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Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility

Edward T. Swaine

One of the primary functions of the law of evidence is to immunize the judicial process against the frailties of the jury. Simultaneously, and derivatively, the evidentiary system attempts to protect the jury from itself, mitigating the jury’s weaknesses by denying it the opportunity to display them. Federal Rule of Evidence 606(b), the influential modern version of the traditional rule declaring juror testimony incompetent to impeach a verdict, conspicuously illustrates the incongruity of these ambitions. Claiming to protect the jury and the judicial process by promoting jury secrecy, Rule 606(b) eschews the regulation or review of juror misconduct, instead excluding post-trial juror testimony concerning juror improprieties.

1. See P. Devlin, Trial By Jury 114 (1956) (“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.”); C. Mueller & L. Kirkpatrick, Evidence Under the Rules: Text, Cases and Problems 1 (1988) (“mistrust of jurors is the single overriding reason for the law of evidence”); G. Tullock, The Logic of the Law 93–94 (1971) (“When I took courses on Evidence in law school, the explanation given for this giant collection of rules was simply that jurors were stupid. . . . [T]his does appear to be the only explanation for the development of this branch of the law.”); Cleary, Evidence as a Problem in Communicating, 5 Vand. L. Rev. 277, 282 (1952) (in removing control of factual determinations from jury, rules of evidence represent “the most careful attempt to control the processes of communication to be found outside a laboratory”).

2. See, e.g., Office of Enforcement, U.S. EPA, The Federal Rules of Evidence Annotated 76 (1980) (no-impeachment rule “shields the jurors from embarrassment when they return a ‘dumb verdict’ in a case which may have been beyond their competence in the first place”).

3. Rule 606(b) states: 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 juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror. Nor may 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.

Fed. R. Evid. 606(b). Rule 606(b) departs from the presumption of competency within the Federal Rules of Evidence. See Fed. R. Evid. 601 (person presumed competent to be witness except as otherwise provided for in rules or by appropriate state law).


Unless otherwise noted, this Note addresses both civil and criminal petit juries.
or errors. Indeed, its focus is on protecting the integrity of jury deliberations, the least accessible, most haphazard aspect of jury decision-making. In attempting to cloak serious shortcomings in the jury system after they have come to fruition, Rule 606(b) seems designed to maximize the tension between preserving the jury and preserving justice.

This tension has been heightened by a recent judicial construction which applies the no-impeachment rule of 606(b) to matters or statements transpiring before deliberations. In *Tanner v. United States*, the Supreme Court provided its first full interpretation of Rule 606(b), upholding by a five-to-four decision the exclusion of evidence offered by two jurors regarding the use by other jurors of marijuana, cocaine, and alcohol throughout the course of the trial. The majority opinion in *Tanner* was criticized harshly by the dissent and subsequently by academic commenta-


6. See *Tanner v. United States*, 107 S. Ct. 2739, 2747-48 (1987) (citing arguments against disclosure of deliberations in support of expansive reading of Rule 606(b)); id. at 2756-57 (Marshall, J., concurring in part and dissenting in part) (citing authority to suggest focus on deliberations); FED. R. EVID. 606 advisory committee's note ("The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment."); 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 290, at 151 (1979) ("by its terms, Rule 606(b) is simply inapplicable" to using testimony or affidavits of jurors relating to matters occurring before or after deliberations); *The Supreme Court, 1986 Term — Leading Cases*, 101 Harv. L. Rev. 119, 255 (1987) [hereinafter *Leading Cases*].

7. See infra note 92.


9. The Supreme Court had previously considered the common law rule against jury impeachment of verdicts. See *McDonald v. Pless*, 238 U.S. 264, 267-69 (1915) (general rule that losing party cannot use testimony of jurors to impeach verdict); *Hyde v. United States*, 225 U.S. 347, 383-84 (1912) (testimony of jurors may be received to show overt acts such as bailiff's comments to jurors and introduction of newspaper into jury room).

These cases were cited in *Tanner*, 107 S. Ct. at 2746, as was *Smith v. Phillips*, 455 U.S. 209 (1982), which did not consider either the common law rule or Rule 606(b). Surprisingly, the Court did not cite the only previous Supreme Court case that refers to Rule 606(b), *Rushen v. Spain*, 464 U.S. 114 (1983). In *Rushen*, the Court endorsed a state court judgment on acceptable juror testimony and squared it with Rule 606(b) in a manner which seems directly at odds with the decision in *Tanner*. Compare *Rushen*, 464 U.S. at 121 n.5 (allowing juror testimony at motion for new trial "concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide" and approving lower court's exclusion of evidence relating to juror's mental attitude in determining verdict) with *Tanner*, 107 S. Ct. at 2750-51 (prohibiting juror testimony impeaching verdict except for that concerning outside influence).

10. Justice O'Connor's opinion was joined by Chief Justice Rehnquist and Justices White, Powell, and Scalia, while Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, dissented to the part of the opinion addressing Rule 606(b).
tors for its narrow reading of the exceptions to Rule 606(b)\textsuperscript{11} and for its temporal extension of the Rule to pre-deliberations events.\textsuperscript{12}

While \textit{Tanner} is perhaps correctly denounced for its aggressive reading of Rule 606(b), critics of the decision and the Rule have failed to challenge the evidentiary system's underlying vision of the ineluctably froward jury. Instead, discussion focuses on alternative means of securing evidence of misconduct (and abiding by Rule 606(b)),\textsuperscript{13} more effective ways of protecting the jury (and slighting Rule 606(b)),\textsuperscript{14} and subject-matter exceptions necessary to make the general exclusion of testimony under 606(b) tolerable.\textsuperscript{15} The Court's decision in \textit{Tanner}, however, suggests a very different line of inquiry. By excluding juror complaints about the competency of other jurors in an effort to improve the integrity of jury deliberations, \textit{Tanner} helps expose the evidentiary system's inherently limited comprehension of the jury system and the problem of juror misconduct. Equally significant, \textit{Tanner}'s extension of Rule 606(b) to pre-deliberations juror activities highlights a useful distinction between the evidentiary system's prescriptive concern for the integrity of jury deliberations and the prescriptive potential for pre-deliberations jury activity.

This Note employs the new application of Rule 606(b) to pre-deliberations events to forge a more coherent approach to juror competency. Section I briefly reviews the underlying problem of juror misconduct addressed by the no-impeachment rule. Section II demonstrates that while juror testimony about pre-deliberations matters or statements does not compromise Rule 606(b)'s concern for the jury system, the benefits of that testimony are sharply limited by the constraints imposed by the evidentiary system. Section III compares the limited evidential functions demanded of jurors by Rule 606(b) to the potential breadth of juror roles. Finally, Section IV suggests concrete means for improving the jury system preserved by Rule 606(b) by using jurors to minimize juror misconduct.

\section{Rule 606(b) and the Problem of Juror Misconduct}

Although the traditional no-impeachment rule and Rule 606(b) theoretically apply to all subjects for testimony by jurors, the vast majority of

\begin{multicols}{2}
\textsuperscript{11} See \textit{Tanner}, 107 S. Ct. at 2758-59 (Marshall, J., concurring in part and dissenting in part); Crump, \textit{supra} note 5, at 523-25; \textit{Leading Cases, supra} note 6, at 255.
\textsuperscript{13} See, e.g., \textit{Tanner}, 107 S. Ct. at 2751.
\end{multicols}
cases implicating those rules concern misconduct by or toward the jury. Indeed, given that Rule 606(b) allows testimony relating to “extraneous prejudicial information” and “outside influences,” it tends to prohibit testimony alleging misconduct by jurors. Since no empirical work has documented the extent of juror misconduct, it is difficult to estimate the degree to which claims excluded by Rule 606(b) understate or overstate the misbehavior of jurors.

Nonetheless, several tentative conclusions are warranted. First, cases involving affirmative misconduct by jurors are legion in number and variety. Second, the legal consequences of reported misconduct changed significantly upon adoption of Rule 606(b), suggesting that no-impeachment rules have a material impact on the finality of judgment in jury trials. Third, the appellate records of states which allow relatively unconstrained impeachment of verdicts for juror misconduct confirm the high incidence of misconduct and the impact of no-impeachment rules.


17. See Berg, Juror Misconduct Gets Closer Look As Trials Lengthen, L.A. Daily J., Sept. 8, 1987, at 1, col. 2 (little research done on volume of juror misconduct). The lack of data may be due to the bias of researchers in favor of trial by jury and to the sheer difficulty of observing juror misconduct given the variety of rules protecting jury secrecy. See Baldwin & McConville, Doubtful Convictions By Jury, 1979 Crim. L. Rev. 230, 230-31, 238; see also infra note 91 (inscrutability of deliberations).


This evidence supports the judgment of one observer that "[perhaps the greatest area of conflict between the view of the jury as an institution dispensing community justice on an ad hoc basis, as opposed to an organ of truth, arises in post-trial challenges to a verdict based on juror misconduct or impropriety."

In moderating this conflict in criminal proceedings, Rule 606(b) affects critical components of the Sixth Amendment right to a fair trial, including the right to confront adverse witnesses, the right to trial by an impartial jury, and the careful division of constitutional authority between judge and jury. The same conflict in the civil setting causes Rule 606(b) to moderate the Seventh Amendment right to trial by jury and the Fifth Amendment's due process guarantee.

Given the general climate of secrecy surrounding jury deliberations, it is not surprising that many of the unveiled incidents of misconduct involve pre-deliberations behavior by jurors, of which Tanner v. United States is exemplary. The defendants in Tanner were convicted of conspiring to defraud the United States and committing several acts of mail fraud. Prior to sentencing, they filed a motion seeking permission to interview jurors, an evidentiary hearing, and a new trial. The defendants based their request on unsolicited information from a juror who alleged that several jurors had consumed alcohol at lunch breaks throughout the trial, causing them to sleep through the afternoons. The district court held that juror testimony on intoxication was inadmissible under Rule 606(b) and denied the motion for new trial. The court later denied similar motions based on unsolicited information from a second juror who observed during the trial regular marijuana and alcohol use by jurors and repeated cocaine use by

sions that three jurors worked crossword puzzles and one juror read novel throughout testimony); see also Note, Crossword Puzzles and Novels: The Impact of Hasson v. Ford on Jury Misconduct, 5 GLENDALE L. REV. 215 (1983) (criticizing decision).


25. See Haley v. Blue Ridge Transfer Co., 802 F.2d 1532, 1535 & 1535-36 nn.4-5 (4th Cir. 1986) (unauthorized communication to jurors during trial raises presumption of prejudice to civil litigant's constitutional rights to impartial jury).

26. See, e.g., United States v. Key, 717 F.2d 1206, 1209 (8th Cir. 1983) (refusal to grant mistrial or replace juror upheld where veteran juror who appeared asleep during closing arguments and instructions was held to be closing his eyes in order to listen); United States v. Widgery, 636 F.2d 200, 203 n.7 (8th Cir. 1980) (refusal to grant mistrial upheld where only evidence of juror misconduct consisted of allegation that juror had been "blowing kisses, winking [and] waving" to assistant prosecutor); People v. Rosenthal, 370 Ill. 244, 18 N.E.2d 450 (1938) (two jurors convicted of contempt for violating sequestration order with ten other jurors by commandeering court-provided bus to make disorderly tour of taverns); Reversal Cites Sequestration Explanation, Nat'l L.J., June 7, 1982, at 13, col. 1 (murder conviction in Brooklyn Supreme Court overturned where jurors and court officers allegedly drank and engaged in sexual relations during trial); see also supra notes 18, 20.
two jurors, the sale of marijuana between jurors, and other behavior leading him to describe the jury as "one big party." The Eleventh Circuit and the Supreme Court upheld the exclusion of testimony by both jurors.

II. RULE 606(b) AND PRE-DELIBERATIONS MATTERS AND STATEMENTS: THE LIMITS OF PROSCRIPTION

Careful examination of the Supreme Court's contestable application of Rule 606(b) to pre-deliberations activities in Tanner reveals the inherent limits of the present regime in controlling juror misconduct. This section demonstrates that while pre-deliberations matters and statements are not addressed by Rule 606(b), and testimony about such activities does not threaten jury deliberations or the health of the jury system, the demands of proof and finality imposed by Rule 606(b) and the evidentiary system may inevitably constrain consideration of juror testimony concerning such misconduct.

A. The Language and History of Rule 606(b)

The Tanner opinions and subsequent discussions of the case focus on the appellants' claim that the use of drugs and alcohol by jurors constituted an "outside influence" under Rule 606(b). The text and legislative history of Rule 606(b) concur, however, in a more comprehensive answer to the problem posed by the juror behavior encountered in Tanner. The language of Rule 606(b) seems solely concerned with limiting impeachment based on juror testimony about deliberations: Not only must the affected testimony report either a matter or statement occurring during deliberations or the effect of something upon deliberations-specific activities, but the exceptions to the Rule only make sense if "outside influence" is understood as a complement to the accepted sphere for jury deliberations. The legislative history clearly supports the deliberations delimitation as well, in marked contrast to the ambiguous congressional

29. Compare id. at 2746-49 with id. at 2754, 2758 (Marshall, J., concurring in part and dissenting in part).
31. See supra note 6.
32. An alternative construction that distinguishes influences originating in the jury room from those originating outside was specifically rejected by the Advisory Committee. See Fed. R. Evid. 606 advisory committee's note ("the door of the jury room is not necessarily a satisfactory dividing point . . ."). In either case, the testimony refused by the Court in Tanner would be acceptable, since it related to misconduct occurring "outside" the jury room.
discussion of certain other terms found in the rule. 34 Finally, notwithstanding the majority opinion in Tanner, other Supreme Court and circuit court decisions provide precedent for the deliberations limitation. 35 Tanner and its satellites may well eclipse this perspective. 36

B. The Purposes of the No-Impeachment Rule

Since the Tanner interpretation of Rule 606(b) may further the Rule's underlying ambitions, it is valuable to test the fidelity of impeaching verdicts based on pre-deliberations matters or statements to the purpose of the traditional no-impeachment rule: secrecy of jury deliberations. A close look reveals that the no-impeachment rule's extension could only be

While Justice Marshall alluded to the developing focus on jury deliberations in the House and Senate resolutions, the evolution began much earlier. The Committee on Rules of Practice and Procedure of the Judicial Conference changed successive drafts of Rule 606(b) to heighten emphasis on jury deliberations. Compare 51 F.R.D. 315, 386-87 (1971) (only "effect" clause) with 56 F.R.D. 183, 264-65 (1972) (adding "during the course of the jury's deliberations" clause and exceptions thereto). These changes were directly responsive to congressional concern that Rule 606 allowed inquiry into jury deliberations. See 117 CONG. REC. 33642, 33645 (1971) (letter from Sen. McClellan to Judge Maris, Chairman of the Committee on Rules); Rules of Evidence: Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 314, 315 (1973) [hereinafter Hearings] (reply from Advisory Committee official stating that "[t]he present Rule [606] has been substantially rewritten in a fashion that meets your criticisms").

34. See supra notes 29-30 (controversy over "outside influence").

35. See supra note 9 (contrasting Rushen v. Spain with Tanner v. United States); Isac v. Kemp, 778 F.2d 1482, 1484-85 n.6 (11th Cir. 1985) (testimony by juror in habeas corpus proceeding as to misconduct by another juror not barred by 606(b) where testimony concerns conduct before deliberations), cert. denied, 476 U.S. 1164 (1986); Sullivan v. Fogg, 613 F.2d 465, 467 (2d Cir. 1980) (inquiry by trial court into juror's statements relating to delusions occurring during trial permissible and required). But see Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1075, 1079-81 (3d Cir. 1985) (barring juror testimony as to inability to hear trial); United States v. Schultz, 656 F. Supp. 1218, 1221 (E.D. Mich. 1987) (standard for evidentiary hearing on juror misconduct does not depend on time of misconduct).

36. See, e.g., Neron v. Tierney, 841 F.2d 1197, 1205 (1st Cir. 1988) (while Rule 606(b) does not bar juror testimony concerning alleged affair between juror and defendant prior to trial, Tanner and like cases indicate general governmental interest in preventing post-trial hearings on juror bias, misconduct, or extraneous influence); Urseth v. City of Dayton, 680 F. Supp. 1084, 1089 (S.D. Ohio 1987) (Rule 606(b) does not pertain to allegations of juror perjury on voir dire, but generally excludes "statements made by a juror during deliberations (or prior thereof)").

37. The original common-law no-impeachment rule was based less on policy than on a behavioral assumption. See 8 J. WIGMORE, EVIDENCE § 2352, at 696 (McNaughton rev. ed. 1961) (explaining Lord Mansfield's creation of no-impeachment rule in Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785), as extension of rule that no person shall be heard to allege his own turpitude); see also Carlson & Sunberg, supra note 15, at 248-58 (tracing history of common law rule). Despite wholesale changes in justification and form, the no-impeachment rule has always retained a focus on jury deliberations. See Thompson, supra note 21, passim.

Remarkably, even juror privilege, a divergent strain of the no-impeachment rule emphasizing the individual prerogative of the juror, recognizes the deliberations limitation. See Comment, Juror Privilege: The Answer to the Impeachment Puzzle, 3 W. NEW ENG. L. REV. 447, 449-50 (1981) (urging renewal of juror privilege doctrine); 8 J. WIGMORE, supra, § 2346, at 678 (conditions for privilege only "fully satisfied for communications among jurors during retirement"). Similarly, attempts to articulate a privacy interest for jurors have suggested a deliberations limitation. See Capital Cities Media, Inc. v. Toole, 463 U.S. 1303, 1306 (1983) (Brennan, Circuit Judge) (dismissing State's concern for juror privacy as "attenuated after the jury brings in its verdict and is discharged"); United States v. Franklin, 546 F. Supp. 1133, 1142 (N.D. Ind. 1982) ("[j]urors have a fundamental right to retain as a part of their own privacy the contents of deliberation").
based on an exaggerated sense of both the jury’s fragility and the curative properties of the evidentiary system.

First, the no-impeachment rule is intended to protect members of the jury from harassment by a losing party intent on discovering evidence that impugns the jury finding. But jurors are not the exclusive or even preferred sources of evidence for pre-deliberations matters or statements: Other parties may observe jury behavior before deliberations, and their testimony would not encounter either the limitations of the “effect” clause of Rule 606(b) or the power of the court to restrict jury interviewing. Given this loophole, and the evident willingness of jurors to volunteer information, a rule incorporating all pre-deliberations matters and statements seems overbroad. Moreover, it is likely to be ineffective, since the ambiguity of the other exceptions to Rule 606(b) permits good faith attempts to discover evidence relating to an “outside influence.”

Second, regardless of the level of investigation by parties, the disclosure entailed by post-verdict impeachment is thought to chill deliberations. While the prospect of being the subject of testimony by one’s fellow jurors might marginally contribute to a less cooperative jury room, a rule barring testimony about anything occurring in the course of a jury’s deliberations would assuage any detrimental effect on deliberations. Moreover, there is reason to doubt the significance of any evidential rule: Unanimity rules mean that individual votes will be publicly available in any event; jurors

38. See McDonald v. Pless, 238 U.S. 264, 267 (1915).
40. See infra notes 58–61 and accompanying text.
41. See, e.g., S.D. ALA. R. 12 (prohibiting juror interrogation without court permission); N.D. ALA. R. 10 (prohibiting juror interrogation prior to day following release from jury service); M.D. ALA. R. 9 (prohibiting juror interrogation with reference to jury verdict or deliberations without formal petition and permission of court). Cf. Crump, supra note 5, at 525–29 (little uniformity in interviewing rules).
42. See In re Express-News Corp., 695 F.2d 807, 810 (5th Cir. 1982) (Rule 606(b) does not justify and First Amendment forbids court order prohibiting press interviews of jurors where “[t]he rule is unlimited in time and in scope, applying equally to jurors willing and anxious to speak and to jurors desiring privacy, forbidding both courteous as well as uncivil communications, and foreclosing questions about a juror’s general reactions as well as specific questions about other juror’s votes”); Note, Constitutional Law: Rule Prohibiting Impeachment of Verdicts by Jurors as Deprivation of Due Process, 14 OKLA. L. REV. 533, 535–36 (1961).
43. See supra notes 29–30; infra note 67 and accompanying text; see also Developments, supra note 14, at 1599 (“existing exceptions to rule 606(b) . . . already give defeated parties a means for harassing jurors”).
45. See Leading Cases, supra note 6, at 258 (“admitting juror testimony about activities that occur before the actual deliberations in no way compromises this interest”). Even so, juror relationships may be poisoned by early distrust.
46. Compare Fed. R. Civ. P. 48 (parties may stipulate to majority verdict) with Fed. R. CRIM. P. 31(a) (unanimous verdict required).
are generally free to report votes and deliberations to all who will listen, and jurors may be unaware of any of these possibilities and thus unaffected in their deliberations. Under these circumstances, it seems excessive to exclude testimony on pre-deliberations matters or statements.

Third, the no-impeachment rule seeks to prevent individual jurors from channeling dissatisfaction with the majority view into a public distortion of the deliberations, thus abusing jury secrecy and decreasing the incentive to deliberate in good faith. Of course, the no-impeachment rule cannot deter jurors from seeking non-legal vindication of minority views through appeals to the public, and forcing such commentary outside the courtroom denies the court the use of perjury penalties against jurors who intend to misrepresent the content of deliberations. More important, such fraud is much less likely and less dangerous with regard to pre-deliberations matters or statements, since in those situations the juror may not exploit the secrecy of the deliberations but must aver to relatively open events.

Finally, juror impeachment is thought to threaten public faith in the jury system and in the administration of justice, thus detracting from a recognized objective of evidence law. But excluding evidence of juror misconduct for this reason treads a narrow line: While decreasing incentives for discovering such misconduct helps to maintain a facade of respectability, that facade is marred when misconduct is alleged and the no-

47. See infra note 73 and accompanying text.
48. See Developments, supra note 14, at 1599 (open discussion not likely to be discouraged unless knowledge of precise rules for admissibility implausibly assumed); Comment, Impeachment of Jury Verdicts, 25 U. CHI. L. REV. 360, 365 (1958).
49. See United States v. Moten, 582 F.2d 654, 664–65 (2d Cir. 1978) (Rule 606(b) "yields to the need for juror testimony in situations where there is a reduced potential for harassment or embarrassment of jurors"). Cf. Crump, supra note 5, at 536 (606(b) "A Blunderbuss Rather than a Scalpel").
51. The problems of juror misrepresentation may be exaggerated. See Smith v. Phillips, 455 U.S. 209, 217 n.7 (1982) (juror testimony at impeachment hearings not inherently suspect); see also Comment, supra note 48, at 364 (jurors have no more motive to lie than other witnesses). But see 3 D. Lounsell & C. Mueller, supra note 6, § 286, at 114 (reluctant jurors may be persuaded by defeated parties that their consent somehow resulted from "false or impermissible considerations"). Justice Marshall has suggested that the most likely distortion is suppression of wrongdoing during post-trial testimony, since jurors will be reluctant to admit impairment of the verdict. Smith v. Phillips, 455 U.S. at 230 (Marshall, J., dissenting).

Neither side to the dispute provides extensive support for its position, nor considers the variables introduced by the post-trial perspectives and procedures which most immediately influence a juror's testimony. See, e.g., J. GUNTHER, THE JURY IN AMERICA 100–01 (1988) (surveying studies suggesting that juror dedication to jury system increases markedly after service).

52. Moreover, pre-deliberations reporting may precede the development of intra-jury antagonism during deliberations. See V. HANS & N. VIDMAR, JUDGING THE JURY 108–09 (1986) (personal and evidentiary conflicts develop during deliberations).
impeachment rule helps sustain the verdict. In other words, the prophylactic effect has to outweigh the immediate effect of declaring already-disclosed misconduct moot. The pre-deliberations exception may mediate the two results by allowing impeachment of matters or statements that court officers may contemporaneously observe and remedy, thus preserving the option of concealment.

C. Proof

Unfortunately, Rule 606(b)'s literal and functional compatibility with juror testimony on pre-deliberations misconduct does not end the problems posed by the present evidentiary regime. The threshold difficulty is that 606(b) bars proof of “the effect of anything upon that or any other juror's mind,” probably even proof of the effect of those matters or statements established by testimony falling into the explicit exceptions within the rule for “extraneous prejudicial information” and “outside influences.” Indeed, this limitation is at the heart of Justice O'Connor's opinion in Tanner, and the failure of the dissent to address the “effect” clause in relation to a pre-deliberations exception may be fatal to its interpretation of 606(b).

Courts have resisted the response of presuming prejudice upon a showing of misconduct, a compromise which could reconcile concern for juror misconduct with jury secrecy. However, not only would a presumption risk overturning verdicts for trivial misconduct, but it would present the

55. See, e.g., Developments, supra note 14, at 1600 (reports of racist jurors rendering unimpeachable verdicts have “demoralizing effect on public confidence”).
56. See id. at 1600 (asserting that rule permitting exposure of racist deliberations will increase public trust in criminal justice system).
57. Relatively autonomous court options include the use of alternate jurors, see infra notes 103-04 and accompanying text; and sua sponte orders for new trial, see Fed. R. Civ. P. 59(d). See, e.g., Nissho-Iwai Co. v. Occidental Crude Sales, 729 F.2d 1530, 1538 (5th Cir. 1984) (trial court justified in retrying all issues where juror questioned by judge indicated confusion over instructions and confusion reflected in damage award). But cf. Fed. R. Crim. P. 33 advisory committee note on 1966 amendment (judge without power to order new trial on own motion in criminal matters).
58. Fed. R. Evid. 606(b).
59. See Fed. R. Evid. 606(b) (disjunctive “deliberations” and “effects” clauses); see also Wiedemann v. Galiano, 722 F.2d 335, 337 (7th Cir. 1983) (trial court's consideration of juror testimony concerning role of unadmitted syringe in jury deliberations reversible error); United States v. Bagnariol, 665 F.2d 877, 884-85 (9th Cir. 1981) (jury may not be questioned about effects of extraneous information obtained from business publications, cert. denied, 456 U.S. 962 (1982); United States v. Greer, 620 F.2d 1383, 1385 n.2 (10th Cir. 1980) (judge erred in allowing jurors to be asked about fidelity to instructions and oath at hearing on extraneous communication of sentencing information). But see Krause v. Rhodes, 570 F.2d 563, 570 (6th Cir. 1977) (propriety of questioning juror about effect of extraneous influences not settled by Rule 606(b)), cert. denied, 435 U.S. 924 (1978).
61. See United States v. Kimberlin, 805 F.2d 210, 243-44 (7th Cir. 1986) (while Rule 606(b) does not literally prohibit testimony regarding juror communications during trial, effect clause renders hearing “fruitless” unless presumed prejudicial); see also 3 J. Weinstein and M. Berger, supra note 4, at ¶ 606(05) n.1 (compiling like cases).
party defending the verdict with the difficult task of overcoming the presumption with evidence which is not itself barred by Rule 606(b). Coupled with the difficulty of proving “effect,” the resulting conundrum of proof has led to considerable confusion as to whether a presumption attaches even in cases involving third party interference. The reigning standard appears to inquire into the likelihood that misconduct affected the verdict but without the benefit of a default rule or competent evidence.

The uncertainty surrounding the burden of proof means that concerned parties will find it hard to estimate ex ante whether they possess meritorious claims. Some may therefore press ultimately unsuccessful claims that nonetheless expose juror misconduct and destroy secrecy. On the other hand, the slim prospects for prevailing might deter the conscientious attorney from investigating allegations of misconduct and thus foreclose the possibility of proof even in those situations the Tanner court would deem prejudicial.

63. See 3 D. LOUISELL & C. MUELLER, supra note 12, at ¶ 291.


65. See 3 D. LOUISELL & C. MUELLER, supra note 12, at ¶ 291.


67. See 3 D. LOUISELL & C. MUELLER, supra note 6, at ¶ 291 (“exceptions to the principle (and areas beyond its reach) are significant enough [sic] to encourage parties dissatisfied with verdicts to enlist the aid of jurors in post-verdict attacks”). But see Comment, supra note 48, at 365 (litigation may be constrained “where fairly precise definition of the grounds of impeachment is possible”—including verdicts decided by loi, juror’s personal knowledge, and extraneous influences).

68. Notwithstanding the possibility that complaints may be deemed waived if not made during trial, see, e.g., Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 661 F. Supp. 1448, 1480 (D. Wyo. 1987) (party waived objection to poem written by juror by waiting until after verdict returned); attorneys are restricted in the investigations they may conduct during trial, and may be impaired in collecting information about pre-deliberations matters and statements even after trial. See supra note 41 (restrictions on jury interviews); Tanner, 107 S. Ct. at 2750 (attorney barred from interviewing jurors after trial); see also 3 D. LOUISELL & C. MUELLER, supra note 6, at ¶ 291 (discussing tension between waiver rule and ban on investigation); Party Time, supra note 30, at 60 (quoting counsel for defendants in Tanner as noting that decision “puts a difficult burden on trial counsel” to uncover misconduct by jurors, since “[y]ou cannot communicate with the jury in any way during the trial, but you have to bring the issue out at trial or the issue is closed”).
D. Finality

The difficulty of rooting Tanner in a concern for protecting the jury suggests a second agenda for Rule 606(b), encouraging finality of judgment.69 In Learned Hand’s words, with unlimited impeachment “judges . . . would become Penelopes, forever engaged in unravelling the webs they wove.”70

Since finality is weakened by all forms of post-verdict inquiry, not just those relying on juror testimony,71 it is difficult to consider it dispositive in this instance.72 Moreover, the conflict may be forced by the binary choice within the evidentiary system between admitting or excluding the evidence. Finality might be encouraged with few attendant costs if a means to reduce juror misconduct and therefore the need for post-verdict impeachment were found. Reduced misconduct would also lessen uncertainty about finality by decreasing the number of petitions for post-trial hearings and for new trials arising from post-trial revelations. Before such a regime can be made successful, it is necessary to rehabilitate the sullied role of jurors.

III. The Role of Jurors in Curing Juror Misconduct

While juror insights are now frequently employed in relatively unconstructive ventures,73 the evidentiary system has disdained juror assistance, a posture consonant with its limited regard for the jury and dissonant with a fuller understanding of the jury’s performance and potential.

A. The Present Role of Jurors

It is hardly surprising that those confronted with juror aberrancies regard juries with a benign paternalism.74 Even so, the continued prevalence of juror misconduct75 suggests that attempts at jury supervision have been ineffective. The Supreme Court’s assertion in Tanner regarding the effectiveness of the trial process in protecting the Sixth Amendment right to an unimpaired jury76 was singularly unpersuasive: None of the cases cited by

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69. See Fed. R. Evid. 606 advisory committee’s note, quoted supra note 6; see also Tanner v. United States, 107 S. Ct. at 2747-48; McCORMICK ON EVIDENCE § 68, at 165-66 (E. Cleary 3d ed. 1984) (no-impeachment rule’s survival attributable to protection of finality).
71. See Sullivan v. Fogg, 613 F.2d 465, 468 (2d Cir. 1980).
72. See Fed. R. Evid. 606(b) advisory committee’s note (“simply putting verdicts beyond effective reach can only promote irregularity and injustice”).
73. See, e.g., Chambers, Little Room on Juries for Profit Motive, Nat’l L.J., Jan. 25, 1988, at 13, col. 4 (sale of accounts by jurors in Bernhard Goetz, Pennzoil-Texaco, CBS-Westmoreland, and Howard Beach trials).
75. See notes 18, 26 and accompanying text.
76. See 107 S. Ct. at 2751.
the Court resulted in control of juror misconduct;\(^7\) the court officers purportedly surveying the jury are as frequently cited for interference with jurors as for policing their conduct;\(^8\) and the trial judge in the underlying case specifically stated that he was "not going to take on [the] responsibility" of monitoring jurors.\(^7\)

The performance of the court and bar might be improved by strengthening their codes of conduct\(^8\) and utilizing their capacity to prevent repeated misconduct.\(^8\) Even so, the very rationales for Rule 606(b) suggest that supervision will continue to be ineffective. The same attorneys entrusted with monitoring the jury are thought to pose a risk of jury tampering if juror testimony is permitted.\(^8\)

For their part, trial judges may have to overcome their preference for finality in order to remedy misconduct.\(^8\)

B. The Potential Role for Jurors

Despite the suppression of jurors by Rule 606(b), the slight role preserved for them is encouraging. Most importantly, the vast majority of Rule 606(b) disputes arise because of information spontaneously brought to the attention of judge or counsel by a juror with no obvious stake in the outcome.\(^8\) When Rule 606(b) is found to be inapplicable and prejudice


78. Compare Provenzano, 620 F.2d at 996-97 (marshal discovers sequestered juror smoking marijuana) with Smith v. Phillips, 455 U.S. 209, 212-13 (1982) (prosecuting attorneys learning of juror's application for employment with District Attorney's Office fail to report information to judge or opposing counsel) and Parker v. Gladden, 385 U.S. 363, 363-64 (1966) (bailiff describes defendant as "guilty" and "wicked" to juror) and Mattox v. United States, 146 U.S. 140, 142 (1892) (bailiff informs jury that defendant previously killed two others) and Haugh v. Jones & Laughlin Steel Corp., 101 F.R.D. 88, 90 (N.D. Ind. 1984) (marshal tells jurors that they will be "locked up until the verdict") and People v. Resenthal, 370 Ill. 244, 246 (1938) (deputy sheriff and bailiff carouse with jurors and commander bus) and Nat'l L.J., supra note 26, at 13 (court officer drinks with and sleeps with juror).


82. See supra note 38 and accompanying text.

83. See supra notes 69-70 and accompanying text.

84. See, e.g., Tanner v. United States, 107 S. Ct. 2739, 2744 (1987). Probably the best compendium of recent 606(b) cases is the Federal Rules of Evidence Digest, supra note 18, Rule
determined, the juror's testimony can be vital;\textsuperscript{65} where no prejudice is found, the result is frequently determined by the judge's assessment of the gravity of the misconduct;\textsuperscript{66} a judgment which presently exceeds the juror's capacity.\textsuperscript{67} Even where Rule 606(b) is found to render the juror's testimony incompetent, the testimony is still routinely employed to demonstrate that the exclusion does not protect a flawed verdict.\textsuperscript{68}

Despite these applications, and despite an ostensible concern for preserving the jury system, little attention has been paid to the possibility of employing jurors to control their own misconduct. Part of the difficulty may be the emphasis on deliberations. No-impeachment rule jurisprudence inherits the traditional assumption of the importance of deliberations to the jury's fact-finding function,\textsuperscript{69} and in turn assumes that the fact-finding function is the most important element of jury duty.\textsuperscript{70} The focus on using the law of evidence to control juror testimony and the extension of that law to pre-deliberations activities (for the sake of deliberations) follows closely from these assumptions. Deliberations and fact-finding, however, are perhaps the most inscrutable\textsuperscript{62} and vulnerable\textsuperscript{92} components of the jury system. Juries may also be defended for performing less benighted functions, such as preserving a popular legislative function, educating citizens in government, and checking the excesses and v

\textsuperscript{65} See infra notes 98--99 (lack of timely jury instructions pertaining to misconduct).
\textsuperscript{66} See, e.g., Government of the Virgin Islands v. Nicholas, 759 F.2d 1073 (3d Cir. 1985) (testimony of partially deaf juror neither competent under Rule 606(b) nor of magnitude suggesting violation of constitutional rights).
\textsuperscript{67} But see H. Kalven, Jr. & H. Zeisel, The American Jury 489 (1966) (outcome determined before deliberations); R. Simon, The Jury: Its Role in American Society 63 (1980) (study indicated "in slightly more than one out of three juries the group verdicts differed from those which the jurors would have reported if they were polled immediately following the trial").
\textsuperscript{69} See J. Guinther, supra note 50, at xvi--xviii (researchers' lack of access to jury deliberations); V. Hans & N. Vidmar, supra note 52, at 98--99 (same); Baldwin & McConville, supra note 17, at 238 (same).
\textsuperscript{70} See P. DiPerna, Juries on Trial: Faces of American Justice 56 (1984) (lack of control over deliberations "may account for continuing jury system criticism"); H. Kalven, Jr. & H. Zeisel, supra note 89, at 3--9 (brief history of "deep controversy" over jury, especially "fascinating but bitter" debate over jury competency); S. Kassin & L. Wrightsman, The American Jury on Trial: Psychological Perspectives 3--4 (1988) (one of two most significant arguments over merits of jury concerns their effectiveness); Myers, Rule Departures and Making Law: Juries and Their Verdicts, 13 Law & Soc'y Rev. 781, 782--83 (1979) ("One of the most serious criticisms of the jury bears on the competence of its members to decide issues of fact.").
nerabilities of the judiciary.\textsuperscript{93} While the value of each of these functions is open to question,\textsuperscript{94} every function of the jury, including those promoted by insulating deliberations and improving fact-finding, may be enhanced by a system which more fully realizes the potential of jurors in controlling misconduct.

IV. COMPLEMENTING EVIDENTIAL INCOMPETENCE: MECHANISMS FOR REDUCING OR RESOLVING JUROR MISCONDUCT DURING TRIAL

A comprehensive resolution of juror misconduct would preserve jury secrecy and the finality of verdicts, yet allow complementary exceptions for pre-deliberations verdict impeachment and meaningful mechanisms for ensuring that jurors prevent the risks of impeachment. Perhaps unsurprisingly, such a resolution would begin before deliberations, bordering and complementing the evidentiary system’s limited competence to decide the incompetence of jurors.

A. Informing Misconduct Reporting

The Federal Rules of Evidence were criticized at their inception for failing to take account of the interests of jurors.\textsuperscript{95} Rule 606(b) seems susceptible to this criticism: not only does it effectively quash all post-verdict juror reporting of misconduct, but it may first manifest itself after trial, catching jurors unawares. Instructing the jury at the beginning of trial on Rule 606(b) is a minimal gesture, but it would inform the conscientious juror of the court’s constraints and facilitate notifying court officers of misconduct and its effects.\textsuperscript{96}

A necessary accompaniment would be an instruction describing the proper conduct of petit jurors and warning against common types of misconduct, such as harassment of other jurors, alcohol or drug use, exposure

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\textsuperscript{94} Compare, e.g., 4 W. Blackstone, Commentaries *350 (jury “palladium” of English liberties) and The Federalist No. 83, at 499 (A. Hamilton) (C. Rossiter ed. 1961) (representing view that jury is “very palladium of free government”) with J. Frank, supra note 5, at 108 (“palladium . . . also is the name of a chemical element which, in the sponge state has the remarkable quality of absorbing up to nearly 1,000 times its own volume in hydrogen gas.”), ch. 8.

\textsuperscript{95} See Hearings, supra note 33, at 198 (letter from Professor Kenneth W. Graham). See generally London School of Economics Jury Project, Juries and the Rules of Evidence, 1973 Crim. L. Rev. 208, 208 (strict evidence rules developed without regard to jury behavior).

\textsuperscript{96} Full information might lift the veil of ignorance supposed earlier and chill deliberations, since jurors would be confronted with the possibility that their behavior during deliberations could lead to reprisals by other jurors. See supra notes 44–52 and accompanying text. This risk would be minimized if jurors were simultaneously informed of the importance of reporting misconduct before deliberations, as this Note proposes.
to out-of-court facts (by experimentation, research, or inadvertence), or nondisclosure of bias, prejudice, or conflict. Although some of this misconduct could be used to impeach a verdict under the explicit exceptions to Rule 606(b), it is best to redress all types of misconduct before deliberations, including when the juror is not at fault but has been compromised by a third party.

Present instructions are inadequate. Not only does the bulk of jury instruction occur after trial, but it tends to pay little attention to the prospect of juror misconduct, particularly misconduct which does not involve extraneous information or outside influences. Pre-trial instruction and encouragement of reporting might prevent or expose pre-deliberations misconduct before a verdict is reached, thus enhancing jury secrecy, finality, and justice for the parties in the case.

Should pre-trial instruction result in the revelation of juror misconduct before a verdict is reached, a federal court may accept a stipulation by the parties reducing the number of jurors, allow a verdict to be returned by eleven jurors if it finds it necessary to excuse a juror after the jury retires or impanel alternate jurors prior to deliberations. Coupled with the pre-instruction of jurors, each mechanism would allow trial courts to nullify the effect of juror misconduct while avoiding the disruption, delay, and expense of disturbing verdicts.

97. See supra note 18 (sources schematizing misconduct claims). Providing a precise definition of "misconduct" may be an enterprise doomed to failure. See NATIONAL JURY PROJECT, INC., supra note 18, § 8.1, at 151 ("a good, working definition of 'infinite' is 'the number of ways jurors can engage in misconduct').


99. See E. Devitt & C. Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§ 10.01, 10.09, 10.14, 10.18 (3d ed. Supp. 1986) (pre-trial instructions for criminal cases), §§ 70.01, 70.12 (4th ed. 1987) (pre-trial instructions for civil cases); Comment, supra note 98; see also HANDBOOK FOR JURORS SERVING IN THE UNITED STATES DISTRICT COURT (1975) (manual for prospective jurors).

100. See A. Elwork, B. Saks, & J. Alfini, supra note 98, § 1–4(B) (instructions at beginning of trial more effective in altering perceptions and decisions of jurors); J. Frederick, supra note 98, § 7–502 (same); S. Kassin & L. Wrightsman, supra note 92, at 144–46 (same); Sand & Reiss, A Report on Seven Experiments Conducted By District Court Judges in the Second Circuit, 60 N.Y.U.L. Rev. 423, 437–53 (1985) (successful experiment with pre-trial instruction).


103. Without alternate jurors, a mistrial may be necessitated in the event of multiple misconduct, since the court may only unilaterally reduce the jury to eleven. Fed. R. Crim. P. 23(b) (reduction of jurors); Fed. R. Crim. P. 24(c) (alternate jurors); Fed. R. Civ. P. 47(b) (same); see, e.g., Arizona v. Washington, 434 U.S. 497, 512 n.31 (1978) (recommending use of alternate juror to replace biased juror); United States v. Reyes, 645 F.2d 285, 288 (5th Cir. Unit A May 1981) (substitution of alternate jurors to cure misconduct).

B. **Deterring Misconduct**

Juror misconduct might be further discouraged by penalizing juror misbehavior, perhaps by adopting the sanctions levied on third parties for interference with the panel.\(^{108}\) Citing individuals for contempt of court, for example, has been advocated in other contexts as a more direct means of deterring misconduct than that available through enforcement of the rules of evidence.\(^{108}\)

While use of the contempt power against jurors has been limited, jurors have been punished for misconduct involving obvious falsification of voir dire\(^{107}\) or disobedience of court instructions.\(^{108}\) Enhancing jury pre-instruction may ultimately permit use of the contempt power, but the current limitations may reflect the difficulty of adapting contempt to the jury. Contempt is a procedurally cumbersome means of deterring misconduct, since its potential severity may affect juror reporting\(^{109}\) and requires pro-

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\(^{106}\) For example, contempt citations might be used as an alternative to the exclusionary rule in search-and-seizure doctrine. See Comment, *Contempt of Court As an Alternative to the Exclusionary Rule*, 72 J. CRIM. L. & CRIMINOLOGY 993 (1981). Professor Crump's attempt at a more comprehensive comparison between Rule 606(b) and search-and-seizure doctrine strains the analogy and sidesteps the considerable criticism of Leon's vision of the Fourth Amendment. Compare Crump, supra note 5, at 536–39 with Dripps, *Living with Leon*, 95 YALE L.J. 906 (1986).


\(^{109}\) Collegial jurors may become less likely to report misconduct by one another, while hostile jurors may be tempted to report misconduct falsely.
cedural safeguards which may ultimately increase disclosure. Moreover, the deterrent effect of contempt sanctions relies on the existence of a reasonably coherent, responsive institution like the police or the bar, a description at loggerheads with the intended diversity of jury pools. Finally, use of contempt sanctions against jurors may provoke a backlash from citizens frustrated by the burdens of jury duty.

A more moderate sanction would accommodate the limited responsibilities and rewards entailed by jury duty. While liability may be the beginning of responsibility, or even coextensive with it, subjecting jurors to extreme penalties would exaggerate the potential deterrent and distort the nature of jury service. One possible compromise would permit the judge to withhold payment of juror fees from jurors who have been involved in misconduct. The preoccupation of jurors with the economic implications of jury duty suggests that they might view such a penalty as a strong incentive to avoid misconduct.

C. Reforming Proof

Beyond preventing, deterring, and controlling juror misconduct, a more active role for jurors could improve the adjudication of misconduct claims. Informing jurors of the contours of Rule 606(b) should make misconduct reporting more timely, and providing guidance as to the appropriate subjects for reporting should enhance the quality of petitions without swamping the courts. Improved juror education and incentives might also in-
crease the credibility of juror testimony, thereby reducing the risk of juror turpitude to the level of conventional witnesses.

More ambitiously, jurors should be relied upon to fulfill the deliberative functions protected by Rule 606(b). Faced with extremely egregious misconduct that cannot be remedied by the evidentiary system,\textsuperscript{118} it would be appropriate for juries to exploit their power to hang and thereby nullify the proceedings. This proposal is less radical than it may seem. Juries are inevitably presented with what has been termed a “recourse role,” consisting of the choice between literal adherence to judicial instructions and doing what they think best.\textsuperscript{119} In the context of pre-deliberations juror misconduct, a jury might purposefully deadlock or delay “where a conflict exists within [its] context of evaluation,”\textsuperscript{120} namely, where it anticipates intolerable damage to the jury system if the misconduct were unconstrained.

By relying on the knowledge and perspective peculiar to jurors, and by choosing the most modest path of juridic defiance,\textsuperscript{121} such decisions would avoid the broadest arguments against jury nullification.\textsuperscript{122} The dynamic of deliberations suggests that a hung jury will be avoided unless a minority consensus exists for it,\textsuperscript{123} and the occasional cost of hung juries to finality and judicial administration should be tolerated as a consequence of taking the jury-promotion objective of Rule 606(b) seriously.\textsuperscript{124}

\textsuperscript{118} See, e.g., supra notes 18, 26.

\textsuperscript{119} See M. KADISH & S. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 56-66 (1973) (legitimacy and coherence of interposition by jurors). This Note does not resolve the larger issue of whether subjects licensed for jury nullification should be so described in jury instructions. Compare id. (instructions bad) with Christie, Lawful Departure From Legal Rules: “Jury Nullification” and Legitimated Disobedience, 62 CAL. L. REV. 1289, 1303 (1974) (nullification without instruction fatally inconsistent). For these purposes, the instructions on Rule 606(b) and juror misconduct recommended in Section IV(A) are sufficient.

The Supreme Court’s death penalty jurisprudence has identified a discrete problem posed by jury nullification: Where unbridled jury discretion is thought to violate the Eighth Amendment, as in the imposition of capital sentences, statutes liable to jury nullification may be impermissible. Compare Sumner v. Shuman, 107 S. Ct. 2716, 2727 n.13 (1987) (commending bifurcated trials in capital cases for avoiding nullification) and Woodson v. North Carolina, 428 U.S. 280, 302-03 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (mandatory death sentence statute constitutionally deficient for creating frequent nullification) with id., 428 U.S. at 313 (Rehnquist, J., dissenting) (jury nullification no less constitutional than jury appraisal of mitigating factors). The instant proposal may be distinguished, however, since it does not contemplate or predict nullification of any particular statute and would not reflect the contemporary valuation of any norms underlying statutes.

\textsuperscript{120} See M. KADISH & S. KADISH, supra note 119, at 60-61.

\textsuperscript{121} A hung jury is not nearly as irremediable as other measures available to juries. See, e.g., Scheflin & Van Dyke, Jury Nullification: The Contours of a Controversy, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 80-82 (jury might regard statute as unconstitutional, define or create crime, or return lesser conviction against evidence). The appeal of the solution proposed here lies in the fact that the jury can simultaneously affect the verdict while signaling that it has not resolved the underlying matter. Nullification by acquittal, on the other hand, could mean that the jury chose not to resolve the matter, could not resolve it, or resolved it negatively. A similar ambiguity attends more conclusive forms of jury nullification in the civil context, although renewal of a civil suit faces frictions of a lesser magnitude than double jeopardy.

\textsuperscript{122} See id. at 85-115 (summary of policy arguments regarding nullification).

\textsuperscript{123} See V. HANS & N. VIDMAR, supra note 52, at 111-12.

\textsuperscript{124} But cf. Zeisel, ... And Then There Were None: The Dimunition of the Federal Jury, 38
V. CONCLUSION

The jurisprudence of Rule 606(b) has been waging a losing war against juror misconduct, a consequence of inherent and perspectival limitations. While Rule 606(b) seems facially and functionally inapplicable to pre-deliberations matters and statements, its extension to such testimony reveals foundational, countervailing imperatives of proof and finality. The resultant intractability of juror testimony and neglect of juror contributions delimit the shortcomings of the evidentiary system’s dismissive image of the jury.

Juror misconduct presents an ideal opportunity for development of a fuller, more responsible role for jurors. Rather than merely conserving jury deliberations through the exclusion of juror testimony, trial courts should take advantage of the manifest involvement of jurors in policing the jury system. By informing jurors and making them accountable for their conduct, courts may begin the transition to a jury system that is not only tolerable but supportive of the sundry objectives of civil and criminal justice.

The Yale Law Journal shares with the Yale Law School and the entire legal community the sense of loss at the death of Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit. Judge Wright was an extraordinary and courageous man. We dedicate this issue to him.