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IMPEACHMENT OF PARTIAL VERDICTS

Daniel J. Kornstein*

In law, as in life, we sometimes must cope with difficult situations. Experience often helps us to cope, and we tend to assume, perhaps more than we should, that most of the basic and more common situations have occurred before and can be met from the fund of experience. Occasionally we come across a situation that seems to be one that should have occurred before, that should fit into the teachings of experience, that should have a neat, ready and established solution, but for some reason fails to do any of these things. Precisely such an unusually “difficult and novel situation” is presented by repudiation of a partial verdict by a criminal jury.

Partial verdicts are a common event in federal criminal trials, but repudiation of such verdicts, even though it involves the intersection of two established procedural devices, is a new problem for the law. Seemingly authorized by the Federal Rules of Criminal

2 See notes 92-94 and accompanying text infra. Although a separate verdict should be returned with respect to each count and defendant in a criminal jury trial, it is permissible for the jury to return a partial verdict at any point in their deliberations as to those issues upon which agreement has been reached. See notes 142-46 and accompanying text infra. See generally 2 C. Wright, Federal Practice and Procedure § 513, at 368 (1969). Thus, a trial court properly may accept the verdict of a jury as to one issue, while declaring a mistrial as to a different issue to which no jury agreement could be reached. See United States v. DeLaughter, 453 F.2d 908, 910 (5th Cir.), cert. denied, 406 U.S. 832 (1972). Similarly, it has been held permissible for a jury to deliberate on several counts, return a verdict as to some of them, and then retire to redeliberate on the remaining counts. See United States v. Barash, 412 F.2d 26, 32 (2d Cir.), cert. denied, 396 U.S. 832 (1969).
Procedure, partial verdicts provide a useful way for judges and juries to whittle away at complex criminal cases involving more than one count or more than one defendant. Less common perhaps, but even more well established, is impeachment of a jury verdict. A verdict can be impeached either before or after it becomes final, with the standards for impeachment after finality being much more strenuous than before finality.\(^4\)

In October 1978 the Supreme Court denied certiorari in the first and only case to raise squarely the issues surrounding the interface between partial verdicts and their repudiation.\(^5\) The central question in United States v. Hockridge\(^6\) was whether or not a trial court should have set aside a partial verdict of guilt on the first of several counts upon the jury's spontaneous and voluntary repudiation of the partial verdict after it was recorded but before deliberations on other counts were concluded and before the jury was discharged.\(^7\) Conceding that it was dealing with a case of first impression, the Court of Appeals for the Second Circuit found no error and held that a recorded partial verdict is as final as a complete verdict after jury discharge.\(^8\)

The affirmance by the Second Circuit and the denial of certiorari by the Supreme Court do not end the matter for all time. Of course those decisions did resolve the status of the particular appeal. But members of the Supreme Court itself have told us that a denial of certiorari means nothing more than that fewer than four justices were willing to hear the case and that it foreshadows no opinion on the merits.\(^9\) After all, where the issue is one of first impression or one perceived as unlikely of repetition, as may be the case with repudiation of partial verdicts prior to jury discharge, the Court may be inclined to let the issue percolate among the lower courts, allowing judicial wisdom to accumulate, conflicts to develop, or the problem to go away, before agreeing to take it on.\(^10\)

It is fair to say, then, that the questions stirred by repudiation

\(^3\) See FED. R. CRIM. P. 31(b); notes 112-16 and accompanying text infra.
\(^4\) See generally notes 43-91 and accompanying text infra.
\(^6\) 573 F.2d 752 (2d Cir.), cert. denied, 439 U.S. 821 (1978).
\(^7\) Id. at 758; see notes 164-167 and accompanying text infra.
\(^8\) Id. at 759-60.
of partial verdicts prior to jury discharge are unresolved, very much alive, and worthy of careful study. The ultimate nature of partial verdicts is implicated, together with the whole purpose and process of jury impeachment. Also at stake, at least in part, is the integrity of the guilt-determining process, the fair performance of the vital functions of a federal criminal jury, and public confidence in its result. Lurking not too far in the background are basic issues surrounding a criminal defendant's constitutional rights.

I. THE PROBLEMSPOSED: THE Hockridge CASE

The facts in Hockridge vividly pose the problems surrounding impeachment of partial verdicts. In 1976, a federal grand jury in the Southern District of New York indicted four persons on one conspiracy count and twenty-three separate counts of misapplying bank funds, making false statements to influence conduct by a federally insured bank, and making false bank entries.11 The trial before District Judge Dudley Bonsal and a jury of twelve lasted eight weeks, with many witnesses testifying.12

To the extent the jury instructions are relevant, they contained what is known as a "modified Pinkerton" charge, that is, a charge that may make conviction of the substantive counts contingent upon conviction on the conspiracy count.13 In effect Judge

\[^{11} \text{573 F.2d at 754-55.}
\[^{12} \text{Id. at 754. Appellants Hockridge, Petri and Easton were convicted of conspiring (1) to misappropriate bank funds, (2) to employ false financial statements to obtain bank loans, and (3) to make false entries in the bank's books. \text{Id. They were also convicted of a substantive count of misapplying and assisting in the misapplication of bank funds. \text{Id. Petri was also convicted on a substantive count charging him with preparing a false financial statement for the purpose of obtaining a loan. \text{Id.}}}
\[^{13} \text{See Pinkerton v. United States, 328 U.S. 640, 642-43 (1946). The Pinkerton Court held that acts done in furtherance of a conspiracy may be attributed to co-conspirators, so that membership in the conspiracy may result in criminal liability for the conspiracy as well as for all substantive offenses committed in furtherance of the conspiracy. \text{Id. at 647. See generally W. LaFave & A. Scott, Jr., Criminal Law § 65, at 513 (1972).}}

In Hockridge, Judge Bonsal charged the jury:

One other word, ladies and gentlemen, regarding all of these substantive counts. The government is contending here and the defendants deny this, that all of the crimes listed in these substantive counts were really in furtherance of the conspiracy charged in Count 1.

I have asked you to consider Count 1 first. You remember when I reviewed the conspiracy count with you it charges among the purposes of a conspiracy was the misapplication of funds, making of false financial statements, making of false white sheets.

If you find in Count 1 that there was a conspiracy here, and if you find on the substantive count the person [who] did it — Hockridge, in this case, for instance,
Bonsal told the jury: If you find someone guilty of conspiracy, then you may, for that reason alone, find him guilty of a substantive count too.

The possible interdependence between verdicts on the conspiracy and substantive counts becomes significant in light of the sequence in which the jury rendered its verdicts. After deliberating for a day and a half, the jury, in response to questioning by the trial judge, announced that it had reached a verdict as to three defendants on the conspiracy count.\(^\text{14}\) Despite objections by defense counsel, Judge Bonsal took the partial verdict of guilt.\(^\text{15}\) Although the jury was polled, a separate poll was not taken of each juror as to each of the three defendants.\(^\text{16}\) After polling the jury and recording the partial verdict, Judge Bonsal sent the jury back to continue its deliberations as to the remaining counts.\(^\text{17}\)

During the morning of the very next day, Juror Number Four sent a note to Judge Bonsal requesting to see him. Judge Bonsal failed to disclose receipt of Juror Number Four’s note until 5:00 p.m. on the day it was received. Judge Bonsal, after consulting counsel, decided not to see Juror Number Four.\(^\text{18}\) At 10:00 a.m. the next day, Judge Bonsal told counsel that he had received a note from Juror Number Three. She asked to speak with the judge,
“fearing that she had committed a ‘grave injustice’ by rushing into the verdict.” Judge Bonsal refused to set aside the partial verdict, but decided to interview Jurors Number Three and Number Four. On being interviewed in chambers without counsel present, Juror Number Three indicated that she “felt that there was not enough evidence to make me decide that Mr. Hockridge and Mr. Petri were involved in a conspiracy.” Juror Number Four indicated that during the deliberations she “was personally attacked incredibly by two members [of the jury].” Judge Bonsal refused to permit her to describe the nature of the attack. Juror Number Four also pointed out that she and several other jurors were “railroaded, you know, before we could bring our doubts . . . I know that all the time we were polled that I should have said no.”

Judge Bonsal then instructed the jurors to resume deliberations, adding that “perhaps after we finish here I will want to see you again.” It then became known that at least one other juror had repudiated the partial verdict.

After this meeting with Jurors Number Three and Number Four, Judge Bonsal never charged the jury as a whole to deliberate anew on the conspiracy count. Nor did Judge Bonsal inform the

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10 573 F.2d at 757; Record at 5920. The note was startling: Judge Bonsal, please see me as soon as possible this morning. I feel that I have committed a grave injustice. Inasmuch as I let myself be let or rushed for lack of a better word into agreeing with the verdict of the jury. I'm sorry for having let this matter continue as long as I have.

See id. at 5921, 5923.

20 Id. at 5921.

21 573 F.2d at 757.

22 Record at 5929.

23 Id. at 5930.

24 Id. at 5930-31. The following colloquy subsequently took place between the court and Juror Number Three:

You have had sort of an emotional problem with this thing here, haven't you?

JUROR NO. 3: It can be an emotional problem but the question in my mind is the reasonable doubt . . .

THE COURT: I think what I would like to do is this. You know, I mentioned to you when I charged you I don't want you ever to surrender your honest convictions because of other jurors.

JUROR NO. 3: That is what I did.

THE COURT: You think you did.

JUROR NO. 3: I feel that I did. I surrendered myself because of verbal attack.

Id.

25 Id. at 5931-34.

26 Id.

27 573 F.2d at 757.
jury as a whole of the substance of the interview.\textsuperscript{28} He never met again with Jurors Number Three and Number Four, despite his promise to do so, and he never repolled the jury as to the conspiracy count.\textsuperscript{29} The defendants subsequently moved for a mistrial but Judge Bonsal denied the motion, saying he was “satisfied that neither of the two jurors surrendered their honest convictions.”\textsuperscript{30} Thereafter the jury found three defendants guilty on the misappliance count, and one defendant guilty of one false statement count.\textsuperscript{31} After the jury rendered its verdicts on thirteen of the twenty-four counts, Judge Bonsal dismissed the remaining counts and discharged the jury.\textsuperscript{32}

All of the convicted defendants appealed, arguing that Judge Bonsal had improperly let stand the partial verdict on the conspiracy count.\textsuperscript{33} The Court of Appeals for the Second Circuit affirmed the convictions unanimously,\textsuperscript{34} recognizing that it was charting new territory.\textsuperscript{35} The court held that a duly recorded partial verdict is as final as a complete verdict after jury discharge.\textsuperscript{36}

The Second Circuit justified its affirmance on two grounds. First it pointed out that impeachment of partial verdicts impinges

\textsuperscript{28} Id. Judge Bonsal’s discussion with jurors Three and Four occurred during an on-the-record in camera interview. Id.

\textsuperscript{29} Id.

\textsuperscript{30} United States v. Hockridge, No. 76-843 (S.D.N.Y. April 12, 1977) (order denying motion by certain defendants to set aside the verdict).

\textsuperscript{31} 573 F.2d at 754.

\textsuperscript{32} Id. at 757.

\textsuperscript{33} Id. at 758. The Hockridge appellants also asserted that indications of jury bias were evident early in the trial. On the fifth day of the trial, one of the jurors informed Judge Bonsal that several of the other jurors had made remarks concerning the defendants’ guilt. Id. at 756. The judge then interviewed each member of the panel individually. Several of them professed ignorance of the statements; however, six reported that although a “passing reference” to guilt had been made in their presence, they were of the opinion that it had been made in jest. Id. Each juror then stated that he would refrain from forming an opinion on the issue of guilt until all the evidence had been presented. Judge Bonsal then concluded that the jury was not prejudiced, and continued the trial. Id. On appeal, the issue of jury prejudice was dismissed by the court, which noted that the decision by the trial judge to continue the trial was a valid exercise of his discretionary power. Id.

\textsuperscript{34} Id. at 761. Hockridge was decided by Circuit Judges Oakes and Van Graafeiland and District Judge Bartels of the Eastern District of New York, who was sitting by designation. Id. at 754.

\textsuperscript{35} Id. at 759-60. The court of appeals knew it was mapping unfamiliar ground, that it was faced with a case of first impression, for it wrote: “Neither the cases nor the treatises definitively answer the question whether rule 606(b) [of the Federal Rules of Evidence] bars impeachment of a partial verdict by the voluntary and spontaneous testimony of a juror prior to the jury’s discharge.” Id. at 758.

\textsuperscript{36} Id. at 759.
PARTIAL VERDICTS

on the freedom of jury deliberation.37 The second ground for decision was the interest in verdict finality.38 Despite its awareness of "appellant's" purported distinction between impeachment of complete verdicts on the one hand and partial verdicts followed by continuing deliberation on the other,39 the court of appeals concluded that "[a] recorded partial verdict ought not to be disturbed absent a showing of the type which would permit impeachment of a complete verdict."40 The court of appeals denied a petition for rehearing and rehearing en banc,41 and the Supreme Court denied the defendants' petitions for certiorari.42

II. IMPEACHMENT OF VERDICTS GENERALLY

The Nonimpeachment Rule

Impeaching a jury verdict has never been easy, though it has always been possible.43 Anglo-American jurisprudence has consistently recognized that the proper functioning of our jury system depends on verdicts being regarded as ultimate decisions.44 In particular, courts have noted three primary and distinct interests served by not allowing jury verdicts to be impeached. First, protection must be given to the public interest in the secrecy of jury deliberations, in which frankness and freedom are too necessary to be discouraged.45 Second, finality, certainty, and stability of the verdict are needed for administrative convenience and expediency in ter-

37 Id.; see notes 45 & 169 and accompanying text infra.
38 Id.; see notes 191-95 and accompanying text infra.
39 Id. at 758.
40 Id. at 759-60. For a discussion of the type of showing that would permit impeachment of a complete verdict, see notes 60-81 and accompanying text infra.
41 No. 77-1243 (2d Cir. May 13, 1978).
45 See Clark v. United States, 289 U.S. 1, 13 (1933)("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."); McDonald v. Pless, 238 U.S. 264, 267-68 (1915)("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"); Rex v. Armstrong, [Eng. 1922] 2 K.B. 555, 568; notes 169-173 and accompanying text infra. For a general review of the entire subject, see Comment, Impeachment of Jury Verdicts, 25 U. Chi. L. Rev. 360 (1958).
minating the controversy.46 Third, jurors must be safeguarded against postverdict harassment and tampering.47 Underlying these three primary interests are two other, more amorphous notions: Lord Mansfield's old maxim that a juror is somehow incompetent to impeach a verdict in which he took part,48 and a "floodgates" argument based on the fear that making impeachment easy would produce "countless allegations of error."49 For all of these reasons,

46 See United States v. Moten, 582 F.2d 654, 664 (2d Cir. 1978), where the court stated: "Certain limits on . . . inquiry into jury verdicts are necessary in the interest of finality lest judges 'become Penelopes, forever engaged in unraveling the webs they wove.'" (The Penelope metaphor comes from Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.) (L. Hand, J.), cert. denied, 332 U.S. 764 (1947). See notes 191-195 and accompanying text infra. At least one court has noted that if postverdict inquiries into the motives behind juror decisions were permitted, the courts might be subjected to "large numbers of applications mostly without real merit." United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962); see also United States v. Grieco, 161 F. Supp. 683, 684 (S.D.N.Y. 1958); Carlson & Sumberg, Attacking Jury Verdicts: Paradigms for Rule Revision, 1977 Ariz. St. L.J. 247, 250-51.

47 "[T]he proper functioning of the jury system requires that the courts protect jurors from being '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.'" United States v. Moten, 582 F.2d 654, 664 (2d Cir. 1978) (quoting McDonald v. Pless, 238 U.S. 264, 267 (1915)). See Mattox v. United States, 146 U.S. 140, 148-49 (1892); United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977); United States v. Green, 523 F.2d 229, 235 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976); Government of Virgin Islands v. Gereau, 523 F.2d 140, 148-50 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976); Miller v. United States, 403 F.2d 77, 82 (2d Cir. 1968); United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962); notes 214-217 and accompanying text infra.

48 This maxim was an innovation introduced in Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785). In Vaise, affidavits of jurors stating that their verdict was based on chance were rejected, with Lord Mansfield saying:

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 such case the court must derive their knowledge from some other source, such as from some person having seen the transaction through a window, or by some other means.

Id. See C. McCormick, Evidence § 68, at 148 n.80 (2d ed. 1972). Lord Mansfield's holding was a corollary of his doctrine that no one shall be heard to assert his own turpitude. See 8 J. Wigmore, Evidence § 2352 (McNaughton rev. ed. 1961). But see notes 54-58 and accompanying text infra.

49 8A J. Moore, supra note 17, ¶ 31.08, at 31-67. See McDonald v. Pless, 238 U.S. 264, 267 (1915), where 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.

Id.

Wigmore offers an additional reason based on the parol evidence rule. According to Wigmore, the verdict is a jural act that controls over any subsequent parol evidence. 8 J. Wigmore, supra note 48 at § 2349.
courts have been reluctant to allow jury verdicts to be impeached unnecessarily.\textsuperscript{50}

At the same time, it has been recognized that in some situations justice may demand that verdicts be impeached.\textsuperscript{51} The choice is between preserving the interests in nonimpeachment\textsuperscript{52} and redressing the injury to the litigant.\textsuperscript{53} Eminent commentators have referred to Lord Mansfield's hoary shibboleth about juror incompetency as an "absurdity"\textsuperscript{54} and a "gross over-simplification."\textsuperscript{55} According to Learned Hand, "The whole subject has been obscured, apparently beyond hope of clarification, by Lord Mansfield's often quoted language. . . ."\textsuperscript{56} Professor Moore believes the nonimpeachment rule is "difficult to justify on theoretical, or conceptual grounds."\textsuperscript{57} The cases themselves reveal "a discernible trend toward broadening the exceptions to the nonimpeachment rule."\textsuperscript{58}

**Impeachment's Three Variables**

Today every jury verdict may, under certain circumstances, be impeached. The relevant circumstances include three main variables, in large part derived from the primary interests sought to be protected by the nonimpeachment rule.\textsuperscript{59} These variables may be accurately described as the nature of the grounds for impeachment, the method by which those grounds become known, and the timing of the assertion of those grounds. Whether or not a jury verdict will be impeached thus depends on what the grounds for

\textsuperscript{50} See, e.g., Fietzer v. Ford Motor Co., 439 F. Supp. 1346 (E.D. Wis. 1977), rev'd per curiam on other grounds, 590 F.2d 215 (1978) (verdict will not be impeached even though juror's letter indicated jury misunderstood the applicable law of comparative negligence). See also 8A J. Moore, supra note 17, ¶ 31.08, at 31-67.

\textsuperscript{51} See, e.g., McDonald v. Pless, 238 U.S. at 268-69; United States v. Reid, 53 U.S. (12 How.) 361, 366 (1851). In Reid, the Supreme Court said: "[C]ases might arise in which it would be impossible to refuse [evidence from jurors impeaching a verdict] without violating the plainest principles of justice." 53 U.S. (12 How.) at 366.

\textsuperscript{52} See notes 43-50 and accompanying text supra.

\textsuperscript{53} 6A J. Moore, supra note 17, ¶ 59.08[04], at 59-143 to -144.


\textsuperscript{57} 8A J. Moore, supra note 17, ¶ 31.08[1][a], at 31-68.

\textsuperscript{58} Id. at n.10 (quoting ABA Minimum Standards for Criminal Justice, ABA Standards Relating to Trial By Jury, § 5.7, commentary at 165 (Approved Draft 1968)).

\textsuperscript{59} See notes 45-47 and accompanying text supra.
impeachment are, how they become known, and when they become known. With respect to each variable, there is a sliding scale along which impeachment becomes more or less justifiable in light of the relevant policy considerations.

What substantive grounds provide the basis for impeachment are related to the interest in freedom of jury deliberations and the notion of juror incompetency. At one end of the spectrum are claims that extraneous prejudicial information was improperly brought to the jury’s attention, that outside influence was improperly brought to bear on jurors, or that irregularities occurred outside the jury room. Such claims are always cognizable by a court in considering whether or not to impeach a verdict. Thus rule 606(b) of the Federal Rules of Evidence expressly permits a juror to testify “on the question whether extraneous prejudicial information was improperly brought to a juror’s attention or whether any outside influence was improperly brought to bear upon any juror.”

At the other end of the spectrum, by contrast, are the forbidden inquiries into the mental operations and emotional reactions of jurors in arriving at a given result. Rule 606(b), for example,

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60 Extraneous prejudicial information can take the form of statements to jurors by court personnel, e.g., Parker v. Gladden, 385 U.S. 363 (1966); Turner v. Louisiana, 379 U.S. 466 (1965); United States ex rel. Tobe v. Bensinger, 492 F.2d 232 (7th Cir. 1974); United States v. Brumbaugh, 471 F.2d 1128 (6th Cir.), cert. denied, 412 U.S. 918 (1973); Richardson v. United States, 360 F.2d 366 (5th Cir. 1966), or prejudicial newspaper or radio accounts, e.g., Marshall v. United States, 360 U.S. 310 (1959); Mattox v. United States, 146 U.S. 140 (1892); United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972); United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970), cert. denied, 401 U.S. 922 (1971); United States v. Kum Seng Seo, 300 F.2d 623 (3d Cir. 1962).


62 E.g., United States v. Barnes, 604 F.2d 121, 143 (2d Cir. 1979), cert. denied, 100 S. Ct. 1883 (1980) (defense counsel claimed juror “raised his middle finger in a sign generally recognized to be the antithesis of approval and indicated by an expression on his face” distaste for counsel). In this group are cases where the jury improperly considered evidence not admitted in court. E.g., United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1971); Farese v. United States, 428 F.2d 1061 (7th Cir. 1972); Holden v. Porter, 405 F.2d 878 (10th Cir.), cert. denied, 395 U.S. 934 (1969).
prohibits a juror from testifying “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 concerning his mental processes in connection therewith.” Though often couched in terms of juror incompetence, the modern rules forbidding such inquiries into jury deliberations actually amount to significant substantive limitations on the possible grounds for impeachment, thereby shrouding a veritable host of events relevant to the accuracy, meaningfulness, and integrity of the factfinding process. Somewhere in between these two extremes are claims

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66 Fed. R. Evid. 606(b).
68 Examples of the conduct of jurors which has been hidden include: ignoring or misunderstanding instructions or interrogatories to jury; ignoring or misunderstanding the applicable substantive law, e.g., Poches v. J.J. Newberry Co., 549 F.2d 1166, 1169 (8th Cir. 1977); misusing any portion of the evidence in the case, e.g., United States v. Crosby, 294 F.2d 928, 949 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962); Morgan v. Sun Oil Co., 109 F.2d 178, 180 (6th Cir.), cert. denied, 310 U.S. 640 (1940); holding it against the accused that he failed to take the stand, e.g., United States v. DiCarlo, 575 F.2d 952, 960 (1st Cir.), cert. denied, 439 U.S. 834 (1978); improperly speculating on extra-record matters of common knowledge, e.g., Gault v. Poor Sisters of St. Frances, 375 F.2d 539, 548-51 (6th Cir. 1967), such as the impact of insurance upon the judgment (or of the judgment upon insurance rates), see Holden v. Porter, 405 F.2d 878, 879 (10th Cir. 1969), or the impact of contingent fees, see Gault v. Poor Sisters of St. Frances, 375 F.2d at 548-51, or the impact of taxes in the case, see id.; improperly speculating that the trial court would suspend a sentence, that the accused would be released on probation, or that he would quickly be paroled, e.g., Klimes v. United States, 263 F.2d 273 (D.C. Cir. 1959); compromising principles out of concern for personal matters in order to make an early end of deliberations, e.g., Poches v. J.J. Newberry Co., 549 F.2d 1166 (8th Cir. 1977), or giving in to pressure from others and casting their votes against their better judgment or without being truly persuaded, see United States v. Blackburn, 446 F.2d 1089, 1090-91 (5th Cir. 1971), cert. denied, 404 U.S. 1017 (1972); United States v. Schroeder, 433 F.2d 846, 851 (8th Cir. 1970), cert. denied, 401 U.S. 943 (1971); being inattentive, sleeping, or thinking about other matters during trial or deliberations; erring in calculating the amount of an award, or miscasting votes in a tenor opposite to that intended (although an error in reporting the verdict may be proved), or not agreeing with or believing in the verdict, see, e.g., United States v. Gerardi, 586 F.2d 896, 898 (1st Cir. 1978), or that the verdict was the result of mistake or prejudice, see, e.g., Poches v. J.J. Newberry Co., 549 F.2d 1166 (8th Cir. 1977); trading votes on one issue or as to one party to get support of another juror as to some other issue or party, see, e.g., Stein v. New York, 346 U.S. 156, 178 (1953); Hyde v. United States, 225 U.S. 347, 382-83 (1912); agreeing on a limit for deliberations, see, e.g., Capella v. Baumgartner, 59 F.R.D. 312 (S.D. Fla. 1973); misunderstanding the requirement of a unanimous decision, see, e.g., United States v. Homer, 411 F. Supp. 972, 978 (W.D. Pa.), aff’d, 545 F.2d 864 (3d Cir. 1976), cert. denied, 431 U.S. 954 (1977), or agreeing to abide by the vote of a majority, or of a number less than necessary for a proper verdict, see Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), cert. denied, 332 U.S. 764 (1947); and arriving at the sum to be awarded
of irregularity inside the jury room such as gambling, coercion, or other misconduct. In short, courts tend to assign different weights to different substantive claims for setting aside a jury verdict, depending on the perceived interference with the privacy and freedom of jury deliberations.

How a court learns of alleged grounds for impeachment can be quite significant and implicates two public policy considerations, juror incompetency and protection of jurors from post-verdict importuning. The venerable doctrine holding jurors incompetent to impeach their own verdict means that courts are more favorably disposed if the grounds for impeachment are brought to its attention by a nonjuror or by circumstantial evidence. But even if a juror is the sole source of information, the interest in protecting jurors from harassment and annoyance would seem not to apply to spontaneous and voluntary statements by jurors. As a result, courts should be more sympathetic to unsolicited information supplied by a juror than to affidavits, statements, or testimony procured from a juror by a lawyer or a litigant. Revelation resulting from inquiry by the court perhaps stands on a different footing. In any event, real differences exist, from a public policy perspective, between spontaneous and voluntary statements by jurors on the one hand, and solicited juror information on the other.

When the court discovers the alleged ground for impeachment involves the interest in verdict finality and bears heavily on the

by adding together the amounts that each juror thought appropriate and dividing by the number of jurors—rendering the classic quotient verdict, see McDonald v. Pless, 238 U.S. 264 (1915).

It has been recognized that the intoxication of a jury member to a degree sufficient to impair his judgment may constitute misconduct serious enough to warrant a new trial. See Perry v. Bailey, 12 Kan. 415 (1874); See also Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir.), cert. denied, 332 U.S. 764 (1947); Faith v. Neely, 41 F.R.D. 361, 366 (N.D. W. Va. 1966); 8 J. WIGMORE, supra note 48, § 2354; Note, To Impeach or Not to Impeach: The Stability of Juror Verdicts in Federal Courts, 4 PEPPERDINE L. REV. 343, 349 (1977). Nor may a juror testify that the other members of the panel coerced him into reaching his decision. See Johnson v. Hunter, 144 F.2d 565, 567 (10th Cir. 1944); 6A J. MOORE, supra note 17, ¶ 59.08[4], at 59-131. If a juror is coerced as a result of statements made by the court, however, a mistrial may be declared. See note 198 infra.

E.g., Consolidated Rendering Co. v. New Haven Hotel Co., 300 F.2d 627 (D. Conn. 1924) (bailiff); Reich v. Thompson, 346 Mo. 577, 142 S.W.2d 486 (1940) (court clerk).

E.g., Central of Ga. Ry. v. Holmes, 223 Ala. 188, 134 So. 875 (1931) (papers in jury room).

But see Domeracki v. Humble Oil and Refining Co., 443 F.2d 1245, 1247 (3d Cir.), cert. denied, 404 U.S. 883 (1971) (court lacks power to inquire into jury's decisional process "even when information pertaining to the deliberations is volunteered by one of the jurors").
decision whether or not to set aside the verdict. Of course a court is more prone to pay attention to the alleged ground for impeachment if it is asserted earlier than later. If non-final, a verdict is more open to attack; if final, a verdict is more difficult to impeach.\(^7\) There are, however, only four points in time worth considering as triggers for verdict finality—announcements of the verdict,\(^7\) polling of the jury,\(^7\) recording of the verdict, and discharge of the jury. Notwithstanding the other possibilities, the accepted rule is that a verdict becomes final only after the jury is discharged.\(^7\) According to Professor Moore, “the general proposition is that after the jury has been discharged, jurors are not competent to testify” about defects in the verdict,\(^7\) but that “there is nothing in the policy underlying the no-impeachment rule” to preclude a juror from so testifying “prior to the jury’s discharge.”\(^7\) Wigmore takes a similar position, finding that the reasons for the nonimpeachment rule disappear if the investigation “takes place before the jurors’ discharge and separation.”\(^7\) Following the usual rule, many cases hold that statements received after discharge may not be received to impeach the verdict,\(^7\) but that statements, even

\(^7\) See notes 77-81 and accompanying text infra.

\(^7\) Verdicts in federal criminal jury trials must be delivered to the judge by the jury in open court following the termination of their deliberations. See Fed. R. Crim. P. 31(a).

\(^7\) After the return of a verdict in a federal criminal jury trial, but prior to the recordation of the verdict, the jury must be polled upon the request of any party, or by order of the court on its own motion. Fed. R. Crim. P. 31(d). The court must also provide the defendant with a reasonable opportunity to request a jury polling. See Miranda v. United States, 255 F.2d 9 (1st Cir. 1958). Should a jury poll reveal that the verdict was not unanimous, the court may discharge the jury or send it back for further deliberations. Fed. R. Crim. P. 31(d).

The jury poll provides each juror with the opportunity, prior to the recording of the verdict, to assent in open court to the verdict that has been returned; all concerned may thus ascertain that the verdict was in fact unanimous. In polling the jury, however, the court must exercise caution to ensure that the individual jurors respond freely to the poll. Therefore, should the poll reveal disagreement among the jurors, the court must refrain from requesting any type of explanation, lest the dissenting jurors feel coerced into agreeing with the majority. See United States v. Love, 597 F.2d 81, 83-84 (6th Cir. 1979); United States v. Sexton, 456 F.2d 981, 966-67 (5th Cir. 1972).

\(^7\) See notes 77-81 and accompanying text infra.

\(^7\) 6A J. Moore, supra note 17, § 59.08[4], at 59-130 to -31.

\(^7\) Id. at 59-143.

\(^7\) 8 J. Wigmore, supra note 34, § 2350 (emphasis deleted). See generally 3 J. Weinstein & M. Berger, Evidence § 606[01]-[05] (1975); ABA Standards for Criminal Justice, ABA Standards Relating to Trial by Jury, Commentary to § 5.7, at 164 (Approved Draft 1968).

\(^80\) See, e.g., Grace Lines v. Motley, 439 F.2d 1028 (2d Cir. 1971); United States v. Schroeder, 433 F.2d 846, 851 & n.8 (8th Cir.), cert. denied, 400 U.S. 1024 (1971); United
statements about jurors' mental operations and emotional processes, are acceptable before discharge.\footnote{See cases cited in note 80 supra. In United States v. Taylor, 507 F.2d 166, 168 (5th Cir. 1975), for example, the court said: "We hold that a jury has not reached a valid verdict until deliberations are over, the result is announced in open court, and no dissent by a juror is registered."}

These three variables — what, how, and when — should not be studied in isolation. Only by examining each variable in relation to the other variables can an intelligent decision on impeachment be made.\footnote{The interplay of these factors can be illustrated easily from, in large part, the situation which confronted the Second Circuit in Grace Lines, Inc. v. Motley, 439 F.2d 1028 (2d Cir. 1971).

Suppose a criminal jury sends a note to a trial judge that it has reached a verdict. The court calls the jury into the courtroom, asks the foreman what the verdict is, and the foreman announces a verdict of guilty. As the judge is polling the jury, one juror says he does not agree with the verdict, that he just went along out of pressure, that he was coerced, and that to join the verdict he would be surrendering an honest conviction. What happens to the verdict? The nature of the grounds involves a juror's mental operations, which are low on the sliding scale of what grounds are likely to result in impeachment, but because they were revealed before the verdict became final, and not as product of postverdict importuning by a defeated party, they would justify rejecting the verdict. In this way, the timing of the revelation can determine the validity of a verdict.}

When A Verdict Is Not A Verdict

A court can avoid the rigidities of the nonimpeachment rules by finding that no "verdict" was reached.\footnote{See 8 J. Wigmore, supra note 48, at § 2350.} If a court finds that no verdict was ever reached, it may accept a juror's statement regarding some irregularity in the jury's decision. For example, in United States v. Pleva,\footnote{66 F.2d 529 (2d Cir. 1933).} decided in 1933 by the Second Circuit, a juror became seriously ill during deliberations and the trial court ordered him to be examined by two physicians, both of whom reported that he was fit to continue deliberating.\footnote{\textit{Id.} at 532.} Upon concluding further deliberations, the jury returned a verdict of guilty.\footnote{\textit{Id.}.} After
the jury had been polled, the juror informed the judge that he had voted for conviction because he was too ill to continue with his dissenting opinion. In reversing the conviction, the Second Circuit found that the juror’s “mind was simply overpowered by his concern for his own well-being and [he] was never persuaded on the merits to come into agreement. It was therefore, in law, no verdict at all.” In ordering a new trial in one case, the Fifth Circuit held that postdischarge affidavits from a juror were admissible, not to impeach the verdict, but to show the true verdict or that no verdict was ever reached. In another, more recent case, the same court held that although affidavits are inadmissible to impeach a verdict after it has been delivered, they are admissible to show that the verdict delivered was not that which was actually agreed upon. Thus, a court can circumvent the nonimpeachment rules by inquiring whether a “final verdict” is under attack.

The rules governing impeachment of jury verdicts arose exclusively in the context of complete, unitary, nonpartial verdicts. Such verdicts resolve at once all issues of guilt or innocence, civil liability, and damages. Partial verdicts, by contrast, deal with only a portion of the issues submitted to the jury. The possible differences between complete and partial verdicts necessitate some in-
quiry into the nature and characteristics of partial verdicts before deciding what impeachment rules control partial verdicts.

III. PARTIAL VERDICTS

A partial verdict is generally understood as a decision by a jury, before its deliberations are fully completed, on less than all the issues presented to it. After rendering such a partial decision, a jury resumes its deliberations on the remaining issues. In a criminal case, the issues can be broken down as to different defendants and different counts of the indictment. In a civil case, the issues can be divided as to different parties, causes of action, liability, damages, and particular issues sought by special verdicts.

The origins of the partial verdict are lost behind the mists of time. It is unclear precisely how or when a partial verdict was first used. Of course verdicts are as old as juries, which themselves date back a thousand years. But verdicts have been understood traditionally as complete verdicts, a decision by the jury on all the issues presented. There is no long history of partial verdicts.

Civil Cases

Civil cases do not give rise to the type of partial verdict encountered in Hockridge. Of course rule 49(a) of the Federal Rules of Civil Procedure empowers a judge to ask a jury to return only a special verdict in the form of a special written finding upon each issue of fact. Furthermore, rule 49(b) permits the court to ask a jury to return a general verdict accompanied by answers to interrogatories. And, if one or more answers are inconsistent with each

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94 See notes 96-99 and accompanying text infra.
95 See note 133 and accompanying text infra.
96 Fed. R. Civ. P. 49(a). The special verdict allows the court to require the jury to return a finding upon specified issues of fact; the court then applies the appropriate law to the jury's finding and renders a judgment. This procedure eliminates the need for instructing the jury upon complicated legal principles and applications. See 5A J. Moore, supra note 17, ¶ 49.02, at 2205-06.
97 Fed. R. Civ. P. 49(b). The use of a general verdict accompanied by answers to interrogatories is particularly appropriate in complicated cases, since it requires the jury to focus on the specific aspects raised in the interrogatories; the responses by the jury enable the court to ascertain that the jury correctly applied the law to the facts. The court may then
other or with the general verdict, the court may, among other things, return the jury for further consideration of its answers. A jury is never permitted under rule 49 or any other rule, however, to return a verdict as to one issue, and then immediately resume deliberations on the remaining issues. Even in a bifurcated trial, separate trials are actually held on the issues of liability and damages, with separate verdicts rendered on each issue. Moreover, only if there is a finding of liability in the first trial will a second trial—necessitating more deliberations and a second verdict—be held on the issue of damages.

The separateness of the trials and verdicts on each issue bears significantly on impeachment of the verdicts. For example, suppose a judge in a civil case ordered separate trials as to liability and damages, and after the liability phase, a plaintiff's verdict was returned by the jury. Then, after evidence had been heard as to damages, what would happen if, during deliberations on the damages issues, one of the jurors repudiated his verdict on liability? It would seem that since the interest in verdict finality is so heavily implicated, that evidence on the liability phase should have no bearing on the first-phase verdict, and that evidence in the second

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enter judgment should it find that the general verdict is consistent with the findings of the jury. If the answers are consistent, but one or more among them is inconsistent with the general verdict, a judgment may still be entered by the court in accordance with the responses to the interrogatories, or the jury may be returned for further consideration of its answers and verdict, or a new trial may be ordered. If the answers are inconsistent, however, and one or more of them conflicts with the general verdict, the court may not enter judgment, but must either send the jury back for further deliberations or order a new trial. See 5A J. Moore, supra note 17, ¶ 49.04, at 2221-29.

See note 97 supra.

When separate trials are ordered, and the jury has rendered a verdict on the first issue, additional evidence is necessary before the jury can return a verdict on the second issue. See generally 5 J. Moore, supra note 17, ¶ 42.03, at 42-33 to 45.

Bifurcated trials are authorized as to any claim or issue by Fed. R. Civ. P. 42 which provides in part:

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.


See notes 191-95 and accompanying text infra.
trial should not be permitted to influence the outcome of the first.\textsuperscript{103} Given this precise situation, however, a court came to a contrary conclusion in \textit{Vizzini v. Ford Motor Co.}\textsuperscript{104}

In \textit{Vizzini}, a jury verdict for the plaintiff on liability was returned and recorded. After hearing the evidence on damages and retiring to deliberate on that issue, a spontaneous note from the jury indicated that the verdict on liability had, in truth, not been unanimous but the result of compromise.\textsuperscript{105} After the court ordered a trial on damages before a different jury, the defendant moved for judgment notwithstanding the verdict on the issue of liability.\textsuperscript{106} The court denied the motion, holding, \textit{inter alia}, that under rule 606(b) of the Federal Rules of Evidence the juror was incompetent to impeach his own verdict.\textsuperscript{107} In stray and overbroad dicta, the \textit{Vizzini} court rejected the arguments that the nonimpeachment rule is inapplicable before jury discharge or where the jury acts spontaneously.\textsuperscript{108} On appeal, the Third Circuit vacated and remanded, ruling that the issues of liability and damages were so intertwined as to require a new trial nonetheless.\textsuperscript{109} The court of appeals specifically declined to determine whether rule 606(b) was applicable under the circumstances.\textsuperscript{110} If, as held in \textit{Vizzini}, the issues in a bifurcated trial can be so intertwined, then of course they can be in an unbifurcated trial as well.

\textsuperscript{104} 72 F.R.D. 132 (E.D. Pa. 1976), vacated and remanded, 569 F.2d 754 (3d Cir. 1977).
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 134.
\textsuperscript{107} Id. at 135.
\textsuperscript{108} Id. at 136. The district court stated: "The fact that no judgment was entered and that the same jury continued to deliberate on another aspect of the case should not impair the validity and finality of the jury's verdict on liability." Id. This dicta was relied on by the government in \textit{Hockridge}, see 573 F.2d at 758, but the Second Circuit found \textit{Vizzini} to be an "inconclusive" precedent, since there were factual distinctions in the two cases, and the Third Circuit in \textit{Vizzini} explicitly reserved decision on the precise issue. Id.
\textsuperscript{109} 569 F.2d 754, 761-62 (3d Cir. 1977). Taking account of the Third Circuit's reasoning in \textit{Vizzini}, the Second Circuit in \textit{Hockridge} said: "We note that the level of symbiosis between liability and damages that existed in \textit{Vizzini} ordinarily would not pertain to partial verdicts on separate counts of an indictment." 573 F.2d at 758 n.15. But the Second Circuit's observation loses its force where, as in \textit{Hockridge}, there is an interdependence between counts, and particularly so, where that interdependence is created by the trial court's charge to the jury. See note 13 and accompanying text supra.
\textsuperscript{110} 569 F.2d at 762 n.2.
Criminal Cases

Criminal cases obviously do involve partial verdicts of the Hockridge-type. To be sure, there are bifurcated criminal trials too, where the first phase focuses on guilt or innocence, and the second on punishment. But from a partial verdict perspective, such cases are no different from bifurcated civil trials — except perhaps for the higher degree of solicitude for the rights of a criminal defendant. The far more interesting cases are those, like Hockridge, where partial verdicts are taken after one trial. How partial verdicts in their current form became an accepted part of our law is a fascinating story, one that underscores the need to be wary of unexplained extensions of legal principles as well as the need to reexamine conventional wisdom.

Rule 31(b)

The Federal Rules of Criminal Procedure authorize partial verdicts as to several defendants but are silent with respect to partial verdicts as to different counts in an indictment. Rule 31(b) of the rules does permit "the jury at any time during its deliberations [to] return a verdict or verdicts with respect to a defendant or defendants." It contains nothing that specifically permits partial verdicts on different counts as were taken in Hockridge. Nor does the rule even so much as refer to partial verdicts on separate counts.

Despite the relatively unambiguous wording of rule 31(b), some courts, including the Second Circuit in Hockridge, have cited the rule as authority for partial verdicts on separate counts. In discussing rule 31(b), Professor Wright states that the jury may render "one or more verdicts on those counts or defendants on which it is agreed" and then "resume its deliberations about the remaining charges." He then states, "In permitting the practice

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111 See, e.g., McGautha v. California, 402 U.S. 183, 186-87 (1971) (bifurcated trial in capital case). In Spencer v. Texas, 385 U.S. 554, 567-68 (1967), however, the Supreme Court pointed out that, "[t]wo-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure."

112 Fed. R. Crim. P. 31(b); see 573 F.2d at 756 n.12.


here described, rule 31(b) is in accord with the prior law.”

This extension of rule 31(b) to partial verdicts on separate counts cannot be based on the language of the rule itself. Indeed, Professor Moore’s commentary on rule 31(b) is more careful and more faithful to the rule’s actual text. Moore, unlike Wright, confines his discussion only to multidefendant cases and omits entirely any discussion of multicount cases. Thus, given the text of rule 31(b), Wright’s extension, if it has any support at all, must be grounded in the “prior law” to which he refers.

“Prior Law”

The “prior law” referred to by Wright is at best unclear. Of the five cases he cites, the three which were decided prior to the effective date of the Federal Rules of Criminal Procedure consist of two Second Circuit decisions written by Learned Hand in the early 1930’s and a 1941 decision by the Seventh Circuit. Above all others, Learned Hand must bear responsibility for extending partial verdicts from multiple defendants to multiple counts. Judge Hand’s innovation was either inadvertent, careless, or intentionally surreptitious, but in any event, it is clearly exposed by examining his decisions in United States v. Cotter, decided in 1932, and in United States v. Frankel, decided a year later.

In Cotter, one of the cases cited as “prior law” by Professor Wright, a jury in a criminal case reported that it had reached agreement as to all but one defendant. The jury found the corporate defendant guilty of all counts, two individuals guilty of one

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116 Id. at 369.
117 See 8A J. Moore, supra note 17, ¶ 31.02(2).
118 Two of the five cases cited by Professor Wright were decided after the effective date of the Federal Rules of Civil Procedure and, therefore, as a simple matter of timing, offer no support for his comments. The two post-1946 cases cited by Professor Wright are United States v. Conti, 361 F.2d 153 (2d Cir. 1966), vacated and remanded, 390 U.S. 204 (1968), and Claimos v. United States, 163 F.2d 593 (D.C. Cir. 1947).
120 United States v. Frankel, 65 F.2d 285 (2d Cir.), cert. denied, 290 U.S. 682 (1933); United States v. Cotter, 60 F.2d 689 (2d Cir.), cert. denied, 287 U.S. 666 (1932).
121 United States v. Skidmore, 123 F.2d 604 (7th Cir. 1941), cert. denied, 315 U.S. 800 (1942).
122 60 F.2d 285 (2d Cir.), cert. denied, 290 U.S. 682 (1933).
count, and one individual not guilty.124 Before recording the verdict, the trial court learned, on inquiry, that the jury had thought only one count was enough and had not even considered the other counts with respect to the individuals.125 The trial judge sent the jury back to consider the other counts. Later the jury found the corporation guilty as before, the two individuals guilty of an additional count, and with respect to the third were still in disagreement.126 They were sent out a third time and were finally discharged.127 It is unclear whether the verdict was recorded before or after the jury was sent out the third time.

On appeal the Second Circuit rejected one defendant’s argument that no verdict should have been recorded until the jury had disposed of the whole case.128 No argument was made that the jury should have been allowed to reconsider its initial finding since it had never been recorded.129 In an opinion that did not expressly deal with partial verdicts as to multiple counts, Judge Hand approved partial verdicts as to multiple defendants, noting that the “only case” found by the court accepted the practice.130 But that case — People v. Cohen,131 decided by the New York Court of Appeals in 1918 — involved a partial verdict as to multiple defendants, not multiple counts.132 If Learned Hand’s research can be trusted, there was no precedent prior to 1932 to support a partial verdict as to separate counts.133

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124 Id.
125 Id.
126 Id.
127 Id.
128 Id. at 690-91.
129 It therefore makes no difference that Hand said, “although it is not absolutely clear, we may assume that [the jury was] given to understand that their deliberation was over as to the twenty-fifth [count].” 60 F.2d at 690.
129 Id. at 690-91; see note infra.
131 223 N.Y. 406, 119 N.E. 886 (1918).
133 The Second Circuit in Hockridge cited McDonald v. Commonwealth, 173 Mass. 322, 329, 53 N.E. 874, 875 (1899), as precedent for the acceptance of a partial verdict as to separate counts, 573 F.2d at 757 n.12, but that case has unique facts that do not support the general taking of partial verdicts as to separate counts. After the trial judge in McDonald charged the jury, the jury returned a guilty verdict on four counts. The clerk was asking the
By the time the Second Circuit decided Frankel a year later, Judge Hand had transformed Cotter’s rationale completely. In Frankel, the court of appeals permitted a judge to record a partial verdict on one count and send the jury back to redeliberate on the other counts. Judge Hand indulged in no extensive analysis, saying simply, “We have recently upheld this practice,” citing Cotter. But neither Cotter, nor its rationale, nor the sole case it relied on, upheld the practice of taking partial verdicts as to multiple counts. Therein lies the story of Learned Hand’s innovative technique regarding partial verdicts. By means of a maddeningly terse nod to a recent but inapposite precedent written by himself, Judge Hand became midwife to a new doctrine which greatly expanded the scope of partial verdicts.

Building on this sleight of Hand, subsequent courts and commentators have seized on its taken-for-granted extension, assuming it represented the settled and considered state of the law, rather than the startling innovation that it was. For example, such was the stature of Learned Hand that in 1941, the Seventh Circuit in United States v. Skidmore cited Cotter and Frankel as authoritative precedent for rejecting the contention that a defendant was put in double jeopardy by allowing a jury to return a verdict as to one indictment, and then after redeliberating, to find him guilty on a second indictment, where both indictments were tried together. Cotter, Frankel, and Skidmore comprise all of the “prior law” that Wright contends “is in accord” with the practice of taking partial verdicts as to multiple counts. Yet Cotter cannot fairly be read that way, Frankel is based on the false premise of

134 65 F.2d 285 (2d Cir.), cert. denied, 290 U.S. 682 (1933).
135 Id. at 288-89.
136 Id. at 288; see 60 F.2d 689 (2d Cir.), cert. denied, 287 U.S. 666 (1932).
137 See, e.g., 4 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 2242 (1951).
138 123 F.2d 604 (7th Cir. 1941).
139 Id. at 611. In rejecting the defendant’s contention, the court simply stated that it had “no merit” and cited the Cotter and Frankel opinions as authority for its position. Id.
140 See text accompanying note 115 supra.
Cotter, and Skidmore depends on the imagined synergy of Cotter and Frankel. In none of these cases is there any genuine discussion, consideration, or evaluation of the practice of taking partial verdicts on multiple counts. Perhaps aware of the doubtful authority for taking partial verdicts on multiple counts, the draftsmen of rule 31(b) carefully provided for partial verdicts as to multiple defendants only.\footnote{141}

Current Practice

Regardless of the dubious genesis of partial verdicts on multiple counts, the practice does exist today. Several cases, relying on the generally accepted though doubtful interpretation of the Learned Hand cases, have approved the practice.\footnote{142} New standard form jury charges include an instruction for partial verdicts on multiple counts as well as multiple defendants.\footnote{143} Under prevailing practice, a court is permitted to ask a jury, after it has deliberated for a reasonable length of time or after it has reported a deadlock,\footnote{144} if it has reached agreement as to any count or defendant.\footnote{145} If such agreement has been reached, the jury may then report it, and the court may then send the jury back for further deliberations on remaining counts or defendants.\footnote{146} Even if well-entrenched, however, the practice of taking partial verdicts still needs to be evaluated since it has escaped intensive scrutiny in the past.

\footnote{141}{According to the Advisory Committee, rule 31(b), as so limited, "is a restatement of existing law." S. Doc. No. 175, 79th Cong., 2d Sess. 52 (1946). By avoiding the whole subject of partial verdicts on multiple counts, the draftsmen were accurately reflecting the state of the existing law. The framers' comment on "existing law" is, on analysis, more persuasive as a contemporary construction than Wright's reference to "prior law."}


\footnote{143}{See, e.g., 1 E. DeVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 18.16, at 611 (1977).}

\footnote{144}{A court is not \textit{required} to ask a jury that reports itself deadlocked whether there is agreement on any count of a multicount indictment. United States v. Medansky, 486 F.2d 807, 810 (7th Cir. 1973), \textit{cert. denied}, 415 U.S. 989 (1974).}

\footnote{145}{See id. at 810 n.3; United States v. DeLaughter, 453 F.2d 908, 910 (5th Cir.), \textit{cert. denied}, 406 U.S. 932 (1972); United States v. Conti, 361 F.2d 153, 159 (2d Cir. 1966), \textit{vacated and remanded}, 390 U.S. 204 (1968); Clainos v. United States, 163 F.2d 593, 596-97 (D.C. Cir. 1947).}

\footnote{146}{See United States v. Barash, 412 F.2d 26, 31-32 (2d Cir.), \textit{cert. denied}, 396 U.S. 382 (1969).}
Partial verdicts do have advantages. In any given case a jury may agree as to certain issues but be hopelessly deadlocked as to others. In such a situation, the taking of a partial verdict permits a resolution of those issues susceptible to resolution, and if there are no further deliberations, really amounts to a complete verdict as to those issues. Beyond that situation the perceived advantages of partial verdicts depend to some extent on one's perception of the nature and function of partial verdicts.

Viewing partial verdicts solely as a "hedge" device—an administrative convenience to save time, effort, and money—leads fairly easily to perceiving finality as the predominant interest served by such verdicts. In Hockridge, the government argued at every stage, and the court of appeals agreed, that a recorded partial verdict should be final for all purposes. The rationale for this position is that if partial verdicts were not final, a juror "would be free to upset a verdict, be it for conviction or acquittal, as many times as he desired as long as the jury's deliberation continued . . . . Trial courts would quite clearly be inhibited from taking any such 'non-final' verdict."148

Neither the government nor the Second Circuit, however, explained why partial verdicts must be final for all purposes. To argue as they did is to ignore other possible advantages of partial verdicts, as well as to presume, on the basis of nothing more empirical than mere assertion, how trial courts would react. It is just as plausible that trial courts will be equally willing to take partial verdicts that are final except in the event of a change resulting from further deliberations. Such a partial verdict still provides a significant hedge against unforeseeable events.

"Of course, finality is not sought for its own sake," said the Second Circuit in Hockridge. The traditional reasons for taking partial verdicts do not require their absolute finality. As the court of appeals in Hockridge noted, "The reason for taking a partial verdict is apparent in cases where there has been a long trial and there exists the prospect of long deliberations. By taking a partial verdict, the court is able to hedge against the possibility of juror

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147 573 F.2d at 759.
148 Brief for United States at 28-30, United States v. Hockridge, 573 F.2d 752 (2d Cir. 1978).
149 573 F.2d at 759.
illness or death or prejudice by publicity.”

Indeed, the district court itself had stated: “The purpose of taking a partial verdict is to avoid a costly and time-consuming retrial in the event that one of the jurors becomes incapacitated.” All of that may well be true, but it does not necessarily mean that a partial verdict must be final for all purposes as soon as it is rendered.

If partial verdicts are held final for all purposes, then at least some of the perceived advantages of partial verdicts will be purchased at a price. Finality may prematurely freeze a jury into a partial verdict that the subsequent course of deliberations reveals to be unwise. Thus a partial verdict should be likened only to an early estimate of guilt or innocence, an estimate that is subject to revision in light of further deliberation. Finality is therefore an unrealistic way to account for a jury’s decisionmaking process in a partial verdict situation.

Absolute finality of partial verdicts violates common sense and experience with provisional hypotheses, particularly in deliberative decisionmaking groups. Such hypotheses often undergo change as more investigation, more light, and more discussion take place. For example, judges often have formed initial positions following oral argument, only to change their positions after more reflection or after reading draft opinions for the majority and the dissent.

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1. Id.
3. See Tribe, Trial by Mathematics: Precision and Ritual in The Legal Process, 84 Harv. L. Rev. 1329, 1350 (1971). Professor Tribe describes the deliberative process of the “rational factfinder” as follows:

In deciding a disputed proposition, a rational factfinder probably begins with some initial, a priori estimate of the likelihood of the proposition's truth, then updates his prior estimates in light of discoverable evidence bearing on that proposition, and arrives finally at a modified assessment of the proposition's likely truth in light of whatever evidence he has considered. When many items of evidence are involved, each has the effect of adjusting, in greater or lesser degree, the factfinder's evaluation of the probability that the proposition before him is true.

Id.

4. Permitting the jury to update its “prior estimates” does not violate the policy of not intruding on a jury's wide latitude in reaching its decision, and the judicial system's knowing wink at irregularities. See Hornig v. District of Columbia, 254 U.S. 135, 138 (1920) (“The jury has the power to bring in a verdict in the teeth of both law and facts.”); O. Holmes, Collected Legal Papers 237-38 (1920); Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 18 (1910). It is, rather, a far more basic effort to permit and encourage proper decisionmaking.


6. As one member of the Supreme Court recently explained:
The tentative decision made by appellate judges in conference following oral argument resembles a partial verdict, and that decision is subject to change prior to publication of the formal written decision.

The same reality applies to jury verdicts. Certainly votes taken in the jury room prior to being returned in court are preliminary.\(^\text{156}\) One court has noted with insight that this “applies particularly where more than one count has been submitted to the jury, for continuing deliberations may shake views expressed on counts previously considered.”\(^\text{157}\)

**A New Hybrid Approach**

The solution to this riddle of finality lies in a new, more flexible, hybrid approach. A partial verdict should operate as a final verdict if one of certain potential happenstances — juror illness or death or prejudice by publicity or similar possibilities — actually takes place, while at the same time should be nonfinal if further deliberations bring about a change of mind on the part of the jury. Such an approach is fully consistent with the advantages inherent in partial verdicts since it provides the “hedge” thought necessary. Yet it avoids exalting finality and interfering with the decision-making process of the jury. The suggested approach recognizes the

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Often some of those who voted with him at the conference will say that they want to reserve final judgment pending circulation of the dissent. It is a common experience that drafts of dissenting opinions change votes, even enough votes to become the majority. Before everyone has finally made up his mind, a constant interchange goes on while we work out the final form of the Court opinion. Stewart, *Inside the Supreme Court*, N.Y. Times, Oct. 1, 1979, § a, at 17, cols. 2-4. Cf. Adler, *The Justices and the Journalists*, N.Y. Times, Dec. 16, 1979, § 7, at 26 (“Now it must be obvious, on a moment’s reflection, that it is desirable — even essential to the judicial process — that the Justices be able sometimes to persuade one another, to change their minds.”). See also *Corporacion de Mercadeo Agricola v. Mellon Bank Int’l*, 608 F.2d 43, 48 (2d Cir. 1979) (“on a renewed motion for summary judgment before a second judge, the district court must balance the need for finality against the forcefulness of any new evidence and the demands of justice. . . . [F]urther reflection may allow a better informed ruling in accordance with the conscience of the court”).

\(^\text{156}\) See, e.g., United States v. Taylor, 507 F.2d 166, 168 (5th Cir. 1975), and cases cited therein.

\(^\text{157}\) Id. at 168. It is only fair to point out, however, that the court in *Taylor* added that while “[j]urors are not bound by votes in the jury room and remain free to register dissent even after the verdict is announced,” they should do so “before the verdict is recorded.” Id. *Taylor* nonetheless recognized the underlying principle of tentative decisions in the decisionmaking process, and quite clearly stands for the proposition that “a jury has not reached a valid verdict until deliberations are over.” Id. Of course deliberations are not “over” when a jury continues to deliberate.
significant qualitative difference between fortuitous possibilities, such as juror incapacity or impermissible prejudice on the one hand, and contemplated and routine occurrences, such as changes of mind in light of further deliberation, on the other.

Perhaps aware of the reality of the decisionmaking process, courts omit to instruct jurors that any partial verdict, once rendered, is absolutely final. Typically, the instructions suggest that partial verdicts might help the jury to proceed "systematically." But where there is nothing in these instructions to indicate that a recorded partial verdict is unchangeable and immutable forever, a jury might well think a partial verdict was entirely nonfinal. To hold a partial verdict absolutely final in such circumstances might involve some deception of the jury. Nevertheless, a partial verdict reached under such circumstances, even if tentative, would still be valuable to orderly and systematic decisionmaking.

Partial verdicts must be considered in the nature of tentative, working hypotheses subject to change prior to the jury's discharge. Therefore, if they are allowed at all they must be regarded only as assumptions adopted to permit or facilitate further deliberations, assumptions that are not immutable until the jury is discharged. The juror, like the journalist and judge, "must formulate his views and, at every step, question his conclusions, tentative or otherwise." This approach is the only approach fully consistent with scientific method, whose hallmark is a readiness to abandon theory when the facts so demand. Changes in our early hypotheses indicate that we are progressively realizing the ideal, since they arise from corrections in previous observations or reasoning, and such

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158 In Clainos v. United States, 163 F.2d 593 (D.C. Cir. 1947), the trial judge, in a mild and reasonable tone, described the procedure for rendering a partial verdict to the jury as follows:

I suggest — and this is only a suggestion — that perhaps you can make orderly progress and most expeditious progress if you proceed systematically and take the various counts of the indictment, one by one, and reach a conclusion on each count, if you can, separately. If you should come to a situation where you can agree on a verdict on some of the counts, but not on the others, come in and return a verdict on those counts that you can agree on and then we will determine whether to send you back and ask you to deliberate on other counts.

Id. at 596.

159 Id.


161 See, e.g., M. Cohen & E. Nagel, An Introduction to Logic and Scientific Method 394 (1934).
correction means that we are in possession of more reliable facts. In science, law, or any intellectually honest discipline, we select that hypothesis most probable on the factual evidence; it is the task of further inquiry to find other factual evidence that will increase or decrease the probability of such a theory. Applying any hypothesis involves some risk, for it may not in fact be applicable. Viewing partial verdicts as tentative, working hypotheses, however, is a self-corrective process that makes possible the noting and correction of errors by continued application of itself prior to jury discharge.

Although it may well be too late to turn back the clock on the basic question of the propriety of partial verdicts on multiple counts, it is not too late to query whether a jury instructed to continue deliberating as to remaining counts can reconsider findings of guilt that it has reported earlier.162

IV. WEAVING THE STRANDS TOGETHER

Determining the proper circumstances for impeachment of partial verdicts requires weaving the policies behind the rules for impeachment of complete verdicts together with the policies embodied in partial verdicts. Central to any such determination is the meaning and effect of rule 606(b) of the Federal Rules of Evidence, which governs the admissibility of a juror's statements to impeach a verdict or indictment. Although rule 606(b) permits a juror to impeach his verdict where “extraneous prejudicial information” is brought to his attention, or where he is improperly subjected to “outside influence,” the rule prohibits a juror from “testify[ing] 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” which may have influenced him to “assent to or dissent from the verdict.”163

The court of appeals noted in Hockridge that, “neither the cases nor the treatises definitively answer the question whether rule 606(b) bars the impeachment of a partial verdict by the voluntary and spontaneous testimony of a juror prior to the jury's discharge.”164 The determination called for by this “difficult and

162 See 1 E. Devitt & C. Blackmar, supra note 143, at 612.
163 Fed. R. Evid. 606(b).
164 573 F.2d at 758. The court continued: “Even the leading treatises ignore the relationship between Rule 606(b) and partial verdicts after which a jury continues its delibera-
novel” problem must, then, proceed from basic principles and policies.

Reasoning from basic principles and policies, the Second Circuit in *Hockridge* concluded that rule 606(b) did bar consideration of spontaneous and voluntary statements by jurors regarding the regularity of a partial verdict after the partial verdict was recorded but before the jury was discharged. The court found no basis for distinguishing the application of rule 606(b) to complete verdicts on the one hand and to partial verdicts followed by continuing deliberations on the other. The *Hockridge* court cast the issue in terms of three relevant policy interests — freedom of deliberation, verdict finality, and freedom from postverdict annoyance, embarrassment, or harassment — and held that the appellants’ position was defective because “it mischaracterized the impeachment of partial verdicts as not implicating the jury’s freedom of deliberation” and because it overlooked verdict finality.

Given the difficult nature of the problem, it is appropriate to reexamine the Second Circuit’s reasoning in *Hockridge* to see if it is, after all, the correct approach. Prior to *Hockridge* there was no precedent directly on point, and it is still too early to tell what kind of reception *Hockridge* will receive.

On close analysis, the decision in *Hockridge* is fundamentally deficient in several respects. In the first place, the court incorrectly evaluated two of the three factors actually discussed. It overlooked its own intrusion into the freedom of jury deliberations, while at the same time misinterpreting rule 606(b), thus exalting finality over other interests. The second fundamental flaw in the Second Circuit’s analysis is that it totally ignored countervailing considerations justifying impeachment of a partial verdict, thereby skewing the inquiry in favor of nonimpeachment.

**Freedom of Jury Deliberations**

The first consideration relied on by the court of appeals in *Hockridge* involves freedom of jury deliberations. The court said that the inquiry requested by the appellants in *Hockridge* “would

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165 Id. at 759.
166 Id.
167 Id.; see notes 169-217 and accompanying text infra.
168 See notes 1-8 and accompanying text supra.
have necessitated scrutiny of the deliberations of the jury including the mental processes of the jurors."\(^{169}\) Such a result would, according to the Second Circuit, be "inconsistent with the strictures of rule 606(b)," which embodies a "strong congressional purpose of protecting the jury deliberation process."\(^{170}\) Recognizing that rule 606(b) does not on its face apply to partial verdicts, the court reasoned that "the policy against intrusion into internal deliberations remains the same."\(^{171}\) The court, moreover, expressly assumed that in enacting the Federal Rules of Evidence, Congress had in mind the Federal Rules of Criminal Procedure, including rule 31(b).\(^{172}\) As a result, the court in Hockridge concluded that, "while the freedom of jury deliberations is less threatened by impeachment of partial verdicts than by impeachment of verdicts generally, it is, nevertheless, clearly impinged."\(^{173}\)

This conclusion is based on a series of demonstrable errors. In applying rule 606(b) to partial verdicts the court in Hockridge extended that rule's scope far beyond any justification in its text or legislative history and in fact clearly violated the congressional intent behind rule 606(b).

**Text of Rule 606(b).** By its own terms, the evidentiary bar of rule 606(b) applies only "[u]pon an inquiry into the validity of a verdict or indictment."\(^{174}\) The language itself implies the existence of a "verdict" to be inquired into and, as a matter of ordinary interpretation in light of existing law, would seem inapplicable before jury discharge.\(^{175}\) By invoking rule 606(b) prior to deciding

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\(^{169}\) 573 F.2d at 759.

\(^{170}\) Id. Fed. R. Evid. 606(b), as originally proposed, stated that "a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." Preliminary Draft of Rule 606(b), 46 F.R.D. 161, 289-90 (1969). Substantial changes were introduced by the Advisory Committee, however, which expanded the exclusionary principle to reach "any matter or statement occurring during the course of the jury's deliberations." See Fed. R. Evid. 606(b). Even with the addition of two exceptions — for "extraneous prejudicial information" and "outside influence" — the addition of this new category to the exclusionary principle gave the rule far broader coverage than the originally proposed version of rule 606(b). Although Congress gave serious consideration to the more narrow proposal, see 120 Cong. Rec. 2374-75 (1974), the rule was enacted in its broader form. See Mueller, Juror's Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b), 57 Neb. L. Rev. 920, 927-32 (1978).

\(^{171}\) Id.; see notes 179-81 and accompanying text infra.

\(^{172}\) 573 F.2d at 759.

\(^{173}\) 573 F.2d at 759.

\(^{174}\) Fed. R. Evid. 606(b).

\(^{175}\) See notes 178-79 and accompanying text infra. Professor Wigmore has noted, in
what constitutes a "final verdict," the court in *Hockridge* begged the crucial threshold question. Certainly nothing on the face of rule 606(b) suggests its applicability to spontaneous and voluntary statements by jurors regarding a partial verdict before deliberations have been concluded.

**Congressional Intent.** Even if there is some ambiguity in the text of rule 606(b), the legislative history behind it shows that Congress plainly intended it *not* to apply to inquiries prior to the end of trial. To be sure, the Second Circuit was obviously correct in stating that rule 606(b) embodies a "strong congressional purpose of protecting the jury deliberation process," as would any rule of evidence barring any type of inquiry into jury deliberations. But the court of appeals totally ignored the congressional intent to encourage such inquiries during the course of deliberations.

Congress decided to make posttrial inquiries difficult precisely because such difficulty would impel jurors to make any complaints before, and not after, the trial ended. This is made clear in the House-Senate Conference Report of Rule 606(b) which states why the participants rejected a House proposal to delete the proscription against juror testimony about any matter or statement occurring during the course of the jury's deliberations: "The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations." Yet in spite of such palpable evidence of specific contrary congressional intent, the Second Circuit held that the policy against intrusion into internal jury deliberations embodied in rule 606(b) applies with equal force to inquiry into partial verdicts before jury deliberations have ended.

The Second Circuit's additional argument that Congress passed rule 606(b) mindful of rule 31(b) of the Federal Rules of

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reference to the nonimpeachment principle:

The reasons for the foregoing rule, namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is made by the judge and takes place before the jurors' discharge and separation.

8 Wigmore, EVIDENCE § 2350, at 691 (McNaughton ed. 1961) (emphasis in original).

176 See note 178 infra.


Criminal Procedure\textsuperscript{178} is nothing more than a makeweight, and an extraordinarily weak one at that. Presumably, the court of appeals was implying that Congress was well aware of the partial-verdict procedure supposedly authorized by rule 31(b), and that rule 606(b) had to have been enacted with an eye toward partial verdicts. But there is nothing in the legislative history of rule 606(b) that refers to rule 31(b), and there is nothing in the language of rule 31(b) that would necessarily call to mind partial verdicts as to different counts.\textsuperscript{180} Nonetheless, the court in \textit{Hockridge} relied on the legislative history of rule 606(b), though it referred to such legislative history as "perhaps not determinative."\textsuperscript{181} More accurate analysis shows that the legislative history of rule 606(b) is determinative of a result opposite to that reached by the court of appeals.

\textbf{A Speculative Threat.} More significantly, the court in \textit{Hockridge} never articulated exactly how jury deliberations would be impinged if a different result had been reached by the court. Apparently the court's premise was that any scrutiny of jury deliberations which includes the mental processes of the jurors constitutes a threat to the freedom of jury deliberations, no matter when such scrutiny occurs, who conducts it, or what causes it.\textsuperscript{182} As framed by the Second Circuit, this premise is false and far too overbroad. Under the Second Circuit's formulation, every instruction from the judge, every complaint of misconduct, and every contact between jury and judge would be a threat to the freedom of jury deliberations. Yet these situations have never been perceived as a sufficient threat to the freedom of jury deliberations to prevent contact between the jury and the court.\textsuperscript{183} On the contrary, the law specifically contemplates and encourages such contacts in order to maintain the integrity of the factfinding process.\textsuperscript{184} The

\textsuperscript{178} 573 F.2d at 759. See note 112 and accompanying text supra.

\textsuperscript{180} See notes 112-41 and accompanying text supra. The \textit{Hockridge} court noted that the relationship between rule 606(b) and partial verdicts had not been analyzed by the treatise authors; it also indicated that there was an absence of case law on the matter. 573 F.2d at 758 & n.17.

\textsuperscript{181} 573 F.2d at 759.

\textsuperscript{182} \textit{Id.} The \textit{Hockridge} court's assertion that scrutiny of the mental processes of jurors is to be avoided may be limited to scrutiny after rendering a partial verdict. The \textit{Hockridge} court, however, did not so limit its rationale.

\textsuperscript{183} See generally 6A J. \textit{Moore}, supra note 17, ¶ 59.08[4].

\textsuperscript{184} Rule 606(b) specifically allows a juror to testify concerning "extraneous prejudicial information" or "outside influence" impacting upon the jury even after a trial verdict has been rendered. \textsc{Fed. R. Evid.} 606(b). Where there is evidence of intrusion into jury deliberations, the trial judge may conduct an examination to determine the prejudicial effect, if any.
The simple fact is that the Second Circuit's perceived threat to the freedom of deliberations is speculative, theoretical, and traditionally has been outweighed by other factors — such as justice and fairness to litigants — which counsel in favor of some control, however mild, over a jury prior to its discharge.\textsuperscript{185}

\textit{The Real Threat.} Paradoxically, the holding of \textit{Hockridge}\textsuperscript{186} itself constitutes a far more serious threat to the freedom of jury deliberations in cases involving partial verdicts. A realistic view of the deliberative process shows that a partial verdict operates as a jury's tentative, working hypothesis.\textsuperscript{186} The provisional conclusion temporarily suffices as a basis for the jury to go on with its deliberations on other issues. But the working hypothesis should be subject to revision after further consideration and discussion prior to the end of the trial, lest the jury be deprived of the freedom to arrive at its result in the freest and most reasonable fashion. This is particularly true of situations where the judge's instructions, designed for ordinary citizens as opposed to legal scholars,\textsuperscript{187} create an interdependence between issues. For example, the fact that the jury in \textit{Hockridge} was given a modified \textit{Pinkerton}\textsuperscript{188} instruction that tied the conspiracy charge to the substantive counts, establishes the reasonable possibility that the jurors thought the partial verdict on the conspiracy charge should have been changed after analysis of the evidence relating to the substantive counts.\textsuperscript{189} What could be more logical on the part of the jurors and more in the interest of freedom of jury deliberations? Jurors cannot stop forming tentative hypotheses, but they can cease articulating them openly.\textsuperscript{190} If partial verdicts are not susceptible to modification, jurors may become reluctant to report a partial verdict. By invoking

\begin{itemize}
\item See Remmer v. United States, 347 U.S. 227, 229-30 (1954); Morgan v. United States, 399 F.2d 93, 97 (5th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).
\item Accord, Morgan v. United States, 399 F.2d 93, 97 (5th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).
\item See notes 152-60 and accompanying text supra.
\item See note 13 supra.
\item Cf. Herbert v. Lando, 441 U.S. 153, 208 (1979) (Marshall, J., dissenting) (referring to possible reactions by journalists to pretrial discovery in libel cases). Merely because the jury offers its finding in open court does not mean that it should, or in fact can, freeze that issue out of its further deliberations.
\end{itemize}
the policy of freedom of deliberations as a justification for prematurely freezing a jury into a partial verdict before it has fully considered the relationship between the partial verdict and the rest of verdict, the court in Hockridge has turned the interest in freedom of jury deliberations inside out.

Verdict Finality

The second interest relied on by the court of appeals in Hockridge involves “verdict finality.” Aware that finality “obviously would be enhanced” by not allowing impeachment of partial verdicts, the court added that, “of course, finality is not sought for its own sake.”191 The court went on to say, however, that a partial verdict should be given final effect since, as Learned Hand had said in Cotter: “It would only promote irresponsible hesitation to tell [the jury] that they must reserve their decision altogether until they got through; the appellants had no right in [the jury's] subsequent vacillations.”192 Noting that a partial verdict enables a judge “to hedge against the possibility of juror illness or death or prejudice by publicity,”193 the Second Circuit concluded that a “recorded partial verdict ought not be disturbed absent a showing of the type which would permit impeachment of a complete verdict.”194

This conclusion does precisely what it disclaims; it exalts finality for its own sake, at the expense of other competing interests. Less obviously but no less importantly, it fails to promote the reasons underlying the concept of verdict finality. Moreover, in its quest for finality at all costs, the Hockridge court not only erred in equating partial and complete verdicts, but also misapplied its own test by refusing to use jury discharge as the cutoff point for finality.195

Finality Enthroned At The Expense of Freedom of Jury Deliberations. The court’s quotation from Learned Hand in support of verdict finality seriously cuts against the court’s other basis for decision—freedom of jury deliberations. Once past the reverence to

191 573 F.2d at 759.
192 Id. (quoting United States v. Cotter, 60 F.2d 689, 690 (2d Cir.), cert. denied, 287 U.S. 666 (1932)). Cotter is a frequently—if inappropriately — cited case for the propriety of partial verdicts as to different counts. See notes 121-41 and accompanying text supra.
193 573 F.2d at 759.
194 Id. at 759-60.
195 See notes 205-13 and accompanying text infra.
Learned Hand, and alert to the allure of his phrasing, we see that what Judge Hand pejoratively calls "irresponsible hesitation" and "subsequent vacillation" may just as easily be referred to in a complimentary tone as "responsible suspension of final judgment" and "later, intelligent and informed modification of a tentative working hypothesis after full consideration of all evidence on all issues." Judge Hand's rather one-sided concern in Cotter to prevent "hesitation" and "vacillations" must be weighed in the balance against freedom of jury deliberations.

Freedom of deliberations means a jury should not be prematurely pushed to a verdict before it is absolutely ready, absolutely sure that it thinks such a verdict is correct within the confines of the applicable burdens of proof. Yet the Second Circuit's adoption of the Cotter formulation chills freedom of deliberations. It embodies an attitude antagonistic to the full, robust, and uninhibited evaluation and reevaluation by a jury before rendering a final verdict.

A perfect example of this inhibiting effect can be seen where, as in Hockridge, an interdependence exists between various issues. The jury in Hockridge was told that it could find the defendants guilty of the substantive counts if it concluded that the defendants were guilty of conspiracy to commit certain acts. Since the disputed partial verdict of guilt related to the conspiracy count, the jury may well have proceeded on the incorrect assumption that there was a conspiracy in order to find the defendants guilty of the

198 See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), cert. denied, 100 S. Ct. 1061 (1980), where the court, referring to the "cryptic" and "characteristically striking prose by Judge Hand," said: "In examining this language . . . we perceive Hand the philosopher. As an operative rule of law, however, the . . . phrase does not suffice." Id. at 273-74.

199 Judge Hand's attitude in Cotter should be contrasted with his attitude in Jorgensen v. York Ice Mach. Corp., 160 F.2d 432 (2d Cir.), cert. denied, 332 U.S. 764 (1947), where the court of appeals declined to set aside a civil verdict achieved by compromise, but did accept as evidence the postdischarge affidavits of jurors. In the course of his opinion, Judge Hand wrote that "judges again and again repeat the consecrated rubric [the nonimpeachment rule] which has so confused the subject; it offers an easy escape from embarrassing choices." Id. at 435.

198 Although the trial judge may encourage the jury to strive to reach a verdict, see Allen v. United States, 164 U.S. 492 (1896), his statements may necessitate a retrial if their effect is to coerce the jury into reaching a verdict. See Jenkins v. United States, 380 U.S. 445, 446 (1965); United States v. Scott, 547 F.2d 334, 337 (6th Cir. 1977); United States v. Taylor, 530 F.2d 49, 51 (5th Cir. 1976); United States v. Thomas, 449 F.2d 1177, 1181-83 (D.C. Cir. 1971).

199 See note 13 supra.
substantive counts. There is no way to tell whether or not the jury used the conspiracy conviction as the basis for the substantive conviction.\textsuperscript{200} The refusal to set aside a partial verdict that has been repudiated before the end of deliberations thus inhibits the freedom of those very deliberations. The interest in verdict finality then assumes preeminence in derogation of the equally important interest in the freedom of jury deliberations.

\textit{Failure to Further Underlying Interests in Finality.} Ironically, treating partial verdicts as final fails even to promote the interests thought to be served by finality of verdict.\textsuperscript{201} Although inroads in the concept of verdict finality generally tend to undermine confidence in the integrity of our procedures,\textsuperscript{202} the opposite occurs where a partial verdict is repudiated before deliberations are over. Such confidence is enhanced, however, if the questionable verdict is not treated as final and is set aside. Indeed, treating such a partial verdict as final would tend to do the very undermining the finality rule was designed, at least in part, to prevent.

Since a court in a \textit{Hockridge}-type case becomes aware of the problems with the partial verdict before the trial is over, the interest in preventing endless litigation is likewise irrelevant. There is no subsequent litigation, no collateral attack, no increased volume of judicial work, no delay in the orderly administration of justice, and no retrial. Whereas finality normally discourages what might be a flood of attacks on verdicts, the \textit{Hockridge} court itself recognized that it was dealing with a case of first impression.\textsuperscript{203} The lack of precedent is more likely due to the rarity of the factual occurrence than to the lack of defense counsel's ingenuity. In short, none of the interests underlying verdict finality — except for administrative convenience — is served by treating partial verdicts as final.\textsuperscript{204}

\textsuperscript{200} Even if the jury could have ignored the modified \textit{Pinkerton} instruction and found the defendants guilty for other reasons, we cannot be certain that this is what actually occurred. \textit{See Sandstrom v. Montana}, 442 U.S. 510 (1979); R. Traynor, \textit{The Riddle of Harmless Error} 23 (1970).

\textsuperscript{201} \textit{See} notes 43-49 and accompanying text supra.


\textsuperscript{203} Any deluge of litigation in this context is airy speculation and "should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles." \textit{Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics}, 403 U.S. 388, 411 (1971) (Harlan, J., concurring) (constitutional tort for violation of Fourth Amendment rights). \textit{See also Davis v. Passman}, 442 U.S. 228 (1979).

\textsuperscript{204} \textit{See note 232 infra}; 8A J. Moore, \textit{supra} note 17, ¶ 31.08[1], at 31-69.
Rejection of Jury Discharge as Finality Cutoff. It is equally ironical that although it ultimately held that partial and complete verdicts should be treated exactly alike for impeachment purposes, the court in Hockridge rejected jury discharge as the point when finality attaches to a partial verdict. The Second Circuit thus misapplied its own test by refusing to use the same test for finality of both partial and complete verdicts. The authorities are unanimous, however, that a complete verdict becomes final only on jury discharge, and sometimes remains nonfinal for a short period after discharge. The Second Circuit noted this “usual rule,” and furthermore stated that with respect to partial verdicts, it could “perceive no reasons of sufficient magnitude to depart from the normal rules governing impeachment of jury verdicts.” Yet, without breaking stride, it departed from those normal rules by making a partial verdict final the moment it is recorded instead of when the jury is discharged.

Relying on nothing more than the force of assertion, and without even attempting to reconcile its conclusion with the usual rule, the court stated that the recording of a partial verdict marks the cutoff point for finality. The court cited no case or other authority — and research has disclosed none — for the proposition that a complete verdict becomes final on recording rather than discharge. The acid test for the court’s theory is the outcome where jurors repudiate a complete verdict between recording and discharge, but in that case, repudiation is proper. Inasmuch as a recorded com-

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205 573 F.2d at 758.
207 E.g., Jorgensen v. York Ice Mach. Corp., 160 F.2d 432 (2d Cir.), cert. denied, 332 U.S. 764 (1947) (accepting as evidence postdischarge affidavits of jurors); Mattice v. Maryland Cas. Co., 5 F.2d 233 (W.D. Wash. 1925) (new trial ordered where, immediately after discharge and following announcement of verdict and polling, juror stated he dissented). See also 8 J. Wigmore, supra note 48 at § 2350 (“and even after an initial discharge, the judge may reconvene [jury]”). A fortiori, these cases support consideration of jurors’ impeaching statements after the verdict is recorded but before discharge.
208 573 F.2d at 758 & n.16.
209 Id. at 759.
210 Id.
211 Id.
212 See notes 80 & 207 and accompanying text supra. In United States v. Pleva, 66 F.2d 529, 533 (2d Cir. 1933), the Second Circuit said, “we leave untouched the question of what effect may be given to proof offered, after a verdict is recorded, of what transpired during
plete verdict is not final until jury discharge, *Hockridge* makes a recorded partial verdict more final than a recorded complete verdict.

This assertion by the Second Circuit not only marks a striking departure from precedent, but also constitutes a non sequitur with significant consequences for the finality of complete verdicts. In view of the court's unique approach to the subject, it would have been better and more candid if the court had launched its holding as an entirely new doctrine, instead of sailing it under the complete verdict flag.

Yet the familiar standard of jury discharge reflects the benefit of extensive experience, accommodates the factors relevant to verdict finality, and provides the relative simplicity and clarity necessary to the implementation of workable rules for both complete and partial verdicts. It would be better to adopt a clean-cut rule that all verdicts are nonfinal until jury discharge. Such an approach would simplify the law of impeachment without seriously derogating from the values protected by verdict finality. This approach also accords with the inherently tentative nature of partial verdicts, which by definition, are incomplete. The decisionmaking process requires them to be provisional too.213

**Postverdict Annoyance**

A third interest identified by the court of appeals in *Hockridge* concerns "freedom from postverdict annoyance, embar-

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213 Of course, a partial verdict can be either favorable or unfavorable, and a litigant will not mind at all if an unfavorable partial verdict is later changed to a favorable final verdict, but will be chagrined if events take the opposite course, and a favorable partial verdict becomes an unfavorable final verdict. Yet such chagrin should be one of the expected and accepted risks of the adversary process. It should take only slight education for litigants to learn the limits of their reasonable expectations in this regard, and to grasp the point that nonfinal partial verdicts are a two-way street. Even in a criminal context, where a nonfinal partial verdict of not guilty may become a final verdict of guilty, there is no special problem, and no violation of the double jeopardy clause. By definition, a nonfinal partial verdict of not guilty in no way constitutes a binding acquittal, thereby failing to activate any claim of former jeopardy. See, e.g., *Wade v. Hunter*, 336 U.S. 684 (1949); *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). See also *Downum v. United States*, 372 U.S. 734 (1963); *Gori v. United States*, 367 U.S. 364 (1961). Since there is only one trial, there is no second jeopardy. Moreover, as a matter of logic and symmetry, the concept of nonfinal partial verdicts necessarily implies the possibility that any nonfinal partial verdict — favorable or unfavorable — may be altered before jury discharge.
rassment, or harassment." This interest reflects the longstanding policy against encouraging defeated litigants and their lawyers to approach jurors after a verdict to find out how the verdict was reached. In reaching its conclusion, the court of appeals in Hockridge did not rely on this third consideration because the facts simply did not implicate it.

It is a simple matter to contemplate situations where the facts would impinge on the postverdict freedom of jurors. A significantly different case would be presented, for instance, if the defendants in Hockridge or their lawyers had approached and solicited statements from jurors either during or after their deliberations. In that event, a court could rightly hold that such procurement clearly violates one of the important interests sought to be protected by the nonimpeachment rule.

**Countervailing Considerations**

The ultimate decision to impeach or not to impeach involves a balancing, a choice between the interests sought to be protected by the nonimpeachment rule on the one hand, and injustice to the litigant on the other. Yet the analysis in Hockridge omitted any discussion whatsoever of the cluster of considerations that impeachment would have served. Instead of basing its decision on an assessment of the competing societal interests involved, the Hockridge court's focus was limited exclusively to an evaluation of the reasons against impeachment. Certainly those competing interests are of sufficient magnitude, however, to have some bearing on the decision of whether or not impeachment is appropriate.

Chief Justice Burger has recently reminded us that "the func-

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214 See United States v. Hockridge, 573 F.2d at 758; Miller v. United States, 403 F.2d 77, 82 (2d Cir. 1968).
215 See, e.g., McDonald v. Pless, 238 U.S. 264, 267 (1915); United States v. Moten, 582 F.2d 654, 664-67 (2d Cir. 1978); Miller v. United States, 403 F.2d 77, 81-82 (2d Cir. 1968).
216 See generally 573 F.2d at 758-59.
217 See McDonald v. Pless, 238 U.S. 264, 267 (1915)("the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what happened in the jury room."); United States v. Moten, 582 F.2d at 665; 6A J. Moore, supra note 17, § 69.08[4], at 69-143 to 144.
218 See generally 573 F.2d at 758-59.
tion of the legal process is to minimize the risk of erroneous decisions.\footnote{Addington v. Texas, 441 U.S. 418, 425 (1979). \textit{See also} Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Speiser v. Randall, 357 U.S. 513, 525-26 (1958).} Our judicial system has traditionally been concerned with the integrity of the procedures used to ascertain the truth at a criminal trial.\footnote{\textit{See generally} United States v. United States Coin & Curr., 401 U.S. 715, 717-22 (1971); Williams v. United States, 401 U.S. 646, 653-55 (1971); Desist v. United States, 394 U.S. 244 (1969); Stovall v. Denno, 388 U.S. 293, 297-98 (1967); Johnson v. New Jersey, 384 U.S. 719, 729 (1966).} It is essential that the guilt-determining process be scrupulously free from and above even the appearance of taint or impropriety.\footnote{\textit{People v. De Jesus, 42 N.Y.2d 519, 369 N.E.2d 752, 399 N.Y.S.2d 196 (1977).}} To this end, the Supreme Court has recognized the importance of adopting procedures that preserve the appearance of fairness and public confidence in the decisionmaking process.

The situation in \textit{Hockridge} throws grave suspicion on the accuracy and integrity of the partial verdict. More than one juror said, before deliberations were over, that they had reasonable doubt about the guilt of certain defendants, that they had been "railroaded" into a "miscarriage of justice," and that they had surrendered their honest convictions.\footnote{\textit{Duncan v. Louisiana,} 391 U.S. 145, 156 (1968).}

Allowing a partial verdict to stand in such circumstances makes relevant an inquiry into several specific rights of the criminal defendant, particularly those surrounding a jury trial. If, as is generally agreed, a jury trial is a basic and hallowed right of a defendant in serious criminal cases, the proud boast of a free society, embodying a deep national commitment as a defense against arbitrary law enforcement,\footnote{\textit{Andres v. United States,} 333 U.S. 740, 748-49 (1948); \textit{Patton v. United States,} 281 U.S. 276 (1930). Not only is unanimity required by case law and tradition, it is also required by rule 31(a) of the Federal Rules of Criminal Procedure and probably by the sixth amendment. \textit{See} Apodaca v. Oregon, 406 U.S. 404, 414 (1972) (Powell, J., concurring). \textit{See generally} Orfield, \textit{Verdict in Federal Criminal Cases,} 15 MERCER L. REV. 378 (1964).} then there should be corresponding protections to assure the propriety of the results of a jury trial. One such protection lies in the well-recognized requirement that a jury verdict in a federal criminal case be unanimous.\footnote{\textit{573 F.2d at 757.}} But the repudiation of a partial verdict by jurors before discharge makes a verdict less than unanimous. Related to the unanimity requirement is the level of proof required for conviction. A criminal defendant is
cloaked with a presumption of innocence,\footnote{Although the Supreme Court recently has trimmed the scope of the presumption of innocence, see Kentucky v. Wharton, 441 U.S. 786, 789 (1979) (per curiam) (jury instruction regarding presumption not always required as a matter of due process); Bell v. Wolfish, 441 U.S. 520, 533 (1979) (presumption allocates burden of proof in criminal trials but does not effect rights of pretrial detainee during confinement before trial has started), "[w]ithout question, the presumption of innocence plays an important role in our criminal justice system." Id. at 533.} and a verdict of guilt must be based on proof beyond a reasonable doubt.\footnote{\textit{In re Winship}, 397 U.S. 358, 363-64 (1970); see C. WRIGHT, \textsc{Federal Practice and Procedure} § 403, at 66 (1969).} Guilt cannot be said to have been proven beyond a reasonable doubt when one or more jurors at the end of deliberation still possesses such a doubt.

It may be that most if not all of these considerations are present in every case presenting a question of impeaching a jury verdict. Nevertheless, they are real and need to be evaluated, lest, as in \textit{Hockridge}, they be overlooked entirely.

From this analysis emerge certain principles applicable to determining whether or not a partial verdict in a criminal case should be set aside following revelations of jury irregularities. As a matter of methodology, the ultimate decision whether or not to impeach a partial verdict involves careful evaluation of the three basic interests traditionally sought to be protected by the nonimpeachment rule and a balancing of the results of that evaluation against whatever affirmative reasons exist for allowing impeachment.

In the context of this methodology, four basic conclusions may be drawn. First, whereas inquiry into a partial verdict prior to jury discharge may, in some theoretical and speculative sense, impinge on the abstract freedom of jury deliberations, an absolute bar to such inquiry would pose a much more clear and present danger to that same freedom, especially where different jury issues are interdependent. Moreover, Congress designed rule 606(b) to bar posttrial inquiry and to encourage such inquiry while jury deliberations were still going on. Second, a partial verdict should not be treated as final until the jury is discharged; until then it is akin to a tentative working hypothesis made necessary by the realities of deliberative decisionmaking. Third, a spontaneous and voluntary statement by a juror prior to discharge in no way diminishes the protection of jurors from posttrial annoyance and harassment. Finally, affirmative reasons — such as the integrity of the guilt-determining process, the requirements of jury unanimity and proof
beyond a reasonable doubt, and the presumption of innocence — counsel in favor of impeachment of partial verdicts.

The net result of the called-for balancing is that where a juror makes a spontaneous and voluntary statement after a partial verdict has been recorded but prior to jury discharge, a court should consider such statement as if it were made after a complete verdict had been recorded but before jury discharge. If the statement would be insufficient to require redeliberation as to a previously recorded complete verdict, then it should not be sufficient to require redeliberation as to a previously recorded partial verdict. But if it would be enough in the complete verdict case, then the defendant in the partial verdict case should not be put at a disadvantage and made to suffer simply because a partial verdict rather than a complete verdict was used in his case; the juror’s statement should justify redeliberation as to the previously recorded partial verdict.

V. Conclusion

These emergent principles should be capable of straightforward application, without creating undue difficulty for a trial judge. In Hockridge, the court of appeals strongly disapproved of Judge Bonsal’s discussion with the two jurors, “which to some extent implied that they might, along with the other jurors, reconsider the recorded verdict.”\textsuperscript{228} The Second Circuit “emphasize[d] ... that in the future the appropriate action of the trial judge faced with a similar request by a juror to reconsider a prior recorded partial verdict should be to advise the juror simply that such a verdict is final.”\textsuperscript{229} But the propriety of the Second Circuit’s solution depends wholly upon the acceptability of its premise — that recorded partial verdicts are final for all purposes. If the Hockridge premise is incorrect, however, then another solution must be devised.

The most appropriate solution — as well as the simplest and most obvious — is for the trial judge to set aside the partial verdict that is impeached and instruct the jury as a whole to redeliberate as to the questioned verdict. There is no need whatsoever to declare a mistrial with its attendant waste of resources, unless the reason for impeachment justifies doing so.\textsuperscript{230} In the usual case, all

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  \item\textsuperscript{228} 573 F.2d at 760.
  \item\textsuperscript{229} Id.
  \item\textsuperscript{230} For a discussion of when a mistrial should be declared as a result of irregularities in
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that is necessary is to allow the jury another chance. It is a solution that has been followed in similar circumstances.\(^{231}\)

In the end of the problem of impeaching partial verdicts is a problem of balancing. The nonimpeachment rule as applied to partial verdicts is convenient. The *Hockridge* court evidently chose convenience over other values. But there are other values, and convenience is a rather insignificant justification for precluding impeachment of partial verdicts.\(^{232}\) Until now, *Hockridge* has been largely ignored. Yet, it has left much in the way of usable lessons and enduring implications, and, if only for pedagogical purposes, the problems it presents should not escape notice.

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\(^{231}\) See, e.g., United States v. Fox, 488 F.2d 1093, 1094 (5th Cir. 1973), cert. denied, 417 U.S. 948 (1974); United States v. Sexton, 456 F.2d 961 (5th Cir. 1972); Grace Lines, Inc. v. Motley, 439 F.2d 1028, 1032 (2d Cir. 1971); Williams v. United States, 419 F.2d 740, 746 (D.C. Cir. 1969) (en banc); Cook v. United States, 379 F.2d 966 (5th Cir. 1967); Bruce v. Chestnut Farms-Chevy Chase Dairy, 126 F.2d 224 (D.C. Cir. 1942). Professor Wigmore advocates the same position:

[T]he judge, in his just and usual control of the proceedings, may refuse to accept it [the verdict] as final and may require the jury to retire again to make the verdict more specific or more clear. This procedure is a traditional part of jury trial. In principle it is equivalent to holding the first utterance of the foreman as tentative and informal only.

8 J. Wigmore, supra note 48 § 2350, at 691-92 (emphasis in original).

\(^{232}\) In Frontiero v. Richardson, 411 U.S. 677, 690 (1973), the Supreme Court said "administrative convenience" is "not a shibboleth, the mere recitation of which" justifies government conduct. *Id.* See also 3 D. Louisell & C. Mueller, FEDERAL EVIDENCE § 286, at 112 (1979) ("Convenience, however, is no justification for the [non-impeachment rule]. It runs against the grain of a democratic society to sanction a deliberate attempt to hide from view the imperfections of its institutions.").