

# UNEARTHING MANSFIELD’S RULE: ANALYZING THE APPROPRIATENESS OF FEDERAL RULE OF EVIDENCE 606(B) IN LIGHT OF THE COMMON LAW TRADITION

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Juror 5: I never knew they locked the door.

Juror 10: Sure they lock the door. Whadya think?

Juror 5: I don’t know. It just never occurred to me.<sup>1</sup>

## I. INTRODUCTION

Juror F could tell that the rest of the jurors were getting impatient. After sitting through an entire trial and deliberating for several hours in the cramped jury room, the eleven of them were ready to convict the defendant, Isidro Samuel Reyes, of possession of cocaine with intent to deliver. The law seemed rather straightforward, and the rest claimed they were certain, at least beyond a reasonable doubt, that Mr. Reyes was guilty of the charges brought against him by the People of California.

Juror F knew that his indecision was holding up the jury from reaching a unanimous verdict. To him, it seemed likely that Reyes did, in fact, possess the drugs in question and intended to distribute them. But could he be sure beyond a reasonable doubt? Parts of the evidence were murky, and Juror F was not sure that the prosecution’s case had completely convinced him of Reyes’s guilt.

“Come on,” Juror C complained. “We’ve discussed everything there is to discuss. The man’s clearly guilty, and now this stupid deliberation is just wasting time. My eight-year-old has her birthday party tonight, and I’d at least like to see her.”

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1. 12 ANGRY MEN (MGM 1957) (starting at 5:20), available at <https://www.youtube.com/watch?v=RelOJfFlyp8>.

Juror F squirmed. After six hours of deliberation, he was ready to get home and pack for his family's weekend trip. He knew the rest of the jurors were just as ready to leave.

Juror F discreetly excused himself to the restroom. He pulled a nickel out of his pocket. Almost always a responsible and conscientious person, he could hardly believe what he was about to do. "Well," he thought, "here it goes. Heads, he's innocent. Tails, he's guilty." He tossed the coin and looked at it with bated breath. *Tails*.

Two years have passed. Reyes is only a quarter of the way through his sentence, and the memory of his own guilty vote constantly burdens Juror F's conscience. Finally, it is too much for him to keep secret any longer. He finds Reyes's former defense counsel and tells him about the coin toss, hoping to redeem what went wrong in the jury room two years ago. Juror F tells the attorney that he is willing to do anything, even testify in court about his misconduct, in order to ensure that Reyes is not punished further by an unfair trial.

The case progresses all the way to the California Supreme Court and eventually to the U.S. Court of Appeals for the Ninth Circuit. But the courts will not consider Juror F's testimony of what happened in the jury room that day. Citing a well-settled rule that jurors cannot testify as to statements made and incidents occurring in the jury room, the courts deny Juror F's attempt to rectify the situation while Reyes continues to sit in prison for a crime of which he was never properly convicted.<sup>2</sup>

Undoubtedly, instances of juror misconduct, such as in Reyes's case, are rare, and the chances that jurors, like Juror F, will turn themselves in are rarer still. Yet these cases have existed throughout our common law history, and they continue to occur today. Despite blatant jury misconduct that can result in an improper guilty verdict, the Federal Rules of Evidence, with few exceptions, prohibit testimony from a juror that such misconduct took place. Rule 606(b) specifically forbids such evidence, and the rule is seemingly based in a historic common law tradition.<sup>3</sup>

Despite its lengthy tradition, history actually demonstrates that the rule embodied by Rule 606(b) is an anomaly that fails to comport with prior precedent and the holistic principles surrounding trial by jury. Furthermore, the policy of finality that supporters now use as the rationale for maintaining this rule at the cost of allowing blatant jury misconduct fails to find support in the common law tradition. As will be discussed further, Rule 606(b) should be amended to allow juror testimony of juror misconduct when such misconduct is not a part of the jury's subjective deliberative process of reaching a verdict.

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2. This account is based off of *Reyes v. Seifert*, 125 F. App'x 788 (9th Cir. 2005).

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

Part II of this Article describes the history of Rule 606(b) and its underlying policies. Part III discusses the origin of this rule—a case decided by the renowned Lord Mansfield—and questions its legitimacy as a bedrock principle in the common law tradition. Part IV analyzes the policy of finality at the expense of overlooking certain juror misconduct in light of historic writings surrounding trial by jury. Finally, Part V provides a suitable amendment to Rule 606(b) that embraces both a holistic understanding of a just trial by jury while also respecting the inviolate nature of the process of jury deliberation.

## II. THE HISTORY OF AND POLICY BEHIND RULE 606(B)

### A. Rule 606(b) and Its Effect

Rule 606(b) reads:

During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.<sup>4</sup>

The rule provides several exceptions to this blanket prohibition: “A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form.”<sup>5</sup> Essentially, unless the misconduct or mistake matches one of the exceptions to the rule, a losing party (or any party for that matter) cannot provide evidence from a juror that the juror or other members of the jury engaged in misconduct in reaching the verdict.

While the exceptions to the rule cover many instances of jury misconduct or tampering, such as communication by one of the attorneys with the jurors, use of non-admitted evidence, and threats or bribes, the rule refuses the admittance of certain evidence of improper influences within the jury room that may affect the verdict.<sup>6</sup> Since the enactment of the Federal Rules of Evidence in 1975, Rule 606(b) has squashed evidence of jury

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4. FED. R. EVID. 606(b)(1).

5. FED. R. EVID. 606(b)(2).

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

misconduct in a wide variety of cases.<sup>7</sup> In *Tanner v. United States*, the Supreme Court of the United States upheld the trial court's use of Rule 606(b) to bar juror testimony that several of the jurors were under the influence of alcohol and drugs throughout a criminal trial.<sup>8</sup> In *Vasquez v. Walker*, the Ninth Circuit held that the trial court properly denied evidence from statements of certain jurors that the jury foreman refused to let all of the jurors read the jury instructions provided by the judge.<sup>9</sup> The Tenth Circuit, in *United States v. Benally*, held that, under Rule 606(b), evidence from a juror was inadmissible when the juror alleged that the foreman made several strong racist comments against Native Americans to the rest of the jury in a case where the defendant was a Native American.<sup>10</sup> Finally, as referenced earlier, the Ninth Circuit upheld a similar state rule that prohibited testimony from a juror that he had tossed a coin to decide his vote of guilty or not guilty.<sup>11</sup>

This sampling of cases demonstrates that the courts and the federal legislature are committed to a rule that bars juror testimony regarding juror misconduct, even at the expense of a fair and just trial. This compromise should not be surprising. In fact, the Federal Rules of Evidence are full of safeguards and checks against the admittance of certain evidence, even when such evidence could be helpful in a particular case.<sup>12</sup> Generally, these rules are in place in order to protect broader, more holistic principles of justice throughout a trial. Understanding the origin of this rule may be helpful to understand why the drafters of Rule 606(b) thought the rule was worthy of such a compromise.

## B. The Roots of Rule 606(b)

Authorities trace Rule 606(b)'s origins to a rule developed in a 1785 English case written by the esteemed Lord Mansfield in which Lord Mansfield held that a court could not receive an affidavit from a juror alleging that he and the other jurors had engaged in juror misconduct.<sup>13</sup> Under the name of the respected jurist, "Mansfield's Rule" quickly took root in American jurisprudence.<sup>14</sup> On several occasions, the Supreme Court

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7. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at 28 U.S.C. app. (2006)).

8. 483 U.S. 107, 116-27 (1987).

9. 359 F. App'x 758, 759-61 (9th Cir. 2009).

10. 546 F.3d 1230, 1231-33 (10th Cir. 2008).

11. *Reyes v. Seifert*, 125 F. App'x 788, 788-89 (9th Cir. 2005).

12. *See, e.g.*, FED. R. EVID. 404 (excluding certain forms of character evidence); FED. R. EVID. 802 (barring the admissibility of hearsay evidence).

13. 3 WEINSTEIN'S FEDERAL EVIDENCE § 606.04(1)(a) (Joseph M. McLaughlin ed., 2d ed. 2012). For a discussion of the case, see *infra* Part III.A.

14. *Dorr v. Fenno*, 29 Mass. (12 Pick.) 521, 530-31 (1832) ("The rule is now perfectly well settled in both countries and may be laid down to be, that the [t]estimony of jurors is inadmissible to show

has attributed this rule back to Lord Mansfield and affirmed the settled nature of the rule.<sup>15</sup> Thus, even before the enactment of the Federal Rules of Evidence in 1975, the rule that a juror could not testify as to juror misconduct was a settled rule within the United States.

### C. Policy Behind the Enactment of Rule 606(b)

In order to provide a proper historical analysis of Rule 606(b), it is necessary to understand the prevailing policy reasons behind why this rule is currently in place.<sup>16</sup> These reasons are best reflected by the legislative history surrounding the formulation and enactment of Rule 606(b). The original version of the rule coming from the House of Representatives specifically limited the bar against a juror's testimony to instances regarding the "emotions" or "mental processes" of a juror.<sup>17</sup> The Senate rejected the House of Representative's limits on the rule and, instead, adopted the finalized version of Rule 606(b) providing for a more general bar of juror testimony related to *any type* of conduct or statements occurring in the jury room.<sup>18</sup> In response to the House version of the rule and in support of its more general rule, the Senate Judiciary Committee reported:

Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court.

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Public policy requires a *finality* to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.<sup>19</sup>

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their own misbehavior . . ."); *Cluggage v. Swan*, 4 Binn. 150, 155-59 (Pa. 1811) (excluding a juror's affidavit that the jury had reached its verdict by lot); *Dana v. Tucker*, 4 Johns. 487, 487-88 (N.Y. Sup. Ct. 1809) (excluding affidavits from jurors that they used a system of averages to determine the amount for which the defendant was liable).

15. See, e.g., *Tanner v. United States*, 483 U.S. 107, 117 (1987); *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915); *Stockton v. Bishop*, 45 U.S. 155, 164 (1846).
16. A full discussion of the legislative history behind Rule 606(b) can be found in the Supreme Court's decision in *Tanner*, 483 U.S. at 116-25.
17. H.R. 5463, 93d Cong. (1974).
18. See FED. R. EVID. 606(b).
19. S. REP. NO. 93-1277, at 13-14 (1974) (emphasis added).

In *Tanner v. United States*, the Supreme Court affirmed that *finality* is indeed the impetus behind Rule 606(b).<sup>20</sup> Realizing that a limited rule allowing evidence of *objective* juror misconduct would “in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior,” the Court doubted that “the jury system could survive such efforts to perfect it.”<sup>21</sup> Instead, the Court was persuaded that “[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.”<sup>22</sup>

The legislative history behind Rule 606(b) and the Supreme Court’s analysis of the rule clearly establish that the asserted reason for this rule is the desire of finality in the jury trial system. Moreover, at a cursory level, Rule 606(b) appears to have the backing of the common law tradition, and it certainly boasts an almost universal acceptance within American jurisprudential history.

But should this rule enjoy unquestioned existence because it can be traced back to a 1785 case (albeit by one of the most distinguished common law jurists) when its effects can be devastating to those placed within the judicial system? Should our courts and legislatures, resting contently in Rule 606(b)’s historic root, be allowed to further their policy of finality at the expense of individuals such as Isidro Reyes who spent several years of his life in a prison cell because of a faulty verdict? Oliver Wendell Holmes warned of blind devotion to ancient rules followed solely because of their age and legacy:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>23</sup>

As the next two parts of this Article will attempt to show, the proponents of Rule 606(b), though armed with good and important intentions, neglect to heed Holmes’s warning. Their problem lies not in that they do not look back to the history of the common law tradition; they simply fail to look back far enough. The current rationale behind Rule 606(b) is blind to the historical context surrounding Mansfield’s Rule and

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20. 483 U.S. at 120.

21. *Id.*

22. *Id.* The Court also noted several other policy reasons: “Moreover, full and frank discussion in the jury room, jurors’ willingness to return an unpopular verdict, and the community’s trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.” *Id.* at 120-21.

23. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

to how its desire for finality conflicts with a holistic understanding of the principles behind the jury trial system.

### III. MANSFIELD'S RULE: A LEGAL ANOMALY

For a rule as powerful as Rule 606(b) (the modern adaptation of Mansfield's Rule), there is surprisingly little discussion within the common law of the issue of verdict impeachment by a juror's testimony. In fact, prior to 1785, the great common law treatises did not even address this issue. The primary source of information surrounding this rule can be found solely in the decisions of the English courts. Little is known about the 1785 case that gave birth to Mansfield's Rule, yet its impact continues today. Its authority, however, is certainly called into question when one understands the method of its derivation and its place within the rest of the common law tradition.

#### A. *Vaise v. Delaval*

Little is known of the 1785 case of *Vaise v. Delaval* because quite little is actually said in the case itself.<sup>24</sup> According to the short account of the facts, the jury in a civil case was divided as to whether the defendant was liable.<sup>25</sup> Undecided, the jurors agreed among themselves to a coin toss to determine the winner of the case.<sup>26</sup> The coin was tossed, the plaintiff came up on top, and the jury returned a verdict in favor of the plaintiff.<sup>27</sup> Apparently, the matter must have weighed heavily on the consciences of two of the jurors, as they eventually confessed to their wrongdoing and provided the defendant with an affidavit describing what had gone on during the so-called jury deliberation.<sup>28</sup> Armed with this new evidence, the defendant went back to the court, moving for a rule to set aside the verdict.<sup>29</sup>

The case made its way to the Lord Chief Justice Mansfield on the King's Bench.<sup>30</sup> Despite the apparent injustice to the defendant, Lord Mansfield's decision was unequivocal. "The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor . . ."<sup>31</sup> Lord Mansfield opined that the decision would be different if the source of the information was from some

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24. (1785) 99 Eng. Rep. 944 (K.B.); 1 T.R. 11.

25. *Id.* at 944; 1 T.R. at 11.

26. *Id.*; 1 T.R. at 11.

27. *Id.*; 1 T.R. at 11.

28. *Id.*; 1 T.R. at 11.

29. *Id.*; 1 T.R. at 11.

30. *Id.*; 1 T.R. at 11.

31. *Id.*; 1 T.R. at 11.

other means, such as a witness who saw the coin toss through a window.<sup>32</sup> But, when the only evidentiary source of juror misconduct came from the jurors themselves, a court could not accept their testimony that impeached their own character. Lord Mansfield denied the motion to set aside the verdict, and a legacy was started.<sup>33</sup>

B. “*Nemo Turpitudinem Suam Allegans Audietur*”: A Discarded Doctrine

Mansfield’s Rule, however, is not based on solid precedent. Rather, it is an extrapolation from a legal doctrine, quite popular at the time of the case and championed by Lord Mansfield, that a witness should not be able to testify to his own depravity or lack of character. Wigmore writes that Mansfield’s Rule is based only on a “curious doctrine of evidence once and temporarily in vogue, long ago discarded in every other relation, and now here persisting through the sponsorship of Lord Mansfield’s great name, the doctrine that a *witness shall not be heard to allege his own turpitude: ‘nemo turpitudinem suam allegans audietur.’*”<sup>34</sup> This doctrine has now been discredited in all other aspects of law with the lingering exception of its bar against juror testimony regarding juror misconduct.<sup>35</sup>

Lord Mansfield primarily championed this doctrine in the case of *Walton v. Shelly*.<sup>36</sup> Lord Mansfield held that the doctrine of *nemo turpitudinem suam allegans audietur* clearly prohibited a party from testifying that a paper he had signed as true was actually false.<sup>37</sup> Because the party would be testifying that he had previously signed a document falsely, his competence as a witness was in serious doubt.<sup>38</sup> As such, the witness was not to be trusted and should not be allowed to testify.<sup>39</sup>

Coming from the authoritative decisions of Lord Mansfield, this general doctrine that a witness should not be allowed to testify as to his own turpitude was quickly accepted in America.<sup>40</sup> It is worth noting, however, that this doctrine was quickly repudiated in England.<sup>41</sup> It is also quite evident that this doctrine has been primarily discarded within the American evidentiary system. While criminal defendants have a right not to be

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32. *Id.*; 1 T.R. at 11.

33. *Id.*; 1 T.R. at 11.

34. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2352 (John T. McNaughton rev. ed. 1961).

35. *Id.*

36. (1786) 99 Eng. Rep. 1104; 1 T.R. 296.

37. *Id.* at 1107; 1 T.R. at 300.

38. *Id.*; 1 T.R. at 300-01.

39. *Id.*; 1 T.R. at 300-01.

40. 2 WIGMORE, *supra* note 34, § 529 (James H. Chadbourne rev. ed. 1979).

41. *Jordaine v. Lashbrooke*, (1798) 101 Eng. Rep. 1154, 1155; 7 T.R. 601, 603-04 (overruling Lord Mansfield’s rule in *Walton v. Shelly*); *see also* 8 WIGMORE, *supra* note 34, § 2352.

compelled to incriminate themselves,<sup>42</sup> the Federal Rules of Evidence do not bar testimony from a witness simply because he admits his own turpitude, leaving the jury to determine the weight of his statements.<sup>43</sup> Absent its lingering effect on Rule 606(b), this doctrine, entertained by the common law for only several decades in the eighteenth century, has since been disregarded as a hindrance in the proper determination of justice in all other aspects of the law.

### C. The Place of Mansfield's Rule in English Common Law

The significance of Mansfield's Rule based on an outdated and discarded doctrine is lessened all the more when compared to the vast body of cases within the English common law that clearly contradict the rule. The English common law regarding the ability of a juror to testify as to juror misconduct was well settled prior to Lord Mansfield's decision in *Vaise v. Delaval* in 1785. Without question, affidavits or statements from jurors were regularly admitted as evidence that the jury had engaged in some sort of misconduct that affected the verdict.

In the 1590 case of *Metcalfe v. Deane*, the court awarded a new trial based off of an affidavit by a juror that the jury had further questioned one of the witnesses after the trial was over and they were deliberating over the verdict.<sup>44</sup> In 1665, the King's Bench decided the case of *Prior v. Powers* in which it upheld the use of a confession by a juror that the twelve jurors, equally divided, had decided to cast lots as to which verdict they should find.<sup>45</sup> In the 1675 *Lord Fitzwater's Case*, the court admitted the testimonies of the jurors that they had decided to throw dice in order to determine the verdict in the case.<sup>46</sup> Based on a juror affidavit that the jury foreman had declared that the plaintiff would never win, regardless of whatever witnesses the plaintiff used, the court in the 1696 case of *Dent v. Hundred of Hertford* granted a new trial.<sup>47</sup>

The use of juror affidavits or statements to prove juror misconduct carried well into the eighteenth century. In the 1734 case of *Parr v. Seames*, the court recognized the use of affidavits by two jurors to determine whether the jury had wrongly decided upon a verdict by "hustling [a] half-pence in a hat."<sup>48</sup> In *Philips v. Fowler*, the court, in 1735,

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42. U.S. CONST. amend. V.

43. In fact, the Federal Rules of Evidence specifically allow, in certain instances, a party to impeach a witness's character for truthfulness. FED. R. EVID. 607; FED. R. EVID. 608; FED. R. EVID. 609.

44. (1590) 78 Eng. Rep. 445 (Q.B.) 445; Cro. Eliz. 189, 189.

45. (1665) 83 Eng. Rep. 1257 (K.B.) 1257; 1 Keb. 811, 811 (refusing, however, to grant a new trial because the sole confession of the lone juror was "not much regarded").

46. (1675) 89 Eng. Rep. 308 (K.B.) 308; 1 Freem. 414, 414-15.

47. (1696) 91 Eng. Rep. 546 (K.B.) 546; 2 Salk. 645, 645.

48. (1734) 94 Eng. Rep. 993 (K.B.) 993; Barnes 438, 438.

set aside a verdict when two of the jurors produced affidavits claiming that the jury had reached a verdict by casting lots for the winner.<sup>49</sup> In the 1774 case of *Norman v. Beaumont*, the court held that it “always admitted of affidavits . . . as in respect to a misbehavior of any of the jury, or any declaration by any of them either before or after the verdict to shew that a jurymen was partial.”<sup>50</sup>

Finally, in 1779, only six years before Lord Mansfield’s decision in *Vaise v. Delaval*, the court in *Aylett v. Jewel* reaffirmed the use of juror affidavits to prove juror misconduct.<sup>51</sup> In *Aylett*, the attorney for the losing defendant was approached by some of the jurors who confessed to him that they had not been able to reach a verdict.<sup>52</sup> To breach their impasse, the jurors decided that they would write their names on twelve pieces of paper and place them in a hat.<sup>53</sup> The first six names to be drawn out of the hat would determine by a majority vote the outcome of the case.<sup>54</sup> When the defendant moved for a new trial, the court refused to grant the motion because the defendant provided only the hearsay affidavit of the defendant’s counsel, “there being no affidavit by the jurymen.”<sup>55</sup> Thus, the tradition of allowing juror testimony regarding juror misconduct appeared to have been quite settled only a few years before the birth of Mansfield’s Rule to the extent that some courts even refused to grant a new verdict *absent affidavits from the jurors themselves*.

Despite its near universal acceptance in modern American jurisprudence, some of the early American courts embraced the use of juror affidavits, in spite of Lord Mansfield’s decision in *Vaise v. Delaval*. In the 1793 case of *Talmadge v. Northrop*, the Superior Court of Connecticut accepted the use of juror testimony that one of the other jurors had provided additional evidence to his fellow jurors, and the court set aside the verdict tainted by this misconduct.<sup>56</sup> In 1805, the Supreme Court of New York upheld the use of juror affidavits as to juror misbehavior, distinctly noting that Lord Mansfield’s decision in *Vaise v. Delaval* “happened since the revolution, and therefore forms no precedent.”<sup>57</sup> Instead, the court relied on the rich body of English cases existing prior to 1776 that permitted juror affidavits as evidence to impeach a verdict.<sup>58</sup> A similar opinion is found in the 1811 Pennsylvania case of *Cluggage v. Swann* holding that the court

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49. (1735) 94 Eng. Rep. 994 (C.P.) 994; Barnes 441, 441-42.

50. (1774) 125 Eng. Rep. 1281 (C.P.) 1282; Willes 484, 487.

51. (1779) 96 Eng. Rep. 761 (C.P.) 761; 2 Black W. 1299, 1300.

52. *Id.*; 2 Black. W. at 1300.

53. *Id.*; 2 Black. W. at 1330.

54. *Id.*; 2 Black. W. at 1300.

55. *Id.*; 2 Black. W. at 1300.

56. 1 Root 522, 523 (Conn. Super. Ct. 1793).

57. *Smith v. Cheetham*, 3 Cai. R. 57, 61 (N.Y. Sup. Ct. 1805).

58. *Id.* at 59-61.

should receive juror affidavits in keeping with the “course of the decisions in *England*, before 1776.”<sup>59</sup>

What all these cases show is that Mansfield's Rule was an anomaly within at least two-hundred years of English common law precedent. Moreover, its basis was in a doctrine that was quickly rejected within the common law system. Some early American courts recognized that this rule contradicted the court's rationale in *Lord Fitzwater's Case* that refusing such evidence violates the virtues of fairness and non-bias intrinsic to a successful system of trial by jury.<sup>60</sup> Nonetheless, Mansfield's Rule became well-settled in the American legal system thanks to the reputation of its sponsor,<sup>61</sup> and its modern appearance in the form of Rule 606(b) is firmly established within the Federal Rules of Evidence.

#### IV. FINALITY AT THE EXPENSE OF FAIRNESS

Now it is possible that a reader may simply shrug off Rule 606(b)'s shaky basis in the common law. After all, even if Mansfield's Rule is somewhat of an anomaly that fails to give valuable precedent to the current rule regarding juror testimony, is not the principle of finality so prevalent in Rule 606(b)'s legislative history so as to continue validating its existence? At first blush, this policy seems important enough to provide some compromise. Yet, by looking back at the general principles surrounding the jury trial system embraced by the common law tradition, it seems that our legal system may be sacrificing too much of its commitment to justice for the sake of finality.

It is undeniable that finality is one of the intrinsic values and benefits of the Anglo-American common law system. Strict procedures on appeal, statutes of limitation, and the laws governing double jeopardy are only a few of the many ways in which the legal system has embraced this virtue. Finality brings with it order and certainty, necessary characteristics of a free legal and political society.<sup>62</sup>

Yet by focusing so much on *this* virtue of our common law tradition, we have done so at the cost of devaluing our entire system of a fair trial by one's peers. By failing to see the larger principles surrounding the patchwork tapestry that is our jury trial system, we have allowed ourselves to become enamored by the patch of finality at the expense of fairness to those the jury system is designed to aid and protect.

Unfortunately, the balance between the principles of finality and fairness as they relate to a juror's testimony of juror misconduct is not

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59. 4 Binn. 150, 152 (Pa. 1811).

60. (1675) 89 Eng. Rep. 308 (K.B.) 308; 1 Freem. 414, 415.

61. See cases cited *supra* note 14.

62. See generally RUSSELL KIRK, *ROOTS OF AMERICAN ORDER* (4th ed. 2003).

discussed by the great common law writers. There are, however, several examples from the common law that support the notion that a court should violate the secrecy and privacy of the jury-deliberation process when failure to do so would result in an unfair or improper verdict.

#### A. Homicide Verdicts

While the common law showed tremendous respect for the finality of a jury's verdict and its ability to reach the appropriate conclusion, it provided exceptions for special involvement by the court when the jury was faced with certain cases involving homicide.<sup>63</sup> A jury was prohibited from reaching a verdict when homicide *se defendendo* or homicide *per infortunium* was at issue.<sup>64</sup> In such cases, the jury would merely return a finding of certain facts with which the judge would form a verdict.<sup>65</sup> By taking the case out of the regular hands of the jurors, the judge would ensure that an appropriate and fair verdict was given on behalf of the defendant.

#### B. The Writ of Attaint

In Book III of his *Commentaries on the Laws of England*, Sir William Blackstone discussed the writ of attaint, which provided a losing party in a civil case with the ability to appeal a jury's false verdict.<sup>66</sup> Referring back to an ancient process of impeaching a jury when the jurors were in reality "witnesses who deposed to facts within their own knowledge, about which there could hardly be the possibility of error,"<sup>67</sup> Blackstone recognized this writ as still being of use in a jury system similar to the modern system where jurors are merely required to decide the facts rather than reach a verdict based off of what they already knew.<sup>68</sup> Under a writ of attaint, a larger jury would try the decision of the original jury to determine if they had reached their verdict falsely.<sup>69</sup> If the grand jury found, after reviewing the same evidence as the original jury, that the original jury had found a verdict in error, the original jurors were punished and the previous losing party was compensated.<sup>70</sup> Blackstone noted that, at the time of his writing, this particular method of appeal was almost completely replaced by setting

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63. 2 MATTHEW HALE, A TREATISE OF THE PLEAS OF THE CROWN 439-40 (1762).

64. *Id.* at 440.

65. *Id.*

66. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*402-05.

67. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 152 (2d ed. 1971).

68. See 3 BLACKSTONE, *supra* note 66, at \*402-05.

69. *Id.* at \*403-04.

70. *Id.* at \*404.

aside verdicts or granting new trials.<sup>71</sup> However, the use of the writ of attaint demonstrates, once again, the willingness of the common law to undermine the sanctity of the jury when fairness was at stake.

### C. The Common Law in Action

The clearest examples of the common law's willingness to disturb the finality of the jury's verdict in order to ensure a fair trial are the numerous cases referenced above in which the courts would set aside a verdict or grant a new trial when evidence of juror misconduct came straight from the mouths of the jurors themselves.<sup>72</sup> Despite the benefit of finality in a case, the tradition was to respect the greater principles of fairness and non-partiality that the common law system recognized as due the parties, even to the extent of setting aside a verdict when the evidence was clear that it had only been reached by juror misconduct.<sup>73</sup> Rule 606(b)'s justification on the policy of finality fails to satisfy general principles of trial by jury demonstrated by the common law's willingness to overlook the sanctity of jury deliberation, in certain instances, when fairness demanded otherwise. While the common law never embraced the notion that fairness required the court to always look into a jury's deliberations (in fact, instances of a court doing so are rare exceptions to the general rule of finality), it did traditionally recognize that a court should do so when there was clear evidence that the verdict was the result of juror misconduct.

## V. THE IOWA RULE: AN ALTERNATIVE APPROACH

While most American courts accepted Mansfield's Rule, the Supreme Court of Iowa was one of the few that flatly rejected the broad disqualification of juror affidavits instituted by the rule. In *Wright v. Illinois & Mississippi Telephone Co.*, the court created a rule (known as the "Iowa Rule") that allowed the use of juror affidavits when they would be used to prove instances of *objective* juror misconduct.<sup>74</sup> The court stated:

That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which *does not essentially inhere in the verdict itself*, as 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

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71. *Id.* at \*405.

72. *See* cases cited *supra* Part III.C.

73. *See* Lord Fitzwater's Case, (1675) 89 Eng. Rep. 308 (K.B.) 308; 1 Freem. 414, 415.

74. 20 Iowa 195 (1866).

average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which *does essentially inhere in the verdict itself*, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgments, or other matter resting alone in the juror's breast.<sup>75</sup>

By creating a distinction between objective and subjective influences and actions, the court attempted to ensure the fairness of the verdict while also recognizing that attacking the subjective aspects of juror deliberation would “unsettle verdicts and destroy their sanctity and conclusiveness.”<sup>76</sup>

By amending Rule 606(b) to conform to the Iowa Rule, Congress would be able to balance both its concerns of finality and fairness within the jury trial system while also ensuring a rule that is in keeping with the common law tradition. By allowing jurors to testify as to objective misconduct within the jury room, Congress would ensure a rule that comports with the overarching principles of fairness and justice in the jury trial as well as the overwhelming tradition in the English common law prior to the birth of Mansfield's Rule in the unique and unsupported case of *Vaise v. Delaval*. Moreover, by ensuring that jurors could not testify as to their own subjective deliberation process in reaching a verdict, Congress would also be protecting the sanctity of the jury room and the ability of the jury to make a determination while also maintaining the virtue of finality in their verdicts.

## VI. CONCLUSION

Back in the mid-eighteenth century, Blackstone warned of the dangers of new developments to the jury trial system that could destroy its virtues of justice and liberty. He wrote:

So that the liberties of England cannot but subsist, so long as this palladium remains sacred and inviolate, not only from all open attacks, . . . but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial . . . . And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered that delays, and little inconveniences in the forms of justice,

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75. *Id.* at 210.

76. *Id.* at 211-12.

are the price that all free nations must pay for their liberty in more substantial matters . . . .<sup>77</sup>

The impact of Mansfield's Rule in American jurisprudence and its lasting legacy codified in Rule 606(b) has just the effect that Blackstone warned of. Driven by a desire for finality in jury trials, the drafters of Rule 606(b) have placed parties that use the American jury system in danger of losing some of the fairness of the process for the sake of the convenience of finality. This danger can be avoided by amending Rule 606(b) to admit evidence from jurors regarding objective juror misconduct that results in a faulty verdict.

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77. 4 BLACKSTONE, *supra* note 66, at \*350.

