Impeachment of Jury Verdicts in Arizona

Jeffrey D. Buchanan

Almost 200 years ago, Lord Mansfield, in a single paragraph and without precedent,[1] declared that affidavits of jurors could not be received to impeach their verdict.[2] Because the rule was announced by the great Chief Justice, the idea that jury verdicts were unimpeachable by the jurors themselves soon prevailed in England and the United States.[3] Many courts have followed the rule unquestioningly[4] prompting other courts and numerous commentators to criticize it.[5] Despite the development of a minority viewpoint,[6] the majority still clings to the nonimpeachment rule which has been recently codified in numerous jurisdictions.[7] Arizona, in codifying its law as to nonimpeachment of jurors, applies different rules to the criminal[8] and civil[9] areas of the law.

This Note will trace the history of the nonimpeachment rule, dis-

1. 8 J. WIGMORE, EVIDENCE § 2352, at 696-97 n.2 (J. McNaughten, ed. 1961). *See* Vaise v. Delaval, 99 Eng. Rep. 944, 944 (K.B. 1785).

2. Vaise v. Delaval, 99 Eng. Rep. 944, 944 (K.B. 1785).

3. 8 J. WIGMORE, *supra* note 1, § 2352, at 696-97.

4. *See, e.g.*, Hull v. Larson, 14 Ariz. 492, 495, 131 P. 668, 669-70 (1913) (following the "universally" held rule that juror affidavits will not be used to impeach a verdict); Crossdale v. Tantum, 11 Del. (6 Houst.) 218, 218-21 (1881) (jurors' affidavits not received to show a quotient-type verdict); Dorr v. Fenno, 29 Mass. (12 Pick.) 520, 525 (1832) (a well-settled rule that juror testimony is inadmissible to show their own misbehavior); Schwindt v. Graeff, 109 Ohio St. 404, 407, 142 N.E. 736, 737 (1924) (in absence of statutory law, common law rules as to impeachment must be followed).

5. Wright v. Illinois & Miss. Tele. Co., 20 Iowa 195, 211 (1866); Schwindt v. Graeff, 109 Ohio St. 404, 409-17, 142 N.E. 736, 737-40 (1924) (Marshall, C.J., dissenting); Crawford v. State, 10 Tenn. (2 Yer.) 60, 67 (1821). *See* 8 J. WIGMORE, *supra* note 1, §§ 2348-2356, at 679-725; Carlson, *Impeaching Jury Verdicts*, LITIGATION, Fall, 1975, at 31.

6. *See, e.g.*, People v. Hutchinson, 71 Cal. 2d 342, 344-48, 455 P.2d 132, 134-38, 78 Cal. Rptr. 196, 198-202, *cert. denied*, 396 U.S. 994 (1969); Wright v. Illinois & Miss. Tele. Co., 20 Iowa 195, 198-213 (1866).

7. In 1975 Congress adopted the Federal Rules of Evidence which includes Rule 606(b). See text & notes 56, 89-90 *infra*. By 1978, 14 states had adopted Rule 606 in some manner. These include Arizona, Arkansas, Florida, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Wisconsin, and Wyoming. *See also* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE Supp. 33-37 (1978). For good examples of state codifications of rules for impeachment of jury verdicts unlike the federal version, see CAL. EVID. CODE § 1150; N.J.R. OF EVID. § 41.

8. ARIZ. R. CRIM. PROC. 24.1(d).

9. ARIZ. R. EVID. 606(b).

cussing the public policy considerations and formulations that rooted the rule so firmly into the common law. Criticism of the Mansfield rule that led to the development of minority rules will also be discussed. Arizona case law will next be studied along with a comparison of Criminal Procedure Rule 24.1 and Evidence Rule 606(b). To enhance the understanding of Arizona's recently adopted Evidence Rule, Federal Evidence Rule 606(b) and its ramifications will also be discussed. Finally, suggestions will be made concerning Arizona's differing rules.

HISTORY OF IMPEACHMENT OF JURY VERDICTS

Lord Mansfield's Rule

Two hundred years ago in England a rule of evidence that has long since died was espoused by Lord Mansfield—*nemo turpidudinem saum allegans audietur*—a witness shall not be heard to allege his own turpitude.[10] Having previously applied this rule to other areas of the law,[11] Chief Justice Mansfield, in 1785, applied it to juror misconduct in *Vaise v. Deleval*,[12] changing two hundred years of common law with one paragraph:

> The court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every case the court must derive their knowledge from some other source; such as some person having seen the transaction through a window or by some other means.[13]

Because *Vaise* was based solely on Lord Mansfield's before mentioned maxim, the case had inherent weaknesses. The brevity of the opinion plus the fact that it was based on a long-discarded maxim forced later courts to supplement their opinions with public policy reasons for sustaining the nonimpeachment rule. The rule was said to prevent juror harassment,[14] juror tampering,[15] juror corruption,[16] verdict uncertanty,[17] and interference with the free and open discussion of the jury.[18] The rule was not unanimously adopted, however, and those ju-

10. 8 J. WIGMORE, *supra* note 1, § 2352, at 696.

11. "Its chief application was to forbid the drawer of commercial paper from proving usury or other illegal consideration and to forbid similar accusational sorts of testimony. . . ." *Id.*

12. 99 Eng. Rep. 944 (K.B. 1785).

13. *Id.* at 944.

14. *See* McDonald v. Pless, 238 U.S. 264, 267 (1915); United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962). *But see* text & notes 126-30 *infra*. For a more complete listing see Note, *Judgment by Your Peers? The Impeachment of Jury Verdicts and the Case of the Insane Juror*, 21 N.Y.L.F. 57, 60 n.22 (1975).

15. *See* Miller v. United States, 403 F.2d 77, 82 (2d Cir. 1968); Haight v. Turner, 21 Conn. 593, 596 (1852). *But see* text & note 131 *infra*.

16. *See* Mattox v. United States, 146 U.S. 140, 148 (1892); Straker v. Graham, 150 Eng. Rep. 1612, 1613-14 (Ex. 1839). *But see* text & note 131 *infra*.

17. *See* McDonald v. Pless, 238 U.S. 264, 267 (1915). *But see* text & notes 119-26 *infra*.

18. McDonald v. Pless, 238 U.S. 264, 267-68 (1915). *But see* text & note 132-33 *infra*.

risdictions that did not follow the rule have soundly criticized it.[19]

The Iowa Rule

A minority view has risen out of the objections to Mansfield's nonimpeachment rule. This rule, known as the Iowa rule, is that jurors' affidavits will be admitted as to facts that do not inhere in the verdict.[20] It was first espoused in *Wright v. Illinois & Mississippi Telegraph Co.*,[21] involving a quotient verdict[22] discovered by juror affidavits. The court first noted that the effects of "the deliberations, conversations, debates, and judgments of the jurors" upon the jurors' minds are impossible to prove and should never be admitted.[23] Facts independent of the verdict, such as quotient determination of damages, can be readily proven, however, and should be admitted to impeach the verdict.[24] The Iowa Supreme Court felt the rule would "purify" the jury room and deter future juries from such improprieties as quotient verdicts.[25]

In attempting to establish a flexible but workable rule, the Iowa court held that jurors could attest to facts not inhering in the verdict.[26] A quotient decision or bribe would not inhere in a verdict, but a misunderstanding of the instructions of the court or the legal but undue influence of fellow jurors would inhere in the verdict.[27] This distinction

19. *See, e.g.*, Smith v. Cheetham, 3 Cai. R. 57, 59 (N.Y. 1805) (criticizing the maxim that a witness should not be heard to allege his own turpitude by noting that criminals are convicted every day by their own words); Crawford v. State, 10 Tenn. (2 Yer.) 60, 67 (1821) (attacking the idea of allowing affidavits of "ignominious eavesdroppers"). *See also* Schwindt v. Graeff, 109 Ohio St. 404, 409-14, 142 N.E. 736, 737-39 (1924) (Marshall, C.J., dissenting because the Mansfield rule discredits the jury system thus bringing the entire judicial system into disrepute).

20. Wright v. Illinois & Miss. Tele. Co., 20 Iowa 195, 211 (1866).

21. 20 Iowa 195 (1866).

22. Quotient verdicts have been defined as follows:

> Used in civil actions where the jury is to set the damages, or in criminal proceedings when the jury is to fix the punishment, [a quotient verdict] consists of an agreement by the jurors to the verdict-reaching procedure of adding together sums representing each individual juror's judgment as to the amount of damages to be awarded or penalty to be exacted, and dividing the total by the number of jurors.

Note, *Chance and Quotient Verdicts*, 37 VA. L. REV. 849, 851 (1951) (footnote omitted). There is disagreement whether a quotient verdict is one of chance or one of mathematical precision. *See* Turner v. Tuolumne County Water Co., 25 Cal. 397, 403 (1864), *overruled*, Dixon v. Pluss, 98 Cal. 384, 33 P. 268 (1893), *aff'd*, 101 Cal. 511, 35 P. 1030 (1894). But no matter how characterized, if the jurors bind themselves to the quotient in advance of the calculations, one juror could drastically lower or raise the average by submitting either a disproportionately low or high figure. *See* Womble v. J.C. Penney Co., 47 F.R.D. 350, 355 (E.D. Tenn. 1969), *aff'd*, 431 F.2d 985 (6th Cir. 1970). For further discussion of quotient verdicts see text & notes 109-13, 154-59 *infra*.

23. 20 Iowa at 210.

24. *Id.* at 210-11. For a more complete discussion, see Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision* 1977 ARIZ. ST.L.J. 247, 256.

25. 20 Iowa at 211.

26. *Id.* at 210.

27. *Id.* Matters that do not inhere in the verdict include

> that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game

between matters that inhere in the verdict and those that do not was later simplified. Thus jurors' affidavits impeaching their verdict were accepted where the evidence introduced was based on the overt acts of the jurors.[28] Evidence of the subjective reasoning processes of the jurors, however, was not accepted.[29]

The United States Supreme Court adopted this view in *Mattox v. United States*,[30] and although its rationalization was later rejected in *McDonald v. Pless*,[31] the exceptions *Mattox* gave the nonimpeachment rules have retained their validity.[32] Thus, the Iowa rule has given rise to important exceptions to the majority rule.[33] Despite the minority view's strong arguments,[34] however, the majority of jurisdictions still clings tenaciously to the general rule of nonimpeachment.[35] Before Arizona's impeachment rules are studied, the main policies behind the nonimpeachment rule must be examined.

Policy Considerations

In adopting the nonimpeachment rule, most jurisdictions discarded Lord Mansfield's abbreviated opinion and relied instead on other reasons. But rather than follow commentators' formulated rationales,[36] the courts have instead relied on confusing public policy rea-

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of chance or other artifice or improper manner. . . . [Matters that do inhere in the verdict include] that the juror did not assent to the verdict; that he misunderstood the instructions of the court, the statements of witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise or his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast.

Id.

28. *See* Perry v. Bailey, 12 Kan. 415, 419 (1874) (Overt acts are "those matters laying outside the personal consciousness of the individual juror, those things which are matters of sight and hearing, and therefore accessible to the testimony of others, and subject to contradiction.").

29. *See* People v. Hutchinson, 71 Cal. 2d 342, 346, 455 P.2d 132, 136, 78 Cal. Rptr. 196, 200 ("subjective reasoning processes of the individual juror . . . can be neither corroborated nor disproved"), *cert denied*, 396 U.S. 994 (1969).

30. 146 U.S. 140 (1892).

31. 238 U.S. 264 (1915). See text & notes 41-54 *infra*.

32. *See* MacDonald v. Pless, 238 U.S. at 269. See text & notes 49-54 *infra*.

33. See text & notes 41-54 *infra*.

34. For a recent case supporting the Iowa rule, see People v. Hutchinson, 71 Cal. 2d 342, 344-48, 455 P.2d 132, 134-38, 78 Cal. Rptr. 196, 198-202, *cert. denied*, 396 U.S. 994 (1969).

35. In discussing the proposed Federal Rule of Evidence 606(b), the House Judiciary Committee noted that only 12 states permitted testimony as to objective jury misconduct: California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington. H.R. REP. No. 950, 93d Cong., 1st Sess. 9-10 (1973). Since then Nebraska has adopted Federal Rule of Evidence 606 (with minor changes) and the law previously allowing impeachment of quotient verdicts in that state appears to have been changed. NEB. REV. STAT. § 27-606 (Supp. 1975). For a more complete discussion see Fenner, *Competency and Examination of Witnesses Under Article VI of the Federal Rules of Evidence and the Nebraska Evidence Rules*, 9 CREIGHTON L. REV. 559, 578-79 (1976). North Dakota has also adopted Federal Rule of Evidence 606, but maintained its common-law tradition of not allowing chance and quotient verdicts by adding a phrase allowing affidavits of jurors to be received to impeach a verdict of the jury "arrived at by chance." N.D.R. EVID. 606.

36. One of the most erudite rationales for an impeachment rule was profferred by Professor Wigmore in 8 J. WIGMORE, *supra* note 1, §§ 2345-2356, at 679-725. He cites three justifications for the rule: Privileged communications, self-stultifying testimony, and parol evidence. *Id.* § 2345, at

sons. Four of the policy considerations most frequently cited are: Protection of verdict finality;[37] freedom of jury deliberation;[38] protection of jurors from annoyance, harassment, and embarrassment;[39] and reduction of incentives for jury tampering.[40] The United States Supreme Court, in *McDonald v. Pless*,[41] laid down most of the public policy that this century's courts have relied on in support of the nonimpeachment rule.[42]

The strongly worded *McDonald* opinion apparently was a reaction to the effect of *Mattox v. United States*.[43] In *Mattox*, juror affidavits

677. The first two reasons are weak and courts rarely rely on them. Privileged communications between jurors hardly seems a good reason for not allowing discovery of jury misconduct. And the rationale that lack of privacy would inhibit the jurors' discussion has been countered with the suggestion that it would purify the jury room. See text & note 25 *supra*. As for self-stultifying testimony, it has been criticized heavily—even by Wigmore himself. *See* 8 J. WIGMORE, *supra* note 1, § 2353, at 698; text & note 19 *supra*.

The third, parol evidence, is a well-reasoned rule and could be objectively applied. The principle of the parol evidence rule is "that where the existence and tenor of a jural act are in issue, the outward utterance as finally and formally made, and not prior and private intention, is taken as exclusively constituting the act." Board of Trustees Eloy Elem. School Dist. v. McEwen, 6 Ariz. App. 148, 151, 430 P.2d 727, 730 (1967). Once the verdict is entered, it is the unalterable expression of the jury and cannot be changed by considering jury motives, beliefs, misunderstandings, or intentions. 8 J. WIGMORE, *supra* note 1, § 2349, at 681. The key to the parol evidence rule is that "certain formalities of conduct must be observed in order to give validity to the jural act" and thus make the rule applicable. Note, *supra* note 14, at 69. Where juror conduct does not meet the formalities because a juror is intoxicated or has been bribed, for example, the verdict reached is not a legal one and may be overturned by juror affidavit. 8 J. WIGMORE, *supra* note 1, § 2352, at 695. Interestingly, the new FEDERAL RULE OF EVIDENCE 606(b) also allows evidence of jury irregularities like bribes, prejudicial newspaper articles, and intoxication to impeach a verdict. *See* 3 J. WEINSTEIN & M. BERGER, *supra* note 7, ¶ 606[04], at 606-31 through 33 (1978). These exceptions were not formulated by applying a uniform rule like parol evidence, but were public policy exceptions to the general rule of nonimpeachment, applied on a case-by-case basis. *Id.* ¶ 606[04], at 606-31 through 606-33 & nn. 21-33. See text & notes 37-55 *infra*.

37. *See, e.g.*, McDonald v. Pless, 238 U.S. 264, 267 (1915); Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

38. *See, e.g.*, McDonald v. Pless, 238 U.S. 264, 267 (1915); Rakes v. United States, 169 F.2d 739, 745 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948). *But see, e.g.*, People v. Hutchinson, 71 Cal. 2d 342, 347, 455 P.2d 132, 137, 78 Cal. Rptr. 196, 201 (citing *Wright*), *cert. denied*, 396 U.S. 994 (1969); Wright v. Illinois & Miss. Tele. Co., 20 Iowa 195, 211 (1866) ("to hear such proof would have a tendency to diminish such practices and to purify the jury room").

39. *See, e.g.*, McDonald v. Pless, 238 U.S. 264, 267 (1915); Miller v. United States, 403 F.2d 77, 82 (2d Cir. 1968). *But see* Comment, *Impeachment of Jury Verdicts by Jurors: A Proposal*, 1969 U. ILL. L.F. 388, 394 n.45.

40. *See, e.g.*, McDonald v. Pless, 238 U.S. 264, 267 (1915); United States v. Procario, 356 F.2d 614, 619 (2d Cir.), *cert. denied*, 384 U.S. 1002 (1966). *But see, e.g.*, People v. Hutchinson, 71 Cal. 2d 342, 347, 455 P.2d 132, 137, 78 Cal. Rptr. 196, 201, *cert. denied*, 396 U.S. 994 (1969); Crawford v. State, 10 Tenn. (2 Yer.) 60, 67 (1821).

41. 238 U.S. 264 (1915).

42. The Court said:

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

Id. at 267-68.

43. 146 U.S. 140 (1892).

stating that the bailiff had made prejudicial remarks[44] and that the jury had read biased newspaper accounts of the trial, were admitted.[45] Although great caution was urged in this area,[46] the Court cited cases following the Iowa rule to support its acceptance of the juror affidavits.[47] In *McDonald*, however, a juror's affidavit had been used as evidence that the verdict had been reached by using a quotient.[48] Since the cases cited in *Mattox* allowed the impeachment of a quotient verdict,[49] the Supreme Court faced a dilemma. The Court apparently wanted the result in *Mattox* to stand—certain extraneous influences could be testified to by jurors if they were sufficiently outrageous—but it did not want to allow juror testimony on quotient verdicts. Therefore, public policy reasons[50] were seen as arguing against allowing the testimony, and the minority view the court had previously cited as correct was subtly denounced.[51] Nevertheless, the Court mentioned that there were times when evidence of gross misconduct by the juror could not be excluded without " 'violating the plainest principles of justice.' "[52]

Thus, the result of *McDonald* was a nonimpeachment rule with exceptions, rather than an impeachment rule delineating between objective and subjective acts of jurors. The *McDonald* Court reasoned that exceptions to this rule should not be defined, but may be applied in "the gravest and most important cases."[53] The Court's rule was not as liberal as the overt act—subjective reasoning distinction delineated in *Mattox*, but it did step free from the restricting stare decisis of Lord Mansfield's rule that had valued the sanctity of the jury room over justice.[54]

Following *McDonald*, exceptions to the nonimpeachment rule were crystalized. This process produced the general idea that jurors may testify about extraneous prejudicial information to which the jury

44. *Id.* at 142. The jurors' affidavits indicated the bailiff had stated, "This is the third fellow [the defendant] has killed." *Id.*

45. *Id.* at 143.

46. *Id.* at 148.

47. *Id.* at 148-49. Two of the cases cited were Perry v. Bailey, 12 Kan. 539, 544-45 (1874) and Woodward v. Leavitt, 107 Mass. 453, 471 (1871), both of which promulgated the overt act—subjective reasoning distinction.

48. 238 U.S. at 265.

49. The *Perry* court had held that those things that lie outside the "personal consciousness of the individual juror should be admitted." 12 Kan. 539, 419 (1874). The *Perry* Court also cited as good law Wright v Illinois & Miss. Tele. Co., 20 Iowa 195, 210 (1866) which had determined that quotient verdicts were impeachable. 12 Kan. at 418-19. See text & note 30 *supra*.

50. See note 42 *supra*.

51. *See* 238 U.S. at 267. "For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror cannot impeach his own verdict." *Id.*

52. *Id.* at 269.

53. *Id.*

54. See text & note 17 *supra*.

was exposed, but not about the effect it had on them.[55] This rule led to the Supreme Court's promulgation of Federal Rule of Evidence 606(b), adopted by Congress[56] and eventually by Arizona.[57]

JURY IMPEACHMENT IN ARIZONA

In 1977 Arizona adopted the Rules of Evidence.[58] Rule 606(b) was adopted almost verbatim from the Federal Rules of Evidence,[59] except that Arizona restricted its application to civil trials[60] since it had adopted an impeachment rule applying to criminal trials in 1973.[61] The civil rule is substantively different than the criminal rule, consequently, two different rules are applied in Arizona.

Common Law

Since statehood, Arizona courts have generally followed the majority rule of nonimpeachment.[62] The reason behind the rule was rarely questioned,[63] and the courts usually summarily dismissed any arguments attacking it, claiming they were bound by common law.[64] Arizona courts have used the phrase "inhere in the verdict" to describe the types of jury conduct that could not be impeached.[65] Unlike other

55. Extraneous prejudicial information has been deemed to include juror communication or contracts with third persons. *E.g.*, Parker v. Gladden, 385 U.S. 363 *passim* (1966) (bailiff expressed opinion on case to jurors); Remmer v. United States, 347 U.S. 227 *passim* (1954) (jury tampering); United States v. Brumbaugh, 471 F.2d 1128 *passim* (6th Cir.), *cert. denied*, 412 U.S. 918 (1973) (prejudicial comment by bailiff to juror). Extraneous prejudicial information has also included publicity received and discussed in the jury room. *E.g.*, Marshall v. United States, 360 U.S. 310 *passim* (1959), *rev'g*, 258 F.2d 94 (10th Cir. 1958); United v. Thomas, 463 F.2d 1061 *passim* (7th Cir. 1972). Jury consideration of outside evidence has also been found prejudicial. *E.g.*, Owen v. McMann, 435 F.2d 813 *passim* (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); Farese v. United States, 428 F.2d 178 *passim* (5th Cir. 1970). *See* Virgin Islands v. Gereau, 523 F.2d 140, 149-50 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

56. Pub. L. No. 93-595, § 1, 88 Stat. 1934 (1975).

57. ARIZ. R. EVID. 606(b).

58. The rules were adopted by the Supreme Court pursuant to ARIZ. CONST. art. 6, § 5 which provides for the promulgation of court rules by the Supreme Court. See note 117 *infra*.

59. FED. R. EVID. 606(b) is fully set out in note 90 *infra*.

60. The only change in Arizona's Evidence Rule 606(b) was the substitution of the words "in a civil action" for "or indictment," thus making Arizona's provision inapplicable to criminal actions. *See* ARIZ. R. EVID. 606(b).

61. The rule adopted was ARIZ. R. CRIM. P. § 24.1(d). See text & notes 80-87 *infra*.

62. *See, e.g.*, Hull v. Larson, 14 Ariz. 492, 495, 131 P. 668, 669-70 (1913) (following the "universal" rule that the affidavit of a juror will not be used to impeach a verdict); Valley Nat'l Bank v. Haney, 27 Ariz. App. 692, 693, 558 P.2d 720, 721 (1976) ("Arizona has long followed the generally recognized rule that affidavits of jurors will not be admitted to impeach a verdict.").

63. *See* Wasko v. Frankel, 116 Ariz. 288, 290, 569 P 2d 230, 232 (1977); State v. Madden, 104 Ariz. 111, 116, 449 P.2d 39, 44 (1969) ("Consideration of these affidavits for purposes of impeaching the verdict is foreclosed."). *But see* Wilson v.Wiggins, 54 Ariz. 240, 241-46, 94 P.2d 870, 871-72 (1939); Board of Trustees Eloy Elem. School Dist. v. McEwen, 6 Ariz. App. 148, 150-54, 430 P.2d 727, 729-33 (1967) (indepth discussion of impeachment of jury verdicts).

64. *See, e.g.*, Hull v. Larsen, 14 Ariz. 492, 495, 131 P. 668, 669 (1913). The court said that since there was no provision in the Rules of Civil Procedure they were bound by common law. *Id. See also* Wilson v. Wiggens, 54 Ariz. 240, 244-45, 94 P.2d 870, 871-72 (1939).

65. This concept was first utilized in State v. Murphy, 79 Ariz. 161, 164, 285 P.2d 614, 615 (1955) and was used frequently thereafter. See cases cited note 67 *infra*.

jurisdictions that used the phrase,[66] Arizona courts construed it so narrowly that practically everything the jury did "inhered in the verdict."[67] In rare cases, however, courts analyzed the problem and carved exceptions to the general rule. These exceptions include accepting juror affidavits to show mistake in entering a verdict not conforming to jury findings,[68] prejudicial comments or acts by third parties with a juror,[69] and bias and prejudice of a juror concealed on voir dire.[70]

The first exception usually involves a procedural error preventing the recording of the correct jury verdict.[71] Since successful impeachment of a jury verdict invalidates the findings of the jury, using affidavits to merely discover the actual verdict of the jury is not really jury impeachment.

The third exception is narrowly confined since it merely allows a juror affidavit to be submitted after the trial, testifying to that particular juror's concealment of bias during voir dire.[72] Affidavits testifying to another juror's concealed bias are strictly disallowed.[73] The reasoning for the third exception is that the affidavit is not based on what occurred in the jury room, but on what occurred during voir dire.[74] Concealment during voir dire can result in the deprivation of a party's valuable right to challenge.[75] Thus the second exception is apparently

66. See text & notes 20-29 *supra*. Since the phrase was first coined in the application of the minority Iowa rule, some confusion may result in attempting to define acts that "inhere in the verdict." This confusion is evident in Valley Nat'l Bank v. Haney, 27 Ariz. App. 692, 558 P.2d 720 (1976), in which the court said it could only consider matters that do not "inhere in the verdict," *id.* at 695, 558 P.2d at 721, but that it [chose] not to follow the Iowa rule." *Id.* at 696, 558 P.2d at 722. The question arises as to what part of the Iowa rule they are not following, since Iowa also refuses to consider matters that inhere in the verdict. In *Haney*, the jury fixed damages in violation of the court's instructions. Evidence of this fact was not allowed because the *Haney* court said it was inherent in the verdict. *Id.*

67. *See* State v. Madden, 104 Ariz. 111, 116, 449 P.2d 39, 44 (1969) (possibility that a criminal verdict was not unanimous could not be considered); State v. Silvas, 91 Ariz. 386, 392-93, 372 P.2d 718, 723 (1962) (possibility that juror was insane could not be considered); Johnson v. State, 33 Ariz. 354, 362, 264 P. 1083, 1086 (1928) (that juror voted guilty only becuase of his desire to return home to his ill wife could not be considered); State v. Melcher, 15 Ariz. App. 157, 161, 487 P.2d 3, 7 (1971) (that the juror was pressured into the verdict could not be considered); Swinehart v. Baker, 6 Ariz. App. 30, 31, 429 P.2d 522, 523 (1967) (that juror had visited scene of accident could not be considered).

68. Valley Nat'l Bank v. Haney, 27 Ariz. App. 692, 693, 558 P.2d 720, 721 (1976). *See* Southern Pac. R.R. v. Mitchell, 80 Ariz. 50, 65-66, 292 P.2d 827, 837 (1956).

69. Valley Nat'l Bank v. Haney, 27 Ariz. App. 692, 693, 558 P.2d 720, 721 (1976). *See* State v. Pearson, 98 Ariz. 133, 136-37, 402 P.2d 557, 559-60.

70. Valley Nat'l Bank v. Haney, 27 Ariz. App. 692, 693, 558 P.2d 720, 721 (1976). *See* Board of Trustees Eloy Elem. School Dist. v. McEwen, 6 Ariz. App. 148, 154-55, 430 P.2d 727, 733-34 (1967).

71. *See, e.g.*, Southern Pac. R.R. v. Mitchell, 80 Ariz. 50, 65, 292 P.2d 827, 837 (1956).

72. *See* Board of Trustees Eloy Elem. School Dist. v. McEwen, 6 Ariz. App. 148, 154, 430 P.2d 727, 733 (1967).

73. Wilson v. Wiggins, 54 Ariz. 240, 246, 94 P. 2d 870, 872 (1939).

74. Board of Trustees Eloy Elem. School Dist. v. McEwen, 6 Ariz. App. 148, 154, 430 P. 2d 727, 733 (1967).

75. *Id.* at 732-33. See *Interference with Peremptory Challenges is Reversible Error*, 20 ARIZ. L. REV. 988 (1978) for a full discussion of the right of challenge in Arizona.

the only true exception to the general common-law rules in Arizona.

This second exception was first applied in *State v. Pearson*.[76] In that case, when the foreman asked the judge to reread a certain instruction, the judge refused in language prejudicial to the defendant.[77] On appeal, the Arizona Supreme Court held that the improper acts of persons other than jurors do not inhere in the verdict and therefore may be established by direct testimony or affidavits of the jurors.[78] Because *Pearson* was a criminal case, its holding may not have been intended to apply in civil cases.[79]

The Criminal Rule

In 1973, the Arizona Supreme Court adopted Rule of Criminal Procedure 24.1(d) which allowed a court to accept as evidence an affidavit of a juror whenever a verdict was challenged because of jury misconduct.[80] Jury misconduct includes receiving evidence not properly admitted during the trial, deciding the verdict by lot, perjury, willfull refusal to fully respond to a direct question on voir dire, receiving a bribe or pledging a vote in any way, intoxication, or conversing before the verdict with any interested party about the outcome of the case.[81]

The Comment to the rules indicates this is a reversal of the strict rule of nonimpeachment in Arizona.[82] The courts applying this rule have strictly interpreted the six types of jury misconduct and refused to venture outside their bounds.[83] This limitation is of little consequence, however, since the six categories virtually cover all juror misconduct. In theory the list is similar to the overt action—subjective reasoning distinction that the minority rule espouses,[84] although the list has the

76. 98 Ariz. 133, 402 P.2d 557 (1965).

77. *Id.* at 136, 402 P.2d at 559.

78. *Id.*

79. *Pearson* has been cited by only one civil case, Valley Nat'l Bank v. Haney, 27 Ariz. App. 692, 693, 558 P.2d 720, 721 (1976). The courts may be instinctively monitoring criminal trials more closely than civil trials because of the criminal defendant's sixth amendment right to cross-examine all adverse witnesses. *See* Parker v. Gladden, 385 U.S. 363, 364-65 (1966).

80. ARIZ. R. CRIM. P. 24.1(d) reads:

> *Admissibility of Juror Evidence to Impeach the Verdict.* Whenever the validity of a verdict is challenged under Rule 24.1(c)(3), the court may receive the testimony or affidavit of any witnesses, including members of the jury, which relates to the conduct of a juror, official of the court, or third person. No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict.

81. *Id.* 24.1(c)(3).

82. *Id.* 24.1(d), comment.

83. *See* State v. Callahan, 119 Ariz. 217, 219-20, 580 P.2d 355, 357-58 (Ct. App. 1978) (citing *Landrum*); State v. Landrum, 25 Ariz. App. 446, 448, 544 P.2d 270, 272 (1976) ("The privacy of the jury's deliberative processes must be carefully protected, and inquiry into that process is strictly limited by the provisions of Rule 24.").

84. See text & notes 28-29 *supra*. In State v. Callahan, 119 Ariz. 217, 220, 580 P.2d 355, 358 (Ct. App. 1978), the court said that "going into the 'subjective motives or mental processes' by which the jurors reach their verdict . . . is prohibited by Rule 24.1(d)."

advantage of being explicit, and not subject to inconsistent court interpretations as to what constitutes overt action or subjective reasoning.[85]

Since the inception of Criminal Rule 24.1(d), the Arizona Supreme Court has refused to apply it in civil cases.[86] As a result, criminal courts could use jury testimony or affidavits to impeach the verdict, but civil courts could not, except for the possible exceptions mentioned earlier.[87] With the adoption of the Rules of Evidence in 1977, Arizona codified the nonimpeachment rules for civil verdicts in Rule 606(b). Since the rule is nearly identical to the federal version,[88] examination of the federal rule's history and application is necessary to fully understand the Arizona rule.

The Civil Rule: Evidence Rule 606(b)

In 1975, Congress adopted the Federal Rules of Evidence.[89] Rule 606(b), the impeachment rule, states that a juror may not testify to anything affecting jury deliberations. Two exceptions to this general rule are given. First a juror may testify if the question is raised as to whether the jury was exposed to any extraneous prejudicial information. Second, jurors can testify to any outside influences applied on them.[90]

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85. In Iowa, where the overt action—subjective reasoning distinction originated, see text & notes 20-29 *supra*, there has been much inconsistency. *Compare* Dunlavey v. Watson, 38 Iowa 398, 402 (1874) *and* Bingham v. Foster, 37 Iowa 339, 340-41 (1873) (both cases not allowing jurors' affidavits testifying that fellow jurors gave personal testimony during deliberations) *with* Douglass v. Agne, 125 Iowa 67, 71-72, 99 N.W. 550, 551-52 (1904) (allowing a juror's affidavit to show the foreman introduced personal information about the plaintiff during retirement). The correct decision was probably *Douglass* considering the landmark case of Wright v. Illinois & Miss. Tele. Co., 20 Iowa 195, 212 (1866). *See* 8 J. WIGMORE, *supra* note 1, § 2354, at 705 n.2.

86. *See* Wasko v. Frankel, 116 Ariz. 288, 290, 569 P.2d 230, 232 (1977) (adhering to Arizona's "long-held view" that a juror's affidavit cannot impeach a verdict).

87. See text & notes 68-70 *supra*.

88. The federal rule is fully set out in note 90 *infra*. For an explanation of Arizona's minor word changes, see note 60 *supra*.

89. Pub. L. No. 93-595, § 1, 88 Stat. 1934 (1975).

90. FED. R. EVID. 606(b) in its entirety reads as follows:

> 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 the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

This rule is substantively identical to the one promulgated by the United States Supreme Court. The change is merely formal—the addition of "for these purposes" at the end of the rule. 3 J. WEINSTEIN & M. BERGER, *supra* note 7, ¶ 606[01], at 606-2.

This version is much more conservative than the one originally proposed by the Advisory Committee. Their 1971 revised draft read as follows:

> (b) Inquiry into the validity of a verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the affect of anything upon his or any other juror's mind or emotions as influencing him to assent to or

In adopting Federal Rule of Evidence 606(b), Congress' purpose is not entirely clear. Although there are a few changes,[91] the rule merely codifies the existing law.[92] Some commentators felt it was not necessarily wise. Judge Friendly, in testimony before the special subcommittee, stated that this area of the law would be "better left to case by case development than to rulemaking."[93]

Judge Weinstein sees two instances in which the majority rule is changed:

> Testimony by a juror in support of a verdict—which would be admissible under Lord Mansfield's rule since the juror is not impeaching his verdict—is disallowed, and testimony by nonjuror witnesses—to whom Lord Mansfield's rule does not apply—as to statements by a juror, which would be barred if made by the juror, is prohibited in the last sentence of the Rule 606(b).[94]

If the congressional intent was to generally codify existing law,[95] several questions are raised that cannot be answered by simply examining the language of Rule 606(b). Prior case law must also be considered.

Rule 606(b) states that a juror may testify as to whether "extraneous prejudicial information was improperly brought to the juror's attention or whether any outside influence was improperly brought to bear upon any juror."[96] In examining extraneous influence, courts may not listen to testimony concerning its effect upon the jurors,[97] but may

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dissent from the verdict of 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.

3 J. WEINSTEIN & M. BERGER, *supra* note 7, ¶ 606[01], at 606-2. That proposal would have followed the minority jurisdiction's distinctions between objective conduct and subjective mental processes without regard to whether the event occurred inside or outside the jury room. *Id.* at 606-3. The House of Representatives initially adopted this liberal version, but the Senate urged the House to change to the conservative Supreme Court version because "[the House rules] would permit the impeachment of verdict by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised." S. REP. No. 1277, 93d Cong., 2d Sess. 13-14 (1974), *reprinted in* 3 J. WEINSTEIN & M. BERGER, *supra* note 7, ¶ 606[01], at 606-8. The Conference Committee adopted the conservative Senate version, and in 1975 it became law. *See id.* ¶ 606[01], at 606-9 through 10.

91. See text & note 94 *infra*.

92. *See* Virgin Islands v. Gereau, 523 F.2d 140, 149 n.22 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) ("[T]he rule, as adopted, tracked existing the case law."); Note, *To Impeach or Not to Impeach: The Stability of Juror Verdicts in Federal Courts*, 4 PEPPERDINE L. REV. 343, 366 (1977). *See also* 3 J. WEINSTEIN & M. BERGER, *supra* note 7, 606[01], at 606-13. Weinstein notes that the Department of Justice disapproved of the 1971 Advisory Committee's liberalized version because it would be a "manifest departure from existing law." *Id.* at 606-13 through 14.

93. *Hearings before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary, H.R., on Proposed Rules of Evidence, Serial No. 2*, 93d Cong., 1st Sess. 250 (1973), *noted in* 3 J. WEINSTEIN & N. BERGER, *supra* note 7, ¶ 606[01], at 606-7.

94. 3 J. WEINSTEIN & M. BERGER, *supra* note 7, ¶ 606[04], at 606-27 through 28 (footnotes omitted).

95. See note 92 *supra*.

96. FED. R. EVID. 606(b).

97. Virgin Islands v. Gereau, 523 F.2d 140, 149 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

only listen to testimony about the existence of such influence.[98] Application of the extraneous influence concept used by courts through the past century have included intrusion of publicity in jury deliberations,[99] comments by court officers on the merits of the case,[100] and facts obtained through field trips, experiments, investigations, media, or other third parties.[101] After the existence of extraneous influence has been verified, the court must independently determine whether it was prejudicial.[102]

Biased or prejudicial jury conduct is difficult to identify, because "it does not fit neatly on one side or the other of the dichotomy drawn in Rule 606(b)."[103] Therefore problems may arise, for example, when a juror has made negative racial remarks[104] or commented adversely on the religion of a witness.[105] As Judge Weinstein states, "Can proof of these statements or some of these statements be separated from proof of the effect these statements had on the minds of the jurors, or are the two so inextricably interwoven that the entire testimony should be rejected under the rule?"[106] To resolve the difficult question, he draws the line in favor of jury privacy,[107] but some courts have not agreed.[108]

Another difficult question is whether verdicts reached by improper methods such as majority votes, chance, or quotients should be impeachable.[109] Before Rule 606(b), jurisdictions were split on this ques-

98. *Id.* "A juryman may testify to any facts bearing upon the question of the existence of an extraneous influence, although not as to how far that influence operated upon his mind." *Id.* (quoting Mattox v. United States, 146 U.S. 140, 149 (1892)).

99. *See* note 58 *supra.*

100. *See id.*

101. *See, e.g.*, Mattox v. United States, 146 U.S. 140, 147-52 (1892) (jurors read newspapers accounts of trial, new trial ordered); Southern Pac. Co. v. Klinge, 65 F.2d 85, 87-88 (10th Cir.), *cert. denied*, 290 U.S. 657 (1933).

102. Miller v. United States, 403 F.2d 77, 83 (2d Cir. 1968). This case held that "where an extraneous influence is shown, the court must apply an objective test, assessing for itself the likelihood that the influence would affect a typical juror." *Id.* at 83 n.11. *See* 3 J. WEINSTEIN & M. BERGER, *supra* note 7, ¶ 606[04], at 606-34.

103. Smith v. Brewer, 444 F. Supp. 482, 490 (S.D. Iowa), *aff'd*, 557 F.2d 466 (8th Cir. 1978).

104. *See* United States v. Booker, 480 F.2d 1310, 1310-11 (7th Cir. 1973).

105. *See* Cherensky v. George Washington E. Motor Lodge, 317 F. Supp. 1401, 1403-04 (E.D. Pa. 1970).

106. 3 J. WEINSTEIN & M. BERGER, *supra* note 7, ¶ 606[04], at 606-36.

107. *Id.*

108. *See* Smith v. Brewer, 444 F. Supp. 482, 490 (S.D. Iowa), *aff'd*, 577 F.2d 466 (8th Cir. 1978) (dicta) ("where . . . an offer of proof showed that there was a substantial likelihood that a criminal defendant was prejudiced by the influence of racial bias in the jury room, to ignore the evidence might very well offend fundamental fairness."). *Cf.* United States v. Booker, 480 F.2d 1310, 1311 (7th Cir. 1973) ("if even one member of the jury harbors racial prejudice against the accused his right to trial by an impartial jury is impaired").

109. A majority verdict is one where the whole jury panel agrees in advance to be bound by a majority vote. A chance verdict results where the jury panel agrees to decide the fate of the litigants by some method of chance such as a coin flip or casting of lots. *See generally* Note, *supra* note 22, at 849-51 (1951). "A quotient verdict is one arrived at by agreement by the jurors to be bound by the quotient in advance of figuring the amount of the quotient." Womble v. J.C. Penney Co., 47 F.R.D. 350, 355 (E.D. Tenn. 1969), *aff'd*, 431 F.2d 985 (6th Cir. 1970). For further explanation of a quotient verdict see note 22 *supra*; Note, *supra* note 22, at 851-54.

tion. Most minority views allowed the impeachment of such irregular verdicts,[110] but some did not.[111] Conversely, one jurisdiction that generally followed the majority nonimpeachment rule, made an exception for quotient and chance verdicts.[112] In Rule 606(b), however, Congress clearly did not intend to allow evidence of such irregularities to impeach verdicts.[113]

Since Arizona recognizes and gives weight to interpretations of similar federal rules when interpreting Arizona rules,[114] Arizona courts can look to federal case law in interpreting and applying Rule 606(b). Arizona courts generally have attempted to follow the federal nonimpeachment rules in the past,[115] so little should change when applying Rule 606(b).[116] Unfortunately the problems that exist in the federal system will exist in Arizona unless its courts resolve them.[117]

Policy Considerations Underlying Rule 606(b)

In attempting to resolve the problems in this area, the Arizona courts should consider the varying policy reasons that are used to jus-

110. *See, e.g.*, People v. Hutchinson, 71 Cal. 2d 342, 346, 455 P.2d 132, 136, 78 Cal. Rptr. 196, 200, *cert. denied*, 396 U.S. 994 (1969); Wright v. Illinois & Miss. Tele. Co., 20 Iowa 195, 210 (1866); Perry v. Bailey, 12 Kan. 415, 419 (1874). *See generally* text & notes 22-28 *supra*.

111. Wigmore's theories based on parol evidence would allow testimony of objective jury misconduct by other jurors. Yet he feels that chance and quotient verdicts are methods of reasoning and should not be classed as jury irregularities sufficient to overturn the verdict. 8 J. WIGMORE, supra note 1, § 2354, at 703, 711-12. *Contra*, Note, *supra* note 22, *passim*; text & notes 152-59 *infra*.

112. *See* S.D. COMPILED LAWS ANN. § 15-6-59(a)(2) (1967).

113. 3 J. WEINSTEIN & M. BERGER, *supra* note 7, ¶ 606[01], at 606-3-5.

114. Harbel Oil Co. v. Steele, 80 Ariz. 368, 373-74, 298 P.2d 789, 792, *rev'd on other grounds*, 81 Ariz. 104, 301 P.2d 757 (1956).

115. *See* Gorski v. J.C. Penney Co., 103 Ariz. 404, 406, 442 P.2d 851, 853 (1968); Wilson v. Wiggins, 54 Ariz. 240, 244, 94 P.2d 870, 872 (1939).

116. One area of Arizona law that will change is the upholding of verdicts with jury affidavits. This process is forbidden by the language of Rule 606(b). *See* text & note 94 *supra*. In LeRoy v. Phillips, 8 Ariz. App. 524, 448 P.2d 94 (1968), affidavits of jurors were accepted to determine if the jurors were prejudiced by the removal of a biased juror. *Id.* at 526, 448 P.2d at 96. The court's rationale was that "[w]hile . . . testimony of affidavits of jurors may not be used to impeach a verdict, our Supreme Court has utilized such evidence as a means of *supporting* a verdict." *Id.* (emphasis in original). Rule 606(b) clearly states that a juror may not testify as "to the effect of anything upon his . . . mind or emotions as influencing him to *assent to* or dissent from the verdict." (emphasis added). See text & notes 94-98 *supra*.

117. The supreme court and not the legislature must solve such problems because the rules are promulgated by the supreme court by virtue of the power given it in ARIZ. CONST. art. 6, § 5. This power to make rules cannot be reduced or repealed by the legislature. Arizona Podiatry Ass'n v. Director of Ins., 101 Ariz. 544, 546, 422 P.2d 108, 110 (1966). The promulgated rules, however, may not diminish or augment substantive rights. *See* State v. Birmingham, 95 Ariz. 310, 316, 390 P.2d 103, 107, *rehearing*, 96 Ariz. 109, 110-11, 392 P.2d 775, 776 (1964). Chief Justice Warren Burger has criticized a similar judicial rulemaking process stating that "[w]ith the vast increases of burdens on the justices over the past 20 years, there are valid questions as to whether justices can give proposed rules the kind of close study needed, and whether the Court's approval is really meaningful." Burger, *The State of the Federal Judiciary 1979*, 65 A.B.A.J. 358, 360 (1979). He especially noted the Rules of Evidence because they encompass questions of both a procedural and substantive nature. *Id.*

tify the nonimpeachment rule, and should recognize the weaknesses inherent in those reasons.

Four of the most frequently cited policy reasons for the nonimpeachment rule are the preservation of verdict finality, and the prevention of juror harassment, juror tampering, and interference with the frank and open discussion of the jurors.[118] Application of these policies may, at one time, have had a sound basis but modern justice can now survive without them.

1. *Preservation of Verdict Finality*

There is a public interest in disposing of litigation and supporting verdict finality.[119] Yet even the United States Supreme Court recognized that there are times when a verdict should be impeached by a juror's testimony because to exclude it would be "violating the plainest principles of justice."[120] A balance must be struck between the interests of justice and the policy of verdict finality.[121] The minority rule[122] has given the interests of justice more weight than the majority rule[123] by allowing the presentation of more evidence to impeach verdicts.[124] In *People v. Hutchinson*,[125] the principle modern case denouncing the majority's nonimpeachment rule, Chief Justice Traynor flatly stated that giving the losing party relief from wrongful conduct by the jury is more important than any other policy argument, including verdict stability and juror hasrassment.[126]

2. *Prevention of Juror Harassment*

The policy of preventing juror harassment no longer adequately supports the nonimpeachment rule because of the ethical restrictions imposed on lawyers. Since there are exceptions to the nonimpeachment rule,[127] attorneys in virtually every jurisdiction must, at times, conduct post-trial interviews with jurors. This procedure is covered in the American Bar Association's *Code* of *Professional Responsibility* which provides that a lawyer may communicate with jurors after the

118. *See* McDonald v. Pless, 238 U.S. 264, 267-68 (1915); text & notes 36-42 *supra*.
119. *See* Note, *Civil Remedies for Perjury: A Proposal for a Tort Action*, 19 ARIZ. L. REV. 349, 369-70 (1977).
120. McDonald v. Pless, 238 U.S. 264, 269 (1915).
121. *See* Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549, 584 & n. 294 (1978).
122. See text & notes 20-29 *supra*.
123. See text & notes 89-113 *supra*.
124. *Compare* citations at note 121 *supra*, *with* citations at note 123 *supra*.
125. 71 Cal. 2d 342, 346, 455 P.2d 132, 136, 78 Cal. Rptr. 196, 200, *cert. denied*, 394 U.S. 996 (1969).
126. *Id.*
127. See text & notes 52-55 *supra*.

trial as long as the attorney does not harass or embarrass the juror.[128] Arizona has adopted the *Code of Professional Responsibility* and approves of this view.[129] With this safeguard, the interests of justice can be served without undue harassment of jurors and the nonimpeachment rule is unnecessary.[130]

3. *Prevention of Jury Tampering*

One of the weakest policies said to support the nonimpeachment rule is that allowing a verdict to be impeached would lead to more opportunities for jury tampering. California has found that the fears of jury tampering are unrealistic.[131] Further, a rule allowing the impeachment of verdicts would give attorneys a greater power to discover jury tampering because affidavits under both could be utilized to uncover any juror misconduct.

4. *Interference with Frank and Open Discussion of Jury*

Another weak policy argument is that a rule providing for impeachment "would be to make what was intended to be a private deliberation, the constant subject of public investigation, to the destruction of all frankness and freedom of discussion and conference."[132] This argument has been countered by the simple explanation that "to hear such proof would . . . purify the jury room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them."[133]

If these policies are the only reasons for the conservatism of Rule 606(b),[134] other than stare decisis,[135] justice would be better served by

128. A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-29 (1977). Under the former ABA CANONS OF PROFESSIONAL ETHICS No. 23 no mention was made of post-trial interviews. In 1967, however, A.B.A. Formal Opinion 319 (1968) was issued stating that it was not unethical to conduct them. *Opinion 319, Communications with Jurors*, 53 A.B.A.J. 1127, 1127 (1967). *See generally* Van Slyck, *Ethical Propriety of Post-Trial Interrogation of Jurors*, ARIZ. B.J., Sept. 1976, at 7-8.

129. The adoption of the CODE OF PROFESSIONAL RESPONSIBILITY "abrogated the disapproving view we took in our Opinion 250 of the propriety of trial counsel's post-trial juror interview for his own self-education." ARIZ. ETHICS OP. 73-75, at 7 (1973).

130. *See generally*, Comment, *supra* note 39, at 392-96.

131. People v. Hutchinson, 71 Cal. 2d 342, 346, 455 P.2d 132, 137, 78 Cal. Rptr. 196, 201 (citing 6 CAL. L. REVISION COM. REP. 611 (1964)), *cert. denied*, 396 U.S. 994 (1969).

132. McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

133. Wright v. Illinois & Miss. Tele. Co., 20 Iowa 195, 211 (1866), *quoted in* People v. Hutchinson, 71 Cal. at 346, 455 P.2d at 137, 78 Cal. Rptr. at 201.

134. The Senate Judiciary Committee, in attempting to persuade the House of Representatives to adopt the conservative version of Rule 606(b) (which they finally did, see note 93 *supra*), cited all the above mentioned policies as reasons why the federal nonimpeachment rule should continue to operate. S. REP. NO. 1277, 93d Cong., 2d Sess. 13-14 (1974), *reprinted in* 3 J. WEINSTEIN & M. BERGER, *supra* note 39, at 606-8 through 606-9.

135. *See* Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963). "We are now convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age involunerable to judicial attack." *Id.* at 393, 381 P.2d at 113.

adopting a more liberal version—one that is flexible enough to allow impeachment when it is obviously necessary,[136] but rigid enough to withstand blatant misuse.[137]

A Comparison Between Arizona's Civil and Criminal Rules of Nonimpeachment

A good example of an impeachment rule that serves the interests of justice is Arizona Rule of Criminal Procedure 24.1(d).[138] It generally follows the objective act—subjective reasoning distinction promulgated by the Iowa rule.[139] Yet, it is so precise and self-explanatory, that it cannot be subject to misinterpretation like the Iowa rule has been.[140]

Because of the numerous exceptions to the nonimpeachment rule in 606(b), most of the grounds for determining jury misconduct under Criminal Rule 24.1 probably also apply under Rule 606(b)[141] with two major exceptions. Failing to respond to a question during voir dire[142] and lot verdicts[143] constitute misconduct that are not included within the civil rule, but should be.

While Arizona courts, in civil cases, allow the parties who withheld information during voir dire to testify as to their own wrongdoing,[144] other jurors are not allowed to present that type of information.[145] Arizona Rules of Criminal Procedure 24.1(c)(3)(iii) and (d) allow anyone to testify as to a juror's failure to respond during voir dire, including other jurors. This provision was included to protect the criminal defendant's sixth amendment right to confront adverse witnesses.[146] Arizona, however, recognizes, even in civil trials, the in-

136. A lot verdict, for example, seems like a gross miscarriage of justice which should be impeachable. See text & notes 151-59 *infra*.

137. An impeachment rule, for example, should not be used to uncover a juror's mental reasoning. See text & notes 20-29 *supra*.

138. See text accompanying notes 80-81 *supra*.

139. See text & notes 20-29 *supra*. *See also* A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE—TRIAL BY JURY § 5.7 (1969) [hereinafter cited as ABA DRAFT]. The comment to ARIZ. R. CRIM. P. 24.1(d) states that the rule "closely adheres" to the A.B.A. DRAFT, *supra*.

140. See text & note 85 *supra*.

141. Of the six types of jury misconduct to which a juror can testify to impeach a verdict under Arizona's Rule of Criminal Procedure 24.1(c) (3), see text accompanying note 8 *supra*, four were already grounds for impeachment in federal courts. These four are: (1) Receiving evidence not properly admitted during trial (*see, e.g.*, DeLucia v. McMann, 373 F.2d 759 *passim* (2d Cir. 1967); Kilgore v. Greyhound Corp., 30 F.R.D. 385, 387-88 (E.D. Tenn. 1962)); (2) receiving a bribe or pledging a juror's vote (*see, e.g.*, Remmer v. United States, 347 U.S. 227, 228 (1953)); (3) juror intoxication (*see, e.g.*, Faith v. Neely, 41 F.R.D. 361, 366 (N.D. W. Va. 1966)); and (4) conversing before the verdict with any interested parties about the outcome of the case (*see, e.g.*, Washington Gas Light Co. v. Connolly, 214 F.2d 254, 257 (D.C. Cir. 1954)). For other cases see 3 J. WEINSTEIN & M. BERGER, *supra* note 7, § 606[04], at 606-31 through 34.

142. See text & notes 70, 73-75 *supra*.

143. See text & notes 110-13 *supra*.

144. See text & note 72 *supra*.

145. See text & note 73 *supra*.

146. *See* A.B.A. DRAFT, *supra* note 139, at 172.

herent wrong in allowing jurors to conceal information with false answers on voir dire. In *Board of Trustees Eloy Elementary School District v. McEwen*[147] a losing party presented a deposition of a juror admitting that he had falsely concealed information during voir dire.[148] The appellate court granted a new trial, noting that the nonimpeachment rule was not violated because the juror's misconduct did not occur in the "sanctity of the jury room" but at voir dire.[149] The court reasoned that the losing party was deprived of his valuable right to a peremptory challenge and, therefore, what actually occurred in the jury room was of no importance.[150] Unfortunately, the court ignored the unique facts of this case—the juror who withheld information at voir dire came forward on his own volition. If the juror had continued to conceal his bias to all but his fellow jurors, the losing litigant would have been deprived of his valuable right of peremptory challenge with no redress available. Allowing a juror who withheld information during voir dire to impeach the verdict while prohibiting fellow jurors in another case from revealing a juror who refuses to inculpate himself is inconsistent and potentially unfair. Merely because the prejudicial information withheld in the latter case was discovered in the "sanctity of the jury room" should not alter the result.

The other exception included in Arizona's criminal procedure rule, but not in its evidence rule, is lot verdicts.[151] The reasons for allowing impeachment of these verdicts apply equally to civil and criminal trials.[152] That reasoning has been stated as follows:

> Chance verdicts might result from the fact that most of the jurors, after some deliberation, have no strong preference for either party. Or they might result from a sharp and close division of opinion. In either event, it seems doubtful that a chance verdict is more likely than not to coincide with what would be the result of a lengthier, more regular deliberation by the same jury. And the toss of a coin in no sense approximates the deliberative process. Impeachment of chance verdicts would probably not put a heavy burden of added litigation on the courts, and in any case, judicial economy is a weak justification for a completely arbitrary disposition of parties' rights.[153]

147. 6 Ariz. App. 148, 430 P.2d 727 (1967).
148. *Id.* at 149-50, 430 P.2d at 728-29.
149. *Id.* at 153, 430 P.2d at 732.
150. *Id.* at 154, 430 P.2d at 733.
151. *Compare* ARIZ. R. CRIM. P. 24.1(c) *with* ARIZ. R. EVID. 606(b).
152. This is unlike the voir dire exception where constitutional issues may require that the criminal defendant be given greater protection. See text & note 146 *supra*.
153. Comment, *Impeachment of Jury Verdicts*, U. CHI. L. REV. 360, 371-72 (1958), *quoted in* A.B.A. DRAFT, *supra* note 139, at 173-74.

Since Arizona follows this reasoning in criminal trials, logically it should follow it in civil trials.

A closely related issue also not covered by Rule 606(b)[154] is that of quotient verdicts.[155] Some commentators have stated that evidence of such jury misconduct should be excluded by the rule because "it is extremely unlikely that jurors would agree to be bound by an impermissible method of arriving at a verdict from the onset of their deliberations and never deliberate at all."[156] Yet this rationale ignores the idea that "[t]he pivotal factor is *the agreement to be bound by the figure thus obtained, made prior to the ballot.*"[157] If a jury computes a quotient verdict and further discussion and voting ensues on the feasibility of the quotient reached, then by definition that is not a quotient verdict. The quotient used was merely a starting point for discussion and deliberation and the jury is not guilty of misconduct. But when the jury agrees in advance to be bound by the quotient and insists on standing by the bargain when dissension to the quotient is raised,[158] that is gross misconduct by the jury and should be admissible as evidence to impeach the verdict.[159]

A Proposed Solution

Information from jurors concerning concealment of information on voir dire, lot verdicts, and quotient verdicts should be allowed to impeach jury verdicts in Arizona. A rule of civil procedure structured like Arizona's Rule of Criminal Procedure 24.1(d) would be most advantageous. The courts would have little difficulty interpreting it, and lawyers could easily understand the limits of the rule. As Evidence Rule 606(b) stands now, it is a guessing game as to what the courts will define as "extraneous influences." Since Arizona courts tend to interpret both impeachment rules strictly, more often than not a particular influence will probably be deemed not "extraneous" and, therefore, undiscoverable by juror testimony. If the Arizona Supreme Court is unwilling to abolish Rule 606(b), it could still be modified to bring it into line with Criminal Rule 24.1(d).[160] As for withholding information

154. See text & notes 110-13 *supra*.

155. See text & notes 22, 110-13 *supra*.

156. 3 J. WEINSTEIN & M. BERGER, *supra* note 7, ¶ 606[04], at 606-41 (footnote omitted). *See generally* 8 J. WIGMORE, *supra* note 1, § 2354, at 711-12; Comment, *supra* note 153, at 371.

157. Sheker v. Jensen, 241 Iowa 583, 587, 41 N.W.2d 679, 681 (1950) (emphasis in original).

158. Such a quotient verdict occurred in McDonald v. Pless, 238 U.S. 264, 265-66 (1915), the landmark case relied on by most of this century's courts to formulate policy for the nonimpeachment rule.

159. *See generally* Note, *supra* note 22, at 851-56.

160. North Dakota, for example, adopted Federal Rule of Evidence 606(b) nearly verbatim but added "or whether the verdict of the jury was arrived at by chance" as a third exception on the end of the rule. N.D.R. EVID. 606(b). This addition was intended to include quotient verdicts. 3 J. WEINSTEIN & M. BERGER, *supra* note 7, at 35.

during voir dire, that phrase could be judicially construed as an extraneous influence included within the penumbra of Evidence Rule 606(b).

Nevertheless, a better solution would be to adopt a rule similar to Criminal Rule 24.1(d) on the civil side of the law. Rule 24.1(d) is a general rule allowing impeachment of verdicts; Rule 606(b) is a general nonimpeachment rule with exceptions. Because of that crucial difference, it is doubtful that courts will expand the evidence rule to the limits proposed in this Note unless the language is altered.

CONCLUSION

For two hundred years most courts in the United States have followed a nonimpeachment rule having no basis in logic or public policy. Throughout the years, courts have struggled to lay a foundation of public policy to support the rule and have been assailed by numerous commentators for doing so. Some courts have succumbed to the logic of disposing with the nonimpeachment rule, but generally most have not. Rule 606(b) is another step backward by the majority who cling to the nonimpeachment view. Arizona, however, seems undecided which way to proceed on this issue, as differing rules are applied to civil and criminal trials. The better, well-reasoned rule is Criminal Rule of Procedure 24.1(d) which discards the general nonimpeachment rule for a controlled guideline for impeachment of jury verdicts. Arizona's Evidence Rule 606(b) should either be modified or discarded and replaced with a rule similar to Criminal Rule 24.1(d).