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WARGER V. SHAUERS: TANNER 2.0 AND THE NEED FOR A LESS RESTRICTIVE INTERPRETATION OF FEDERAL RULE OF EVIDENCE 606(B) AND ITS EXCEPTIONS

I. INTRODUCTION

This Note is a critique of the Supreme Court's recent decision in *Warger v. Shauers*¹ and their continued enforcement of the logic in *Tanner v. United States*² with respect to Federal Rule of Evidence 606(b).³ The rule generally prevents a juror from testifying "about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."⁴ Rule 606(b), and its three exceptions, is Congress's attempt to formalize and create uniformity as to when trial courts permit a juror to testify.⁵ This note evaluates over two centuries of precedent and legal rhetoric that lead up to Rule 606(b), as well as the subsequent interpretation by the Supreme Court and the criticisms of their logic and findings.⁶

II. HISTORY

For nearly as long as the United States has been a nation, the practice of disallowing jurors from testifying about jury deliberations and preserving verdicts has been a legally protected interest.⁷ Less than a decade after the U.S. declared its independence, England heard *Vaise v. Delaval*,⁸ in which Lord Mansfield effectively argued that "a juror could not offer testimony to impeach a verdict once it was rendered."⁹ English

¹ 135 S. Ct. 521 (2014).

² 483 U.S. 107, 107 (1987).

³ See *infra* Part III (analyzing *Tanner*).

⁴ FED. R. EVID. 606(b).

⁵ *Id.*

⁶ See *infra* Parts III and IV (analyzing Rule 606(b) using precedent).

⁷ See Timothy C. Rank, *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 MINN. L. REV. 1421, 1421-22 (1992) (detailing evolution of jury verdict testimony and Rule 606(b)).

⁸ 99 Eng. Rep. 944 (K.B. 1785).

⁹ See Rank, *supra* note 7, at 1425 (discussing American common law development of rule

and American courts adopted the results of *Vaise* as the Mansfield Rule, based primarily on the notion that a juror's testimony was not reliable if they had committed wrongful conduct during deliberations.¹⁰ The Mansfield Rule would remain substantively unchanged in the United States for nearly a century until the Iowa Supreme Court deviated from the general rule in *Wright v. Illinois and Mississippi Telegraph Company*.¹¹ The *Wright* Court was hesitant to deviate from the Mansfield Rule and unwilling to open the jury to any party that wished to probe their methods, but believed that it may be possible to allow a juror to testify on the grounds in which the jury reached its verdict, without exposing or invalidating the verdict itself.¹² The court argued that:

the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance, or the like, is to receive his testimony as to a fact, which, if not true, can be readily and certainly

606(b)); see *Vaise*, 99 Eng. Rep. at 944 (stating juror could not "allege his own turpitude").

¹⁰ See *id.* at 1425-26 (examining history of Rule 606(b)).

¹¹ See 20 Iowa 195, 210 (1866) (determining whether or not jury could testify on "quotient verdict"). After awarding damages to the plaintiff in a civil case, several jurors submitted an affidavit that they reached the award by a quotient verdict: each juror wrote down how much relief they believed the plaintiff should be awarded, the amounts were collected and added together, and then divided by twelve to determine the award. *Id.* This practice was not unheard of, but common law found it to be an invalid method of determining a verdict, and could be grounds for a new trial. See *id.* at 202 (citing *Forshee v. Abrams*, *Cook v. Sypher*, and *Manix v. Maloney*).

¹² See *id.* at 209-13 (discussing circumstances under which judges may accept juror affidavits). The court stated that:

While we do not feel entirely confident of its correctness, nor state it without considerable hesitation, yet we are not without that assurance, which, under the circumstances, justifies us in laying down the following as the true rule: That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast.

Id. at 210. The Court was not willing to allow free access to the jury or allow a single juror to undermine the finality of a verdict. See *id.* at 210-11 (reasoning that allowing affidavits would "unsettle verdicts and destroy their sanctity and conclusiveness.").

disproved by his fellow jurors; and to hear such proof would have a tendency to diminish such practices and to purify the jury room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them.¹³

Because of this, the court decided to permit the jurors' affidavits to be used as grounds for a new trial.¹⁴

The decision in *Wright* grew into what is now known as the Iowa Rule, and has since been adopted by multiple states.¹⁵ Only five years later, the Supreme Judicial Court of Massachusetts used *Woodward v. Leavitt*¹⁶ to create a second major detraction from the Mansfield Rule.¹⁷ In *Woodward*, a motion for a new trial was filed after one juror disclosed that another juror had already made up his mind prior to the trial, and maintained that opinion when coming to a verdict.¹⁸ Other districts heavily influenced *Woodward* by allowing juror affidavits "to disprove that a juror had formed an opinion, or was subject to bias or prejudice, the affidavits of the juror himself and his associates as to the part which he took in the discussions in the jury room."¹⁹ The court admitted portions of the juror's

¹³ See *id.* at 211 (distinguishing disprovable and non-disprovable juror affidavits).

¹⁴ See *id.* at 212-13 ("We are, therefore, of the opinion that the District Court erred in striking from the files and refusing to consider the affidavits of the four jurors, that the verdict was determined by each juror marking down such sum as he thought fit, and dividing the aggregate by twelve and taking the quotient as their verdict, pursuant to a previous agreement to accept it as such. These affidavits, uncontradicted, are sufficient to sustain the motion to set aside the verdict and grant a new trial.").

¹⁵ See Rank, *supra* note 7, at 1428 (recounting impact of *Wright* case). "By 1969, the Iowa rule had been adopted by twelve jurisdictions: Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, Washington, Wisconsin, and the federal district courts." *Id.* at 1428 n.39.

¹⁶ 107 Mass. 453 (1871).

¹⁷ See *id.* at 460 (allowing juror testimony about another juror's preliminary conclusion regarding case); Rank, *supra* note 7, at 1428 (discussing *Woodward*).

¹⁸ See *Woodward*, 107 Mass. at 459-60 (discussing juror's express opinion of case before trial).

¹⁹ *Id.* at 470. *Tenney v. Evans* was one specifically cited case, which was heavily concerned with biased or prejudicial jurors producing verdicts. See 13 N.H. 462, 463-64 (1843) ("The affidavits of the foreman, and of one of the jurors, have been laid before us for the purpose of removing any impression unfavorable to the verdict caused by the evidence offered to impeach it. The decisions on the admissibility of the evidence of jurors, in relation to their verdict, are contradictory."). In *Tenney*, the court reasoned that "[n]o one would willingly trust his life, or even his property, to a jury composed of twelve persons, each of whom had made similar declarations to those proved in this case." *Id.* at 466 (applying notably liberal approach to probing potentially biased juries and allowing juror testimony). While aware of the need for jurors to deliberate in private and with confidence, the *Tenney* court was also very fearful of the impact a biased or incompetent jury had on a trial. *Id.* The court went into detail about possible prejudiced or incompetent jurors:

affidavit to determine the basis on which he formed his opinion about the case, but omitted portions of the affidavit regarding what the jury discussed during their deliberation.²⁰ The court found that juror statements refuting allegations a juror made about a defendant's guilt prior to trial are admissible, establishing an exception to the Mansfield Rule for outside influences, such as an initial prejudice for a verdict.²¹ While state courts were starting to create several major modifications to Mansfield, it would take another two decades before the Supreme Court finally decided a case regarding juror testimony.²² In *Mattox v. United States*,²³ jurors had to decide the verdict in a criminal murder trial, in which Mattox was accused of shooting John Mullen in December of 1889.²⁴ Multiple jurors reported that during deliberations, the bailiff read them a copy of local newspaper.²⁵ The newspaper contained an article that concluded Mattox was guilty based on the evidence.²⁶ *Woodward's* ruling influenced the Court in that outside influences were an exception to juror testimony about deliberations. Ultimately, the Court found that the juror affidavits were competent and

But it is a part of the price we pay for this benefit, that weak-minded and incompetent men will sometimes be selected; and no one can calculate in how short a time a weak man, or one careless of his grave duties, may be prejudiced or seduced into a wrong course. A greater evil could hardly befall society, than, with institutions like our own, the loss of the public confidence in the entire impartiality of juries; and the fearful consequences of such a result must ever be present to the minds of all who are called upon to determine questions like the present.

Id. at 466-67.

²⁰ See *Woodward*, 106 Mass. at 471 (holding, in part, juror affidavit properly admitted to explain how the juror formed his opinion). The court found the latter portion of his affidavit should have been excluded in that it was incompetent: "because it related to the private deliberations of the jury, and had no tendency to disprove that he had previously expressed and still entertained an opinion inconsistent with an impartial discharge of his duty." *Id.*

²¹ See *id.* (describing exception "The court in *Woodward* sought to maintain the integrity of the jury verdict by ensuring free and secret deliberations while pursuing allegations of extraneous impropriety." Rank, *supra* note 7, at 1429.

²² See *Mattox v. United States*, 146 U.S. 140, 150-51 (1892) (holding jurors may testify about outside influence of reading newspaper before verdict); Rank, *supra* note 7, at 1429-30 (discussing *Mattox*).

²³ 146 U.S. 140 (1892).

²⁴ See *id.* at 151.

²⁵ *Id.* at 142-43.

²⁶ See *id.* at 150-51 ("It is not open to reasonable doubt that the tendency of that article was injurious to the defendant."). The Court was gravely concerned with how clearly prejudicial the newspaper article was to the jury and the fact that it was read during their deliberation. *Id.* at 150-51. The jury rendered its verdict against the defendant an hour later. *Id.* at 151. "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Id.* at 150.

justified grounds for a new trial.²⁷ The Supreme Court also upheld the Iowa Rule, validating both State Supreme Court rules.²⁸ The holding in *Mattox* would prevail until the Supreme Court heard *McDonald v. Pless*²⁹ in 1915.³⁰ Similar to *Wright*, McDonald sought a new trial after jurors stated that they determined the judgment amount by pooling together what each juror thought the plaintiff should be awarded and then dividing the sum by twelve.³¹ Rather than continuing with preceding case law, however, the Court created a new method of determining whether a juror's affidavit may be competent by balancing the parties' interest in a fair trial and the jurors' interest in private deliberation:

[W]hen the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.³²

Upon performing this "balancing test," the *McDonald* Court found that the greater concern was interest in preventing jurors from harassment and having private deliberations.³³ The Court justified their decision to

²⁷ See *id.* at 149 (distinguishing *Woodward*).

²⁸ See *id.* (affirming rationale of Iowa Rule).

²⁹ 238 U.S. 264 (1915).

³⁰ See *id.* at 264 (preventing jury from being harassed is greater interest than verdict inquiry: balancing test); Rank, *supra* note 7, at 1430 ("Several years later, the Supreme Court again considered the admissibility of juror testimony, this time in a civil case concerning a jury's use of a quotient verdict."); MICHAEL H. GRAHAM, 4 HANDBOOK OF FED. EVID. § 606:2 (7th ed. 2015) (outlining development and rationale of Rule 606(b)).

³¹ See *McDonald*, 238 U.S. at 265 (discussing jury deliberations).

³² *Id.* at 267.

³³ See *id.* at 267-68 (discussing conflicting considerations of trial fairness and juror privacy). The Justices were highly concerned about opening the flood gates and exposing every jury to scrutiny and analysis for every verdict against a party's interest:

Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Id. at 267-68; GRAHAM, *supra* note 30, at § 606:2. The court further asserted its concern, saying:

exclude the testimony with three enumerated reasons.³⁴

First, the court reasoned that “admitting the testimony encourages post-trial jury harassment.”³⁵ Second, they believed that admitting the testimony may discourage “free and frank discussions within the jury room, because jurors may fear that their discussions would become public knowledge.”³⁶ Third, the court determined that “admitting the testimony interferes with the finality of litigation by encouraging unsuccessful litigants to tamper with jury verdicts.”³⁷

The Court’s new adoption and application of a balancing test in *McDonald* caused considerable confusion and inconsistencies amongst the different jurisdictions.³⁸ To establish more clarity and consistency, Congress took action in 1974 to create Federal Rule of Evidence 606.³⁹ Rule 606(b)(1) states that:

For, while it may often exclude the only possible evidence of misconduct, a change in the rule “would open the door to the most pernicious arts and tampering with jurors.” “The practice would be replete with dangerous consequences.” “It would lead to the grossest fraud and abuse” and “no verdict would be safe.”

McDonald, 238 U.S. at 268 (quoting *Cluggage v. Swan*, 4 Binn. 155 (PA 1811); *Straker v. Graham*, 4 Mees. & W. 721 (Eng. 1839)).

³⁴ See Rank, *supra* note 7, at 1430 (“Using this balancing test, the Court found three overriding reasons to exclude the testimony.”).

³⁵ Rank, *supra* note 7, at 1430; see *McDonald*, 238 U.S. at 257-68.

³⁶ Rank, *supra* note 7, at 1430; see *McDonald*, 238 U.S. at 257-68.

³⁷ Rank, *supra* note 7, at 1430; see *McDonald*, 238 U.S. at 257-68 (expressing concern with opening jury deliberations to scrutiny).

³⁸ See Rank, *supra* note 7, at 1431 (discussing Rule 606(b) conception and birth). While the Court concluded in saying that “such testimony of the juror could not be excluded without ‘violating the plainest principles of justice[.]’ [t]his might occur in the gravest and most important cases . . .”, it failed to elaborate upon what it meant by “gravest and most important” or to ask a standard from which other courts could determine for themselves. See *McDonald*, 238 U.S. at 269. This led to every jurisdiction implementing different standards and applications for the same rule. See Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 519 (1988) (discussing issues American common law created issues on juror testimony about deliberations).

In a sense, it is not surprising that courts even in the same jurisdiction reached inconsistent results and emphasized different policy concerns in doing so. When the Mansfield Rule was divorced from its initial justification, numerous policies arose to allow the Rule to retain its viability. These policies were developed piecemeal, were at times contradictory, and frequently were inartfully balanced.

Id.

³⁹ See Edward T. Swaine, Note, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 188-89 (1988) (showing development of 606(b) and better alternatives available to courts).

During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.⁴⁰

606(b)(2) allows three exceptions to the overall prohibition of juror testimony: "(A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form."⁴¹ While Rule 606(b) created a more uniform application of juror testimony, it has been riddled with varying interpretations of its language and scope, leading to a nationally inconsistent application.⁴² The Rule has gone through several textual and superficial revisions since 1974, but Rule 606(b) has remained substantively unchanged for nearly half a century.⁴³

⁴⁰ FED. R. EVID. 606(b)(1).

⁴¹ See *id.* at (b)(2) (listing three exceptions a juror may testify about).

⁴² See Swaine, *supra* note 39, at 188-92 ("Instead, discussion focuses on alternative means of securing evidence of misconduct (and abiding by Rule 606(b)), to the text of the note more effective ways of protecting the jury (and slighting Rule 606(b)), to the text of the note and subject-matter exceptions necessary to make the general exclusion of testimony under 606(b) tolerable."). "The jurisprudence of Rule 606(b) has been waging a losing war against juror misconduct." *Id.* at 206.

⁴³ See FED. R. EVID. 606 advisory committee's note ("The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment."). In 2006, Congress amended Rule 606 to include an exception for a juror to testify if the verdict reported was the result of a mistake in entering the verdict on the verdict form. *Id.* See FED. R. EVID. 606 advisory committee's note to 2006 amendment ("Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form."). It was expressly added to address a split amongst the circuits and varied application. See generally *Plummer v. Springfield Term. Ry. Co.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Karl v. Burlington Northern R. Co.*, 880 F.2d 68, 74-75 (8th Cir. 1989) (supporting its application of Rule 606(b)). However, this new exception was limited to instances "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989).

III. ANALYSIS

While there has been virtually no substantive change to Rule 606(b) for decades, there remain considerable concerns of its efficacy and critiques of its current applications.⁴⁴ Many believe that 606(b) should be less restrictive in allowing parties to examine a jury's decision because juries are often not competent when rendering their verdict.⁴⁵ While there are dozens, if not hundreds, of procedures set in place to limit the types of evidence parties present to the jury and dictating the manner the evidence should be presented, it is currently extremely difficult to determine if any of a court's precautions were actually adopted by the jury upon making their verdict or if the verdicts are arbitrary.⁴⁶ Timothy Rank eloquently described the reliance on jurors:

An irony of the jury system in the United States is that jurors are considered at the same time omniscient and incompetent. They are deemed incapable of weighing the difference between "admissible" and "inadmissible" evidence, but considered sufficiently responsible and autonomous to mete out justice with little review of the rationale behind their decisions.⁴⁷

Jurors do not necessarily ignore their instructors, but cases often deal with complex legal matters well beyond the realm of a layperson's common experience, making juries often unqualified to make an informed verdict.⁴⁸ The Supreme Court addressed many of these complaints and

⁴⁴ See Rank, *supra* note 7, at 1421-27 (discussing concerns of overly relying on jurors and suggestion of greater oversight); William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 576-77 (1991) (suggesting ways to improve jury efficacy and transparency, and recommending reform in regards to 606(b)); Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, 1484 (2006) (suggesting alternatives to preserve juror privacy); Crump, *supra* note 38, at 510 (criticizing *Tanner* and 606(b) for lack of clarity and direction).

⁴⁵ See Rank, *supra* note 7, at 1421 (outlining issues such as too much faith in jurors and concerns of limited oversight).

⁴⁶ See *id.* at 1421-23 (criticizing jury system in United States trial system).

⁴⁷ *Id.* at 1421-22.

⁴⁸ See Schwarzer, *supra* note 44, at 576 (providing insight and suggestions into fixing current jury system, which often uses uninformed jurors).

We have to guard against the creation of a new school of legal thinking: Law and Nostalgia. And we must escape the shackles of habit and tradition to make more effective use of juries. A genuine commitment to jury trials must therefore be accompanied by openness to enlightened change if the new demands of complex litigation are to be accommodated.

inconsistencies with their interpretation of Rule 606(b) when they heard *Tanner v. United States*.⁴⁹

A. Tanner

Anthony R. Tanner was charged with and convicted of committing various acts of mail fraud and conspiring to defraud the United States.⁵⁰ Before sentencing, it was revealed to Tanner and his attorney that several of the jurors had been drinking throughout the trial, and often fell asleep by the afternoon.⁵¹ The district court judge denied his motion for a new trial, finding that the only source of evidence to validate Tanner's claims was juror testimony, which was barred under Rule 606(b).⁵² Upon appeal, other jurors came forward describing multiple instances in which jurors drank to the point of inebriation, regularly smoked marijuana, and ingested cocaine throughout the trial and deliberations.⁵³ Despite the second account, the appellate court also denied the motion for a new trial, as they were not persuaded by Tanner's argument that alcohol and drugs should count as "outside influences" in regards to the exception for 606(b).⁵⁴

In her opinion, Justice O'Connor relied heavily on precedent, notably *McDonald v. Pless* and *Mattox v. United States*, in arguing the Court's extreme trepidation in expanding any possibility of allowing a juror to testify about jury deliberations.⁵⁵ The Supreme Court's fear of halting

Id. at 596.

⁴⁹ See *Tanner v. United States*, 483 U.S. 107, 125 (1987) (holding juror intoxication is not an "outside influence" under Rule 606(b)).

⁵⁰ See *id.* at 108 (discussing facts of case).

⁵¹ *Id.* at 107.

⁵² See *id.* at 113 (discussing procedural history of the case). Tanner's attorney received a phone call from Vera Absul, one of the jurors, to inform him that many of the jurors were drinking throughout the trial and deliberations, and were overall inattentive. *Id.* The only other form of evidence supporting Absul's claim was the observation by Tanner's attorney that several of the jurors were "in a sort of giggly mood" at parts of the trial. *Id.* Tanner's attorney, however, was faulted for not addressing this during the trial and the judge concluded that there was lack of sufficient grounds to warrant a motion for a new trial. *Id.* at 114-15.

⁵³ See *id.* at 115-16 (discussing facts of trial). Juror Daniel Hardy approached Tanner's attorney at his home to elaborate on the extent of the jurors' debauchery. *Id.* at 116. Upon giving his account to private investigators, hired by counsel, he described that he "felt like . . . the jury was on one big party." *Id.* at 115.

⁵⁴ See *Tanner*, 483 U.S. at 115-16 (discussing lower court's findings).

⁵⁵ See *id.* at 116-21. Justice O'Connor wrote:

[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would

the judicial process and the public losing faith in jury trials led them to ultimately find that “the language of the Rule cannot easily be stretched to cover this circumstance.”⁵⁶ Despite their impact and impropriety, “drugs or alcohol voluntarily ingested by a juror seems no more an ‘outside influence’ than a virus, poorly prepared food, or a lack of sleep.”⁵⁷

The decision in *Tanner*, however, was heavily criticized, even by several members of the Supreme Court.⁵⁸ In his dissent, Justice Marshall expressed his deep concern for how inattentive and intoxicated the jurors were, and quoted Justice O’Connor’s opinion in a previous case to express that there should be some degree of oversight, because:

A hearing permits counsel to probe the juror’s memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror’s demeanor under cross-examination and to evaluate his answers in light of the particular circumstances of the case.⁵⁹

Marshall further argues that 606(b) should not prevent the jurors from testifying about alcohol and drug consumption because it would not reveal what was discussed during their deliberations, merely what happened before and after.⁶⁰ The dissent criticized the Court’s

be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Id. at 119-20 (quoting *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915)).

⁵⁶ *See id.* at 122-25 (holding juror intoxication is not an “outside influence”).

⁵⁷ *Id.* at 122.

⁵⁸ *See id.* at 134-42 (presenting dissenting opinions). Justices Brennan, Blackmun, and Stevens joined Justice Marshall, who dissented in part and concurred in part with the majority’s decision. *Id.*

⁵⁹ *Tanner*, 483 U.S. at 135 (quoting *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O’Connor, J., concurring)).

⁶⁰ *See id.* at 138-39 (advocating for juror alcohol consumption testimony). Justice Marshall elaborated his argument by explaining that:

By its terms . . . Rule 606(b) renders jurors incompetent to testify only as to three subjects: (i) any “matter or statement” occurring during deliberations; (ii) the “effect” of anything upon the “mind or emotions” of any juror as it relates to his or her “assent to or dissent from the verdict”; and (iii) the “mental processes” of the juror in connection with his “assent to or dissent from the verdict.” Even as to matters involving deliberations, the bar is not absolute.

Id. at 138; *see* FED. R. EVID. 606 (discussing prohibited testimony).

classification of drugs and alcohol to not be an outside influence in regards to 606(b), and did not subscribe to the fear that this would expand the definition of “outside influence” to include more trivial matters, such as a juror suffering from sleep deprivation or common sicknesses.⁶¹

Furthermore, the dissenting opinion criticized the Court’s trepidation about impacting the juror system, arguing that:

[p]etitioners are not asking for a perfect jury. They are seeking to determine whether the jury that heard their case behaved in a manner consonant with the minimum requirements of the Sixth Amendment. If we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless.⁶²

Tanner was the broadest interpretation of Rule 606(b) and by far the most restrictive allowance of juror testimony the Supreme Court had yet issued, which quickly restricted the lower courts and severely limited opportunities for jurors to testify; if alcohol and drugs were not considered outside influences, than what could possibly be considered an internal influence?⁶³ Almost immediately after *Tanner*, lower courts felt restricted by their interpretation of 606(b) and, when possible, tried to make distinctions to permit more digression by the trial judge.⁶⁴ While it may

This was one of the broader liberties that the Court took with its opinion in *Tanner*, not only expanding the subject matter covered under 606(b) (by not including alcohol and drugs as an “outside influence”), but also the scope in which it was discussed. *See Tanner*, 483 U.S. at 138-39 (describing areas jurors can testify about, like consuming alcohol). The dissent holds, however, that allowing jurors to testify about what other juror’s consumed before deliberations is not substantively “what was intended to be a private deliberation”, and should ultimately not be included under the scope of 606(b). *Id.* at 140-41 (Marshall, J., dissenting); *see McDonald*, 238 U.S. at 267-68 (discussing history and application of 606(b)).

⁶¹ *Tanner*, 483 U.S. at 141. It is a fear that is not rationalized by any data or precedent, and greatly overlooks the courts’ ability to use discretion, which the dissent believes would simply be the familiar practice of line-drawing. *See id.* (“Courts are asked to make these sorts of distinctions in numerous contexts; I have no doubt they would be capable of differentiating between the intoxicants involved in this case and minor indispositions not affecting juror competency.”).

⁶² *Id.* at 142.

⁶³ *See supra* text accompanying notes 56-63 (criticizing Court’s definition of “outside influence”).

⁶⁴ *See Dobbs v. Zant*, 720 F. Supp. 1566, 1574 (N.D. Ga. 1989), *aff’d*, 963 F.2d 1403 (11th Cir. 1991), *rev’d*, 506 U.S. 357 (1993) (making distinction between racial prejudice and intoxication, particularly in observability); *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009) (“[u]sing this framework, most courts have concluded that juror testimony about race-related

have only exclusively dealt with juror intoxication, *Tanner's* extreme reluctance to permit jurors to testify about jury deliberations and the Court's broad interpretation of what constitutes "outside influences" had an echoing effect in many of the lower courts, who felt compelled that their rationale could be applied to other matters as well.⁶⁵ Ultimately, the Supreme Court managed to only further divide the lower courts in regards to Rule 606(b), as many tried to have their rationale apply strictly to cases in which a juror is going to testify about alcohol and drug consumption during the trial, while others tried to liberally apply the logic in *Tanner* to bar a gambit of claims, resulting in a lack of uniformity and clarity.⁶⁶ This lack of clarity and diminishment of Rule 606(b) exceptions has led to multiple criticisms of the rationale in *Tanner*, most notably the Court's

statements made by deliberating jurors does not fall within either the 'extraneous prejudicial information' or the 'outside influence' exceptions of Rule 606(b), but does fall squarely within Rule 606(b)'s prohibition of post-verdict juror testimony."); *Mejias v. Filion*, No. 13 Civ. 8362 PKC GWG, 2014 WL 2573656, at *6 (S.D.N.Y. May 8, 2014) *report and recommendation adopted*, No. 13 Civ. 8362 PKC GWG, 2014 WL 3728217 (S.D.N.Y. July 24, 2014) (disagreeing with expansion in *Tanner* to juror's deliberating prior to trial, keeping strict interpretation); *State v. Cherry*, 341 Ark. 924, 933 (2000) (finding *Tanner* did not apply to testimony about juror deliberations prior to trial). In *Cherry*, the court went one step further and, contrary to *Tanner*, found that jurors could discuss improper conduct prior to the trial without breaching the confidentiality of the juror deliberations, and that it was essential they do so because:

As egregious as such conduct may have been, we cannot say that standing alone, it would have been enough to support a finding of prejudice. However, when this conduct is considered in light of the testimony that some jurors prematurely formed a conclusion about defendant's guilt and then discussed those conclusions with other jurors, it does support a finding of prejudice. In light of the foregoing, we cannot say the trial court manifestly abused its discretion in granting *Cherry* a new trial.

Cherry, 341 Ark. at 933.

⁶⁵ See *Cherry*, 341 Ark. at 928-29 (relying heavily on *Tanner* to prevent juror deliberation on pre-trial discussions of jurors). "The[*Tanner*] Court stated that under the federal rules of evidence a verdict may not be impeached by jury testimony on matters involving jury deliberations." *Id.*

⁶⁶ See Huebner, *supra* note 44, at 1487-90 (discussing application of *Tanner* in different states). Many cases take particular notice when dealing with a racial bias and pre-trial evidence of prejudice, which has been a complaint in regards to 606(b). *Id.* at 1489-90 (citing 606(b) in the context of racial bias when accepting affidavits). In regards to the courts' split on whether racism is an "outside influence" in 606(b), one court said:

In our view, the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations. While individual pre-trial voir dire of the jurors can help to disclose prejudice, it has shortcomings because some jurors may be reluctant to admit racial bias.

Villar, 586 F.3d at 87.

fears and slippery-slope logic not being based on any amicus briefs or representative data, but rather a generalized feeling and belief.⁶⁷ Benjamin Huebner summarized the *Tanner* decisions, explaining that *Tanner*:

... 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.⁶⁸

B. Doubling-Down on *Tanner*

Despite the multitude of criticisms, concerns, and fallacies associated with the decision in *Tanner*, the Supreme Court recently assured its validity in their opinion of *Warger v. Shauers*.⁶⁹ In a 9-0 decision, the Supreme Court ruled to not only rely on the decision of *Tanner*, but to use its logic to restrict the exceptions to Rule 606(b) even further.⁷⁰ Gregory Warger sued Randy Shauers in federal court after a motor vehicle accident resulted in Warger losing his left leg.⁷¹ He alleged that Shauers' negligence was the cause of the accident, and wished to recover for property damage, loss of enjoyment of life, permanent disability, present and future medical expenses, and prejudgment interest.⁷² After the jury ruled in favor of Shauers, one of the jurors approached Warger to express her concern with a statement made by Regina Whipple, the jury forewoman, who, during deliberations, discussed "'a motor vehicle collision in which her daughter was at fault for the collision and a man died,' and had 'related that if her daughter had been sued, it would have

⁶⁷ See Huebner, *supra* note 44, at 1484 (offering different approach to preserving juror privacy by pulling away from ruling in *Tanner*).

⁶⁸ See *id.* (offering different approach to preserving juror privacy by pulling away from ruling in *Tanner*). Despite Justice O'Connor's fears that it is not clear that "the jury system could survive such efforts" to permit juror testimony about pre-trial discussions, and that an investigation into the validity of a verdict would result in the entire jury system being "undermined by a barrage of postverdict scrutiny of juror conduct", she never offers specific evidence as to why or how prevalent these results would be. See *Tanner*, 483 U.S. at 120-21.

⁶⁹ 135 S. Ct. 521 (2014).

⁷⁰ See *id.* at 525-26 ("We hold that Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during *voir dire*.").

⁷¹ *Id.* at 524.

⁷² *Id.*

ruined her life.”⁷³ This comment was made despite a lengthy, probative *voir dire*, where Whipple, and every other prospective juror, was specifically asked “whether [she] would be unable to award damages for pain and suffering or for future medical expenses, or whether [she] thought, ‘I don’t think I could be a fair and impartial juror on this kind of case.’”⁷⁴

Upon hearing this, Warger moved for a new trial, relying on the precedent of *McDonough Power Equip., Inc. v. Greenwood*,⁷⁵ which held that:

[T]o . . . obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror’s impartiality can truly be said to affect the fairness of a trial.⁷⁶

Both the district court and Eighth Circuit, however, did not grant Warger a new trial, finding that Rule 606(b)’s barred “any statement made or incident that occurred during the jury’s deliberations” which ruled over the matter, and that none of the exceptions in 606(b)(2) for “(A) extraneous prejudicial information was improperly brought to the jury’s attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form” applied.⁷⁷

⁷³ *Id.*

⁷⁴ *Shauers*, 135 S. Ct. at 524.

⁷⁵ 464 U.S. 548 (1984).

⁷⁶ *See id.* at 556 (reversing Appellate Court’s decision granting defendant new trial after revealing juror’s deception during *voir dire*). Justice Rehnquist commented on behalf of the majority of the Court that he did not want to overturn a three week trial because one of the jurors did not disclose his son was injured by a truck tire explosion when asked:

Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain and suffering, that is you or any members of your immediate family?

Id. at 550. While in this case, Justice Rehnquist did not believe the omission was sufficient to grant the defendant a new trial, he did comment that “respondents are not entitled to a new trial unless the juror’s failure to disclose denied respondents their right to an impartial jury.” *Id.* at 549.

⁷⁷ *See* FED. R. EVID. 606 (enumerating exceptions); *Shauers*, 135 S.Ct. at 525 (recounting procedural history).

The Eighth Circuit elaborated that the exception to 606(b)(2)(A) did not apply because “[j]urors’ personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room.”⁷⁸

The Supreme Court granted certiorari: not to refute or challenge these findings, as was the hope of this Note, but rather to affirm them.⁷⁹ The Court’s logic mirrored their argument in *Tanner*, by first detailing the evolution of preventing juror testimony from Lord Mansfield to the lower courts’ schism of the Iowa Rule and the more restrictive federal approaches.⁸⁰ On behalf of the entire Court, Justice Sotomayor’s opinion relied on the legislative history of Rule 606(b) to infer Congress’s preference for stricter guidelines when permitting juror testimony; by not only the words used in the rule, but also the words *not* used.⁸¹ Justice Sotomayor stated:

Congress rejected a prior version of the Rule that, in accordance with the Iowa approach, would have prohibited juror testimony only as to the ‘effect of anything upon . . . [any] juror’s mind or emotions . . . or concerning his mental processes.’⁸²

The Court then interprets this omission of language to mean Congress “specifically understood, considered, and rejected” the House’s proposed language.⁸³ This interpretation is extreme, especially considering that the Conference’s note to subdivision (b) expressly states that “[t]he Senate bill does provide, however, that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention and on the question whether any outside influence was improperly brought to bear on any juror”, and was ultimately adopted to form Rule 606(b).⁸⁴ While not expressly permitting the use of juror

⁷⁸ *Shauers*, 135 S. Ct. at 525 (quoting *Warger v. Shauers*, 721 F.3d 606, 611 (8th Cir. 2013)).

⁷⁹ *Id.*

⁸⁰ *See id.* at 525-27 (discussing genesis and development of Rule 606(b)).

⁸¹ *See id.* at 527 (rejecting version of rule permitting introducing “evidence of deliberations to show dishonesty during *voir dire*”).

⁸² *See id.* (quoting Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 387 (1971)) (rejecting version of rule permitting introducing “evidence of deliberations to show dishonesty during *voir dire*”); Schwarzer, *supra* note 44, at 576 (providing insight and suggestions into fixing current jury system, which often uses uninformed jurors); *supra* text accompanying notes 6-9 (deviating from Mansfield Rule).

⁸³ *See Shauers*, 135 S. Ct. at 527 (discussing legislative history of Rule 606(b)).

⁸⁴ FED. R. EVID. 606; *see Shauers*, 135 S. Ct. at 528 (discussing legislative history of Rule 606(b)).

testimony for statements made during *voir dire*, the final adopted language of Rule 606(b) does not expressly forbid it, and the court may deem Whipple's statement either an "outside influence," or perhaps more appropriately, "extraneous prejudicial information," which multiple lower courts have done.⁸⁵

Warger argued that he merely wished to allow testimony regarding what was said during *voir dire*, not the deliberations themselves or the reasoning behind the verdict, since *McDonough* simply requires a false statement be made prior to juror deliberations: "inquiry begins and ends with what happened during *voir dire*."⁸⁶ The Court, however, found this to be an illegitimate way to circumvent 606(b)(1), arguing that:

It simply applies "[d]uring an inquiry into the validity of the verdict"—that is, during a *proceeding* in which the verdict may be rendered invalid. Whether or not a juror's alleged misconduct during *voir dire* had a direct effect on the jury's verdict, the motion for a new trial requires a court to determine whether the verdict can stand.⁸⁷

Continuing with their traditional interpretation of Rule 606(b), the Court rejected Warger's constitutional concerns with Rule 606(b).⁸⁸ Justice Sotomayor acknowledged the Constitution's requirement of access to an impartial jury,⁸⁹ but was not persuaded, firmly holding "any claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*," and relying on the same logic that:

A party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased. Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence

⁸⁵ See FED. R. EVID. 606(b) (illustrating rule); see also *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) ("Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine. It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony.").

⁸⁶ See *Shauers*, 135 S. Ct. at 528 (quoting Brief for Petitioner at 19–20, *Warger v. Shauers*, 135 S. Ct. 521 (2014) (No. 13-517)) (relying on *McDonough*).

⁸⁷ *Id.* (quoting FED. R. EVID. 606).

⁸⁸ See *id.* (reasoning that *voire dire* is essential to protecting defendant's right to impartial jury).

⁸⁹ See *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (discussing media impact on jury); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946) (finding juror competence to be individual matter, not class or group).

even after the verdict is rendered.⁹⁰

The Supreme Court still heavily relied on the belief of preventive measures to forestall virtually all juror testimony regarding significant juror bias, despite the considerable concerns and contradictions of that logic.⁹¹ The Justices' fear of permitting juror testimony continued to persist even when Warger tried to argue that several of the exceptions in 606(b) apply; but in addition to finding that 606(b) does not apply to *voir dire* statements and that it is constitutional, the Court further reasoned that no other exception would permit the testimony either.⁹² Particularly, the Court was not willing to find that Warger's affidavit pertained to "extraneous prejudicial information was improperly brought to the jury's attention" under Rule 606(b)(2)(A).⁹³ The Court greatly relied on their findings in *Tanner*, again, and concluded that "extraneous" means anything from a "source 'external' to the jury", and the forewoman's statements are "internal" since all jurors bring in their life experiences and it provided no specific knowledge of either party in the case.⁹⁴

Shauers concluded with the Supreme Court re-affirming nearly every doctrine they held in *Tanner* and refusing to allow a juror to testify, despite acknowledging Warger's grounds for a new trial and ignoring nearly three decades of criticisms, deviations, and contradictions of their reasoning.⁹⁵ In *Shauers*, the Court ignored many of the plaintiff's arguments by saying that *Tanner* already ruled on the matter: "Moreover, this Court's *Tanner* decision forecloses any claim that Rule 606(b) is unconstitutional. Similar to the right at issue in that case, Warger's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring unbiased jurors."⁹⁶ Although the Court's opinion was only nine pages, the drafting Justices quoted or cited to *Tanner* no less than eleven times.⁹⁷ There are primarily two major faults with the Court's reasoning in *Tanner* and *Shauers*: first, an over-reliance on efficacy pre-verdict measures to prevent a biased jury; and second, using overly restrictive precautionary measures to prevent an overly-hyped fear at the

⁹⁰ *Shauers*, 135 S. Ct at 529.

⁹¹ *See id.* (providing that evidence of bias still available to be brought to the court's attention after *voir dire*).

⁹² *See id.* at 524-30 (reasoning the Court's application of Rule 606(b)).

⁹³ *Id.* at 529; *see also* FED. R. EVID. 606.

⁹⁴ *See id.* at 529

⁹⁵ *See Shauers*, 135 S. Ct. at 525-30 (holding 606(b) applies when jurors lie during *voir dire*, affidavit inadmissible, and constitutional avoidance inapplicable).

⁹⁶ *Id.* at 523.

⁹⁷ *See generally id.* at 521-30 (citing *Tanner*).

costs of litigants' constitutional rights.⁹⁸

The Court believes that existing measures to prevent juror bias are sufficient to satisfy the requirements of an unbiased jury for the Sixth Amendment, and they include: *voir dire*; the ability of the court and counsel to observe jurors during trial; the ability of jurors to report misconduct before rendering a verdict; and the ability to impeach a verdict with non-juror evidence of misconduct.⁹⁹ The problem, however, is that there is considerable evidence which suggests fault with that reasoning.¹⁰⁰ While those measures are necessary and effective to reveal bias and impartiality, they are by no means always successful.¹⁰¹ The Court is correct in saying they do not have to provide a "perfect" jury, or remove all possible bias, which is a logistical nightmare, but they should acknowledge that jurors with substantial, material biases and prejudices are able to successfully get on a jury.¹⁰² Modern research suggests that even if confronted during *voir dire*, a juror may not admit to a bias or prejudice because they are either not consciously aware of bias, or are too embarrassed to admit it publically or to another person.¹⁰³ Despite post-*voir dire* safety measures, a jury may still use faulty reasoning and evidence outside the permitted scope of the law: "while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour."¹⁰⁴ A broader interpretation to the exceptions in Rule 606(b)(2) would act as an addition safeguard to prevent an impartial verdict caused by a prejudice that was able to slip

⁹⁸ See *Tanner*, 483 U.S. at 120 ("Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process."); *Shawers*, 135 S. Ct. at 525-26 (holding 606(b) to be plain meaning); Crump, *supra* note 38, at 510 ("Tanner v. United States is a fascinating illustration of the ambiguous policies, unresolved conflicts, and potential for anomalous outcomes concealed in the ostensibly clear language of the evidentiary rule that excluded . . . testimony.").

⁹⁹ See *Tanner*, 483 U.S. at 127 (enumerating protections against juror bias).

¹⁰⁰ See Crump, *supra* note 38, at 510 ("Tanner v. United States is a fascinating illustration of the ambiguous policies, unresolved conflicts, and potential for anomalous outcomes concealed in the ostensibly clear language of the evidentiary rule that excluded . . . testimony.").

¹⁰¹ See *id.* at 524-25 (discussing measures to reduce biases).

¹⁰² See Amanda Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 264 (2012) ("Voor dire, however, may not uncover a juror's bias or prejudice, and, therefore, a biased or prejudiced juror may sit and render a verdict, thus depriving the defendant of his constitutional right to an impartial jury.").

¹⁰³ See *id.* at 286-87 (discussing research on juror bias and prejudice).

¹⁰⁴ See *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948) (arguing issues with leaving jury completely alone to render verdict, leading to confusion and error).

through *voir dire*.¹⁰⁵

Furthermore, in both *Tanner* and *Shauers*, the Court greatly expressed their fear that a more inclusive 606(b) would wreak havoc on the courts, but with virtually no evidence or solid reasoning to support that fear.¹⁰⁶ This fear is not without its merits or completely unreasonable, but it chooses to ignore many of the realities in which Rule 606(b) exists. The Supreme Court's reliance on jurors to come forward with any issues of prejudice or bias during the trial seems to be putting too much faith on the average person who may not know what is appropriate and what is not appropriate.¹⁰⁷ A myriad of rules exist to regulate the type, manner, relevance of every piece of evidence, and testimony throughout the trial because jurors are not deemed competent to know themselves; by that logic then, they are no more qualified to know what is appropriate in deliberations than in the courtroom.¹⁰⁸

The Supreme Court also expressed a fear that expanding 606(b)(2) would compromise the total secrecy of jury deliberations and that "[j]urors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation."¹⁰⁹ While the Court repeatedly states that it wishes to preserve the privacy and secrecy of juror deliberations, they overlook the fact that Rule 606(b) only applies jurors testifying; it does not bar any juror from discussing deliberations outside of the courtroom, as they often talk to their friends and family, and for high-profile cases, some even publish tell-all books and conduct lengthy television interviews.¹¹⁰ For

¹⁰⁵ See Schwarzer, *supra* note 44, at 576-77 (providing suggestions for improving jury trials, notably not being bound fear of change).

¹⁰⁶ See *Tanner*, 483 U.S. at 120 ("Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process."); see also *Shauers*, 135 S. Ct. at 525-26 (holding 606(b) to be plain meaning).

¹⁰⁷ See Rank, *supra* note 7, at 1421-22 ("An irony of the jury system in the United States is that jurors considered at the same time omniscient and incompetent. They are deemed incapable of weighing the difference between "admissible" and "inadmissible" evidence, but considered sufficiently responsible and autonomous to mete out justice with little review of the rationale behind their decisions.").

¹⁰⁸ See *Baltimore & O.R. Co.*, 167 F.2d at 57-59 ("Yet no amount of brave talk can do away with the fact that, when a jury returns an ordinary general verdict, it usually has the power utterly to ignore what the judge instructs it concerning the substantive legal rules, a power which, because generally it cannot be controlled, is indistinguishable for all practical purposes, from a 'right'").

¹⁰⁹ See *Tanner*, 483 U.S. at 124 (discussing potential issues of expanding 606(b)).

¹¹⁰ See HAZEL THORNTON ET AL., *HUNG JURY: THE DIARY OF A MENENDEZ JUROR* (1995) (detailing Thornton's time as juror in infamous 1993 trial of Lyle and Erik Menke); MICHAEL KNOX & BRIAN E. MIKE WALKER, *THE PRIVATE DIARY OF AN O.J. JUROR* (1995) (revealing Knox's private thoughts throughout trial O.J. and how other jurors affected verdict in deliberations); AMANDA COOLEY, CARRIE BESS, & MARSHA RUBIN-JACKSON, *MADAM*

example, after George Zimmerman was acquitted in the shooting of Trayvon Martin, CNN's Anderson Cooper conducted a lengthy interview of juror B37, in which she discussed her opinion of nearly every aspect of the case, as well as the mentality and rationale of several other jurors.¹¹¹ In one juror's self-published book, he mentioned that in order to test the defendant's alleged intoxication levels when driving, he drank three vodka drinks before the jury deliberations to see the impact.¹¹² Not only did this result in the defendant getting a new trial, directly contradictory to *Tanner's* belief, but DeMartin was charged with indirect criminal contempt.¹¹³ Finally, the Court's fear seems to ignore the history of juror testimony: Mansfield and the less restrictive Iowa Rule existed for centuries before the establishment of Rule 606(b), and yet, the court systems have still managed to operate and function efficiently and the nation has yet to collapse into lawless disorder and chaos.¹¹⁴

The Court should not only concern itself with the hypothetical consequences juror testimony would have on jury autonomy and secrecy, but rather, the impact a severely limited interpretation of Rule 606(b)(2) is actively having now on the lower courts and their litigants.¹¹⁵ The Sixth

FOREMAN: A RUSH TO JUDGMENT? (1996) (consisting of complaints and thoughts of multiple jurors in the O.J. Simpson trial); GREG BERATLIS ET AL., *WE, THE JURY: DECIDING THE SCOTT PETERSON CASE* (2007) (surmising thoughts and deliberations of seven jurors in the trial of Scott Peterson); DENNIS DEMARTIN, *BELIEVING IN THE TRUTH* (2012) (detailing DeMartin's thoughts and rationale of vehicular manslaughter case).

¹¹¹ Dana Ford, *George Zimmerman Was 'Justified' in Shooting Trayvon Martin, Juror Says*, CNN, Mar. 30, 2015, [http://www.cnn.com/2013/07/16/us/zimmerman-juror/](http://www.cnn.com/2013/07/16/us/zimmerman-juror/http://www.cnn.com/2013/07/16/us/zimmerman-juror/) (containing juror B37 video and what impacted her thoughts and other jurors during trial).

¹¹² See DEMARTIN, *supra* note 110 (detailing DeMartin's thoughts and rationale of vehicular manslaughter case); Marc Freeman, *Judge Upgrades Contempt Charge for Ex-Goodman Juror*, SUN SENTINEL, May 30, 2013, http://articles.sun-sentinel.com/2013-05-30/news/fl-dennis-demartin-contempt-hearing-20130530_1_goodman-case-drinking-experiment-john-goodman (discussing impact of DeMartin's statements in his book).

¹¹³ See Freeman, *supra* note 112 ("DeMartin, 70, returned to face a charge of indirect criminal contempt.").

¹¹⁴ See discussion *supra* Section II (discussing Iowa Rule and *Mansfield* history).

¹¹⁵ See *Henley*, 238 F.3d at 1120 ("Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine. It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony."); *Villar*, 586 F.3d at 84 (holding Rule 606(b) prevents further juror inquiry regarding comments during deliberation).

¹¹⁵ See *Henley*, 238 F.3d at 1120 ("Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine. It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony."); *Villar*, 586 F.3d at

Amendment guarantees every defendant in a criminal trial the right to be tried by an impartial jury.¹¹⁶ The Court in *Shauers* found not only that a juror's bias and deception during *voir dire* did not apply to Rule 606(b)(2)(A), but also that it was constitutional because "[a] juror's bias can certainly be considered 'extraneous prejudicial information' since it is a particular fact or circumstance (*information*) outside of the evidence presented to the jury (*extraneous*) concerning an unfavorable preconceived opinion or feeling (*prejudicial*)."¹¹⁷ While some circuit courts have similar logic to *Shauers* in denying testimony of juror bias under Rule 606(b),¹¹⁸ many courts have found that it does not apply to bias, and grant juror testimony as a preservation of the Sixth Amendment, especially in regards to racial bias.¹¹⁹ Not only does a biased juror undermine the validity of the verdict, "the deliberation room may be the only place in which to ascertain a juror's true bias or prejudice", making the other jurors uniquely qualified to be the best, if not the only, source of evidence.¹²⁰ In spite of this, the Court in *Shauers* still clings to the notion that if juror misconduct is not identified prior to deliberation, the misconduct is not admissible.¹²¹

84 (holding Rule 606(b) prevents further juror inquiry regarding comments during deliberation).

¹¹⁶ See *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (discussing media impact on jury); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946) (finding juror competence to be individual matter, not class or group); Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 334 (2005) (explaining Sixth Amendment guarantees defendant unbiased jury in criminal cases); see also *Ristaino v. Ross*, 424 U.S. 589, 594-95 (1976) (discussing minimum requirements and expectations determining bias of juror).

¹¹⁷ See Wolin, *supra* note 102, at 289 (describing first two exceptions of Rule 606(b)).

¹¹⁸ See *United States v. Benally*, 546 F.3d 1230, 1241 (10th Cir. 2008) (holding that Sixth Amendment does not require exception for racial bias testimony).

¹¹⁹ See *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) ("Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine. It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony."); *United States v. Villar*, 586 F.3d 76, 84 (2009) (holding Rule 606(b) prevents further juror inquiry regarding comments during deliberation).

¹²⁰ See Wolin, *supra* note 102, at 281 (describing juror testimony is important where bias is alleged after the verdict); see also Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 925 (2009) (elaborating that juror testimony is often only evidence of juror misconduct or bias).

¹²¹ See *Shauers*, 135 S. Ct. at 523-30 ("Whether a juror would have been struck from the jury because of incompetence or bias, the mere fact that a juror would have been struck does not make admissible evidence regarding that juror's conduct and statements during deliberations.").

C. Need for Reform

One of the most harmful consequences of limiting a juror's ability to testify is that they are frequently the only ones who witness juror misconduct and often only come forward once the trial is over.¹²² The Supreme Court, however, has repeatedly argued that purely preventive measures are sufficient, despite court officers, judges, attorneys, and other jurors repeated failures to identify a bias or outside influence prior to juror deliberations.¹²³ This is particularly concerning because most data suggests that influences outside of trial are going to be more prevalent with the growing access and use of smartphones and social media; so much so, that it has given birth to the term "Google mistrial."¹²⁴ Over the past two decades, there has been an increasing trend for jurors to conduct their own research on the internet, rather than rely solely on evidence presented

¹²² See *Henley*, 238 F.3d at 1120 ("Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine. It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony."); *Villar*, 586 F.3d at 84 (holding Rule 606(b) prevents further juror inquiry regarding comments during deliberation); see also *Wright v. Illinois & Mississippi Tel. Co.*, 20 Iowa 195, 211-12 (1866) (discussing juror's knowledge); *State v. Cherry*, 341 Ark. 924, 931-33 (2000) (granting new trial only because allegations were paired with juror testimony and accounts); Huebner, *supra* note 44, at 1469-71 (discussing impact of *Tanner* while also offering alternative methods to maintaining effective trials). Considering precedent set by Lord Mansfield, the court in *Wright* said:

At all events the superior opportunities of knowledge and less liability to mistake, which the juror has over the spy, would entitle his statement to the most credit. And if, as is universally conceded, it is the *fact* of improper practice, which avoids the verdict, there is no reason why a court should close its ears to the evidence of it from one class of persons, while it will hear it from another class, which stands in no more enviable light and is certainly no more entitled to credit.

Wright, 20 Iowa at 211-12 (emphasis in original).

¹²³ See *Henley*, 238 F.3d at 1120 ("Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine. It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony."); *Villar*, 586 F.3d at 84 (holding Rule 606(b) prevents further juror inquiry regarding comments during deliberation); Wolin, *supra* note 102, at 281 (describing juror testimony is important where bias is alleged after the verdict); Miller, *supra* note 120, at 925 (elaborating that juror testimony is often only evidence of juror misconduct or bias).

¹²⁴ See John Schwartz, *As Jurors Turn to the Web, Mistrials Are Popping Up*, N.Y. TIMES, March 17, 2009, http://www.nytimes.com/2009/03/18/us/18juries.html?em&_r=0 (explaining Google mistrial and impact on modern trials).

during the trial, which often goes undetected by the Court itself.¹²⁵ For example, take the recent murder trial in New York for Dr. Robert Neulander, who quickly gained media attention after being accused of murdering his wife.¹²⁶ Dr. Neulander was ultimately found guilty, but before the sentencing hearing, an alternate juror came forward to tell court officers that Juror 12 had been fervently texting during the course of the trial and during breaks.¹²⁷ Juror 12 ultimately admitted that she had been texting during the trial, and when just chosen to sit on the jury she texted her father about the high profile case, who texted back “Lucky you, make sure he’s guilty.”¹²⁸ Further investigation revealed that Juror 12 had sent approximately 7,000 text messages during the three week trial, none of which had been observed or reported by anyone associated with the trial.¹²⁹ This is by no means an isolated incident, and what is perhaps most concerning is that courts are failing to properly block jurors from outside information and most jurors do not realize it was improper or inappropriate until after the trial.¹³⁰ One juror in the United Kingdom was taking part in a child abduction and sex abuse case, and during the trial she conducted a

¹²⁵ See Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 417-19 (2012) (discussing impact mobile technology is having on jurors and concerns for today’s courtrooms).

¹²⁶ See Sarahbeth Ackerman, *Juror admits to deleting text messages sent throughout Neulander trial*, CNY CENTRAL, July 8, 2015, <http://cnycentral.com/news/local/juror-admits-to-deleting-text-messages-sent-throughout-neulander-trial?id=1227680> (covering Neulander’s trial and scandal of juror caught texting); Douglass Dowtry, *Dr. Robert Neulander denied new murder trial in wife’s death; sentencing Thursday*, SYRACUSE.COM, July 27, 2015 7:54 PM) http://www.syracuse.com/crime/index.ssf/2015/07/dr_neulander_murder_trial_jury_misconduct.html (reporting impact of Juror’s texting on trial and detail about amount of texting).

¹²⁷ See Dowtry, *supra* note 126 (reporting impact of Juror’s texting on trial and detail about amount of texting); Ackerman, *supra* note 126 (describing text received by Juror 12 from father saying “Lucky you, make sure he’s guilty[.]”).

¹²⁸ See Ackerman, *supra* note 126 (describing text received by Juror 12 from father saying “Lucky you, make sure he’s guilty[.]”).

¹²⁹ See *id.*; see also Dowtry, *supra* note 126. While the texting was rather extensive and discussed sensitive material pertaining to the trial, the judge presiding over the case found that the messages alone did not warrant a new trial, and Dr. Neulander was found guilty of murder and evidence tampering. See Dowtry, *supra* note 126 (reporting on Dr. Neulander’s murder case).

¹³⁰ See John Leyden, *Juror dismissed over Facebook poll*, THE REGISTER, Nov. 26, 2008, http://www.theregister.co.uk/2008/11/26/facebook_trial_poll/ (reporting instance in which U.K. juror made Facebook poll about the verdict); Douglas L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet (the “Googlemistrial”)*, THE JURY EXPERT, Nov. 2009, <http://www.thejuryexpert.com/2009/11/online-and-wired-for-justice-why-jurors-turn-to-the-internet-the-google-mistrial/> (detailing trend of juror’s doing online research and difficulty of court’s preventing them); Brian Sharpe, *Twelve Angry Iphone Users*, 23 DCBA Brief 46, 47 (2010) (discussing how ingrained smartphones and social media is with jurors and challenges therein).

poll on Facebook to ask people to vote on her verdict.¹³¹ When questioned about why she created the poll, the juror did not think it was improper and simply replied that she was unsure about her verdict, and thought an online poll would be helpful.¹³² Often times, it may not simply just be one rogue juror—in 2009, a Florida federal judge had to declare a mistrial after it was discovered that at least nine of the jurors had been researching the case on their smartphones throughout the entire trial, which went unnoticed for a surprising amount of time.¹³³ Juror testimony can be invaluable, because while many jurors may not intentionally research the case on their own, they are highly susceptible to updates, links, tweets, and posts from dozens of internet sources that could influence their decisions, whether that was their intent or not, and courts are repeatedly proving to be ill-equipped to prevent this before deliberations.¹³⁴

Besides the impeding complications with social media and digital influences on jurors, the Supreme Court should adopt a less strict interpretation of Rule 606(b) and develop clearer methods for allowing juror testimony to alleviate the confusion and inconsistency in lower courts.¹³⁵ While the *Schauers* opinion was consistent with the ruling in *Tanner*, it failed to clarify any of *Tanner*'s uncertainty that has resulted in wildly different applications of Rule 606(b) depending on the district.¹³⁶ When dealing with extraneous information, some courts say “a rebuttable presumption of prejudice arises,”¹³⁷ others have ruled that through particular influences an “irrebuttable presumption of prejudice arises,”¹³⁸ while other courts view the prejudice of outside influences on a case-by-

¹³¹ See Leyden, *supra* note 130 (explaining juror's conduct).

¹³² See Leyden, *supra* note 130. The Facebook post was titled “I don't know which way to go, so I'm holding a poll.” *Id.*

¹³³ See Bill Haltom, *Twelve Angry Tweeters*, Tenn. B.J. 40, 40 (2009) (discussing social media during jury deliberations and impact on jury).

¹³⁴ See Schwartz, *supra* note 124 (detailing issues of smartphones in the juror box); sources cited *supra* note 130 (discussing issues with internet access and jurors).

¹³⁵ See Rank, *supra* note 7, at 1421 (outlining issues such as too much faith in jurors and concerns of limited oversight).

¹³⁶ See Part III. B (discussing *Shaurers*); see also Victor James Gold, 27 FED. Practice and Procedure § 6075 (2nd. ed. 2015) (compiling information on inconsistencies and different definitions of 606(b) and exceptions).

¹³⁷ See, e.g., *Remmer v. United States*, 347 U.S. 227, 229 (1954) (establishing burden to rebut presumption of influence is government's burden); *United States v. Lawson*, 677 F.3d 629, 644-46 (4th Cir. 2012) (finding a presumption of influence on juror who researched case terms through online database); *United States v. Vasquez-Ruiz*, 502 F.3d 700, 701 (7th Cir. 2007) (concluding juror getting message “GUILTY” in her notebook created presumption of prejudice).

¹³⁸ See *United States v. Greer*, 620 F.2d 1383, 1385 (10th Cir. 1980) (concluding outside influence found after verdict, its “presumption of prejudice cannot be overcome.”).

case basis.¹³⁹ It may be impossible to create a single effective, clear rule when it comes to permitting jurors to testify about what was discussed during deliberation, which is perhaps why it may be best to give some discretion to the presiding trial or appellate judge.¹⁴⁰ In contrast, one of the objectives of physics is to establish a theory of everything, or an “ultimate theory” in which everything in the universe would abide by one eloquent theory or framework.¹⁴¹ This has proven impossible thus far, however, because quantum mechanics does not abide by the same principles as the rest of universe, essentially, a theory that may operate well in the grand scheme of things falls apart when applied to the extremely specific; so too is the application of juror testimony and Rule 606(b).¹⁴² Even if the Supreme Court did not take such a conservative approach to their interpretation of 606(b), it may be best to give greater discretion to the lower courts, as an all-encompassing interpretation of 606(b) may work on a grand scale, but deny a constitutionally qualified and unbiased jury to a few specific litigants.¹⁴³ Also, the Supreme Court has failed to acknowledge that Rule 606(b) and *Tanner* are not millennial-long legal principles, and have only been in existence for a fraction of the history of juror testimony procedures.¹⁴⁴ In fact, just two decades before Rule 606(b) was created, in *Remmer v. United States*¹⁴⁵ the Supreme Court was much more lenient towards claims of jurors who were affected by outside influences, and were hesitant to create a nation-wide standard when they

¹³⁹ See Gold, *supra* note 136, at § 6075 (discussing approaches by other courts); see generally *United States v. Boylan*, 898 F.2d 230, 261 (1st Cir. 1990) (stating presumption if “egregious tampering or third party communication which . . . injects itself into the jury process.”); *Hard v. Burlington N. R.R.*, 812 F.2d 482, 485 (9th Cir. 1987) (holding burden to prove outside influence was prejudicial and rested with the defendant, not government), *abrogated by* *Warger v. Shauers*, 135 S. Ct. 521 (2014); *State v. Stafford*, 678 P.2d 644, 647 (Mont. 1984) (deciding outside influences were not prejudicial and put burden upon plaintiff to prove otherwise).

¹⁴⁰ See 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, 233 (1989) (“Just as the jury system provides a safeguard against the excesses, insensitivities, and biases of judges, judges should check the excesses, insensitivities, and biases of jurors. Bringing the distinct perspectives of jurors and professional judges to bear on an issue promotes greater confidence in its resolution than yielding the decision to either lay or professional judges alone.”).

¹⁴¹ See STEVEN WEINBERG, *DREAMS OF A FINAL THEORY: THE SCIENTIST’S SEARCH FOR THE ULTIMATE LAWS OF NATURE* 3-14 (1994) (detailing evolution and framework from which physicists have tried to create unifying theory).

¹⁴² See *id.* (detailing evolution and framework from which physicists have tried to create unifying theory).

¹⁴³ *Id.*

¹⁴⁴ See Rank, *supra* note 7, at 1425 (providing overview of American common law development of rule 606(b)); *supra* Part II (discussing history of Iowa Rule and *Mansfield* Rule).

¹⁴⁵ 347 U.S. 227 (1954).

ruled in *McDonald*.¹⁴⁶ That is, in part, what makes the Court's strict standards in *Shauners* ultimately so frustrating: "In *McDonald*, the Supreme Court 'recognize[d] that it would not be safe to lay down any inflexible [anti-jury impeachment] rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice.'"¹⁴⁷

IV. CONCLUSION

Justice comes not from the verdict rendered by the jury, but the *means by which* they come to that verdict. Having such a strict interpretation of the already narrow exceptions to Rule 606(b) prevents legitimate inquiries into the validity of a verdict. There is admittedly, however, the potential for abuse when juror testimony is made less restrictive, but it could be greatly diminished by practical safeguards. An attorney could become aware of a conflict or outside influence during the trial, but choose to wait until the verdict is rendered to decide to make a motion for a new trial, or perhaps be so egregious as to intentionally add a juror during deliberations as an ace in the hole to overturn an unfavorable verdict. A reasonableness test could be implemented that bars juror misconduct that the attorney was aware of, or reasonably should have been aware of, or that would have been revealed during traditional *voir dire* and juror instruction. While a broad rule, it would require the attorney and court officers to be vigilant throughout the trial, but permit testimony on unforeseeable outside influences and juror deception during *voir dire*. Also, it is worth noting that these suggestions in no way guarantee a new trial, nor is that their intention: even with multiple jurors testifying to alleged misconduct, a judge may reasonably conclude that the misbehavior is not sufficient to warrant a new trial. The objective here is to simply permit the opportunity for a party to effectively present their case before an impartial jury. It would be in the best interest if the Supreme Court mirrored its earlier decisions in the early twentieth century and gave greater discretion to the lower courts. Rule 606(b) and its rules will still remain in effect, obviously, but the greatest problem and criticism come not from the language of the Rule, but the Court's interpretation of that language, which they alone have the power to correct. While the fears and concerns expressed by the majority in *Tanner* and *Shauners* are legitimate, the Court

¹⁴⁶ See generally *Remmer*, 347 U.S. at 229 (establishing burden to rebut presumption of influence is government's burden); *supra* Part II (discussing *McDonald*).

¹⁴⁷ See *Miller*, *supra* note 120, at 942; see also *Tanner v. United States*, 483 U.S. 107, 114-21 (1987) (discussing *McDonald*).

prevents them by bringing into effect an overly restrictive interpretation of Rule 606(b), and for the reasons previously mentioned, further litigation and court decisions should lean towards a more liberal interpretation to allow every litigant access to an unbiased jury as the Constitution demands.

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