Holding Juries Accountable: Assessing the Right to a Competent and Unimpaired Jury in Light of *Tanner* and Federal Rule of Evidence 606(b)

CADEN A. GRANT*

INTRODUCTION

In *Tanner v. United States*, the Supreme Court held that Federal Rule of Evidence 606(b) prohibits the use of juror testimony to impeach a verdict except where an outside influence was brought to bear on the jurors.[1] This holding, while a reasonable interpretation of the text of Rule 606(b),[2] was remarkable given the extent of the misconduct at issue in the case. Jury members admitted to having five to six drinks during lunch breaks and using and selling both marijuana and cocaine.[3] Jurors even described themselves as "flying" during the trial, which they regarded as "one big party."[4] The Court, however, found that such influences were largely internal, no different than an illness or general fatigue.[5] Furthermore, the constitutional right to a fair trial in front of an impartial jury was deemed adequately protected by procedural safeguards such as voir dire, observation of juror behavior by judges and other court officials, and non-juror testimony during any post-verdict inquiry.[6]

Given the importance of the jury trial to the American legal system, a substantive inquiry into the merits of *Tanner* and Rule 606(b) is necessary. Our Constitution guarantees every criminal defendant the right to a fair trial by a capable and impartial jury, as well as the right to the due process of law before any defendant is deprived of their life or liberty.[7] While decisions like that in *Tanner* profess to protect the judicial system's integrity by securing the finality of a jury verdict, they rely on fear-based reasoning that questions the system's ability to survive an inquiry into its methods, rather than focusing on the adequacy of the system itself. Although the Court was correct in emphasizing the importance of the jury system's survival, ensuring survival by

* J.D., Georgetown University Law Center (expected May 2023); B.A., George Washington University (2020).

1. Tanner v. United States, 483 U.S. 107, 108 (1987).
2. FED. R. EVID. 606(b).
3. *Tanner*, 483 U.S. at 115–16.
4. *Id.*
5. *Id.* at 122.
6. *Id.* at 127.
7. *See* U.S. CONST. amend. V (granting the right to a jury in a criminal trial); U.S. CONST. amend. VI (granting the right to an impartial jury); U.S. CONST. amend. XIV, § 1 (granting the right to due process of the law before deprivation of life, liberty, or property).

putting the jury's methods beyond question causes more harm than good. However, *Tanner* remains largely unchallenged, with courts being particularly unwilling to accept arguments contesting the policy concerns used to shield the jury process from inquiry. They have instead preferred requests for highly specific exceptions to the now generally accepted no-impeachment rule.[8] Notably, despite the Court's concerns, the success of these exceptions proves that the jury system is capable of surviving attempts to improve its process. Therefore, it is important to revisit the necessary extent of the no-impeachment rule to move beyond the mere survival of the jury system and toward a more effective system of ensuring the quality of justice.

This Note will analyze the give and take between *Tanner*'s interpretation of Rule 606(b) and the constitutional rights of due process and trial by a competent and unimpaired jury. Ultimately, it will argue that the rule's current interpretation leaves those constitutional rights unprotected and requires significant change in either application or substance. Section I will provide a general background on the constitutional rights at issue, namely the jury trial rights and due process rights provided by the Fifth, Sixth, and Fourteenth Amendments, as well as a background on *Tanner* and the no-impeachment rule. Section II will define the extent of the no-impeachment rule and its post-*Tanner* exceptions. Section III will then question the Court's decision in *Tanner*, weighing the policy arguments for the no-impeachment rule against the downsides of the Court's reluctance to evaluate the jury process, while also explaining the inadequacy of the enumerated alternative methods for protecting constitutional due process and jury rights. Finally, Section IV will propose methods in which legal professionals can either work within the confines of current precedent or attempt to reform Rule 606(b) to better protect and ensure the right to a competent and unimpaired jury.

I. BACKGROUND

Rule 606(b) and its subsequent interpretation in *Tanner* implicate a variety of policy considerations and constitutional rights. This section will provide a background on the constitutional jury trial and due process rights, the meaning of Rule 606(b), and a summary of the *Tanner* decision to provide necessary context for an analysis of the no-impeachment rule.

A. THE SIXTH AMENDMENT AND DUE PROCESS

The Sixth Amendment of the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy public trial,

8. *See, e.g.*, Peña–Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (preserving the no-impeachment rule while creating an additional exception for allegations of juror racial bias); Warger v. Shauers, 574 U.S. 40, 49–50 (2014) (disfavoring arguments questioning policy justifications for the no-impeachment rule and preferring requests for specific exceptions to the rule).

by an impartial jury of the State and district wherein the crime shall have been committed."[9] Courts have held that this right can be violated when jury members act improperly; however, "not all misconduct necessarily deprives a losing party of the right to a fair trial."[10]

The Constitution also, through the Fifth Amendment, guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[11] This due process right includes the right to "a tribunal both impartial and mentally competent to afford a hearing,"[12] as well as "a jury capable and willing to decide the case solely on the evidence before it."[13]

Each of these Constitutional guarantees are implicated by Rule 606(b) and the *Tanner* decision. The *Tanner* Court ultimately determined that both were adequately protected by other procedural safeguards, despite the inability to inquire into certain types of juror misconduct.[14] Both Rule 606(b) and the Court's holding in *Tanner* are discussed further below.

B. FEDERAL RULE OF EVIDENCE 606(B): THE NO-IMPEACHMENT RULE

Federal Rule of Evidence 606(b) governs inquiries into the validity of a verdict or indictment.[15] The Rule generally bars evidence about any statement made during jury deliberations.[16] It prevents post-verdict juror testimony on (1) any statement made or incident that occurred during deliberations, (2) the effect of anything on the jury's vote, or (3) any juror's mental processes concerning the decision.[17] The Rule also contains exceptions, allowing post-verdict juror testimony about whether "extraneous prejudicial information was improperly brought to the jury's attention[,] an outside influence was improperly brought to bear on any juror[, or] a mistake was made in entering the verdict form."[18]

Despite these exceptions, the Rule is colloquially known as the no-impeachment rule, as it largely prevents parties from impeaching jury verdicts based on juror testimony about how a verdict was reached. While the Rule's Advisory Committee Notes recognize that "simply putting verdicts beyond effective reach can only promote irregularity and injustice," they assert that the Rule properly accommodates these considerations while also promoting the values of "freedom of deliberation, stability and finality of verdicts, and protection of jurors against

---

9. U.S. CONST. amend. VI.
10. 24 AM. JUR. 2D *Proof of Facts* 633 § 1 (1980).
11. U.S. CONST. amend. V.
12. Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).
13. Smith v. Phillips, 455 U.S. 209, 217 (1982).
14. See *infra* Section I.C.2 for a discussion of the *Tanner* case, including the Court's alternative procedural safeguards of voir dire, juror observability, and non-juror testimony. *See generally*, Tanner v. United States, 483 U.S. 107, (1987).
15. FED. R. EVID. 606(b).
16. *Id.*
17. *Id.*
18. *Id.*

annoyance and embarrassment."[19] Therefore, according to the Advisory Committee, the Rule focuses primarily on insulating the "manner in which the jury reached its verdict," extending the protection to "each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other furtherance of the process."[20]

By insulating the jury's deliberative process while allowing post-verdict investigation into outside influences, Rule 606(b) left open for courts to consider exactly what constitutes an "outside influence." While instances of threats or bribery clearly fall within the exception,[21] courts long struggled with whether to apply the exception more broadly to undesirable juror misconduct caused by influences arguably external to an effective deliberation.[22] The Supreme Court eventually weighed in, addressing the scope of the "outside influence" exception directly in *Tanner v. United States*.

C. TANNER V. UNITED STATES

1. FACTS AND PROCEDURAL HISTORY

Petitioners Anthony Tanner and William Conover were convicted by the District Court for the Northern District of Florida for conspiracy to defraud the United States and mail fraud.[23] Shortly before sentencing, Petitioners filed a motion seeking an evidentiary hearing with juror testimony after receiving a statement from one of the jurors that several jury members slept through afternoons during trial after drinking alcohol at lunch.[24] The District Court "concluded that juror testimony on intoxication was inadmissible under Federal Rule of Evidence 606(b) to impeach the jury's verdict," while admitting non-juror testimony by defense counsel, who mentioned seeing one of the jurors "'in a sort of giggly mood'" but neglected to mention it at trial.[25] The judge concluded that the admitted evidence was insufficient to warrant an evidentiary hearing with juror testimony, noting that "[n]othing was brought to [the judge's] attention in this

19. FED. R. EVID. 606(b) advisory committee's note to 1972 proposed rules (citing McDonald v. Pless, 238 U.S. 264, 269 (1915)).

20. *Id.*

21. *See* H.R. REP. NO. 93-650, at 7095 (1973) (outlining the scope of the outside influences exception).

22. *See, e.g.*, United States v. Dioguardi, 361 F. Supp. 954, 957 (S.D.N.Y. 1973), aff'd 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 873 (1974) (describing testimony regarding juror incompetence as typically barred by Rule 606(b) as it was demonstrated during deliberations and thus "internal" rather than "external," with an exception for a "strong showing as to the existence of the alleged mental infirmity . . . sufficient to overcome the legal presumption that all men are sane"); United States v. Conover, 772 F.2d 765, 770 (11th Cir. 1985) (finding that "allegations of substance abuse" are not an "'adequate showing of extrinsic influence to overcome the presumption of jury impartiality.'"); United States v. Schultz, 656 F. Supp. 1218, 1221 (E.D. Mich. 1987) (criticizing *Conover* for giving "inadequate consideration to the defendants' right to a competent jury, and thus employ[ing] too narrow a reading of the exceptions in [Rule 606(b)]," but refusing to find that "*any* or *every* such allegation would require an evidentiary hearing").

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

24. *Id.*

25. *Id.*

case about anyone appearing to be intoxicated," despite counsel's opportunity to do so, and that the judge "saw nothing that suggested [intoxication]."[26]

While appeal was pending, Petitioners renewed their motion after receiving an unsolicited visit from a second juror alleging misconduct.[27] The juror gave a sworn statement to a private investigator, claiming that the trial "'was one big party'" with multiple jurors consuming "'a pitcher to three pitchers'" during recesses, while others had multiple mixed drinks or bottles of wine.[28] The juror also claimed that three other jurors "smoked marijuana quite regularly during the trial," while others ingested cocaine multiple times.[29] He even claimed that one juror sold marijuana to another juror and brought "marijuana, cocaine, and drug paraphernalia into the courthouse."[30] Finally, he corroborated claims that jurors were sleeping during the trial and described his own experience as "'flying.'"[31] However, the District Court denied the new motion for merely containing more of the same type of allegations from the original motion and thus being barred by Rule 606(b).[32] The Eleventh Circuit affirmed, and the case went to the Supreme Court to address whether Rule 606(b) compels courts to hear juror testimony on intoxication and similar juror misconduct.[33]

2. ANALYSIS AND HOLDING

The Supreme Court upheld the refusal to allow post-verdict juror testimony regarding the alleged substance use at trial.[34] The Court first referenced the "near-universal and firmly established common-law rule" that flatly prohibits impeaching a jury verdict with post-verdict juror testimony.[35] However, it noted that this prohibition is not absolute, as lower court practice outlined exceptions in situations in which the verdict was allegedly affected by an "'extraneous influence.'"[36] Therefore, the question before the Court was whether alcohol and drug use by jurors during trial and deliberation constituted such an "extraneous influence."[37]

To answer, the Court observed that the "extraneous influence" exception created an internal/external distinction between prohibited and permitted post-verdict juror testimony to impeach a verdict.[38] The Court defined this distinction not based on the juror's literal location inside or outside the jury room, but on the

26. *Id.* at 114–15.
27. *Id.* at 115.
28. *Id.*
29. *Id.* at 115–16.
30. *Id.* at 116.
31. *Id.*
32. *Id.*
33. *Id.* at 126–27.
34. *Id.* at 110.
35. *Id.* at 117.
36. *Id.*
37. *See Id.* at 126–27.
38. *Id.* at 117.

nature of the allegation itself.[39] Petitioners argued that rejection of a locational interpretation meant that substance use, even in the jury room, was an external influence.[40] The Court, however, disagreed, comparing allegations of juror substance use to allegations of juror physical and mental incompetence, which lower courts had deemed "internal" rather than "external."[41]

Despite the alarming nature of the jury's behavior, the Court found ample support for designating substance use as an external influence, therefore preventing post-verdict juror testimony regarding such conduct. It first asserted that, regardless of the severity of effect and undesirability of use, "drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep," thereby doubling down on the comparison between allegations of substance use and those of physical and mental incompetence.[42] Additionally, the Court pointed to the legislative history of Rule 606(b).[43] While the House Judiciary Committee opted for a broader interpretation allowing juror testimony on any "'objective juror misconduct,'" the Senate and eventually the Conference Committee explicitly rejected this expansion, reverting to the original proposal that barred testimony as to "'the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.'"[44] The Court argued that this indicated a clear consideration and rejection of a rule allowing post-verdict juror testimony as to juror misconduct, including substance use.[45]

More importantly, the Court emphasized a variety of policy considerations supporting a rule barring admission of juror testimony to impeach a verdict. First, the no-impeachment rule helps shield jury deliberations from public scrutiny.[46] Removing that shield would, according to the Court, expose jurors to a constant stream of harassment by a defeated party hoping to secure evidence of misconduct to overturn the verdict.[47] The shield was also deemed essential for ensuring "full and frank discussion in the jury room [and] jurors' willingness to return an unpopular verdict," as it eliminated the fear of backlash and reputational damage

---

39. *Id*. at 117–18.

40. *Id*. at 108.

41. *Id*. at 118. To reach this conclusion, the Court relied on the holding and reasoning in United States v. Dioguardi. 361 F. Supp. 954, 957 (S.D.N.Y. 1973).

42. *Id*. at 122.

43. *Id*. at 122–25.

44. *Id*. at 122–25 (citing H.R. REP. NO. 93–650, at 9–10 (1973) (explaining broader interpretation by the House Judiciary Committee); S. REP. NO. 93–1277, at 13 (1974) (rejecting of House interpretation by Senate); H.R. REP. NO. 93–1597, at 8 (1974) (Conf. Rep.) (rejecting the House bill allowing "a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror" in favor of the Senate bill that "does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations")).

45. *Tanner*, 483 U.S. at 125.

46. *Id*. at 119.

47. *Id*. at 119–120 (quoting McDonald v. Pless, 238 U.S. 264, 269 (1915)).

to jurors.[48] Additionally, the Court emphasized the importance of verdict finality, arguing that "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process."[49] Finally, both public scrutiny and questionable finality can undermine public confidence in jury verdicts; therefore, the Court deemed the no-impeachment rule essential to protect public trust in the jury process by hiding what actually happens in the jury room.[50] The Court concluded that, while "[t]here is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior[, i]t is not at all clear . . . that the jury system could survive such efforts to perfect it."[51]

Finally, the Court addressed Petitioners' argument that, irrespective of Rule 606(b), post-verdict juror testimony was required to ensure their Sixth Amendment right to a trial by a competent and unimpaired jury.[52] While noting a long recognition of a right to "'a tribunal both impartial and mentally competent to afford a hearing,'"[53] the Court nonetheless rejected the constitutional claim, holding that these rights were adequately protected by other aspects of the trial process.[54] These protections include voir dire examinations of the suitability of potential jurors; the observability of the jury during the trial by the court, counsel, and other personnel; individual jurors' ability to observe each other and report any misconduct before the verdict; and finally, the ability to impeach a verdict with non-juror evidence of misconduct.[55] Therefore, the Court concluded that the no-impeachment rule comports with the Sixth Amendment.[56]

Tanner conceptualized Rule 606(b)'s prohibition of post-verdict juror testimony in terms of a restrictive internal/external distinction and categorized intoxication and drug use as internal, thus making juror intoxication and drug use extremely difficult to prove. The Court justified this prohibitive distinction as necessary to protect policy interests in the finality of verdicts, the privacy of deliberations, and jurors' freedom from post-verdict harassment.[57] Furthermore, *Tanner* found post-verdict juror testimony unnecessary even in the face of egregious misconduct implicating the litigants' constitutional jury trial and due

48. For a detailed discussion about the necessity of shielding juries from public scrutiny that the Court relied upon in rendering its decision in *Tanner*, 483 U.S. at 120–121, see generally Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 888–892 (1983).

49. *Tanner*, 483 U.S. at 120 (citing Gov't of Virgin Islands v. Nicholas, 759 F.2d 1073, 1081 (3d Cir. 1985)).

50. *Id.* at 121.

51. *Id.* at 120.

52. *Id.* at 116–17.

53. *Id.* at 126 (quoting Jordan v. Massachusetts, 225 U.S. 167, 176 (1912)).

54. *Id.* at 127.

55. *Id.*

56. *See Id.*

57. *Id.* at 119.

process rights, as those rights were adequately protected by other procedural safeguards, such as voir dire, juror observability, and non-juror impeachment evidence.[58]

II. WHERE IS THE LINE?: THE EXTENT OF THE NO-IMPEACHMENT RULE

The Court's interpretation of Rule 606(b) in *Tanner* has become colloquially known as the no-impeachment rule, generally prohibiting the admission of post-verdict juror testimony to impeach that verdict when such testimony goes toward juror conduct, the method of deliberation, or any other internal influences.[59] Since *Tanner*, courts have attempted to define the contours of the external/internal distinction when faced with new types of alleged misconduct. The extent of the no-impeachment rule after these attempts, along with its exceptions, is discussed below.

A. MENTAL AND PHYSICAL INCOMPETENCE

Evidence of juror mental or physical incompetence had been deemed "internal" and thus prohibited from use to impeach a verdict long before *Tanner*, with courts preferring to address such issues before empaneling the jury.[60] Lower courts thus typically denied evidentiary inquiries with juror testimony into allegations of juror insanity,[61] inability to understand English,[62] and physical disability.[63] The only exception to this blanket ban was outlined in *United States v. Dioguardi*, where a post-verdict inquiry into juror competency was deemed permissible following a showing of incompetence strong enough to overcome the presumption that a person is sane.[64] *Tanner* extended this well-settled prohibition to juror consumption of alcohol and drugs, indicating that such substances served only to cause juror incompetence and therefore post-verdict juror testimony on allegations of substance use should be similarly prohibited.

B. LYING DURING VOIR DIRE

More recently, the Supreme Court assessed the applicability of the no-impeachment rule to allegations that a juror lied during voir dire. In *Warger v. Shauers*, after the jury returned its verdict in a negligence case involving a motor

---

58. *Id.* at 127.

59. *See supra* Section I.C.2.

60. *See, e.g.*, United States v. Allen, 588 F.2d 1100, 1106 n.12 (5th Cir. 1979) ("Questions concerning the competency of a jury ordinarily are not entertained once the jury has entered its verdict.").

61. *E.g.*, Sullivan v. Fogg, 613 F.2d 465, 467 (2d Cir. 1980).

62. *E.g.*, United States v. Pellegrini, 441 F. Supp. 1367, 1371 (E.D. Pa. 1977).

63. *E.g.*, Gov't of Virgin Islands v. Nicholas, 759 F.2d 1073, 1080–81 (3d Cir. 1985) (holding that juror's hearing impairment that allegedly rendered him incompetent to understand evidence and deliver a verdict was an internal influence, not an external influence).

64. United States v. Dioguardi, 361 F. Supp. 954, 957 (1973) (the court neglected to provide any examples of when a showing of incompetence would be strong enough for an exception, merely leaving the door open for such an exception in the future).

vehicle accident, a juror contacted the plaintiff Warger's counsel claiming that the jury foreperson revealed during deliberations that her daughter caused a fatal motor vehicle accident and that the lawsuit would have ruined her daughter's life, a fact that she deliberately omitted during voir dire.[65] The Court, however, found that Rule 606(b) excluded post-verdict juror testimony even regarding allegations that a juror lied during voir dire.[66]

First, the Court determined that the plain meaning of Rule 606(b) indicates its application to any "'inquiry into the validity of the verdict,'" and that a "postverdict motion for a new trial on the ground of voir dire dishonesty" clearly involves such an inquiry.[67] While some courts had allowed jury testimony regarding voir dire dishonesty revealed during deliberations, the *Warger* Court noted that the drafters of Rule 606(b) considered and rejected this broader "Iowa" approach[68] in favor of the more widely used "federal" approach, which prohibits testimony regarding jury deliberations on anything other than "extraneous" influences on the jury.[69]

More significantly, the Court refused to consider Warger's arguments against Rule 606(b)'s validity, requiring instead an argument for a specific exception to the established universal ban of juror testimony to impeach a verdict. The Court stated: "Warger cannot escape the scope of the Rule Congress adopted simply by asserting that its concerns were misplaced," thereby affirming the policy justifications for the non-impeachment rule espoused in *Tanner*.[70] Additionally, the Court dismissed Warger's constitutional concerns by reaffirming *Tanner*, even going as far as asserting that "a party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased."[71] However, it did leave the door open for questioning this reality in extreme cases of juror bias that make the abridgment of the jury trial right all but certain, but left the enumeration of such an exception for future courts.[72]

After expressly reaffirming both the policy justifications for Rule 606(b) and the procedural protections for the constitutional jury right notwithstanding the Rule, the Court added lying during voir dire to the list of internal influences and refused to create a new exception.[73] The Court also refused to hold that the mere fact that a juror should have been excluded makes anything the juror said

65. Warger v. Shauers, 574 U.S. 40, 40 (2014).

66. *Id*. at 44.

67. *Id*. at 44–45.

68. For a background on the "Iowa" approach, see generally Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 210 (1866) (advocating for exclusion of jury testimony regarding deliberations to the extent it related to matters that "inhere[d] in the verdict," such as thought process and subjective intentions).

69. *See Warger*, 574 U.S. at 48 (referencing *Tanner*'s detailed discussion of Rule 606(b)'s legislative history and Congress's explicit consideration and rejection of a broader approach to the rule).

70. *Id*. at 49–50.

71. *Id*. at 51.

72. *Id*. at 51 n.3.

73. *Id*. at 51–52.

"'extraneous.'"[74] Instead, the Court likened such evidence to evidence of juror misconduct, as both would call for juror exclusion or dismissal.[75]

C. EXTREME JUROR BIAS

1. EXCEPTIONS TO THE NO-IMPEACHMENT RULE

While the Court since *Warger* has refused to accept arguments questioning the policy justifications for the no-impeachment rule or the constitutional concerns it may implicate, it has become more willing to consider specific exceptions to the Rule. Even before its codification, when the Rule was just common-law doctrine, there were indications that the door was being left open for situations in which the rule could be ignored. Even at the rule's earliest recognition, the Supreme Court noted that, while post-verdict juror testimony need be received cautiously, "cases might arise in which it would be impossible to refuse [post-verdict juror testimony] without violating the plainest principles of justice."[76] Such circumstances, the Court explained, "might occur in the gravest and most important cases," yet no further definition was provided.[77] One hundred years later, the *Warger* Court still stopped short of defining a precise exception, merely noting that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged," thereby necessitating an exception when the usual safeguards are insufficient.[78]

2. RACIAL BIAS AS AN EXCEPTION TO THE NO-IMPEACHMENT RULE

In *Peña–Rodriguez v. Colorado*, the Court finally provided an example of an extreme circumstance necessitating an exception. In this case, after Peña–Rodriguez was convicted, two jurors informed defense counsel that another juror had repeatedly expressed anti-Hispanic bias toward Peña–Rodriguez and his alibi witness.[79] The trial court denied Peña–Rodriguez's motion for a new trial, citing Rule 606(b)'s prohibition of post-verdict juror testimony.[80] The Supreme Court overruled the lower court, holding that "the Sixth Amendment requires that the no-impeachment rule give way" in cases where "a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant."[81]

The Court began by distinguishing racial bias from previous attempts at creating exceptions to the no-impeachment rule. It first emphasized the national importance of eliminating racial discrimination, along with the judiciary's role in

74. *Id.* at 52.
75. *Id.* at 53.
76. United States v. Reid, 53 U.S. 361, 366 (1851).
77. McDonald v. Pless, 238 U.S. 264, 269 (1915).
78. *Warger*, 574 U.S. at 51 n.3.
79. Peña–Rodriguez v. Colorado, 137 S. Ct. 855, 857 (2017).
80. *Id.*
81. *Id.* at 858.

helping achieve that elimination given racial discrimination's "'especially pernicious [impact] in the administration of justice.'"[82] The Court then distinguished racial bias from the types of misconduct in *Tanner* and *Warger*, for which an exception was rejected. Racial bias, the Court posited, "implicates unique historical, constitutional, and institutional concerns" and is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice," unlike isolated and less pernicious misconduct such as lying during voir dire and substance use.[83] Finally, the Court noted that at least sixteen states had already adopted a racial-bias exception to the no-impeachment rule and three Courts of Appeals had suggested similar exceptions.[84]

The Court continued to distinguish racial bias from other potential misconduct by addressing the atypical inadequacy of the protection provided by *Tanner's* procedural safeguards. It noted the ineffectiveness of generic questions about impartiality at exposing specific biases during voir dire, the discouragement of cross-juror reporting of racial bias due to the stigma attached to such an accusation, and the difficulty of perceiving bias during trial.[85] The Court also recognized the jury's important role as a safeguard of life and liberty against improper use of government power, the potentially catastrophic damage to the country's confidence in the judicial system should it become susceptible to racial bias, and the Court's resulting willingness to enforce the constitutional protections against racial discrimination in the jury system.[86]

The Court thus created a well justified exception to the no-impeachment rule for evidence of racial bias; however, it was nonetheless saddled with significant limitations. The juror must have made a clear statement "exhibiting overt racial bias that cast[s] serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."[87] Additionally, the trial court has substantial discretion to consider all circumstances surrounding the statement, including its

82. *Id.* at 867–68.

83. *Id.* at 868.

84. *Id.* at 865; *See* United States v. Villar, 586 F.3d 76, 87–88 (1st Cir. 2009) (holding the Constitution demands a racial-bias exception); United States v. Henley, 238 F.3d 1111, 1119–21 (9th Cir. 2001) (finding persuasive arguments in favor of an exception but not deciding the issue); Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987) (observing that in some cases fundamental fairness could require an exception).

85. *Peña–Rodriguez*, 137 S. Ct. at 868–69; *see also*, *Villar*, 586 F.3d at 87 ("[T]he rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury. In our view, the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations.").

86. *See Peña–Rodriguez*, 137 S. Ct. at 869; *see also*, Strauder v. West Virginia, 100 U.S. 303, 305–09 (1879) (holding that the Fourteenth Amendment prohibits the exclusion of jurors based on race); Neal v. Delaware, 103 U.S. 370, 370 (1880) (striking down laws and practices that systematically exclude racial minorities from juries); Batson v. Kentucky, 476 U.S. 79, 80 (1986) (ruling that no litigant may exclude a prospective juror based on race); Ham v. South Carolina, 409 U.S. 524, 526–27 (1973) (holding that defendants may at times be entitled to ask about racial bias during voir dire).

87. *Peña–Rodriguez*, 137 S. Ct. at 869.

content and timing and the reliability of the alleging evidence, in determining whether the movant demonstrated that "racial animus was a significant motivating factor in the juror's vote to convict."[88]

D. WHERE DOES THIS LEAVE THE NO-IMPEACHMENT RULE?

Today, *Tanner*'s interpretation of Rule 606(b)'s no-impeachment rule has become a well-settled doctrine that prohibits post-verdict juror testimony on any matters in which "the nature of the allegation" is deemed internal to the jury's deliberations.[89] *Tanner*'s external/internal distinction is routinely applied to determine the admissibility of post-verdict juror testimony, with matters such as juror misconduct, juror incompetence, and even lying during voir dire all deemed internal, in contrast to external influences brought to bear on the jury by outside actors or information.[90]

This distinction has been repeatedly justified as necessary to protect uninhibited discussion in the jury room by shielding jurors from post-verdict harassment, and to protect public trust in the jury process by keeping deliberations free from public scrutiny and ensuring the finality of the verdict.[91] These policy justifications seem unchallengeable, with courts only amenable to arguments as to whether the conduct is external or internal under the current distinction or for specific exceptions to the prohibition.[92] Arguments along the distinction must demonstrate externality beyond the individual juror[93] or overcome the general presumption of a juror's sanity and competence.[94] Arguments for exceptions are more difficult. The sole success, the racial bias exception, was accepted only because of its constitutional importance, distinguishability from other internal matters, and the risk of substantial damage to the legal system without the creation of an exception.[95]

Finally, the no-impeachment rule is not understood to impermissibly impede any constitutional rights, absent evidence of extremely serious misconduct.[96] Such rights to trial by a competent and impartial jury are deemed adequately

---

88. *Id.* (acknowledging the importance of legal rules of ethics in governing evidence collection).

89. Tanner v. United States, 483 U.S. 107, 117–18 (1987).

90. *See* Gov't of Virgin Islands v. Nicholas, 759 F.2d 1073, 1080–81 (3d Cir. 1985) (holding that juror's hearing impairment that allegedly rendered him incompetent to understand evidence and deliver a verdict was an internal influence, not an external influence); Warger v. Shauers, 574 U.S. 40, 44 (2014); *Tanner*, 483 U.S. at 117 (listing consideration of non-admitted evidence, undue influences from litigating or outside parties, and jurors' conflicts of interest as examples of external matters). For other examples of external influences, see Remmer v. United States, 347 U.S. 227, 228–29 (1954) (admitting post-verdict juror testimony about bribing of jurors); Parker v. Gladden, 385 U.S. 363, 364–65 (1966) (admitting post-verdict juror testimony regarding bailiff's statements about defendants).

91. *Tanner*, 483 U.S. at 119–21.

92. *See Warger*, 574 U.S. at 49–50.

93. *See* FED. R. EVID. 606(b); *Tanner*, 483 U.S. at 117–18.

94. United States v. Dioguardi, 361 F. Supp. 954, 957 (1973).

95. *See supra* Section II.C.2 discussing the racial bias exception created in *Peña–Rodriguez*.

96. *Warger*, 574 U.S. at 51 n.3.

protected by other procedural safeguards, namely voir dire, juror observability during trial, and impeachment by non-juror evidence.[97] These procedural safeguards are considered so strong that only the failure of every safeguard justifies an exception to the no-impeachment rule, while the failure of one can be overcome by the presence of the others.[98]

III. RIGHT TO A COMPETENT AND UNIMPAIRED JURY LEFT POORLY PROTECTED

A. FLAWS IN *TANNER* AND ITS PROGENY

Rule 606(b) generally prohibits the use of post-verdict juror testimony to impeach a verdict with two exceptions. The first, the extraneous prejudicial information exception, is relatively clear, allowing testimony regarding any non-admitted material that influenced the jury.[99] The second, the outside influence exception, is defined by *Tanner's* internal/external distinction, allegedly in place to protect the integrity of the jury process, and, while such a rule may not be ideal, it is unlikely that the jury system would survive efforts to perfect it in absence of the rule.[100] However, this rationale is vulnerable to two routes of criticism. First, under the current internal/external distinction, the Court routinely sweeps too broadly in classifying matters as internal and thus prohibited subjects of post-verdict juror testimony. Second, the rationale is nothing more than fear-based reasoning that does more damage to the integrity of the jury process than is justified by the alleged protection provided by the no-impeachment rule.

1. CRITIQUING THE INTERNAL/EXTERNAL DISTINCTION

First, the facts of *Tanner* themselves demonstrate the flaws in the Court's overly broad, arbitrary reasoning. While the Court makes a compelling comparison between intoxication and illness, the latter being a clearly internal matter, a stronger argument can be made for designating intoxication as an external influence. Not unlike a newspaper article detailing information not admitted into evidence, substances like alcohol and drugs, whether consumed within or outside the jury room, are nonetheless also brought in from outside the jury room by jurors, resulting in juror confusion and the general impairment of decision-

97. *See Tanner*, 483 U.S. at 127.

98. *See* Warger v. Shauers, 574 U.S. 40, 51 (2014) (holding that failure of voir dire compensated by presence of other procedural safeguards); *Peña–Rodriguez*, 137 S. Ct. at 868–69; *see also*, *Villar*, 586 F.3d at 87 ("[T]he rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury. In our view, the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations.").

99. FED. R. EVID. 606(b). *See, e.g.*, United States v. Bruscino, 662 F.2d 450, 459 (7th Cir. 1981) (allowing post-verdict juror testimony to impeach a verdict where a newspaper was brought into the jury room and the jury was mistakenly given a document that was not admitted into evidence).

100. *See Tanner*, 483 U.S. at 120.

making. Each occurrence of substance use derails the proper deliberative process and, unlike bribes or other improper contacts which belong under the extraneous prejudicial information exception, does not specifically prejudice one party.

Additionally, it has long been recognized that the no-impeachment rule should not become an absolute bar against the admission of post-verdict juror testimony. The Advisory Committee included a note with Rule 606(b) explaining its attempt to strike a proper balance between universal admissibility and universal inadmissibility.[101] Drifting too far toward the former, they believed, would damage key policy interests in finality, privacy, and protecting jurors from harassment, while tilting instead toward the latter would put "verdicts beyond effective reach[, which] can only promote irregularity and injustice."[102] The Rule's common law origins and even recent interpretations reflect the need for balance in another way, by consistently acknowledging that in certain scenarios, the no-impeachment rule must be discarded to protect the principles of justice.[103] Therefore, it not only must walk a delicate line between universal inadmissibility and universal admissibility, but it must also be willing to cede in the gravest cases or in the face of extreme juror bias.[104]

As it stands today, the internal/external distinction upsets this balance, drifting too closely toward universal inadmissibility, placing verdicts beyond effective reach. The Rule prohibits post-verdict juror testimony on even the gravest misconduct, such as intoxication and drug use, lying during voir dire, most forms of discriminatory bias (i.e., religious, gender, sexual orientation biases), and all but the most crippling forms of mental incompetence.[105] Many of these circumstances can be demonstrated only by juror testimony,[106] and they all can severely impair competent and impartial deliberation, damaging a verdict's validity. This broad-sweeping prohibition leaves almost no eligible subject matter for juror testimony, therefore effectively placing verdicts beyond reach.

Furthermore, the current distinction does not honor the longstanding recognition of the need for the rule to cede in the gravest of cases. While most misconduct may not rise to this level, it is hard to see how rampant drunkenness and the sale of illicit substances within the jury room do not constitute the "gravest of cases." Such behavior clearly damages the principles of justice by permitting the thoughtless administration of justice by those in willful violation of the law themselves. Instead of recognizing the gravity of this misconduct, the Court has created an exceedingly strict standard moving beyond centuries of precedent indicating "extreme juror bias" necessitates an exception. Rather, the Rule only cedes for an issue of significant constitutional importance that has long plagued

101. *See* FED. R. EVID. 606(b) advisory committee's note to 1972 proposed rules.
102. *Id.*
103. *See Warger*, 574 U.S. at 51–52.
104. *See Warger*, 574 U.S. at 52; United States v. Reid, 53 U.S. 361, 366 (1851).
105. *See supra* Section II.
106. *See infra* Section III.B.

the judiciary and that cannot be mitigated by any of the procedural safeguards.[107] By creating such a rigid standard, it is hard to see how any other misconduct could escape the no-impeachment rule, thereby further tilting the balance of the current system toward universal inadmissibility.

2. ANALYZING THE UNJUSTIFIED POLICY CONSIDERATIONS AND THEIR WEAK CONNECTION TO THE COURT'S INTERPRETATION OF THE NO-IMPEACHMENT RULE

The *Tanner* Court justified its decision by noting the necessity of the no-impeachment rule in protecting key policy interests, such as the finality of verdicts, the privacy of deliberations, the protection of jurors from harassment, and public confidence in the jury process.[108] However, the actual line drawn between impeachable external matters and unimpeachable internal matters does not actually protect those policy interests. Furthermore, while courts have been loath to accept challenges to these policy justifications, none should escape scrutiny.

First, there is no difference in the extent to which finality interests are implicated by "internal" matters, such as intoxication or other misconduct, and "external" matters, such as bringing in unadmitted evidence.[109] Both occurrences are not considered part of a proper deliberative process, and any inquiry into either would upset the finality of the verdict in question. The distinction at best indirectly protects finality interests by decreasing the actionability of post-verdict challenges. Juror misconduct is typically revealed during deliberations and thus verifiable only through juror testimony, so the resulting verdict would be difficult to challenge without such testimony. Therefore, this indirect protection is obtained at the high cost of increased tolerance for grave misconduct in jury deliberations.

This exceptional cost is especially objectionable when considering that the no-impeachment rule may not even be necessary to protect the finality of verdicts. For one, post-verdict requests for relief are routinely permitted for a variety of reasons, including mistake, newly discovered evidence, fraud, or other misconduct.[110] Even when these requests involve "internal" matters on which juror testimony is permitted, the verdict's finality is still disrupted by the availability of non-juror post-verdict evidence.[111] Therefore, the no-impeachment rule merely

---

107. *See* Peña–Rodriguez v. Colorado, 137 S. Ct. 855, 868–69 (2017) (holding that not even the failure of every procedural safeguard is dispositive, relying on the constitutional importance of the elimination of racial bias to push the exception over the line).

108. *See* Tanner v. United States, 483 U.S. 107, 119–22 (1987).

109. *See* Edward T. Swaine, Note, *Pre-deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 198 (1988) (finding finality not to be dispositive, as all post-verdict inquiries upset finality).

110. *See, e.g.*, FED. R. CIV. P. 60(b) (allowing relief from a final judgement, order or proceeding for mistake, newly discovered evidence, fraud, or other reasons); FED. R. CRIM. P. 33(a) (allowing court to vacate judgment and grant new trial if "interest of judgment so requires").

111. *Cf. Tanner*, 483 U.S. at 127 (citing *United States v. Taliaferro*, 588 F.2d 724, 725–26 (4th Cir. 1977) (holding that courts can seek to impeach a verdict after trial by nonjuror evidence of misconduct, such as records of a club where jurors dined and testimony of marshal who accompanied jurors).

limits the scope of post-verdict inquiries, providing only limited protection for verdict finality in the face of grave misconduct that would be readily demonstratable were it not for the rule.

Second, the current interpretation of the no-impeachment rule does nothing to preserve the privacy of the jury nor ensure full and frank discussion in the jury room. While jurors are barred from disclosing the substance of their deliberations to litigants or the court, nothing prohibits jurors from discussing such matters with anyone outside the courtroom after the trial.[112] For example, jurors often accept interviews from news outlets or write books about their experiences.[113] Prohibiting post-verdict juror testimony as to juror intoxication or lying during voir dire just because the evidence of each instance of misconduct was revealed during deliberations does not make uninhibited discussion more likely. While juror privacy would technically be protected as their illicit acts during deliberations would evade public scrutiny, allowing testimony regarding the misconduct would not discourage full and frank discussion during future deliberations. Rather, the knowledge that such conduct can be freely examined would simply discourage the specific misconduct at issue.

Post-verdict juror testimony can avoid implicating material privacy interests by being limited to confirming or denying the facts of the misconduct (i.e., whether jurors were drunk, or lying during voir dire) without discussing the impact that the misconduct had on the verdict. Similar limitations have often been utilized in post-verdict inquiries into external matters to prevent juror testimony from otherwise violating Rule 606(b), and the framework could be readily extended to instances of misconduct deemed internal by past decisions.[114] So long as the substance of the deliberations remains confidential, privacy concerns do not require the alleged further protection provided by the no-impeachment rule.

Third, preventing post-verdict juror testimony on such a wide range of "internal" matters does not prevent juror harassment. Courts have long been concerned that, "in the hope of discovering something which might invalidate the finding [, j]urors would be harassed . . . by the defeated party in an effort to secure . . . evidence . . . which might establish misconduct sufficient to set aside a verdict."[115] However, there is no indication that jurors are any less vulnerable to post-verdict harassment regarding extraneous circumstances or improper outside influences

112. *See, e.g.*, Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y REV. 389, 391–394 (1994); Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 302–03 (1993).

113. Goldstein, *supra* note 111, at 296.

114. *See, e.g.*, United States v. Williams, 613 F.2d 573, 575–76 (5th Cir. 1980) (limiting post-verdict juror testimony regarding an improper external influence to the objective facts of the influence and not its effect on the minds of individual jurors); United States v. Simpson, 950 F.2d 1519, 1521 (10th Cir. 1991) (interpreting Rule 606(b) to allow testimony concerning whether extraneous prejudicial information as improperly presented to a juror but not testimony as to the effect of that information on the juror).

115. McDonald v. Pless, 238 U.S. 264, 267 (1915).

than they are regarding internal influences. Therefore, any line drawn between the two limits only the permissible motivating factors for potential harassment, rather than eliminating harassment as a problem. Furthermore, in nearly every case where the Court must interpret Rule 606(b), the impeachment evidence was brought forward by the jurors themselves.[116] It is ludicrous to suggest that jurors need protection from harassment by themselves, yet *Tanner* and its progeny interpret Rule 606(b) to bar even self-reported misconduct, citing harassment prevention as one of the justifications.[117] Additionally, jurors are protected from post-verdict harassment without the no-impeachment rule. For example, Model Rule of Professional Conduct 3.5(c)(3) prohibits attorneys from contacting jurors after their discharge if "the communication involves misrepresentation, coercion, duress or harassment."[118] This principle is codified in many local jurisdictions through rules restricting attorneys' access to jurors both during and after the trial.[119]

Finally, all the above policy justifications are said to combine to ensure public confidence in the jury process, reflecting the *Tanner* Court's concern that the jury system could not "survive such efforts to perfect it."[120] However, not only are these policy considerations not adequately protected by the current interpretation of the no-impeachment rule, but decisions to refuse post-verdict juror testimony in cases like *Tanner* and *Warger* actually erode, rather than strengthen, public confidence in the jury system. When fact patterns like those in *Tanner* and *Warger* reach the public, the flaws of our "jury of your peers" system are revealed. By prohibiting juror testimony impeaching verdicts reached under flawed conditions, especially when the misconduct is so plainly undesirable as the intoxication and drug dealing in *Tanner* or the lying about significant bias during *Warger*, the public is left facing a harsh reality: not only is the jury system deeply flawed, but once a verdict is reached, courts refuse to act even in the most extreme circumstances. The no-impeachment rule thus has an effect opposite that which it intended, creating a system that is both unwilling and unable to rectify even those errors explicitly brought to its attention.

---

116. *E.g.*, Tanner v. United States, 483 U.S. 107, 113 (1987) ("Tanner's attorney had received an unsolicited telephone call from one of the trial jurors"); Warger v. Shauers, 574 U.S. 40, 43 (2014) (noting that after the verdict was returned, "one of the jurors contacted Warger's counsel to express concern over [another juror's] conduct"); Peña–Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017) ("Following the discharge of the jury, Petitioner's counsel entered the jury room to discuss the trial with the jurors. As the room was emptying, two jurors remained to speak with counsel in private. They stated that, during deliberations, another juror had expressed anti-Hispanic bias toward Petitioner and Petitioner's alibi witness.").

117. *See Tanner*, 483 U.S. at 119–20.

118. MODEL RULES OF PROF'L CONDUCT R. 3.5 (2016) [hereinafter MODEL RULES].

119. *See, e.g.*, United States v. Cavallo, 790 F.3d 1202, 1225 (7th Cir. 2015) (citing U.S. DIST. CT. RULES M. DIST. FLA. R. 5.01(d)) (requiring attorneys to obtain court order before contacting jurors); U.S. DIST. CT. RULES S. DIST. CAL. CIV. R. 47.1 (requiring that examinations of jurors be conducted by the court).

120. *See Tanner*, 483 U.S. at 120.

B. INADEQUACY OF ALTERNATIVE METHODS FOR PROTECTING THE JURY RIGHT

A common argument lodged against the no-impeachment rule is that it violates Sixth Amendment rights to a trial by jury and Fifth and Fourteenth Amendment due process rights.[121] Misconduct such as intoxication or juror bias clearly implicates these rights as the former can be violated when a juror acts improperly,[122] while the latter implies a right to a mentally competent, capable, and impartial jury.[123] However, the *Tanner* Court rejected these arguments, positing that jury trial and due process rights were adequately protected by procedural safeguards such as voir dire, observability of juror behavior, and impeachment by non-juror evidence of misconduct.[124] These safeguards are deemed sufficient even when one is rendered ineffective by alleged misconduct.[125] The no impeachment rule only cedes to these constitutional concerns if every safeguard fails.[126] Yet despite confidence in these safeguards, each has its own vulnerabilities and none is a sufficient protector of the constitutional jury trial and due process rights.

1. VOIR DIRE

The first of the procedural safeguards, voir dire is designed to screen potential jurors, examining their suitability for the responsibility of jury service.[127] Voir dire acts as a preventative measure, aimed at limiting potential bias or misconduct by excluding those jurors whose views or backgrounds make them more likely to violate the proper deliberative process. To effectuate this purpose, trial judges often grant attorneys wide discretion in selecting which questions to ask prospective jurors, allowing queries into their "religious beliefs, drinking habits, jobs, hobbies, and prior experience with lawyers."[128] These inquires can extend weeks and even months in search of a desirable jury.[129] However, despite the thoroughness of the process, voir dire often fails to prevent the very misconduct and bias *Tanner* claims it effectively safeguards against.

---

121. U.S. CONST. amend. VI.; 24 AM. JUR. 2D *Proof of Facts* 633 § 1 (1980); U.S. CONST. amend. V; *Tanner*, 483 U.S. at 116–117.

122. *See, e.g.*, Peña–Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (preserving the no-impeachment rule while creating an additional exception for allegations of juror racial bias); Warger v. Shauers, 574 U.S. 40, 49–50 (2014) (disfavoring arguments questioning policy justifications for the no-impeachment rule and preferring requests for specific exceptions to the rule).

123. 24 AM. JUR. 2D *Proof of Facts* 633 § 1 (1980); U.S. CONST. amend. V.

124. *Tanner*, 483 U.S. at 127.

125. *See* Warger v. Shauers, 574 U.S. 40, 51 (2014).

126. *See* Peña–Rodriguez v. Colorado, 137 S. Ct. 855, 868–69 (2017).

127. *See Tanner*, 483 U.S. at 127.

128. 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, 158 (1989) (citing *State v. Barnes*, 547 A.2d 584, 588 (1988) (illustrating how far judges allow lawyers to go in asking questions during voir dire, as the decision reversed conviction for stealing a family's Christmas gifts because the trial judge refused to allow questions concerning prospective jurors' attitudes toward Christmas)).

129. *See Id.* at 157–58.

For one, lawyers often ask questions "designed not to gain information but to make a point," such as emphasizing the importance of forgoing judgment of guilt until the summation of argument.[130] Even if questions are designed to uncover misconduct or bias, their ability to actually prevent such occurrences during deliberation is limited.[131] Even with rigorous voir dire analysis, certain "undesirable" jurors still make it onto the jury. For one, individuals may be unaware of their own biases.[132] If they are aware of their own biases, the strong societal stigma against such biases discourages honest answers to voir dire questions;[133] making even constitutionally required questions about racial bias ineffective.[134] Generic questions about impartiality "may not expose specific attitudes or biases that can poison jury deliberations,"[135] while more pointed questions "could well exacerbate whatever prejudice might exist without substantially aiding in exposing it."[136] Furthermore, once a potential juror gives a dishonest response, the court is left with little recourse. While *Tanner* claims that such risks are controlled by the ability to observe and report such bias as it reveals itself throughout the trial, discriminatory biases are notoriously difficult to observe,[137] and once the verdict is reached, the no-impeachment rule still prevents post-verdict juror testimony on the matter despite the failure of one procedural safeguard.[138]

As for misconduct, it is unlikely that any potential voir dire question can satisfactorily be used to predict future misconduct. While attorneys have broad discretion to ask about a juror's past behaviors and experiences, using the information gleaned from an individual's past to predict their future behavior has been deemed highly unreliable, with modern psychology revealing the extremely difficult and complicated nature of predicting future behavior.[139] This reality has long been recognized by the courts, as such propensity evidence is strictly regulated throughout the trial process.[140] Yet, the Court's current approach inexplicably

---

130. *Id.* at 158.

131. *E.g.*, NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 91–92 (2007) (noting that voir dire does not allow the deep analysis of people and their likely motives).

132. *See generally Id.* (noting that people often do not recognize their own biases); Arthur H. Patterson & Nancy L. Neufer, *Removing Juror Bias by Applying Psychology to Challenges for Cause*, 7 CORNELL J.L. & PUB. POL'Y 97, 101 (1997) (noting that it is a well-known fact in psychology that people "often do not know what affects their behavior, and are largely out of touch with their own cognitive states").

133. *See* Smith v. Phillips, 455 U.S. 209, 221–22 (1982) (noting that jurors will rarely admit their own bias given either their interest in concealing it or their unawareness of it).

134. *See, e.g.*, Ham v. South Carolina, 409 U.S. 524, 526–27 (1973); Rosales-Lopez v. United States, 451 U.S. 182, 189–90 (1981); Turner v. Murray, 476 U.S. 28, 36–38 (1986).

135. Peña–Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

136. *Rosales-Lopez*, 451 U.S. at 195 (Rehnquist, J., concurring in result).

137. *See infra* Section III.B.2.

138. *See* Warger v. Shauers, 574 U.S. 40, 51 (2014).

139. *See generally* Miguel A. Méndez, *Character Evidence Reconsidered: People Do Not Seem to Be Predictable Characters,* 49 HASTINGS L.J. 871, 877–80 (1998).

140. *See* FED. R. EVID. 404, 405 (outlining the restrictions on the admissibility of character propensity evidence); FED. R. EVID. 406 (allowing propensity evidence to show specific habit); FED. R. EVID. 609 (allowing impeachment by past conviction under certain conditions).

seems to consider propensity evidence inadmissible at trial but reliable during voir dire. Therefore, if voir dire questions cannot effectively be used to reveal bias or likelihood of misconduct during deliberations, it cannot be deemed an adequate safeguard of the constitutional rights to an impartial, unimpaired, and competent jury.

2. OBSERVING JUROR BEHAVIOR

Another often-cited alternative protection for constitutional jury trial and due process rights is the fact that jury behavior is observable by both court officials and fellow jurors throughout the trial, and that any observed bias or misconduct can be reported at any point before the verdict.[141]

Starting with observation by the court, while court officials may understand what constitutes prejudicial misconduct or bias, the actual behaviors they can observe are severely limited. For one, since the jury room remains isolated, interaction with court officials is limited to during the actual trial or during transportation between the courtroom and jury room. This makes the judge an ineffective observer, as misconduct or bias is more likely to occur during more informal periods, such as mealtimes or deliberations themselves.[142] One can assume that the formality of the courtroom, the presence of legal officials, and the jury's silent confinement to the jury box all make any misconduct unlikely to occur.

Juror bias presents further problems, as "visual observations of the jury by counsel and the court during trial are unlikely to identify jurors harboring racial or ethnic bias."[143] Bias is not a physical characteristic like intoxication or other misconduct,[144] and biased jurors who make it onto the jury may either have implicit biases that allowed them to escape detection in voir dire or explicit biases that they are determined to hide,[145] making observation extremely difficult. Finally, even when misconduct or bias is observed, such observation is not always sufficient. The only observable evidence at trial of the flagrant misconduct in *Tanner* was a few jurors nodding off during the afternoons,[146] which, while problematic, does not suggest rampant alcohol and drug use. Furthermore, even though such behaviors were observed by counsel, their innocuity led to a delay in reporting to the court, which resulted in the judge dismissing the claim because

---

141. Tanner v. United States, 483 U.S. 107, 127 (1987).

142. *See infra* Section III.B.3 (explaining that, while jurors are observed during more informal transportation and mealtimes, asking the singular official overseeing the jury to be attuned to the subtle indicators of misconduct and bias in all twelve jurors is an extremely dubious proposition, especially when considering that jurors would be attempting to hide said misconduct or bias and that the latter is extremely difficult to detect as an unqualified layman).

143. United States v. Villar, 586 F.3d 76, 87 (1st Cir. 2009); *see also* United States v. Benally, 546 F.3d 1230, 1240 (10th Cir. 2008) (noting the unobservable nature of ethnic or racial bias).

144. *See Benally*, 546 F.3d at 1240.

145. *See* Vidmar & Hans, *supra* note 130; Patterson & Neufer, *supra* note 131; Smith v. Phillips, 455 U.S. 209, 221–22 (1982).

146. *See Tanner*, 483 U.S. at 113–14.

"[n]othing was brought to [his] attention . . . about anyone appearing to be intoxicated."[147] Bias is even harder to prove through observation, as allegations of racist gestures, and even statements, may not be deemed sufficient evidence of prejudicial bias.[148]

Moving to observation by other jurors, while jurors may be better positioned than court officials to catch instances of misconduct or bias, they lack a similar knowledge of the law. Jurors may not fully understand what constitutes prejudicial misconduct or bias or that what they observed violates the typical deliberative process. This is likely because mutual survival of the voir dire process could provide implicit confirmation that every juror that made it to the jury room is sufficiently competent and impartial.[149] Secondly, the typical juror may not know that they are able to and often should report misconduct or bias absent a specific instruction to do so from the court.[150] Furthermore, jurors are likely unaware of the no-impeachment rule itself, assuming that they can just report any misconduct or bias after the verdict, preferring to avoid the hassle of such a report until it is clear that the misconduct or bias actually lead to an undesirable verdict. Finally, just as misconduct or bias is difficult to observe during the formal trial process, jurors may be unaware of any misconduct or bias until they openly interact with each other during deliberations.[151] As the jury is prohibited from discussing the case until formal deliberations commence, the necessary circumstances that could reveal relevant misconduct or bias may not exist until deliberations, at which point the no-impeachment rule would prevent jurors from reporting what they observe.

3. IMPEACHMENT BY NON-JUROR EVIDENCE OF MISCONDUCT

If all else fails, *Tanner* posits that the constitutional right to an impartial and unimpaired jury can be properly protected without post-verdict juror testimony by the availability of non-juror evidence of misconduct.[152] However, non-juror evidence is limited by the same observability problems discussed above. Additionally, it fails to open the deliberations black box, where the best and often only evidence of bias is found. For example, "non-jurors are more likely to report inappropriate conduct—such as alcohol or drug use—among jurors than racial statements uttered during deliberations to which they are not privy."[153]

---

147. *Id.* at 115.

148. *See* United States v. Abcasis, 811 F. Supp. 828, 830 (E.D.N.Y. 1992) (finding observations of anti-semitic gestures and comments against the defendants insufficient proof absent other concrete evidence).

149. Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . But Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 282–83 (2012).

150. *Id.*

151. *Id.*

152. *See Tanner*, 483 U.S. at 127.

153. United States v. Villar, 586 F.3d 76, 87 (1st Cir. 2009).

Even misconduct may be hard to see, as jurors are kept sequestered and non-juror contact with individual jurors is limited. Thus, such evidence is often incomplete. For example, in *Tanner*, while the receipts from meal breaks or testimony from the supervising officer could provide some evidence of juror intoxication, such evidence would form only a piece of the puzzle and would not reveal the use or sale of drugs, information that could be gleaned only from juror testimony. Any attempts to fill in the remaining gaps with less obvious or readily available non-juror testimony would be costly and difficult to find, as it may not be immediately evident which non-juror actors observed potential misconduct or bias. Therefore, while non-juror evidence may help uncover misconduct or bias, it alone is insufficient to hold juries accountable for those prejudicial actions.

IV. HOW CAN LEGAL PROFESSIONALS ENSURE COMPETENT AND UNIMPAIRED JURIES?

A. CHANGES TO THE CURRENT SYSTEM

The current application of the no-impeachment rule by *Tanner* and its progeny is deeply flawed and likely requires modification if juries are to be held accountable for their prejudicial actions. As it stands, the current system effectively places verdicts beyond reach. This is accomplished by creating an overly restrictive bar on otherwise reliable evidence—in the form of juror testimony—in an arbitrary manner that does not promote the policy interests allegedly justifying the prohibition. While an elimination of the Rule would be as objectionable as the current near-universal prohibition of post-verdict juror testimony,[154] more incremental changes can be implemented to strike a proper balance between interests in finality, privacy, and protection from harassment and interests in fairness to litigants and the constitutional rights to a competent and impartial jury. First, judges should aid juries in holding themselves accountable by informing them of the standard for prejudicial misconduct and bias and providing greater opportunities for its reporting and detection. Second, once misconduct or bias is alleged, courts should make relevant evidence more available by relaxing the bar against post-verdict juror testimony and the rules governing contact between jurors and judges or counsel.

1. HELPING THE JURY HOLD ITSELF ACCOUNTABLE

One of the easiest changes that can be made to the current application of the no-impeachment rule without upsetting any of its policy rationales would be to allow jurors to self-report, to the court, any observed misconduct or bias. Many instances of misconduct and bias can only be sufficiently demonstrated by

154. *See* FED. R. EVID. 606(b) advisory committee's note to 1972 proposed rules; McDonald v. Pless, 238 U.S. 264, 267–68 (1915).

accounts from the jurors present when the conduct or statements occurred.[155] While jurors are currently allowed to report such behaviors up until the commencement of deliberations, restrictions on pre-deliberation discussion between jurors means that evidence of misconduct or bias is less likely to occur before the no-impeachment rule prevents reporting.[156] As for those actions like the intoxication in *Tanner* that could occur before deliberations, there would be no significant harm in allowing jurors to report such behavior after the verdict. Allowing self-reports eliminates any risk of harassment, as jurors cannot be vulnerable to harassment from themselves, while protecting privacy interests by giving jurors complete discretion over the content of their deliberations. Therefore, there should be no risk to full and frank discussion: jurors would be unlikely to reveal information that would discourage their uninhibited discussion, as such action would be contrary to their self-interest. While allowing post-verdict reporting would obviously upset the finality of verdicts, these concerns would be outweighed by the litigants' constitutional jury trial and due process rights, as reporting would be limited to only those instances where a verdict was reached in a manner prejudicial to litigants' constitutional rights.

Attorneys and judges should modify their trial practice in three ways to help facilitate juror reporting of misconduct and bias while maintaining a proper balance between the no-impeachment rule's policy justifications and the litigants' constitutional and fairness concerns. First, attorneys and judges should work to ensure jurors are properly informed regarding what constitutes prejudicial misconduct or bias, and their duty and ability to report said misconduct or bias. Jurors likely have little knowledge of what the court deems unacceptable and, as discussed above, are susceptible to confirmation bias potentially endorsing otherwise undesirable conduct as a result of their shared survival of the voir dire inquiry.[157] Judges can help mitigate this knowledge gap by informing juries, both at the outset of the trial and before deliberations commence, both what constitutes prejudicial misconduct or bias and when and how jurors can report such misconduct or bias to the court.[158] However, jury instructions are not exceptionally effective in controlling juror behavior,[159] so attorneys should supplement this effort by emphasizing the importance of proper conduct and impartiality during their opening and closing statements.

Judges should also provide standardized reporting procedures beyond merely informing jurors. First, judges could require a confidential report from the jury

---

155. *See* Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 212 (1866) (justifying the hearing of post-verdict juror testimony because such testimony is "the best evidence of which the matter is susceptible").

156. *See supra* Section III.B.2.

157. *See* Wolin, *supra* note 148, at 282–83.

158. *See* Swaine *supra* note 108 at 202 n.100 (citing A. ELWORK, B. SAKS, & J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE § 1-4(B) (1982)) (noting that jury instructions are more effective when delivered at the beginning of trial than at the end).

159. *See generally* Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of* United States v. Rosenberg, 86 YALE L.J. 1622, 1647–48 (1977).

foreperson submitted with the verdict form documenting any potential issues revealed during deliberations. Such a report would not significantly increase the cost or length of litigation and could be easily administered if provided with jury instructions outlining what constitutes prejudicial misconduct or bias. However, these reports may not provide the most accurate depiction of prejudicial conduct, as they would be limited to the singular perspective of the foreperson. Alternatively, the judge could go more in-depth by debriefing individual jurors at the trial's conclusion, although this method would be more costly and time-consuming.[160] Court-led debriefings would be better than voluntary reporting at uncovering misconduct while mitigating the risk of attorneys harassing jurors in search of prejudicial evidence.[161] However, the privacy of deliberations must be strictly maintained by limiting questions and responses to the existence of the misconduct or bias, and not the effect of such misconduct or bias on the deliberations.[162]

2. MAKING IMPEACHMENT EVIDENCE MORE READILY AVAILABLE

Beyond helping juries better hold themselves accountable, a variety of changes should be made to the no-impeachment rule to better enable litigants' discovery of prejudicial misconduct or bias. First, the relationship between attorneys and jurors after the verdict has been rendered must be reimagined. Currently, Model Rule 3.5 governs attorney communications with jurors, prohibiting attorneys from seeking to influence jurors; engaging in ex parte communications during proceedings; or communicating with jurors after their discharge when communication is prohibited by law, is refused by the jury, or involves misrepresentation, coercion, or harassment.[163] In addition, many states and local courts have stricter restrictions on attorney-juror communications, prohibiting attorney contact with jurors without prior court approval[164] or a showing of "good cause."[165] Attorneys should advocate for a clarification of this rule so that it better aligns with their "special responsibility for the quality of justice."[166]

Restrictions on attorney post-verdict contact with jurors should not simply be relaxed, as they do prevent juror harassment by litigants.[167] However, the current

---

160. *See* Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 537–38 (1997).

161. *See* Benjamin M. Lawsky, Note, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950, 1971–72 (1994).

162. *See* Marder, *supra* note 159, at 541–44.

163. MODEL RULES R. 3.5.

164. *See* Lawsky, *supra* note 160, at 1956 n.41 (1994) ("Of the 51 rules concerning contact with jurors, the author found that 40 require at least court approval.").

165. *See* Lawsky, *supra* note 160, at 1956 n.42 ("good cause" has thus far escaped definition).

166. MODEL RULES pmbl. ¶ 1.

167. Timothy C. Rank, *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 MINN. L. REV. 1421, 1446 (1992) (arguing that restricting juror contact rules will prevent juror harassment).

application of the no-impeachment rule reduces the quality of justice by allowing egregious misconduct and bias to occur in the jury room without punishment. This is especially objectionable given that this misconduct or bias is often voluntarily reported to litigants by the jurors themselves.[168] Lawyers should feel more confident pursuing these unsolicited reports in the spirit of zealous advocacy. Therefore, a comment should be added to Model Rule 3.5 explaining that the prohibition against juror contact should not prevent attorneys from pursuing unsolicited reports of prejudicial misconduct or bias, so long as further contacts with jurors are limited to those freely consented to by the jurors who originally came forward voluntarily. Additionally, attorneys should advocate for explanatory comments on local federal and state court restrictions either indicating that good cause is demonstrated by a credible and unsolicited report of prejudicial misconduct or bias or restricting the trial judge's discretion to withhold approval of further contacts with the juror who came forward, provided the juror's consent is continuous and uncoerced. While these changes could be accomplished by amendment, a comment would likely be less controversial and difficult to achieve without overly diminishing the resulting effectiveness of the change.

Second, courts must be more willing to hear the evidence revealed by these juror reports and sanctioned investigations by litigants. The easiest method for relaxing the current no-impeachment rule's near-universal prohibition on post-verdict juror testimony would be to allow for more exceptions to the no-impeachment rule. Currently, exceptions are considered permissible where extreme juror bias or the gravest forms of misconduct abridge constitutional rights to an impartial and competent jury;[169] yet the only such scenario identified by the Court is racial bias.[170] However, if racial bias is deemed sufficiently extreme, it would follow that all forms of discriminatory bias (gender, religious, sexual orientation, etc.) can be considered extreme juror bias against which the procedural safeguards fail to protect the constitutional jury trial and due process rights. Therefore, the racial bias exception can logically be extended to these similarly invidious forms of discriminatory bias. An extension could then be drawn to more subject-specific bias, like that in *Warger*, where the juror in question knowingly concealed that her daughter had caused a similar car accident to that caused by the defendant, and that the lawsuit would have ruined her daughter's life.[171]

---

168. *E.g.*, Tanner v. United States, 483 U.S. 107, 113 (1987) ("Tanner's attorney had received an unsolicited telephone call from one of the trial jurors."); Warger v. Shauers, 574 U.S. 40, 43 (2014) (noting that after the verdict was returned, "one of the jurors contacted Warger's counsel to express concern over [another juror's] conduct"); Peña–Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017) ("Following the discharge of the jury, Petitioner's counsel entered the jury room to discuss the trial with the jurors. As the room was emptying, two jurors remained to speak with counsel in private. They stated that, during deliberations, another juror had expressed anti-Hispanic bias toward Petitioner and Petitioner's alibi witness.").

169. *See supra* Section II.C.1.

170. *See supra* Section II.C.2.

171. Warger v. Shauers, 574 U.S. 40, 40 (2014).

Such past experiences so intimately related to the case at issue are typically grounds for rejecting a prospective juror during voir dire. Evidence of such biases does not become less relevant if revealed later and should therefore be heard whenever it is disclosed.

Additionally, misconduct such as extreme mental incompetence, intoxication, or other forms of gross impairment, also merits an exception. No-impeachment rule jurisprudence has long alluded to an extreme mental incompetence exception, with the Court even expressly acknowledging that the Rule should give way in the face of evidence of incompetence strong enough to overcome the presumption of sanity.[172] As for impairment, there is no precedent supporting an exception, but, as discussed above, misconduct causing impairment, like that in *Tanner*, gravely damages the constitutional right to an unimpaired jury, and the procedural safeguards cannot reliably detect such misconduct. Therefore, an impairment exception to the no-impeachment rule is necessary.

Finally, given the current internal/external distinction's arbitrariness, a more radical change to Rule 606(b)'s text or comments might be necessary. Subsection (2)(A) allows post-verdict juror testimony on "outside influence[s] . . . improperly brought to bear on any juror."[173] Here, the language could be softened by adding an additional category for improper outside influences "otherwise found in the jury room." This would better incorporate egregious misconduct or bias such as intoxication or racism that cannot properly be described as "an outside influence . . . brought to bear" on a juror but that are still not part of the proper deliberative process. Alternatively, an easier approach could be to simply add a comment to the Rule explaining that such conduct, including intoxication, extreme impairment or incompetence, discriminatory bias, or subject-specific bias, can be considered as included in Subsection (2)(A).

3. EVALUATING IMPEACHMENT EVIDENCE WITHOUT UPSETTING RULE 606(B)'S POLICY CONCERNS

Lastly, once the system is modified to allow potential prejudicial misconduct or bias to be reported and the court to hear juror testimony on the matter, there must be a method for evaluating juror testimony that preserves the balance between the no-impeachment rule's policy justifications and the fairness and constitutional concerns of litigants. This can be done by using confidential hearings on such allegations to avoid the embarrassment and attention of hearings open to the public. A confidential hearing would maintain privacy interests, by functioning as a preliminary filter weeding out frivolous claims or those too revealing of the reasoning or methods behind deliberations. Judges already conduct similar

172. United States v. Dioguardi, 361 F. Supp. 954, 957 (1973).
173. FED. R. EVID. 606(b)(2)(B).

preliminary hearings when evaluating the admissibility of evidence.[174] Such preliminary inquiries could be based on the Rule 403 weighing test. Just as Rule 403 allows a trial judge to exclude otherwise relevant evidence if its probative value is substantially outweighed by its risk of unfair prejudice,[175] so too could judges be given the discretionary power to hear post-verdict juror testimony when seemingly "internal" conduct is deemed sufficiently prejudicial to the litigant's constitutional rights that it outweighs finality, privacy, and harassment concerns. Additionally, hearing claims of prejudicial bias or misconduct behind closed doors would limit the risk of harassment by litigants attempting to investigate the allegations on their own.[176]

Confidential hearings would need to conform to a variety of constitutional and policy-based requirements. For one, circuit courts have run into issues when conducting confidential hearings regarding post-verdict juror impeachment testimony, with two circuits finding that a qualified right of access applies to such hearings under the First Amendment.[177] While the question of the First Amendment's applicability to these confidential hearings remains open, any universal adoption of this system would likely have to navigate the restrictions presented by this qualified right of access. Additionally, a firm line must be drawn between testimony revealing the existence of misconduct or bias and testimony indicating the impact of such misconduct or bias on deliberations.

B. ETHICAL APPLICATION OF THE CURRENT SYSTEM

While changes to the no-impeachment rule are likely necessary to adequately protect litigants' constitutional rights, some of the damage could at least be mitigated should lawyers and judges attempt a more ethical application of the current system. This would start with renewed efforts to prevent misconduct or bias through neutral voir dire evaluations and a streamlined trial process. From there, lawyers and judges must cooperate to catch any instances of prejudicial misconduct or bias that slip past these new preventative efforts by increasing juror observation to make non-juror impeachment evidence more available and effective. Finally, judges must rethink the lines of the internal/external distinction to allow for a full inquiry into potential incidents of prejudicial misconduct or bias when such evidence is brought to the attention of the court.

---

174. *See* FED. R. EVID. 104 (allowing judges to conduct preliminary admissibility hearings on questions of conditional relevance); *see also* FED. R. EVID. 613 (allowing judge to admit extrinsic evidence of a prior inconsistent statement "if justice so requires").

175. FED. R. EVID. 403.

176. *See* United States v. Moten, 582 F.2d 654, 665 (2d Cir. 1978) (holding jurors would be better protected from harassment if questioning was court-supervised).

177. United States v. Simone, 14 F.3d 833, 840 (3d Cir. 1994); Phoenix Newspapers v. U.S. Dist. Ct. for Dist. of Ariz., 156 F.3d 940, 943, 949 (9th Cir. 1998).

1. PREVENTING PREJUDICIAL MISCONDUCT OR BIAS

Since misconduct and bias are incredibly difficult to punish under the current system, the focus should shift first to prevention of such behaviors. While limited in its predictive capabilities, voir dire, with some modifications, could still help identify potentially prejudicial bias before it reaches the jury room. This would require increased focus and care from both attorneys and judges on using the process to root out bias rather than as a strategic tool for victory later in trial. Since attorneys often use voir dire to advocate for their client,[178] judges must drive the preventative effort by institutionalizing procedures for uncovering potential biases. This can be done by supplementing traditional voir dire questionnaires with reliable and peer-reviewed tests for biases, both explicit and implicit. One potential example is the ABA's Implicit Association Test ("IAT"), which asks for "quick responses to a series of words and pictures," to measure "response time to the computer images as a proxy for implicit bias."[179] While this may not always catch those determined to hide their bias, it can still uncover otherwise undetectable implicit biases that could derail the proper deliberative process. Using a neutral technique like the IAT for evaluating bias would also avoid the downsides of the peremptory challenge method, which has a long discriminatory history and is routinely used as a strategic weapon rather than a means of ensuring juror competence.[180]

While voir dire improvements may help prevent prejudicial bias, they will inadequately predict future misconduct given the unreliability of propensity evidence and the difficulty of predicting future behavior.[181] However, misconduct of the like seen in *Tanner* could be limited by streamlining the trial process to prevent juror boredom, which may contribute to the desire to use alcohol or other substances during the trial. Thus, attorneys should work to ensure the jury remains captivated and clear-minded by providing a more efficient and engaging presentation. This could be achieved by preventing long narrative statements by witnesses, colloquializing expert testimony, and resolving procedural conflicts before empaneling the jury, so that the conveyance of substantive information is uninterrupted. Judges can support this effort by narrowly interpreting and strictly enforcing rules of evidence concerning relevance, character evidence, and anything else that may cause distraction or undue delay. These Rules of Evidence can operate as a safeguard against the reluctance to evaluate the jury process by ensuring on the front end that juries are given only the best and most necessary

178. 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, 158 (1989) (citing *State v. Barnes*, 547 A.2d 584, 588 (1988)).

179. Implicit Bias Task Force, *Implicit Bias Test*, ABA SEC. OF LITIG. https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-test/ [https://perma.cc/TB4L-7FHL] (last visited Jan. 9, 2022).

180. For a general discussion of the strengths and limitations of voir dire and peremptory challenges, see Alschuler, *supra* note 127, at 157–70.

181. *See supra* Section III.B.1.

evidence to inform their decision.[182] For specific prevention of the conduct at issue in *Tanner*, jurors could be more thoroughly searched upon entry and exit of the jury room and/or the courthouse.

2. CATCHING PREJUDICIAL MISCONDUCT OR BIAS

Even with renewed preventative efforts, undesirable jurors will inevitably slip through the cracks, requiring further reform to catch prejudicial misconduct or bias before the jury is sent away to deliberate and the no-impeachment rule takes effect. The most effective method would likely be increasing juror observation efforts. Again, this is best achieved by relying on judges and court officials as neutral actors rather than attorneys motivated by their clients' interests and ethically obligated to advance those interests, to avoid any unnecessary juror harassment. First, court officials overseeing the jury, such as clerks or bailiffs, must be instructed on how to identify potentially prejudicial bias or misconduct. While such evidence may be difficult to observe,[183] monitoring juror statements, demeanor, and interactions could provide enough to justify further investigation by the court.[184] Courts can increase supervision of jurors, particularly outside the courtroom, where such evidence is more likely to reveal itself, by monitoring juror behavior during lunch breaks and recess. This would prevent the opportunity for undesired interactions or behaviors without the need to inquire into such occurrences post-verdict. As a specific example, courts could prevent or catch the misconduct at issue in *Tanner* by restricting or prohibiting access to alcohol during lunch breaks, more closely monitoring its consumption, and drug-testing those jurors whose demeanor indicates potential impairment.[185]

Catching prejudicial misconduct and bias would also require more reliable and readily available non-juror impeachment evidence, as the current problem with such evidence is that it is far less probative of prejudicial misconduct or bias than evidence from within the jury deliberations.[186] Increased observational efforts would make testimonial accounts from non-juror witnesses more common and reliable, as such efforts would create a higher likelihood of catching said behavior before the verdict. These accounts could be supplemented by a greater effort to

---

182. *See generally* C. MUELLER & L. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES AND PROBLEMS 1 (1988) ("mistrust of jurors is the single overriding reason for the law of evidence.").

183. *See supra* Section III.B.2.

184. See *supra* Section IV.A.3 for a discussion of how indications of potential prejudicial misconduct or bias can be investigated without upsetting the balance of constitutional and policy interests under *Tanner* and Rule 606(b).

185. Drug-testing would likely implicate the jurors' Fourth Amendment rights but could otherwise be justified as serving the important state interest of preventing drug use by jurors. *Cf.* Bd. of Edu. of Indep. School Dist. No. 92 of Pottawatomie Co. v. Earls, 536 U.S. 822, 825 (2002) (holding that mandatory drug tests for students engaging in extracurricular activities serve an important state interest in preventing drug use and therefore do not violate students' Fourth Amendment rights despite lack of probable cause or a warrant).

186. *See* Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 212 (1866) (justifying the hearing of post-verdict juror testimony because such testimony is "the best evidence of which the matter is susceptible").

record and retain documentary evidence of potential misconduct, such as individual receipts documenting alcohol consumption at mealtimes or notes from the clerk or bailiff detailing pre-deliberative conversations on subjects related to potential misconduct or bias. However, these efforts would not only be costly and difficult to administer but would risk increasing the undesirability of jury service by strictly monitoring jurors' every move throughout their time on the jury. As such, any benefit these efforts would have in catching potential misconduct or bias would have to be balanced against concerns of court costs and juror discontent.

3. RETHINKING THE INTERNAL/EXTERNAL DISTINCTION

Finally, when evidence of potentially prejudicial misconduct or bias is unearthed, judges must become more willing to further investigate such claims to properly punish the conduct and ensure the rights of the litigants are adequately protected. As discussed above, the current internal/external distinction is extremely prohibitive and makes it extremely difficult to ensure a proper deliberative process.[187] However, the *Model Code of Judicial Conduct* provides a basis for reinterpreting this distinction without upsetting well-established precedent. Model Rule 2.8 provides that "[a] judge shall require order and decorum in proceedings before the court."[188] The current application of Rule 606(b) leads to results that contravene this principle, as jury conduct like that in *Tanner* certainly does not indicate order and decorum. However, judges can adopt a more lenient interpretation of the internal/external distinction that allows for greater inquiry into potential misconduct or bias to better fulfill this duty. For example, discriminatory beliefs are not views we are born with but rather are imparted upon us by outside actors until they become internalized, much like how external evidence imparts upon a juror a view of the case that they eventually internalize when returning an improper verdict. Therefore, bias could be construed not as an internal belief but rather as an "improper outside influence brought to bear on a juror."

The argument for a more lenient understanding is even stronger for instances of misconduct. Intoxication or substance use is literally an outside influence (the alcohol or drug), improperly acting on a juror to impair their decision-making. As for mental incompetence, the affected juror has no control over their condition, but rather is being controlled by the outside factor of the symptoms of their condition. Multiple circuit courts have deemed these behaviors "external," and by allowing juror testimony on such conduct to be heard when the claims were sufficiently concrete, have provided basis for this suggested reinterpretation.[189]

---

187. *See supra* Section III.A.1.

188. MODEL CODE OF JUD. CONDUCT R. 2.8(A) (2020) [hereinafter MODEL CODE].

189. *See* United States v. Allen, 588 F.2d 1100, 1106–07 (5th Cir. 1979) (affirming trial court's admission of post-verdict juror testimony regarding evidence that juror was intoxicated and mentally incompetent); Sullivan v. Fogg, 613 F.2d 465, 467 (2d Cir. 1980) (admitting post-verdict juror testimony regarding another juror's mental instability evidenced during deliberations).

That being said, this new interpretation must not be limitless in its inquiry into juror conduct. Specifically, under Model Rule 2.8(C), "[a] judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding."[190] Additionally, this more lenient approach must also balance the policy considerations of finality, privacy, and harassment prevention enumerated in *Tanner*.[191] While Model Rule 2.8(C) might require a slight relaxation to prevent the tying of judges' hands in the face of verdicts reached without the requisite "order and decorum," the interests of both the *Model Code of Judicial Conduct* and the policy considerations in *Tanner* can be properly respected by maintaining a sufficient divide between testimony revealing misconduct or bias and testimony discussing the effect of such behaviors on deliberations.[192] Many state rules have already begun the process of relaxing the near-universal prohibition created by the internal/external distinction, with most of them containing express language detailing the divide between evidence of conduct and evidence intruding on the privacy of deliberations which judges could use to guide their discretion.[193] So long as judges refuse to hear any testimony that intrudes too far into the deliberative process, the interests of the *Model Code of Judicial Conduct* and the *Tanner* policy considerations should both remain protected.

CONCLUSION

The no-impeachment rule has long been established in common law history and in the codified Federal Rules of Evidence. However, *Tanner* took this restrictive but reasonably justified rule and turned it into a near-universal prohibition of post-verdict juror testimony. The case upset the delicate balance between policy considerations of finality, privacy, and harassment prevention and litigants' constitutional jury trial and due process rights. It drew an arbitrary and overly restrictive distinction between internal and external conduct, classifying even the most egregious forms of misconduct as internal and thus barred from illumination via post-verdict juror testimony. This restrictive trend continued until the Court poked the smallest of holes in its prohibitory wall with its racial bias exception, yet even this effort left much to be desired.

The current interpretation of the no-impeachment rule requires significant change in either substance, application, or understanding to properly respect both the policy considerations supporting our jury system and the constitutional right to a competent and unimpaired jury. Lawyers and judges alike must re-evaluate their practice to better maintain this balance. The system must be changed to help

190. MODEL CODE R. 2.8(C).

191. *See* Tanner v. United States, 483 U.S. 107, 120 (1987).

192. *See supra* Section IV.A.3.

193. *See, e.g.*, HAW. R. EVID. R. 606(b) (prohibiting testimony regarding the effect of misconduct or bias on deliberations but not regarding the existence of such misconduct or bias); FLA. STAT. § 90.607(2)(b) (2005) ("Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.").

juries hold themselves accountable through instructions on what constitutes prejudicial misconduct or bias and procedures for discovering and reporting such occurrences. Additionally, impeachment evidence must be made more readily available through a relaxation of the internal/external distinction, the expansion of categories of misconduct or bias excepted from Rule 606(b)'s prohibition, and clear rules governing attorney conduct with jurors post-verdict that allow investigation into voluntarily reported incidents without causing undue harassment. Lastly, courts must become more willing to conduct hearings, preferably confidentially, on potentially prejudicial misconduct or bias.

At the very least, the procedural safeguards cited in *Tanner* must be strengthened to better protect litigants' jury trial and due process rights. Lawyers and judges must cooperate to institute an impartial measure of bias during voir dire and must work to make the trial process more efficient and effective to deter misconduct. There must also be a greater effort to observe juror behavior and retain non-juror evidence of misconduct or bias to properly catch such occurrences even without juror testimony. In the end, whether the current system is changed, or merely reinterpreted, significant action must be taken by both lawyers and judges to properly preserve the integrity of our jury system.