BEYOND *TANNER*: AN ALTERNATIVE FRAMEWORK FOR POSTVERDICT JUROR TESTIMONY

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Almost twenty years ago, the Supreme Court's decision in Tanner v. United States *established that under Federal Rule of Evidence 606(b) juror intoxication was an "internal" influence to which jurors were incompetent to testify. Since that decision, many states have discarded their diverse approaches regarding the admissibility of juror testimony on juror misconduct in favor of* Tanner*'s external/internal framework.*

This Note demonstrates why the policy considerations justifying restrictions on juror testimony are not well served by Tanner*'s external/internal framework. The Note offers states an alternative approach to the issue of juror misconduct which would better protect both jurors and litigants.*

INTRODUCTION

"One touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'"[1]

Ever since there have been juries, there has been juror misconduct. In a system without professional jurors, it is inevitable that some jurors will act unprofessionally on occasion. Varieties of juror misconduct run the gamut of human weakness, but common examples include jurors consulting nonadmitted evidence (newspapers, in particular),[2] investigating crime scenes on their own,[3] lying or otherwise

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[1] McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984) (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)).

[2] *See, e.g.*, Mattox v. United States, 146 U.S. 140, 147, 149 (1892) (admitting affidavits regarding introduction of newspaper into jury room); People v. Maragh, 729 N.E.2d 701, 702–03 (N.Y. 2000) (holding that two jurors—both nurses—committed misconduct by informing jury of personal medical opinions which were not presented at trial as evidence).

[3] *See, e.g.*, People v. Brown, 399 N.E.2d 51, 52, 54 (N.Y. 1979) (finding misconduct where juror drove to crime site in order to test defense theory and shared results with

misleading the court during voir dire in order to be placed on a jury,[4] committing acts of violence or other forms of unacceptable coercion in the jury room,[5] and consuming alcohol or drugs during the course of the trial.[6] While most jurors serve without incident,[7] the cases cited throughout this Note make clear that serious juror misconduct does occur.

In response, courts have adopted a variety of procedural protections to be used during the course of the trial to counter the threat of misconduct. For example, potential jurors are questioned during voir dire, in part to root out jurors likely to cause trouble.[8] Some jurisdictions require judges to give jurors written instructions directing them to report misconduct.[9] Impaneling alternate jurors also allows courts to dismiss jurors who have committed misconduct without ordering a mistrial.[10]

This Note, however, is concerned with misconduct uncovered only after courts have entered judgment.[11] Jurors are often the sole

other jurors); People v. De Lucia, 229 N.E.2d 211, 214 (N.Y. 1967) (finding misconduct where juror visited crime scene).

[4] *See, e.g.*, People v. Rodriguez, 790 N.E.2d 247, 248–49 (N.Y. 2003) (finding juror's failure to mention friendship with assistant district attorney during voir dire constituted misconduct, but that misconduct did not prejudice defendant). Admittedly, lying to get out of jury duty is far more common.

[5] *E.g.*, Anderson v. Miller, 346 F.3d 315, 318–19 (2d Cir. 2003); Jacobson v. Henderson, 765 F.2d 12, 14 (2d Cir. 1985).

[6] *E.g.*, Tanner v. United States, 483 U.S. 107, 113, 115–16 (1987); Massey v. State, 541 A.2d 1254, 1254 (Del. 1988).

[7] No statistics are kept regarding jury misconduct. *See* Tresa Baldas, *Lawyers Report Jurors Gone Wild*, NAT'L L.J., May 16, 2005, at 1 (noting that neither Administrative Office of U.S. Courts nor National Center for State Courts keeps statistics on such misconduct). One survey of hundreds of judges reported that few judges had personally dealt with known incidents of misconduct. *See* NAT'L CTR. FOR STATE COURTS, THROUGH THE EYES OF A JUROR: A MANUAL FOR ADDRESSING JUROR STRESS 52 (1998), *available at* http://www.ncsconline.org/WC/Publications/Res_Juries_JurorStressPub.pdf. The strength of this finding is questionable, however, as the survey concerned juror stress and did not specifically ask any questions regarding misconduct. *See id.* app. B.

[8] *Tanner*, 483 U.S. at 127.

[9] *See, e.g.*, TEX. R. CIV. P. 226a (requiring judge to instruct jurors to report acts of juror misconduct to judge).

[10] *See, e.g.*, FED. R. CRIM. P. 24(c)(1) ("The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties."); People v. Daniels, 802 P.2d 906, 929–31 (Cal. 1991) (finding serious misconduct to be good cause for juror substitution). With judges facing overburdened dockets, the absence of alternate jurors would likely result in judges finding fewer actions to constitute juror misconduct, as such rulings would result in mistrials.

[11] In so focusing, this Note seeks to examine an often overlooked problem. *See generally* 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 (1989) (arguing that while substantial resources are devoted to jury selection, postverdict procedures for curing jury misconduct have been neglected).

witnesses to acts of juror misconduct, either because they themselves have committed the misconduct or because the misconduct took place in the privacy of jury deliberations.[12] If jurors do not come forward during trial, none of the procedural protections described above can address the misconduct.

Admitting juror testimony after judgment, though, raises significant concerns for the finality of verdicts, the privacy of deliberations, and the possibility that displeased litigants may harass jurors into impeaching their verdict.[13] On the other hand, ignoring postjudgment allegations of juror misconduct implicates fairness issues and undermines the public's faith in the jury system.

In the nineteenth and early twentieth centuries, state and federal courts struggled with these issues, engaging in a common law dialogue regarding the necessity and proper scope of juror testimony. These courts created a variety of evidentiary rules that each balanced the underlying policy concerns differently. In the last twenty to thirty years, however, the widespread adoption of the Federal Rules of Evidence by the states, combined with state court deference to the Supreme Court's decision in *Tanner v. United States*,[14] has created a comparative uniformity in practice that has stifled this common law dialogue.

Such uniformity would not pose a problem if the *Tanner* framework for admitting juror testimony were demonstrably superior to its common law predecessors. Unfortunately, while *Tanner* correctly identified the policy rationales that underlie the general bar on juror testimony, its content-based rule on admissibility fails to serve these rationales. The Court's framework also ignores narrower solutions that could preserve the finality of verdicts and the privacy of deliberations, as well as prevent juror harassment, without perpetrating the admitted injustice of total exclusion of this evidence. Given *Tanner*'s imperfect solution to the jury misconduct problem, this Note argues that states should reject the *Tanner* framework for determining the admissibility of juror testimony and develop new approaches that protect both litigants and the jury system.

Part I of this Note briefly examines the common law dialogue that created the early evidentiary rules on juror testimony, as well as their supporting policy rationales. Part II discusses the Supreme Court's interpretation of Federal Rule of Evidence 606(b) (F.R.E. 606(b)) and demonstrates that *Tanner*'s evidentiary framework does

[12] *See* Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 212 (1866) (referring to juror testimony as "the best evidence of which the matter is susceptible").

[13] *See infra* Part I detailing the development of these three policy concerns.

[14] 483 U.S. 107 (1987).

not advance these policy goals. Part III details the widespread adoption of the *Tanner* framework despite its flaws. Part IV offers states a menu of alternative evidentiary and procedural approaches that will better serve the policy goals of the general bar on juror testimony while preserving a just system for litigants.

I
COMMON LAW ROOTS OF PROHIBITIONS ON JUROR TESTIMONY

A review of the common law roots of the rules on juror testimony reveals diverse approaches among the states in dealing with the policy implications of admitting juror testimony. The cases demonstrate that courts developed evolving rules regarding juror testimony in response to changing policy concerns. They also make clear that prior to the *Tanner* decision, states played a more active role in defining and refining these evidentiary rules.

A. The Untrustworthy Juror: Vaise v. Delaval

Early English common law treated postjudgment complaints of juror misconduct quite liberally. Until the late eighteenth century, many British courts admitted juror affidavits or testimony to vacate verdicts tainted by juror misconduct.[15] One case, *Vaise v. Delaval*, is universally cited as putting an end to this relatively liberal admissibility rule.[16] In *Vaise*, Lord Mansfield refused to admit the affidavits of two jurors who swore that the jury broke their deadlock by "toss[ing] up" (i.e., by casting lots). Mansfield reasoned that a juror

[15] *See, e.g.*, Aylett v. Jewel, (1779) 96 Eng. Rep. 761 (K.B.) (requiring juror affidavit concerning juror misconduct); Hale v. Cove, (1739) 93 Eng. Rep. 753 (K.B.) (setting aside verdict where jury drew lots); Phillips v. Fowler, (1735) 92 Eng. Rep. 1190 (K.B.) (same); Metcalfe v. Deane, (1590) 78 Eng. Rep. 445 (K.B.) (agreeing to hear evidence from juror regarding jury resummoning witness). *See also* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2352, at 696 (John T. McNaughton rev. 1961) ("Up to Lord Mansfield's time, and within half a decade of his decision in *Vaise v. Delaval*, the unquestioned practice had been to receive jurors' testimony or affidavits without scruple."); Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 513 (1988) ("Prior to *Vaise*, jurors routinely had been permitted to give affidavits as to misconduct . . . ."). *But see* Prior v. Powers, (1664) 83 Eng. Rep. 1257 (K.B.) (denying new trial based on juror affidavit "because [the affidavit] appeared only by pumping a juryman, who confessed all; but being against himself, it was not much regarded," though it appears affidavit was admitted).

[16] (1785) 99 Eng. Rep. 944 (K.B.); *see, e.g.*, McDonald v. Pless, 238 U.S. 264, 268 (1915) (noting early divergence in common law was diminished after *Vaise*); *Wright*, 20 Iowa at 211 (citing *Vaise* as leading case, though disagreeing with its reasoning); R v. Mirza [2004] UKHL 2, [2004] 1 A.C. 1118, 1142 (appeal taken from Eng.) (U.K.) (L. Slynn opinion) (citing *Vaise* as "basic rule" in regard to juror testimony).

who committed misconduct or who witnessed misconduct but failed to bring it to the court's attention prior to the verdict could not be a credible witness.[17] With its uncompromising stance that an affidavit may never be admitted from "any of the jurymen themselves," *Vaise* has come to symbolize the extreme view that all juror testimony should be inadmissible, regardless of the possible injustice to the parties or the broader damage to the credibility of the jury system.

Wigmore's *Evidence* claims that the rule of *Vaise* drew "an adherence almost unquestioned" in the United States,[18] and lists hundreds of cases in which U.S. courts have followed the "Mansfield Rule."[19] Adherence to the Mansfield Rule, however, has never been universal.[20] By the mid-nineteenth century, criticism surrounding the severity of the Mansfield Rule led to two American innovations: the Iowa Rule and the rule that emerged from *Woodward v. Leavitt*.[21]

B. The Importance of Finality: The Iowa Rule

The Iowa Supreme Court developed the greatest departure from *Vaise*. In *Wright v. Illinois & Mississippi Telegraph Co.*, the defendant, relying on the affidavits of four jurors, alleged that the jury had returned a quotient verdict.[22] Finding a "want of entire or perfect consistency"[23] in the law on juror testimony, the Iowa Supreme Court created what was later referred to as the Iowa Rule: Affidavits from

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17 *Vaise*, 99 Eng. Rep. at 944.

18 WIGMORE, *supra* note 15, § 2352, at 697.

19 *Id.* § 2354, at 702 & n.2.

20 *See, e.g.*, Talmadge v. Northrop, 1 Root 522, 523 (Conn. 1793) (allowing juror testimony concerning nonadmitted evidence discussed during deliberations); Langworthy v. Myers, 4 Iowa 18, 22–23 (1856) (noting admission of affidavit from juror regarding other jurors' refusals to read juror instructions, which court found to be "misconduct," though not sufficiently prejudicial to undermine verdict); Grinnell v. Phillips, 1 Mass. (1 Will.) 530, 542 (1805) (Sewall, J., concurring) (admitting juror testimony to prove "overt acts"); Bradley's Lessee v. Bradley, 4 U.S. (4 Dall.) 112, 113 (Pa. 1792) (admitting jurors' affidavits regarding consideration of evidence not admitted in court); *see also* United States v. Reid, 53 U.S. (12 How.) 361, 366 (1852) (refusing to create rule regarding admissibility of juror affidavits, but noting that "cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice").

21 107 Mass. 453 (1871).

22 20 Iowa 195, 197 (1866). A quotient verdict occurs when the jury makes an agreement that each juror will write down an estimate of damages and that the group will be bound by the average of these estimates.

23 *Id.* at 205. In contrast to the near uniformity of opinion regarding the admissibility of juror testimony described decades later by Wigmore, *see supra* notes 18–19 and accompanying text, in 1866 the Iowa court found a legal morass, *Wright*, 20 Iowa at 209–10. In the seventeen years prior to its decision in *Wright*, the Iowa Supreme Court had ruled no less than seventeen times on issues involving juror affidavits. *Id.* at 198–204, 209.

jurors are admissible if they concern some matter which did not "essentially inhere in the verdict itself."[24]

While Lord Mansfield focused on the reliability of juror testimony, the critical issue for the Iowa court was whether the alleged misconduct was sufficiently litigable to justify the impact on the finality of the verdict.[25] Affidavits alleging that a litigant, witness, or third party improperly approached jurors, or that the jury drew lots or returned a quotient verdict, were held admissible because they contained allegations of "fact[s] independent of the verdict itself."[26] Since there could be witnesses to these overt acts of misconduct, these issues could be resolved by the court and litigation might help deter jurors from engaging in such misconduct in the first place.[27]

The court contrasted such misconduct with allegations which "rest[ ] alone in the juror's breast."[28] Allegations that a juror did not assent to the verdict, that he misunderstood the instructions of the court or the testimony, or that he felt he had made a mistake fell into this category.[29] In these cases, the finality of the verdict, and the difficulty of litigating what occurred in the juror's mind, overwhelmed any need to perfect the jury process.[30]

Despite its sharp departure from *Vaise*, the Iowa Rule gained broad acceptance. At least twelve states adopted the rule,[31] and it was also cited with approval by the Supreme Court.[32]

C. *Protecting the Privacy of Deliberations:* Woodward v. Leavitt

This general trend towards a more liberal rule, however, soon faced competition from a second American reformulation of the Mansfield Rule. In *Woodward v. Leavitt*, a juror testified that before the trial he told companions that he had already made up his mind for the defendant, but the juror further testified that during deliberations

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[24] *Wright*, 20 Iowa at 210; Crump, *supra* note 15, at 516 (noting that holding soon came to be called "the Iowa Rule").

[25] *Wright*, 20 Iowa at 210–13. The Iowa court rejected Lord Mansfield's reasoning, asserting that jurors who witness misconduct are no less reliable than other witnesses. *Id.* at 211–12.

[26] *Id.* at 210.

[27] *Id.* at 211.

[28] *Id.* at 210.

[29] *Id.*

[30] *Id.* at 210–11.

[31] WIGMORE, *supra* note 15, § 2354, at 702 n.1; *see also* Timothy C. Rank, *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 MINN. L. REV. 1421, 1428 & n.39 (1992).

[32] Mattox v. United States, 146 U.S. 140, 148–49 (1892) (citing Perry v. Bailey, 12 Kan. 539, 544–45 (1874) (applying Iowa Rule)).

he had in fact argued for the plaintiff.[33] The Massachusetts Supreme Judicial Court ruled that the juror's testimony concerning his pretrial opinions was admissible, but that all testimony regarding the internal deliberations of the jury must be excluded.[34]

As in *Wright*, the Massachusetts court rejected the absolutism of *Vaise*, but the court's decision was far more conservative than the Iowa Rule. Instead of admitting juror testimony regarding any "independent facts," the Massachusetts court figuratively barred the jury room door. The court reasoned that juror testimony regarding events occurring outside the jury room was perfectly acceptable. Once jurors entered the jury room, however, they were entitled to deliberations that are "secret and inviolable; . . . to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty."[35] Under the *Woodward* rule, the jury room becomes a black box, from which nothing but the jury's verdict can ever be discovered.

Though this rule overlaps with the Iowa Rule, the *Woodward* court's focus on the location of the misconduct leads to significantly different results for many forms of juror misconduct. In contrast to the Iowa Rule, *Woodward* bars testimony regarding a quotient verdict[36] or physical violence in the jury room. However, were the same conduct to occur in the hallway, both the Iowa Rule and the *Woodward* rule would admit the testimony of the offending juror, in contradiction to the rule in *Vaise*.

These divergent results stem from differences in the underlying rationales of the rules. The *Vaise* rationale, at its core, is the most "evidentiary" in nature: Juror testimony is excluded not as a matter of policy, but because its source is unreliable, as proven by the very misconduct itself. In so holding, however, the rule eliminates the best—and often only—source of evidence of any misconduct. The Iowa Rule discards the *Vaise* rationale, instead adopting a policy-focused rule that balances the desire for finality in verdicts with the fairness concern of providing relief in cases of objectively verifiable juror misconduct. The Iowa Rule, however, gives less weight to finality interests, admitting juror testimony regarding misconduct so long as it is not subjective and thus virtually impossible to litigate.

By focusing on the need for privacy in deliberations, the rule in *Woodward* shifts the policy focus from the nature of the misconduct to

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[33] 107 Mass. 453, 459 (1871).

[34] *Id.* at 471.

[35] *Id.* at 460.

[36] *Id.* at 470–71 (finding New York decision admitting affidavits regarding quotient verdict to be irreconcilable with English and Massachusetts precedent).

the needs of the jury system itself. Though *Woodward* bases its outcome on the location of the juror at the time of the misconduct, it is ultimately the secrecy and sanctity of the deliberations that the court finds more important than any litigant's claim of injustice.[37] The jury room is important only as the locus of the jury's private discussions. It is therefore unsurprising that the only exception to *Woodward*'s jury room rule relates to misconduct perpetrated by the parties, not the jurors. Jurors, the Massachusetts court held, must be allowed to testify when one of the parties has secretly passed evidence into the jury room, though they may not testify to the material's effect on the deliberations themselves.[38] Juror deliberations, even if they involve misconduct related to these documents, are thus protected from public view, even while misconduct by one of the parties can be rooted out.

D. *Protecting the Jury: Extraneous Influences,* Mattox, *and* Pless

The Supreme Court also played a role in this common law dialogue. In *Mattox v. United States*, the Court addressed allegations that a juror had brought a newspaper into the jury room and that the bailiff had informed the jury during deliberations that the defendant was about to be tried for another murder.[39] In its opinion, the Court "quoted" the following from *Woodward*: "[A] juryman may testify to any facts bearing upon the question of the existence of any *extraneous influence*, although not as to how far that influence operated upon his mind."[40] The Court adopted this "extraneous influence" test as its own and held that the trial court should have admitted the affidavits

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[37] *See supra* note 35 and accompanying text. Interestingly, the court has no similar problem with jurors being asked questions by the judge regarding their deliberations and the basis of their verdict *before* the jury is released from its service. *Woodward*, 107 Mass. at 464.

[38] *Woodward*, 107 Mass. at 466.

[39] 146 U.S. 140, 150–51 (1892). Prior to 1892, the only Supreme Court case dealing with the admissibility of juror affidavits was *United States v. Reid*, 53 U.S. 361, 362 (1852). *Reid* concerned the passing of a newspaper into the jury room. In its decision, the Court avoided the question of the admissibility of juror affidavits by finding that the newspaper contained no prejudicial information. The Court did note, however, that the issue was thorny enough that it "would . . . hardly be safe to lay down any general rule upon the subject." *Id.* at 366.

[40] *Mattox*, 146 U.S. at 149 (emphasis added). The "quoted" text, however, appears somewhat differently in the official reports of *Woodward*. *Woodward*, 107 Mass. at 466. Most importantly for our purposes, *Woodward* never used the term "extraneous influence," instead referring to "disturbing influences." *Id.* It is possible that Associate Justice Horace Gray, who authored *Woodward* in his former post as an associate justice of the Massachusetts Supreme Judicial Court, gave Chief Justice Fuller, the author of *Mattox*, an earlier draft of his opinion.

regarding the presence of the newspaper and the actions of the wayward bailiff.[41]

Following *Mattox*, the extraneous influence test became an important thread in the ongoing dialogue regarding juror testimony.[42] The *Mattox* test moved away from *Woodward*'s reliance on the location of the misconduct, instead translating *Woodward*'s exception regarding material passed to the jury into the rule. Under *Mattox*, the *source* of the alleged misconduct, not its location, nature, or even its effects, was the dominant factor in determining the admissibility of juror testimony.[43]

As with previous juror testimony rules, the *Mattox* test had its strengths and weaknesses. The test worked particularly well for rooting out jury tampering, as it allowed testimony regarding wrongdoing by the litigants and their agents without violating the secrecy of the deliberative process. The Court's failure to define what conduct constituted an "extraneous influence," however, left many unanswered questions regarding other forms of juror misconduct. Clearly a litigant who bribed a juror or passed nonadmitted evidence to the jury would constitute an extraneous influence, but what about a juror who brought a newspaper into the jury room himself, or was intoxicated, or went to the scene of the crime to investigate? *Mattox*'s record was far too sparse to resolve these issues.

Prior to the adoption of F.R.E. 606(b), the Supreme Court made one further pronouncement regarding juror testimony in *McDonald v. Pless*.[44] In *Pless*, the defendant moved to set aside the verdict on the grounds that the jury had returned a quotient verdict. In affirming the trial court's refusal to admit affidavits or testimony, *Pless* offered no new test for determining when juror testimony should be admissible.[45] Instead, the decision merely noted that in accordance with *Vaise*, such testimony should generally be excluded, except in "the gravest and most important cases."[46]

Though the *Pless* opinion fails as a model of legal clarity, its importance lies in its marshalling of the policy arguments against admitting juror testimony. As the *Pless* Court stated, limits on juror testimony serve to (1) preserve the finality of verdicts, (2) promote

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41 *Mattox*, 146 U.S. at 150–51.

42 *See, e.g.*, State v. Henry, 198 So. 910, 921–23 (La. 1940) (applying extraneous influence test); Sharp v. Merriman, 66 N.W. 372, 375–76 (Mich. 1896) (same); Emmert v. State, 187 N.E. 862, 866–67 (Ohio 1933). *But see infra* note 49 and accompanying text.

43 *See* FED. R. EVID. 606 advisory committee's note (stating that *Mattox* held that "the door of the jury room is not necessarily a satisfactory dividing point").

44 238 U.S. 264 (1915).

45 *Id.* at 269.

46 *Id.* at 268–69.

the frankness of private deliberations, and (3) prevent juror harassment by the litigants.[47] These three policy concerns had heretofore been interwoven in earlier opinions by both the Supreme Court and the state courts, though the concern over juror harassment had rarely been so explicitly stated. The decision further made clear that even though the ban on juror testimony would result in injustice to some litigants by eliminating "the only possible evidence of misconduct,"[48] the Court was more concerned with the negative implications of admitting juror testimony.

While the Supreme Court added to the common law dialogue, its opinions did not bring automatic adherence. In fact, many states rejected the more restrictive approach to juror testimony propagated by the Court.[49] The Court's interpretations did not achieve dominance until after Congress passed, and the states largely adopted, the Federal Rules of Evidence.[50]

II
EXTERNAL/INTERNAL: THE *TANNER* FRAMEWORK

As in many other areas of evidentiary law, the creation of the Federal Rules of Evidence substantially changed the rules regarding juror testimony. Section A of this Part details the adoption of F.R.E. 606(b) and the subsequent confusion in the appellate courts regarding the extent of admissible "outside influences." Section B describes how the Supreme Court's interpretation of F.R.E. 606(b) in *Tanner* once again subtly reformulated the juror testimony rule. Section C demonstrates that while the *Tanner* Court recognized the important policy goals justifying restrictions on juror testimony, its decision ultimately created a distinction between external and internal misconduct which does not serve these goals.

A. Federal Rule of Evidence 606(b)

When the Judicial Conference formulated its approach to juror testimony for the new Federal Rules of Evidence in the 1960s and

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[47] *Id.* at 267–68.

[48] *Id.* at 268.

[49] *See* Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 387 advisory committee's note (1971) [hereinafter Proposed Rules of Evidence] (citing Iowa Rule in *Wright* as representing modern "trend"); *see, e.g.*, Aillon v. State, 363 A.2d 49, 55 (Conn. 1975) (admitting testimony of any juror misconduct which violated statute where statute included "disorderly conduct" or "neglect of duty"); State v. Levitt, 176 A.2d 465, 467–68 (N.J. 1961) (admitting juror testimony as to "events" but not "thought processes" showing prejudice against Jews in deliberations); Killough v. State, 231 P.2d 381, 387–88 (Okla. 1951) (adopting Iowa Rule).

[50] *See infra* Part III.

1970s, it drew from an extensive and still vibrant common law debate. The Conference's early drafts of the rule governing juror testimony adopted a variation of the Iowa Rule: The draft rule banned testimony on the "mental processes" of jurors, but jurors could testify to any other "conditions or occurrences of events calculated improperly to influence the verdict."[51] The federal rule ultimately adopted, however, sides with the more conservative precedents: F.R.E. 606(b) limits juror testimony to testimony regarding "extraneous prejudicial information" or "outside influences."[52]

In describing the rationale for F.R.E. 606(b), the Advisory Committee acknowledged the Mansfield Rule's prohibition of juror testimony as the general rule, but also called it a "gross oversimplification," stating that the blind application of such a rule could "only promote irregularity and injustice."[53] Broad admissibility of juror testimony, on the other hand, was also undesirable for the three policy considerations outlined in *Pless*—preserving finality, protecting the privacy of jury deliberations, and preventing juror harassment.[54] In an attempt to strike the proper balance, F.R.E. 606(b) deems inadmissible all testimony regarding "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that [juror] or any other juror's mind or emotions."[55] Rule 606(b) therefore prohibits testimony regarding the subject matter and process of the deliberations, including any testimony

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[51] Proposed Rules of Evidence, *supra* note 49, at 387–88 advisory committee's note (citing Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195 (1866)). The relevant portion of the proposed rule read as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

Id. at 387.

[52] FED. R. EVID. 606(b). The rule in its entirety reads:

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

Id.

[53] FED. R. EVID. 606 advisory committee's note.

[54] *Id.*; *see also supra* text accompanying notes 44–48.

[55] FED. R. EVID. 606(b).

regarding quotient or compromise verdicts, misinterpretation of jury instructions, juror speculation as to insurance coverage of the litigants, or attribution of the guilty plea of one defendant as evidence of the guilt of other defendants.[56]

Adopting a variation of the *Mattox* test, F.R.E. 606(b) allows juror testimony regarding "extraneous prejudicial information" and "outside influence[s]."[57] As formulated, the extraneous prejudicial information exception is relatively broad; it permits juror testimony regarding the tainting of deliberations by any evidence which had not been admitted at trial. For example, the rule allows testimony concerning information that a juror gleaned from a newspaper article, regardless of whether that newspaper is smuggled in by the bailiff or read by a juror outside the jury room.[58]

The scope of the "outside influence" exception is less clear. The exception presumably at least covers juror testimony regarding bribery or other improper pressures exerted by one of the litigants or a third party.[59] More expansive readings, however, are also entirely plausible. Does the outside influences exception apply only to influences that are external to the jury itself (such as pressure from the litigants), or does it also apply to influences arising from the juror's own misconduct, but which are external to a proper deliberative process? Under the extraneous information test, the source of the extraneous information was deemed unimportant. Courts have struggled over whether the source of the "outside" influence is similarly irrelevant in cases dealing with juror intoxication,[60] juror insanity,[61] and

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[56] *See* FED. R. EVID. 606 advisory committee's note (citing with approval cases barring each category of testimony); *see, e.g.*, United States v. Campbell, 684 F.2d 141, 151–52 (D.C. Cir. 1982) (rejecting inquiry into compromise verdict); United States v. Friedland, 660 F.2d 919, 927–28 (3d Cir. 1981) (denying right to inquiry regarding whether jury improperly considered defendant's failure to testify); United States v. D'Angelo, 598 F.2d 1002, 1003–05 (5th Cir. 1979) (holding inadmissible evidence from jurors that jury misapplied law).

[57] FED. R. EVID. 606(b).

[58] *See, e.g.*, United States v. Bruscino, 662 F.2d 450, 456–61 (7th Cir. 1981) (reversing conviction based on prejudicial effect of both nonadmitted document mistakenly given to jury by court clerk as well as newspaper account brought into jury room by juror); *see also In re* Beverly Hills Fire Litig., 695 F.2d 207, 213 (6th Cir. 1982) (allowing testimony regarding juror's out-of-court investigation).

[59] *See* H.R. REP. NO. 93-650, at 9–10 (1973) (describing perceived scope of external influences exception).

[60] *Compare* United States v. Schultz, 656 F. Supp. 1218, 1221 (E.D. Mich. 1987) (holding juror's affidavit regarding his heavily medicated state at time of jury instructions and deliberation was admissible as controlled substances are outside influences), *with* United States v. Conover, 772 F.2d 765, 770 (11th Cir. 1985), *aff'd in part*, Tanner v. United States, 483 U.S. 107 (1987) (finding intoxication to be neither "outside" nor "extrinsic" influence).

juror racism.[62] Some circuits split over whether to exclude testimony regarding these matters, while other appellate courts avoided the admissibility question altogether by holding that the moving party had failed to show any prejudice from the misconduct.[63] At least one court candidly admitted that many types of juror misconduct do not easily fit into F.R.E. 606(b)'s outside influence category, though they share enough characteristics with other outside influences to not belong within the rule's general prohibition on juror testimony.[64]

B. *The* Tanner *Framework*

The Supreme Court entered this morass in a case with a particularly galling set of facts. In *Tanner v. United States*,[65] the jury found Anthony Tanner and William Conover guilty of mail fraud and conspiracy to defraud the United States.[66] After the verdict, the defendants twice moved for a new trial based on the affidavits of two jurors, which stated that no fewer than seven jurors had been drinking substantial quantities of alcohol throughout the trial.[67] In addition, the affidavits alleged that four jurors smoked marijuana on a regular basis during the trial and that one witness sold a quarter pound of marijuana to another inside the courthouse.[68] In the words of one of the jurors, "the jury was 'on one big party.'"[69] The district court and the

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[61] *Compare* Virgin Islands v. Nicholas, 759 F.2d 1073, 1080 (3d Cir. 1985) (characterizing issues of juror competence during deliberations as "internal" in nature, and thus barred by F.R.E. 606(b)), *with* Sullivan v. Fogg, 613 F.2d 465, 467 (2d Cir. 1980) (admitting, without comment, juror testimony regarding juror's mental instability during course of trial and deliberations), *and* United States v. Allen, 588 F.2d 1100, 1106–07 & nn. .11–12 (5th Cir. 1979) (approving trial court's admission of juror's testimony regarding role in deliberations after defendant brought forth evidence that juror was mentally incompetent and possibly intoxicated).

[62] *Compare* Wright v. United States, 559 F. Supp. 1139, 1151–52 (E.D.N.Y. 1983) (noting division in courts regarding application of F.R.E. 606(b) to juror testimony regarding juror racism, but avoiding "constitutional difficulties" raised by this question by finding juror's racist statements not to be substantial enough to justify evidentiary hearing), *and* Smith v. Brewer, 444 F. Supp. 482, 490 (S.D. Iowa 1978), *aff'd*, 577 F.2d 466 (8th Cir. 1978) (ultimately holding juror testimony regarding racism inadmissible in this case, but stating that 606(b) may allow such testimony if substantial prejudice to defendant can be shown), *with* United States v. Duzac, 622 F.2d 911, 913 (8th Cir. 1980) (holding that evidence of "personal prejudices" is inadmissible because prejudice cannot be defined as external influence as defined by *Pless*).

[63] *See supra* notes 60–62.

[64] *See Brewer*, 444 F. Supp. at 489 ("The question of juror conduct arising within the jury room which injects a note of bias into the deliberations does not fit neatly on one side or the other of the dichotomy drawn in Rule 606(b).").

[65] *Tanner*, 483 U.S. 107.

[66] *Id.* at 109–10.

[67] *Id.* at 113–16.

[68] *Id.* at 115–16.

[69] *Id.* at 115 (quoting Brief for the Petitioners at 10, *Tanner*, 483 U.S. 107 (No. 86-177)).

Eleventh Circuit denied both motions on the grounds that intoxication is an internal influence to which jurors may not testify.[70]

In her opinion for the Court, Justice O'Connor referenced the holding in *Vaise*, but acknowledged that the common law had long since evolved to provide numerous exceptions to *Vaise*'s absolute bar.[71] Justice O'Connor, however, recharacterized all of these exceptions to *Vaise* under one new broad rule, and in so doing subtly changed the jurisprudence regarding juror testimony yet again. Taking *Mattox*'s "extraneous influence" test as a point of departure, Justice O'Connor classified all of the matters to which the Court had previously held that jurors may testify as relating to "external" matters.[72]

In using the term "external," Justice O'Connor rejected *Woodward*'s formulation based on the locus of the misconduct.[73] Instead, under her new framework, the "nature of the allegation" itself was either external or internal.[74] O'Connor classified as external matters consideration of nonadmitted evidence by jurors, undue influences from the litigating parties or others, and a juror's conflicts of interest.[75] Admitting testimony regarding external evidence was still consonant with the "substantial policy considerations" detailed in *Pless* because these cases of misconduct all constituted "unauthorized invasions" of the jury process itself.[76] As Justice O'Connor interpreted them, both F.R.E. 606(b) and the common law rule against juror testimony stood as a bulwark protecting the jury process, to be removed only when that process had already been infected from without.

Conversely, Justice O'Connor labeled jurors' psychological or physiological issues, regardless of whether they stemmed from disability, illness, or intoxication, as "internal" issues that were beyond the

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[70] United States v. Conover, 772 F.2d 765, 769 (11th Cir. 1985).

[71] *See Tanner*, 483 U.S. at 117 (referencing Mansfield Rule). O'Connor made particular note of the *Mattox* decision but also cited other more recent cases in which the Court had found juror testimony to be admissible: Smith v. Phillips, 455 U.S. 209 (1982), which admitted juror testimony regarding a juror's application for employment with the district attorney; Parker v. Gladden, 385 U.S. 363, 365 (1966), which admitted juror testimony concerning a bailiff's comments about the defendants; and Remmer v. United States, 347 U.S. 227, 228–30 (1954), which admitted juror testimony regarding bribery of a juror. *Tanner*, 483 U.S. at 117.

[72] *Tanner*, 483 U.S. at 117.

[73] *Id.* at 117–18 (noting that such arbitrary application of rule would result in jurors being able to testify to reading newspaper in any place except jury room).

[74] *Id.*

[75] *See supra* note 71.

[76] *Tanner*, 483 U.S. at 119–21.

scope of review permitted by F.R.E. 606(b).[77] She believed that judicial inquiry into such internal matters constituted as significant an invasion into the jury process as an act of "external" misconduct.[78] This threat to the jury process overwhelmed even well-founded concerns of the parties that they had been denied their right to a competent jury. In a statement that acknowledged the underlying injustice sanctioned by her rule, O'Connor wrote: "It is not at all clear, however, that the jury system could survive such efforts to perfect it. . . . [T]he community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct."[79] Tanner and Conover were thus denied any relief, despite substantial (though now inadmissible) evidence that they had suffered a severe miscarriage of justice.

C. Tanner, *Critiqued*

Tanner's critical flaw is that while it correctly identifies the proper policy considerations for and against admitting juror testimony, it creates a content-based external/internal framework that does not adequately distinguish between juror testimony that harms these interests and that which does not.[80] As previously discussed, in *Wright*, *Woodward*, and *Mattox* early juror testimony rules balanced fairness concerns for the litigants with the need to preserve the privacy of deliberations, protect the finality of verdicts, and prevent the harassment of jurors.[81] Different states balanced these interests in different

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[77] *Id.* at 118–19 (discussing United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974), in which evidence regarding juror's psychological disorder at time of trial was held inadmissible); *see also id.* at 122 (suggesting that intoxication was "no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep"). Justice O'Connor went on to explain why the legislative history of F.R.E. 606(b) supported a finding that intoxication is an internal matter under her new rubric. *Id.* at 122–25. This Note does not dispute Justice O'Connor's interpretation of the legislative history. This Note only argues that the rule created in *Tanner* fails to achieve properly the policy goals that generally support restrictions on juror testimony.

[78] *Id.* at 120–21. In fact, Justice O'Connor believed that the jury process itself would be under such severe threat, were these inquiries allowed, that not even a defendant's Sixth Amendment right to a competent jury would require such an inquiry. *Id.* at 120–21, 127. O'Connor went on to state that any Sixth Amendment right that the defendant has to an "unimpaired" jury is adequately protected by other procedural protections such as voir dire, the ability of jurors to inform the court of any misconduct before returning a verdict, the court's own responsibility to oversee the jury during the course of the trial, and the admissibility of nonjuror evidence. *Id.* at 127.

[79] *Id.* at 120. This quotation makes clear that the Court is effectively using F.R.E. 606(b) to sweep a great deal of juror misconduct under the rug.

[80] *See* Crump, *supra* note 15, at 522–23 (referring to F.R.E. 606(b)'s distinction between outside and inside influences as "arbitrary").

[81] *See supra* Part I; *see also* Crump, *supra* note 15, at 512 (summarizing countervailing interests to juror impeachment rule).

ways, resulting in a variety of rules regarding proper subjects for juror testimony. *Tanner*, in contrast, excluded testimony on juror intoxication, despite the fact that juror testimony on this topic was no more likely to impact the privacy of deliberations, impair the finality of verdicts, or cause more juror harassment than comparable juror testimony on admissible subjects, such as a juror bringing a newspaper into the jury room.[82]

Contrasting these two examples of juror misconduct—the juror who brings alcohol into the jury room (an "internal" act of misconduct under the *Tanner* framework) and the juror who brings in a newspaper (an "external" act of misconduct)—demonstrates the external/internal framework's failure to draw a line that is rationally related to the underlying policy concerns. In terms of injury to the litigants, the harms caused by these forms of misconduct are different in kind, but not necessarily in degree. The newspaper may contain additional information which the rest of the evidentiary code has struggled to keep away from the jury. Intoxication of the jury, however, undermines the ability of the affected jurors to evaluate the evidence that has been admitted, thereby denying the litigants their right to a competent jury.[83] Certainly neither form of misconduct can be considered part of the proper deliberative process.

Nor can these forms of misconduct be distinguished based on the three countervailing policy considerations weighing against juror testimony. First, finality interests are implicated anytime an additional issue is opened to postjudgment inquiry.[84] Litigants, the judiciary, and society as a whole certainly have strong interests in ensuring that criminal and civil matters are fully and finally resolved. Yet postjudgment motions are permitted for a variety of issues,[85] including many forms

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[82] *Cf.* United States v. Campbell, 684 F.2d 141, 151–52 (D.C. Cir. 1982) (arguing rationale of extraneous influence test is "self-evident" because internal pressures are part and parcel of jury process). The court in *Campbell*, however, considered only juror conduct—specifically, a compromise verdict—broadly accepted as barred. No court has argued that a juror who is intoxicated or racially biased, or who has engaged in intra-jury violence, has similarly acted within the acceptable bounds of juror conduct.

[83] *See Tanner*, 483 U.S. at 126 ("This Court has recognized that a defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing.'" (quoting Jordan v. Massachusetts, 225 U.S. 167, 176 (1912))).

[84] Alschuler, *supra* note 11, at 225 ("[F]inality is disrupted as much by proof of juror misconduct from eavesdroppers, bartenders, and drug dealers as by proof from the jurors themselves."); Edward T. Swaine, Note, *Pre-deliberation Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 198 (1988) (finding finality not to be dispositive, as all postverdict inquiries upset finality).

[85] *See, e.g.*, FED. R. CIV. P. 60(b) (permitting postjudgment motions for relief from judgment or order in cases of "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . (3) fraud . . . misrepresentation, or other misconduct of an adverse party"); FED. R. CRIM. P. 33 (allowing postjudgment relief upon finding of new

of "external" juror misconduct.[86] Preserving the finality of verdicts would justify limiting the scope of postjudgment inquiries into less serious forms of misconduct or forms of misconduct which are not easily litigable. For example, verdicts should not be upset based on a juror's second thoughts or the unprovable assertion that a juror decided to disregard the law. But when misconduct is serious and objectively verifiable, as is the case when a juror is intoxicated, violent, or observably mentally unstable, or when a juror makes blatantly racist statements, the interest in finality alone does not inform us which injustices are acceptable.[87]

Second, *Tanner*'s external/internal distinction also fails to better preserve the privacy, and thus frankness, of jury deliberations. Courts inquiring into external influences already take great care to ensure that jurors testify only about the objective act of misconduct. Testimony regarding the effect of this misconduct on the minds of individual jurors or on the deliberations as a whole is already (properly) forbidden.[88] There is no reason why a similar practice could not be used for many forms of misconduct currently labeled as internal. A juror could testify to the amount of alcohol or controlled substances he or she ingested (or saw another juror ingest) without revealing the effect of this ingestion on his or her mind. Acts of physical violence or threats in the jury room could easily be detailed without testimony

evidence); N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2005) (allowing defendants "[a]t any time after the entry of a judgment" to move to vacate their judgment based on lack of jurisdiction, allegations of fraud or misrepresentation by court or prosecutors, new evidence, etc.).

[86] *See, e.g.*, FED. R. EVID. 606(b) (permitting postverdict juror testimony regarding extraneous prejudicial information and outside influences); *see also* Sullivan v. Fogg, 613 F.2d 465, 468 (2d Cir. 1980) (dismissing finality argument in juror insanity case because "[f]inality of judgment is affected by any post-verdict inquiry; it is not specific to the problem here").

[87] It should be made clear that the inquiry here is whether any misconduct occurred, not whether the misconduct prejudiced the litigants. *See infra* notes 141–43 and accompanying text (discussing differences between proof of misconduct and proof of prejudice). Thus, the questions being asked are "Did you see Juror A drink three beers during the lunch break?" or "Did you see Juror A shove Juror B?," *not* "Was Juror A too intoxicated to deliberate?" or "Was Juror B frightened?" These inquiries are as litigable as any DUI or assault case.

[88] *See, e.g.*, United States v. Berry, 92 F.3d 597, 601 (7th Cir. 1996) ("[A] district court must ignore a juror's comment regarding how a particular piece of material disposed the juror toward a particular verdict, and the district court must make an independent determination of the likely effect of the extraneous material."); United States v. Simpson, 950 F.2d 1519, 1521 (10th Cir. 1991) ("Rule 606(b) allows a juror to testify as to *whether* any extraneous prejudicial information was improperly brought to bear upon a juror. However, the language of the rule is equally clear that a juror may not testify as to the *effect* the outside information had upon the juror."); United States v. Williams, 613 F.2d 573, 575–76 (5th Cir. 1980) (allowing juror testimony regarding objective facts concerning external influence, but not effect of influence on juror's mind).

regarding whether those acts successfully intimidated a juror.[89] To be sure, courts must make careful judgments to ensure that only the acts of misconduct, not the content of the deliberations, are revealed. But we know the courts are capable of policing this line, because they are already doing so in cases of external misconduct.

Finally, *Tanner*'s framework does not provide additional protection for jurors from postverdict harassment. By eliminating jurors as a source of admissible evidence, the Court hoped to eliminate incentives for unhappy litigants to contact, much less pressure, jurors. Once again, the external/internal distinction does little to promote this goal.[90] Because jurors may testify about external influences or extraneous information they have received, litigants still have incentives to contact and interview jurors. As juror misconduct is, virtually by definition, unknown at the time of the verdict, litigants who contact jurors after the trial are already on a fishing expedition. By admitting any juror testimony, F.R.E. 606(b) sanctions such fishing. Allowing jurors to testify on matters such as juror intoxication or intra-jury violence merely gives disgruntled litigants a few more potential fish to catch; it does not stop them from climbing into the boat in the first place.

Furthermore, the above analysis assumes that litigants are allowed to contact jurors, which is often not the case. In many jurisdictions, local court rules already restrict litigants' access to jurors.[91] Using these local rules, courts can screen out litigants who are merely seeking to bully jurors into impeaching their verdict. Unlike more narrowly tailored local rules, however, *Tanner*'s interpretation of

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[89] Rooting out racism in the jury room, however, provides a more challenging case. Often it will be difficult to distinguish even overtly racist statements from the juror's thoughts on the outcome of the case at the time. Courts, however, have been far more willing both to bend the definition of outside influences to include racial bias and to examine statements made in the jury room than they have for other acts of misconduct. *See, e.g.*, United States v. Henley, 238 F.3d 1111, 1113, 1119–22 (9th Cir. 2001) (admitting statement of juror that "[a]ll the niggers should hang" made during trial but before deliberations); Wright v. United States, 559 F. Supp. 1139, 1151–52 (E.D.N.Y. 1983) (admitting statement by juror to nonjuror that "the Black Bastard is guilty," though finding this insufficient evidence of racism to require new trial); Tobias v. Smith, 468 F. Supp. 1287, 1290–91 (W.D.N.Y. 1979) (admitting testimony of racist statements made in jury room).

[90] *See* Alschuler, *supra* note 11, at 227 (questioning why litigants would have greater interest in harassing jurors for evidence of external misconduct than internal misconduct); Crump, *supra* note 15, at 525–26, 533 (referring to F.R.E. 606(b) as only "indirectly" preventing juror harassment).

[91] *See, e.g.*, S.D. CAL. CIV. R. 47.1 (requiring examinations of jurors to be conducted by court); D.D.C.R. 47.2 (granting attorneys leave to speak with jurors if request made before jury is dismissed, but requiring leave of court if request made at later date); M.D. FLA. R. 5.01(d) (requiring court order before attorneys contact jurors); Brief for United States at 7 n.5, Tanner v. United States, 483 U.S. 107 (1987) (No. 86-177) (noting that, at that time, Local Rule 2.04(c) of Middle District of Florida barred attorneys from contacting jurors without first making showing of good cause to trial court).

F.R.E. 606(b) prevents jurors from testifying about misconduct on their own initiative.[92] Jurors who voluntarily come forward with their own misconduct do not need protection from themselves.[93]

This critique does not seek to diminish the significant policy concerns behind the general ban on juror testimony. Instead, it demonstrates that *Tanner*'s external/internal framework, while explicitly permitting significant injustice, advances these policy goals only indirectly, if at all.

III
TANNER IN THE STATES

Despite *Tanner*'s flaws, its framework has gained widespread acceptance in the states. This is partially due to a broader trend of states moving toward more formalized evidentiary codes, most of which are based on the Federal Rules of Evidence.[94] This trend has led many state supreme courts, who remain the highest authorities regarding state evidentiary law, to abandon their common law traditions in favor of Supreme Court precedents.[95]

Of the forty-two states with state evidentiary codes modeled on the Federal Rules of Evidence, twenty-five have adopted rules that either are substantially similar to F.R.E. 606(b) or have even stronger bars against juror testimony.[96] Six states have rules that are substantially similar to F.R.E. 606(b) but also specify one other area of mis-

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92 *Tanner*, 483 U.S. at 113, 115 (noting that jurors alleging misconduct contacted defense counsel on their own accord); *see also* Mark A. Corti, Note, Tanner v. United States*: Did the Court Go Too Far in Its Interpretation of Federal Rule of Evidence 606(b)?*, 3 J. LEGAL ADVOC. & PRAC. 49, 58 (2001) (arguing juror harassment policy rationale is undermined when jurors come forward on their own initiative).

93 *But see* Quarles v. State, 233 N.W.2d 401, 404 (Wis. 1975) (asserting litigants would harass jurors into "voluntarily" coming forward).

94 To date, forty-two states have adopted evidentiary codes based on the Federal Rules of Evidence. 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE T-1 (2006).

95 *Cf.* Stewart v. Rice, 47 P.3d 316, 321 (Colo. 2002) ("When our rule is similar to the federal rule, we may look to the federal authority for guidance in construing our rule."); John David Collins, *Character Evidence and Sex Crimes in Alabama: Moving Toward the Adoption of New Federal Rules 413, 414 & 415*, 51 ALA. L. REV. 1651, 1678 (2000) (suggesting that common law rules do not survive state adoption of evidentiary codes modeled after Federal Rules of Evidence); Mark McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 886–87 (1982) (noting greater uniformity in evidentiary rules as states moved to adopt Federal Rules of Evidence).

96 States with identical or substantially similar evidentiary rules to F.R.E. 606(b): Alaska, Arkansas, Colorado, Delaware, Iowa, Maine, Mississippi, Nebraska, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. States with additional bars to proving juror misconduct: Alabama, Louisiana, Ohio, and Texas. *See infra* App. A. Maryland bars all juror testimony. *See* MD. R. EVID. 5-606(b).

conduct to which jurors may testify.[97] Seven states have no statutory rules analogous to F.R.E. 606(b).[98] Arizona has a rule identical to F.R.E. 606(b), but only applies it to civil actions.[99] Florida, Hawaii, and Nevada are the only states with F.R.E.-based evidentiary codes that have codified rules substantially different from F.R.E. 606(b).[100]

In the states that have adopted language similar or identical to F.R.E. 606(b), state supreme courts have often followed federal precedents, rather than their own case law, to interpret the language of their state evidentiary rule. Nowhere is this seen more starkly than in Iowa, a state whose common law tradition most clearly stands in opposition to the *Tanner* framework.[101] Following the adoption of Iowa Rule of Evidence 5.606(b), which is identical to F.R.E. 606(b),[102] the Iowa Supreme Court came to reject the subjective/objective test of the Iowa Rule in favor of *Tanner*'s external/internal framework.[103] Even where state supreme courts claim to be relying on their own

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[97] These states are: Idaho, Indiana, Minnesota, Montana, North Dakota, and Tennessee. *See infra* App. A.

[98] These states are: Connecticut, Kentucky, Michigan, New Hampshire, New Jersey, Oregon, and Washington. *See infra* App. A.

[99] *Compare* ARIZ. R. EVID. 606(b), *with* FED. R. EVID. 606(b).

[100] *See* FLA. STAT. § 90.607(2)(b) (2005) (adopting variation of Iowa Rule); HAW. R. EVID. 606(b) (same); NEV. REV. STAT. § 50.065(2) (2005) (same). *But see* Meyer v. State, 80 P.3d 447, 454 & n.20 (Nev. 2003) (referring to § 50.065 as being "substantially the same as predecessor to Federal Rule of Evidence 606(b)" and adopting *Tanner* framework).

[101] *See supra* Part I.B (discussing Iowa Rule).

[102] *Compare* IOWA R. EVID. 5.606(b), *with* FED. R. EVID. 606(b).

[103] *See* Ryan v. Arenson, 422 N.W.2d 491, 493–95 (Iowa 1988) (adopting external/internal test and rejecting juror testimony regarding quotient verdict, though without citing to *Tanner*). Iowa's rejection of the Iowa Rule began even before the state adopted an F.R.E.-based evidentiary code in 1983. In 1980, despite the Iowa Rule, the Supreme Court of Iowa cited the F.R.E. 606(b) test favorably. State v. Rouse, 290 N.W.2d 911, 916–17 (Iowa 1980). Between 1983 and 1986, the court alternatively applied the Iowa Rule and a *Tanner*-like interpretation of F.R.E. 606(b) in five different cases. *See* Crowley v. Glessner, 328 N.W.2d 513, 513–14 (Iowa 1983) (applying *Rouse*'s external/internal test, but also citing application of Iowa Rule in *Harris v. Deere & Co.*, 263 N.W.2d 727, 729–30 (Iowa 1978)); State v. Christianson, 337 N.W.2d 502, 504 (Iowa 1983) ("[Iowa law] distinguishe[s] between impermissible inquiries into the *internal workings of the jury* and evidence of '*external matters* improperly brought to bear on the [jury's] deliberations.'" (emphasis added) (quoting *Crowley*, 328 N.W.2d at 514)); State v. Harrington, 349 N.W.2d 758, 762 (Iowa 1984) (quoting Iowa Rule's "inheres in the verdict" test, but also quoting application of external/internal test in *Christianson*, 337 N.W.2d at 504); State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984) (adhering to Iowa Rule by admitting only juror testimony to "objective" facts); State v. Sauls, 391 N.W.2d 239, 240–41 (Iowa 1986) (same). It was not until after *Tanner* was decided that the Iowa court in *Ryan* fully adopted the external/internal test and rejected the Iowa Rule. *See Ryan*, 422 N.W.2d at 495; *see also* State v. Lamphear, No. 5-012/04-0080, 2005 Iowa App. LEXIS 87, at *9–10 (Ct. App. 2005) (citing *Tanner*, 483 U.S. at 121, as representing federal rule that had been "essentially" adopted by Iowa court in *Ryan*).

interpretations of state versions of F.R.E. 606(b), discussions of *Tanner* and other federal precedents dominate their opinions.[104]

The *Tanner* framework has also been adopted to varying degrees in some states that either do not have an F.R.E.-based evidentiary code, or whose legislatures adopted such a code, but without a rule equivalent to F.R.E. 606(b). The Illinois Supreme Court cited *Tanner* with approval and adopted a similar external/internal framework in *People v. Hobley*—a case where the court allowed juror affidavits regarding nonjurors who yelled "Hang the motherfucker" at the jury while they were sequestered, but rejected juror affidavits alleging that the jury foreman tried to intimidate other jurors by showing them his gun on the first day of trial.[105] Citing both *Tanner* and F.R.E. 606(b), the Supreme Court of Georgia rejected affidavits alleging racial bias in a death penalty case, despite state case law stating that "the rule of juror incompetency 'cannot be applied in such an unfair manner as to deny due process.'"[106] Other state concessions to the *Tanner* framework are more subtle. The Court of Appeals of New York, for example, held that "[New York] case law is consonant with [F.R.E. 606(b)'s] underlying principles,"[107] but has not stated whether it also accepts *Tanner*'s broad definition of "internal" testimony.[108]

A few states have eschewed the Court's lead. Most significantly, California's evidentiary code retains the Iowa Rule, permitting juror testimony regarding conduct "of such a character as is likely to have influenced the verdict improperly,"[109] while excluding evidence as to the misconduct's effect on the jurors.[110] Connecticut, Florida, and

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104 *See, e.g.*, State v. Quesinberry, 381 S.E.2d 681, 686–89 (N.C. 1989). *Quesinberry*, a death penalty case, involved the issue of the inadmissibility of juror testimony concerning a jury's improper consideration of likely sentencing implications. The court begins its opinion with a discussion of F.R.E. 606(b) and proceeds to cite frequently to *Tanner*, ultimately holding that the testimony was properly excluded because it was "internal." *Id.* at 688–89. North Carolina's rule on juror testimony is identical to the federal rule. *Compare* N.C. GEN. STAT. ANN. § 8C-1, Rule 606(b) (West 2000), *with* FED. R. EVID. 606(b). However, state supreme courts sometimes behave similarly even where the state rule differs from the federal one. *See, e.g.*, NEV. REV. STAT. § 50.065(2) (barring only juror testimony regarding effect of misconduct on deliberations); Meyer v. State, 80 P.3d 447, 454 & n.20 (Nev. 2003) (adopting F.R.E. 606(b) approach, in spite of state's statute).

105 *See* People v. Hobley, 696 N.E.2d 313, 338–42 (Ill. 1998).

106 Spencer v. State, 398 S.E.2d 179, 184 (Ga. 1990) (quoting Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987)).

107 Sharrow v. Dick Corp., 653 N.E.2d 1150, 1153 (N.Y. 1995).

108 At least one New York trial court has taken the New York Court of Appeals's statement to hold that testimony regarding intoxication is inadmissible. *See* People v. Brandon, 785 N.Y.S.2d 286, 288–89 (Crim. Ct. 2004) (citing *Sharrow*, 653 N.E.2d at 1153).

109 CAL. EVID. CODE § 1150(a) (West 2005).

110 *Id.*; *see also* People v. Steele, 47 P.3d 225, 248 (Cal. 2002) (finding effect on jury of juror statements of expertise to be inadmissible, but finding statements themselves to be

Hawaii have also retained the Iowa Rule.[111] Other states admit juror testimony concerning specific acts of misconduct which *Tanner* would classify as "internal." South Carolina, for example, admits juror testimony concerning racial bias.[112] Indiana's statutory rule tracks F.R.E. 606(b) virtually word for word, but specifically rejects *Tanner* with a clause allowing for testimony regarding juror intoxication.[113] Minnesota has a similar exception for acts or threats of violence against jurors, even if by another juror during deliberations.[114]

These states, though, are the exceptions. Where once there was a diversity of approaches to the admissibility of juror testimony, with each state balancing fairness to the litigants with the important goal of protecting the jury system, there is now staid uniformity and little experimentation.

IV
A New Framework

The flaw in *Tanner*'s approach to juror testimony is that it provides no rational explanation for why testimony on overt evidence regarding serious misconduct—such as juror intoxication, racism, insanity, or intra-jury violence—damages the interests protected by F.R.E. 606(b) more than similar testimony concerning bribery, consideration of extraneous evidence, or other outside influences. However, simply allowing jurors to testify to "internal" matters does not address the three policy rationales behind F.R.E. 606(b). Allowing testimony on these additional areas of misconduct would not in and of itself undermine the finality of verdicts, the privacy of deliberations, or invite juror harassment,[115] but it would increase the overall number of

admissible because they were "objectively ascertainable overt acts that are open to sight, hearing, and the other senses and are therefore subject to corroboration").

111 *See* 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."); Conn. Super. Ct. R. § 16-34 (barring only testimony regarding effect of misconduct on deliberations, not misconduct itself); Haw. R. Evid. 606(b) (same). Nevada also adopted a statute permitting testimony regarding objective misconduct, but the Nevada Supreme Court has since interpreted this language to adopt *Tanner*'s external/internal framework. *See supra* note 104.

112 State v. Hunter, 463 S.E.2d 314, 316 (S.C. 1995) (citing to *Tanner*, but affirming admission of juror testimony regarding racist remarks of another juror during deliberations because "allegations of racial prejudice involve principles of fundamental fairness"). South Carolina's rule of evidence regarding juror testimony is identical to the federal rule. *Compare* Fed. R. Evid. 606(b), *with* S.C. R. Evid. 606(b).

113 Ind. R. Evid. 606(b)(1). Four states similarly track F.R.E. 606(b) but make a specific exception for verdicts agreed to by chance. *See* Idaho R. Evid. 606(b); Mont. R. Evid. 606(b); N.D. R. Evid. 606(b); Tenn. R. Evid. 606(b).

114 Minn. R. Evid. 606(b).

115 *See supra* notes 84–93 and accompanying text.

inquiries into juror misconduct, which might harm these interests in the same manner as juror testimony regarding "external" misconduct.

Critics will argue that any effort to modify the external/internal framework would do nothing more than rebalance the interests underlying F.R.E. 606(b) and similar state rules. However, such a rebalancing is justified if, when coupled with new rules, it will more effectively achieve these interests than *Tanner*'s roughshod approach. Section A of this Part proposes a menu of practices for addressing juror testimony that would more effectively serve the relevant policy interests. Section B discusses the types of "internal" misconduct most damaging both to litigants' interests and to our sense of justice that could reasonably be found admissible after my proposed changes.

A. Practices and Procedures for Better Protecting the Jury System

States should consider: (1) requiring in camera questioning of jurors when credible allegations of misconduct have been made, (2) imposing further limits on postverdict contact between litigants and jurors, (3) creating a system for debriefing jurors at the end of a trial, and (4) reinforcing the prohibition on juror testimony regarding the effect of misconduct on deliberations.

1. In Camera Questioning

Questioning jurors in open court about alleged misconduct can lead to significant embarrassment to both the jurors and the judicial process, while providing a near-irresistible story for the press.[116] Courts could limit the harm to the jurors and the privacy of the delib-

[116] *See, e.g.*, People v. Brandon, 785 N.Y.S.2d 286, 291 n.4 (Crim. Ct. 2004) (allowing juror to testify that intoxicated juror made "annoying comments" and smelled of alcohol, but later ruling that testimony inadmissible); Trial Transcript at 12, 25, 36, 44, *Brandon*, 785 N.Y.S.2d 286 (No. 2004NY042604) (evidencing other jurors' testimony characterizing intoxicated juror as "nuisance . . . [and] bothersome," "obstructive," "scatterbrained and inappropriately forthcoming," and indicating that he "behaved oddly"). Though a misdemeanor case, *Brandon* received significant, and somewhat mocking, press coverage. *See, e.g.*, *Around the Nation*, HOUSTON CHRON., Sept. 16, 2004, at 10 (reporting on *Brandon*); Karen Freifeld, *Juror's Vodka No Influence*, NEWSDAY (N.Y.), Sept. 16, 2004, at A22 (naming intoxicated juror); Laura Italiano, *Justice Is Blind Drunk – Juiced WTC Juror OK*, N.Y. POST, Sept. 16, 2004, at 19 (reporting *Brandon* and quoting other juror's derogatory comments about intoxicated juror's performance during deliberations); *Odds and Ends*, SEATTLE TIMES, Sept. 18, 2004, at A2 (reporting on *Brandon*); Barbara Ross, *Drunk Juror? No Problem, Judge Decides*, N.Y. DAILY NEWS, Sept. 16, 2004, at 16 (reporting that defense counsel referred to ruling as "insane" following decision); Michael Wilson, *Retiree Found Guilty, Juror Found Tipsy, and Verdict Stands*, N.Y. TIMES, Sept. 16, 2004, at B1 (reporting on *Brandon* and quoting other juror's comments); *see also* Jacqueline Conner & Anne E. Skowe, *Dial 'M' for Misconduct: The Effects of Mass Media and Pop Culture on Juror Expectations*, *in* NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2004, at 104 (Carol R. Flango et al. eds., 2004), *available at* http://www.ncsconline.org/WC/

erations by first questioning the jurors in camera.[117] In camera questioning can serve a screening function, allowing judges to bar claims of misconduct with little or no evidentiary support from ever becoming part of the public record.[118] By directly supervising the investigation of any claimed juror misconduct, the court also may ensure that no party puts improper pressure on jurors to impeach their verdict.[119]

When in camera questioning reveals substantial evidence of misconduct, it provides the added benefit of giving the trial judge a preview of any testimony that must be elicited on the record in open court. With this information, the trial judge may give careful and more exacting instructions to the parties' attorneys regarding the lines of questioning they may conduct in their examinations of the juror-witnesses.[120]

States considering adopting a policy of in camera questioning will need to consider the First Amendment issues inherent in any closed criminal proceeding. The Third and Ninth Circuits have held that a qualified First Amendment right of access attaches to postverdict, in camera questioning of jurors.[121] While a thorough examination of right-to-access issues is beyond the scope of this Note, the Third Circuit's decision leaves open the question of whether the need to protect the privacy of deliberations may override the right to access.[122]

Publications/Trends/JurDecTrends2004.html (asserting that juror misconduct is overreported by media).

117 Crump, *supra* note 15, at 531 (noting in camera hearings for determining misconduct are used only "occasionally").

118 *Cf.* Gov't of V.I. v. Dowling, 814 F.2d 134, 137 (3d Cir. 1987) (stating preference for in camera questioning as opposed to en banc questioning to determine whether jury has been prejudiced by extra-record information on grounds that it is "most effective manner [of determining] latent prejudices").

119 *See* United States v. Moten, 582 F.2d 654, 665 (2d Cir. 1978) (finding court-supervised questioning of jurors in misconduct claim to be "desirable . . . to protect jurors from harassment"); *see also* S.D. CAL. CIV. R. 47.1 (requiring examinations of jurors to be conducted by court); Corti, *supra* note 92, at 57–58 (asserting in camera hearing would address juror privacy concerns).

120 In some cases, after previewing the jurors' testimony, the trial judge may also be able to convince parties to stipulate to certain facts. *See* State v. Coburn, 724 A.2d 1239, 1242 (Me. 1999) (noting with approval trial judge's and parties' use of stipulation to facts, which "similar to *in camera* inquiry by the court, avoids the prospect of unacceptable intrusions into the deliberations of the jury").

121 *See* United States v. Simone, 14 F.3d 833, 840 (3d Cir. 1994); *see also* Phoenix Newspapers v. U.S. Dist. Court, 156 F.3d 940, 946–49 (9th Cir. 1998) (finding qualified First Amendment access right to transcripts of two hearings regarding threats to jurors during jury deliberations).

122 *Simone*, 14 F.3d at 841 ("We note, without deciding whether [concern that the deliberative process will be revealed] is a 'higher interest' that might justify closure, that [the district court's] concern was unjustified in this case."); *see also* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) ("The presumption of openness may be overcome

2. *Limiting Postverdict Access to Jurors*

Stricter and more specific rules restricting communications with jurors would provide a far better approach to preventing juror harassment and protecting the finality of verdicts than *Tanner*'s limits on the admissibility of certain juror testimony. Regardless of whether the alleged misconduct is labeled internal or external, investigations into juror misconduct can result in juror harassment and, like any postverdict proceeding, impair the finality of a verdict.[123] Many states and federal courts therefore strongly discourage counsel or their investigators from contacting jurors after the trial.[124] Federal local rules range from total bans on communications with jurors without court approval[125] to rules that allow questioning as long as it is not designed to "harass or embarrass" jurors.[126] More common are local rules which put discretion in the hands of the trial judge by permitting litigants to contact jurors only after a court order, but offer no standard for what showing is required to obtain such an order.[127]

Instead of limiting the admissibility of certain kinds of testimony, juror contact rules limit harassment by restraining litigants from con-

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only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.").

123 *See supra* Part II.C.

124 *See generally* Dale R. Agthe, Annotation, *Propriety of Attorney's Communication with Jurors After Trial*, 19 A.L.R.4th 1209, § 2, at 1213 (2000) (acknowledging that some courts admit evidence garnered from such communications, but stating that "courts have more frequently held such communications to be improper"); Crump, *supra* note 15, at 526–29 (conducting broad overview of federal local rules, or lack thereof, regarding contacting jurors and finding "little uniformity among jurisdictions either with or without local federal rules").

125 *See, e.g.*, D. KY. R. 47.1 ("Unless permitted by the Court, no person, party or attorney, nor representative of a party or attorney, may contact, interview, or communicate with any juror before, during, or after the trial.").

126 *See, e.g.*, E.D.N.C. R. 47.1(c) ("Following the discharge of a jury from further consideration of a case, no attorney or party litigant shall . . . ask questions of or make comments to a member of that jury . . . that are calculated merely to harass or embarrass such a juror . . . .").

127 *See, e.g.*, E.D. ARK. R. 47.1 ("No juror shall be contacted without express permission of the Court and under such conditions as the Court may prescribe."); E.D. TEX. CIV. R. 47(b) ("After a verdict is rendered, an attorney must obtain leave of the judge before whom the action was tried to converse with members of the jury."); S.D. TEX. CRIM. R. 24.1 ("Except with leave of Court, no attorney, party, nor agent of either of them may communicate with a former juror to obtain evidence of misconduct in the jury's deliberations."). The Second Circuit has no local rules barring juror interrogations, but has similarly left the discretion to district court judges through its case law. *See* Miller v. United States, 403 F.2d 77, 81–82 (2d Cir. 1968) (declining to set forth rules regulating juror interrogations and instead holding that matter is within discretion of trial judge). The Southern, Eastern, and Western Districts of New York still have no local rules regarding contacting jurors. The Northern District of New York explicitly states that parties are barred from contacting jurors only during the course of the trial. N.D.N.Y. R. 47.5(1).

tacting jurors months or years after they have completed their service.[128] Juror contact rules should therefore, at the very least, require a showing of good cause; moreover, they could provide even better protection if they specified that good cause cannot be shown without specific and credible evidence of misconduct, produced from a nonjuror source.[129] Such rules would also ensure the finality of verdicts if they expressly stated that good cause will not be found where a litigant failed to promptly inform the court of any evidence of misconduct. Any evidence procured through improper contact with jurors should be excluded.

Juror contact rules, however, should not apply to situations in which the juror contacts one of the parties on his or her own volition.[130] When jurors come forward, either to the parties or to the court, due to misgivings over their own misconduct or misconduct they witnessed, there need be far less concern that the jurors are being harassed by litigants unhappy with the result of the trial.

The principal objection to tightening juror contact rules is that limiting postverdict juror interviews prevents litigants from ever discovering misconduct, be it internal or external.[131] Good cause requirements in particular may be impossible to meet when the jurors themselves are the sole source of information regarding misconduct.[132] One response to this argument is that a system that relaxes the content restrictions on juror testimony, but also limits juror contact, better targets the policy goals of finality and juror harassment than our current system, which imposes content restrictions unrelated to these goals. Both systems cause some injustice, but the former at least more effectively promotes these countervailing policy goals. This is not a wholly satisfying answer. States should therefore also

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128 *See* Rank, *supra* note 31, at 1446 (advocating stricter local juror contact rules to prevent juror harassment).

129 Professor Crump suggests that good cause requirements may already implicitly require such nonjuror evidence. *See* Crump, *supra* note 15, at 528.

130 According to the defense, such was the case in *Tanner*. *See* Tanner v. United States, 483 U.S. 107, 113, 115 (1987) (stating that according to defense counsel, both jurors came forward without any contact on counsel's part). The prosecution questioned whether the jurors truly came forward solely of their own volition. *See* Brief for United States, *supra* note 91, at 9 (stating that juror "purportedly" came forward without prompting by defense counsel). The majority opinion of the Court did not comment upon this issue, but it does present a significant concern. Trial courts operating under my proposed local rule will have to be vigilant in its enforcement. In camera questioning of the juror regarding any improper contact by either party or their agents would provide an adequate protection against efforts to subvert the rule. *See supra* Part IV.A.1.

131 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, 1966 (1994).

132 *Id.*

consider further procedures, such as postverdict juror debriefings, which would minimize the harms of stricter juror contact rules.

3. *Juror Debriefings*

Court-supervised debriefing of jurors after trial would be an effective means of identifying possible juror misconduct while minimizing opportunities for abuse by the litigants. Jurors have an affirmative duty to report misconduct to the court. The many cases cited in this Note, however, indicate both that unreported misconduct occurs and that this misconduct later comes to light.

Jurors are the best, and often sole, source of evidence of their own misconduct.[133] Instead of relying on jurors to come forward and reveal misconduct to the court, or on weakly enforced juror contact rules that allow the parties to contact and (potentially) harass jurors into revealing misconduct, court-supervised debriefings of jurors would allow the court to affirmatively seek out misconduct without the threat of abuse by the litigants.[134] During these debriefings, jurors would be encouraged to report any problems with the process or misconduct they witnessed during the trial. Short interviews could be conducted by the judge or other court personnel at the conclusion of the trial.

The debriefing would have to be carefully constructed in order to ensure that it did not intrude on the private sphere of jury deliberations.[135] Questions should be specific and inquire only into acts of possible misconduct. For example, jurors should be asked whether they were contacted by the parties or their agents during the trial, whether they spoke with nonjurors about the evidence they heard before the end of the trial, whether they observed anyone who appeared to be under the influence or otherwise mentally incompetent during deliberations, or whether they witnessed or were subject to any act of violence during deliberations. The debriefings should avoid open-ended questions (e.g., Is there anything you believe that went wrong during deliberations?) that may lead jurors to reveal the

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133 The Iowa Rule was justified, in part, by jurors' privileged access to information regarding juror misconduct. *See* Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 212 (1866) ("[T]here can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible . . . .").

134 *See* Lawsky, *supra* note 131, at 1971–72 (suggesting more extensive jury polling would root out more juror harassment while "mitigating almost completely any risk of juror harassment").

135 *See* Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 537–38 (1997) (arguing that judges may be uncomfortable conducting postverdict interviews or more extensive polling out of concern that private deliberations will be revealed).

course of their deliberations. Jurors must be instructed carefully that they are only being asked about acts of misconduct, not about the content of their deliberations. If possible misconduct is revealed during the debriefing process, the jurors involved could be questioned by the judge in camera in order to discover whether the allegations have any merit.

Judicial economy is the principal counterargument to a requirement for postverdict juror debriefings.[136] Costs could be reduced by having court personnel, not judges, conduct standardized interviews. In addition to lowering the cost, some jurors may even be more likely to admit misconduct if they are not confronted by an authority figure.

4. *Retaining and Reinforcing the Bar on Juror Testimony Regarding the Effect of Misconduct on Deliberations*

When an in camera investigation by the court determines that an evidentiary hearing is required, the best way to protect the privacy of jury deliberations while accepting juror testimony regarding misconduct is for courts to enforce the prescription against testimony on the effect of the misconduct on deliberations. Seemingly, this is already the rule in all jurisdictions. F.R.E. 606(b) explicitly forbids juror testimony on "the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment."[137] Both federal and state appellate courts have also repeatedly warned trial courts to limit juror testimony to the act of misconduct, and have precluded any testimony regarding the effects of misconduct on the jury's deliberations.[138] Trial courts, and even some appellate courts, however, have failed to scrupulously uphold this rule, regardless of whether the misconduct at issue has been ruled "internal" or "external."[139] In one New York case, the trial judge admitted testimony concerning whether an allegedly intoxicated juror fully participated in deliberations, other jurors' opinions of

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136 *Id.* at 537.

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

138 *See, e.g.*, United States v. Bassler, 651 F.2d 600, 603 (8th Cir. 1981) ("Rule 606(b) precludes the district court from investigating the subjective effects of any extrinsic material on the jurors . . . ."); People v. Holmes, 372 N.E.2d 656, 659 (Ill. 1978) ("[A]ctual evidence of the nature of outside influences exerted on the jury during deliberations will be considered, but evidence relating to the effect of such influences on the mental processes of jury members is inadmissible.").

139 *See, e.g.*, People v. Hobley, 696 N.E.2d 313, 341 (Ill. 1998) (holding evidentiary hearing should have been held after allegations of nonjuror harassing jurors into convicting defendant, in part because juror affidavits established that jurors were "noticeably upset" about misconduct during deliberations); Doe v. Johnston, 476 N.W.2d 28, 34 (Iowa 1991) (finding improper trial court's reliance on juror affidavits concerning effect of cartoon brought into jury room by juror).

the effectiveness of that participation, and even whether the intoxicated juror believed he would have rendered a different verdict had he not been drinking during the deliberations.[140] Inquiries such as these—rather than testimony about the act of misconduct itself—are the real danger to the privacy of deliberations. An allegedly intoxicated juror need only testify to whether he consumed alcohol during deliberations, and if so, the timing and amount of his consumption. From this evidence, the trial court can determine whether his intoxication substantially deprived the defendant of his right to a competent jury of his peers.

The bar on testifying to the effect of misconduct on deliberations is already so clear that it is admittedly somewhat difficult to determine how appellate courts could reinforce it. Much of the confusion seems to stem from the fact that the moving party has the burden of proving prejudice from any act of juror misconduct.[141] Some judges seem to confuse this burden of proof with a burden of production, and subsequently allow testimony or affidavits that allege that the misconduct affected a particular juror's verdict.[142] The better approach is for courts to admit only testimony regarding the act of conduct itself and then determine whether a reasonable juror may have been adversely affected by the act of misconduct.[143] Another possible avenue for reinforcing the bar would be through continuing legal education classes for judges and litigators, which could deal with the special difficulties of juror testimony. And, as previously discussed, prior in

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140 *See* Trial Transcript, *supra* note 116, *passim*.

141 *See, e.g.*, People v. Irizarry, 634 N.E.2d 179, 182 (N.Y. 1994) ("Absent a showing of prejudice to a substantial right, . . . proof of juror misconduct does not entitle a defendant to a new trial."); *see also* Swaine, *supra* note 84, at 196–97 ("Courts have resisted the response of presuming prejudice upon a showing of misconduct . . . .").

142 *See, e.g.*, *Hobley*, 696 N.E.2d at 341.

143 Such an approach was delineated by the court in *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914 (7th Cir. 1991):

> The proper procedure therefore is for the judge to limit the questions asked the jurors to whether the communication was made and what it contained, and then, having determined that the communication took place and what exactly it said, to determine—without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion—whether there is a reasonable possibility that the communication altered their verdict.

Id. at 917; *see also* Anderson v. Miller, 346 F.3d 315, 329 (2d Cir. 2003) (holding test for whether intrajury threat of violence rises to misconduct depriving defendant of right to jury is whether "reasonable juror . . . would have thought herself to be facing a physical assault if she refused to vote for conviction"). *But see* Massey v. State, 541 A.2d 1254, 1259 (Del. 1988) (requiring defendant to prove actual prejudice or misconduct so egregious as to support presumption of prejudice).

camera questioning of the jurors will also assist trial judges in keeping testimony of private deliberations out of open court.[144]

B. *Expanding the Content-Based Definitions*

After adopting some or all of the reforms described above, states should consider admitting evidence pertaining to additional categories of juror misconduct. Determining exactly which areas of misconduct should be open to postverdict inquiry ultimately must be a state decision, made with due respect for that state's common law tradition. Identifying a definitive list of egregious juror misconduct for which all states must waive their general bar on juror testimony is contrary to the spirit of this Note, which argues in part that such strict uniformity has led to the dominance of the ineffective external/internal framework. Certain forms of misconduct, however, are particularly egregious to general conceptions of justice and can be admitted without inquiry into the proper functioning of the deliberative process.

Four categories leap out. Ironically, given the result in *Tanner*, intoxication is the first that comes to mind. Jurors can easily testify to their own consumption of intoxicants during the trial or to intoxicants that they witnessed another juror ingest without commenting on the effect that the intoxicant had on the juror's ability to deliberate. Second, overtly racist comments made by jurors during deliberations offend our sense of fundamental fairness[145] and can be testified to without inquiry into their effect on the deliberations of the jury. It makes little sense that while *Batson v. Kentucky*[146] and its progeny are aimed at preventing the specter of racism from influencing the selection of jury members, racist acts committed by jurors during deliberations are currently protected by the *Tanner* framework. Third, violence or credible threats of violence in the jury room likewise are overt acts to which a juror may testify with no reference to the effects on the jury. Manifest evidence of the insanity of a juror presents a final, but admittedly tougher case. In some cases, other jurors may be able to testify to specific nondeliberative acts committed by the allegedly insane juror. This evidence should be admissible, insofar as it can corroborate a clinical evaluation of a juror's competency.[147]

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144 *See supra* Part IV.A.1.

145 *See* State v. Hunter, 463 S.E.2d 314, 316 & n.3 (S.C. 1995) (admitting juror testimony regarding racist statements due to concerns of fundamental fairness).

146 Batson v. Kentucky, 476 U.S. 79 (1986).

147 *See* Nancy B. Ledy & Ellen Lefkowitz, Note, *Judgment by Your Peers? The Impeachment of Jury Verdicts and the Case of the Insane Juror*, 21 N.Y.L.F. 57, 82 (1975) (equating acts of insanity of juror with juror intoxication).

On the other hand, states would be justified in refraining from admitting testimony on more subjective matters which cannot easily be corroborated and thus raise greater concerns for the finality of the verdict, or on matters which cannot be investigated without inquiry into the content of the deliberations themselves. Vague allegations that a juror felt "pressured" (as opposed to physically threatened) into a verdict or that a juror did not understand the jury instructions would fall into this category.

CONCLUSION

Almost twenty years ago in the *Tanner* decision, the Supreme Court held that a defendant could not utilize juror testimony to protect his or her right to trial by a competent jury. States largely followed the Court's lead, rejecting the diverse approaches found in their own case law. This trend, however, is not predestined. By adopting more effective strategies to limit the admittedly real harms to the jury system that occur when a juror testifies about any kind of juror misconduct, states may justifiably expand the exceptions to the juror impeachment rule in order to combat the most egregious forms of "internal" juror misconduct.

APPENDIX A
STATE RULES OF EVIDENCE REGARDING ADMISSIBILITY OF JUROR TESTIMONY

States which do not have an evidentiary code based on the Federal Rules of Evidence are denoted with an asterisk (*). In these states, comparable rules of evidence (where they exist) have been cited and briefly described. In states that do not have a statutory rule of evidence comparable to F.R.E. 606(b), relevant case law has been cited in the footnotes.

State/Rule of Evidence	Differences from Federal Rule of Evidence 606(b)
Alabama ALA. R. EVID. 606(b)	Substantively similar to F.R.E. 606(b), but admits any juror testimony in support of the verdict.
Alaska ALASKA R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).
Arizona ARIZ. R. EVID. 606(b)	Substantively similar to F.R.E. 606(b), but confines rule to civil verdicts.
Arkansas ARK. R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).
California* CAL. EVID. CODE § 1150(a) (West 1995)	Substantively similar to the Iowa Rule: Admits juror testimony regarding "conduct, conditions, or events" that may "have influenced the verdict improperly," but bars testimony regarding the effects of misconduct on the verdict.
Colorado COLO. R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).
Connecticut CONN. SUPER. CT. R. § 16-34	No comparable rule of evidence, but the superior court rule is substantively similar to the Iowa Rule, barring only juror testimony regarding "the effect . . . [of misconduct] upon the mind of a juror," not testimony regarding the act of misconduct itself.
Delaware DEL. R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).
District of Columbia*	No comparable rule regarding juror testimony on the validity of the verdict.[148]

[148] While the District of Columbia does not have a statutory evidentiary code, D.C. courts have in practice generally followed F.R.E. 606(b). *See* 1 STEFFEN W. GRAE & BRIAN T. FITZPATRICK, THE LAW OF EVIDENCE IN THE DISTRICT OF COLUMBIA § 606.01[3][b] (2004) ("Both D.C. practice and Rule 606(b) take dim views of permitting jurors to impeach their verdicts. . . . Broadly viewed, D.C. and federal practice are thus consistent regarding jury impeachment."). In a case decided prior to *Tanner*, however, the D.C. Court of Appeals ruled that there is a "tightly-circumscribed exception permitting inquiry into a juror's mental competence." Khaalis v. United States, 408 A.2d 313, 359 (D.C. 1979).

State/Rule of Evidence	Differences from Federal Rule of Evidence 606(b)
Florida FLA. STAT. ANN. § 90.607(2)(b) (West 1999)	Adopts Iowa Rule: Only precludes juror testimony regarding matters which "essentially inhere[ ] in the verdict or indictment."
Georgia* GA. CODE ANN. § 9-10-9 (1982); GA. CODE ANN. § 17-9-41 (2004)	Bars all juror testimony challenging the validity of a verdict, but allows juror testimony to support the verdict.[149]
Hawaii HAW. R. EVID. 606(b)	Substantively similar to the Iowa Rule: Bars only juror testimony regarding effect of misconduct on deliberations.
Idaho IDAHO R. EVID. 606(b)	Substantively similar to F.R.E. 606(b), but also admits juror testimony as to whether verdict was determined "by resort to chance."
Illinois*	No statutory evidentiary code.[150]
Indiana IND. R. EVID. 606(b)	Substantively similar to F.R.E. 606(b), but also admits testimony regarding drug or alcohol use by a juror.
Iowa IOWA R. EVID. 5.606(b)	Substantively identical to F.R.E. 606(b).
Kansas* KAN. STAT. ANN. §§ 60-441, 60-444 (2005)	Substantively similar to the Iowa Rule: Bars only juror testimony regarding "the effect . . . [of misconduct] upon the mind of a juror," not testimony regarding the act of misconduct itself.
Kentucky KY. R. EVID. 606	No comparable rule regarding juror testimony on the validity of the verdict.[151]
Louisiana LA. CODE EVID. ANN. art. 606(b) (2006)	Substantively similar to F.R.E. 606(b), but limits testimony regarding extraneous prejudicial information to criminal cases.
Maine ME. R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).
Maryland MD. R. EVID. 5-606(b)	Bars all juror testimony regarding the validity of a verdict.

[149] Despite statutory language stating that all such testimony will be barred, Georgia case law has carved out exceptions "in cases where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations." Spencer v. State, 398 S.E.2d 179, 184 (Ga. 1990).

[150] *See supra* note 105 and accompanying text.

[151] Kentucky has no evidentiary rule regarding the validity of verdicts, but has developed an extensive case law. *See generally* ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 3.15 (4th ed. 2003). In relatively old but still controlling cases, the Kentucky Supreme Court has held that there is a general bar regarding juror testimony that extends even to extraneous prejudicial information. *See, e.g.*, Pollack v. S. Ry., 295 S.W. 150, 151–52 (Ky. 1927) (refusing to admit juror testimony regarding jury's consultation of unadmitted evidence). Exceptions, however, have been made when the verdict was determined by lot, *see* Gartland v. Connor, 59 S.W. 29, 30 (Ky. 1900), or to correct a verdict that has been mistakenly entered for the wrong party, *see* Youtsey Bros. v. Darlington, 25 S.W.2d 44, 45 (Ky. 1930).

State/Rule of Evidence	Differences from Federal Rule of Evidence 606(b)
Massachusetts*	No comparable rule regarding juror testimony on the validity of the verdict.[152]
Michigan MICH. R. EVID. 606	No comparable rule regarding juror testimony on the validity of the verdict.[153]
Minnesota MINN. R. EVID. 606(b)	Substantively similar to F.R.E. 606(b), but also admits testimony regarding violence or threats of violence, even if originating from another juror.
Mississippi Miss. R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).
Missouri*	No comparable rule regarding juror testimony on the validity of the verdict.[154]
Montana MONT. R. EVID. 606(b)	Substantively similar to F.R.E. 606(b), but also admits juror testimony as to whether verdict was determined "by a resort . . . to chance."
Nebraska NEB. REV. STAT. § 27-606(2) (1995)	Substantively identical to F.R.E. 606(b).
Nevada NEV. REV. STAT. § 50.065(2) (2005)	Bars only juror testimony regarding the effect of misconduct on deliberative process.[155]
New Hampshire N.H. R. EVID. 606	No comparable rule regarding juror testimony on the validity of the verdict.[156]
New Jersey N.J. R. EVID. 606	No comparable rule regarding juror testimony on the validity of the verdict.[157]

[152] Massachusetts case law on juror testimony is somewhat unclear. The most cited precedent in the current era states that juror testimony regarding extraneous influences is admissible. Commonwealth v. Fidler, 385 N.E.2d 513, 517 (Mass. 1979). The extraneous influence test seemingly adopts the unpublished *Woodward* language. *See supra* note 40. *Fidler*, however, does contain some language suggesting that there may be a broader exception to the general bar on juror testimony. *See Fidler*, 385 N.E.2d at 517 (suggesting that evidence of "overt factors" is admissible).

[153] The Michigan Supreme Court adopted the *Tanner* framework in a case concerning the influence of a movie viewed by the jury. People v. Budzyn, 566 N.W.2d 229, 235–36 (Mich. 1997).

[154] The Missouri Supreme Court has recently ruled that juror testimony is admissible to prove juror misconduct which occurred outside the jury room. *See* Travis v. Stone, 66 S.W.3d 1, 4 (Mo. 2002); 22A WILLIAM A. SCHROEDER, MISSOURI PRACTICE § 606.1 n.11 (Supp. 2005) (noting *Travis* departed from Missouri precedent which barred juror testimony regarding extraneous information).

[155] *But see supra* notes 100 & 104.

[156] New Hampshire case law holds that juror testimony is admissible only to support, never to impeach, a verdict. *See* Kravitz v. Beech Hill Hosp., 808 A.2d 34, 39 (N.H. 2002).

[157] I have not found a reported case in New Jersey dealing with the admissibility of juror testimony since the *Tanner* decision. New Jersey formerly adhered to the Iowa Rule. N.J. R. EVID. 41 advisory comment (1972) (repealed 1991) (noting that neither New Jersey case law nor evidentiary rules limited testimony by jurors regarding "objective acts of misconduct"). New Jersey Rule of Evidence 41 was eliminated when New Jersey moved to an evidentiary code modeled after the Federal Rules of Evidence. N.J. R. EVID. 606 advisory

State/Rule of Evidence	Differences from Federal Rule of Evidence 606(b)
New Mexico N.M. R. EVID. 11-606(b)	Identical to F.R.E. 606(b).
New York*	No comparable rule regarding juror testimony on the validity of the verdict.[158]
North Carolina N.C. GEN. STAT. ANN. § 8C-1, Rule 606(b) (West 2000)	Substantively identical to F.R.E. 606(b).
North Dakota N.D. R. EVID. 606(b)	Substantively similar to F.R.E. 606(b), but also admits juror testimony as to whether verdict was "arrived at by chance."
Ohio OHIO R. EVID. 606(b)	Substantively similar to F.R.E. 606(b), but requires nonjuror corroborating evidence of some outside influences before admitting juror testimony.
Oklahoma OKLA. STAT. ANN. tit. 12, § 2606(b) (West 1993 & Supp. 2006)	Substantively identical to F.R.E. 606(b).
Oregon OR. REV. STAT. § 40.335 (2005)	No comparable rule regarding juror testimony on the validity of the verdict.[159]
Pennsylvania PA. R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).
Rhode Island R.I. R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).
South Carolina S.C. R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).[160]
South Dakota S.D. CODIFIED LAWS § 19-4-7 (2006)	Substantively identical to F.R.E. 606(b).
Tennessee TENN. R. EVID. 606(b)	Substantively similar to F.R.E. 606(b), but also admits juror testimony as to whether jurors "agreed in advance to be bound by a quotient or gambling verdict without further discussion."
Texas TEX. R. EVID. 606(b)	Limits juror testimony to outside influences or to rebut a claim that the juror was not qualified to serve.

committee's comment (finding an analogue to F.R.E. 606(b) to be unnecessary). There is some indication, however, that the New Jersey Supreme Court is moving in the direction of the *Tanner* decision. The New Jersey Supreme Court cited *Tanner* with approval when it upheld a trial court's decision to deny a defendant the right to contact jurors absent other evidence of extraneous influence. State v. Marshall, 690 A.2d 1, 96–97 (N.J. 1997).

158 *See supra* notes 107–08 and accompanying text.

159 The Oregon legislature intentionally omitted the language in F.R.E. 606(b), preferring to retain Oregon's vaguer standard requiring juror affidavits to be admitted when justice demands. *See* Ertsgaard v. Beard, 800 P.2d 759, 764 (Or. 1990).

160 *But see supra* note 112 and accompanying text.

State/Rule of Evidence	Differences from Federal Rule of Evidence 606(b)
Utah UTAH R. EVID. 606(b)	Identical to F.R.E. 606(b).
Vermont VT. R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).
Virginia*	No comparable rule regarding juror testimony on the validity of the verdict.[161]
Washington WASH. R. EVID. 606	No comparable rule regarding juror testimony on the validity of the verdict.[162]
West Virginia W. VA. R. EVID. 606(b)	Identical to F.R.E. 606(b).
Wisconsin WIS. STAT. ANN. § 906.06(2) (West 2000)	Substantively identical to F.R.E. 606(b).
Wyoming WYO. R. EVID. 606(b)	Substantively identical to F.R.E. 606(b).

161 Virginia limits juror testimony to acts of misconduct committed outside the jury room and additionally does not allow jurors to testify to their own misconduct. *See* Morrisette v. Warden of the Sussex I State Prison, 613 S.E.2d 551, 555 (Va. 2005).

162 Washington case law essentially adopts the Iowa Rule. *See* Gardner v. Malone, 376 P.2d 651, 653–55 (Wash. 1962) (holding that testimony is admissible if it does not "inhere in the verdict"); Breckenridge v. Valley Gen. Hosp., 75 P.3d 944, 949–50 (Wash. 2003) (applying *Gardner* test).