version, effective July 1, 1973), *reprinted in* 56 F.R.D. 183, 265 (1973).

[105] HOUSE COMM. ON THE JUDICIARY, H.R. DOC. NO. 650, 93d Cong., 1st Sess. 9-10 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7083.

[106] SENATE COMM. ON THE JUDICIARY, S. DOC. NO. 1277, 93d Cong., 2d Sess. 56 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7060.

[107] HOUSE CONFERENCE COMM., H.R. DOC. NO. 1597, 93d Cong., 2d Sess. 8 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7102; Conference Report, 120 CONG. REC. 33,941 (1974); *see also* Mueller, *supra* note 6, at 928-32 (detailed discussion of Senate approach to analysis of rule); Thompson, *supra* note 9, at 1203-04 (same); Note, *supra* note 13, at 425-26 (same); Comment, *Stability of Jury Verdicts*, *supra* note 13, at 365-66 (same); Comment, *Juror Privilege*, *supra* note 13, at 461-63 (same).

[108] Mueller, *supra* note 6, at 932-33; Thompson, *supra* note 9, at 1203-05; Note, *supra* note 13, at 426; Comment, *Stability of Jury Verdicts*, *supra* note 13, at 365-66; Comment, *Juror Privilege*, *supra* note 13, at 463.

[109] *See Tanner*, 483 U.S. at 122-25.

[110] *Id.*

[111] *See* FED. R. EVID. 606(b). Federal Rule of Evidence 606(b) 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 that or any other juror's mind or emotions as influencing the jurors to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, ex-

rule prohibits a juror from testifying "as to: [1] any matter or statement occurring during the course of the jury's deliberations or [2] the effect of anything upon that or any other juror's mind . . . as to influencing jurors to assent to or dissent from the verdict or indictment or [3] concerning the juror's mental processes in connection therewith."[112]

The rule provides for two exceptions when a juror may properly testify: (1) as to "whether extraneous prejudicial information [was] brought to the jury's attention" or (2) as to "outside influence . . . improperly brought to bear upon any juror."[113] Finally, the rule provides that "a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received"[114] for the purposes set forth in the rule. This provision effectively eliminates the reception of any evidence of a juror's statement for these purposes.[115]

Rule 606(b) specifies three areas in which the juror is incompetent to testify. However, these areas do not include all evidence that could be obtained from a juror,[116] and it appears that under certain circumstances even evidence included in these areas may be competent and therefore admissible.[117] The rule lists two exceptions and, although the terms of these exceptions are explicit, the courts have experienced great difficulty in determining their exact meaning.[118]

Rule 606(b) is an exclusionary rule in that it acts as a disincentive, discouraging parties from harassing jurors.[119] Unlike other exclusionary rules, it does not prevent the use of all evidence de-

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

Id.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] While our discussion has focused on impeachment of petit jury verdicts, Rule 606(b) applies equally to grand juries and the impeachment of indictments. *See* Mueller, *supra* note 6, at 965-72.

[116] *See infra* notes 141-42.

[117] *See infra* notes 162-78 and accompanying text.

[118] *See infra* notes 147-60 and accompanying text.

[119] *See supra* notes 6-9 and accompanying text.

rived from postverdict juror contact. While the rule precludes the juror from presenting evidence, other evidence obtained as a result of contact with jurors may be admitted.[120]

It is important to keep in mind that Rule 606(b) is a rule of evidence applicable in all cases. By its terms, the rule is not concerned with substantive matters such as the grounds for impeachment of verdicts,[121] yet these matters may become important in determining questions relating to, for example, whether the case involves an outside influence.[122] Unlike procedural rules that permit some discretion,[123] a rule of evidence must be applied consistently in every case, and unlike a privilege,[124] the rule may not be waived by the protected party. More importantly, Rule 606(b) is but one approach to the law of impeachment of jury verdicts and in no way precludes the use of other approaches where they apply.[125]

IV. THE *Tanner* CASE

Prior to the Supreme Court's decision in *Tanner v. United States*,[126] courts had frequently addressed the issue of impeachment of jury verdicts. However, these decisions did little to resolve the questions that had been recurring since Lord Mansfield's time. At the heart of the matter was the issue of whether these questions should be resolved in favor of protecting the individual jurors and the jury system or ensuring that the verdict accurately reflected the decision of a fair and impartial jury. In *Tanner*, the Supreme Court determined, based in part on the legislative history of Rule 606(b), that this issue should be resolved in favor of protecting the individual jurors and the jury system.[127] In arriving at this conclu-

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[120] *See infra* notes 179-84 and accompanying text.

[121] *See infra* notes 218-20 and accompanying text.

[122] *See infra* notes 149-55 and accompanying text.

[123] *See infra* notes 200-05 and accompanying text.

[124] *See infra* notes 214-17 and accompanying text.

[125] *See* Crump, *supra* note 5, at 532-43. Crump recognizes the relationship of at least two approaches in her proposition that a change in rule 606(b) be accompanied by the adoption of a court rule protecting jurors. *See id.*

[126] 483 U.S. 107 (1987).

[127] In *Tanner*, Justice O'Connor stated for the majority:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the ver-

sion, the Court noted and embraced virtually all of the policy considerations militating in favor of protecting the jurors and their verdicts, including concerns of juror exposure to postverdict pressure,[128] the potential chilling effect on the deliberative process,[129] the need for finality,[130] and the interest of ensuring a fair trial.[131]

The defendants in *Tanner* were convicted of mail fraud and conspiring to defraud the United States. The district court had a local rule barring posttrial interviews of jurors. Based on a juror's statement to Tanner's attorney that several of the jurors consumed alcohol at various times during the trial, the defendants filed a motion for permission to interview jurors, an evidentiary hearing, and a new trial. The district court concluded that Rule 606(b) precluded the use of juror testimony, but invited the defendants to adduce any nonjuror evidence at a hearing. A hearing was held at which Tanner's counsel testified that he had noticed that one of the jurors was in a "giggly mood" at one point during the trial. The district court, after making other observations concerning the trial, decided that it would not permit interviews of the jurors, nor would it allow the jurors to testify at a hearing. The defendants appealed.

While the appeal was pending, Tanner's attorney moved for a for new trial. In the accompanying affidavit, the attorney related an unsolicited visit he had received from a second juror. He then, without leave of the court, arranged for the juror to be interviewed two days later by private investigators. At the interview, the second juror related that the jurors had engaged in the use of drugs and alcohol during the trial, including the use of cocaine and marijuana. The district court again denied the defendants' motion for a new trial and the United States Court of Appeals for the Eleventh Circuit affirmed.[132]

> dict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner, 483 U.S. at 120-21 (citation omitted). The fact that Justice Marshall chose to address this policy-motivated statement in the final lines of his dissenting opinion attests to its importance. *Id.* at 142 (Marshall, J., dissenting).

[128] *Id.* at 119-20.

[129] *Id.* at 120-21.

[130] *Id.* at 120, 124-25.

[131] *See id.* at 120. Implicitly, the Court exhibited a suspicion of postverdict allegations, and concern regarding the effect of a hearing. *See id.* at 120, 126-27.

[132] United States v. Conover, 772 F.2d 765, 767 (11th Cir. 1985).

The United States Supreme Court granted certiorari,[133] and affirmed the decisions of the Eleventh Circuit and the district court on the issue of verdict impeachment.[134] The Court, following the policy disfavoring impeachment of verdicts, held that the alleged use of drugs and alcohol by jurors did not constitute an "outside influence." Accordingly, juror testimony with respect to these activities was inadmissible to overturn the verdict.[135] In reaching this decision, the Court discussed several other matters pertaining to the issue of jury verdict impeachment, such as the constitutional implications,[136] the need for a hearing,[137] and the propriety of court orders limiting postverdict contact with jurors.[138]

V. The Future of the Law Governing Impeachment of Jury Verdicts

In recent years, the law governing impeachment of jury verdicts has moved steadily in the direction of further restricting attacks on verdicts. This is partly attributable to the *Tanner* decision, but the trend appears to be more broadly based, driven by the courts' adoption of the policy arguments promoting this perspective. We will now survey these developments by examining the effect that *Tanner* and its progeny have had on the individual elements of this body of law.

A. The Effect on Rule 606(b)

Since the *Tanner* holding deals directly with Rule 606(b) of the Federal Rules of Evidence, it has had a significant effect on the development of the law relating to this rule. Not surprisingly, this has lead to further limitations on the impeachment of jury verdicts.

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[133] Tanner v. United States, 479 U.S. 929 (1986).

[134] *Tanner*, 483 U.S. at 127. The Court remanded the case on a second issue, whether the defendants' actions constituted a conspiracy to defraud the United States within the meaning of 18 U.S.C. § 371. *Id.* at 134.

[135] *Id.* at 125.

[136] *Id.* at 126-27.

[137] *Id.*

[138] *Id.* at 126.

1. Generally

Rule 606(b) is a rule of evidence that affects only the competency of the juror to testify. The rule purports to regulate the manner in which proof is presented and does not address the grounds upon which impeachment of a verdict is permitted.[139] Use of a competency rule to effectuate the important policy considerations involved has been criticized as foreshadowing the demise of Rule 606(b).[140] However, the decision in *Tanner* makes it clear that the vitality of the rule is not in question.

Litigation involving Rule 606(b) generally examines two issues. First, whether the evidence falls within the terms of the rule; specifically, whether the evidence relates to a matter or statement that occurred during the course of jury deliberations or to a juror's mind, or the juror's mental processes. Second, if the evidence falls within the rule, whether one of the exceptions applies. Further, while the *Tanner* holding relates directly to defining the terms employed in the exceptions, the case will also affect future decisions dealing with the first issue.

Decisions regarding whether evidence falls within the scope of Rule 606(b) have not always been consistent.[141] Courts have, however, held that Rule 606(b) does not apply to preverdict inquiries directed at jurors or to the process of postverdict polling of the jury.[142] On the other hand, it would appear that the rule does apply to partial verdicts.[143]

Tanner holds that matters relating to juror competence such as alcohol and drug use come within the scope of Rule 606(b).

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[139] *See* FED. R. EVID. 606(b); *see also* Alschuler, *supra* note 5, at 224-25 (noting that rule is evidentiary, not substantive); Mueller, *supra* note 6, at 927 (purpose of rule is to "regulate . . . proof . . . not to set grounds upon which verdicts may be impeached").

[140] *See* Thompson, *supra* note 9, at 1221-29.

[141] *Compare* Shillcutt v. Gagnon, 827 F.2d 1155, 1158 (7th Cir. 1987) (evidence outside rule inadmissible) *with* Tobias v. Smith, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979) (court may receive evidence of improper influence).

[142] *See, e.g.*, Sincox v. United States, 571 F.2d 876, 878-79 (5th Cir. 1978) (polling permissible), *cert. denied*, 429 U.S. 1040 (1977); United States v. Khoury, 539 F.2d 441, 442 (5th Cir. 1976) (in camera interrogation permissible); *see also* Kornstein, *supra* note 6 (prior to discharge jurors may be polled); Mueller, *supra* note 6, at 957-60 (rule inapplicable to matters occurring before deliberation); Thompson, *supra* note 9, at 1207 (rule does not apply to "issues of misconduct or impropriety that are addressed prior to accepting the verdict").

[143] United States v. Hockridge, 573 F.2d 752, 759 (2d Cir.), *cert. denied*, 439 U.S. 821 (1978); *see also* Kornstein, *supra* note 6, at 668-69 (partial verdict may be considered final and complete); Mueller, *supra* note 6, at 940-41 (same).

More significantly, in making a strong statement against impeachment of jury verdicts, the Court established a policy that will undoubtedly lead to a broader interpretation of the rule, resulting in the inclusion of more situations within its scope.[144] This trend has been reflected in at least two post-*Tanner* decisions that have held that jurors' postverdict statements to the press are included within the scope of Rule 606(b). One case involved a juror's statement that in view of subsequent disclosures, he now had a reasonable doubt as to the defendant's guilt.[145] The other arose out of a juror's assertion that although the jurors believed the defendant innocent, they voted guilty due to time pressure.[146]

2. The Exceptions to Rule 606(b)

Even where it appears that the exceptions to Rule 606(b) do apply, questions have arisen regarding their application. These cases usually deal with the nexus of the exception to the other provisions of Rule 606(b). For example, it has been held that although jurors may testify on the situation covered by the exception, they may not testify as to other matters proscribed by the rule.[147] Thus, while jurors may give testimony concerning an external influence that may have affected the jury, they may not testify regarding the effect that the external influence had upon their minds or mental processes, nor may they testify concerning their deliberations. The difficult task of enforcing these distinctions and controlling the juror's testimony is left to the judge presiding at the hearing.

Most litigation in this area involves the question of the applicability of the exceptions. Confusion arises because some courts tend to discuss the two exceptions together, merging them into one concept.[148] However, even if one is careful to separate the concepts and speak in terms of either "outside influence" or "extraneous prejudicial information," problems may arise. Difficulties usually

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[144] *See* Robles v. Exxon Corp., 862 F.2d 1201, 1208-09 (5th Cir.) (juror's misinterpretation of trial court's instructions constitutes "juror's mental processes" within Rule 606(b)), *cert. denied*, 490 U.S. 1051 (1989).

[145] United States v. Sjekloca, 843 F.2d 485, 488 (11th Cir. 1988).

[146] United States v. Gravely, 840 F.2d 1156, 1159 (4th Cir. 1988).

[147] United States v. Hornung, 848 F.2d 1040, 1045 (10th Cir. 1988), *cert. denied*, 489 U.S. 1069 (1989); Urseth v. City of Dayton, 680 F. Supp. 1084, 1089 (S.D. Ohio 1987); Braley v. State, 741 P.2d 1061, 1066 (Wyo. 1987).

[148] United States v. Black, 843 F.2d 1456, 1464 n.7 (D.C. Cir. 1988); United States v. Boylan, 698 F. Supp. 376, 385 (D. Mass. 1988), *aff'd*, 898 F.2d 230 (1st Cir.), *cert. denied*, 111 S. Ct. 139 (1990).

arise due to the breadth of the terms that define the exceptions. This gives the courts a great deal of latitude in determining whether a case falls within one of the exceptions.[149] While this expansive terminology may be necessary to effect the purposes of Rule 606(b), it has made application of the rule more difficult and has led to inconsistent results.[150]

Defining the term "outside influence" has proved particularly troublesome, and it is in this area that the *Tanner* decision will have the greatest impact. In the past, courts addressing this question have frequently arrived at conflicting results.[151] Therefore, it was very difficult to classify their opinions.[152] The policy set forth in *Tanner* of upholding jury verdicts will undoubtedly have an impact upon future decisions,[153] especially in light of the exception's broad terms. In addition, the *Tanner* court in dealing with this issue rejected with strong words the claim that drug and alcohol use by jurors falls within the exception.[154] The *Tanner* decision may even raise doubts as to whether juror incompetence can ever be considered an outside influence. At a minimum, we can expect that post-*Tanner* decisions will adopt a restrictive view of the exception. To a certain extent this policy has already been reflected in the decisions.[155]

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[149] *See Tanner*, 483 U.S. at 118 (1987); *Black*, 843 F.2d at 1464 n.7.

[150] Mueller, *supra* note 6, at 951-56; Thompson, *supra* note 9, at 1205. The difficulty of the problem is demonstrated by the fact that prior to *Tanner* it was thought that alcohol or drug use by a juror constituted an "outside influence." Mueller, *supra* note 6, at 952-53. For a comprehensive review of pre-*Tanner* case law interpreting the term "outside influence," see *id.* at 951-56. For an overall review of pre-*Tanner* case law pertaining to jury misconduct, see Comment, *Stability of Juror Verdicts*, *supra* note 13, at 348-63.

[151] *See* United States v. Schultz, 656 F. Supp 1218, 1221 (E.D. Mich. 1987).

[152] *See supra* note 150.

[153] *See supra* notes 126-31 and accompanying text.

[154] In *Tanner*, Justice O'Connor stated, "[h]owever severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep." *Tanner*, 483 U.S. at 122.

[155] *See* United States v. Sjeklocha, 843 F.2d 485, 487 (11th Cir. 1988) (juror statement that due to developments in Iran-Contra matter he would now acquit inadmissible to impeach verdict); United States v. Gravely, 840 F.2d 1156, 1159 (4th Cir. 1988) (juror statement that some jurors believed defendant innocent, but changed minds due to time pressure inadmissible to impeach verdict); Shillcutt v. Gagnon, 827 F.2d 1155, 1159-60 (7th Cir. 1987) (racial comment by juror inadmissible to impeach verdict); United States v. Sokoloff, 696 F. Supp. 1451, 1455-56 (S.D. Fla. 1988) (juror statements as to pressure and insufficiency of government's case inadmissible to impeach verdict), *aff'd sub nom.* United States v. Cathel, 903 F.2d 1381 (1990); Salter v. Watkins, 513 So.2d 569, 572 (Miss. 1987) (testimony as to foreperson's refusal to return vote of adequate number for verdict inadmissible to impeach verdict); Shamburger v. Behrens, 418 N.W.2d 299, 304 (S.D. 1988) (testimony as to juror's

Interpretation of the term "extraneous information" has generally proved to be less troublesome. For example, there is little doubt that the exception applies in a case where the jurors have been provided with prejudicial information not admitted into evidence.[156] Nonetheless, difficult questions may arise in cases involving racial comments,[157] jury notice,[158] and in other contexts.[159] In such cases, the policy enunciated in *Tanner* may also have an effect.[160]

3. Other Exceptions

There are only two exceptions specifically set forth in Rule 606(b): the "outside influence" exception and the "extraneous

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attempt to extort money from prevailing party inadmissible to impeach verdict).

[156] *See, e.g.*, Mattox v. United States, 146 U.S. 140, 143-44 (1892) (newspaper article prejudicial to accused read to jury during deliberations).

[157] *See* Andrews v. Shulsen, 485 U.S. 919, 919-22 (1988) (Marshall, J., dissenting) (juror handed bailiff napkin with drawing of man on gallows above inscription exhibiting racial hatred); Dobbs v. Zant, 720 F. Supp. 1566, 1574 (N.D. Ga. 1989) (testimony of racial bias based on juror's conduct may be admissible if it appears death penalty imposed on basis of defendant's race); *see also* Crump, *supra* note 5, at 524-25 (racial bias, though not clearly "extraneous information," may result in juror conduct offensive to fundamental fairness); Note, *supra* note 18, at 894-95 (most jurors are prejudiced against those culturally different); Note, *Racial Slurs by Jurors as Grounds for Impeaching a Jury's Verdict:* State v. Shillcutt, 1985 WIS. L. REV. 1481, 1482 [hereinafter Note, *Racial Slurs*] (discussion of racial bias as grounds for impeaching jury verdict).

[158] Jury notice refers to the general knowledge that jurors bring with them to their jury service. For an interesting and informative article on this subject, and a discussion of potential problems, see Mansfield, *Jury Notice*, 74 GEO. L.J. 395 *passim* (1985); *see also* Note, *supra* note 13, at 427 n.66 (jurors expected to use commonly known facts not introduced at trial).

[159] *See* Mueller, *supra* note 6, at 943-51 (comprehensive review of pre-*Tanner* case law interpreting term "extraneous prejudicial information"); Comment, *Stability of Jury Verdicts*, *supra* note 13, at 348-63 (review of pre-*Tanner* cases pertaining to jury misconduct).

[160] Since the *Tanner* decision, the United States Court of Appeals for the Fourth Circuit has dealt with two classic cases of extraneous information, and has reaffirmed that impeachment of the verdict will be permitted in such cases. *See* Stockton v. Virginia, 852 F.2d 740, 743-46 (4th Cir. 1988) (extrajudicial communication to juror by third party), *cert. denied*, 489 U.S. 1071 (1989); Stephens v. South Atl. Canners, Inc., 848 F.2d 484, 486 (4th Cir.) (prejudicial items not admitted into evidence introduced into the jury room), *cert. denied*, 488 U.S. 996 (1988). However, the Seventh Circuit has refused to permit impeachment of the jury's verdict on the basis of a racial comment made by a juror. *See* Shillcutt v. Gagnon, 827 F.2d 1155, 1158 (7th Cir. 1987) ("proper time to discover such prejudices is when the jury is being selected and peremptory challenges are available to the attorneys") (quoting United States v. Dunzac, 622 F.2d 911, 913 (5th Cir.), *cert. denied*, 449 U.S. 1012 (1980)); *see also* Andrews v. Shulsen, 485 U.S. 919, 1093 (1988) (Marshall, J., dissenting) (sufficient cause for hearing to determine whether verdict was result of racial prejudice).

prejudicial information" exception.[161] Courts and scholars, however, have recognized exceptions to Rule 606(b) that are not set forth in Rule 606(b) or its legislative history. These exceptions include: the egregious situation exception, the clerical error exception, and the perjury on voir dire exception. There can be little doubt that, while the propriety of recognizing these exceptions may be questionable, they do in fact exist.

a. The common-law egregious situation exception

The term "common law egregious situation exception" describes the concept that although evidence obtained from a juror may be barred by Rule 606(b), such evidence may be admitted in cases of extreme prejudice. While neither the terms of the exception nor its basis have been clearly defined, support for the doctrine is found in some federal decisions, including those of the United States Supreme Court. In the 1915 case of *McDonald v. Pless*,[162] the Court ruled that the jurors were incompetent to testify, but noted that "it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.' "[163]

McDonald was decided long before Rule 606(b) was enacted, but cases decided since its enactment have indicated that the doctrine enjoys continued vitality. The *Tanner* Court did not specifically adopt the principle, but acknowledged that the common-law egregious situation exception may continue to exist.[164] More recently, the United States Court of Appeals for the Seventh Circuit noted, "further review may be necessary in the occasional case in order to discover the extremely rare abuse that could exist even

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[161] FED. R. EVID. 606(b).

[162] 238 U.S. 264 (1915).

[163] *Id.* at 268-69 (referring to Mattox v. United States, 146 U.S. 140 (1892) and United States v. Reid, 53 U.S. 361, 366 (1851)).

[164] *See Tanner*, 483 U.S. at 125. In *Tanner*, Justice O'Connor stated that "even if Rule 606(b) is interpreted to retain the common-law exception allowing post-verdict inquiry of juror incompetence in cases of 'substantial if not wholly conclusive evidence of incompetency,' . . . the showing made by petitioners falls far short of this standard." *Id.* (citations omitted). Justice O'Connor noted, "[t]hese allegations would not suffice to bring this case under the common-law exception allowing post-verdict inquiry when an extremely strong showing of incompetency has been made." *Id.* at 126. Thus, while the Supreme Court in *Tanner* did not apply the doctrine, it certainly acknowledged the possibility that there may be a common-law egregious situation exception to Rule 606(b), at least in cases of alleged juror incompetency. *Id.* at 125-26.

after the court has applied [Rule 606(b)] and determined the evidence incompetent."[165]

It is rather unusual for the courts to retain a common-law exception where neither the drafters of the rule nor Congress intended to do so. One reason for the courts continued recognition of the egregious situation exception may be that if the alleged impropriety is so serious as to deny a party due process of law, constitutional requirements will override the specific terms of Rule 606(b).[166] Whatever the reason, the common-law egregious situation exception to Rule 606(b) does appear to have continued vitality.

b. The clerical error exception

Another exception not found in Rule 606(b) but recognized by the courts is the "clerical error" exception. This exception is generally viewed as permitting consideration of juror affidavits and other forms of evidence to prove that the verdict was reported erroneously or that the verdict was never agreed upon by the requisite number of jurors.[167] The federal courts have distinguished between the impermissible practice of "interrogat[ing] a juror concerning what he meant by his verdict," and the use of a juror's affidavit "to show that the verdict delivered was not that actually agreed upon," which is permitted.[168] The courts have also held that a juror affidavit is admissible "to show the true verdict or that no verdict was reached at all."[169] While these cases were decided before the enactment of Rule 606(b), at least one scholar is of the opinion that the clerical error exception will survive in the federal system.[170] It has also gained acceptance on the state level.[171]

The clerical error exception has been defined differently in

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[165] Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987).

[166] *See id.* "The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process." *Id.*

[167] *See* Robles v. Exxon Corp., 862 F.2d 1201, 1207-08 (5th Cir.) (inquiries not covered by Rule 606(b) because they do not concern jury's internal processes), *cert. denied*, 490 U.S. 1051 (1989); Mueller, *supra* note 6, at 958-59 (polling of jury clearly not prohibited by Rule 606(b)).

[168] Mueller, *supra* note 6, at 958 n.149 (quoting University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 547 n.43 (5th Cir. 1974)).

[169] *Id.* (quoting Fox v. United States, 417 F.2d 84, 88-89 (5th Cir. 1969)).

[170] *See id.*; *see also Robles*, 862 F.2d at 1207-08 (dicta supporting clerical exception).

[171] *See* Note, *Jury Impeachment: The Illusory Clerical Error Exception*, 63 U. DET. L. REV. 499, 501-08 (1986) (discussing clerical error exception with reference to exclusionary rule).

various jurisdictions. Some courts have held that it covers errors that appear on the face of the verdict as well as errors in recording the intended verdict of the jury. Other courts have limited its application to cases where the error appears on the face of the verdict.[172] One jurisdiction has recently decided that a court may inquire into and correct a clerical error in the verdict while the jury is still sitting, but that such an error may not be corrected after the jury is discharged.[173] Although this Article will not engage in an in-depth examination of this concept,[174] it would appear that, the exception, if interpreted broadly, could consume the rule. In any event, many jurisdictions continue to recognize the clerical error exception to some degree.

c. *Perjury on voir dire and related exceptions*

Generally, Rule 606(b) does not apply to inquiries made by the court prior to the verdict.[175] Some courts have used this principle to permit otherwise inadmissible evidence regarding certain pre-deliberation activities, such as a juror's commission of perjury on voir dire.[176] It is questionable whether the postverdict admission of such evidence can be justified solely on the basis that it involves a pre-deliberation event, particularly if the basis for the allegation of perjury was revealed by the juror during the jury's deliberations.[177]

Nonetheless, at least one court has made the unqualified statement that inquiries into allegations of perjury constitute an exception to Rule 606(b). Therefore, even statements allegedly made by a juror during deliberations tending to prove such perjury are ad-

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[172] *See id.*

[173] *See* Chandler v. U-Line Corp., 91 N.C. App. 315, 324-25, 371 S.E.2d 717, 722-23 (1988).

[174] For a thoughtful and informative review of this matter, see Note, *supra* note 171, at 505-08.

[175] *See supra* note 142 and accompanying text.

[176] *See* United States v. Robbins, 500 F.2d 650, 653 (5th Cir. 1974) (ruling on questions of jury impartiability is within discretion of trial judge); *cf.* Salter v. Watkins, 513 So. 2d 569, 573 (Miss. 1987) (juror's failure to acknowledge, on voir dire, knowledge of party as "outside influence" comes under exception).

[177] *See Tanner*, 483 U.S. at 117-18. In *Tanner*, most, if not all of the narcotic and alcohol use occurred *before* the jury's deliberations. *Id.* at 115-16. However the Supreme Court found that the activities were covered by rule 606(b). *Id.* at 122. "Clearly a rigid distinction based only on whether the event took place inside or outside the jury room would . . . [be] quite unhelpful." *Id.* at 117-18.

missible.[178] Such holdings would appear to create a new "perjury on voir dire" exception to Rule 606(b). This may be attributable to simple expediency, based on a view that perjury on voir dire is intolerable, and if the only evidence of the perjury occurred during the jury's deliberations, it must be admitted even if it would not be competent under the provisions of Rule 606(b). Similar concerns could be raised with regard to other situations, such as a juror's admission of criminal conduct.

While the creation by the courts of new exceptions not specifically set forth in Rule 606(b) is perhaps necessary, such action is fraught with danger. Each new exception creates inroads into the policies and interests protected by the rule, and care must be exercised to ensure that the exceptions do not ultimately undermine the rule.

4. Impeachment of a Jury Verdict by Nonjuror Evidence

Rule 606(b) does not preclude impeachment of jury verdicts. Rather, with certain exceptions, it prevents the use of a juror's statement or affidavit to impeach the verdict. Thus, by its terms Rule 606(b) impliedly permits the impeachment of jury verdicts by the use of nonjuror evidence not otherwise excluded by the rule. This was acknowledged by the *Tanner* Court when it noted that the trial court held a hearing and permitted the parties to adduce nonjuror evidence.[179] Thus, evidence of the observations of counsel and court personnel,[180] documentary evidence,[181] circumstantial evidence,[182] and even the testimony of an eavesdropper,[183] may be admissible to impeach a jury verdict.[184]

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[178] *See* Urseth v. City of Dayton, 680 F. Supp. 1084, 1089 (S.D. Ohio 1987). In *Urseth*, the court stated:

> The scope of Rule 606(b) . . . does not extend to allegations of juror perjury on voir dire. Thus, statements made by a juror during deliberations (or prior thereto), which would tend to indicate that he or she had perjured himself or herself on voir dire, are not excluded by the rule, and so are competent, admissible evidence under the general provisions of Rule 601.

Id. (citations omitted); *see* Note, *supra* note 13, at 432-33 (perjury on voir dire exception recognized in Minnesota).

[179] *See Tanner*, 483 U.S. at 127.

[180] *See id.* at 113.

[181] *See id.* at 127 (citing United States v. Taliaferro, 558 F.2d 724, 725-26 (4th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978)).

[182] *See* Mueller, *supra* note 6, at 927.

[183] *See id.*

[184] The admission of nonjuror evidence to impeach a jury verdict has led to criticism of

B. Procedural Requirements

The application of procedural rules, such as requiring a threshold showing, allocation of burden of proof, vesting discretion in the trial court, and authorization of a finding of harmless error have led to restrictions on the impeachment of jury verdicts. These rules will profoundly affect the outcome of a case and may even be determinative, particularly when they are applied together. For example, if it is held in a specific case that the attacking party must make a threshold showing, that the attacking party has the burden of proof, that the trial court has broad discretion in preserving the verdict, and that any error may be held to be harmless on appeal, it will be extremely difficult to overturn a verdict. On the other hand, if it is held that there is no requirement of a threshold showing, that the party seeking to sustain the verdict has the burden of proof, that the trial court has no discretion in preserving the verdict, and that no error will be harmless, verdicts will be overturned more easily.

In practice, these rules are applied simultaneously and each has an effect upon the other. It is therefore difficult to view each rule in isolation. However, for purposes of this discussion, each will be examined separately.

1. Requirement of a Threshold Showing

Courts have held that before a postverdict inquiry will be authorized and initiated, the party seeking to impeach the verdict must make some showing that the allegations have merit.[185] The quantum of proof required for this initial showing has ranged from

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rule 606(b). One commentator has noted that, regardless of the prejudicial effect of juror misconduct, the determination of whether or not a litigant will receive a new trial will depend solely on whether a person other than a juror witnessed the misconduct. *See* Note, *supra* note 13, at 442-43.

[185] *See* Neron v. Tierney, 841 F.2d 1197, 1203 (1st Cir.) (petitioner's showing of partiality insufficient to justify recall of juror), *cert. denied*, 488 U.S. 832 (1988); Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1081 (3d Cir. 1985) (defendant failed to meet "substantial burden" necessary to procure evidentiary hearing); United States v. Dioguardi, 492 F.2d 70, 80 (2d Cir.) ("substantial if not wholly conclusive evidence" required for hearing), *cert. denied*, 419 U.S. 873 (1974); United States v. Sokoloff, 696 F. Supp. 1451, 1456 (S.D. Fla. 1988) (court need not investigate juror misconduct absent reliable accusation), *aff'd sub nom.* United States v. Cuthel, 903 F.2d 1381 (11th Cir. 1990); *see also* Mueller, *supra* note 6, at 960 (petitioner must ordinarily make preliminary showing of misconduct sufficient to impeach with supporting evidence).

"strong evidence,"[186] to a requirement that the party demonstrate the need for an inquiry by "clear and incontrovertible evidence."[187] Obviously, requiring that the party seeking to initiate a postverdict inquiry make an initial showing of the need based on "clear and incontrovertible evidence" substantially reduces the probability that such an inquiry will be undertaken and that the verdict will be impeached.

Even more significant is the requirement that such an initial showing be made before a party will be permitted to interview jurors. As previously noted, courts have by both court rule and court order placed limitations on postverdict contact with jurors, including provisions that parties may contact jurors only upon leave of the court.[188] At least one federal appellate court has upheld the trial court's refusal to grant such leave where the party failed to make the required threshold showing.[189] This makes it extremely difficult to impeach a verdict, particularly if the party is required to make a showing based on "clear and incontrovertible" evidence. The attacking party will, in most cases, fail to meet this burden without information that can be obtained only from the jurors.

2. Burden of Proof

Authorities generally agree that the burden of proof lies with the party seeking to attack the verdict.[190] *Government of the Virgin Islands v. Nicholas*[191] is one of the more important cases addressing this issue. *Nicholas* was decided solely on the issue of burden of proof and the opinion includes a review of the relevant case

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[186] *Dioguardi*, 492 F.2d at 78.

[187] *Id.* at 79; *see* King v. United States, 576 F.2d 432, 438 (2d Cir.), *cert. denied*, 439 U.S. 850 (1978). In *King*, the court stated, "[t]o overcome this reluctance [to inquire into jury deliberations] and to authorize a post-verdict inquiry, there must be 'clear evidence,' 'strong evidence,' 'clear and incontrovertible evidence,' 'substantial if not wholly conclusive evidence.' " *Id.* (quoting *Dioguardi*, 492 F.2d at 78-80).

[188] *See supra* notes 76-77.

[189] *See* United States v. Gravely, 840 F.2d 1156, 1159 (4th Cir. 1988) (citing *Tanner*, 483 U.S. 107 (1987)).

[190] *See* Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1077-81 (3d Cir. 1985); Shamburger v. Behrens, 418 N.W.2d 299, 302 (S.D. 1988); Crump, *supra* note 5, at 531.

[191] 759 F.2d 1073 (3d Cir. 1985). The *Nicholas* case was cited with approval in *Tanner*, 483 U.S. at 118-20, 125. Although the Supreme Court decided *Tanner* on the issue of external influence, it did note that, in attempting to prove a common law exception to rule 606(b), the burden of proof would fall on the party seeking to impeach the verdict. *See id.* at 125-26.

law on this question. The court in *Nicholas* determined that the burden rests with the party seeking to impeach the verdict and that the burden is substantial.[192]

However, the matter is complicated by the discussion in the decisions regarding the presence or absence of presumptions, implied bias, and the need to prove prejudice. In *Remmer v. United States*,[193] the Supreme Court held that a presumption of prejudice arises in a criminal case where there is improper communication or contact with a juror during the trial, and that the burden rests heavily upon the government to establish that the contact was harmless. More recently, in *Smith v. Phillips*,[194] the Court declined to imply bias on the part of a juror who submitted an application for employment to the district attorney's office during the trial.[195] Some courts have read *Smith* to have shifted the burden of proof to the party alleging improper contact with a juror,[196] while others have interpreted it to have retained the rule laid down in *Remmer*.[197] Similarly, some courts have held that a presumption of prejudice continues to attach in cases of improper external contact with a juror,[198] while others hold that, in light of *Smith*, prejudice

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[192] In *Nicholas*, 759 F.2d at 1081, in a section of the opinion entitled "Burden of Proof," the court concluded:

> The *Dioguardi* court indicated that "[t]he rule against any inquiry whatever recognizes exceptions only where there is a *clear and uncontrovertible evidence* of incompetence *shortly before or after jury service.*" It cannot be seriously contended that the present case satisfies the *Dioguardi* standard. In this case it is sufficient to rule that defendant's evidence does not have that "strong showing" and clarity which would require an evidentiary hearing on the ultimate issue of what [juror] Fleming did or did not hear during the trial.

Id. (emphasis original) (citations omitted).

[193] 347 U.S. 227 (1954).

[194] 455 U.S. 209 (1982).

[195] *Id.* at 215; *see* Note, *Constitutional Law-Juror Bias-Posttrial Hearing to Determine Actual Juror Bias Held Sufficient to Satisfy Due Process Rights*, Smith v. Phillips, *102 S. Ct. 940 (1982)*, 66 MARQ. L. REV. 400 *passim* (1983).

[196] *See* United States v. Pennell, 737 F.2d 521, 532 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); *see also* Eades v. State, 75 Md. App. 411, 425 n.4, 541 A.2d 1001, 1008 n.4 (1988) (discussing conflict among federal circuits).

[197] *See* Stephens v. South Atl. Canners, Inc., 848 F.2d 484, 486 (4th Cir.), *cert. denied*, 488 U.S. 996 (1988); *see also Eades*, 75 Md. App. at 425 n.4, 541 A.2d at 1008 n.4. "The majority of the federal appellate courts hold that, when a presumption of prejudice arises from an improper juror contact, the government bears the burden of establishing that the improper juror contact was harmless to the defendant." *Id.*

[198] Stockton v. Virginia, 852 F.2d 740, 744 (4th Cir. 1988) (rebuttable presumption of prejudice attaches to impermissible communication), *cert. denied*, 489 U.S. 1071 (1989); *Stephens*, 848 F.2d at 486 (presumption of prejudice if contacts are "more than innocuous interventions") (quoting Haley v. Blue Ridge Transfer Co., 802 F.2d 1532, 1539 n.9 (4th Cir.

is no longer presumed.[199] These cases reveal the difficulties that arise when the various grounds for impeachment of jury verdicts are treated differently and presumptions are introduced into the decision-making process.

3. Trial Court Discretion

Another procedural matter that may have a significant effect on the outcome of cases is the amount of discretion given to the trial court in determining whether to initiate a postverdict inquiry or hearing. In every case where there is a claim of improper juror conduct, external influence upon a juror, or similar grounds for verdict impeachment, the trial court will be required to make a determination of whether further inquiry is warranted. In reaching this decision, the court will consider not only the nature of the allegations, but also whether the law requires an initial showing and, if so, whether that showing has been made.[200] The question then becomes how much discretion, if any, does the trial court have in deciding whether to initiate a postverdict inquiry or to hold a hearing.

A review of the case law reveals that the trial court has broad discretion in this area.[201] This is based in part on the fact that the trial judge was present throughout the proceedings, had the ability to observe the jurors and the parties, and otherwise gained an "on-the-scene" perspective of the matter.[202] Whatever the reason, the resulting "abuse of discretion" standard on appeal[203] makes it more difficult to impeach jury verdicts.

Perhaps even more important is the discretion reposed in the trial court in determining whether to permit parties to have postverdict contact with jurors. As previously noted, many courts, by court rule or court order, have imposed the requirement that a party obtain leave of court before initiating such contact. Obvi-

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1986)); *Eades*, 75 Md. App. at 425, 541 A.2d at 1007 (court assumes *Remmer* is valid); Crump, *supra* note 5, at 531 (party alleging misconduct aided by presumption of prejudice).

[199] *See, e.g.*, *Pennell*, 737 F.2d at 532 (*Smith* applies generally to allegations of jury partiality).

[200] *See supra* notes 185-89 and accompanying text.

[201] *See Nicholas*, 759 F.2d at 1075; United States v. Piccarreto, 718 F. Supp. 1088, 1090 (W.D.N.Y. 1989); United States v. Boylan, 698 F. Supp. 376, 388 (D. Mass. 1988), *affd*, 898 F.2d 230 (1st Cir.), *cert. denied*, 111 S. Ct. 139 (1990); Massey v. State, 541 A.2d 1254, 1257 (Del. 1988); Crump, *supra* note 5, at 531.

[202] *See Tanner*, 483 U.S. at 125; *Nicholas*, 759 F.2d at 1077.

[203] *See Massey*, 541 A.2d at 1257.

ously, if a litigant is not permitted to communicate with jurors it will be very difficult for the party to satisfy the requisite quantum of evidence to initiate a postverdict inquiry. It has been held that the trial court has discretion in deciding whether to permit a party to have postverdict contact with a juror.[204] Here again, if the trial court declines to permit such contact, the decision will be reversed only upon a finding of abuse of discretion, and thus, there is little likelihood that the jury verdict will be impeached.[205]

4. Hearing Requirement

The importance of whether a party is entitled to a hearing is immediately apparent. If no hearing is held, it will be extremely difficult for the party seeking to attack the jury verdict to establish that the verdict should be impeached. On the other hand, the holding of a hearing at which jurors are called to testify may offend many of the policy considerations underlying Rule 606(b).[206]

Consistent with the recent trend restricting the impeachment of jury verdicts, courts have exhibited an increasing reluctance to hold hearings at which jurors may be called to testify. The *Tanner* Court specifically refused to grant such a hearing, holding that the defendants' constitutional right to an unimpaired jury was protected by other facets of the trial process.[207] Similarly, the United States Court of Appeals for the Third Circuit has held that in a case of alleged juror incompetency, no hearing is required.[208] While earlier Supreme Court cases dealing with external influences support the holding of a hearing,[209] recent case law gives rise to doubts

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[204] United States v. Gravely, 840 F.2d 1156, 1159 (4th Cir. 1988).

[205] *See id.*

[206] *See supra* notes 40-45 and accompanying text.

[207] *See Tanner*, 483 U.S. at 126-27. It should be noted that in *Tanner*, the trial court granted a hearing and permitted the introduction of non-juror evidence. *Id.* For a criticism of the Court's refusal to grant a second hearing, see Comment, *supra* note 5, at 371-75.

[208] Case v. Mondragon, 887 F.2d 1388, 1394 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1490 (1990); *Nicholas*, 759 F.2d at 1081; United States v. Dioguardi, 492 F.2d 70, 80-81 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974); *see also* Note, *Criminal Law—Postverdict Hearings on Juror Incompetence*—Virgin Islands v. Nicholas, 759 F.2d 1073 (3d Cir. 1985), 59 TEMP. L.Q. 199, 206-09 (1986) (federal treatment of allegation of juror incompetence).

[209] *See Smith*, 455 U.S. at 215; *Remmer*, 347 U.S. at 229. Dissenting opinions have frequently taken issue with the denial of a hearing in these situations. *See, e.g.*, Andrews v. Shulsen, 485 U.S. 919, 919-22 (1988) (Marshall, J., dissenting); *Tanner*, 483 U.S. at 135 (Marshall, J., concurring in part, dissenting in part) (quoting *Smith*, 455 U.S. at 222 (O'Connor, J., concurring)); *Nicholas*, 759 F.2d at 1087 (Garth, J., concurring in part, dissenting in part).

as to the continued vitality of those holdings, particularly in other contexts.

5. Harmless Error

Impeachment of jury verdicts implicates issues of constitutional dimension.[210] Therefore, it must be decided whether an error at the trial level will automatically require reversal, or whether the error may be viewed as harmless.[211]

The courts have held with some consistency that errors relating to impeachment of jury verdicts may be deemed harmless.[212] It has also been held that a party seeking to impeach a verdict must demonstrate prejudice.[213] Since most appeals are taken from the trial court's refusal to permit the impeachment of the jury verdict, these holdings are of great practical significance. The application of the harmless error doctrine and the requirement of proof of prejudice will result in fewer reversals and, accordingly, fewer jury verdicts will be overturned.

C. *Juror Privilege*

Although the policy considerations that give rise to juror privilege are the same as those underlying the juror incompetency approach embodied in Rule 606(b), juror privilege is different in both

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[210] *See supra* notes 54-60 and accompanying text.

[211] *See, e.g.*, Chapman v. California, 386 U.S. 18, 24 (1967) (applying "harmless constitutional error" test).

[212] *See* Rushen v. Spain, 464 U.S. 114, 120-22 (1983); United States v. Hornung, 848 F.2d 1040, 1045-46 (10th Cir. 1988), *cert. denied*, 489 U.S. 1069 (1989); Shillcut v. Gagnon, 827 F.2d 1155, 1159-60 (7th Cir. 1987); People v. Oliver, 196 Cal. App. 3d 423, 435-36, 241 Cal. Rptr. 804, 811-12 (1987).

[213] Appellate courts have refused to disturb lower court decisions upholding verdicts solely on the basis of a party's failure to demonstrate prejudice. *Shillcutt*, 827 F.2d at 1158-60; Massey v. State, 541 A.2d 1254, 1259 (Del. 1988); *see also* Frank v. Brookhart, 877 F.2d 671, 675 (8th Cir. 1989) (convicted defendant failed to establish prejudice based on news accounts of missing witnesses), *cert. denied*, 110 S. Ct. 736 (1990); *Nicholas*, 759 F.2d at 1078 ("defendant's evidence does not have that 'strong showing' and clarity which would require an evidentiary hearing"); Government of the Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975) (government met its burden of establishing that no prejudice resulted from statements made to juror by court personnel), *cert. denied*, 424 U.S. 917 (1976); United States v. Boylan, 698 F. Supp. 376, 387 (D. Mass. 1988) (defendant failed to establish prejudice caused by newspaper and magazine articles present in jury room), *aff'd*, 898 F.2d 230 (1st Cir), *cert. denied*, 111 S. Ct. 139 (1990).

This issue may be complicated by questions of whether prejudice should be presumed in certain cases, such as those involving improper contact with a juror and, if so, whether that presumption has been rebutted. *See supra* notes 193-99 and accompanying text.

its terms and effect.[214] It is immediately apparent that Rule 606(b) may apply in situations where juror privilege has no application, and that the opposite may also be true. Unlike a rule of evidence which must be applied consistently in every case, the terms of the privilege provide the court with discretion in determining whether it should be applied in a particular case.[215] Also, this privilege, like any other privilege, may be waived.[216] Although this doctrine has fallen into disuse in recent years, it has been recognized by the Supreme Court and appears to be a viable concept.[217]

D. Limiting the Grounds for Impeachment

Limiting the grounds for impeaching a jury's verdict is an effective approach to the problem of verdict impeachment and it has been suggested that this approach be adopted by the courts.[218] Although Rule 606(b) does not address the issue, courts are at liberty to limit the grounds available to impeach a verdict and some have indicated a willingness to do so. For example, the Third Circuit has taken the position that a jury verdict may be overturned only if the attacking party establishes the existence of grounds recognized as adequate for impeachment.[219]

Although there are many possible grounds for overturning a verdict and the courts have considered the issue of jury verdict impeachment on numerous occasions, the decisions generally are based on issues other than the validity of the grounds asserted.[220]

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[214] *See* Comment, *Juror Privilege*, *supra* note 13, at 464-74; *see also supra* note 88 and accompanying text (list of requisite elements of juror privilege).

[215] *See* Comment, *Juror Privilege*, *supra* note 13, at 464-74.

[216] *See id.* at 465; *see also* Comment, *Impeachment of Jury Verdicts*, *supra* note 13 (lawyers seek waiver of privilege to overturn verdict).

[217] Professor Wigmore's juror privilege was recognized by the United States Supreme Court in Clark v. United States, 289 U.S. 1, 18 (1933), however, it has not gained wide acceptance. *See* Comment, *Juror Privilege*, *supra* note 13, at 448-50, 464-74. Nonetheless, the doctrine has been mentioned in at least one recent opinion. *See* Eades v. State, 75 Md. App. 411, 417, 541 A.2d 1001, 1004 (1988). Some scholars prefer the juror privilege doctrine to the doctrine of juror incompetence. *See* Thompson, *supra* note 9, at 1222-23; Comment, *Juror Privilege*, *supra* note 13, at 464-74.

[218] *See* Comment, *Impeachment of Jury Verdicts*, *supra* note 13, at 365-66; *see also* Kornstein, *supra* note 6, at 672-74 (listing various grounds for impeachment).

[219] *See Nicholas*, 759 F.2d at 1078 (quoting Government of the Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976)). Although *Tanner* does not address this issue directly, there appears to be nothing in the decision that would preclude the limitation of potential grounds.

[220] *See Tanner*, 483 U.S. at 126-27; Robles v. Exxon Corp., 862 F.2d 1201, 1207-09 (5th Cir.), *cert. denied*, 490 U.S. 1051 (1989); United States v. Sjeklocha, 843 F.2d 485, 488-89

Nonetheless, this appears to be a fertile area for the courts and counsel to explore. An argument could be advanced that, based on precedent involving similar situations, the grounds alleged are not recognized as adequate to overturn a verdict. Conversely, it would be incumbent upon a party seeking to impeach a verdict to demonstrate that the grounds alleged have been recognized as adequate.

One of the shortcomings in using this approach is the difficulty of determining which of the many possible grounds will be recognized and which will not. In addition, a particular ground may deserve recognition in an egregious case, while it may lack merit in a less serious situation. Despite these difficulties, the possibility of limiting the grounds for impeachment does exist.

E. Court Limitations on Contact With Jurors

One of the most important and controversial approaches to the issue of impeachment of jury verdicts involves restrictions imposed by the courts on postverdict contact with jurors. There are many possible alternatives in this area, ranging from the imposition of conditions on contact with jurors to the total proscription of such contact.

The importance of such limitations is obvious, for if a party is precluded from interviewing jurors, the probability of that party's impeaching a verdict is substantially diminished. There is a danger that such limitations may prevent litigants from learning of egregious situations where the impeachment of the verdict is appropriate.[221] When such limitations are imposed on third parties and the press, first amendment issues are implicated.[222] On the other hand, most of the policy considerations previously discussed militate in favor of protecting jurors from dissatisfied litigants and other posttrial harassment. Indeed, the constitutional right to trial by a fair and impartial jury may require that jurors be afforded some protection. Jurors, with what appears to be increasing frequency, are being pursued and harassed by both litigants and members of the

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(11th Cir. 1988); Kornstein, *supra* note 6, at 673 n.68; *see also* Comment, *Stability of Jury Verdicts*, *supra* note 13, at 351-63 (analysis of cases pertaining to specific areas of juror misconduct).

[221] *See* Thompson, *supra* note 9, at 1221.

[222] *See In re* Express-News Corp., 695 F.2d 807, 810 (5th Cir. 1982); Note, *supra* note 18, at 897-902; Recent Development, *Posttrial Juror Interviews by the Press: The Fifth Circuit's Approach*, 62 WASH. U.L.Q. 783, 783 (1985).

media.[223] Such actions may restrict freedom of discussion in the jury room, inhibit jurors from reaching unpopular verdicts, increase the likelihood that jurors will, for self-protection, make remarks in an effort to disassociate themselves from the verdict, and lead to an unwillingness on the part of the public to serve as jurors.[224]

Many courts have adopted rules restricting postverdict contact with jurors and these limitations have taken many forms.[225] It appears that the most common limitation is a requirement that litigants must obtain leave of the court before communicating with jurors. Such rules and orders have been upheld by the federal appellate courts.[226] The courts, however, have not approved limitations on posttrial media contact with jurors.[227]

In *Tanner*, the Supreme Court, for the first time, implicitly approved a limitation on postverdict contact with jurors.[228] Interestingly, the Court stated that violation of a rule limiting such contact could, in and of itself, constitute grounds for disregarding evidence gained as a result of the interview.[229] This is a significant development in that it now appears that evidence of an egregious situation that would be admissible under Rule 606(b) could be disregarded by a court solely on the ground that the evidence was obtained in violation of a court rule or order limiting posttrial contact with jurors.

Perhaps even more significant is the increased use of anonymous juries where, pursuant to a court order, the names and ad-

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[223] *See Sjeklocha*, 843 F.2d at 488; Note, *supra* note 18, at 886-87.

[224] *See supra* notes 12-39 and accompanying text.

[225] *See* United States v. Gravely, 840 F.2d 1156, 1159 (4th Cir. 1988); Haeberle v. Texas Int'l Airlines, 739 F.2d 1019, 1021 (5th Cir. 1984); *Express-News Corp.*, 695 F.2d at 810; United States v. Sokoloff, 696 F. Supp. 1451, 1457 (S.D. Fla. 1988), *aff'd sub nom.* United States v. Cuthel, 903 F.2d 1381 (11th Cir. 1990); Braley v. State, 741 P.2d 1061, 1065 (Wyo. 1987); Mueller, *supra* note 6, at 933-34; Recent Development, *supra* note 222, at 783.

[226] *See Gravely*, 840 F.2d at 1159; *Haeberle*, 739 F.2d at 1021; Note, *supra* note 18, at 899-902; Recent Development, *supra* note 222, at 786.

[227] *See In re* Express-News Corp., 695 F.2d 807, 810 (5th Cir. 1982); Note, *supra* note 18, at 897-902; Recent Development, *supra* note 222, at 787. *But see* Gannett Co. v. Delaware, 571 A.2d 735, 751 (Del. Super. Ct.) (upholding trial court's decision to prevent publication of information to press and others), *cert. denied*, 110 S. Ct. 1947 (1990). The question remains whether the courts would approve a rule directed at jurors precluding postverdict communications with nonlitigants. *Compare Nicholas*, 759 F.2d at 1078 *with* Note, *supra* note 18, at 903-04. Jurors are, of course at liberty to refuse to discuss the case and there appears to be no problem with advising them of this right. *Id.* at 900 & n.84.

[228] *See Tanner*, 483 U.S. at 126.

[229] *Id.*

dresses of the jurors are kept secret.[230] This procedure has been justified by the federal appellate courts for the reason that the jurors should be insulated from harassment and intimidation, one of the major policy considerations in the area of impeachment of jury verdicts.[231] It is apparent that in approving the concept of anonymous jurors,[232] the courts have made it clear that the right to the names and addresses of jurors is not absolute. This procedure has an even greater effect on impeachment of jury verdicts than court orders limiting postverdict contacts with jurors. Since the names and addresses of jurors will never be divulged, it is virtually impossible for the parties, the media, or anyone, for that matter, to communicate with the jurors. As a result, the revelation of potential grounds for verdict impeachment is substantially reduced, if not eliminated entirely.

F. Constitutional Implications of Tanner

Tanner addresses a number of constitutional considerations in the area of jury verdict impeachment.[233] It is clear that courts continue to recognize the importance of the sixth amendment right to a fair and impartial jury,[234] and the importance of that right as applied to the states through the fourteenth amendment.[235] How-

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[230] *See* United States v. Scarfo, 850 F.2d 1015, 1021-26 (3d Cir.), *cert. denied*, 488 U.S. 910 (1988); United States v. Edmond, 730 F. Supp. 1144, 1145 (D.D.C. 1990) (ordering use of anonymous jury). Anonymous juries have been increasingly used in the Second Circuit and their use is now spreading to the other circuits. *Scarfo*, 850 F.2d at 1021-22.

[231] *See Scarfo*, 850 F.2d at 1024-25.

[232] *See id.* at 1023. In *Scarfo*, Justice Weis stated:

> The virtue of the jury system lies in the random summoning from the community of twelve "indifferent" persons—"not appointed till the hour of trial"—to decide a dispute, and in their subsequent, unencumbered return to their normal pursuits. . . . The lack of continuity in their service tends to insulate jurors from recrimination for their decisions and to prevent the occasional mistake of one panel from being perpetuated in future deliberations. Because the system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed, anonymity would seem entirely consistent with, rather than anathema to, the jury concept. In short, we believe that the probable merits of the anonymous jury procedure are worthy, not of a presumption of irregularity, but of disinterested appraisal by the courts.

Id. (citation omitted).

[233] *Tanner*, 483 U.S. at 107.

[234] *See id.* at 127; Stockton v. Virginia, 852 F.2d 740, 743 (4th Cir. 1988) (private communication with juror is presumptively prejudicial), *cert. denied*, 489 U.S. 1071 (1989).

[235] *See* Neron v. Tierney, 841 F.2d 1197, 1200-01 (1st Cir.), *cert. denied*, 488 U.S. 832 (1988); Eades v. State, 75 Md. App. 411, 420, 541 A.2d 1001, 1006 (1988); Thompson, *supra* note 9, at 1193; Note, *Racial Slurs*, *supra* note 157, at 1504; *see also supra* note 60 and

ever, it does appear that the *Tanner* Court has limited that right. The Court, in addition to concluding that the juror evidence was inadmissible under Rule 606(b), held that the United States Constitution did not require the trial court to hold an additional evidentiary hearing to permit the defendant to adduce that evidence. The Court found that the defendant's sixth amendment interest in an unimpaired jury was adequately protected by other aspects of the trial process, such as voir dire, observations made by the court, court personnel, and counsel during the proceedings, the possibility of reports of misconduct by jurors *before* the verdict is rendered, and the availability of nonjuror evidence.[236] The *Tanner* holding will certainly affect future decisions with regard to the constitutional requirements of holding a hearing, especially in cases involving the alleged incapacity of a juror.

Perhaps even more important is the observation in *Tanner* that: "[Although] post-verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior[,] [i]t is not at all clear . . . that the jury system could survive such efforts to perfect it."[237] This statement, when viewed with the *Tanner* holding, indicates that the Court is inclined to further restrict the impeachment of jury verdicts. It may even suggest a willingness by the Court to adopt a position that preservation of the sixth amendment right to trial by jury will require additional restrictions on postverdict contacts with jurors and the impeachment of jury verdicts.

VI. The Two Opposing Views

Unfortunately, the two-hundred-year-long debate over the impeachment of jury verdicts has not reached a resolution. It has, however, sharpened the issues and refined the respective positions.

The body of law governing the impeachment of jury verdicts is driven by a number of important and conflicting policy considerations, which have given rise to two disparate views. Proponents of the first viewpoint, which most scholars have adopted, argue that the interests of fairness and accuracy of result mandate the adop-

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accompanying text.

[236] *See Tanner*, 483 U.S. at 127; *see also Nicholas*, 759 F.2d at 1081 (enough safeguards present despite juror hearing disability).

[237] *Tanner*, 483 U.S. at 120.

tion of a liberal approach with regard to inquiries into jury verdicts and the impeachment of those verdicts. They focus on whether the verdict in a particular case was rendered by a fair and impartial jury, based solely on the evidence, a position that finds its roots in the Constitution.

Proponents of the second view, which Congress and most courts have adopted, advocate restriction of posttrial scrutiny of jury verdicts. They focus primarily on protecting individual jurors and the jury system as a whole. This position is based on a number of policy considerations and is also derived from the Constitution. One of the chief policy considerations underlying this view is the concern that protection of citizens' liberty will be compromised without secrecy of jury deliberations. Jurors will not feel free to render unpopular verdicts or verdicts that could offend those in power if there is a possibility that individual jurors may be examined publicly as to the positions that they have taken. As one commentator expressed it, "[P]osttrial scrutiny sabotages sixth and seventh amendment values to the extent that, when jurors are chosen from the community and must one day return to it, the public's very possession of information about their deliberations may become tantamount to control over them."[238] Proponents of this view also maintain that impeachment of jury verdicts may lead to harassment and threats against jurors, thwart free discussion in the jury room, and erode public confidence in the judgments of the courts.

VII. Conclusion

In recent years we have seen a trend towards a more restrictive approach in the law governing impeachment of jury verdicts. Congress took this tack in adopting rule 606(b), and thereafter the courts expanded the scope of the rule and limited the application of its exceptions. The courts have also developed procedural rules making it more difficult to attack jury verdicts. The proliferation of court rules and orders limiting postverdict contact with jurors and the increased use of anonymous juries is perhaps even more significant. These developments have created a strong movement in this body of law, reflecting the courts' increased focus upon the more universal concerns relating to the the preservation of the jury system, rather than the fairness and impartiality of the jury in a

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[238] Note, *supra* note 18.

particular case.

The possibility exists that the course of the law may shift. However, this change will only come about if the courts and legislatures are convinced that individual jurors and the jury system as a whole are adequately protected. Until that time we can expect the law of impeachment of jury verdicts to become, if anything, even more restrictive.