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Timothy C. Rank
Note

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A man of genius makes no mistakes.¹

It is an oddity of the Anglo-American legal tradition that it entrusts the resolution of complex and controversial issues to a group of people with no prior interest in or knowledge about the specific question being decided.² Using the jury system to determine the outcome of civil and criminal cases requires a great leap of faith and a tremendous compromise between competing interests. As compared to trial before a judge, what is given up in consistency and expertise in a jury trial is balanced against what is gained by a diversity of perspectives and the opportunity to inject community values into the decision. Guaranteed by the Constitution,³ the jury trial has become a democratic sacred cow in American social, political, and legal discourse.⁴

An irony of the jury system in the United States is that jurors are considered at the same time omniscient⁵ and incompe-

1. JAMES JOYCE, ULYSSES 190 (1946).
2. See Marc Galanter, Jury Shadows: Reflections on the Civil Jury and the ‘Litigation Explosion,” in THE AMERICAN CIVIL JURY 1, 15 (1986) (observing that a jury is “not made up of professionals or experts who possess special knowledge of legal norms or their application”).
4. See Peter N. 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, 1188 (1985) (“Along with the flag and the American eagle, the jury system is a revered symbol of the American way of life to such an extent that to question the jury system or to engage in activity that might alter its function can be deemed ‘un-American.’”).
5. The common law concept of jury omniscience was described by Judge Frank:

The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi. Both stand on the same foundation—a presumption of wisdom. The court protects the jury from all investigation and inquiry as fully as the temple

1421
tent. They are deemed incapable of weighing the difference between “admissible” and “inadmissible” evidence, but considered sufficiently responsible and autonomous to mete out justice with little review of the rationale behind their decisions. In an age of complex litigation, the jury has been labelled anachronistic and vestigial by commentators. Juries are accused of rendering arbitrary rather than reasoned decisions.

Some argue that the jury system is in need of reform and even, in the case of complex litigation, complete abolition. In

6 See Patrick Devlin, Trial by Jury 114 (1966) (“The first object of the [English] rules [of evidence] was to prevent the jury from listening to material which it might not know how to value correctly.”). Judge Learned Hand addressed this paradox by observing that we “trust [jurors] so reverently as we do, and still . . . surround them with restrictions which if they have any rational validity whatever, depend upon distrust.” Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, in 3 Lectures on Legal Topics 89, 101 (1926).


8 See Skidmore, 167 F.2d at 60, in which Judge Frank mused that “while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour.” Id. For a contrary view, see In re United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979), cert. denied, 446 U.S. 929 (1980), in which the court wrote that “no one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case. We do not accept the underlying premise of appellees’ argument, ‘that a single judge is brighter than the jurors collectively functioning together.’” Id. at 431.

9 See, e.g., William W. Schwarzer, Reforming Jury Trials, 132 F.R.D. 575 (1990). Judge Schwarzer argues that the current conception of the jury trial is inadequate and that “[u]nless trial by jury is reformed, it may lose credibility and sink into disrepute.” Id. at 576. To improve the jury trial process, he suggests that the jury trial should be modified to allow for more involvement of the jurors in the trial process. Id. at 590-94. His recommendations include permitting jurors to ask questions during the trial and encouraging jurors to discuss the case among themselves during the course of the trial. Id.

Other commentators have suggested “a more active jury likely will be perceived as, and will be in fact, a more effective decisionmaker.” Steven I. Friedland, Legal Institutions: The Competency and Responsibility of Jurors in Deciding Cases, 85 Nw. U. L. Rev. 190, 192 (1990).

spite of the criticism, the jury and the deliberative process remain central fixtures of the American legal system, insulated from outside scrutiny and insider disclosure. From the beginning, the policies of jury secrecy and jury verdict finality have been vindicated in practice and procedure.

One aspect of the concern for the jury system is embodied in Federal Rule of Evidence 606. Rule 606 governs situations in which a juror is deemed not competent to testify as a witness. Subdivision (b) of the Rule pertains to the competency of juror testimony about the jury deliberation process. It excludes affidavits and testimony regarding a juror’s statements or conduct in the jury room and the juror’s “mental processes in connection” with deliberations. Although Rule 606(b) has been the subject of much debate and controversy, the provi-
sion concerning juror testimony about his or her "mental processes" has undergone little scrutiny.

This provision of the Rule has been applied with varying results to jurors' post-trial testimony that the verdict does not reflect the jury's intention. Some circuits have interpreted the language precluding testimony about jurors' mental processes to prohibit the revisititation of jury verdicts in civil cases when, because of a misunderstanding about the court's instructions, the award is not what the jury intended. Other circuits have concluded that such testimony does not require inquiry into the mental processes of the jurors and have allowed the testimony to clarify the jury's intent. This issue arises most often in trials in which the jury uses a special verdict to determine comparative negligence. These trials often require juries to answer complex questions about the fault of the parties without knowledge of the effect of their answers on the ultimate award. For this reason, the possibility of jury confusion, resulting in a mistaken verdict, is high. Because mistaken verdicts exacerbate an already imperfect decision-making process, a construc-

centered around interpretations of the "extraneous prejudicial information" and "outside influence" provisions of the Rule. In particular, the Supreme Court's decision in Tanner v. United States, 483 U.S. 107 (1987), sparked the most vehement response in legal literature. For a description of the Tanner case, see infra note 78.

17. See infra part II. A.

18. See infra part II. B.

19. A special verdict, as opposed to a general verdict, is a statement by the jury of its findings of fact to which the court then applies the law and renders judgment accordingly. See Fed. R. Civ. P. 49(a); Donald Olander, Note, Resolving Inconsistencies in Federal Special Verdicts, 53 Fordham L. Review 1089, 1089-90 (1985). For a description of the use of the special verdict in federal litigation, see Quaker City Gear Works, Inc. v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984), cert. denied, 471 U.S. 1136 (1985). This verdict is often used in cases of comparative negligence to apportion comparative fault. See, e.g., Mateyko v. Felix, 913 F.2d 744, 746 (9th Cir. 1990), modified, 924 F.2d 824, cert. denied, 112 S. Ct. 65 (1991).

20. This is especially true in complex cases involving multiple parties to the litigation. Trials involving large scale products liability, antitrust, or patent issues provide examples of cases which may be susceptible to jury confusion. See, e.g., Nanavati v. Burdette Tomlin Memorial Hosp., 857 F.2d 96, 99 (3d Cir. 1988) (using a special verdict in an antitrust action in which "litigation has raged in state as well as federal courts, trial and appellate, and has presented an extraordinary number of difficult legal issues"), cert. denied, 49 U.S. 1078 (1989); see also New Idea Farm Equip. Corp. v. Sperry Corp., 916 F.2d 1561, 1562 (Fed. Cir. 1990) (patent infringement action); Cipollone v. Liggett Group, Inc., 893 F.2d 541, 555-55 (3d Cir. 1990) (products liability action against cigarette manufacturers), aff'd in part and rev'd in part, 60 U.S.L.W. 4703 (U.S. June 24, 1991) (No. 90-1038).
tion of Rule 606(b) which allows testimony to correct a mistaken verdict would ameliorate a defect in the jury system.

This Note examines whether Rule 606(b) should permit reformation of jury verdicts in comparative negligence cases when the special verdict answers incorrectly reflect the jury's intended verdict. Part I explains the history of the rule against juror testimony from its common law development to its current formulation in Federal Rule of Evidence 606(b). Part II discusses the reasoning and holdings of the leading cases applying Rule 606(b) to mistaken verdicts. Part III questions whether the admission of testimony for the purpose of reforming jury verdicts substantially conflicts with the policies Congress sought to advance by enacting Rule 606(b). It proposes an interpretation of the Rule that will allow a court to admit verdict reformation when jurors unanimously agree on what the jury had intended. This Note argues that this construction of Rule 606(b), coupled with local rules limiting the admissibility of reformation testimony and restricting posttrial contact between attorneys and jurors, will protect the policies Rule 606(b) seeks to advance while minimizing the irregularity and injustice of mistaken verdicts.

I. RULE 606(b): PRECURSORS, PROGRESSION, AND POLICIES

A. AMERICAN COMMON LAW DEVELOPMENT

Rule 606(b) has its origins in the English case of Vaise v. Delaval. In Vaise, Lord Mansfield established the rule that a

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21. This Note assesses Rule 606(b) only as it applies to civil trials, but the principles supporting admission of reformation testimony to correct unintended verdicts also pertain to criminal trials. Indeed, because of the heightened liberty concerns implicated in criminal trials, the systemic criticisms may apply with greater force in this second area.

22. All the cases analyzed in this Note address reformation of verdicts when a jury has assessed comparative fault through the use of a special verdict. While the suggestions in this Note specifically concern these types of cases, the arguments in favor of reformation apply equally to all situations in which reformation promotes justice without undermining the integrity of the jury verdict. For these suggestions to be acted upon fully, the language of Rule 606(b) would need to be amended to allow a limited inquiry into the mental processes of jurors in connection with deliberations. This Note, however, does not undertake to propose any such changes to the Rule.

23. See infra notes 137-39 and accompanying text.

24. See infra notes 132-34 and accompanying text.

juror could not "allege his own turpitude." Thus, a juror could not offer testimony to impeach a verdict once it was rendered. Lord Mansfield's rule soon became universally followed in both England and the United States. The Mansfield rule was premised on the belief that if a juror participated in wrongful conduct during deliberations, his subsequent testimony on the subject was unreliable.

The Iowa Supreme Court, in *Wright v. Illinois & Mississippi Telegraph Co.*, formulated the first major deviation in the United States from the Mansfield rule. In *Wright*, the court considered whether testimony about a jury's use of a "quotient verdict" should be admitted as the ground for grant-

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26. *Id.* Based on this rule, Lord Mansfield refused to receive the affidavit of jurors to prove that their verdict had been arrived at by lot. *Id.*


28. See Crump, *supra* note 16, at 513. This same common law rationale was also applied to witnesses who retracted perjured testimony or invalidated their own instruments, to accomplices who testified in criminal cases, and to married men who attempted to disclaim paternity on grounds of nonaccess in illegitimacy cases. *Id.* Common law judges inferred reasons why such witnesses might in some instances be unreliable and then mechanically applied the sweeping exclusion of this testimony in all cases by declaring them incompetent. *Id.* at 513-14. As Wigmore characterized the court's reasoning, "[t]he notion underlying the maxim is that a person who comes upon the stand to testify that he has at a former time spoken falsely or acted corruptly is by his very confession a liar or a villain, and therefore untrustworthy as a witness." 2 JOHN H. WIGMORE, *Evidence* § 525, at 735 (James H. Chadbourne rev. ed. 1979).

One apparent inconsistency in the formulation of the Mansfield rule is that while it prohibited jurors from impeaching the verdict, it did not prevent a non-juror from testifying about an observation of jury misconduct. In *Vaise v. Delaval*, the court indicated in dicta that if a bailiff had witnessed improper juror conduct, his testimony would be sufficient basis for a new trial. 99 Eng. Rep. at 944. Under this rule, testimony about egregious violations of the deliberation process was inadmissible if witnessed only by the jurors, but admissible if witnessed by someone who arguably intruded upon the sanctity and secrecy of the jury room. Wigmore points out that the admission of non-juror testimony could perhaps "tempt the parties to seduce the bailiffs to tricky expedients and surreptitious eavesdroppings." 8 JOHN H. WIGMORE, *Evidence* § 2353, at 699 (John T. McNaughton rev. ed. 1961) [hereinafter WIGMORE ON *Evidence*—1961]. This inconsistency led to criticism of the rule by commentators as well as modification by the courts. *Id.*

Although the Mansfield rule was initially adopted in the United States as the general rule for assessing the competency of juror testimony regarding jury misconduct, it has since been modified by statute and by case law. See Tanner v. United States, 483 U.S. 107, 117 (1987).

29. 20 Iowa 195 (1866).

30. A "quotient verdict" is one resulting from an agreement among the jurors whereby each juror writes down the amount of damages to which he thinks the party is entitled, and the jurors then determine the final award by
The court devised a rule that "affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict." The court explained that, because objective, verifiable occurrences are independent of the verdict and can be corroborated, testimony about them is admissible. Conversely, because a verdict partially results from the mental processes of individual jurors, it is impossible to separate a juror's thought processes in connection with deliberation from the verdict itself. The court thus held that testimony regarding matters about which a juror or jurors had exclusive knowledge should be excluded.3

Using its test, the court concluded that quotient verdicts are objectively verifiable because each juror can testify to its use, and, therefore, testimony about the jury's use of a quotient verdict is admissible. On the other hand, testimony about matters such as a juror's misinterpretation of the court's instructions or misunderstanding of the statement of a witness would be inadmissible under the Wright rule because it requires inquiry into the juror's thought process.
The Wright court's primary concern was protecting the inviolability and finality of jury verdicts. In the Wright court's view, its rule would prevent attacks on the verdict at the whim of a minority juror while still allowing proof of actual misconduct or irregularity. The Wright rule eventually became recognized as the Iowa rule and, in subsequent years, was adopted in many other jurisdictions.

The second major modification of the Mansfield rule was made by the Supreme Judicial Court of Massachusetts in Woodward v. Leavitt. While the Wright court distinguished between matters resting solely in the mind of a juror and external matters, the Woodward court differentiated between matters occurring outside the jury room and those occurring inside. The Woodward court concluded that testimony "concerning anything that passed in the jury room" was incompetent because it "related to the private deliberations of the jury." Conversely, testimony about matters that did not rest in the juror's breast was admissible. Id. at 210 (emphasis added). The Wright court distinguished between actual happenings, to which all jurors are exposed, and the thoughts and beliefs of a specific juror, which remain hidden in that juror's mind.

The Kansas Supreme Court adopted the rule of Wright in Perry v. Bailey, 12 Kan. 415, 418-19 (1874). In assessing the rule, the court explained that "justice will be promoted, and no sound public policy disturbed" if juror testimony is admitted regarding "matters lying outside the personal consciousness of the individual juror or those things which are matters of sight and hearing, and therefore accessible to the testimony of others." Id. at 419.

37. Wright, 20 Iowa at 210-11.
38. Put succinctly, the Wright rule distinguishes between matters existing only within the mind of a juror and external matters, allowing testimony regarding the latter, but excluding testimony regarding the former. See id.
40. 107 Mass. 453 (1871).
41. Id. at 471. The court also stressed the distinction between testimony about an external "disturbing influence," which the court considered admissible, and testimony about "how far that influence operated upon [the juror's] mind," which the court held inadmissible. Id. at 466. Although this bifurcation is simply an extension of the Woodward court's outside/inside distinction, it mirrors the Iowa rule's exclusion of testimony regarding matters existing solely within the mind of an individual juror. See supra note 36.
42. Woodward, 107 Mass. at 471.
late to jury deliberations was deemed competent.\textsuperscript{43} Using this test, the court admitted a juror's affidavit refuting allegations that prior to trial the juror had made statements about the defendant's guilt.\textsuperscript{44} The court did not, however, admit the portion of the juror's affidavit describing the deliberations.\textsuperscript{45} The court in \textit{Woodward} sought to maintain the integrity of the jury verdict by ensuring free and secret deliberations while pursuing allegations of extraneous impropriety.\textsuperscript{46}

B. \textbf{ARRESTED DEVELOPMENT IN THE UNITED STATES SUPREME COURT}

The United States Supreme Court addressed the question of juror testimony on the validity of a verdict in \textit{Mattox v. United States}.\textsuperscript{47} \textit{Mattox} involved affidavits from jurors alleging that members of the jury had read newspaper accounts of the trial during deliberations.\textsuperscript{48} The Court cited with approval both the Iowa rule\textsuperscript{49} and the "outside influence" rule of \textit{Woodward v. Leavitt}.\textsuperscript{50} Using this precedent, the Court concluded that the

\begin{itemize}
  \item \textsuperscript{43} \textit{Id.}
  \item \textsuperscript{44} \textit{Id.}
  \item \textsuperscript{45} \textit{Id.}
  \item \textsuperscript{46} \textit{Id. at 460.}
  \item \textsuperscript{47} 146 U.S. 140 (1892). The United States Supreme Court first addressed the issue of juror competency in \textit{United States v. Reid}, 53 U.S. 361 (1851). In \textit{Reid}, the Court considered the admissibility of two jurors' testimony that they had read newspaper accounts of the trial prior to reaching a verdict. \textit{Id.} at 362. The jurors further stated in their affidavits that the newspaper stories had not influenced their decisions. \textit{Id.} at 366. The Court did not decide the competency of the jurors' testimony. \textit{Id.} Instead, it held that because "[t]here was nothing in the newspapers calculated to influence [the jurors'] decision, and both of them swear that these newspapers had not had the slightest influence on their verdict," no new trial was required. \textit{Id.}
  \item \textsuperscript{48} The \textit{Reid} Court "cited no authority for its decision, stated no general rule to follow, and analyzed no policy considerations." Crump, \textit{supra} note 16, at 517. Instead, the Court proposed a case-by-case analysis which assessed the fairness of allowing juror testimony. This approach was adopted because, while the Court recognized the need for protecting the secrecy of deliberation, "cases might arise in which it would be impossible to refuse [juror affidavits] without violating the plainest principles of justice." \textit{Reid}, 53 U.S. at 360.
  \item \textsuperscript{49} \textit{Mattox}, 146 U.S. at 142-43. The newspaper accounts indicated that the evidence in the trial suggested defendant's guilt. \textit{Id.} at 143. The affidavits further alleged that the bailiff told the jury that "'[t]his is the third fellow [the defendant] has killed.'" \textit{Id.} at 142 (quoting a juror affidavit).
  \item \textsuperscript{50} The Court cited the Iowa rule as applied by the Kansas Supreme Court in \textit{Perry v. Bailey}, 12 Kan. 539, 544 (1874). \textit{Mattox}, 146 U.S. at 148. Although the facts were similar to those in \textit{Reid}, see \textit{supra} note 47 and accompanying text, the \textit{Mattox} Court did not follow \textit{Reid}'s case-by-case approach.
\end{itemize}
affidavits concerned "outside influences" to the deliberations which did not require an analysis of matters resting solely in the mind of the jurors. 51 Thus, the Court deemed the affidavits competent and ordered a new trial.52

Several years later, the Supreme Court again considered the admissibility of juror testimony, this time in a civil case concerning a jury's use of a quotient verdict. In McDonald v. Pless,53 the Court explained that previous "decisions recognize[d] that it would not be safe to lay down any inflexible rule" about the use of juror affidavits.54 The Court then strayed from its reasoning in Mattox,55 instead balancing the parties' interest in a properly conducted trial against the potential injury to the public.56

Using this balancing test, the Court found three overriding reasons to exclude the testimony. First, admitting the testimony encourages post-trial jury harassment.57 Second, admitting it discourages free and frank discussions within the jury room because jurors may fear that their discussions would become public knowledge.58 Third, admitting the testimony interferes with the finality of litigation by encouraging unsuccessful litigants to tamper with jury verdicts.59 The Court stated that, as a rule, juror testimony about the validity of the verdict should be excluded except "in the gravest and most important cases."60 However, it gave no direction as to what those cases

51. Id. at 148-49.
52. Id. at 149.
53. 238 U.S. 264 (1915).
54. Id. at 268.
55. The McDonald Court made no reference to its approval in Mattox of the Iowa rule or the Woodward test. Indeed, because Wright was factually similar to McDonald, the Iowa rule would have yielded the same result. If the Woodward test were followed, however, the quotient verdict could not have been deemed an extraneous influence, and the affidavits would not have been allowed.
56. McDonald, 238 U.S. at 267. The Court explained this balance as follows:

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

Id.
57. Id.
58. Id. at 267-68.
59. Id. at 267.
60. Id. at 269.
might be.

C. **Rule 606(b): Conception and Birth**

The Court's use of a balancing test in *McDonald* created substantial confusion in the federal courts in the years following the decision. By the late 1960s, however, when the drafters of the proposed Federal Rule of Evidence 606(b) began their work, two general principles were recognized by the majority of jurisdictions. First, thoughts of one or more jurors were always considered inadmissible, and second, testimony from jurors about the misconduct of an outside party or from a court officer about jury misconduct was considered admissible. Disagreement among jurisdictions was most pronounced over the manner in which courts assessed testimony about matters occurring inside the jury room when the mental processes of individual jurors were not involved. The drafters of Rule 606(b)

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61. See Crump, supra note 16, at 519 (discussing the inconsistent interpretations by federal courts).

62. See Fed. R. Evid. 606(b) advisory committee's note, reprinted in 56 F.R.D. 183, 265 (1972). The Advisory Committee concluded that the "authorities are in virtually complete accord in excluding" evidence regarding the mental operations and emotional reactions of jurors during deliberations. Id.; see also Crump, supra note 16, at 519 (stating that "all courts would have excluded evidence about a juror's defective reasoning process").

63. See Fed. R. Evid. 606(b) advisory committee's note, reprinted in 56 F.R.D. at 265-66.

64. With this task in mind, the Federal Rules Advisory Committee promulgated its first proposed draft in 1969. This first attempt at creating a uniform rule was essentially a codification of the Iowa rule, which the Advisory Committee concluded was the trend in the majority of jurisdictions. The Advisory Committee's Note to Rule 606(b) stated that, among the jurisdictions, the "trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room." Fed. R. Evid. 606(b) advisory committee's note (first proposed draft), reprinted in 46 F.R.D. 161, 289-90 (1969). The proposed rule provided:

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

*Id.*

The Rule as proposed was criticized for concentrating solely on the exclusion of testimony about the mental processes of jurors while remaining silent on whether jurors were competent to testify about activities of the jurors in the jury room. See 3 Weinstein & Berger, supra note 27, § 606[01], at 606-15. The Department of Justice contended that the proposed subdivision was a de-
sought to incorporate the established principles of juror competency and to reconcile the inconsistencies among the circuits.\(^6\)

The Advisory Committee’s final proposal, ultimately adopted as Rule 606(b),\(^6\) took the previous codification of the departure from established law governing the bases for jurors impeaching their own verdicts. The Department argued that “by making a juror incompetent to testify concerning the effect of anything upon his or any other juror’s mind or emotions,” suggests that a juror is competent to testify concerning all transactions during the jury deliberations.” \(\text{Id.} \) (quoting \textit{DEPARTMENT OF JUSTICE, REPORT ON PROPOSED FEDERAL RULES OF EVIDENCE} 39-40 (1971)). The Department disagreed with the Advisory Committee’s assertion that the trend among the jurisdictions was to allow jurors to testify about anything that did not pertain to their own mental processes. \(\text{Id.} \) \(\text{\S} \) 606[01], at 606-16. The proposed draft was also criticized by Senator John L. McClellan in a letter to the Standing Committee on Rules of Practice and Procedure, in which he wrote:

I have no objection to permitting jurors to testify that improper information came to their attention . . . [b]ut as I read the present draft of Rule 606, it would go further and permit the impeachment of verdicts by inquiry into, not the mental processes themselves, but what happened in terms of conduct within the jury room.

\(\text{Id.} \) \(\text{\S} \) 606[01], at 606-16 n.2 (quoting Letter from Sen. McClellan to Judge Albert B. Maris, Chairman of the Standing Committee on the Rules of Practice and Procedure (Aug. 12, 1971), \textit{reprinted in} \textbf{117 CONG. REC.} 33,642, 33,645 (1971)).


Iowa rule\(^6\) and incorporated the rule from *Mattox*\(^6\) and *Woodward*\(^6\) that jurors were not competent witnesses about occurrences or statements made during deliberations unless their testimony concerned extraneous prejudicial information or improper outside influence.\(^7\) The Rule does not define the substantive grounds on which a verdict can be set aside; rather, it applies only to determining a juror's competency to testify about jury irregularity.\(^7\)

Rule 606(b) represents an accommodation between competing values in our jury system.\(^7\) The Senate Judiciary Committee Report emphasized that the Rule is intended to prevent "harassment of former jurors by losing parties,"\(^7\) to encourage open debate among jurors,\(^7\) to uphold a "finality to litiga-

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\(6\) See supra notes 29-39 and accompanying text (discussing the Iowa rule).

\(6\) *Mattox v. United States*, 146 U.S. 140, 149 (1892); see supra notes 47-52 and accompanying text.

\(6\) *Woodward v. Leavitt*, 107 Mass. 453, 466 (1871); see supra notes 40-46 and accompanying text.

\(6\) Rule 606(b) was rewritten by the Standing Committee on Rules of Practice and Procedure as follows, with the Committee modifications indicated by italics:

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received.


71. See *Fed. R. Evid.* 606(b) advisory committee's note, reprinted in 56 F.R.D. 183, 266 (1972).


74. Id. The Senate Report asserted that "common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts." Id. The Supreme Court has stated that privacy encourages "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." *Tanner v. United States*, 483 U.S. 107, 120 (1987).

Jury privacy seems to be necessary to encourage unfettered debate, without which the process would be tainted by concerns about appearance. Jurors
tion," and to dissuade fraud by individual jurors who could remain silent during deliberations and later assert they were influenced by improper considerations. The Report concluded that "[i]n the interest of protecting the jury system and the citizens who make it work, Rule 606 should not permit any inquiry into the internal deliberations of the jurors."  

would be less candid if they felt that the substance of the deliberation might be made public. See Note, Public Disclosures of Jury Deliberations, 96 HARV. L. REV. 886, 891 (1983) [hereinafter Note, Public Disclosures]. A "juror's willingness to depart from community expectations becomes even less probable if a wide audience may discover precisely how much each individual contributed to an unpopular verdict or which jurors delayed or thwarted a popular one." Id. at 890. As the Senate Judiciary Committee noted, "[j]urors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation." S. REP. No. 1277, supra note 66, at 14, reprinted in 1974 U.S.C.C.A.N. at 7060.

In addition, the policy of jury secrecy is "influenced by the notion that failure to shield current jurors from unwanted scrutiny will cause other citizens to shun jury duty in the future." Note, Public Disclosures, supra, at 889.

75. See S. REP. No. 1277, supra note 66, at 14, reprinted in 1974 U.S.C.C.A.N. at 7060. This concern seems to encompass both the conservation of judicial resources by foreclosing lengthy post-trial hearings on marginal claims and the preservation of the dignity of the court and of the trial process. Without solicitude for the entry of the verdict as the end of litigation, the losing party could seek to extend the process until some issue arose in his favor.

76. See id. (stating that the rule should prevent "exploitation of disgruntled or otherwise badly motivated ex-jurors"); see also United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976) (asserting that prevention of fraud by individual jurors is a central purpose of the rule of juror incompetency), cert. denied, 429 U.S. 1110 (1977).

77. See id. (stating that the rule of 606(b) consideration of the secrecy of deliberations and the finality of litigation took precedence over consideration of the accuracy of individual jury verdicts. See Crump, supra note 16, at 525 ("The Rule actually conceals the accommodation, struck first by the Advisory Committee and then by Congress, between an accurate process for seeking truth and a stable jury system."); Thompson, supra note 4, at 1204 ("Throughout the debate little concern was expressed about the accuracy of jury verdicts, litigants' rights, or society's interest in accurate, reliable jury verdicts."); see also Crump, supra note 16, at 520, 525. Similarly, the Court in Tanner v. United States, 483 U.S. 107 (1987), wrote: "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 juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." Id. at 120.

One commentator has stated that this compromise, which led to the current formulation of the Rule, represented a concern for the long-term effects of a rule which allowed inquiry into the deliberative process but gave little consideration to the effects of "a judicial system that consciously suppresses evidence of malfeasance" and mistake. Crump, supra note 16, at 521.
II. RULE 606(b): JUDICIAL APPLICATION

Since the adoption of the Federal Rules of Evidence, many commentators have criticized the wording of Rule 606(b) as imprecise and functionally problematic. Although some inter-

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78. See, e.g., Crump, supra note 16, at 521. Crump concluded that the "legislative history of Rule 606(b) suggests that a fairly diffuse accommodation was obtained, and the ambiguous wording of the Rule makes it difficult to interpret." Id. at 522. Another commentator has argued that "[t]he rule has proven to be difficult to apply, thereby encouraging more litigation." Thompson, supra note 4, at 1204. Most criticism of the Rule has centered around the ambiguity of the terms "extraneous prejudicial information" and "outside influence improperly brought to bear." See, e.g., Note, Impeachment of Verdicts by Jurors—Rule of Evidence 606(b), 4 WM. MITCHELL L. REV. 417, 439-42 (1978); see also Crump, supra note 16, at 522-25; Swaine, supra note 16, at 189-90.

Little guidance was given as to the proper way to apply Rule 606(b). The Advisory Committee did attempt to provide some guidance for applying the Rule by indicating that compromise verdicts, quotient verdicts, speculation about insurance coverage, or misunderstanding of juror instructions would not constitute "extraneous prejudicial information." FED. R. EVID. 606(b) advisory committee's note, reprinted in 56 F.R.D. 183, 266 (1972). The House Judiciary Committee suggested that verdicts decided by lot or chance should not be considered to be affected by an "improper outside influence." H.R. REP. No. 650, supra note 66, at 9-10, reprinted in 1974 U.S.C.C.A.N. at 7083-84.

Because of the lack of significant guidance, however, courts construing the "extraneous influence" and "outside information" clauses arrived at a wide variety of results. For example, in its most recent interpretation of the "outside influence" provision of Rule 606(b), the Supreme Court held 5-4 that a juror was incompetent to testify about the consumption of alcohol and the use of illegal drugs by jurors during the trial. Tanner v. United States, 483 U.S. 107, 125 (1987). In Tanner, a juror who called the defendant's attorney after the trial stated that several jurors consumed alcohol at lunch throughout the trial, causing them to sleep in the afternoon. Id. at 113. While the appeal of the case was pending, a second juror submitted an affidavit that described the jury as "one big party." Id. at 137. He further asserted that many jurors smoked marijuana and ingested cocaine and that the jury foreperson was "'an alcoholic' who would drink a liter of wine at lunch." Id. at 136. Writing for the majority, Justice O'Connor reasoned that substance abuse was not an "external" or "outside" influence, and therefore Rule 606(b) precluded juror testimony about such matters. Id. at 124. The opinion concluded that the use of drugs and alcohol and other "physical or mental incompetence of a juror [are treated] as 'internal' rather than 'external' matters," id. at 118, and it equated intoxication with "a virus, poorly prepared food, or a lack of sleep," id. at 122.

The "extraneous information" provision has been interpreted to include introduction to the jury of news items, see, e.g., United States v. Boylan, 698 F. Supp. 376, 386-88 (D. Mass. 1988) (admitting juror testimony regarding a newspaper article mentioning the defense attorney which had been passed around jury room), aff'd, 898 F.2d 230 (1st Cir.), cert. denied, 111 S. Ct. 139 (1990), as well as other "extra-record facts about the case," communications between the jurors and third parties, or partial statements by the court. See Government of V.I. v. Gereau, 523 F.2d 140, 150 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).

Courts have also construed as "extraneous" information communicated by
pretations of Rule 606(b) have provoked criticism, little attention has been paid to that part of the Rule which provides that a juror may not testify about his or her “mental processes in connection [with the verdict].” Courts applying Rule 606(b) to juror testimony about unintended verdicts have not a juror to another juror or jurors that is specific to the case and has not been revealed at trial. See, e.g., United States v. Posner, 644 F. Supp. 885, 889 (S.D. Fla. 1988) (allowing testimony that a juror had visited the property that the defendant claimed as an income tax deduction and had conveyed to the other jurors her beliefs about the value and appropriate use of the land), aff’d, 828 F.2d 773 (11th Cir. 1987), cert. denied, 485 U.S. 935 (1988), as have experiments, see, e.g., In re Beverly Hills Fire Litig., 695 F.2d 207, 213-14 (6th Cir. 1982) (upholding the admission, in an action involving the manufacturer of electrical wiring, of juror testimony that another juror conducted experiments with the wiring in his home and communicated to other jurors his belief that his experiments contradicted the plaintiff’s theory of the case), cert. denied, 461 U.S. 929 (1983), and communications, see, e.g., Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517, 1540-41 (D. Minn. 1989) (conducting an evidentiary hearing and admitting testimony that the jury foreman learned from his brother-in-law, a doctor, about the defendant manufacturer’s withdrawal from the market of the allegedly defective intrauterine device). Testimony about “improper outside influences,” such as acceptance of bribes and exposure to threats, has also been construed as falling outside the broad exclusionary sweep of Rule 606(b). See Krause v. Rhodes, 570 F.2d 563, 566-67 (6th Cir. 1977) (remanding for a new trial because a juror testified that he had been assaulted and told that his home would be blown up), cert. denied, 435 U.S. 924 (1978).

79. See, e.g., Crump, supra note 16, at 523-24 (criticizing the Court’s decision in Tanner).

80. Swaine, supra note 16, at 189-90 (“Although . . . Rule 606(b) theoretically appl[ies] to all subjects for testimony by jurors, the vast majority of cases implicating [the Rule] concern misconduct by or toward the jury.”). When examined, most notably by federal circuit courts, this provision has been interpreted broadly and inconsistently. Courts have ruled juror testimony incompetent because it related to the mental processes of jurors in a wide variety of cases: when it was alleged that the jury reached its verdict by quotient or compromise, Scogin v. Century Fitness, Inc., 780 F.2d 1316, 1320 (8th Cir. 1985) (quotient verdict); United States v. Marques, 600 F.2d 742, 746-47 (9th Cir. 1979) (compromise verdict), cert. denied, 444 U.S. 1019 (1980); when the judge’s anti-deadlock instructions were alleged to be coercive, United States v. Black, 843 F.2d 1456, 1462 (D.C. Cir. 1988); when an affidavit was offered to prove that the jury did not follow the court’s instructions, Moores v. Navitrade, S.A., 94 F.R.D. 340, 342-43 (D. Me. 1982), aff’d, 705 F.2d 440 (1st Cir. 1983); and when it was asserted that a juror’s plan to leave on vacation af-
uniformly interpreted the "mental processes" clause. Some circuits have held that "a jury's misunderstanding of testimony, misapprehension of law, errors in computation or improper methods of computation, unsound reasoning or other improper motives cannot be used to impeach a verdict." Other courts have concluded that the Rule does not bar testimony that due to "inadvertence, oversight, or mistake the verdict announced was not the verdict on which agreement had been reached."

A. THE EIGHTH CIRCUIT: REFORMATION TESTIMONY REQUIRES IMPROPER INQUIRY

Some courts hold that any reformation testimony is inadmissible. In *Karl v. Burlington Northern Railroad*, the Eighth Circuit Court of Appeals set the course, holding that Rule 606(b) prohibits testimony that the verdict announced in court did not reflect the result that the jurors intended. In *Karl*, a personal injury suit, the jury determined that the defendant was twenty-five percent negligent and the plaintiff was seventy-five percent negligent. In response to a special interview, United States v. Murphy, 836 F.2d 248, 256 (6th Cir.), cert. denied, 488 U.S. 924 (1988).

81. See infra notes 84–118 and accompanying text.
82. *Karl v Burlington N.R.R.*, 880 F.2d 68, 75 (8th Cir. 1989) (quoting Chicago, R.I. & P.R.R. v. Speth, 404 F.2d 291, 295 (8th Cir. 1968)). In *Tanner v. United States*, 483 U.S. 107 (1987), the Supreme Court mentioned in dicta that "allegations of a juror's inability to hear or comprehend at trial [are treated] as an internal matter" and are therefore barred by the Rule. *Id.* at 118 (citing Government of V.I. v. Nicholas, 759 F.2d 1073 (3d Cir. 1985)).
83. 3 WEINSTEIN & BERGER, supra note 27, ¶ 606[4], at 606–40 (citing cases); see also *Mount Airy Lodge v. Upjohn Co.*, 96 F.R.D. 378, 380–81 (E.D. Pa. 1982) (concluding that the Rule did not bar juror testimony that, through mistake, the verdict reached was not what was intended by the jury).
84. 880 F.2d 68 (8th Cir. 1989).
85. *Id.* at 75.
86. *Id.* at 70. After deliberation, the jury was polled outside the presence of counsel, but because of some irregularities in the way the verdict was returned, the trial court did not enter the verdict until after consultation with counsel. *Id.* at 70–71. The attorneys that tried the case were not in the courtroom while the jury deliberated. In the absence of counsel, jurors returned to the courtroom and announced that they had reached a verdict. The judge distributed copies of the special verdict form and polled each juror with respect to each answer. After the jurors had responded, "[t]he judge told the jury that based upon their finding that [the railroad's] negligence did not proximately cause Karl's injuries, they 'can't give the plaintiff any money' and accomplish what they thought they had accomplished by awarding monetary damages to [plaintiff]." *Id.* at 70. The court, finding the answers to the special interrogatories inconsistent, directed the jury to reconsider the interrogatories in light of clarifying instructions. *Id.* at 71.
rogatory requesting the total amount of damages suffered by plaintiff, the jury entered a figure of $273,750.87.

After the verdict was returned, but before judgment was entered, the plaintiff’s attorney, suspecting that the jurors had made a mistake, requested that the jury be interviewed about whether the amount entered was the amount intended.88 In an in camera interview, the jury foreman testified that the jury had reduced the total amount of damages by seventy-five percent, with the $273,750 representing the net amount the jury intended the plaintiff to recover.89 The judge admitted the foreman’s testimony as well as affidavits from other jurors concurring with the foreman’s statement.90 The district court judge concluded that the verdict should be corrected to reflect the intention of the jury.91 The court reasoned that the reformation was a clarification of an error in transmission, not an attempt to impeach the verdict.92

On appeal, the Eighth Circuit reversed.93 The court agreed that “[t]he admission of a juror’s testimony is proper to indicate the possibility of a ‘clerical error’ in the verdict”94 but determined that the error made by the jury in Karl went “to the ‘validity’ of the verdict.”95 The court reasoned that if the foreman had written down a damage amount different from that agreed upon by the jury, such an action would constitute clerical error.96 Instead, the jurors’ testimony and affidavits referred specifically to “what the jurors understood or intended when the

87. Id. The special interrogatory read: “If you have attributed some fault to the defendant, you must now decide the total amount of damages, if any, sustained by the plaintiff, without taking into consideration any reduction of the plaintiff’s claim due to her own negligence, if any.” Id. at 71 n.4. Under applicable rules, the court would then have reduced this figure by 75%, the amount of plaintiff’s comparative negligence. Id. at 70 n.3.
88. Id. at 71. Because this figure was exactly 25% of the $1,095,000 damages requested by plaintiff, plaintiff’s counsel surmised that the jury had already accounted for plaintiff’s negligence in arriving at $273,750. Id.
89. Id.
90. Id.
91. Id.
92. Id. at 72. Because “the court concluded that the jury had erred in transmitting the verdict, rather than in reaching the verdict itself[,] . . . [plaintiff’s] motion was not considered as an attempt to impeach the verdict, and the foreman’s testimony and jurors’ affidavits could be considered.” Id.
93. Id. at 77-78.
94. Id. at 74.
95. Id.
96. Id. (citing Dunham v. Veterans of Foreign Wars Club of Muskegon, Post 446, 305 N.W.2d 260, 262 (Mich. Ct. App. 1981)).
Because the testimony addressed the way the jury interpreted the district court's instructions, the court concluded that the testimony concerned the mental processes of the jurors and was, therefore, inadmissible under Rule 606(b). In reaching its decision, the Karl court stressed the dual policies of secrecy and finality underpinning the Rule and concluded that allowing testimony about the jury's intended verdict would run counter to these policies.

Other circuits have applied the "mental processes" provision of Rule 606(b) to testimony about the validity of a jury award in a manner that mirrors the Eighth Circuit's interpretation of the rule in Karl. In factually analogous situations, the Fifth, Seventh, and Eleventh Circuits have reached the same conclusion as did the Karl court.

97. Id.
98. Id. ("Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule.").
99. Id. Specifically, the court reasoned:
This rule was adopted to prevent jurors from being harassed by the defeated party in an effort to secure from them evidence of facts which might be sufficient to set aside a verdict, and to assure the finality of the jury's verdict. . . . Rule 606(b) also serves to prevent fraud by individual jurors who could remain silent during deliberations and later assert that they were influenced by improper considerations.

100. Id.
101. See Robles v. Exxon Corp., 862 F.2d 1201, 1208-09 (5th Cir.), cert. denied, 490 U.S. 1051 (1989). In Peveto v. Sears, Roebuck & Co., 807 F.2d 486 (5th Cir. 1987), the Fifth Circuit articulated a succinct justification for the Karl approach:
[I]n the jury trial process there is always some danger that jurors will misunderstand the law or consider improper factors in reaching their verdict, but, by implementing Rule 606(b), Congress has made the policy decision that the social costs of such error are outweighed by the need for finality to litigation, to protect jurors from harassment after a verdict is rendered, and to prevent the possible exploitation of disgruntled ex-jurors.

103. See Sims' Crane Serv., Inc. v. Ideal Steel Prods., Inc., 800 F.2d 1553, 1556 (11th Cir. 1986).
104. Similarly, courts in some of the states that have adopted their own versions of Federal Rule 606(b) have applied the Rule in accord with the Karl approach. For example, the Supreme Court of Maine reasoned that to "admit affidavits of jurors to correct a mistake in recording the verdict would permit all losing parties to attack verdicts, thereby vitiating the finality and definitiveness of a judgment." Cyr v. Michaud, 454 A.2d 1376, 1383 (Me. 1983). In Cyr, the defendant had offered jury testimony in an attempt to show that the
B. THE SECOND CIRCUIT: TEXTUAL APPROACH TO ALLOWING REFORMATION TESTIMONY UNDER RULE 606(b)

The Karl court's holding is not universally followed. Some courts have found juror testimony admissible to "correct" a verdict. In Attridge v. Cencorp Division of Dover Technologies International, Inc., the jury found the plaintiff eighty percent negligent and the defendant twenty percent negligent. In response to a special verdict question regarding damages, the jury entered $150,000. The court then returned the verdict and discharged the jury.

During a conversation with a courtroom deputy, two jurors stated that the jury intended the plaintiff's to receive a net recovery of $150,000 rather than $30,000—the total damages less eighty percent. The deputy communicated the information to the judge. The judge recalled the jury the following morning and, during separate interviews, each juror stated that he or she intended the plaintiffs to recover $150,000. The judge, convinced that this figure represented the jury's "true verdict," entered $150,000 in judgment.

On appeal, the Second Circuit affirmed. Appellants contended that the juror testimony violated Rule 606(b) because the district court's interview induced the jurors to impeach their verdict. The court, however, observed that while the Rule expressly precludes testimony about mental processes or emotional reaction and specifically allows testimony about extraneous information or improper influence, it "is silent regard-

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105. 836 F.2d 113 (2d Cir. 1987).
106. Id. at 115.
107. Id. The court reduced the award by 80%—the amount of plaintiff's comparative negligence—for a net award to the plaintiff of $30,000. Id.
108. Id.
109. Id.
110. Id.
111. Id. The judge asked each juror the question: "What was your understanding as to what the verdict was; what was the jury verdict?" Id. at 117.
112. Id. at 116.
113. Id. at 118.
114. Id. at 116.
ing inquiries designed to confirm the accuracy of a verdict.\textsuperscript{115} Therefore, the court concluded that the language of the Rule does not prohibit juror testimony concerning the intended verdict.\textsuperscript{116} The court stated that because the interviews were "designed to ascertain what the jury decided and not why they did so,"\textsuperscript{117} admitting the testimony was proper.\textsuperscript{118}

\textsuperscript{115} Id. The court stated that the Rule is intended "to promote free and uninhibited discourse during deliberations, to protect jurors from attempts to influence them after trial, and to preserve the finality of verdicts." Id. Nonetheless, the court concluded that Rule 606(b) did not govern reformation testimony. Id. The court also looked to the common law leading up to the adoption of Rule 606(b) and concluded that "it reflects a cautious propensity to expand jurors' competence to testify, while avoiding wholesale divergence from centuries of practice." Id.

\textsuperscript{116} Id.

\textsuperscript{117} Id. at 117.

\textsuperscript{118} Id. Appellants further asserted that the testimony violated the provision of the Rule precluding testimony about jurors' mental processes. Id. The court responded that the interview questions did not require the jurors to testify about their mental processes in connection with the deliberations but rather were "intended to resolve doubts regarding the accuracy of the verdict announced." Id. The court concluded that because Rule 606(b) does not explicitly prohibit testimony regarding the accuracy of a verdict, testimony offered to correct a verdict was admissible. Id.

In a similar case, McCullough v. Consolidated Rail Corp., 937 F.2d 1167 (6th Cir. 1991), the court cited the policies of secrecy and finality but recognized that these values had to be balanced against the irregularity and injustice of excluding all juror testimony. Id. at 1169. The court cited Attridge, stating: "In utilizing this approach, the interests of justice are served in assuring that [appellee] receives the award that the jury intended and the values protected by FRE 606(b) are not violated." Id. at 1172 (citing Attridge, 937 F.2d at 117). The court found it important that the judge did not inquire how the jury reached the amount intended, but simply asked what the intended award was. Id. Because the trial judge "did not inquire into the thought processes of the jurors, but merely asked for clarification of the final award," the court concluded that reformation in this case "in no way threatens the jury's freedom of deliberation." Id. The court also found it compelling that the jurors, not counsel, reported the irregularity to the court and that the jurors were in unanimous agreement as to the intended verdict. Id. Finally, the court found that because little time had elapsed between the delivery of the verdict and the court's discovery of the inconsistency, "the stability and finality of verdicts are not threatened." Id. The court, quoting the Advisory Committee's note to Rule 606, determined that juror "[t]estimony on 'matters other than their own inner reactions involves no particular hazard to the values sought to be protected.'" Id. (quoting Fed. R. Evid. 606(b) advisory committee's note, reprinted in 56 F.R.D. 183, 266 (1972)).

Decisions from some state courts with rules similar to Rule 606(b) also have adopted the Attridge approach. In Prendergast v. Smith Labs., Inc., 440 N.W.2d 880 (Iowa 1989), the Iowa Supreme Court held that Iowa's version of the Rule (IOWA R. EVID. 606(b)) did not bar the receipt of juror testimony to demonstrate a mistake in the completion of a special verdict. Id. at 883. However, because the jury completed the special verdict incorrectly and entered no
III. VERDICT REFORMATION AND RULE 606(b):
FAIRNESS, FINALITY, AND SECRECY

Current federal jurisprudence presents polar approaches to assessing verdict reformation testimony. On one side, the Karl approach assumes that reformation testimony requires explanation of the mental processes of the jurors. On the other side, the Attridge approach assumes that no inquiry into the mental processes of the jurors is necessary for reformation of unintended verdicts. Both the Karl and Attridge lines of authority incorporate plausible understandings of the “mental processes” provision of the Rule, but they reach substantially different results by emphasizing different values. Karl represents a heightened concern for finality of the verdict and sanctity of the deliberative process, while Attridge gives greater weight to individual justice for litigants. The values emphasized by each line of cases dictate the scope of inclusiveness of the “mental processes” clause in the two approaches.

In order to assess the competing constructions of the Rule, it is necessary to examine the policies which Congress intended to carry out with Federal Rule of Evidence 606(b). The Rule is the result of a compromise in which Congress balanced a concern for the individual litigant against a concern for the integrity of the jury system. Some misconduct and misunderstanding goes without remedy because of the Rule, but the resulting benefits in stability and candor are believed to outweigh the occasional injustice. However, exceptions already exist to the exclusionary principles that underlie the Rule, and the injustice of maintaining a verdict that is the result of an identifiable and acknowledged mistake merits a further, narrowly defined exception.

agreed-upon verdict, the Prendergast court did not reform the verdict according to the expressed intention of the jurors but rather granted a new trial on the issue of damages. Id. at 884.

119. See supra note 77 (discussing the legislative compromise).

120. See supra note 77.

121. For example, the provisions of Rule 606(b) allowing testimony concerning “extraneous prejudicial information” and “improper outside influence” provide the basis for the admission of evidence that is in conflict with the exclusionary principles of Rule 606(b). See supra note 78. Further exceptions to these principles are recognized by some courts. See supra note 83 and accompanying text. All of the exceptions to the general rule prohibiting juror testimony appear to be premised on the belief that the value of admission of the testimony outweighs the cost to the finality of the verdict and to the secrecy of the deliberations.
A. RULE 606(b) AND REFORMATION TESTIMONY: A PROPOSED APPROACH

Absent an exception for verdict reformation testimony, the important values of fairness and justice are sacrificed without a commensurate increase in the protection of finality and secrecy. Litigants who have persuaded the jury that they should prevail on the merits should not be denied the award the jury deemed appropriate. Indeed, it seems that if evidently mistaken verdicts are allowed to stand, the legitimacy of the entire jury system is damaged. Not only are the values of fairness and justice significant for the individual litigants, but they are also vital for maintaining the perception that the jury system is a responsible and accurate decision-making body. Any rule which tends to promote, rather than correct, the fallibility of juries is injurious to the perceived validity of the jury verdict.

This Note proposes an interpretation of Rule 606(b) that would allow admission of juror testimony in support of verdict reformation only when the testimony is unanimous and the mistake is discovered within a reasonable time after trial. Moreover, use of this testimony would be limited by additional safeguards; namely, local rules limiting post-trial contact between attorneys and jurors. The narrow scope of examination allowed under this proposed exception would not necessitate inquiry into the mental processes of jurors in connection with deliberations. Any exception to the general rule of exclusion in Rule 606(b) must not run afoul of its underlying policies of secrecy and finality. Admission of testimony to reform mistaken verdicts, within the proposed guidelines, is consistent with the protection of these policies.

B. NARROW INQUIRY DOES NOT UNDERMINE THE POLICY OF JURY SECRECY

Maintaining the privacy of the deliberation process protects some of the most desirable aspects of the jury system; namely, free and frank discussion among the jury members as well as the jurors' willingness to return an unpopular verdict. If ju-

122. See infra text accompanying notes 123-41. For the purposes of this proposal, "testimony" should be read to include juror affidavits.
123. See generally Note, Public Disclosures, supra note 74, at 889-90. The author suggests that the precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a thoroughgoing exchange of ideas and impressions. For the
rors felt that their conduct in the jury room would be scrutinized after the trial, they might be less candid in deliberations and less willing to serve as jurors. Thus, any inquiry into the verdict after it is rendered tends to diminish the effectiveness of the jury system. However, the scope of the inquiry into the verdict must be taken into account and then weighed against the injustice of its preclusion.

Allowing juror testimony for the limited purpose of reforming an incorrect verdict does not raise the problems associated with broad disclosure of jury deliberations. The concern for protecting jurors' statements or actions during deliberations is premised on the belief that a juror would be less candid in deliberating if she thought her statements or actions would become public. This concern is warranted when there is juror misconduct or a juror's argument is revealed. Reformation testimony, however, simply requires the disclosure of the jury's ultimate and unanimous agreement—the intended verdict. This agreement, in the absence of mistake, is exactly what is made public in a typical jury trial. Thus, reformation testimony would not require any broader disclosure than a typical trial.

Disclosure of a mistaken verdict need not cause jurors embarrassment. Some jurors might be uncomfortable admitting that they misunderstood the court's instructions. Such concerns, however, would be minimized by requiring unanimity.

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124. See, e.g., United States v. Miller, 284 F. Supp. 220, 228 (D. Conn.) ("Leaving jurors at the mercy of investigators for both sides to probe into their conduct would make the already difficult task of obtaining competent citizens willing to serve as jurors well nigh impossible."). aff'd, 403 F.2d 77 (2d Cir. 1968), modified on other grounds, 411 F.2d 825 (2d Cir. 1969); see also Note, Public Disclosures, supra note 74, at 889.

125. Note, Public Disclosures, supra note 74, at 889.

126. See Attridge v. Cencorp Div. of Dover Technologies Int'l, Inc., 836 F.2d 113, 115 (2d Cir. 1987). This would not be a problem if a judge interviewed jurors in a manner such as that done by the trial judge in Attridge, where the judge simply asked the jurors individually what they believed the final verdict to be. Id. at 117.

127. See, e.g., McCullough v. Consolidated Rail Corp., 937 F.2d 1167, 1172 (6th Cir. 1991) (allowing testimony when "all jurors agreed that by mistake a verdict other than that agreed upon had been delivered in court"); Attridge, 836 F.2d at 114 (determining through juror interviews that "all jurors . . . unanimously intended a verdict different from the one announced"). But cf. Robles v. Exxon Corp., 862 F.2d 1201, 1207 n.6 (5th Cir. 1989) (holding that ju-
If all members of the jury were mistaken about the court's instructions, the problem probably was caused by the wording of the instructions or special verdict rather than the faulty understanding of the jurors. Unanimous testimony in support of reformation would not involve disclosure of statements or occurrences which, if the possibility of disclosure were known to the jurors, might inhibit free and frank debate.

Without unanimity, however, the testimony should not be admitted; disputes among jurors regarding the intended verdict cannot be resolved outside the jury room. While non-unanimous testimony may not involve disclosure of matters that would undermine free and frank debate, the potential for juror fraud may arise if testimony from a less-than-unanimous group of jurors is admitted to reform a verdict.

A further aspect of the policy of secrecy is the prevention of post-trial harassment of jurors by the losing party. By making most juror testimony inadmissible, Rule 606(b) discourages the losing party from pursuing jurors to discover information to impeach the verdict. Allowing testimony to reform verdicts thus increases the possibility that jurors will be beset by upset litigants. Unrestricted exceptions to the exclusionary principles of Rule 606(b) would likely encourage parties to embark on fishing expeditions, badgering jurors with the hope of finding some discrepancy in the verdict. Thus, an exception for reformation testimony is supportable only if properly restricted.

The exception proposed here contains limitations which will prevent post-trial harassment. The utility of harassing jurors to impeach the verdict is minimized by the requirement of unanimity. A party could not rely on the assertions of one juror to support reformation. Although it might be possible to

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128. Indeed, one commentator argues that many of the problems of inaccurate verdicts would vanish with the use of plain, concise language in the instructions and thorough polling of the jurors before they are dismissed. Schwarzer, supra note 9, at 582-88; see also 8 WIGMORE ON EVIDENCE—1961, supra note 28, § 2350, at 691. As Wigmore observes: "[T]he dangers of uncertainty and of tampering with the jurors testimony, disappear in large part if such investigation as may be desired is made by the judge and takes place before the jurors' discharge and separation." Id.

129. See infra notes 140-41 and accompanying text. If agreement about the intended verdict is not unanimous, a single juror or a minority of jurors may attempt to upset a verdict to which they agreed during deliberations but with which they secretly disagreed.

130. See FED. R. EVID. 606(b) advisory committee's note, reprinted in 56 F.R.D. 183, 265 (1972).
convince one juror that the verdict returned did not reflect her intention, convincing the entire jury would be nearly impossible if no mistake actually occurred.¹³¹

Properly structured local rules could further reduce the risk of harassment from a reformation testimony exception. For example, many jurisdictions limit post-trial contact between attorneys and jurors.¹³² Local rules that prohibit attorneys from contacting jurors regarding any aspect of the case without a showing of “good cause”¹³³ are an effective means of preventing juror harassment. Moreover, a high standard should be imposed on an attorney who wishes to contact a juror for the purpose of questioning the verdict.¹³⁴ If an attorney is required to demonstrate that she has a compelling reason to interview jurors, a significant obstacle stands in the attorney’s way of harassing jurors. Finally, prior to dismissal, judges should instruct the jury about the applicable local rules and emphasize that jurors are not required to speak to any attorney after the trial. The combination of local rules and judicial instruction will sufficiently prevent post-trial harassment, thereby decreasing the need to preclude testimony on reforming a verdict.

C. FINALITY OF VERDICT MAINTAINED

The second major policy behind Rule 606(b) is the protec-

¹³¹. This observation is true at two levels. First, if no mistake occurred, creating doubt in six or twelve people is more difficult than creating doubt in one person. Second, because the agreement of the jury is an objective matter, rather than an internal conclusion of an individual juror, the agreement provides an external referent upon which the jurors can ground their belief. For this reason, the judge, as a threshold must hear testimony or receive affidavits from each juror to determine if unanimity exists before admitting such evidence for the purposes of reforming the verdict.

¹³². For a thorough compilation of the local rules of the United States district courts which govern attorney-juror contact, see Crump, supra note 16, at 526-28 & nn.127-40; see also Note, Public Disclosures, supra note 74, at 901 nn.93-96.

¹³³. See, e.g., U.S. Dist. Ct. D. Conn. R. 12(f); see also U.S. Dist. Ct. N.D. Miss. R. 1(b)(4) (prohibiting contact with jurors unless an attorney “believes in good faith that the verdict may be subject to legal challenge”).

¹³⁴. Some judges and jurisdictions may value post-trial contact between attorneys and jurors, primarily for the educational benefit of the attorneys. If a judge wishes to allow post-trial communication, another possibility is to allow general communication, but to preclude the substance of that communication from being used to challenge the verdict unless leave is granted by the court for the express purpose of questioning the juror about the veracity of the verdict. Attorneys should be required to demonstrate cause to interview jurors for this specific purpose.
tion of the finality of jury verdicts. As a general matter, the jury verdict should be the end of the trial. It cannot be doubted that allowing juror testimony to support reformation of a jury verdict poses a risk of protracting litigation. There are, however, alternative means for controlling threats to finality. For example, admissibility can be limited by time restrictions in local rules. The period between the end of trial and the deadline for admitting reformation testimony should be short. Memory limits dictate that the difficulty in getting all jurors to reach an agreement regarding their intended verdict increases with every day that passes. For this same reason, judges should be wary of allowing any testimony about the jury's intended verdict after even a few days. Indeed, in most reformation cases the inaccuracy was detected within a day of trial.

Thus, local rules establishing a uniform time limitation should allow no more time than is necessary for resolving irregularities.

Time limits under local rules should not exceed the ten-day limit for bringing a new trial motion under Federal Rule of Civil Procedure 59(b). This limitation will adequately protect the finality of the verdict while allowing a reasonable time for jurors to report any inconsistencies to the court or for an attorney to request leave from the court to interview jurors.

The requirement of unanimity also protects the policy of finality. As a general matter, juror unanimity is necessary to prevent individual jurors from attempting to upset verdicts that they overtly supported during deliberations but with which secretly disagreed. Because disgruntled jurors might testify

135. See supra note 75 and accompanying text.
136. See, e.g., McCullough v. Consolidated Rail Corp., 937 F.2d 1167, 1168 (6th Cir. 1991) (stressing that "only minutes elapsed before the jurors attempted to rectify their mistake"); Attridge v. Cencorp Div. of Dover Technologies Int'l, Inc., 836 F.2d 113, 114 (2d Cir. 1987) (noting that the jurors informed the deputy of the mistake directly after the jury was discharged).
137. In the absence of local rules, reformation testimony could be admitted at the trial judge's discretion within the 10-day limit for bringing a motion for a new trial under Federal Rule of Civil Procedure 59(b). A 10-day period promotes finality in a manner consistent with other Federal Rules of Civil Procedure and thus promotes consistency and reliability in federal civil litigation.
138. See supra note 137. In addition, when a juror brings evidence of mistake to the court's attention, the court should, sua sponte, pursue the allegations to determine whether reformation is required.
139. As discussed previously, any request by an attorney for interviews should require a demonstration of cause. See supra notes 132-34 and accompanying text. Such a request, if made within the time limitation for a motion for verdict reformation and if granted, should toll the limitation until the jurors can be interviewed.
that they did not understand the instructions or considered improper information, Rule 606(b) rightly prevents the "secret thought of one" juror from disturbing "the expressed conclusions of twelve."140 Moreover, in enacting the Rule, Congress was concerned that jurors should not be able to testify about their "mental processes" in connection with the deliberations because of the inherent subjectivity of such testimony.141

Unanimous juror testimony about the intended verdict would not be subject to the same concerns as the unsupported testimony of the individual juror. By its very unanimity, the agreement of the jury is an objectively defined fact. Each juror is in turn a witness to the group determination. Reformation does not depend upon the private thoughts of individual jurors, but rather upon the jurors' witnessing the collective resolution. Thus, the proposed exception does not implicate the concern for subversion of the jury process by post-trial disagreement.

Because reformation testimony does not require inquiry into the mental processes of the jurors, the language of Rule 606(b) does not prohibit a narrow examination of jurors to discover the intended verdict. Neither the secrecy of the jury room nor the finality of the verdict are compromised by admission of reformation testimony.

CONCLUSION

While it has been observed about the jury system that "[l]ike much else in human affairs, its defects are so deeply enmeshed in the system that wholly to disentangle them would quite kill it,"142 some defects can be corrected without such a fatal result. Because of the complexity of today's litigation, unless accommodation is made, the jury system may become obsolete.

To mitigate one aspect of the jury's inadequacy in complex litigation, testimony about a jury's intended verdict should be admitted under Federal Rule of Evidence 606(b), but only in cases of juror unanimity. The opportunity to reform the verdict will further the values of fairness to litigants without un-

141. See supra note 77 and accompanying text. The problem with allowing testimony regarding a juror's mental processes is that, if admitted, it would be effectively irrebuttable because proof would lie in the mind of the juror. See supra text accompanying notes 31-38 (discussing the Wright court's concerns).
dermining the policies supporting the general exclusionary principles of Rule 606(b). Although allowing reformation testimony will not alleviate all of the problems of our jury system, it will help ensure the system’s viability in an increasingly complex judicial environment.