Note

Jury Secrecy During Deliberations

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Jurors are expected to follow the law and participate in deliberations, yet under current law there is no way for a judge to ensure that this occurs. *United States v. Brown*[1] illustrates this problem. After thirteen weeks of trial and five weeks of deliberations, one of the jurors in the case sent a note to the judge stating, "I Bernard Spriggs am not able to discharge my duties as a member of the jury."[2] The judge called juror Spriggs into the courtroom to question him about why he was unable to continue deliberating. After an abbreviated and inconclusive exchange, the judge cut off his questioning, deciding that any additional inquiry would intrude on the secrecy of the jury's deliberations.[3] Although the judge's interrogation did not establish decisively why the juror wished to be discharged, the judge ruled that the juror should be dismissed for "just cause"[4] on the ground that the juror would not follow the law and therefore could not fulfill his duties.[5] Three weeks after the dismissal of juror Spriggs, eight weeks after the start of deliberations, and twenty-one weeks after the beginning of the trial, the remaining eleven jurors returned with a guilty verdict. This verdict did not stand; on appeal, the D.C. Circuit overturned the jury's conviction, finding that juror Spriggs was improperly dismissed.

The Federal Rules of Criminal Procedure allow a judge to dismiss a juror "for just cause,"[6] but do not elaborate on what might constitute just cause for dismissal. Three federal circuits—the D.C. Circuit in *United*

1. 823 F.2d 591 (D.C. Cir. 1987).
2. *Id.* at 594.
3. *Id.* at 595.
4. *See* FED. R. CRIM. P. 23(b).
5. 823 F.2d at 595.
6. FED. R. CRIM. P. 23(b).

States v. Brown,[7] the Second Circuit in *United States v. Thomas*,[8] and, most recently, the Ninth Circuit in *United States v. Symington*[9]—have limited a judge's discretion to dismiss a nondeliberating juror for cause. These courts found that if there is "any possibility"[10] or "any *reasonable* possibility"[11] that the juror's refusal to deliberate stems from her views about the sufficiency of the evidence in the case, the judge can neither investigate further nor dismiss the juror. The usual result is a hung jury.

Because inquiries to establish just cause are restricted, the trial judge is unable to dismiss a nondeliberating juror if there is any ambiguity about why the juror will not participate in deliberations.[12] This outcome did not go unnoticed by these three appellate courts. As the court in *Brown* recognized, "unless the initial request for dismissal [of a nondeliberating juror] is transparent, the court will likely prove unable to establish conclusively the reasons underlying it."[13] The three courts, however, preferred to restrict a judge's investigatory power over the alternative: intruding on the secrecy of the jury's deliberations.

The courts in *Brown*, *Thomas*, and *Symington* explained that "the need to safeguard the secrecy of jury deliberations requires the use of a high evidentiary standard for the dismissal of a *deliberating* juror."[14] They found preserving the secrecy of jury deliberations to be more important than investigating whether just cause exists for dismissal. As the *Thomas* court explained,

> [W]e are compelled to err in favor of the lesser of two evils—protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity. Achieving a more perfect system for monitoring the conduct of jurors in the intense environment of a jury deliberation room entails an unacceptable breach of the secrecy that is essential to the work of juries in the American system of justice. To open the door to the deliberation room any more widely and provide opportunities for broad-ranging judicial inquisitions into the thought processes of jurors would, in our view, destroy the jury system itself.[15]

For these courts, the question of which value should prevail was a simple one: They would tolerate jurors who disregarded the law, jurors who

7. 823 F.2d 591.
8. 116 F.3d 606 (2d Cir. 1997).
9. 195 F.3d 1080 (9th Cir. 1999).
10. *Thomas*, 116 F.3d at 622; *Brown*, 823 F.2d at 596.
11. *Symington*, 195 F.3d at 1087.
12. *See, e.g.*, *Thomas*, 116 F.3d at 621.
13. 823 F.2d at 596.
14. *Thomas*, 116 F.3d at 618; *see Symington*, 195 F.3d at 1087; *Brown*, 823 F.2d at 596.
15. *Thomas*, 116 F.3d at 623.

refused to deliberate, and hung juries, rather than intrude, even slightly, on the sanctity of the jury's deliberations.

This Note argues that the courts in *Brown*, *Thomas*, and *Symington* struck the wrong balance between jury secrecy and judicial inquiry. These courts placed too much emphasis on the secrecy of a jury's deliberations and too little trust in a judge's ability to question deliberating jurors impartially. They failed to appreciate the difference between postverdict juror secrecy, which is protected by Federal Rule of Evidence 606(b), and preverdict juror secrecy, which is neither as well-defined nor as absolute. In relying on a generalized conception of jury secrecy, these courts did not recognize that the values and policy rationales supporting postverdict secrecy are not parallel to the concerns that apply while a jury is still deliberating. This Note asserts that, to strike a more appropriate balance between secrecy and preverdict judicial inquiry, the restrictions on judicial investigation adopted in *Brown*, *Thomas*, and *Symington* should be relaxed. When a problem arises in the jury room, judges should be given more latitude to question deliberating jurors in order to determine whether a juror should be dismissed for just cause.

Part I examines the use of the jury secrecy rationale in *Brown*, *Thomas*, and *Symington* to limit a judge's ability to investigate whether a juror can be dismissed for just cause. Part II discusses the historical development and limits of postverdict juror secrecy, focusing on the impeachment doctrine. Part III explains the policies underlying postverdict secrecy and the inapplicability of these policies to the preverdict context. Part IV explores uniquely preverdict values that compete with jury secrecy during deliberations. This Part first examines what is expected of the jury during deliberations, namely that it be a fully participatory and actively deliberating body, and then looks at the protection of holdout jurors during deliberations. Part V describes the role of preverdict judicial inquiry in mediating between a protection of jury secrecy and other preverdict concerns. Part VI concludes that viewing preverdict secrecy based solely on an analogy between preverdict and postverdict secrecy fails to appreciate the different values that come into play before and after a verdict is reached. When a deliberating jury is experiencing problems with one or more of its members, narrowly tailored judicial inquiry can strike an appropriate balance between protecting secrecy and promoting the preverdict values of full participation and active deliberation.

I. JUROR DISMISSAL AND JURY SECRECY IN *BROWN*, *THOMAS*, AND *SYMINGTON*

Until 1983, when a judge in a criminal trial was presented with an incapacitated or disqualified juror, she would have to discharge the juror

and declare a mistrial unless the parties had agreed before trial to accept a jury of less than twelve in the event of juror dismissal. This situation resulted from the combination of Federal Rule of Criminal Procedure 23(b), which required a unanimous verdict of twelve jurors unless the parties had stipulated otherwise,[16] and Rule 24(c), which required the court to dismiss alternate jurors at the start of deliberations.[17] If a juror had to be excused after the beginning of deliberations, the effect of strict compliance with these two rules was a mistrial.

In order to remedy this problem, Congress amended Rule 23(b) in 1983. This amendment allowed a judge, upon a finding of just cause, to dismiss a juror even absent agreement among the parties, and then permitted the remaining eleven members of the jury to render a verdict. Rule 23(b) now reads:

> Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors *for any just cause* after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror *for just cause* after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.[18]

As the Advisory Committee's note to this rule states, the rationale behind this change was that "when a juror is lost during deliberations . . . it is essential that there be available a course of action other than mistrial."[19] Consequently, when a trial judge finds "just cause" to dismiss a juror, a verdict can be reached by the remaining eleven members.

A. *Limiting Just Cause for Dismissal*

The D.C. Circuit in *Brown* was the first court to overturn a trial judge's finding of just cause under Rule 23(b).[20] The decision in *Brown* rested on the premise that "a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the evidence."[21] This restriction on dismissal under Rule

16. FED. R. CRIM. P. 23(b) (amended 1983).
17. *Id.* 24(c) (amended 1999).
18. *Id.* 23(b) (emphasis added).
19. *Id.* advisory committee's note.
20. 823 F.2d 591, 597 (D.C. Cir. 1987); Lynne A. Sitarski, Note, United States v. Brown, *823 F.2d 591 (D.C. Cir. 1987)*, 61 TEMP. L. REV. 991, 1012 (1988).
21. 823 F.2d at 596.

23(b) was based on the defendant's right to a unanimous verdict.[22] The *Brown* court found that the judge's questioning of the juror in this case left an "ambiguous" record.[23] Since it was possible that the juror was a holdout, the court held that the trial judge erred in dismissing the juror.[24]

The *Thomas* court agreed with *Brown*'s limitation on juror dismissal. The Second Circuit in *Thomas* overturned a conviction, stating that the judge should not have dismissed a deliberating juror based on his intent to nullify the law.[25] While the Second Circuit held that intent to nullify could constitute just cause for dismissal,[26] the court found that it was unclear in this case whether the juror's position resulted from a desire to nullify or, instead, from reservations about the sufficiency of the evidence.[27]

The Ninth Circuit in *Symington* was the third and most recent appellate court to limit a trial judge's ability to dismiss a juror under Rule 23(b). The court held that "if the record evidence discloses any *reasonable* possibility that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror."[28] In this case, the conviction of former Arizona governor John Fife Symington III was overturned because the Ninth Circuit found that the trial judge erred in dismissing a deliberating juror. After nearly three months of trial and over a week of deliberations, the jury sent a note to the judge expressing concern about the ability of one of the jurors to comprehend the evidence and engage in deliberations. The judge questioned the jurors and then dismissed the problem juror because she was "either unwilling or unable to deliberate with her colleagues."[29] The Ninth Circuit found this dismissal to be in error because it was reasonably possible that the juror's conduct stemmed from her views on the merits of the case.[30] The dissenting judge in *Symington*

22. As the D.C. Circuit reasoned, "[i]f a court could discharge a juror on the basis of such a request, then the right to a unanimous verdict would be illusory." *Id*.; *see* FED. R. CRIM. P. 31(a) (requiring unanimity for federal criminal verdicts). *But see* Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972) (holding that unanimous verdicts are not constitutionally required).

23. 823 F.3d at 597.

24. *Id*.

25. 116 F.3d 606, 624 (2d Cir. 1997).

26. *Id*. at 617. For criticism and commentary on the *Thomas* court's holding that nullification can constitute just cause for dismissal, see, for example, Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 878 (1999); Frank A. Bacelli, Note, United States v. Thomas*: When the Preservation of Juror Secrecy During Deliberations Outweighs the Ability To Dismiss a Juror for Nullification*, 48 CATH. U. L. REV. 125 (1998); Elizabeth I. Haynes, Note & Comment, United States v. Thomas*: Pulling the Jury Apart*, 30 CONN. L. REV. 731 (1998); Recent Case, United States v. Thomas, *116 F.3d 606 (2d Cir. 1997)*, 111 HARV. L. REV. 1347 (1998); and Ran Zev Schijanovich, Note, *The Second Circuit's Attack on Jury Nullification in* United States v. Thomas*: In Disregard of the Law and the Evidence*, 20 CARDOZO L. REV. 1275 (1999).

27. 116 F.3d at 623-24.

28. 195 F.3d 1080, 1087 (9th Cir. 1999). This standard may be slightly less stringent than the "any possibility" standard adopted in *Brown* and *Thomas*. As the court emphasized, the standard it adopted was "any *reasonable* possibility, not any possibility whatever." *Id*. at 1087 n.5.

29. *Id*. at 1084.

30. *Id*. at 1088.

argued that the record clearly indicated that the trial judge did not remove the juror because of her position on the merits, and that "[i]n light of the overwhelming evidence, the trial judge could not have abused his discretion in dismissing [the juror]."[31]

B. *Preserving Jury Secrecy*

Jury secrecy was used by the courts in *Brown*, *Thomas*, and *Symington* as the primary rationale for restricting judicial questioning when a problem arises during deliberations. The court in *Brown* held that once there is "any possibility" that the problem with a juror stems from the juror's doubts about the sufficiency of the evidence, the trial court can neither dismiss the juror nor investigate further.[32] By cutting off judicial questioning once it was possible that a juror was a holdout, the secrecy of the jury's deliberations would be preserved. But in protecting jury secrecy at the expense of judicial inquiry, the courts in *Brown*, *Thomas*, and *Symington* failed to appreciate the differences between preverdict secrecy, or jury secrecy during the course of deliberations, and postverdict secrecy, or jury secrecy after the jury reaches a verdict and is dismissed.

In *Brown*, the D.C. Circuit limited judicial interrogation in order to protect jury secrecy without explaining why preserving secrecy during deliberations was so important. The court did not cite any cases or articles; instead, it merely agreed with the district court, claiming that "a court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations."[33] The absence of any explanation for the reliance on jury secrecy suggests that the *Brown* court simply assumed that preverdict jury secrecy was indistinguishable from the well-established tradition of postverdict jury secrecy.[34]

Of the three appellate court opinions limiting judicial inquiry under Rule 23(b), the opinion in *Thomas* most fully explains why such a high evidentiary standard for dismissal was considered necessary to preserve jury secrecy. The *Thomas* court addressed the issue of jury secrecy in three ways. First, the court described the tradition of jury secrecy, listing three dangers that might result from disclosing the substance of deliberations: undermining public confidence in the jury system, threatening the finality of a verdict, and endangering "the operation of the deliberative process itself."[35] Next, the *Thomas* court discussed the issue of jury secrecy during

31. *Id*. at 1098.
32. 823 F.2d 591, 596 (D.C. Cir. 1987).
33. *Id*.
34. *See* FED. R. EVID. 606(b); *see also infra* Section II.A (discussing the origins and foundations of postverdict secrecy).
35. 116 F.3d 606, 618 (2d Cir. 1997).

deliberations. The court listed several reasons why a jury's deliberations "must remain largely beyond examination and second-guessing, shielded from scrutiny by the court as much as from the eyes and ears of the parties and the public."[36] Among these reasons, the court suggested that judicial investigation could "foment discord among jurors,"[37] "would invite trial judges to second-guess and influence the work of the jury,"[38] and would "permit judicial interference with, if not usurpation of, the fact-finding role of the jury."[39] Finally, in explaining its reliance on jury secrecy, the *Thomas* court created an analogy between protecting preverdict secrecy at the cost of judicial inquiry and Rule 606(b)'s prohibition against juror testimony to impeach a verdict, which has the drawback of allowing some juror misconduct to go unremedied.[40] The *Thomas* court concluded that "[t]he standard that we adopt here with respect to inquiries of deliberating jurors *likewise* recognizes the basic necessity of protecting the secrecy of the jury room, even when this protection places some instances of willful disregard of the applicable law beyond the reach of the court's corrective powers."[41]

The problem with *Thomas*'s defense of jury secrecy is that it does not sufficiently make the case for protecting *preverdict* jury secrecy. In discussing the policies behind jury secrecy, all of the court's citations are to authorities that discuss *postverdict* jury secrecy. One of the court's citations, for example, is to an article by Professor Abraham Goldstein entitled *Jury Secrecy and the Media: The Problem of Postverdict Interviews*.[42] Moreover, in discussing limitations on jury disclosure, the court noted that "[t]oday, it is common—and entirely appropriate—for a conscientious trial judge to advise jurors against disclosing the substance of their deliberations *after the end of a trial*."[43] The court did not explain if these same restrictions applied before the end of a trial. While the *Thomas* court did address the issue of jury secrecy during deliberations, the only authority cited in *Thomas*'s discussion of preverdict secrecy is the one-sentence reference to secrecy in *Brown*.[44] The court did not say whether the various authorities and policies supporting postverdict secrecy are applicable in the preverdict context. The *Thomas* court also failed to discuss whether there are any countervailing values or concerns during

36. *Id*. at 620.
37. *Id*.
38. *Id*.
39. *Id*.
40. FED. R. EVID. 606(b).
41. 116 F.3d at 623 (emphasis added).
42. *Id.* at 619 (citing Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 295).
43. *Id*. (emphasis added).
44. *See supra* text accompanying note 33.

deliberations that might weigh against a strict protection of jury secrecy in the preverdict context. Instead, the court merely fell back on an analogy to postverdict secrecy and the posttrial rule preventing jurors from testifying to impeach a final verdict.

The Ninth Circuit in *Symington* did not add much to the understanding of preverdict jury secrecy. It supported the claims made in *Brown* and *Thomas* that a court may not intrude on the secrecy of the jury's deliberations.[45] The court first noted *Thomas*'s proposition that allowing trial judges more leeway to investigate would invite them to second-guess and influence the jury's work.[46] Second, the court expressed concern that exposing a juror's deliberations to public scrutiny would jeopardize the integrity of the deliberative process.[47] For this proposition, the Ninth Circuit cited authorities discussing postverdict secrecy.[48] Like the courts in *Brown* and *Thomas*, the *Symington* court did not distinguish preverdict jury secrecy from postverdict secrecy, nor did it address preverdict concerns that weigh against imposing strict limitations on a trial judge's ability to question jurors during deliberations.

C. *Consequences of Limiting Judicial Inquiry*

While the courts' understanding of preverdict secrecy in these cases was incomplete, the consequence of their strong protection of jury secrecy is clear: Trial judges will be forced to decide whether or not to dismiss a juror based on limited evidence. In *Symington*, the appeals court stated:

> The district court had to evaluate the issue on the basis of that limited information, information insufficient to support any high degree of certainty as to the underlying motive for the attempt to have [the juror] dismissed. In light of that limited evidence, we conclude that the district court could not have been "firmly convinced" that the impetus for [the juror's] dismissal was unrelated to her position on the merits of the case.[49]

The effect of the holdings in *Brown*, *Thomas*, and *Symington* is to circumscribe strictly a court's inquiry, making it impossible for a judge to determine, in all but the clearest cases, whether the problem with a juror stems from the juror's assessment of the evidence or from the juror's bias, desire to nullify the law, or incompetence. Unless the answer to this

45. 195 F.3d 1080, 1086-87 (9th Cir. 1999).
46. *Id*. at 1086 (citing *Thomas*, 116 F.3d at 620).
47. *Id*.
48. *Id*. (citing Benjamin S. Duval, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 646 (1986); Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 889 (1983)).
49. *Id*. at 1088 n.7.

question is clear, the judge will not be able to dismiss the juror even if the judge believes that the juror is incompetent to serve. As a result, a judge's authority under Rule 23(b) has been significantly diminished.

II. POSTVERDICT JUROR SECRECY

To help explain why an analogy between preverdict and postverdict secrecy is not justified, this Part explores the historical foundation of and limits to postverdict secrecy.[50] This discussion of postverdict juror secrecy focuses on the common-law development of the impeachment doctrine and its codification in Federal Rule of Evidence 606(b). It is not surprising that the *Thomas* court used an analogy to the impeachment rule to justify its protection of preverdict jury secrecy.[51] The notion of preserving the secrecy of a jury's deliberations originated with the impeachment rule,[52] and it is around this rule that the policy discussions of jury secrecy have been the most comprehensive.[53] The development of the impeachment doctrine, however, also reveals that this rule is limited to the postverdict context. The impeachment rule restrains only postverdict statements by jurors. It does not prohibit conversations between the judge and jurors during deliberations.

A. *Historical Development of Postverdict Secrecy*

The rule against impeachment originated in the eighteenth-century common-law rule barring a juror from testifying to overturn a verdict. In 1785, Lord Mansfield wrote in *Vaise v. Delaval* that the testimony of a juror is not admissible to impeach the jury's verdict.[54] Wigmore described this as the doctrine of *nemo turpitudinem suam allegans audietur*: A witness shall not be heard to allege his own turpitude.[55] While Wigmore claimed that Lord Mansfield's adoption of this rule had no basis in precedent, "its authority came to receive in the United States an adherence

50. For more detailed analysis of the origin and history of Rule 606(b), see *United States v. Tanner*, 483 U.S. 107, 117-25 (1987); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 221-25 (1989); Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 513-22 (1988); and Peter N. Thompson, *Challenge to the Decisionmaking Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial*, 38 SW. L.J. 1187, 1196-206 (1985).

51. 116 F.3d 606, 623 (2d Cir. 1997).

52. *See* Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785) (stating that a juror's testimony cannot be used to impeach a verdict).

53. *See* Goldstein, *supra* note 42, at 299 ("Perhaps the most sustained judicial consideration of jury secrecy is the body of law on impeachment of jury verdicts.").

54. 99 Eng. Rep. at 944.

55. 8 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN THE COMMON LAW § 2352 (3d ed. 1940).

almost unquestioned."[56] Early exceptions to this rule took two forms. One exception, known as the Iowa rule, excluded juror testimony about matters that "essentially adhere in the verdict itself," but admitted testimony relating to an "independent fact."[57] This rule was articulated in *Wright v. Illinois & Mississippi Telegraph Co.*,[58] which was "the first major deviation in the United States from the Mansfield rule."[59] In *Wright*, the Iowa Supreme Court permitted testimony that a jury had reached a quotient verdict because this testimony was objectively verifiable and not based on the jury's thought processes during the deliberations.[60]

The Supreme Court, in *Mattox v. United States*, was the next to deviate from the Mansfield rule against impeachment of a jury's verdict.[61] This exception permitted a juror to testify to "external influences" that might have affected the jury's decision, but not to any "internal influences" relating to the jury's deliberation process. In *Mattox*, the Court classified both outside information provided by a bailiff and newspapers brought into the jury room as "external influences."[62] The *Mattox* exception was widely adopted. The Court, in reviewing the history of Rule 606(b), stated that after *Mattox*, "[l]ower courts used this external/internal distinction to identify those instances in which juror testimony impeaching a verdict would be admissible."[63]

The common-law rule against impeachment of a verdict, in conjunction with the exception established in *Mattox*, was incorporated in 1975 into the Federal Rules of Evidence as Rule 606(b).[64] The legislative history of this evidentiary rule shows a debate over whether to adopt the more expansive policy of the Iowa rule, which would preclude only testimony about the effect of statements made during deliberations on the juror's mind or the

56. *Id.*

57. Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 210-11 (1866).

58. 20 Iowa 195.

59. Timothy C. Rank, Note, *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 MINN. L. REV. 1421, 1426 (1992).

60. 20 Iowa at 210.

61. 146 U.S. 140 (1892).

62. *Id.* at 150-51.

63. Tanner v. United States, 483 U.S. 107, 117 (1987).

64. James W. Diehm, *Impeachment of Jury Verdicts:* Tanner v. United States *and Beyond*, 65 ST. JOHN'S L. REV. 389, 413 (1991). Rule 606(b) states:

> Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

FED. R. EVID. 606(b).

jury's decision, or to adopt *Mattox*'s stricter "external influences" approach, which would permit only juror testimony about external influences operating on jurors.[65] The House Judiciary Committee favored the more permissive Iowa rule, which would have allowed jurors to testify, for example, to quotient verdicts or a juror's drunken condition.[66] The Senate Judiciary Committee and the Conference Committee rejected this broader view. The Senate Committee feared that the House's approach would make it easier to challenge verdicts, "for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations."[67] To avert contested verdicts, the Conference Committee adopted the Senate Committee's more restrictive protection of a jury's deliberations for Rule 606(b), allowing testimony about extraneous prejudicial information or outside influences, but not about statements made during deliberations.

B. *The Limits of Postverdict Secrecy*

The Congressional Conference Report on Rule 606(b) confirms that neither this rule nor the policies underlying it were intended to prevent inquiry into a juror's deliberations before a verdict was reached. The last sentence of the Conference Report indicates as much: "The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations."[68] The Report indicates that the rule against impeachment and the policies behind it do not apply to preverdict disclosure of jury deliberations. In fact, the Committee seems to be encouraging a dialogue between jurors and the court before a verdict is reached.

While this statement by the Conference Committee does not specify that reporting by jurors to the judge should occur before a verdict is reached, its limitation to preverdict disclosure is evident. The Committee placed this statement in the context of its adoption of a rule that prohibits jurors from testifying about misconduct after a verdict has been rendered. In its report, the Conference Committee stated that "[t]he Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations."[69] After adopting this Senate bill, the Conference Committee concluded by encouraging jurors to report promptly misconduct to the court. If this concluding statement was meant to apply postverdict, it would directly conflict with the rule that the Committee had

65. *See Tanner*, 483 U.S. at 122-25; Diehm, *supra* note 64, at 413-14.
66. H.R. REP. NO. 93-650, at 9-10 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7083.
67. S. REP. NO. 93-1277, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.
68. CONF. REP. NO. 93-1597, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7102.
69. *Id.*

just adopted. Instead, it seems clear that the Committee was encouraging, preverdict, the type of disclosure that it was prohibiting postverdict. The location of this sentence at the end of the Committee's adoption of Rule 606(b) might also suggest that the Committee was attempting to mitigate the effects of its strict restriction on postverdict testimony. By advocating increased preverdict reporting, more misconduct could be cured before the jury reaches a final verdict; this would obviate the need to use Rule 606(b) to bar postverdict testimony. The final sentence of the Conference Report on Rule 606(b) indicates that the rule and policies supporting postverdict juror secrecy were not intended to apply to deliberations before a verdict was reached.[70]

A similar understanding of the limits of Rule 606(b) can be seen in *Tanner v. United States*. In *Tanner*, the Court excluded postverdict testimony that several jurors had consumed alcohol and drugs during the course of the trial and deliberations.[71] In finding that these actions were not "external influences" within the scope of Rule 606(b), the Court noted that there existed other protections against juror misconduct and "[p]etitioners' Sixth Amendment interests in an unimpaired jury."[72] Most significantly, the Court stated that "jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict."[73] It seems clear that the *Tanner* Court's decision upholding the secrecy of a jury's deliberations was explicitly limited to postverdict disclosure. As the Court in *Tanner* stated, its decision to prevent the use of postverdict juror testimony of incompetence was fair "[i]n light of these other sources of protection of petitioners' right to a competent jury."[74]

For both the Congressional Conference Committee and the Court in *Tanner*, a juror's ability to report misconduct preverdict was considered essential to preserve a defendant's right to a competent jury.

III. JURY SECRECY: POLICIES AND VALUES

In restricting a judge's ability to question jurors during deliberations, the courts in *Brown*, *Thomas*, and *Symington* equated the preverdict secrecy that they were protecting with postverdict secrecy. This Part examines the

70. *See id.*; *see also* Edward T. Swaine, Note, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 202 (1988) (arguing that jurors should be informed of Rule 606(b) at the beginning of a trial and be encouraged to report misconduct before a verdict is reached, "thus enhancing jury secrecy, finality, and justice for the parties in the case").

71. 483 U.S. 107, 127 (1987).

72. *Id.* For example, parties could establish the suitability of an individual for jury service through voir dire; the court, counsel, and court personnel could observe the jury during trial; after a trial, a party could seek to impeach a verdict through nonjuror evidence of misconduct. *Id.*

73. *Id.*

74. *Id.*

policies supporting postverdict secrecy and then evaluates whether these policies also apply in a preverdict context.

A. *Policies Underlying Postverdict Secrecy*

Early notions that the jury should deliberate in secret were linked to the conception of the jury as an enigmatic, divinely inspired body. Holdsworth wrote that any inquiry into the work of the jury would have been as "impious" as questioning the judgments of God.[75] The jury, like the ordeals of water and fire that it replaced, was supposed to reach a verdict mysteriously. This religious or mystical origin still resonates in current discussions of jury secrecy. The Second Circuit in *Thomas* asserted that "[t]he jury as we know it is supposed to reach its decisions in the mystery and security of secrecy; objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself."[76]

Most modern discussions of jury secrecy, however, have moved from religious justifications to more pragmatic ones. The variety of rationales proffered to justify jury secrecy can be grouped into four main areas: Jury secrecy secures the finality of a verdict; it serves to protect jurors; it promotes free, unhampered deliberations; and it helps to maintain community faith in juries and their verdicts.

1. *Finality*

Preserving the finality of the verdict ranks first among the policies underlying jury secrecy. In the much-cited[77] opinion of *McDonald v. Pless*,[78] the Court ruled that testimony that the jury had reached a quotient verdict could not be used to impeach the verdict. Although this ruling would prevent an individual litigant from showing that a jury behaved improperly, the Court was more concerned with what might ensue if a jury's means of reaching a verdict could be subject to inquiry. The Court cautioned:

> [L]et 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

75. 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 317 (A.C. Goodhart & H.G. Harbury eds., 7th ed. 1956).

76. 116 F.3d 606, 619 (2d Cir. 1997).

77. *E.g.*, Tanner v. United States, 483 U.S. 107, 117 (1987); McCleskey v. Kemp, 481 U.S. 279, 296 (1987); United States v. Powell, 469 U.S. 57, 67 (1984); Stein v. New York, 346 U.S. 156, 178 (1953).

78. 238 U.S. 264, 267-68 (1915).

> the hope of discovering something which might invalidate the finding.[79]

The concern with finality still dominates the Court's thinking. More than seventy years after *Pless*, the Court in *Tanner* concluded that preserving finality outweighed the importance of uncovering improper juror behavior in every instance.[80]

The Senate Committee's rationale for restricting postverdict inquiry into a jury's deliberations also rested primarily on the objective of protecting the finality of a verdict. The Committee rejected the House's more lenient version of the impeachment rule because it "would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations."[81] The Committee concluded that "[p]ublic policy requires a finality to litigation."[82] Thus, from the early formulations of the rule against impeachment to Congress's adoption of Rule 606(b), the practice of preventing jurors from testifying about deliberations has been closely intertwined with the policy of ensuring that a verdict, once rendered, should not easily be overturned.[83]

2. *Protecting the Jury from Harassment*

Jury secrecy also serves a protective function. By preventing litigants from using a juror's testimony to impeach a verdict, postverdict jury secrecy protects jurors from harassment by a defeated party "in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict."[84] While the impeachment rule itself does not completely insulate jurors from harassment by the press, current discussions of postverdict jury secrecy are now largely focused on intrusions by the media.[85] Bolstering postverdict secrecy to protect jurors

79. *Id*. at 267.

80. *See Tanner*, 483 U.S. at 120. As the Court asserted, "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Id*.

81. S. REP. NO. 93-1277, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

82. *Id*. at 14.

83. *But see* Alschuler, *supra* note 50, at 225 (arguing that since this rule does not bar testimony of outsiders to impeach a verdict, Rule 606(b) promotes finality "in a haphazard, backhanded way, relying on the fact that no one other than jurors usually is able to testify to their misconduct").

84. *Pless*, 238 U.S. at 267; *see also* S. REP. NO. 93-1277, at 13-14 (viewing the adoption of a more restrictive version of Rule 606(b) as essential to preventing harassment of former jurors by the defeated party as well as the exploitation of badly motivated or disgruntled ex-jurors).

85. *See, e.g.*, Nancy J. King, *Nameless Justice: The Case for Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 129-30 (1996) (describing jurors' concerns about violations of their privacy by the media); David Weinstein, *Protecting a Juror's Right to Privacy*: *Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 2-3 (1997) (stating that for jurors "the price of such service may include intrusive questioning, disclosure of their

from the media is a real concern. For example, following the John Hinckley, Jr. trial, "several jurors revealed that they had been forced to move out of their homes temporarily to avoid the entreaties of the press."[86] Using jury secrecy to shield jurors from harassment also takes into account the privacy and security interests of future jurors. If current jurors cannot be protected from a barrage of postverdict scrutiny, then future jurors might avoid service in order to escape the same assaults on their privacy.[87]

3. *Freedom of Debate During Deliberations*

Promotion of free discussion in the jury room is commonly offered as a reason for preserving jury secrecy.[88] In imagining the effect on a jury if there were no postverdict impeachment rule, the Court in *Pless* suggested that "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."[89]

One of the most frequently quoted passages[90] supporting this policy rationale for preserving jury secrecy is Justice Cardozo's statement in *Clark v. United States*[91] that "[f]reedom 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."[92] This comment is used by courts, including the Second Circuit in *Thomas*[93] and the Ninth Circuit in *Symington*,[94] to support the claim that disclosing the substance of deliberations would harm the jury's deliberative process.

Freedom to deliberate in secret is thought to promote good group dynamics within a jury, whereby jury members exchange ideas and concerns to reach a verdict that reflects community mores. This connection

answers to the news media, background investigations by counsel, release of their name and address to the defendant and the public, and repeated attempts by the press to obtain post-trial interviews").

86. Weinstein, *supra* note 85, at 38.

87. *See* Note, *supra* note 48, at 889.

88. *See, e.g.*, Tanner v. United States, 483 U.S. 107, 120-21 (1987) (noting that "full and frank discussion in the jury room" would be undermined if jurors' views could be scrutinized after a trial); S. REP. NO. 93-1277, at 14 ("[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation.").

89. 238 U.S. at 267-68.

90. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 712 n.20 (1974); United States v. Symington, 195 F.3d 1080, 1086 (9th Cir. 1999); United States v. Cleveland, 128 F.3d 267, 270 (5th Cir. 1997); United States v. Thomas, 116 F.3d 606, 619 (2d Cir. 1997); *In re* Globe Newspaper Co., 920 F.2d 88, 95 (1st Cir. 1990); *see also* Note, *supra* note 48, at 889 (quoting Justice Cardozo and noting that this sentence is a "passage echoed by numerous courts").

91. 289 U.S. 1 (1933).

92. *Id*. at 13.

93. 116 F.3d at 619.

94. 195 F.3d at 1086.

between secrecy and community judgment was recognized by Wigmore: "The jury, and the secrecy of the jury room, are the indispensable elements in popular justice."[95] Postverdict discovery of jury deliberations is seen as threatening this important function. If jury deliberations became public knowledge, "previously anonymous jurors, reaching a group decision based on 'community values,' and lay perspectives, will feel they must justify it in the court of public opinion."[96]

Jury secrecy is believed to promote not only group debate but also individual participation in deliberations. Assuring jurors that their deliberations will remain secret may encourage more sensitive jurors to express their opinions freely by giving them the security that their views will remain private.[97] Secrecy may also give jurors courage to render verdicts that might be unpopular with the public.[98] Jury secrecy, under this view, helps remove the fear from the minds of deliberating jurors that they might at some point be held to account for their views.

4. *Community Trust in the Jury*

A fourth justification for jury secrecy is that it promotes community confidence in the jury system. The Court in *Tanner* asserted that "the community's trust in a system that relies on the decisions of laypeople would . . . be undermined by a barrage of postverdict scrutiny of juror conduct."[99] This rationale is reminiscent of the religious origins of jury secrecy. By guarding the secrecy of deliberations, a jury is cloaked in mystery and the public must place its faith in the belief that the verdict is just. The fear underlying this policy explanation is that if a community could dissect the flaws in a jury's logic, the public might not place such blind trust in a body of laymen to render justice. Exposing a jury's deliberations could potentially "unravel the distinctive nonrational and intuitive 'genius' of this lay tribunal,"[100] and undermine the jury's role as final decisionmaker.

95. John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. SOC'Y 166, 170 (1929), *quoted in* Goldstein, *supra* note 42, at 296 n.4; *see also* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (discussing the requirement that a jury be chosen from a fair cross-section of the community).

96. Goldstein, *supra* note 42, at 314.

97. *See* Note, *supra* note 48, at 890 ("Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.").

98. *See* Tanner v. United States, 483 U.S. 107, 120-21 (1987); Note, *supra* note 48, at 890-91 ("A juror who realizes, consciously or subconsciously, that deliberations may become a part of the public domain is less likely to argue for judgments contrary to public opinion, and the deliberative process is therefore less likely to produce them.").

99. 483 U.S. at 121.

100. Goldstein, *supra* note 42, at 314.

B. *Policies Supporting Postverdict Secrecy Largely Do Not Apply to Preverdict Secrecy*

These policies supporting jury secrecy help justify Rule 606(b)'s prohibitions on postverdict juror testimony. They also explain what motivates courts like the Second Circuit in *Thomas* to assert that the "secrecy of deliberations is the cornerstone of the modern Anglo-American jury system."[101] The strength of these justifications should not be exaggerated, however.[102] In *Clark v. United States*, Justice Cardozo cautioned that "the recognition of a privilege [of jury secrecy] does not mean that it is without conditions or exceptions."[103] He explained that the privilege against disclosure of jury deliberations "has its origin in inveterate but vague tradition and . . . no attempt has been made either in treatise or in decisions to chart its limits with precision."[104] While the policies underlying jury secrecy help explain why a jury's deliberations are protected, secrecy should not be viewed as an absolute value. It is not even constitutionally required: "The Court may some day say that deliberative secrecy is 'integral' to the jury trial—that it is a 'core characteristic of the jury' under the Sixth and Fourteenth Amendments. But that has not yet occurred."[105] Jury secrecy is important, but to call it a "cornerstone" may be an exaggeration.

It should not be taken for granted, therefore, that the policies supporting postverdict secrecy are equally applicable to preverdict secrecy between a judge and a jury. Reevaluating these policies in a preverdict context shows that most of the reasons supporting postverdict jury secrecy do not apply preverdict.

1. *Finality*

One crucial difference between preverdict and postverdict jury secrecy is that when jurors disclose details about their deliberations before a verdict has been reached, they are not impeaching a final verdict. While this point seems obvious, the centrality of finality to postverdict secrecy is lost in an attempt to analogize secrecy in the context of impeachment to preverdict secrecy. The development of the rule against impeachment was expressly limited to a postverdict context. In *Pless*, the Court clearly restricted the

101. 116 F.3d 606, 618 (2d Cir. 1997).

102. *See* Alschuler, *supra* note 50, at 227 (claiming that "[t]he justifications offered for the rule against the impeachment of jury verdicts by jurors seem thin, and one may wonder whether this rule has served other goals that courts have been reluctant to avow").

103. 289 U.S. 1, 13 (1933).

104. *Id.*

105. Goldstein, *supra* note 42, at 297.

scope of its decision; it cautioned that the holding of the case "is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict."[106] Rule 606(b) echoes this limitation.[107] Since finality of the verdict is the most important rationale supporting postverdict jury secrecy,[108] its inapplicability in a preverdict context is significant.

In fact, preserving the finality of a jury's verdict is the only policy effectively protected by Rule 606(b). After a trial is over, jurors are free to discuss their deliberations with litigants or the media without running afoul of Rule 606(b). The only actual prohibition in the rule is against the use of a juror's testimony as evidence to overturn a verdict or indictment.[109] Although many policies other than finality are discussed to justify jury secrecy, these other concerns remain secondary. Wigmore noted this point. After listing various reasons supporting the rule against impeachment, including those provided in *Pless*, he concluded that "they prove, if anything, much more than the rule in question."[110] Rule 606(b) does not impose any sanctions on parties who harass jurors, nor does it prohibit jurors from divulging details about their deliberations. The only policy that this rule substantively protects is the finality of the verdict.

2. *Protecting the Jury from Harassment*

Many of the other policy reasons offered to support postverdict juror secrecy rest in part on the assumption that the jury has reached a final verdict. This can be seen in the argument that postverdict secrecy will protect jurors from harassment. The *Pless* Court, for instance, was concerned that posttrial harassment might pressure jurors to disclose or manufacture evidence that would set aside a verdict.[111] Unlike postverdict secrecy, preverdict secrecy does not shield jurors from harassment, because harassing deliberating jurors is already impossible given the strict rules barring parties from any contact with jurors. From the initial selection of the jury panel to the time the jury renders its verdict, parties are not allowed to have any contact with jurors.[112] Further, at the beginning of the trial and

106. 238 U.S. 264, 269 (1915).

107. The Rule begins: "Upon an inquiry into the validity of a verdict or indictment . . . ." FED. R. EVID. 606(b). Like the common-law history preceding this rule, Rule 606(b) is premised on the fact that a jury has reached a final decision in the form of a verdict or an indictment.

108. *See supra* Section III.A.

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

110. 8 WIGMORE, *supra* note 55, § 2353; *see also* Thompson, *supra* note 50, at 1187 ("Although courts cite the interest in juror privacy—encouraging free and robust debate and avoiding juror harassment—as justification for the rule, the primary concern is to ensure the finality of jury verdicts.").

111. 238 U.S. at 267.

112. For example, the ABA Model Code of Professional Responsibility states:

(B) During the trial of a case:

before a jury's first recess, a judge admonishes jurors to conduct their deliberations in secret and not to discuss the case with anyone outside the jury room. A typical instruction warns the jury:

> Until the trial is over, you are not to discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else, nor are you allowed to permit others to discuss the case with you. If anyone approaches you and tries to talk to you about the case, please let me know about it immediately.[113]

The only possible way that this policy concern would apply preverdict is if it were meant to protect jurors from harassment by a judge. This argument seems far-fetched. It is unlikely that judges, subject to appellate review,[114] would harass jurors to uncover evidence of misconduct. The real concern about protecting jurors from harassment is directed at the pursuit of former jurors by litigants and the press after a trial.

3. *Freedom of Debate During Deliberations*

Unlike the other justifications for postverdict secrecy, the argument that jury secrecy protects freedom of debate is not dependent on the finality of a verdict. Justice Cardozo's statement that "[f]reedom 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," [115] can apply both during and after deliberations. Cardozo's argument, however, has been overemphasized by proponents of jury secrecy. Despite Cardozo's qualifications to this statement indicating that the privilege of jury secrecy is not absolute,[116] later commentators have viewed the *Clark* passage praising freedom of debate as a definitive justification for establishing strong protection of juror secrecy. They argue that jury secrecy must be preserved to ensure the participation of jurors who might fall silent if they

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.
(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

MODEL CODE OF PROF'L RESPONSIBILITY DR 7-108 (1981) (citation omitted); *see also* CAL. STATE BAR RULES OF PROF'L CONDUCT § 5-320 (1989); MODEL RULES OF PROF'L CONDUCT R. 3.5(a)-(b) (1999).

113. MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE NINTH CIRCUIT § 2.1 (1997) [hereinafter NINTH CIRCUIT MANUAL].

114. *E.g.*, United States v. Gibson, 135 F.3d 257, 259 (2d Cir. 1998) (stating that a district judge's decision to dismiss a juror under Rule 23(b) is reviewed for abuse of discretion); United States v. Donato, 99 F.3d 426, 429 (D.C. Cir. 1997) (same, regarding Rule 24(c)).

115. Clark v. United States, 289 U.S. 1, 13 (1933).

116. *See supra* text accompanying notes 103-104.

believed their discussions in the jury room would later be revealed. As one commentator put it, "[s]ensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience."[117] Justice Cardozo explicitly rejected this argument. For him, rooting out juror misconduct was more important than shielding an unusually sensitive or timid juror. As he stated:

> A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. . . . The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.[118]

This suggests that while freedom of debate is a significant value, it should not trump concerns about the jury's competency or impartiality. Cardozo counseled that protection against juror misconduct should override any privilege of secrecy.

While not necessarily the last word on the question, Cardozo's initial concern that publicizing deliberations might chill debate among jurors may still represent a legitimate concern. It is possible, as the Ninth Circuit in *Symington* suggested, that "a trial judge's examination of juror deliberations risks exposing those deliberations to public scrutiny. Such exposure, in turn, would jeopardize the integrity of the deliberative process."[119] One answer to this concern is that, unlike a public postverdict investigation of a jury's deliberations, a preverdict inquiry could be kept private. A judge's preverdict questioning of deliberating jurors could be sealed to prevent any chilling effect that public disclosure might have on a jury's deliberations.[120]

Even if the public was prevented from scrutinizing the jury's deliberations (the primary concern raised in the postverdict context), there remains a possibility that jurors might still engage in self-censorship in order to prevent a judge from becoming involved in its deliberations. This argument, however, ignores the fact that a judge's inquiry into a jury's deliberations is initiated only in direct response to a request from one or

117. Note, *supra* note 48, at 890; *see also* United States v. Thomas, 116 F.3d 606, 619 (2d Cir. 1997) (quoting this passage to support the *Thomas* court's contention that preverdict deliberations must be kept secret).

118. *Clark*, 289 U.S. at 16.

119. 195 F.3d 1080, 1086 (9th Cir. 1999).

120. *Infra* Section V.B (discussing in camera questioning of jurors during deliberations).

more members of the jury.[121] Moreover, unlike questions posed by a member of the press who may wish to conduct a far-ranging investigation into a jury's deliberations, a judge's inquiry is limited to establishing whether just cause for dismissal exists under Federal Rule of Criminal Procedure 23(b).[122]

The argument that jury secrecy protects freedom of debate assumes that an intrusion on jury secrecy would necessarily stifle discussion in the jury room. It is unclear, however, what effect publicizing deliberations actually has on freedom of debate.[123] One reason given in support of jury secrecy is that it bolsters jurors' willingness to return an unpopular verdict.[124] Unless there is a hung jury and no verdict is returned, however, protecting the secrecy of deliberations does not conceal how jurors ultimately voted, and "[i]t is not at all clear why the fact that their conversations in the jury room also may come to be known will make them less courageous.[125] Therefore, preserving the secrecy of deliberations does not necessarily embolden jurors who fear community reaction to their verdict.

In fact, the fear that breaching jury secrecy would constrain freedom of debate may be exaggerated in both the preverdict and the postverdict contexts. The concern about chilling debate if the substance of deliberations is revealed assumes that jurors expect that their deliberations will be secret. It is not certain that jurors in fact make this assumption. It is more probable that the opposite is true—that jurors, in the words of Cardozo, are "made to feel that their arguments and ballots [will] be freely published to the world."[126] Much is now known about the details of a jury's deliberations. One study of postverdict interviews of jurors revealed that in forty-two percent of the articles surveyed, the interviewed jurors revealed one or more of the jury's early votes.[127] In the Jean Harris case, for example, the jury moved from 8-4, to 11-1, to 12-0 in favor of conviction.[128] In the O.J. Simpson case, the first juror balloting went 10-2 for acquittal; the second vote was unanimous.[129] The reasons for which a jury ultimately reaches its

121. *See infra* Subsection IV.A.2 (discussing a judge's ability to dismiss a juror for just cause under Rule 23(b)).

122. *See infra* Section V.B (suggesting that a judge inform jurors of the limits to any preverdict inquiry).

123. *See* Goldstein, *supra* note 42, at 313 ("[S]ystematic research has not been conducted to determine whether individuals and groups are affected by knowledge that their behavior subsequently may be exposed.").

124. *See supra* note 98 and accompanying text.

125. Goldstein, *supra* note 42, at 313; *see also, e.g.*, United States v. Watchmaker, 761 F.2d 1459, 1464-65 (11th Cir. 1985) (discussing a juror who was afraid to return a verdict for fear of retaliation).

126. Clark v. United States, 289 U.S. 1, 13 (1933).

127. Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 487 (1997).

128. *Id.*

129. *Id.*

verdict also become public knowledge. The jury acquitted William Kennedy Smith of rape because of inconsistencies in the state's evidence,[130] and they acquitted Lorena Bobbitt because of her husband's lack of credibility.[131] It is clear from these examples that, at least in high profile cases, a jury's deliberations do not remain secret.

The impact of these postverdict disclosures is not limited to high-profile cases. If a case is widely publicized, all potential jurors following the case are likely to become aware that jury deliberations can be made public after a trial. This knowledge will probably decrease a juror's expectation of secrecy during deliberations. Thus, the extensive postverdict disclosure of jury deliberations makes it likely that jurors already enter deliberations with the understanding that their discussions may become public at some point.

Given this extensive infringement on juror secrecy after a trial is over, the possibility that a judge's limited preverdict intrusion into a jury's deliberations would increase any chilling of debate among jurors seems remote. Especially if a judge can assure jurors that any disclosure of the substance of the jury's deliberations would remain sealed, the prospect of narrow judicial intervention in a situation in which the jurors have asked for the judge's assistance is unlikely further to hamper freedom of discussion in the jury room. Indeed, it is hard to see how a good faith attempt by a judge to resolve a problem with a jury could chill jury deliberations any more than the increased posttrial publicity of jury deliberations[132] already has.

4. *Community Trust in the Jury*

The argument that the community's trust in the jury would be undermined if jury deliberations were made public also assumes a postverdict context in which the media or litigants interrogate former jurors in an attempt to understand how and why a jury reached its verdict. In *Tanner*, the Court stated that a "barrage of postverdict scrutiny" of juror conduct would erode public trust.[133] This concern might also apply in a

130. *Id.* at 480.

131. *Id* at 479. Posttrial reports typically provide substantial information about a jury's deliberations. In a recent *New York Times* article covering a jury verdict in a brick attack case, one juror, who was identified by name in the article, described the jury's two deadlocks and informed the reporter that "there were three jurors, including the foreman, who were unconvinced both times the jury deadlocked." Katherine E. Finkelstein, *After 2 Deadlocks, Brick-Attack Jury Delivers Mixed Verdict*, N.Y. TIMES, Nov. 30, 2000, at B1. The juror then told the reporter that the holdout jurors were finally convinced after deciding that a certain witness "did in fact get a good look at [the defendant's] face." *Id.*

132. One survey of postverdict juror interviews from 1980 to 1995 revealed that ninety-four percent of the articles containing juror interviews appeared in the last eight years of the study. *See* Marder, *supra* note 127, at 476.

133. 483 U.S. 107, 121 (1987).

preverdict context, however, if a judge's questioning of jurors revealed that jurors were misinterpreting the law or the facts in the case. There are three responses to this argument. First, unlike the inherently public nature of a postverdict media inquiry, a judge's narrow questioning of jurors could be kept sealed, preventing community scrutiny of deliberations.[134] Second, some have argued that publicizing deliberations could actually enhance community trust by increasing the jury's accountability to the public.[135] Under this view, if the jury is meant to act as a representative for the community, it should be treated like other public agencies, observable by the public. Making deliberations public could serve to educate the community about "democracy in action."[136] And if jurors knew in advance that their debates would be made public, they might be more attentive during trial and think more seriously about the views they express during deliberations.[137] Some jurors might even welcome the opportunity to explain their verdict to the public.[138] Third, as discussed above in the context of free debate, deliberations of jurors are not always kept secret postverdict. The community is likely to learn what happened during deliberations, especially during trials in which community interest is strongest. Therefore, if exposing deliberations to the public erodes community trust, this will occur with or without any preverdict breach of secrecy.

IV. PREVERDICT JURY SECRECY AND COMPETING VALUES

Not only are the policies supporting postverdict jury secrecy largely inapplicable in a preverdict context, but there also are independent values ascribed to jury deliberations that are uniquely important prior to the verdict. This Part first explores crucial preverdict values and considerations that compete with jury secrecy. This Part then looks at the protection of the holdout juror, and how this protection interacts with jury secrecy and other preverdict values.

134. *See infra* Section V.B (discussing sealing of preverdict judicial questioning).

135. Marder, *supra* note 127, at 498-501; Kenneth B. Nunn, *When Juries Meet the Press: Rethinking the Jury's Representative Function in Highly Publicized Cases*, 22 HASTINGS CONST. L.Q. 405, 434 (1995) ("[T]he more public the workings of a jury are, the more likely the community will allow the jury to fulfill its role as an arbiter of disputes and accept jury conclusions."). *Contra* Note, *supra* note 48, at 893-94.

136. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1187 (1995).

137. *See* Marder, *supra* note 127, at 498-99.

138. *See* Kelly L. Cripe, Comment, *Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System*, 6 UCLA ENT. L. REV. 235, 259 (1999) (arguing that jury secrecy hurts jurors by preventing them from defending against public attacks on their intelligence and moral character).

A. *The Jury's Role During Deliberations*

After a trial is complete, upholding finality, preserving public confidence in a jury's verdict, and preventing juror harassment by unhappy litigants and the press are important objectives. Before a verdict has been rendered, central considerations include promoting trial efficiency and good group dynamics, dismissing any jurors that are not competent to serve, and ensuring that all jurors are actively participating in deliberations.

1. *Juror Dismissal: Trial Efficiency and Group Dynamics*

Rule 23(b) was amended in 1983 to allow a judge to dismiss a juror for "just cause" after the start of deliberations.[139] This rule now allows a jury of fewer than twelve to reach a verdict after the dismissal of a jury member. The Advisory Committee's note to the rule emphasized that this change was intended to promote judicial efficiency and economy: "The problem is acute when the trial has been a lengthy one and consequently the remedy of mistrial would necessitate a second expenditure of substantial prosecution, defense and court resources."[140] The Committee further indicated that it had considered and rejected an alternative way of avoiding mistrials, which was to amend Rule 24(c) to permit the substitution of alternates if a juror was dismissed during deliberations.[141] The Committee pointed to the potentially coercive effect on a substituted juror who joins a jury that has already begun deliberating, saying that "[t]he central difficulty with substitution . . . is that there does not appear to be any way to nullify the impact of what has occurred without the participation of the new juror."[142] Because of these deleterious effects on group dynamics, the Committee preferred to authorize a verdict of eleven, citing *Williams v. Florida*'s holding that a jury of twelve was not constitutionally required under the Sixth Amendment.[143]

Congress, and the Federal Rules Advisory Committee, have recently reversed their views about the substitution of alternates after the dismissal of a deliberating juror. A revision of Rule 24(c) that went into effect on December 1, 1999, now permits a judge, in her discretion, to retain alternates during deliberations. If a juror is dismissed during deliberations, a judge may now substitute an alternate without the parties' stipulation.[144] In

139. *See supra* text accompanying notes 16-19.
140. FED. R. CRIM. P. 23(b) advisory committee's note.
141. *Id.*
142. *Id.*
143. *See id*. (citing Williams v. Florida, 399 U.S. 78 (1970)).
144. Rule 24(c) now reads:
(3) *Retention of Alternate Jurors*. When the jury retires to consider the verdict, the court in its discretion may retain the alternate jurors during deliberations. If the court

supporting the rule change, the Committee recognized the practical problems of juror dismissal during long trials, stating that the availability of alternates for substitution during deliberations "might be especially appropriate in a long, costly, and complicated case."[145] In order to "protect the sanctity of the deliberative process," the Committee stressed that Rule 24(c) required a judge to insulate the alternates from the deliberating jurors and to instruct the jury to begin deliberations anew if an alternate was substituted.[146]

Both the changes in the Federal Rules and the Committee's comments suggest several values and policies essential to a jury's deliberations. First, the initial reluctance to permit the substitution of alternates shows that maintaining good group dynamics in a deliberating jury is vital, as is the active participation of each juror during deliberations. The instruction at the end of Rule 24(c), that a jury must begin deliberations anew after an alternate has been substituted, emphasizes the importance of ensuring that each member of a jury is an dynamic participant in the entire deliberations process.

Second, the changes in the Federal Rules demonstrate the significance of efficient trial management and the desire to avoid costly mistrials. In fact, the amendment of Rule 24(c) suggests that promoting the policies of efficiency and cost-effective trial management ultimately outweighed the perceived importance of preserving group dynamics and jury privacy. As the Advisory Committee noted, the old version of Rule 24(c) forbidding substitution of alternates was "grounded on the concern that after the case has been submitted to the jury, its deliberations must be private and inviolate."[147] Before the Rule was amended, some courts and commentators cautioned that allowing for the substitution of alternates after the start of deliberations would adversely affect the delicate group dynamics present in a jury room.[148] The fact that Congress decided to amend this Rule despite

> decides to retain the alternate jurors, it shall ensure that they do not discuss the case with any other person unless and until they replace a regular juror during deliberations. If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin deliberations anew.

FED. R. CRIM. P. 24(c)(3).

145. *Id.* advisory committee's note.

146. *Id.*

147. *Id.*

148. *E.g.*, Jeffrey T. Baker, Casebrief, *Post-Submission Juror Substitution in the Third Circuit: Serving Judicial Economy While Undermining a Defendant's Rights to an Impartial Jury Under Rule 24(c)*, 41 VILL. L. REV. 1213, 1222-23 (1996) (citing various studies showing that postsubmission substitution of alternate jurors endangers the impartiality of a jury); Joshua G. Grunat, Note, *Post-Submission Substitution of Alternate Jurors in Federal Criminal Cases: Effects of Violations of Federal Rules of Criminal Procedure 23(b) and 24(c)*, 55 FORDHAM L. REV. 861 (1987) (contending that the substitution of alternates after the beginning of deliberations affects a defendant's right to be tried by an impartial jury and should be considered reversible error); *see also* United States v. Gambino, 788 F.2d 938, 948-49 (3d Cir. 1986) (preferring an eleven-person jury to the substitution of an alternate juror after deliberations had begun). *But see*,

these concerns indicates that it considered judicial efficiency and avoidance of mistrials to be policy considerations of at least equivalent weight.

2. *The Just Cause Standard: Dismissing Incompetent Jurors*

The reasons for which judges have dismissed jurors for just cause under Rule 23(b) help elucidate the qualities that judges consider essential to a fair jury and a fair trial. It is only when a juror lacks one of these fundamental qualities that a judge has just cause to dismiss the juror.

The federal rules do not define the meaning of "just cause" for dismissal of a juror under Rule 23(b). The Advisory Committee's note following the Rule does not do much to clarify the standard. The most that the Committee's note offers by way of guidance is a reference to two cases in which a judge's dismissal was deemed appropriate. In one, *United States v. Meinster*,[149] a juror had a heart attack during deliberations after a four-month trial. In the other, *United States v. Barone*,[150] a juror was removed during deliberations upon the recommendation of a psychiatrist. Aside from these illustrative examples, courts have been left to determine the existence of just cause on a case-by-case basis.

Courts, in investigating problems with a deliberating jury, have found just cause for dismissal for a wide variety of reasons. Just cause has been found when a juror has been physically unable to deliberate because of an illness or other physical injury,[151] because of a necessary absence from court or a planned vacation,[152] because of other physical problems that impair the juror's ability to deliberate,[153] because of concern with the juror's

e.g., Claudio v. Snyder, 68 F.3d 1573, 1577 (3d Cir. 1995) (allowing for postsubmission substitution of an alternate juror because an "essential feature" of jury trial was not compromised when a judge instructed a reconstituted jury to begin deliberations anew).

149. 484 F. Supp. 442 (S.D. Fla. 1980).

150. 83 F.R.D. 565, 566-68 (S.D. Fla. 1979).

151. *E.g.*, United States v. Gibson, 135 F.3d 257, 260 (2d Cir. 1998) (affirming the dismissal of a juror who was hospitalized); United States v. Wilson, 894 F.2d 1245, 1249-51 (11th Cir. 1990) (affirming the dismissal of a juror for illness); United States v. Armijo, 834 F.2d 132, 134 (8th Cir. 1987) (affirming the dismissal of a juror who was injured in an automobile accident). Courts have found just cause for dismissal even with minor injuries. *E.g.*, United States v. Acker, 52 F.3d 509, 513, 515 (4th Cir. 1995) (affirming the dismissal of a juror who had injured her ankle).

152. *E.g.*, United States v. Nelson, 102 F.3d 1344, 1350 (4th Cir. 1996) (affirming the dismissal of two jurors who had holiday travel plans); United States v. McFarland, 34 F.3d 1508, 1510-12 (9th Cir. 1994) (upholding the dismissal of a juror who had previously informed the court of vacation plans that eventually conflicted with deliberations); United States v. Stratton, 779 F.2d 820, 830-32 (2d. Cir 1985) (affirming the dismissal of a juror who could not deliberate on a religious holiday). *But see* United States v. Donato, 99 F.3d 426, 429 (D.C. Cir. 1997) (reversing the dismissal of a juror for travel plans because the trial record did not adequately explain why the juror should be dismissed).

153. *E.g.*, United States v. Leahy, 82 F.3d 624, 629 (5th Cir. 1996) (affirming the dismissal of a juror when a hearing impairment precluded that juror from deliberating).

mental competence or stability,[154] because of questions about the juror's ability to be impartial,[155] because of a personal religious objection,[156] because a juror was distracting to fellow jurors,[157] because of a juror's failure to deliberate,[158] and because of a juror's refusal to follow the law.[159]

One court's description of what might constitute just cause for dismissal highlights the strict requirements a court can impose for juror competence. According to the California Court of Appeals, a court can find just cause for dismissal of

> a juror who conceals or misstates facts in response to voir dire or other questioning, sleeps or otherwise fails to attend to the proceedings, betrays bias or a fixed prejudgment of the issues, exhibits an inability or refusal to deliberate, disclaims the ability or willingness to apply the law as given by the court, or fails to comply with other duties imposed on jurors. Good cause for substitution may also be found where a juror's emotional state threatens his or her ability to receive and consider the evidence or to deliberate.[160]

Though this list is not definitive, it demonstrates the wide range of factors that trial courts can consider when deciding whether or not to dismiss a juror. More generally, these criteria for just cause suggest a standard that a juror should be an active, unbiased, and open participant in deliberations.

154. *E.g.*, United States v. Huntress, 956 F.2d 1309, 1313 (5th Cir. 1992) (affirming the dismissal of a juror diagnosed by a doctor as suicidal and suffering from paranoia); United States v. O'Brien, 898 F.2d 983, 986 (5th Cir. 1990) (affirming the dismissal of a juror suffering from depression); United States v. Molinares Charris, 822 F.2d 1213, 1222-23 (1st Cir. 1987) (affirming the dismissal of a juror who had been crying during deliberations and had taken a tranquilizer).

155. *E.g.*, United States v. Barone, 114 F.3d 1284, 1305-09 (1st Cir. 1997) (affirming the dismissal of a juror whose cousin had been represented in another matter by one of the defendant's attorneys); United States v. Egbuniwe, 969 F.2d 757, 761-63 (9th Cir. 1992) (affirming the dismissal of a juror whose girlfriend had been arrested and maltreated by the police because the juror "might not be able to be fair to both parties"); United States v. Barker, 735 F.2d 1280, 1282 (11th Cir. 1984) (affirming the dismissal of a juror who, on the way to deliberate the case, touched the defendant's shoulder and smiled at him); United States v. Gambino, 598 F. Supp. 646, 658-59 (D.N.J. 1984) (dismissing a juror after learning that the juror observed the prosecution's notes, which had accidentally been placed in an exhibit box).

156. *E.g.*, United States v. Burrous, 147 F.3d 111, 117-18 (2d Cir. 1998) (affirming the dismissal of a juror who raised a religious objection after several hours of deliberations).

157. *E.g.*, United States v. Walsh, 75 F.3d 1, 4-5 (1st Cir. 1996) (upholding the dismissal of a juror whose behavior had suddenly become erratic and distracting to fellow jurors); United States v. Fajardo, 787 F.2d 1523, 1525-26 (11th Cir. 1986) (affirming the dismissal of a juror because his sinus trouble was disruptive to the rest of the jury).

158. *E.g.*, People v. Thomas**,** 32 Cal. Rptr. 2d 177, 179 (Ct. App. 1994) (upholding the trial court's dismissal of a juror for refusal to deliberate). *But see* Mason v. State**,** 535 S.E.2d 497, 500 (Ga. Ct. App. 2000) (holding that failure to deliberate was not grounds for dismissing a holdout juror and that trial court should have declared a mistrial).

159. United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997); *see supra* Section I.A.

160. People v. Hightower, 92 Cal. Rptr. 2d 497, 508-10 (Ct. App. 2000).

While a judge is free to consider a wide range of issues relating to a juror's competency to participate in deliberations before a verdict is reached, this same type of evidence is expressly barred postverdict. *Tanner* provides a perfect illustration of this distinction. Although the Court in *Tanner* asserted that a defendant has "Sixth Amendment interests in an unimpaired jury"[161] and a "right to a competent jury,"[162] the Court refused to accept juror testimony on the issue of competence once a verdict had been reached. In stark contrast to *Tanner*, the D.C. Circuit in *United States v. Sobamowo* held that the dismissal of a juror only suspected of using drugs was appropriate.[163] In *Tanner*, a verdict could not be impeached despite clear evidence that several jurors were under the influence of drugs during deliberations.[164] In *Sobamowo*, by contrast, Juror Nine was suspected of using heroin, but a lengthy voir dire of all of the jurors revealed no evidence of drug use. During the judge's questioning, however, several jurors complained that they were "irritated" by Juror Nine's lateness.[165] Without any conclusive evidence of drug use, the judge dismissed Juror Nine, "solely as a result of her lateness."[166] In this preverdict context, it was taken for granted that a judge could question jurors about a juror's lateness and alleged drug use. Comparing this case with *Tanner* highlights the dramatic difference in a judge's ability, preverdict and postverdict, to hear evidence about the capacity of jurors and to use this evidence to alter the composition of the jury. It shows how the values of jury competency and the responsibility of a judge to dismiss an incompetent juror are uniquely preverdict concerns.

Sobamowo also demonstrates the significant leeway given to judges in deciding what can constitute just cause for dismissal. The appellate court in this case affirmed the judge's dismissal, stating that "[i]t is surely not a defendant's constitutional, statutory, or case law entitlement to have, as one appellant urged, a slow poke on the jury."[167] Trial courts in several other cases have been affirmed in finding just cause for seemingly trivial matters. For example, courts have upheld the dismissal of a juror who had sinus trouble that distracted other jurors,[168] a juror who had vacation plans that conflicted with deliberations,[169] and a juror who injured her ankle.[170] This broad application of Rule 23(b) underscores that ensuring that all

161. 483 U.S. 107, 127 (1987).

162. *Id.*; *see also* Jordan v. Massachusetts, 225 U.S. 167, 176 (1912) (stating that a defendant has a right to "a tribunal both impartial and mentally competent to afford a hearing").

163. 892 F.2d 90, 95 (D.C. Cir. 1989).

164. 483 U.S. at 115-16.

165. 892 F.2d at 95.

166. *Id* (citation omitted).

167. *Id.*

168. United States v. Fajardo, 787 F.2d 1523, 1525-26 (11th Cir. 1986).

169. United States v. McFarland, 34 F.3d 1508, 1510-13 (9th Cir. 1994).

170. United States v. Acker, 52 F.3d 509, 513, 515-16 (4th Cir. 1995).

deliberating jurors are competent and actively engaging in deliberations is a crucial component of a fair trial.

3. *The Duty To Deliberate*

In asserting the importance of preverdict jury secrecy, the courts in *Brown*, *Thomas*, and *Symington* underestimated the countervailing significance of a juror's duty to deliberate and the judge's obligation to ensure that jurors fulfill this duty.[171] The duty to deliberate is not just an attendance requirement; a juror must meaningfully participate in deliberations. For instance, a person who is mentally unstable is considered incompetent to be a juror.[172] While such a person is physically capable of being present at the deliberations, and even perhaps contributing to them, she is considered unfit to be a juror because she cannot be counted on to contribute in a useful way. Additionally, a juror must be able to understand and be understood by her fellow jurors. Difficulties speaking or understanding English can constitute just cause for dismissal.[173] A jury's duty to deliberate even requires that any one juror does not disrupt or upset her fellow jurors' deliberations; therefore, an annoying sinus infection or habitual lateness can suffice to disqualify a juror from service.[174] The duty to deliberate is such an integral part of a juror's responsibilities that a common instruction for jurors is entitled "Duty To Deliberate."[175] At the conclusion of a trial and before the start of deliberations, a judge will typically instruct jurors: "Each of you must decide this case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors."[176]

Several cases have spoken directly to this duty to contribute meaningfully to deliberations. In discussing the purpose of a jury trial, the

171. This discussion focuses on a juror's duty to deliberate. The court in *Thomas* addressed the issue of a juror's refusal to follow the law, concluding that intent to disregard, or nullify, the law, constitutes just cause for dismissal. 116 F.3d 606, 614 (2d Cir. 1997). The court reasoned that nullification is a violation of a juror's oath to apply the law and that "there is a countervailing duty and authority of the judge to assure that jurors follow the law." *Id.* at 616. As discussed in Part I, however, the *Thomas* court placed such a strong emphasis on the secrecy of a jury's deliberations that the court left a judge essentially unable to determine whether a juror was in fact intent on nullifying the law.

172. *See supra* note 154 and accompanying text.

173. United States v. Speer, 30 F.3d 605, 611 (5th Cir. 1994) (affirming the dismissal of a juror because "her duties as a juror were impaired by her inability to understand or communicate effectively in English").

174. *See supra* notes 157, 167 and accompanying text.

175. NINTH CIRCUIT MANUAL, *supra* note 113, § 4.1.

176. *Id.*; *see also* FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS § 2.11 (1999) ("Each of you must decide the case for yourself but only after full consideration of the evidence with other members of the jury.").

Supreme Court, in *Williams v. Florida*, stated that "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."[177] This emphasis on community participation and shared responsibility implies that all members of the jury should be engaged in developing a shared consensus.[178]

The requirement of unanimity is also connected to the duty of all jurors to engage in deliberations. As the California Supreme Court stated:

> The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint.[179]

This obligation that all jurors interact with each other to reach a unanimous verdict implies a duty on the part of a juror to deliberate actively.[180]

B. *The Problem of the Holdout Juror*

Only by piercing jury secrecy can a court establish just cause for dismissal. Different types of just cause, however, require varying degrees of

177. 399 U.S. 78, 100 (1970).

178. The emphasis on preserving effective group dynamics during deliberations is also seen in Rule 24(c), which permits substitution of an alternate after the start of deliberations only if deliberations begin anew after substitution; this is meant to ensure that all of the final jury are actively involved in all of the deliberations. FED. R. CRIM. P. 24(c)(3); *see also supra* Subsection IV.A.1 (discussing Rule 24(c)).

179. People v. Collins, 552 P.2d 742, 746 (Cal. 1976).

180. *See* United States v. Barone, 83 F.R.D. 565, 572 (S.D. Fla. 1979) (stating that the requirement of unanimity is "part of a broader right which additionally requires each juror to have engaged in all of the jury's deliberations"); People v. Thomas, 32 Cal. Rptr. 2d 177, 179 (Ct. App. 1994) (affirming the dismissal of a juror for failure to deliberate and holding that "[t]he refusal to deliberate amounted to a failure of the juror to perform his duty . . . and constituted good cause for removal from the jury"); *cf.* Lim v. Cambra, No. C 97-3514 SI PR, 1998 WL 456274, at *6 (N.D. Cal. July 28, 1998) (stating that "[t]here is no constitutional basis . . . to contend that all jurors *must* interact in a particular way before reaching a verdict," but noting that the juror in question was willing to participate in the deliberations and therefore denying relief because the juror "did not fail to deliberate"). *But see* Mason v. State, 535 S.E.2d 497, 499 (Ga. Ct. App. 2000) (stating that the trial court abused its discretion in finding that a holdout juror was incapacitated because she had made up her mind and did not want "to deliberate further because she needed to get back to her business").

intrusion by the judge on the jury's deliberations. Many forms of just cause can be established with minimal inquiry. If a juror has become ill, is injured in an automobile accident, or cannot attend deliberations because of a religious holiday, a judge can investigate the problem without probing into the jury's deliberations. Other forms of just cause can be established with a mild intrusion into the jury's deliberative process. For example, when a juror is dismissed for disturbing the rest of the jury,[181] or for certain emotional or mental problems,[182] a judge must ask questions that touch on the nature of deliberations. In these cases, the conflict between jury secrecy and the right of a defendant to a competent jury is not so significant because a judge is not likely to find out how a juror has voted, or what issues the jury has covered during its deliberations. Because the jury's secrecy is not being seriously breached, and because the right to a competent jury is established by Rule 23(b), *Tanner*, and the case law on just cause for dismissal, it seems clear that in these circumstances the judge's ability to investigate should overcome any privilege of jury secrecy.

The greatest conflict between jury secrecy and the ability of a judge to probe into deliberations occurs when dismissal for just cause is based on a juror's failure to deliberate or refusal to follow the law. Here the reasons for dismissing a juror come closest to crossing the line separating what can and what cannot constitute just cause under Rule 23(b). This line was first drawn in *Brown*, where the D.C. Circuit held that a holdout juror could not be dismissed for just cause. While holdout jurors cannot be dismissed for just cause, jurors who intend to nullify or who fail to deliberate can be dismissed for just cause.[183] The problem for courts is that the line between a holdout juror and a nondeliberating juror is often fuzzy. In order to establish on which side of the line a particular juror falls, a judge's questioning of jurors may have to touch on the substance of a jury's deliberations. The courts in *Brown*, *Thomas*, and *Symington* were attempting to guard against this possibility. Because these courts felt that preserving jury secrecy was critically important, they removed the ability of a judge to question jurors who fall into this middle ground by holding that if there is "any possibility" that the problem with the juror related to a view on the evidence in the case, the juror cannot be dismissed. This standard effectively stops a judge's questioning cold once the issue of evidence arises.

181. *See, e.g.*, United States v. Leahy, 82 F.3d 624, 629 (5th Cir. 1996) (affirming the dismissal of a juror whose hearing impairment precluded meaningful deliberations); United States v. Walsh, 75 F.3d 1, 5 (1st Cir. 1996) (noting that the trial judge's questioning of the dismissed juror did not reveal the juror's position on the case but that the evidence indicated that the juror was not able to perform his duties).

182. *See supra* note 154 and accompanying text.

183. *See supra* Subsection IV.A.3.

The adoption of a standard strictly prohibiting dismissal of holdout jurors is understandable given the concern that without such a standard a judge or a jury might use Rule 23(b) to circumvent the unanimity requirement.[184] The court in *Thomas* argued that setting a high standard for dismissal "serves to protect these holdouts from fellow jurors who have come to the conclusion that the holdouts are acting lawlessly."[185] This standard might also protect holdouts from a judge's use of the dismissal power to avoid a mistrial. Due to the often subtle distinctions among holdouts, nullifiers, and nondeliberating jurors, a judge could dismiss a juror without knowing that the excused juror was a holdout. A strict rule prohibiting dismissal of holdouts serves to guard against these dangers.

The problem with this strong protection of holdouts emerges when it is coupled with a strict protection of juror secrecy. While shielding holdouts is important, it is a mistake to think that a judge's power to question jurors must also be curtailed. The *Thomas* court concluded that "[g]iven the necessary limitations on a court's investigatory authority in cases involving a juror's alleged refusal to follow the law, a lower evidentiary standard could lead to the removal of jurors on the basis of their view of the sufficiency of the prosecution's evidence."[186] Although the unanimity requirement supports a concern for protecting holdouts, the limitations on a judge's investigatory authority are not "given." Just because a judge cannot dismiss a holdout does not also necessarily mean that the judge should not be able to question the juror to determine whether he or she is a holdout, a nullifier, or a nondeliberating juror.

While protecting the holdout juror is an important preverdict policy concern, it is not the only one. Instead, it should be weighed against other important preverdict policies: promoting trial efficiency, protecting group dynamics, and ensuring that jurors are competent and actively deliberating. Coupling a protection of holdouts with a restriction on judicial questioning intrudes too far into a judge's power to dismiss incompetent jurors. The changes in the Federal Rules of Criminal Procedure regarding juror dismissal and the development of the just cause standard for dismissal show

184. *See* United States v. Hernandez, 862 F.2d 17, 23 (2d Cir. 1998) ("That a juror may not be removed because he or she disagrees with the other jurors as to the merits of a case requires no citation."). Federal Rule of Criminal Procedure 31(a) requires that a jury reach a unanimous verdict. This rule states: "The verdict shall be unanimous. It shall be returned by the jury to the judge in open court." FED. R. CRIM. P. 31(a). While unanimity is not constitutionally required, *see* Apodaca v. Oregon, 406 U.S. 404, 410 (1972) (holding that unanimity is not indispensable to criminal justice), at least in the federal system criminal defendants have an established right to a unanimous verdict. Most states also require unanimous verdicts at least in criminal cases. *See* Michael H. Glasser, Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 671 (1997) (noting that while thirty-three states allow nonunanimous verdicts in civil cases, only two permit them in criminal cases).

185. 116 F.3d 606, 622 (2d Cir. 1997).

186. *Id.*

that a fair trial requires both protecting holdouts and dismissing incompetent jurors.

V. PREVERDICT JUDICIAL INQUIRY

Judges must balance preserving jury secrecy, protecting holdout jurors, and upholding other preverdict values. This Part examines, first, the judge's responsibility to mediate among these three competing concerns; second, the limits on judicial intervention into deliberations; and third, the benefits of allowing judges to question jurors when problems arise during deliberations.

A. *The Role of the Judge in Protecting Secrecy*

Postverdict, a judge must shield the jury's deliberations from the prying eyes of the public. In the preverdict context, in contrast, a judge can both breach and protect jury secrecy. A judge can intrude on jury secrecy by questioning deliberating jurors, but a judge can also minimize intrusions on jury secrecy by limiting the scope of questioning and the extent to which these inquiries are revealed to the public.

Any attempt to extend the concept of postverdict secrecy to a preverdict setting must acknowledge the distinction between an inquiry into a jury's deliberations conducted by a disgruntled litigant or an ambitious reporter, on the one hand, and, on the other hand, an inquiry performed by a trial judge whose intervention has been requested by members of the jury themselves. In arguing that a judge must preserve juror secrecy, the Second Circuit in *Thomas* claimed that

> [i]t is the historic duty of a trial judge to safeguard the secrecy of the deliberative process that lies at the heart of our system of justice, even in the face of relentless, and sometimes inappropriate, demands by the news media and the public for postverdict disclosure of what went on behind the closed door of the jury room.[187]

It does not follow from a judge's duty to mediate between external requests for information and the preservation of jury secrecy, however, that a judge should also protect a jury's secrecy in the face of a request for intervention by the jury itself.

Arguments for preserving the secrecy of a jury's deliberations typically assume that the investigation into a jury's deliberative process is being

187. *Id.* at 619.

conducted by a losing party or by the news media. The impeachment rule was developed to prevent an unhappy litigant from using information about the jury's deliberations to overturn a verdict.[188] More recent support for protecting jury secrecy has been directed toward restricting the ability of the media to question jurors.[189] These concerns about intrusions on jury secrecy do not extend to inquiries conducted by the judge. Instead, proponents of jury secrecy encourage judges to play an active role in deciding what information about the jury should be disclosed to the public and even to supervise interviews of jurors conducted by nonparties.[190] One commentator has suggested imposing criminal sanctions on anyone who seeks disclosure of deliberations without court permission, including the jurors themselves.[191] Thus, support for strong protection of juror secrecy against external intrusions goes hand-in-hand with a trust in judges to serve as appropriate buffers between the jury and the outside world.

In addition to their integral role in protecting postverdict secrecy, judges also have a mediating role to play in preserving preverdict secrecy. Justice Cardozo in *Clark* believed a judge was responsible for weighing the importance of jury secrecy against competing social concerns. Cardozo asserted that "[i]t is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process."[192] According to this view, the judge must define the limits of jury secrecy, protect it when necessary, and intrude on it when a more important social policy requires.

One important concern that conflicts with preverdict secrecy is the responsibility of the judge, under Rule 23(b), to dismiss a juror if just cause arises during deliberations.[193] As the *Sobamowo* case shows, a judge is permitted to dismiss jurors for a wide variety of reasons. To determine whether cause for dismissal exists, a judge must question jurors, intruding somewhat on their secrecy.[194] As the First Circuit noted, "a juror's representations regarding her ability to perform fairly and impartially are not dispositive," and therefore "the trial court must make its own

188. *See* McDonald v. Pless, 238 U.S. 264, 269 (1915) (stating that the principle in the case "is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict").

189. *See, e.g.*, Abraham Abramovsky & Jonathan I. Edelstein, *Cameras in the Jury Room: An Unnecessary and Dangerous Precedent*, 28 ARIZ. ST. L.J. 865, 891-92 (1996); Goldstein, *supra* note 42, at 312-14; Weinstein, *supra* note 85, at 39-40.

190. *See* Note, *supra* note 48, at 904-05.

191. *See* Goldstein, *supra* note 42, at 308-09.

192. Clark v. United States, 289 U.S. 1, 13 (1933).

193. *See* People v. Hightower, 92 Cal. Rptr. 2d 497, 512 (Ct. App. 2000) ("[A] trial court errs if it *fails* to investigate an assertion, which, if true, would justify removal of a juror.").

194. *Supra* Subsection IV.A.2.

determination of the juror's ability to be fair and impartial."[195] Rule 23(b) permits a judge to dismiss a deliberating juror "for any just cause," and thus clearly implies that the jury's deliberations are not meant to be kept entirely secret from a judge.[196]

The opinions in *Brown*, *Thomas*, and *Symington* represent a break from this tradition of relying on a judge to protect a jury's secrecy from external inquiries and to balance secrecy with competing preverdict concerns. These courts expressed extreme mistrust of a judge's ability to preserve juror secrecy. The court in *Thomas* claimed that "the very act of judicial investigation can at times be expected to foment discord among jurors."[197] It also expressed concern that if a judge were allowed to conduct a thorough investigation into a jury's problem, the judge "would wind up taking sides" in disputes between jurors, and that this would perhaps result in "judicial interference with, if not usurpation of, the fact-finding role of the jury."[198] This evinces a strikingly low opinion of judges. As one court noted:

> The holdings in *Brown* and its progeny appear to rest, at least in part, on an approach directly contrary to these familiar principles [that in the absence of an affirmative showing to the contrary, the trial judge did the right thing for the right reasons]. They indulge an assumption that if the removal of a juror *might* have been motivated by an improper concern, it must be treated as having in fact been so motivated.[199]

This skepticism of a judge's ability impartially to question and dismiss jurors ignores the role of the judge in guarding a jury's secrecy from outsiders and in balancing secrecy with competing preverdict concerns.

B. *The Limits on Judicial Intervention*

The judge's role as an impartial mediator among jury secrecy, external demands for information, and internal problems among jurors is not the only constraint on a judge. A judge's inquiry into deliberations is bounded in four important areas: the timing of the intervention; the scope of the inquiry; the extent to which the inquiry is made public; and the judge's discretion in dismissing jurors.

First, judicial intervention into deliberations is confined in terms of when it can occur. A judge begins a just-cause inquiry only in response to a request by one or more jurors. This limitation gives jurors the power to

195. United States v. Barone, 114 F.3d 1284, 1307 (1st Cir. 1997).
196. FED. R. CRIM. P. 23(b).
197. 116 F.3d 606, 620 (2d Cir. 1997).
198. *Id.* at 622.
199. People v. Hightower, 92 Cal. Rptr. 2d 497, 516 (Ct. App. 2000).

control the timing of judicial intervention. Since secrecy is a privilege of the jury, it is appropriate that jurors can dictate when this privilege is waived.[200]

Second, judicial intervention is limited by the narrow scope of the inquiry. A judge's questioning should be confined to the task of establishing whether just cause exists to dismiss a juror. The degree of intrusion on deliberations will vary with the alleged problem of a juror.[201] In order to assure jurors that the secrecy of their deliberations will not be breached any more than necessary, a judge should inform jurors at the start of an inquiry that any investigation will be focused on the particular problem raised by the jury's note.

A third limit to judicial inquiry is that, unlike external investigation by the media and by litigants, a judge's inquiry can be sealed. While the parties to the case should either observe the judge's questioning of jurors or, at the very least, receive a transcript of the dialogue, this record can be sealed so that it is not made public. The Supreme Court discussed the possibility of conducting in camera questioning of jurors in the context of voir dire in *Press-Enterprise Co. v. Superior Court*.[202] The Court stated that a prospective juror "may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record."[203] The Court found that allowing in camera questioning at the request of a juror struck an appropriate balance between the tradition of open proceedings and the privacy interests of jurors: "By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure."[204] If jurors could request that their discussions be conducted in camera,[205] many of the concerns associated with breaching jury secrecy, such as the chilling of debate or the weakening of community trust in the jury, would be mitigated or avoided altogether.[206]

Finally, a judge's discretion about the use of any information obtained while questioning deliberating jurors should dictate restraint. If inquiry

200. *See* Clark v. United States, 289 U.S. 1, 13 (1933); 8 WIGMORE, *supra* note 55, § 2346. Even though a note from only one juror can waive the secrecy of all jurors, the other limits on a judge's inquiry are additional protections for the privacy of jurors. Moreover, the power to control the timing of intervention is not the same as the power to alter the composition of the jury. Only the judge, constrained by other bounds on inquiry and on juror dismissal, can alter the jury's composition.

201. *Supra* text accompanying notes 181-183.

202. 464 U.S. 501 (1984).

203. *Id.* at 512.

204. *Id.*

205. A judge's instructions to the jury could inform jurors that, upon their request, any sensitive discussion with the judge could be conducted in camera.

206. *Supra* Subsections III.A.3, III.A.4.

reveals that the juror in question was the holdout, a judge should not dismiss the juror. If the judge's questioning was inconclusive as to whether a juror was a holdout, the judge should not be permitted to dismiss the juror, in order to err on the side of protecting holdouts. If judicial intervention revealed that a juror lacked sufficient competence to deliberate or was intent on nullifying the law, however, the judge should be allowed to dismiss the juror. Any temptation on the part of a judge to dismiss a holdout would be limited by the reviewability on appeal of the judges' decision.[207] Allowing a broader judicial inquiry under Rule 23(b) would give appellate courts a more extensive record with which to review a judge's decision to dismiss a juror.

C. *The Benefits of Judicial Intervention During Deliberations*

Permitting a judge to engage in a more extensive just-cause inquiry could help clarify the distinction between holdout jurors and nondeliberating or nullifying jurors. In response to a request by one or more jurors that a juror be dismissed, a judge must engage in some sort of inquiry. Removing restrictions that bar further inquiry once responses to a judge's questioning touch on the substance of a jury's deliberations would allow a judge to conduct a more effective just-cause investigation. The conclusion in *Brown*, *Thomas*, and *Symington* that preventing dismissal of holdouts requires restrictions on judicial questioning assumes that it would be dangerous for a judge to find out how the jurors stand in a case. If questioning revealed that the juror in question was a holdout, however, this would simplify the judge's duty under Rule 23(b). If a situation was more ambiguous, the limits on judicial intervention would protect holdouts. Allowing a judge freer rein to question jurors will help the judge to understand the nature of the difficulty in the jury room and to decide what remedy is most appropriate.

The advantage of this approach is that it places primary responsibility for the resolution of a problem in the jury room on the person most familiar with the jury. Unlike an appeals court, a trial judge can observe the behavior and mannerisms of jurors and take these into account in deciding whether they are competent to deliberate. Granting a judge more leeway to question deliberating jurors will make a judge's decision about dismissal even better informed. As trials became longer and more expensive, Federal Rules of Criminal Procedure 23(b) and 24(c) were amended to avoid mistrials and to encourage the efficient resolution of trials. Freeing judges from stringent restrictions on questioning will help effectuate the intended

207. *See* United States v. Gibson, 135 F.3d 257, 259-60 (2d Cir. 1998) (stating that the district court's decision to dismiss a juror under Rule 23(b) is reviewed for abuse of discretion).

results of these rule changes. Preverdict inquiry that examines whether jurors are capable of effectively deliberating can promote both trial efficiency and a defendant's right to a competent jury.

VI. CONCLUSION

The problem with *Brown* and its progeny is that they emphasize the preservation of jury secrecy and the protection of the holdout to the exclusion of all other important concerns. While federal defendants are entitled to a unanimous jury, they are also entitled to a competent and actively deliberating body of jurors. To ensure that both objectives are met, judicial intervention into deliberations can help establish whether dismissal of a juror would fall within the accepted standards of just cause. Restricting judicial interrogation protects the right of unanimity but goes too far in hampering a judge's responsibility to ensure that each member of the jury is meaningfully participating in deliberations.

While it has been argued that "objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself,"[208] allowing a judge to question deliberating jurors will not violate a fundamental right of secrecy nor will it destroy the jury system. Preverdict questioning does not threaten a jury's final verdict. Instead, upon receipt of a note stating that a jury is experiencing problems in its deliberations, a judge is expected to question jurors to establish just cause for dismissal under Rule 23(b). This just-cause inquiry need not touch on the substance of deliberations to uncover whether a juror should be dismissed. Moreover, merely because the reasons underlying a problem with a jury are initially ambiguous does not mean that a judge should abstain from attempting to understand the nature of the problem. Unlike postverdict questioning of jurors by the press, preverdict judicial interrogation can be sealed from public view and narrowly tailored to address the problem raised in the jury's note.

Jury secrecy is not absolute. A fair trial requires that the jury be participatory and efficient as well as unanimous. Judges should be trusted to strike the appropriate balance between protecting jury secrecy and unanimity, while also ensuring that a case is decided by a competent, actively deliberating body of jurors.

208. United States v. Thomas, 116 F.3d 606 (2d Cir. 1997).