Becoming Penelopes: Rethinking the Federal No-Impeachment Rule After *Peña-Rodriguez*[*]

Introduction

The United States has a long, complicated relationship with juries.[1] While particular jury verdicts encounter disbelief or even hostility, the system itself is generally praised as a protector of justice and other key democratic values. Yet even the staunchest defenders of the jury system admit it is imperfect, and very few expect the system to be without fault. Often, it falls to the courts to recognize the limitations of the jury system, and in particular to protect verdicts from demands of perfection. Expecting faultless verdicts would threaten the integrity of the system itself: as Learned Hand once wrote, requiring perfection would turn judges into "Penelopes," constantly reconsidering verdicts until they were delivered by an ideal jury.[2]

In an effort to preserve the system's integrity, the law has frequently sought to protect juries and the verdicts they deliver. Nowhere is this goal more apparent than in the long-standing "no-impeachment rule," codified in Federal Rule of Evidence 606(b), which generally precludes the introduction of evidence related to the validity of a verdict.[3] Considered essential to ensuring the jury's independence and guaranteeing the right to a fair trial,[4] the no-impeachment rule has nevertheless come under significant attack, culminating in the Supreme Court's recent decision in *Peña-Rodriguez v. Colorado*.[5] By ruling that Rule 606(b) is incompatible with the Sixth Amendment under certain circumstances, the Court continued the long line of conflicting opinions on the Rule and the common law tradition that supports it.

The problem confronting *Peña-Rodriguez*—as well as other opinions regarding Rule 606(b)—is that there is not one common law tradition supporting the adopted no-impeachment rule. Rather, it is the result of an

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1. Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 205 (2005).

2. Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir. 1947).

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

4. Lee Goldman, *Post-Verdict Challenges to Racial Comments Made During Juror Deliberations*, 61 SYRACUSE L. REV. 1, 3, 12–13 (2010); Martin J. Greenberg, Note, *Impeachment of Jury Verdicts*, 53 MARQ. L. REV. 258, 261–62 (1970); Note, *Public Disclosure of Jury Deliberations*, 96 HARV. L. REV. 886, 892 (1983); Courselle, *supra* note 1, at 211.

5. 137 S. Ct. 855 (2017).

uneasy synthesis of two common law paths, directed toward similar goals yet destined to conflict. *Peña-Rodriguez*, then, does not represent a final decision on an issue that has been plaguing federal courts and commentators for years, but rather another attempt to draw principled distinctions from a Rule confronted by internal tension.

The no-impeachment rule's history shows the difficulty in striking a balance between protecting crucial interests—such as finality and deliberative secrecy—and ensuring that deliberations are free from misconduct. Federal Rule of Evidence 606(b), far from uniting two competing interpretations, has instead led to muddied distinctions and inconsistent judgments. More troubling, Rule 606(b) has failed to protect important interests more consistently than other, more permissive interpretations of the no-impeachment rule.

This Note seeks to explain these shortcomings by evaluating the common law history of the Rule and decisions from federal courts—including the Supreme Court—that have sought to clarify it. It begins in the years before the drafting of the Federal Rules, when different jurisdictions sought different ways to reconcile the values of jury deliberation and the threat of juror misconduct. It then describes the process that created Federal Rule 606(b) and the first major decision to analyze the Rule, *Tanner v. United States*.[6] Next, it notes the analytical difficulties the *Tanner* decision created, and traces the issues courts struggled with until the announcement of two additional noteworthy Supreme Court decisions, *Warger v. Shauers*[7] and *Peña-Rodriguez v. Colorado*. It concludes by offering solutions to the difficulties raised by Rule 606(b) and advocating for an approach that would better guard against juror misconduct while still protecting the policies the Rule purports to serve.

I. The History of Impeachment Before the Federal Rules

A. *Early English History and the Mansfield Rule*

Although now considered one of the bedrocks of contemporary criminal procedure, the secrecy of jury deliberations may have arisen as a historical accident.[8] In fact, many British courts thwarted deliberative secrecy by admitting juror testimony to impeach verdicts until the late eighteenth century.[9] Before the American Revolution, the common law of both England

6. 483 U.S. 107 (1987).

7. 135 S. Ct. 521 (2014).

8. Ashok Chandran, Note, *Color in the "Black Box": Addressing Racism in Juror Deliberations*, 5 COLUM. J. RACE & L. 28, 31 (2014).

9. Benjamin T. Huebner, Note, *Beyond* Tanner*: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, 1472 (2006).

and the American colonies liberally allowed jurors' testimony and affidavits,[10] frequently without any questions[11] or hesitation.[12]

However, this relatively liberal admissibility convention ended in 1785 with Lord Mansfield's opinion in *Vaise v. Delaval*,[13] where the court excluded a juror's testimony that the verdict had been reached by a game of chance.[14] The resulting rule, later known as Mansfield's Rule, prohibited jurors from testifying about either their subjective mental processes or events that occurred during deliberations.[15] Rooted in the doctrine that a witness should not be heard to allege his own moral turpitude,[16] the Mansfield Rule sharply distinguished between testimony about deliberations by a juror (which is inadmissible) and testimony about deliberations by a non-juror (which is admissible).[17] For the first time, English courts adopted a rule protecting the secrecy of the jury's deliberations to avoid the corruption that would result from inquiring into verdicts.[18] Mansfield's Rule thus fundamentally transformed evidence laws by routinely excluding evidence that would have been admissible a scarce half-century before.[19]

B. American Applications of the Mansfield Rule: The Federal Approach and the Iowa Rule

The Mansfield Rule, however, was not free from criticism or condemnation.[20] Wigmore, for one, commented that the Rule was "neither strictly correct as a statement of the acknowledged law nor at all defensible upon any principle in this unqualified form. It is a mere shibboleth and has no intrinsic signification whatever."[21] Perhaps because of these criticisms, adherence to the Mansfield Rule has never been universal in American courts.[22] Furthermore, even courts that used the Rule rarely interpreted it strictly.[23] Indeed, many jurisdictions in the United States substantially

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10. Greenberg, *supra* note 4, at 260.
11. *Id.*
12. Ronald L. Carlson & Steven M. Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 249 (1978).
13. (1785) 99 Eng. Rep. 944 (K.B.).
14. *Id.* For commentary on the importance of this decision, see Huebner, *supra* note 9, at 1472–73; John L. Rosshirt, Note, *Evidence—Assembly of Jurors' Affidavits to Impeach Jury Verdict*, 31 NOTRE DAME L. REV. 484, 484 (1956).
15. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).
16. Greenberg, *supra* note 4, at 260; Rosshirt, *supra* note 14, at 484.
17. Carlson & Sumberg, *supra* note 12, at 249.
18. Greenberg, *supra* note 4, at 261.
19. Rosshirt, *supra* note 14, at 484–85.
20. Greenberg, *supra* note 4, at 274.
21. *Id.* at 268 (quoting 8 WIGMORE ON EVIDENCE § 2345, at 677 (McNaughton Rev. 1961)).
22. Huebner, *supra* note 9, at 1473.
23. Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920, 925 (1978).

reduced and refined the Rule by allowing particular kinds of testimony to identify and correct flawed verdicts.[24] Eventually, two general departures from the Mansfield Rule solidified in American courts: the federal approach and the Iowa Rule.

The so-called federal approach to the no-impeachment rule, like the original Mansfield Rule, accepted that the finality interests protected by a robust no-impeachment rule outweighed the risks of juror misconduct.[25] Unlike the Mansfield Rule's complete ban, however, the federal approach permitted juror testimony offered to show that an "extraneous matter" *had* influenced the jury,[26] while it continued to prohibit evidence regarding *how* such extraneous matters had influenced the jury.[27] The federal approach thus refused to admit evidence of quotient verdicts, decisions to abide a majority vote, misinterpretation of instructions, or misuse of evidence; however, courts could hear evidence of improper juror contacts with bailiffs or parties, the introduction of unauthorized evidence into the jury room,[28] or personal investigations of the facts.[29]

A more substantial challenge to the Mansfield Rule—indeed, a "direct repost to Mansfield's Rule"[30]—was issued by the Iowa Supreme Court in *Wright v. Illinois Central and Mississippi Telegraph Co*.[31] By focusing on whether the "alleged [juror] misconduct was sufficiently litigable to justify threatening the finality of verdicts,"[32] the court declared a rule that greatly expanded the scope of the no-impeachment rule. Under the resulting Iowa Rule, affidavits by jurors would be admitted "to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself . . . ."[33] Thus, instead of allowing only evidence of *extraneous* misconduct, the Iowa Rule allowed evidence of *any* misconduct—including, crucially, misconduct that occurred inside the deliberation room—while still maintaining an exclusion on how the evidence impacted the jurors' decisions.[34]

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24. *Id.*

25. Chandran, *supra* note 8, at 34.

26. Warger v. Shauers, 135 S. Ct. 521, 526 (2014).

27. Mueller, *supra* note 23, at 926.

28. *Id.*

29. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).

30. 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, 882 (2009).

31. 20 Iowa 195 (1866).

32. Huebner, *supra* note 9, at 1474.

33. *Wright*, 20 Iowa at 210.

34. *See id.* (clarifying (1) the rule's allowance of evidence that a juror was improperly approached by a party, that witnesses discussed the case with the jurors out of court, or that the verdict was determined in an improper manner, and (2) the rule's prohibition of evidence that a juror

The *Wright* court articulated three reasons in support of its position.[35] First, the court argued that, in contrast to events or discussions that occurred during deliberation, matters personal to a juror were incapable of verification by objective proof;[36] thus, evidence of the former should be admitted and evidence of the latter excluded.[37] Second, the court noted that receiving affidavits of juror misconduct would positively affect the deliberations by creating the possibility of exposing such improprieties.[38] Finally, the court argued that while jurors who acted legitimately deserved the protection of the court, those who engaged in misconduct deserved no such protection and could properly be called to be witnesses to their own impropriety.[39]

By emphasizing the importance of the quality of the jury's decision-making process and making that process open to scrutiny by the courts,[40] the Iowa court rejected the principles supporting the federal approach: finality ceased to be the paramount concern. The Iowa Rule instead reflected a desire to balance finality with fairness by providing relief in cases of clear and objectively verifiable juror misconduct.[41] This shift, however, would lead to vacillating treatment by the Supreme Court of the United States on the issue of whether to admit juror affidavits impeaching a verdict.[42]

C. Conflicting Supreme Court Decisions

This fluctuation between interpretations of the no-impeachment rule also figured prominently in Supreme Court decisions. The first Supreme Court case to consider the admissibility of juror affidavits to impeach a verdict was *United States v. Reid*.[43] There, the Court considered the impact of a juror's affidavit that he had read a newspaper account of the case during deliberations; the juror insisted, however, that the newspaper did not influence his decision because he had already made up his mind.[44] The Court ruled that the affidavit would not be admitted in a motion for a new trial.[45] However, it was hesitant to rigidly adopt the Mansfield Rule,[46] stating that

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misunderstood the jury instructions or was "mistaken in his calculations or judgment," and evidence of "other matter[s] resting alone in the juror's breast").

35. Carlson & Sumberg, *supra* note 12, at 256.

36. *Id.*

37. *See Wright*, 20 Iowa at 210–11 (weighing the costs of allowing evidence of juror influences—which are impossible to disprove—against the benefits of allowing evidence of juror misconduct—"which, if not true, can be readily and certainly disproved by . . . fellow jurors").

38. Carlson & Sumberg, *supra* note 12, at 256.

39. *Wright*, 20 Iowa at 212; Carlson & Sumberg, *supra* note 12, at 256.

40. Carlson & Sumberg, *supra* note 12, at 256–57.

41. Huebner, *supra* note 9, at 1475.

42. Carlson & Sumberg, *supra* note 12, at 259.

43. 53 U.S. 361 (1851).

44. *Id.* at 362.

45. *Id.* at 366.

46. Carlson & Sumberg, *supra* note 12, at 259.

"[i]t would perhaps hardly be safe to lay down any general rule" on verdict impeachment, since "cases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice."[47]

Some forty years later, the Supreme Court again considered modifications to the no-impeachment rule in *Mattox v. United States*.[48] Mattox not only complained that jurors had read a newspaper account during deliberations, but also sought to introduce juror affidavits showing that the bailiff had engaged in misconduct.[49] While acknowledging the reasoning behind a policy supporting a blanket ban on juror testimony, the Court maintained that such a policy might "create an exception to its own rule" when the interest of justice commanded.[50] The Court found such an exception existed in *Mattox* because the juror misconduct was the effect of external causes, i.e., extraneous prejudicial information and improper outside influences.[51] Clearly, the Court's decision in *Mattox* indicated its adoption of the federal approach to the no-impeachment rule.

However, the *Mattox* Court also argued for changes to the no-impeachment rule in language similar to, and possibly informed by, the Iowa Rule. Not only did the Court determine that the affidavits were admissible because "[t]hey tended to prove something which did not essentially inhere in the verdict," it also argued that evidence of overt acts should be admitted because such acts are accessible "to the knowledge of all the jury . . . ."[52] The Iowa Rule's influence on the Supreme Court's interpretation of the no-impeachment rule reached its height twenty years later in *Hyde v. United States*,[53] where the Court prohibited juror testimony about "matters which essentially inhere[d] in the verdict itself . . . ."[54] At the turn of the twentieth century, then, it was clear that even the Supreme Court was struggling with the principles and contours of the no-impeachment rule.

The last significant word the Supreme Court would have on jury impeachment before the drafting of the Federal Rules came in *McDonald v. Pless*,[55] where the Court refused to admit a juror's affidavit alleging that the jury had delivered a quotient verdict.[56] Seemingly retreating from the liberal

47. *Reid*, 53 U.S. at 366.
48. 146 U.S. 140 (1892).
49. *Id.* at 142–43.
50. *Id.* at 148.
51. Miller, *supra* note 30, at 884.
52. *Mattox*, 146 U.S. at 148–49.
53. 225 U.S. 347 (1912).
54. *Id.* at 384.
55. 238 U.S. 264 (1915).
56. *Id.* at 266. A "quotient verdict" is one in which, instead of achieving true unanimity in determining the precise amount of damages to award the plaintiff, the jury adds the damages awards *each juror* believes is proper, then divides by the number of jurors. *See id.* at 265 (explaining the process by which the jurors in *Pless* arrived at their quotient verdict).

approach in *Mattox*,[57] the Court determined that the public injury resulting from a more permissive no-impeachment rule generally outweighed private injuries caused by juror misconduct.[58] In addition, the Court detailed the policies justifying this more restrictive rule: limiting juror testimony was necessary to preserve the finality of verdicts, promote the frankness of private deliberations, and prevent juror harassment by the litigants.[59] Significantly, however, the Court limited the extent of the rule to apply only in civil cases, stating that "[t]he suggestion that . . . jurors could not be witnesses in criminal cases . . . is without foundation."[60]

D. *Codified Rules*

While the Supreme Court struggled to develop a consistent jurisprudence around the no-impeachment rule, drafters of the Model Code of Evidence and the Uniform Rules of Evidence were coalescing around provisions that strongly resembled the Iowa Rule.[61] Rule 301 of the Model Code of Evidence allowed witnesses—"including every member of the jury"—to testify about "any material matter," including statements about jurors' conduct or condition, even if they occurred during deliberations.[62] The only limitation placed on admissibility was that no evidence was to be admitted "concerning the effect which anything had upon the mind of a juror as tending to cause him to assent to or dissent from the verdict . . . or concerning the mental processes by which it was reached."[63] Seeking to distinguish the Rule from the English common law and the majority of American cases, the drafters declared that "[t]he Rule permits the juror to testify to *every relevant matter* except his mental processes and the effect which any act or event had upon" the determination of the verdict.[64] An accompanying case illustration explained that, under the rule, evidence that jurors reached a verdict by a coin toss would be admissible, while evidence that a juror misunderstood the jury instructions or agreed to a verdict because she wanted to go home would be inadmissible.[65]

A similar development occurred in the Uniform Rules of Evidence, where two separate rules addressed the no-impeachment rule. Rule 41 disallowed the introduction of any evidence that would "show the *effect* of

57. Carlson & Sumberg, *supra* note 12, at 260.

58. *Pless*, 238 U.S. at 267.

59. *Id.* at 267–68; Huebner, *supra* note 9, at 1479.

60. *Pless*, 238 U.S. at 269.

61. *See* Greenberg, *supra* note 4, at 266–67 (noting that the Model Code of Evidence contained a similar provision to the Iowa Rule and that the Uniform Rules of Evidence were in accord with the Iowa Rule).

62. MODEL CODE OF EVIDENCE R. 301 (AM. LAW INST. 1942).

63. *Id.*

64. *Id.* R. 301 cmt. a (emphasis added).

65. *Id.* R. 301 cmt. a, illus. 3.

any statement, conduct, event or condition upon the mind of a juror as influencing him to assent or dissent from the verdict."[66] Rule 44 provided that Rule 41 "shall not be construed to exempt a juror from testifying as a witness . . . to conditions or occurrences either within or outside the jury room having a material bearing on the validity of the verdict."[67] The comments explained that the Rules imposed no limitations "on testimony about conditions or events bearing on the verdict"[68] and allowed for juror testimony on any "proper subject for judicial inquiry."[69] The comments further emphasized that Rule 44 was included out of an "abundance of caution" to make it clear that the rules imposed no additional limitations.[70]

II. From Writing the Rules to *Tanner v. United States*

It was against this backdrop of inconsistency and conflict that the Federal Rules of Evidence were drafted in 1975. The Supreme Court had struggled with the limits of the no-impeachment rule, and its opinions reflected the tensions between Mansfield's Rule, the Iowa Rule, and the federal approach. Those who sought to codify rules of evidence tended toward the more permissive Iowa Rule, while still acknowledging that most American cases advocated a stricter rule more in line with the federal approach.[71] These conflicts would plague Rule 606(b)'s drafting process and the judicial opinions that sought to explain and clarify the Rule. Thus, while courts have successfully articulated the policies supporting the Rule, they have struggled to apply it in a principled and consistent way.

A. The Drafting and Adoption of Rule 606(b)

When the Judicial Conference formulated its approach to the no-impeachment rule, it drew from "an extensive and still-vibrant common law debate."[72] Seeking to protect the policies supporting the no-impeachment rule while also avoiding "irregularity and injustice,"[73] the Rule's initial proposal "would have permitted much greater leeway for jurors to impeach their verdict" than under the federal approach.[74] In strikingly similar language to the Uniform Rules of Evidence, the Advisory Committee's proposed Rule excluded juror testimony only where it concerned the effect of anything upon

66. UNIF. R. EVID. 41 (emphasis added) (amended 1999).

67. *Id.* 44.

68. *Id.* 41 cmt.

69. *Id.* 44 cmt.

70. *Id.*

71. *See* MODEL CODE OF EVIDENCE R. 301 cmt. a (AM. LAW INST. 1942) (observing that "[t]he majority of American cases do not permit a juror to testify even to objective misconduct in the jury room").

72. Huebner, *supra* note 9, at 1478–79.

73. FED. R. EVID. 606(b) advisory committee's note to proposed rules.

74. Goldman, *supra* note 4, at 5.

a juror's mind or emotions or the juror's mental processes.[75] Through its explicit reference to *Wright*, the Committee indicated its proposed Rule was based on a long-standing precedent precluding evidence concerning jurors' mental processes, while permitting evidence concerning conditions or occurrences both inside and outside the jury room.[76]

Reluctant to adopt such a far-reaching rule, the Supreme Court recommended changes to the Advisory Committee's draft to bring the Rule closer to the federal approach it advocated in *Pless*.[77] When the Committee presented the new draft to the House, however, it was rejected because "it limited jury testimony to an unnecessary degree."[78] Referring to the Advisory Committee's original draft, the House emphasized that jurors were the only people "who know what really happened" during deliberations.[79] The House believed that allowing jurors to testify about objective instances of misconduct involved "no particular hazard" to values such as finality and free discussion, further noting that twelve states allowed such testimony.[80] The House therefore recommended adopting the Advisory Committee's original draft[81] and sent the Rule forward to the Senate.

When the House rule reached the Senate, however, it was heavily criticized "as promoting juror harassment, interfering with jury deliberations, and undermining finality."[82] Deeming the House's extension of the no-impeachment rule to be "unwarranted and ill-advised," the Senate Judiciary Committee recommended the Supreme Court's version, which "embodied long-accepted Federal law."[83] The Senate particularly objected to the draft's

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75. *Compare* Rules of Evidence for U.S. Dist. Courts and Magistrates, 46 F.R.D. 161, 289–90 (Preliminary Draft, 1969) ("[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.") *with* UNIF. R. EVID. 606(b) ("[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 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.").

76. Miller, *supra* note 30, at 887.

77. The federal approach had been reaffirmed by the Court in decisions between *Pless* and the drafting of the Federal Rules. *See, e.g.*, Marshall v. United States, 360 U.S. 310, 312–13 (1959) (holding that jurors' exposure to unfavorable news articles during trial was so prejudicial that the accused was entitled to a new trial, especially because the trial court had barred the articles' introduction into evidence); Remmer v. United States, 347 U.S. 227, 229–30 (1954) ("A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions.").

78. Goldman, *supra* note 4, at 6.

79. H.R. REP. NO. 93-650, at 9–10 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7083.

80. *Id.* The twelve states named by the House Judiciary Committee were California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington. *Id.*

81. Goldman, *supra* note 4, at 6.

82. *Id.*; S. REP. NO. 93-1277, at 13–14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

83. S. REP. NO. 93-1277, at 13–14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

refusal to prohibit testimony about conduct and statements made inside the jury room.[84] Allowing such testimony, the Senate argued, would open verdicts up to challenge on what happened during deliberations.[85] It would also encourage the harassment of former jurors by losing parties as well as possible exploitation of the system by "disgruntled or otherwise badly-motivated ex-jurors."[86]

Criticism of the House rule also came from the Justice Department and Senator John McClellan.[87] Senator McClellan suggested that overturning verdicts based on bias would lead to a flood of litigation that would damage the justice system,[88] and he expressed disbelief that it would be possible to conduct trials—particularly criminal prosecutions—"if every verdict were followed by a post-trial hearing into the conduct of the juror's deliberations."[89] The Senate Judiciary Committee echoed this concern, fearing that jurors would be unable to function effectively if their deliberations were scrutinized.[90] Accordingly, "[i]n the interest of protecting the jury system and the citizens who make it work,"[91] the Senate rejected the House proposal and recommended adoption of the Supreme Court's version.[92]

The version adopted by the Conference—and, with minimal changes, the version still followed today[93]—embraced the Senate's restrictions. Instead of allowing juror testimony except where it described a juror's mental process, the adopted Rule opted for broadly prohibitive language with two exceptions:

> (b) Inquiry into the validity of a 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 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, except that a juror may testify on the question[:]

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84. *Id.*
85. *Id.*
86. *Id.*
87. Goldman, *supra* note 4, at 5.
88. *Id.*
89. 117 CONG. REC. 33641, 33645 (1971) (letter from Sen. McClellan).
90. S. REP. NO. 93-1277, at 14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.
91. *Id.*
92. Goldman, *supra* note 4, at 6.
93. The Rule was restyled in 2011, and an exception was added by amendment in 2006 to allow testimony that there was a mistake made in entering the verdict on the verdict form. *See* FED. R. EVID. 606(b) (1987) (amended 2006) (providing that juror testimony may be used to prove that the verdict was the result of a mistake in entering the verdict on the verdict form); FED. R. EVID. 606(b) (2006) (amended 2011) (emphasizing that the amended language was part of the restyling effort and such changes were intended to be stylistic rather than substantive).

> [(1)] whether extraneous prejudicial information was improperly brought to the jury's attention or
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> [(2)] whether any outside influence was improperly brought to bear upon any juror.
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> Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.[94]

While Congress believed that it was merely codifying common law principles about deliberative secrecy,[95] the changes from the Advisory Committee's first draft to the final version expanded the Rule's exclusionary impact significantly.[96] Though seemingly based on the federal approach,[97] the Rule also seemed broader than *any* previous common law doctrine because it also excluded juror testimony that would be prohibited for some other reason, such as hearsay.[98] It is true that Rule 606(b)'s exceptions are consistent with a long-held desire to shield the jury from outside influences in order to protect the legitimacy of the system itself.[99] It is equally true, however, that there was also a vibrant common law tradition that sought to balance the importance of deliberative secrecy with the costs of juror misconduct.[100] Nor were these competing common law traditions a relic of the distant past. As seen above, the Iowa Rule informed both the Advisory Committee and the House Judiciary Committee in writing Rule 606(b). Rule 606(b) may indeed amount to a conservative, modern-day restatement of an old principle,[101] but the challenges of the federal approach created difficulties for the Supreme Court as it sought—and continues to seek—the proper contours of Rule 606(b).

B. *The* Tanner *Decision*

Much of the current jurisprudence surrounding Rule 606(b) comes from the Supreme Court's decision in *Tanner v. United States*.[102] In *Tanner*, the Court was asked to determine the admissibility under Rule 606(b) of an affidavit from a juror alleging alcohol and drug use by jurors during the trial. The scope of the alleged juror misconduct was extraordinary: four jurors consumed one to three pitchers of beer between themselves during various

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94. FED. R. EVID. 606(b) (1977) (amended 2011).

95. Chandran, *supra* note 8, at 34.

96. Mueller, *supra* note 23, at 929.

97. Chandran, *supra* note 8, at 35. Recall that this distinction formed the basis of the federal approach, but was of little consequence for the Iowa Rule, which must be considered at least a competing "common law tradition." *See supra* Part I(B).

98. Mueller, *supra* note 23, at 932.

99. Courselle, *supra* note 1, at 220.

100. *Id.*

101. Mueller, *supra* note 23, at 972.

102. 483 U.S. 107 (1987).

recesses, two jurors had one or two mixed drinks during the lunch recess, and the foreperson had a liter of wine on three occasions.[103] Moreover, four jurors "smoked marijuana quite regularly during the trial"; two jurors ingested cocaine; one juror took marijuana, cocaine, and drug paraphernalia into the courthouse; and one juror even managed to sell to another juror a quarter pound of marijuana.[104] Unsurprisingly, this behavior affected the jurors' ability to focus during the trial: some of the jurors fell asleep during afternoon sessions, and one juror described himself as "flying."[105]

The Court approached Rule 606(b) in terms of the familiar "external/internal distinction" evident in the common law federal approach. Under the Court's interpretation, evidence that reflected misconduct that was "external" to the deliberations—extraneous influences and external information—could be admitted to impeach the verdict, but misconduct that reflected internal misconduct was barred.[106] The Court determined that the evidence of substance abuse was inadmissible because interpreting such evidence as an improper outside influence stretched the Rule beyond its appropriate application.[107] "However severe their effect and improper their use," the Court said, "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."[108]

More importantly, the *Tanner* opinion detailed the "substantial policy considerations" supporting its highly exclusionary interpretation of Rule 606(b).[109] The Court reasoned that "allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict [would] seriously disrupt the finality of the judicial process."[110] Furthermore, postverdict scrutiny of jurors' conduct would undermine full and frank deliberations, a willingness to return an unpopular verdict, and the community's trust in the jury system.[111] Most importantly, *Tanner* emphasized that, while "very substantial concerns" supported limiting the admissibility of evidence impeaching a verdict, defendants' Sixth Amendment interests in an unimpaired jury were protected by several aspects of the trial process:

> The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel.

103. *Id.* at 115.
104. *Id.* at 115–16.
105. *Id.* at 116.
106. *Id.* at 117.
107. *Id.* at 122.
108. *Id.*
109. *Id.* at 119.
110. *Id.* at 120 (citing Gov't of V.I. v. Nicholas, F.2d 1073, 1081 (3d Cir. 1985)).
111. *Id.* at 120–21.

> Moreover, jurors are observable to each other, and may report inappropriate juror behavior to the court *before* they render a verdict. Finally, after the trial a party may seek to impeach the verdict by non-juror evidence of misconduct.[112]

Justice Marshall's concurrence in part and dissent in part illustrated the divergent common law traditions that continued to animate the debate about the proper scope of Rule 606(b). Despite readily acknowledging the important policy considerations that supported the no-impeachment rule, Justice Marshall used language from the Advisory Committee notes to show that courts and commentators had also recognized that such a stringent interpretation could "only promote irregularity and injustice."[113] Furthermore, the majority's interpretation of Rule 606(b) as applying an absolute bar on testimony was not supported by the text. According to the text, the Rule *only* excluded juror testimony related to the jury's deliberations, and even this exclusion is limited to excluding testimony about certain juror conduct that has no verifiable manifestations.[114] Since the juror misconduct alleged in *Tanner* occurred before deliberations had begun and involved conduct that was unquestionably verifiable,[115] neither of these prohibitions should apply.

Marshall continued by stating that even if he agreed with the Court's "expansive construction of Rule 606(b)," both common sense and suggestions from commentators indicated that evidence of juror intoxication should be admissible under the outside-influence exception.[116] Marshall then contested the majority's comparison of intoxication and a viral illness, arguing that distinguishing between the two was simply "a matter of line-drawing," which courts were frequently called to do.[117] Finally, he declared the majority's reliance on other procedural safeguards "misguided":[118] voir dire was incapable of discovering if a juror would abuse drugs during a trial, such conduct could not be readily verifiable through nonjuror testimony, the jurors were unsupervised and unobservable by courtroom personnel when the misconduct occurred, and reliance on observations of the court was "particularly inappropriate on the facts of [the] case."[119]

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112. *Id.* at 127.

113. *Id.* at 137 (Marshall, J., concurring in part and dissenting in part) (quoting FED. R. EVID. 606(b) advisory committee's note on proposed rules).

114. *Id.* at 138.

115. *Id.*

116. *Id.* at 140–41. Indeed, as Justice Marshall points out, many commentators suggested that testimony as to drug and alcohol abuse fell under the outside influence exception *even when it occurred during deliberations*. *Id.* at 141.

117. *Id.*

118. *Id.* at 141–42.

119. *Id.*

C. *The Shortcomings of* Tanner

As Justice Marshall's opinion indicates, people questioned the adequacy of the *Tanner* protections as soon as the case was decided.[120] Criticism is particularly pointed regarding the adequacy of the voir dire "protection,"[121] for three reasons. First, the power of voir dire depends greatly on how the process itself is conducted and to what extent certain issues are probed, a decision that largely lies within the discretion of the trial judge.[122] Second, even where counsel conducts the questioning, strategic considerations may advise against asking the precise sorts of questions that are required to delve into jurors' potential biases and prejudices.[123] What's more, only a highly skilled lawyer can craft questions that are specific enough to elicit meaningful answers but generalized enough to avoid focusing the voir dire on something like racial prejudice. Third, even when highly skilled counsel conduct voir dire, jurors may choose to conceal information regarding their biases, especially where something like racial bias is involved.[124] Not only are jurors unlikely to willingly reveal their known biases and prejudices, many jurors are completely unaware of such biases, and honestly believe they can be fair and impartial.[125]

There is also a significant analytical problem plaguing the rule adopted by *Tanner*. While the Court correctly identified the policies that underlie the general bar on juror testimony—fullness and frankness of deliberations, protecting jurors from harassment, ensuring the legitimacy of the jury system, and promoting finality of verdicts—the internal/external framework it developed does not always serve those policies.[126] Consider, for instance, protecting and promoting deliberative secrecy. Even under the Iowa Rule—the most permissive form of the no-impeachment rule in use—courts' inquiries into "internal events" allow jurors to testify only about an objective *act* of misconduct while excluding testimony about the misconduct's *effect*.[127] It is hard to understand why applying this more permissive interpretation to other forms of "internal" misconduct would significantly

120. Leah S.P. Rabin, Comment, *The Public Injury of an Imperfect Trial: Fulfilling the Promises of* Tanner *and the Sixth Amendment Through Post-Verdict Inquiry into Truthfulness at Voir Dire*, 14 U. PA. J. CONST. L. 537, 542 (2012).

121. *E.g.*, *id.* at 552–55 (discussing voir dire's weakness as a Sixth Amendment safeguard).

122. *Id.* at 552.

123. Chandran, *supra* note 8, at 43; *see also* Rabin, *supra* note 120, at 553 ("[M]any attorneys may strategically refrain from requesting voir dire questions regarding racial bias as such questioning can lead to problematic and antithetical results.").

124. Rabin, *supra* note 120, at 552.

125. Amanda R. Wolin, Comment, *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, 285 (2012).

126. Huebner, *supra* note 9, at 1471, 1483.

127. *Id.* at 1485.

threaten the secrecy of deliberations *Tanner* seeks to protect.[128] Additionally, consider the goal of shielding jurors from postverdict harassment. Once again, the internal/external framework does little to promote this goal: because jurors may testify about external influences or extraneous information, litigants still have incentives to contact and interview jurors.[129] Not only does the *Tanner* framework fail to achieve these policies better than other interpretations of the no-impeachment rule, it also tends to over-exclude evidence, resulting in more misconduct going unheard and unrepaired.

III. The Current Jurisprudence

For years following *Tanner*, federal circuit courts struggled with applying the opinion's main findings to the cases that came before them. Significant circuit splits on the adequacy of voir dire and applying the internal/external framework to questions of racial prejudice resulted in two important Supreme Court decisions regarding Rule 606(b). However, these two cases—*Warger v. Shauers* and *Peña-Rodriguez v. Colorado*—suffer from the same interpretive difficulties that have long confronted the Supreme Court, and they further illustrate the fundamental tensions that make Rule 606(b) largely unworkable going forward.

A. *Circuit Conflicts over the Power of Voir Dire*

Because *Tanner* justified an expansive no-impeachment rule based on the idea that voir dire could protect defendants, it would stand to reason that when jurors lie during voir dire, courts should be more permissive toward admitting evidence of juror misconduct. Yet circuit courts confronted with this situation have ruled evidence of juror misconduct inadmissible, despite the apparent infirmity of the voir dire "protection."[130] In *Williams v. Price*,[131] the defendant sought to introduce evidence that the jurors lied during voir dire when they denied their racial prejudice.[132] During the voir dire proceedings, the trial court asked two questions regarding racial bias, and all the selected jurors' answers indicated that they had no racial biases.[133] In his

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128. *See id.* (explaining how juror testimony of misconduct via drug consumption, without revealing how it affected their thoughts, satisfies the *Tanner* rationale).

129. *Id.* at 1486.

130. The Supreme Court further ruled in *McDonough Power Equip., Inc. v. Greenwood*, that a mistaken response by a juror made during voir dire was not a sufficient basis to overturn a judgment based on juror misconduct. McDonough Power Equip. v. Greenwood, 464 U.S. 548, 555–56 (1984).

131. 343 F.3d 223 (3d Cir. 2003).

132. *Id.* at 225.

133. *Id.* at 226. The two questions asked were: "Do you personally believe that blacks as a group are more likely to commit crimes of a violent nature involving firearms?" and "Can you listen to and judge the testimony of a black person in the same fashion as the testimony of a white person, giving each its deserved credibility?" *Id.* All the selected jurors answered "no" to the first question and "yes" to the second. *Id.*

appeal, however, Williams relied on an affidavit submitted by a juror who alleged that other jurors "made remarks that suggested acute racial bias."[134] Williams argued that the courts were obligated to consider the juror's affidavit testimony, because the no-impeachment rule could not be applied to evidence that would support a claim of juror misconduct committed during voir dire.[135]

In a decision authored by then-Judge Alito, the court rejected this claim. If the argument were correct, the court reasoned, "a party could call jury members to testify about statements made during actual jury deliberations so long as the purpose for introducing the evidence was to show that a juror had lied during voir dire."[136] Such a claim clearly fell within Rule 606(b)'s prohibition on juror testimony "as to any matter or statement occurring during the course of the jury's deliberations."[137] While emphasizing the limited scope of the court's holding,[138] the opinion nevertheless suggested that at least one federal circuit viewed the scope of Rule 606(b) as unaffected by a failure of the voir dire protection.

Indeed, in some cases involving deceptive answers during voir dire, courts have held that evidence of misconduct was inadmissible despite a *Tanner* safeguard's clear failure. In *United States v. Benally*,[139] the judge asked two questions during voir dire about whether the jurors would be prejudiced against the defendant because he was Native American.[140] Though no juror answer indicated bias, the day after the jury announced its verdict one juror claimed that the deliberation had been improperly influenced by two jurors' racist claims about Native Americans.[141] The defendant argued that Rule 606(b) did not prohibit this evidence, because it was being offered to show that a juror had been dishonest during voir dire, not to inquire into the validity of the verdict.[142]

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134. *Id.* at 234–35.

135. *Id.* at 235.

136. *Id.*

137. *Id.* (quoting FED. R. EVID. 606(b)). In dicta, the court addressed whether the statements would be barred under Rule 606(b) if they were not made during deliberations since they would not concern any matter or statement made during deliberations or their effect upon the decision process. *Id.* at 236. While noting that it "appreciate[d] [the] argument," the court indicated that such an interpretation might "create the potential for the very sort of problems that the 'no impeachment' rule is designed to prevent." *Id.* at 236–37. Thus, it seems likely that the *Williams* court would have denied the admission of *any* evidence of juror misconduct on the basis of a lie told in voir dire, much as the Supreme Court later held in *Warger v. Shauers*. *See infra* notes 162–75 and accompanying text.

138. *Id.* at 237.

139. 546 F.3d 1230 (10th Cir. 2008).

140. *Id.* at 1231.

141. *Id.* at 1231–36.

142. *Id.* at 1235.

Relying on the policy rationales of protecting the integrity of the jury system and ensuring a finality to litigation[143] as well as the legislative history that accompanied Rule 606(b),[144] the court rejected this argument. "Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing" was to challenge the validity of the verdict.[145] Allowing juror testimony "through the backdoor of a voir dire challenge" would risk swallowing the rule, which the court declined to do given the importance of protecting jury deliberations from judicial review.[146] Crucially, the court noted that each *Tanner* protection "might not be equally efficacious in every instance of juror misconduct."[147] However, since voir dire *could* protect defendants, and since some of the other protections were unaffected, the court reasoned that the defendant's interest in an impartial jury was nevertheless unthreatened.[148]

Still other courts, however, took the opposite tack, arguing that at least in some cases the *Tanner* protections did not provide adequate safeguards. In *United States v. Villar*,[149] hours after the defendant was convicted, defense counsel received an email from one the jurors claiming that another juror engaged in racial profiling during deliberations.[150] In contrast to both *Williams* and *Benally*, neither party requested the court to ask jurors voir dire questions about racial or ethnic bias, and so no such questions were asked.[151]

While the court ultimately ruled that Rule 606(b) was inapplicable in this case because the alleged misconduct violated the defendant's Sixth Amendment right to a fair trial,[152] its analysis shows the skepticism some courts have expressed about the efficacy of the *Tanner* protections. Stressing that "the policies embodied in Rule 606(b) and underscored in *Tanner* are extremely important," the court nevertheless believed that the *Tanner* protections were inadequate in guarding against particular instances of misconduct.[153] The court noted that observation of the jury during proceedings was unlikely to identify jurors that might engage in misconduct, and also observed that relying on non-jurors to report misconduct was more likely to result in the reporting of alcohol or drug use than prejudice during

143. *Id.* at 1233–34.
144. *Id.* at 1238–39.
145. *Id.* at 1235.
146. *Id.* at 1236.
147. *Id.* at 1240.
148. *Id.*
149. 586 F.3d 76, 87 (1st Cir. 2009).
150. *Id.* at 78.
151. *Id.* at 79.
152. *Id.*
153. *Id.* at 87–88.

deliberations.[154] The court also remarked on the multiple ways voir dire failed at protecting defendants, from the recognition that jurors may be reluctant to admit racial bias[155] to the acknowledgement that tactical concerns would often lead to questions about bias or prejudice going unasked.[156]

Moreover, in *United States v. Henley*,[157] the Ninth Circuit determined that when the voir dire protection proved inadequate because of juror dishonesty, Rule 606(b)'s prohibitions should be relaxed.[158] There, a juror indicated on his voir dire questionnaire that he had no racial biases but later made racist statements to other jurors while they carpooled to and from the courthouse.[159] The court determined that an affidavit from another juror testifying to these statements was "indisputably admissible" to determine whether the juror had been honest during voir dire.[160] It then added that the Rule's primary purpose of insulating the jurors' private deliberations from post-verdict scrutiny would not be implicated by permitting juror testimony about what was said while the jurors carpooled to the trial.[161]

B. *The Supreme Court Weighs In*

It was not until 2014, in *Warger v. Shauers*,[162] that the Supreme Court would rule on whether evidence from deliberations indicating juror dishonesty during voir dire would be admissible under Rule 606(b). In this negligence case about a car accident, counsel for both parties conducted lengthy voir dire of the prospective jurors.[163] During these proceedings, Warger's counsel asked "whether any jurors would be unable to award damages for pain and suffering or for future medical expenses," as well as if any juror thought she could not be fair or impartial.[164] A prospective juror who later became the foreperson answered no to each of these questions.[165] After the jury returned a verdict for the defendant, a juror contacted Warger's counsel to express concern over the foreperson's conduct during deliberations.[166] She then signed an affidavit challenging the foreperson's ability to consider the case fairly and impartially.[167] Warger moved for a new

154. *Id.* at 87.
155. *Id.*
156. *Id.* at 87 n.5 (citing McDonough Power Equip. v. Greenwood, 464 U.S. 548, 558 (1984)).
157. 238 F.3d 1111 (9th Cir. 2001).
158. *Id.* at 1120–21.
159. *Id.* at 1121.
160. *Id.* (citing Hard v. Burlington N. R.R., 812 F.2d 482, 485 (9th Cir. 1987)).
161. *Id.* at 1120.
162. 135 S. Ct. 521 (2014).
163. *Id.* at 524.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* The affidavit claimed that the foreperson could not be impartial because her daughter had previously been involved in a car accident in which a person had died. This experience made

trial, contending that the foreperson had lied during voir dire about her impartiality.[168] He also claimed the affidavit was admissible under Rule 606(b) because it did not inquire into the validity of the verdict; rather, it inquired into the validity of the voir dire proceedings.[169]

Writing for a unanimous Court, Justice Sotomayor began by acknowledging the tortuous history and varied interpretations of the no-impeachment rule.[170] She then argued that Warger's interpretation would limit the scope of Rule 606(b) to prohibit *only* evidence of misconduct that occurred during deliberations.[171] The Rule's proper scope, she contended, was more expansive than this: it prohibited evidence about misconduct in *any proceeding* inquiring into the validity of the verdict, regardless of when the alleged misconduct the evidence referred to occurred.[172] If Warger's motion for new trial were granted, proceedings inquiring into the validity of the verdict would inevitably follow. Even though the alleged misconduct Warger complained of took place during voir dire, he would still be asking the court to consider evidence about deliberations in an effort to challenge the validity of the verdict.[173] Such admission would run directly contrary to the Rule's directives and, therefore, the motion for new trial must be denied.

The Court then reinforced the collective effectiveness of the *Tanner* protections, explaining that even if jurors concealed bias during voir dire, other protections assured impartiality.[174] The Court, however, ended with an important caveat: in a footnote, it advised that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process."[175]

C. *Muddying Through the Internal/External Distinction*

Determining the strength of the *Tanner* "protections," as well as how Rule 606(b) should be applied when such protections were clearly ineffective, was not the only aspect of *Tanner* that confounded lower courts. Many of them also found the internal/external distinction difficult to interpret and apply. Lower courts' interactions with the issue of whether or not racial bias fell within the "extraneous influence" exception articulated in Rule

the foreperson unlikely to vote for the plaintiff because of her belief that "if her daughter had been sued, it would have ruined her life." *Id.*

168. *Id.*

169. *Id.* at 524, 528.

170. *Id.* at 526–27.

171. *Id.* at 528.

172. *Id.*

173. *Id.*

174. *Id.* at 529.

175. *Id.* at 529 n.3.

606(b)(2)(A) illustrates this difficulty. For example, the Ninth Circuit in *Henley* presented the "powerful case . . . that Rule 606(b) is wholly inapplicable to racial bias" based on Supreme Court precedent which stated that a juror "may testify concerning any mental bias in matters *unrelated to the specific issues that the juror was called upon to decide*."[176] The court also suggested that it would support an interpretation of Rule 606(b) that considered racial bias "extraneous prejudicial information" while adding that, even without such a characterization, it would be consistent with the Rule's text to hold that racial bias does not generally fall within the scope of the Rule.[177]

However, other courts have determined that racial bias constitutes impermissible evidence of an internal process. The Sixth Circuit, for instance, declared flatly and with little analysis that racial slurs were internal influences and that testimony on such subjects should therefore be barred by Rule 606(b).[178] And the D.C. Court of Appeals, "in accordance with the overwhelming majority of decisions from other jurisdictions," held that evidence alleging racial bias could not be admitted because such bias did not constitute extraneous influence.[179] The expression of racial bias, according to the court, did not clearly fall within any definable category of "extraneous influence," nor was it evidence that the jurors could obtain outside of the trial process.[180] The application of *Tanner*'s internal/external divide, while perhaps helpful in determining some of the boundaries of Rule 606(b)'s application, has not offered guidance to lower courts on more difficult questions. This has often forced them to determine questions of admissibility based not on the text of the Rule, but rather on the protections afforded to criminal defendants by the Sixth Amendment.[181]

D. Peña-Rodriguez v. Colorado

Thus, when the Supreme Court met to hear oral arguments in *Peña-Rodriguez v. Colorado*, there was no consensus on either the admissibility of racial bias or how exactly *Tanner*'s internal/external distinction operated in the face of a constitutional challenge. Asked to determine whether a state rule modeled on Rule 606(b) applied to juror testimony that the deliberations had

176. United States v. Henley, 238 F.3d 1111, 1119–20 (9th Cir. 2001) (quoting Rushen v. Spain, 464 U.S. 114, 121 n.5 (1983) (per curiam)).

177. *Id.*; *see also* Wolin, *supra* note 125, at 289 (arguing that racial bias constitutes an impermissible extraneous influence that falls outside of Rule 606(b)'s prohibition).

178. Mason v. Mitchell, 320 F.3d 604, 636 (6th Cir. 2003).

179. Kittle v. United States, 65 A.3d 1144, 1151 (D.C. 2013).

180. *Id.* at 1150.

181. *See* Wolin, *supra* note 125, at 281 ("Every court except for the Tenth Circuit in *Benally* . . . has either held that such testimony is admissible under an exception to the Rule, or, if not, that the Sixth Amendment might require its admittance in certain situations. Until the Supreme Court decides this issue, courts will continue to struggle with the intersection of the Sixth Amendment and Rule 606(b).").

been tainted with racial bias, the Court was forced to address not only the contours of Rule 606(b), but also its interaction with the Sixth Amendment. In holding that Rule 606(b) could result in evidentiary rulings that would violate the Sixth Amendment, *Peña-Rodriguez* illustrated the deficiencies of Rule 606(b) in determining admissibility of juror testimony on its own terms.

Peña-Rodriguez was convicted in state district court of unlawful sexual contact and harassment.[182] After the jury had been discharged, two jurors contacted his attorney and told him that another juror had expressed anti-Hispanic bias during deliberations.[183] The attorney reported this to the court and obtained sworn affidavits from the two jurors, which described the biased statements.[184] After reviewing the affidavits and considering Colorado Rule of Evidence 606(b)—which is generally equivalent to its federal counterpart—the trial court acknowledged the bias but denied the motion for a new trial because the evidence was inadmissible since it occurred during deliberations.[185]

Justice Kennedy's opinion noted first that the Court's "early decisions did not establish a clear preference for a particular version of the no-impeachment rule"[186] and detailed the development of the law surrounding Rule 606(b), including the recognition in *Warger* that there may be extreme cases where the Sixth Amendment required an exception to the no-impeachment rule.[187] It then distinguished the racial bias in *Peña-Rodriguez* from the misconducts alleged in *Pless*, *Tanner*, and *Warger*. While the latter three decisions "involved anomalous behavior from a single jury—or juror—gone off course," *Peña-Rodriguez* involved "racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."[188] The Court noted a "pragmatic" distinction as well: the *Tanner* protections, while adequate to address other forms of prejudice, were largely ineffective in rooting out racial bias.[189] Voir dire was unlikely to uncover racial bias because of the inherent difficulty in posing such questions, and "the stigma that attends racial bias" made it unlikely that

182. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017).

183. *Id.*

184. *Id.* at 861–62.

185. *Id.* at 862.

186. *Id.* at 863.

187. *Id.* at 864–66.

188. *Id.* at 868. The Court received little pushback from the dissenters in distinguishing *Peña-Rodriguez* from earlier cases considering juror misconduct. Rather, as Justice Alito's dissent indicates, *see infra* notes 179–83 and accompanying text, the three dissenting Justices argued that there was no principled way to distinguish between racial bias and bias based on religion, gender, and sexual orientation. Transcript of Oral Argument at 3–4, 6–7, 56, Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (No. 15-606). The majority sought to distinguish race from other forms of bias by pointing out that the Sixth Amendment applied to the state through incorporation by the Fourteenth Amendment, which was primarily intended to deter racial discrimination. *Id.* at 5–6.

189. *Peña-Rodriguez*, 137 S. Ct. at 866, 868.

other jurors would report such misconduct to the court.[190] "It is one thing," the Court argued, "to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot."[191]

Relying in part on "the experiences of the 17 jurisdictions that have recognized a racial-bias exception,"[192] the Court therefore determined that Rule 606(b)'s prohibition of evidence of racial bias infringed upon a defendant's Sixth Amendment rights. "[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant," the Court concluded, "the Sixth Amendment requires that the no-impeachment rule give way . . . ."[193] The majority added—perhaps in an effort to limit the scope of the holding—that "[n]ot every offhand comment indicating racial bias or hostility" would be admissible, but only those statements that "tend[ed] to show that racial animus was a significant motivating factor in the juror's vote to convict."[194]

While Justice Thomas contributed a brief dissent, the main opposition was provided by the author of one of the most influential circuit opinions in determining the scope of Rule 606(b): Justice Alito. After emphasizing the importance of keeping deliberations confidential, Alito argued that "*Tanner* and *Warger* rested on two basic propositions."[195] The first, which the majority did not dispute, was that the no-impeachment rule advances crucial interests such as verdict finality and deliberative secrecy; the second, reaffirming *Tanner*, was that the right to an impartial jury is adequately protected by procedures other than the use of jury testimony regarding deliberations.[196] Through individual questioning of prospective jurors and the use of "subtle and nuanced" questions, a carefully conducted voir dire was capable of adequately protecting defendants' interests in a fair trial even where jurors may hold racial biases.[197]

Alito ended his dissent by arguing that while it was "undoubtedly true" that racial bias implicated unique concerns, he could not see what these concerns "ha[d] to do with the scope of an individual criminal defendant's Sixth Amendment right[s] . . . ."[198] The Justice argued that the majority's decision was incapable of producing principled distinctions between different types of juror partiality, which threatened to completely subsume

190. *Id.* at 869.
191. *Id.*
192. *Id.* at 870.
193. *Id.* at 869.
194. *Id.*
195. *Id.* at 879 (Alito, J., dissenting).
196. *Id.* at 879, 884–85.
197. *Id.* at 880.
198. *Id.* at 883 (emphasis omitted).

the no-impeachment rule.[199] If the Sixth Amendment required the admission of evidence showing one type of juror partiality, Justice Alito reasoned, it equally required evidence showing any type of juror partiality.[200] Since such a concept ran against Rule 606(b)'s general ban on evidence to impeach a verdict, Justice Alito argued that the Court should not allow this type of evidence to be admitted.

IV. Toward a Better No-Impeachment Rule

Justice Alito was not the first person to doubt that there is a principled distinction between racial bias and any other form of internal bias.[201] One commentator had previously noted that no language existed in the Sixth Amendment that would justify treating racial comments differently from other comments indicating partiality or unfairness,[202] while another deemed it "unlikely" that courts would use the type of reasoning deployed in *Peña-Rodriguez* for fear that it "would effectively undercut the entire purpose of Rule 606(b)."[203] If for no other reason, then, the holding in *Peña-Rodriguez* that the Sixth Amendment might sometimes render Rule 606(b) unconstitutional suggests a rethinking of the Rule itself.

To be sure, proposals for amending Rule 606(b) have been made in the past. People concerned with the impact of racial bias have argued that the Rule should include instructions indicating that racial bias should fall within one or both of the Rule's exceptions.[204] Others think the Rule should add a fourth exception allowing for allegations of racism that occurred during deliberations.[205] Still others have advocated for adding an exception that would allow the introduction of evidence that violence or a threat of violence was made upon one juror by another.[206] Because these suggestions predate both *Warger* and *Peña-Rodriguez*, however, they do not consider these decisions or the difficulties in interpreting and applying Rule 606(b) that led to them. Such suggestions, therefore, either do not go far enough or are no longer applicable given the Supreme Court's understanding of the scope of the Rule.[207] At least one more recommendation, then, is in order.

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199. *Id.* at 884.

200. *Id.* at 883.

201. Chandran, *supra* note 8, at 44.

202. Goldman, *supra* note 4, at 19.

203. Chandran, *supra* note 8, at 44.

204. *See, e.g.*, Wolin, *supra* note 125, at 293 (asserting that because "such bias or prejudice is not part of the record, . . . it should be considered either extraneous prejudicial information or an outside influence").

205. *See, e.g.*, Chandran, *supra* note 8, at 50 (concluding that the exception would help signal the legal system's "legitimacy," particularly in communities of color, which have historically experienced a distrust of law enforcement).

206. Carlson & Sumberg, *supra* note 12, at 271.

207. *See* Cynthia Lee, *Peña-Rodriguez v. Colorado: The Court's New Racial Bias Exception to the No-Impeachment Rule*, GEO. WASH. L. REV. (Mar. 19, 2017), http://www.gwlr.org/pena-

The first and most drastic change that should be made is to create two separate no-impeachment rules: one governing the admissibility of evidence in criminal trials and one governing the admissibility of evidence in civil trials. A number of factors support this separation. First, older Supreme Court precedent indicates that the Court understood that a strict no-impeachment rule was only applicable in civil cases.[208] Second, it is the simplest and most effective way to account for the Supreme Court's recognition in *Peña-Rodriguez* of the inherent conflict between Rule 606(b) and the Sixth Amendment[209] while preserving the existing Rule in cases where it is not in conflict. Third, it accords with the practice of other Federal Rules of Evidence that make constitutionally based distinctions for criminal defendants. Rule 803(8)—the public-records exception to the hearsay rule—is illustrative of this distinction: the exception does not allow for factual findings of a legally authorized investigation to be introduced against criminal defendants because of concerns rooted in the Confrontation Clause of the Sixth Amendment.[210] Finally, the separation accords with other postverdict relief available solely for criminal defendants, such as habeas corpus petitions, claims of ineffective assistance of counsel, and *Batson* challenges.

Furthermore, while Rule 606(b)'s current construction can be retained for civil trials, the rule governing criminal trials should be altered. In accordance with the Iowa Rule, it should only disallow evidence of jurors' mental and decision-making processes. While such a change would certainly lead to more evidence being admitted, it would also ensure courts balance the interests of deliberative secrecy with avoiding juror misconduct. Moreover, allowing the court to consider more instances of juror misconduct—particularly statements indicating biases against minorities—would have benefits beyond individual defendants. In fact, rather than *threatening* the jury system's legitimacy,[211] a more permissive rule might actually *strengthen* the jury system's legitimacy, particularly among communities of color.[212]

The fears of Justice Alito and others that the no-impeachment rule will perish if it adopts such a policy of greater admissibility are arguably suspect. After all, if the sanctity of jury deliberations and the finality of verdicts were

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rodriguez-v-colorado-the-courts-new-racial-bias-exception-to-the-no-impeachment-rule/ [https://perma.cc/N45M-E7W7] (noting that *Peña-Rodriguez* may prompt reconsideration of previously established notions regarding confidence in jury verdicts).

208. *See* Miller, *supra* note 30, at 886 (noting that the Court ended its opinion in *Pless* by clarifying that the more robust no-impeachment rule it adopted therein was only applicable in civil cases); McDonald v. Pless, 238 U.S. 264, 269 (1915) (explaining that, though it is true that a losing party cannot use the testimony of a juror to impeach their verdict, this rule is limited to private parties and does not reach criminal cases or contempt proceedings).

209. Wolin, *supra* note 125, at 265, 267–68.

210. FED. R. EVID. 803(8)(A)(iii).

211. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 705 (1997).

212. *See* Chandran, *supra* note 8, at 44–45 (noting courts' indifference towards juror racism has delegitimized the court system before communities of color).

the only considerations, the Advisory Committee should have simply adopted Mansfield's Rule. But the drafters of the Rule understood that such a blanket rule of exclusion would create problems of its own, and important policy objectives could be achieved while still allowing for some needed exceptions. Few, if any, courts suggest that the "extraneous information" or "outside influence" exceptions threaten deliberative secrecy or the integrity of the jury system.[213] It seems overreactive, then, to suggest that any additional exceptions are liable to bring the whole system crashing down.

Amendments to Rule 606(b) would also not threaten the finality of verdicts, which is "[p]erhaps the most important policy supporting Rule 606(b)."[214] First, by expanding the Rule in only criminal cases, this change would impact those cases where only one party, the criminal defendant, could take advantage of greater admissibility, because the Fifth Amendment would bar prosecutors from retrying the case. Second, the fears that a more permissive no-impeachment rule would incentivize parties to challenge the finality of verdicts by seeking out impeachment testimony are unsupported by the empirical evidence. In fact, in almost every case that has addressed the issue so far, petitioners have not actively sought out juror testimony to impeach the verdict; rather, a member of the jury independently reached out and alerted the petitioners of misconduct.[215] Furthermore, the Rule could simply provide that defendants may only challenge the validity of the verdict using evidence obtained through a juror's independent disclosure[216] or evidence obtained from juror interviews conducted immediately after rendition of the verdict. This would alleviate concerns about the finality of verdicts and would also protect against—or at least not encourage—harassment of the jury.

It is undeniable that Rule 606(b) protects important interests of the justice system. Maintaining the secrecy of deliberations through a robust ban on evidence from deliberations serves several crucial functions, such as preserving the jury's independence and encouraging more well-considered verdicts.[217] But "[t]he right to a trial by an impartial jury lies at the very heart

213. *See* United States v. Thomas, 116 F.3d 606, 622–23 (holding FED. R. EVID. 606 and its limited exceptions embody traditional policy generally favoring deliberative secrecy); *see also* Rules of Evidence for U.S. Dist. Courts and Magistrates, 46 F.R.D. 161, 291 n.b (Preliminary Draft, 1969) (allowing jurors "to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected").

214. Goldman, *supra* note 4, at 10.

215. Chandran, *supra* note 8, at 50. The only case referred to in this Note where the jurors provided information about potential misconduct after questioning by attorneys was in *Peña-Rodriguez*. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017). Even in *Peña-Rodriguez*, however, the jurors were approached by the defense immediately following the discharge of the jury and stayed behind of their own accord to speak with the attorney privately. *Id.*

216. Chandran, *supra* note 8, at 50.

217. Courselle, *supra* note 1, at 211–12.

of due process"[218]—indeed, "stands guardian over all other rights."[219] Acts of juror misconduct fundamentally threaten this right. The protection of the right to a fair trial by an impartial jury requires a reckoning with a rule of evidence that often serves to confound and frustrate this right. Seventy years before the Supreme Court decided that Rule 606(b) conflicted with the Sixth Amendment, Judge Learned Hand warned of allowing evidence of juror misconduct to impeach a verdict.[220] Forced to ensure that verdicts were rendered only when every juror was entirely without bias, Hand prophesied that judges "would become Penelopes, forever engaged in unravelling the webs they wove."[221] Faced with the challenges created by our current understanding of the no-impeachment rule, perhaps the time has come for all of us to become Penelopes in the service of fairness and justice.

Fraser Holmes

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218. Smith v. Phillips, 455 U.S. 209, 224 (1982) (Marshall, J., dissenting) (citing Irvin v. Dowd, 336 U.S. 717, 721–22 (1961)).

219. Dennis v. United States, 339 U.S. 162, 173 (1950) (Jackson, J., concurring).

220. Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir. 1947).

221. *Id.*