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The principle that state action must be compatible with the basic rights of citizens is a keystone of our political system. In America, an early illustration may be found in the refusal of the original states to ratify the Constitution unless specific guarantees were incorporated therein.

One such protection, the right to trial by jury in a federal criminal prosecution, was embodied in the sixth amendment. However, this provision does not apply to all state criminal proceedings.[1] On the state level, jury trial is provided for by the various state constitutions. For example, the New Jersey Constitution provides that "the right to trial by jury shall remain inviolate."[2] Implicit in such a guarantee is the right to a trial by an impartial jury whose verdict will be based on the evidence, and not bias. If this were not so, the utilization of the jury as opposed to a single judge would tend to multiply the probability that prejudice would influence the verdict.

In the recent case of *State v. Levitt*,[3] the defendant, a physician, was indicted for committing a "private act of lewdness" upon one of his patients. The act was allegedly perpetrated while the complainant was under hypnosis. The jury found him guilty. Shortly thereafter, one of the jurors informed the trial judge of certain prejudicial remarks uttered by another juror. These remarks, which consisted of derogatory statements about the religion of the defendant's character witnesses, were made in deciding what weight should be given to their testimony.[4] The defendant utilized this juror's affidavit in support of his motion for a new trial. The trial judge granted the motion and the state appealed. The Supreme Court of New Jersey, reaffirming its traditional adherence to the minority rule allowing impeachment of a verdict by a juror, *held* that the existence of religious prejudice in the juryroom was not a "thought process of jurors" into which no inquiry could be made but rather, constituted an external circumstance which could be grounds for setting aside the verdict.

The majority of jurisdictions, however, categorically prohibit impeachment by a juror.[5] This approach was enunciated for the first time in *Vaise v. Delaval*.[6] In that

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[1] Maxwell v. Dow, 176 U.S. 581, 603 (1900).

[2] N.J. CONST, art 1, §9.

[3] 36 N.J. 266, 176 A.2d 465 (1961).

[4] *Id.* at ———, 176 A.2d at 466.

[5] 8 WIGMORE, EVIDENCE §2352, at 696-97, (McNaughton rev. ed. 1961).

[6] 1 Term Rep. 11, 99 Eng. Rep. 944 (K.B. 1785).

case, Lord Mansfield refused to receive a juror's affidavit that sought to overturn the verdict by showing that it was reached by flipping a coin. He maintained that while such conduct was reprehensible, no juror could testify to it. Yet a stranger who saw the "transaction through a window, or by some other means"[7] could testify. The law, even in 1785, was not so much concerned with what misconduct on the part of the jury warranted a new trial, as with who would be legally competent to testify to it. Today, the law still stresses the competency of jurors to impeach their own verdict. The approach of the *Vaise* case has been justified on various grounds. For example, it prevents "tampering with the jurors,"[8] forecloses the possibility of harassment of a juror by an unsuccessful litigant who seeks evidence of misconduct as the basis for a motion for a new trial,[9] and prohibits a juryman who might succumb to bribery or one who was dissatisfied with the verdict from destroying it by impeachment.[10] On the other hand, the case has been criticized because it tempts litigants to bribe bailiffs to eavesdrop;[11] furthermore, since the juror is closer to any misconduct than a non-juror, he is the one best suited to give the most accurate description and thereby limit the possibility of mistake.[12]

The majority position presents little difficulty in application since a juror is never allowed to impeach a verdict. Again, it must be stressed that it is not a question of whether this or that irregular conduct by a juror requires a new trial, but whether a juror will be heard to testify to it, and thereby impeach the verdict. Thus, in jurisdictions which adhere to the majority rule, courts have held that a juror's affidavit cannot be used to set aside a verdict in the following instances: where a juror was maliciously motivated against the plaintiff;[13] where one juror stated that other jurymen reached the verdict relying on "women's intuition";[14] where one member of the jury claimed that she was pressured into voting for a conviction by the male jurors;[15] or where a juror visited the scene of the accident in a negligence proceeding and reported his findings to the other jurors.[16]

As far as New York is concerned, early cases bring it within the majority camp.[17] Later cases confirm its unwillingness to permit a juror to impeach.[18] "It is well settled law in this State that statements or affidavits of jurors which tend to impeach their verdict may not be used on a motion

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[7] *Ibid.*

[8] State v. Kociolek, 20 N.J. 92, 118 A.2d 812, 815 (1955).

[9] McDonald v. Pless, 238 U.S. 264, 267 (1915).

[10] Payne v. Burke, 236 App. Div. 527, 529, 260 N.Y. Supp. 259, 262 (4th Dep't 1932).

[11] 8 WIGMORE, *op. cit. supra* note 5, §2353, at 699.

[12] Wright v. Illinois & Mississippi Tel. Co., 20 Iowa 195, 211-12 (1866).

[13] Payne v. Burke, *supra* note 10.

[14] People v. Walker, 154 Cal. App. 2d 143, 315 P.2d 740 (Dist. Ct. App., 2d Dist. 1957).

[15] People v. Van Camp, 356 Mich. 593, 97 N.W.2d 726 (1959).

[16] Tartacower v. New York City Transit Authority, 9 Misc. 2d 606, 169 N.Y.S.2d 695 (Sup. Ct. 1957).

[17] Williams v. Montgomery, 60 N.Y. 648 (1875) (memorandum decision); Dalrymple v. Williams, 63 N.Y. 361 (1875) (dictum).

[18] Schrader v. Gertner, 282 App. Div. 1064, 126 N.Y.S.2d 521 (2d Dep't 1953) (memorandum decision); Atikian v. Chang Wen Ti, 153 Misc. 881, 276 N.Y. Supp. 228 (Sup. Ct. 1934). See also People v. Sprague, 217 N.Y. 373, 111 N.E. 1077 (1916) (Defendant attempted to use juror's affidavit to impeach verdict).

to set aside such verdict."[19] However, there is one distinction to be made in connection with this "well settled law." This distinction, based on the cases of *People v. Leonti*[20] and *McHugh v. Jones*[21] only exists where a juror questions the legal validity of a verdict as opposed to misconduct on the part of members of the jury. Misconduct, as such, will not warrant a new trial.

In *People v. Leonti,* the defendant's attorney met one of the jurors on the street after the rendition of the verdict. The juror told counsel that "I wouldn't believe a Sicilian under oath. . . ."[22] The court granted a motion for a new trial, distinguishing this case from one wherein a juror seeks to impeach a verdict. The court's theory was that the juror, because of bias, had never legally qualified so that the "verdict" under attack had no legal validity.

In *McHugh v. Jones* a juror concealed her acquaintance with the defendant's wife during their *voir dire* examination. During the trial she attempted to persuade the other jurors to vote for the defendant. After the rendition of the verdict, several of the other jurors sought to impeach it by making affidavits concerning her statements during the course of the trial.[23] The court, in granting a new trial, followed *Leonti* by distinguishing the situation in question from one involving impeachment of a valid verdict. As in *Leonti,* the reasoning was that no binding verdict existed due to the fact that one of the jurors, though impanelled, had in reality failed to qualify because of prejudice. However, *McHugh* went one step further than *Leonti* inasmuch as in the former, the court's action was based on the testimony of members of the jury while in the latter, the testimony of defendant's counsel was relied upon.

To summarize, New York's position is in accord with the majority view that a juror's testimony will not be received in order to set aside a legally valid verdict. However, where it can be demonstrated, whether by the jurors themselves or by third parties, that no such valid verdict exists due to some legal disqualification, a new trial will be granted.

Prior to an examination of the minority attitude, it should be mentioned that some jurisdictions have dealt with the problem by statute. Some allow a juror to overturn the verdict in criminal proceedings,[24] while others permit it in a civil action.[25] The statutes usually indicate under what particular circumstance the juror will be heard by the court.[26] For example, Rule 59(b) of the North Dakota Rules of Civil Procedure provided that a juror may impeach any verdict that is reached by chance. In North Dakota, this is the only ground for an impeachment of the verdict

[19] Atikian v. Chang Wen Ti, *supra* note 18, at 882, 276 N.Y. Supp. at 230.

[20] 262 N.Y. 256, 186 N.E. 693 (1933) (per curiam).

[21] 258 App. Div. 111, 16 N.Y.S.2d 332 (2d Dep't 1939), *aff'd,* 283 N.Y. 534, 29 N.E.2d 76 (1940) (per curiam).

[22] People v. Leonti, 262 N.Y. 256, 258, 186 N.E. 693, 694 (1933) (per curiam).

[23] McHugh v. Jones, 258 App. Div. 111, 16 N.Y.S.2d 332 (2d Dep't 1939), *aff'd,* 283 N.Y. 534, 29 N.E.2d 76 (1940) (per curiam).

[24] ARK. STAT. §43—2204 (1947); MONT. REV. CODE ANN. §94—7603 (1947); TEX. CODE CRIM. PROC. art. 753 (1925).

[25] CAL. CIV. PROC. CODE §657; N.D. RULES CIV. PROC. 59(b).

[26] Arkansas, California, Montana and North Dakota allow a juror to impeach only where the verdict is the result of chance.

by a juror.[27] The same restriction holds true for the other jurisdictions having similar statutes.

A minority of jurisdictions have rejected the *Vaise v. DeLaval* decision in favor of the so-called Iowa rule announced in *Wright v. Illinois & Mississippi Tel. Co.*[28] In that case, the basis for the defendant's motion for a new trial was the affidavit of a juror who swore that the jury calculated the measure of damages by totaling their respective estimates and dividing by the number of jurors. The court allowed a juror to impeach the verdict but it was careful to distinguish between overt acts which can be the basis for a juror's impeachment, and matters that inhere in the verdict which cannot. This distinction has been employed by the Commissioners for Uniform State Laws. Rule 41[29] of the Uniform Rules of Evidence states that no evidence can be received concerning the mental processes by which a verdict is reached, but Rule 44[30] provides that a juror is competent to testify to other extraneous factors that have a "material bearing on the verdict."

With regard to this "overt-inherent" distinction, courts have characterized the following as matters that inhere in the verdict: a juror's misunderstanding of the judge's instruction;[31] an agreement between the jurors to acquit certain defendants in return for the conviction of other defendants desired by one faction of the jury;[32] and the unsound reasoning whereby a verdict was reached.[33] On the other hand, the following have been deemed to be overt acts or extraneous influences: a juror's statement that he heard that defendant had offered 20,000 dollars to settle;[34] a juror's description of real property whose value was involved in an eminent domain proceeding;[35] and a report to the other jurors by a juryman who had visited the site of the accident in a negligence action.[36]

Considerations such as the following have been offered in favor of the majority position: "[c]ases might arise in which it would be impossible to refuse [jurors' affidavits] . . . without violating the plainest principles of justice."[37] From a legal standpoint, the jury's verdict is to be based on the evidence, and nothing else. When factors not in evidence influence the verdict, the jurors "poison the fountain of justice at its source."[38]

The federal solution to the problem of a juror's impeachment of a verdict offers the least consistency of any attitude yet discussed. In *Mattox v. United States,*[39] the defendant, on trial for murder in the first degree, predicated his motion for a new trial on a juror's affidavit that stated

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[27] State v. Graber, 77 N.D. 645, 44 N.W.2d 798 (1950).

[28] 20 Iowa 195 (1866).

[29] UNIFORM RULE OF EVIDENCE 41.

[30] UNIFORM RULE OF EVIDENCE 44.

[31] State v. Register, —— Iowa ——, 112 N.W. 2d 648 (1962).

[32] Hyde v. United States, 225 U.S. 347, 383-84 (1912).

[33] State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955).

[34] Southern Pac. Co. v. Klinge, 65 F.2d 85 (10th Cir.), *cert. denied,* 290 U.S. 657 (1933).

[35] City of Amarillo v. Emery, 69 F.2d 626 (5th Cir. 1934).

[36] Capozzi v. Butterwei, 2 N.J. Super. 593, 65 A.2d 144 (1949).

[37] United States v. Reid, 53 U.S. (12 How.) 361, 366 (1851).

[38] Southern Pac. Co. v. Klinge, *supra* note 34, at 88.

[39] 146 U.S. 140 (1892).

that the bailiff had read a prejudicial account of the trial from a newspaper to the jury. The Supreme Court, in allowing the verdict to be impeached, utilized the "overt-inherent" distinction. Some later cases, while reaching different results, have consistently applied the distinction used in the *Mattox* case.[40] Yet, there are other federal cases[41] that come extremely close to espousing the majority rule that a juror cannot impeach under any circumstances. In an attempt to resolve this divergency, two of the more recent cases[42] have adopted a new approach. According to this reasoning, each case involving the impeachment of a verdict by a juror should be decided on an *ad hoc* basis. In reaching this conclusion, Judge Hand has stated: "[W]e shall accept what the affidavit said . . . and . . . we shall decide whether it requires the relief asked."[43]

As already indicated, the court in the present case follows the minority rule in allowing a juror to impeach on the basis of overt acts which evidence prejudice and further holds that religious bias on the part of a juror is sufficient grounds for setting aside a verdict. The court cites *State v. Kociolek*[44] in which a juror was allowed to impeach. In that case, the defendant was charged with murder. The jury decided that he was guilty, but as to whether or not a recommendation of clemency should be made, one juror mentioned that the defendant had also been indicted for robbery and assault with intent to kill prior to his commission of the alleged murder for which he was now on trial. The court accepted the juror's affidavit as competent to show an overt act or extraneous condition that required a new trial.

The result reached in the instant case would be similar in New York based on the discussion above of *McHugh v. Jones*.[45] However, the instant case takes a more realistic approach, while New York, by means of a rather artificial distinction, allows a juror to overturn a verdict indirectly by showing either legal invalidity of the verdict or disqualification of a juror, through bias or some other cause. However, with regard to misconduct, as such, New York will not allow impeachment by a juror.

While the minority attitude does appeal to one's sense of justice, it does admit of one practical difficulty. There is no time limit after which a juror could not impeach. Hence, a juror, who has wrestled with his conscience for a year or five years after the rendition of a verdict, might be heard to challenge it by showing misconduct. This might work irreparable damage to the finality with which verdicts are supposed to be clothed.

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[40] Hyde v. United States, 225 U.S. 347, 383 (1912); United States v. Furlong, 194 F.2d 1 (7th Cir. 1952); Walker v. United States, 298 F.2d 217 (9th Cir. 1962).

[41] McDonald v. Pless, 238 U.S. 264 (1915); Johnson v. Hunter, 144 F.2d 565 (10th Cir. 1944.)

[42] Jorgensen v. York Ice Machinery Corp., 160 F.2d 432 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947); Klimes v. United States, 263 F.2d 273 (D.C. Cir. 1959).

[43] Jorgensen v. York Ice Mach. Corp., *supra* note 42, at 435.

[44] 20 N.J. 92, 118 A.2d 812, 816 (1955).

[45] 258 App. Div. 111, 16 N.Y.S.2d 332 (2d Dep't 1939), *aff'd*, 283 N.Y. 534, 29 N.E.2d 76 (1940) (per curiam).