"EXTRANEOUS PREJUDICIAL INFORMATION": REMEDYING PREJUDICIAL JUROR STATEMENTS MADE DURING DELIBERATIONS

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Federal Rule of Evidence 606(b) precludes juror testimony regarding deliberations, but contains an exception for "extraneous prejudicial information." A circuit split on the issue of what qualifies as "extraneous prejudicial information" has created dramatic inconsistency in the application of the Rule. This Note evaluates the role of juries, discusses the policy concerns on which the Rule is based, provides historical context for how the circuit split was created, highlights the pitfalls of the narrow interpretation of "extraneous prejudicial information," and makes a case for reform using state variations on the Federal Rule. I conclude that Rule 606(b) must be amended and that this can be done without undermining the policy concerns that have caused some circuits to be reluctant to implement change.

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INTRODUCTION

The jury in the recent *Apple v. Samsung* patent infringement case awarded a record verdict of $1.05 billion in favor of Apple, but Samsung is crying foul.[1] Samsung alleges that the jury foreman, Velvin Hogan, failed to answer truthfully during voir dire.[2] When asked whether he had been involved in any lawsuits, Mr. Hogan failed to disclose that his former employer, Seagate, sued him for breach of contract and that he filed for bankruptcy.[3] As the single largest direct shareholder, Samsung has a "substantial strategic relationship" with Seagate.[4] Also, the attorney who sued Hogan on Seagate's behalf was the husband of a partner at the firm representing Samsung.[5] Samsung alleges that Hogan's failure to disclose the

1. Vanessa Blum, *Apple Tries to Hold on to Record Patent Verdict Against Samsung*, LAW.COM (Dec. 6, 2012), http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202580661915&Apple_Tries_to_Hold_on_to_Record_Patent_Verdict_Against_Samsung.

2. Samsung's Notice of Motion and Motion for Judgment as a Matter of Law, New Trial and/or Remittitur Pursuant to Federal Rules of Civil Procedure 50 & 59 at 2, Apple Inc. v. Samsung Elecs. Co., 926 F. Supp. 2d 1100 (N.D. Cal. 2013) (No. 11-cv-01846-LHK), 2012 WL 4739391 [hereinafter Samsung's Motion].

3. *Id.*

4. *Id.*

5. *Id.*

Seagate lawsuit prevented it from exploring additional issues related to his bias during voir dire and from moving to strike him for cause or exercising a peremptory strike.[6] Samsung also points out that Hogan remained silent when asked whether he had strong opinions about the patent system or intellectual property law, but gave a post-verdict news interview where he explained that he wanted to protect copyrights and intellectual property rights in order "to send a message to the industry" and "make sure the message . . . was not just a slap on the wrist."[7] Hogan owned two technology patents,[8] and Samsung alleges that he provided his fellow jurors with an incorrect legal standard for patent infringement during deliberations.[9] Although the court instructed the jury that they must decide the case solely on the evidence presented, one of Hogan's fellow jurors explained in a news interview that Hogan used his experience with patents to sway the jury[10]: They initially awarded damages for patents that were not even infringed but later amended their award at the request of the court.[11]

Post-verdict interviews of the *Apple v. Samsung* jurors raise myriad issues pertaining to the validity of the verdict. What other prejudicial remarks did Hogan make during the deliberations? Did Hogan conceal material information during voir dire? Because the deliberations were private, the most effective means of determining what Hogan said during deliberations is through juror testimony. In some, but not all, federal circuit courts, this testimony would be precluded. The circuits are split on this very question.

Federal Rule of Evidence 606(b) creates a blanket prohibition of juror testimony regarding deliberations but establishes three exceptions. In other words, jurors may only testify to matters that fall within one of the exceptions. Specifically, Rule 606(b) provides:

> 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. . . . A juror may testify about whether (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.[12]

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6. *Id.*
7. *Id.* at 3.
8. Exhibit H to the Estrich Declaration at 2, Apple Inc. v. Samsung Elecs. Co., No. 11-cv-01846-LHK (N.D. Cal. Mar. 1, 2013) .
9. Samsung's Motion, *supra* note 2, at 3.
10. Declan McCullagh & Josh Lowensohn, *Samsung Raises Jury Misconduct in Bid for New Apple Trial*, CNET (Sept. 24, 2012, 3:01 PM), http://news.cnet.com/8301-13579_3-57519238-37/samsung-raises-jury-misconduct-in-bid-for-new-apple-trial.
11. *Id.*
12. FED. R. EVID. 606(b).

This Note will only address the extraneous prejudicial information exception in Section A. The Federal Rules of Evidence do not define "extraneous prejudicial information," but courts generally interpret the phrase to mean factual information considered during deliberation about a litigant or the case that was not introduced as evidence at trial.[13]

Some federal circuits have held that prejudicial juror statements based on personal experiences—such as Mr. Hogan's alleged comments regarding the standard for patent infringement—are not extraneous prejudicial information, thus jurors are unable to testify that the statements were made during deliberation.[14] These same circuits have held that jurors may testify that the jury accessed materials not in evidence, even when the materials do not contain prejudicial information.[15]

The distinction some circuits have drawn between jurors' personal experiences related to the litigation and accessing materials not in evidence is unworkable and must be reconsidered so jurors are able to testify regarding these prejudicial statements made during deliberations. When prejudicial information is presented in the jury room, the jury abandons its duty to decide the case based solely on the law and evidence, regardless of whether the information comes from a juror's personal experience or from an outside source.[16] In Part I, this Note evaluates the jury's duty to decide cases based solely on the law and evidence presented at trial, voir dire's shortcomings in furthering this objective, and the policy considerations Rule 606(b) seeks to protect. Part II considers the Rule's constitutional implications in certain cases and evaluates the circuit split. In Part III, this Note discusses the merits of the broad interpretation of the phrase "extraneous prejudicial information" and surveys state approaches that balance litigants' rights with the policy concerns embedded in the Federal Rule. Finally, this Note concludes that the policy considerations on which Rule 606(b) is based can be protected without the broad preclusion of juror testimony some circuits apply and suggests an alternative approach that responsibly manages this testimony. Jurors must be permitted to testify to prejudicial juror statements made during deliberations, particularly when the statements indicate deceit during voir dire or racial or ethnic bias. In order to protect litigants' rights and achieve uniformity in federal courts, Rule 606(b) should be amended to (1) clarify that prejudicial statements based on a juror's personal experience are always extraneous, (2) enable jurors to testify regarding these statements when they are

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13. *See* Dean Sanderford, *The Sixth Amendment, Rule 606(b), and the Intrusion into Jury Deliberations of Religious Principles of Decision*, 74 TENN. L. REV. 167, 182 (2007).

14. *See, e.g.*, United States v. Benally, 546 F.3d 1230, 1237–38 (10th Cir. 2008).

15. *See, e.g.*, United States v. Davis, 60 F.3d 1479, 1482–83 (10th Cir. 1995).

16. *See* Sanderford, *supra* note 13, at 173 (noting that some courts permit jurors to testify to the presence of a Bible in the jury room but prohibit testimony regarding whether the jury engaged in a discussion of biblical principles without the presence of a Bible, and concluding that in both cases the jury abandons its duty of deciding the case based on the law and facts presented at trial).

made during deliberations, and (3) preclude testimony regarding the statements' subjective effect.

I. BACKGROUND

Juries have a duty to rely solely on the law and evidence presented at trial. This is how our judicial system ensures that juror predispositions do not taint the fairness of proceedings. Voir dire is the litigants' opportunity to examine these predispositions, but as explained in section B, it is often ineffective at identifying biased jurors. When voir dire fails to identify biased jurors, and those jurors taint the impartiality of deliberations, the fairness of trials is undermined. For this reason, there must be an *ex post* mechanism for identifying when biased jurors have polluted the neutrality of deliberations.

Juror testimony is often the only way to determine whether a juror made prejudicial statements during deliberations, but some courts have applied Rule 606(b) to almost systematically preclude this testimony. As explained in section C, this is the case even though the Rule was only intended to bar testimony regarding jurors' thought processes (i.e., the *effect* that the statement(s) had on the jurors), and not simply whether a juror made prejudicial statements during deliberations.

A. A Jury's Duty to Rely Only on the Law and Evidence Presented at Trial

During the United States's founding era, the common law presumed that jurors would possess some personal knowledge of a case's facts.[17] Jurors who were not familiar with the events involved in the litigation were expected to investigate matters themselves prior to the trial.[18] The common law's impartiality concerns were satisfied as long as the jurors were not related to a litigant and did not have a financial interest in the trial.[19] Ironically, Anti-Federalists argued during the founding era that a local jury acquainted with the litigants' character and circumstances would best serve the interest of impartiality.[20] Proponents of this requirement asserted that jurors familiar with the parties and the underlying facts would be able to judge the character of the parties and the credibility of witnesses.[21]

This view eventually gave way to the modern notion that a jury unacquainted with the litigants and ignorant of the case makes an impartial decision more probable.[22] Although a juror's reliance on personal beliefs and experiences is now widely regarded as one of the jury system's great strengths, this

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17. Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1616 (2011) (citing Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1673 (2000)).

18. Engel, *supra* note 17, at 1674.

19. *Id.*

20. Morrison, *supra* note 17, at 1617 (citing 2 DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, ON THE ADOPTION OF THE FED. CONSTITUTION 112 (Jonathan Elliot ed., 1891) (1787) [hereinafter DEBATES]).

21. *Id.* (citing DEBATES, *supra* note 20, at 109–10).

22. *Id.* at 1619 (citing DEBATES, *supra* note 20, at 112–13).

reliance also increases the risk that the jury will reach a verdict on an improper basis.[23] The Rules of Evidence exist to limit the information juries use so they are not exposed to information that has not been tested for relevance, reliability, and prejudicial effect.[24] A juror's reliance on information that is not in evidence undermines this purpose. Reliance on personal experiences enhances the risk that a jury will reach a verdict without proper regard for the law and evidence presented at trial.[25] Simply put, when a juror relies on personal experience that is specifically related to the case or a litigant, the information is likely to become a substitute for the evidence presented at trial rather than an aid in evaluating the evidence.[26] For this reason, discussion of the case and litigants must be limited to what was presented at trial.[27]

B. Development of Voir Dire

The voir dire process also changed dramatically during the founding era. In voir dire's early days, jurors could be challenged for specific bias such as relation to a litigant or having an economic interest in the outcome of the case, but not for nonspecific bias such as "ill-feeling toward a litigant's class, race, or religion."[28] Parties were not permitted to question potential jurors on nonspecific biases.[29] Our country's founders reversed this practice, with Patrick Henry opining that the right to challenge partial jurors "is as valuable as the trial by jury itself."[30] Chief Justice Marshall affirmed this notion, holding that a juror who forms an opinion prior to hearing the evidence cannot be expected to decide the case as fairly as a juror whose judgment is not already made up.[31]

Voir dire is the litigants' opportunity to examine juror bias.[32] Modern voir dire promotes fairness by ensuring, at least in theory, that jurors will reach a verdict based solely on the evidence presented at trial and not on prejudicial

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23. Sanderford, *supra* note 13, at 173 (citing People v. Marshall, 790 P.2d 676, 699–700 (Cal. 1990)).

24. *See* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 765 (2004); *see also* FED. R. EVID. 403.

25. Sanderford, *supra* note 13, at 173 (citing *Marshall*, 790 P.2d at 699–700).

26. *Id.* at 183–84 (noting that when the information is specific to the issues involved in the case or the defendant, a jury is likely to use it in a manner inconsistent with the jury's duty to apply the law to the evidence presented at trial).

27. *E.g.*, Hard v. Burlington N. R.R., 812 F.2d 482, 486 (9th Cir. 1987) ("Jurors must rely on their past personal experiences when hearing a trial and deliberating on a verdict. Where, however, those experiences are related to the litigation . . . they constitute extraneous evidence which may be used to impeach the jury's verdict.").

28. Jon Van Dyke, *Voir Dire: How Should It Be Conducted To Ensure That Our Juries Are Representative and Impartial?*, 3 HASTINGS CONST. L.Q. 65, 67 (1976).

29. *Id.*

30. S. Mac Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 297 (1972) (emphasis omitted) (citation omitted).

31. United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,693).

32. *See, e.g.*, Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132, 1141 (7th Cir. 1992).

opinions.[33] Juror prejudice functions in a similar manner as inadmissible hearsay.[34] In both contexts, a jury's reliance on matters not presented in open court risks an unjust adjudication. Juror prejudice may not be specifically directed at a party, but it may be as damaging as hearsay statements regarding a party's culpability.[35] Voir dire essentially serves as cross-examination: It gives the parties the opportunity to ensure that the jurors will decide the case "on the basis of the evidence placed before them and not otherwise."[36]

The effectiveness of voir dire in identifying juror bias is contested, however. Although litigants have the opportunity to examine potential jurors' biases, critics of the system note that the process is ineffective in eliciting data that would identify prospective jurors as biased.[37] For instance, prospective jurors frequently give deceptive answers or withhold the truth during voir dire.[38] Justice Brennan opined that jurors will rarely admit bias "partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."[39] Most people are also unwilling to discuss their prejudices in public, and even fewer are willing to single themselves out by raising their hand in response to a general question about prejudices.[40] As a result, courts must infer juror bias from surrounding facts and circumstances.[41] Courts are to infer that a prospective juror is biased when she lies or withholds information in order to be selected.[42] Critics of voir dire also assert that the process provides an inadequate forum to question prospective jurors fully.[43] Courts tend to be hostile toward extended voir dire, and empirical studies indicate that lawyers believe prolonged questioning only serves to irritate the jurors that are selected.[44] Finally, lawyers are

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33. United States v. McClinton, 135 F.3d 1178, 1188 (7th Cir. 1998) (citing Murphy v. Florida, 421 U.S. 794, 800 (1975)); Gutman, *supra* note 30, at 304.

34. Gutman, *supra* note 30, at 304.

35. *Id.*

36. *Id.* (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965) *overruled on other grounds by* Batson v. Kentucky, 476 U.S. 79 (1986) (internal quotation marks omitted)).

37. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505 (1965).

38. *Id.* at 510–15.

39. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 558 (1984) (Brennan, J., concurring) (quoting Smith v. Phillips, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring) (internal quotation marks omitted)).

40. Van Dyke, *supra* note 28, at 80–81.

41. *McDonough Power Equip., Inc.*, 464 U.S. at 558 (Brennan, J., concurring).

42. Dyer v. Calderon, 151 F.3d 970, 982 (9th Cir. 1998) (en banc) ("The individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent.").

43. *See* Broeder, *supra* note 37, at 505; David Suggs & Bruce Dennis Sales, *Using Communication Cues to Evaluate Prospective Jurors During the Voir Dire*, 20 ARIZ. L. REV. 629, 630 (1978).

44. *See* United States v. Villar, 586 F.3d 76, 87 n.5 (1st Cir. 2009) ("[M]any defense attorneys have sound tactical reasons for not proposing specific voir dire questions regarding racial or ethnic bias because it might be viewed as insulting to jurors or as raising an issue defense counsel does not want to highlight. . . . [V]oir dire using questions about race or ethnicity may not work to a defendant's benefit where one of the robbers was

unable to anticipate many of the factors that influence a juror's thinking, such as her background.[45]

In sum, voir dire attempts to promote fairness by giving litigants an opportunity to examine juror bias. Voir dire seeks to ensure that jurors will reach a decision based on the evidence rather than personal prejudices. The process, however, is imperfect; it does not guarantee that every juror selected is impartial. When voir dire fails to identify biased jurors, or jurors who are unable to rely exclusively on the law and evidence presented at trial, fairness is undermined. Fairness requires a mechanism for reporting juror statements made during deliberations that indicate a juror failed to disclose a bias during voir dire.

The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which a party has the opportunity to prove actual bias."[46] To obtain a new trial because of a juror's failure to disclose a bias, a party must demonstrate that a juror failed to answer honestly a material question on voir dire and that a correct response would have provided a valid basis for a challenge for cause.[47] Litigants are permitted to introduce evidence demonstrating bias on the part of a juror who gave an incorrect answer during voir dire.[48] Although the narrow interpretation of "extraneous" that some circuits have adopted in analyzing Rule 606(b) often precludes the use of juror testimony regarding prejudicial statements made during deliberations, the reality is that juror testimony is frequently the only practical method of determining whether a juror provided an incorrect answer to a material voir dire question.[49] As a result, the most effective means of remedying prejudicial juror statements made during deliberations is by expanding Rule 606(b)'s exception for extraneous prejudicial information.

C. Policy Considerations Behind Rule 606(b)

Rule 606(b)'s broad prohibition of juror testimony is intended to protect the common law notions of "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment."[50] The

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described as Hispanic."); Broeder, *supra* note 37, at 505; Suggs & Sales, *supra* note 43, at 630.

45. *See* Broeder, *supra* note 37, at 505–06.

46. Smith v. Phillips, 455 U.S. 209, 215 (1982).

47. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

48. Skaggs v. Otis Elevator Co., 164 F.3d 511, 516 (10th Cir. 1998).

49. *See Villar*, 586 F.3d at 87 (explaining that nonjurors are not privy to juror statements made during deliberation and, as a result, are unlikely to report prejudicial statements).

50. FED. R. EVID. 606(b) advisory committee's note (citing McDonald v. Pless, 238 U.S. 264, 267–68 (1915)); *see also* Remmer v. United States, 347 U.S. 227, 229 (1954) ("The integrity of jury proceedings must not be jeopardized by unauthorized invasions."); United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976) (explaining that Rule 606(b) codifies the common law rule regarding juror testimony). For a detailed discussion of the common law origins of the prohibition of juror testimony, see Benjamin T. Huebner, *Beyond* Tanner*: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, Part I (2006).

Rule's framers feared that allowing the mental processes and emotional reactions of jurors to be challenged would "invite tampering and harassment."[51] The United States Supreme Court has noted that allowing a post-verdict inquiry into a jury's deliberations could lead to defeated parties harassing jurors in an attempt to obtain facts that could be used to set aside verdicts.[52] The Court concluded that this would result in private deliberations becoming the subject of public investigation and would undermine frankness and freedom of discussion.[53]

Rule 606(b)'s framers also noted, however, that completely insulating jury verdicts would promote irregularity and injustice.[54] The Advisory Committee on Rules reasoned that "the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation."[55] Recognizing the danger of systematically precluding juror testimony about what occurred in the jury room, the Supreme Court held "it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice. This might occur in the gravest and most important cases."[56] The advisory committee later concluded that allowing jurors to "testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected."[57] Rule 606(b) seeks to accommodate competing interests. On one hand, the Rule attempts to ensure fairness; on the other, it seeks to protect freedom of deliberation, finality of verdicts, and avoidance of juror harassment.[58]

Congress rejected a version of Rule 606(b) that would have allowed a significantly broader use of juror testimony in instances of juror misconduct.[59] The U.S. House of Representatives proposed a version that would permit jurors to testify about matters such as the misconduct of another juror during deliberations or the reaching of a quotient verdict.[60] The U.S. Senate rejected the House version of the Rule,[61] largely because of the conclusory objection that "strong policy considerations continue to support the rule that jurors should not be permitted to testify about what occurred during the course of their deliberations."[62] In adopting the Senate version of Rule 606(b), the congressional Conference Committee

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51. FED R. EVID. 606(b) advisory committee's note.
52. McDonald v. Pless, 238 U.S. 264, 267 (1915).
53. *Id.* at 267–68.
54. FED R. EVID. 606(b) advisory committee's note.
55. *Id.* (citing Mattox v. United States, 146 U.S. 140, 149 (1892)).
56. *McDonald*, 238 U.S. at 268–69 (internal quotation marks omitted).
57. FED R. EVID. 606(b) advisory committee's note.
58. *Id.*
59. Tanner v. United States, 483 U.S. 107, 122 (1987) (comparing 51 F.R.D. 315, 387 (1971), with 56 F.R.D. 183, 265 (1972)).
60. *Id.* at 125 (citing H.R. REP. NO. 93-1597, at 8 (1974) (Conf. Rep.)). A quotient verdict is an award of money damages in which each juror's opinion regarding the proper award is averaged with the other jurors' opinions so the final verdict reflects a compromise. BLACK'S LAW DICTIONARY 1697 (9th ed. 2009).
61. *Tanner*, 483 U.S. at 125.
62. *Id.* at 122 (citation omitted).

emphasized that jurors should be encouraged to report misconduct that occurs during jury deliberations.[63]

II. THE NEED FOR A CHANGE TO RULE 606(b) TO PROTECT LITIGANTS' RIGHTS AND MAKE APPLICATION MORE UNIFORM

Rule 606(b), as some circuits apply it, raises constitutional issues. Some of the courts that apply the restrictive definition of "extraneous" base their holdings on a misinterpretation of a Supreme Court case that was completely unrelated to prejudicial juror statements occurring during deliberations. This misinterpretation has created a circuit split on when juror testimony is allowed.

A. Rule 606(b)'s Constitutional Implications

An impartial jury, capable of deciding the case solely on the evidence before it, is crucial to the constitutional guarantee of a fair trial.[64] The Fifth and Sixth Amendments protect litigants from a jury's "lynch mob mentality" by guaranteeing due process of law and trial by an impartial jury.[65] To establish a violation of the Fifth or Sixth Amendment, a defendant must show a probability of prejudice.[66]

The Supreme Court has held that due process requires a fair trial before a fair and impartial tribunal in both civil and criminal cases.[67] It guarantees every litigant a jury that is able to decide the case solely on the evidence before it and a trial judge that seeks to prevent and remedy prejudicial occurrences.[68] Due process "is concerned not only with actual bias but also with the appearance of justice."[69] The impartiality requirement "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,'" by ensuring that no person is deprived of her interests by an

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63. FED R. EVID. 606(b) advisory committee's note (citing H.R. REP. NO. 93-1597 (1974) (Conf. Rep.)).

64. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984) (citing Smith v. Phillips, 455 U.S. 209, 217 (1982)).

65. United States v. McClinton, 135 F.3d 1178, 1185 (7th Cir. 1998).

66. *Developments in the Law—Race and the Criminal Process: Racist Juror Misconduct During Deliberations*, 101 HARV. L. REV. 1595, 1601 (1988).

67. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Murphy v. Florida, 421 U.S. 794, 799 (1975) ("The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors." (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)) (internal quotation marks omitted)); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Due process requires . . . a trial by an impartial jury free from outside influences."); *In re* Murchison, 349 U.S. 133, 136 (1955); *see also* Skaggs v. Otis Elevator Co., 164 F.3d 511, 515 (10th Cir. 1998) (holding that the denial of an impartial jury is a denial of due process).

68. *Smith*, 455 U.S. at 217.

69. Exxon Corp. v. Heinze, 32 F.3d 1399, 1403 (9th Cir. 1994) (quoting *Murchison*, 349 U.S. at 136) (internal quotation marks omitted).

arbiter predisposed to find against her.[70] Impartiality is in question when a jury learns of prejudicial information not in evidence, and due process may require a retrial.[71] Due process includes an opportunity to prove juror bias.[72] Because nonjurors are not privy to deliberations, juror testimony is the only means of proving this bias.[73]

The constitutional protections afforded to criminal defendants extend beyond due process alone. The Sixth Amendment guarantees criminal defendants a fair trial by impartial and indifferent jurors.[74] Courts hold that no right is more essential to the fairness of a trial.[75] The Sixth Amendment is contravened when a juror places her bias against the defendant over the law and evidence presented at trial.[76] The bias or prejudice of even a single juror violates the Sixth Amendment.[77] Although jurors are permitted to rely on their personal beliefs and experiences, this reliance may not supplant the law and evidence presented at trial.[78] The Supreme Court has held that the Sixth Amendment right to an impartial jury also requires that the defendant have an opportunity to prove jury bias.[79] Because nonjurors are not privy to juror statements made during deliberation, juror testimony is the only means of ensuring that extraneous information does not undermine the integrity of the deliberations.[80]

The Supreme Court has repeatedly affirmed that confrontation and cross-examination are among the fundamental requirements of a constitutionally fair

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70. *Marshall*, 446 U.S. at 242 (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

71. Housden v. United States, 517 F.2d 69, 70 (4th Cir. 1975).

72. Dennis v. United States, 339 U.S. 162, 171–72 (1950).

73. *See* United States v. Villar, 586 F.3d 76, 87 (1st Cir. 2009) (explaining that nonjurors are not privy to juror statements made during deliberations and, as a result, are unlikely to report prejudicial statements).

74. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

75. United States v. Lawson, 677 F.3d 629, 651 (4th Cir. 2012) (citing Stockton v. Virginia, 852 F.2d 740, 743 (4th Cir. 1988)).

76. Sanderford, *supra* note 13, at 172 (citing Smith v. Phillips, 455 U.S. 209, 216 (1982)).

77. United States v. Henley, 238 F.3d 1111, 1120 (9th Cir. 2001) (citing Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998) (en banc)); *see also* United States v. Booker, 480 F.2d 1310, 1311 (7th Cir. 1973) ("For if even one member of the jury harbors racial prejudice against the accused, his right to trial by an impartial jury is impaired.").

78. Sanderford, *supra* note 13, at 173.

79. *Smith*, 455 U.S. at 216 (citing Dennis v. United States, 339 U.S. 162, 171–72 (1950)); *see also* Wright v. United States, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) ("Certainly, if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the sixth amendment's [sic] guarantee to a fair trial and an impartial jury."); Tobias v. Smith, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979) ("Whatever the scope of a jurisdiction's non-impeachment rule, a court determination of whether particular jury events are open or closed to inquiry must consider a defendant's sixth amendment [sic] rights to confront witnesses, to the assistance of counsel, and to an impartial jury.").

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

trial.[81] The Sixth Amendment requires that the evidence against a defendant must be presented in a public courtroom where there is full protection of the right of confrontation, cross-examination, and counsel.[82] In *Parker v. Gladden*, the bailiff told the jury that the defendant was a "wicked fellow" and that he was guilty.[83] The Court held that the Sixth Amendment prohibited this prejudicial contact and reversed the jury conviction.[84] Although *Parker* did not involve prejudicial juror statements made during deliberations, its holding is instructive. Statements made outside of the courtroom are not subject to the protections the judicial process provides. There is a significant risk that jurors will impermissibly use these statements in reaching a verdict. As a result, all evidence against a criminal defendant must come from the witness stand, thereby ensuring a defendant the protection of the Sixth Amendment.[85] Because prejudicial statements made during deliberation are not subject to the protections of confrontation, cross-examination, and counsel, the Sixth Amendment requires the same result when these statements are more like new evidence than a discussion of the evidence presented in court.

An interpretation of Rule 606(b) that prevents trial judges from evaluating prejudicial occurrences during deliberations violates the Fifth and Sixth Amendments. Judges have a duty to evaluate whether prejudicial juror statements during deliberation made a difference in the outcome of a trial, but they cannot make this evaluation without juror testimony because nonjurors are not privy to deliberations.[86] Without the ability to establish jury prejudice through juror testimony, the Fifth and Sixth Amendments are empty promises.

B. The Tanner v. United States *Precedent*

Post-verdict inquiries into juror misconduct will occasionally lead to the reversal of jury verdicts.[87] As a result, the Supreme Court has been reluctant to implement change to the common law no-impeachment rule, which prohibits juror testimony elicited for the purpose of challenging verdicts.[88] In *Tanner v. United States*, the Court expressed its skepticism that "the jury system could survive such efforts to perfect it," and explained that individuals alleging juror misconduct could do so long after the verdict, thereby undermining the policy goal of finality.[89] The Court also noted, however, that drawing the line at whether juror

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81. Parker v. Gladden, 385 U.S. 363, 364–65 (1966) (per curiam); Pointer v. Texas, 380 U.S. 400, 400–08 (1965); *In re* Oliver, 333 U.S. 257, 273 (1948); Kirby v. United States, 174 U.S. 47, 55 (1899).

82. *Parker*, 385 U.S. at 364 (citing Turner v. Louisiana, 379 U.S. 466, 472–73 (1965)).

83. *Id.* at 363.

84. *Id.* at 364.

85. *Id.*

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

87. Tanner v. United States, 483 U.S. 107, 120 (1987).

88. *Id.*

89. *Id.*

misconduct took place inside or outside of the jury room is an unworkable formalism.[90]

Tanner involved a verdict challenged after a juror revealed that several of the other jurors drank heavily and used marijuana and cocaine throughout the trial.[91] In holding that juror testimony was inadmissible to demonstrate this misconduct, the Court reasoned that the defendant's Sixth Amendment right to a *competent* and *unimpaired* jury was protected by means other than juror testimony.[92] The Court reasoned that these rights were adequately protected by (1) voir dire, (2) observation by counsel and court personnel, (3) observation by other jurors, and (4) the use of nonjuror evidence of misconduct.[93] Notably, the Court did not assert that these protections are adequate in the context of prejudicial juror statements, but some courts have relied on this opinion to justify a broad preclusion of juror testimony regarding these statements

The four-Justice *Tanner* dissent questioned the effectiveness of the majority's four asserted protections, reasoning that reliance on these safeguards, to the exclusion of an evidentiary hearing with juror testimony, is misguided because juror misconduct is not readily verifiable without juror testimony.[94] The dissent noted that Rule 606(b) only "operates to prohibit testimony as to certain conduct by the jurors which has no verifiable manifestations," and that jurors are competent to testify to other matters.[95] In response to the majority's claim that the jury system may not survive attempts to perfect it, the dissent noted that this was not an attempt to perfect the jury system.[96] The dissenting Justices argued that precluding inquiry into juror misconduct may preserve the system, "but the constitutional guarantee on which it is based will become meaningless."[97] The dissent acknowledged the importance of freedom of deliberation, finality of verdicts, and protection of jurors against harassment, but reasoned that these policy considerations must give way when they "threaten the constitutional right to trial by a fair and impartial jury."[98]

Although *Tanner* did not involve prejudicial statements made during deliberations, some courts have used its holding to justify the preclusion of juror testimony regarding such statements.[99] These courts have reasoned that *Tanner*'s four safeguards are also sufficient to expose jury prejudice.[100]

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90. *Id.* at 117–18.
91. *Id.* at 115–16.
92. *Id.* at 126–27.
93. *Id.* at 127.
94. *Id.* at 141–42 (Marshall, J., concurring in part and dissenting in part).
95. *Id.* at 138 (emphasis omitted).
96. *Id.* at 142.
97. *Id.*
98. *Id.* at 137 (citing Parker v. Gladden, 385 U.S. 363 (1966); Mattox v. United States, 146 U.S. 140 (1892)).
99. *E.g.*, United States v. Benally, 546 F.3d 1230, 1240 (10th Cir. 2008).
100. *E.g.*, *id.*

C. Circuit Split

Federal circuit courts are split on what forms of juror communication fall under the "extraneous prejudicial information" exception to the general preclusion of juror testimony concerning deliberations. Outside the context of prejudicial statements during deliberations, circuit courts have held, in general, that, for purposes of Rule 606(b), "extraneous" includes instances of juror misconduct such as reading news reports about a case,[101] consulting a dictionary,[102] conducting an experiment,[103] searching the Internet,[104] viewing court documents containing inadmissible information[105] or other objects not in evidence,[106] communicating with a third party, accepting bribes, and other forms of jury tampering.[107]

Courts that utilize a narrow definition of "extraneous" do not consider a juror sharing her personal experiences or knowledge to be extraneous prejudicial information, thus drawing a distinction between jurors introducing outside evidence and jurors bringing "personal experiences to bear on the matter at hand."[108] Circuits utilizing this distinction bar juror testimony regarding deliberations regardless of how prejudicial sharing these personal experiences may be.[109] Courts that use the narrow interpretation of "extraneous" have held that prejudicial juror statements made during deliberations are not "extraneous prejudicial information" that a judge can consider, even when those statements are directly related to the issues being litigated and tend to show deceit during voir dire.[110]

Circuits that employ a broad definition of "extraneous" have held that the term includes "matters considered by the jury but not admitted into evidence."[111] In these circuits, prejudicial juror statements related to the litigation fall within

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101. United States v. Davis, 60 F.3d 1479, 1482–83 (10th Cir. 1995).

102. Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919, 921–22 (10th Cir. 1992).

103. Anderson v. Ford Motor Co., 186 F.3d 918, 920 (8th Cir. 1999).

104. U.S. v. Farhane, 634 F.3d 127, 168 (2d Cir. 2011).

105. U.S. v. Vasquez, 597 F.2d 192, 192–93 (9th Cir. 1979) (identifying court file accidentally left in jury room as extraneous information).

106. Farese v. United States, 428 F.2d 178, 179 (5th Cir. 1970) (holding that a large amount of cash found in defendant's shirt was extraneous information when only the shirt, and not the cash, was admitted into evidence).

107. 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 6075 (2d ed. 2012) (collecting cases).

108. United States v. Benally, 546 F.3d 1230, 1236–37 (10th Cir. 2008); *see generally* United States v. Barraza, 655 F.3d 375 (5th Cir. 2011); Williams v. Price, 343 F.3d 223 (3d Cir. 2003).

109. *See, e.g.*, Marquez v. City of Albuquerque, 399 F.3d 1216, 1223 (10th Cir. 2005).

110. *E.g.*, *Benally*, 546 F.3d at 1235–36.

111. United States v. Wintermute, 443 F.3d 993, 1002 (8th Cir. 2006) (citing United States v. Vig, 167 F.3d 443, 450 (8th Cir. 1999)); *see generally* United States v. Villar, 586 F.3d 76 (1st Cir. 2009); United States v. Henley, 238 F.3d 1111 (9th Cir. 2001); United States v. Boney, 68 F.3d 497 (D.C. Cir. 1995); United States v. Boylan, 898 F.2d 230, 259 (1st Cir. 1990); Hard v. Burlington N. R.R., 812 F.2d 482 (9th Cir. 1987).

Rule 606(b)'s exception for extraneous prejudicial information, particularly when the statements tend to show deceit during voir dire[112] or racial or ethnic bias.[113] These circuits repeatedly express that it is irrelevant whether the statements are based on the declarant's personal experiences when those personal experiences are related to the litigation.[114] Courts that utilize this broader meaning of "extraneous" note the trial court's inherent duty to investigate further when an allegation of jury prejudice arises.[115]

1. Restrictive View of "Extraneous Prejudicial Information" and Misuse of the Tanner *Precedent*

The Tenth Circuit acknowledged that the *Tanner* protections might not be effective in cases involving prejudicial juror statements, but nevertheless relied upon them in this context.[116] In *United States v. Benally*, a Native American defendant was charged with assaulting a law enforcement officer.[117] During deliberations, the jury foreman told the other jurors that he formerly lived near an Indian reservation and that all Native Americans get drunk and violent.[118] When another juror asserted that not all Native Americans get drunk and violent, the foreman replied, "Yes, they do."[119] Another juror stated that she had also lived near a reservation and that she agreed with the foreman's statement.[120] Some of the jurors also discussed the need to "send a message back to the reservation."[121] After the jury convicted the defendant, one of the jurors came forward with an account of what happened during the deliberations.[122] The trial court determined that the juror testimony fell within the "extraneous prejudicial information" exception and found that the testimony showed that "two jurors had lied on voir dire when they failed to reveal their past experiences with Native Americans and their preconception that all Native Americans get drunk and then violent."[123] The judge granted a new trial.[124] On appeal, the Tenth Circuit held that juror testimony regarding prejudicial statements made during deliberations cannot be used to

112. *E.g.*, *Hard*, 812 F.2d at 483–86.
113. *E.g.*, *Villar*, 586 F.3d at 87.
114. *E.g.*, *Hard*, 812 F.2d at 486. This interpretation is consistent with the dictionary definition of "extraneous": "[T]hat which is . . . external. . . . [N]ot . . . essential to a thing; coming from outside . . . not belonging to the matter under consideration; not pertinent." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 651 (2d ed. unabr. 1968).
115. United States v. Bradshaw, 281 F.3d 278, 289 (1st Cir. 2002) (citing United States v. Hunnewell, 891 F.2d 955, 961 (1st Cir. 1989)).
116. United States v. Benally, 546 F.3d 1230, 1240–41 (10th Cir. 2008).
117. *Id.* at 1231.
118. *Id.*
119. *Id.*
120. *Id.* at 1231–32.
121. *Id.* at 1232.
122. *Id.* at 1231–32.
123. *Id.* at 1232.
124. *Id.*

demonstrate deceit during voir dire and challenge the validity of the verdict.[125] The court held that the prejudicial statements were not extraneous and thus barred the juror testimony and affirmed the conviction.[126] None of the prejudicial statements in *Benally* were determined to be "specific extra-record facts relating to the defendant."[127] Although the court acknowledged that the statements may have been relevant to the matter before the jury, it concluded that this was irrelevant to the Rule 606(b) inquiry.[128] Instead, the court asserted, the inquiry is "whether the statements concerned specific facts about [the defendant] or the incident in which he was charged."[129] The court reasoned that allowing juror testimony under circumstances like these risks eviscerating Rule 606(b).[130]

The *Benally* court acknowledged that the *Tanner* protections might not be effective in the context of prejudicial juror statements because a judge will not be able to identify racist jurors as easily as drunken ones and voir dire is ineffective if a juror lies.[131] Notwithstanding these reservations, the court concluded that "jury perfection is an untenable goal. The safeguards that the Court relied upon for exposing the drug and alcohol use amongst jurors in *Tanner* are also available to expose racial biases of the sort alleged in Mr. Benally's case."[132] The court held that the attempt to remedy racial bias was "not necessarily in the interest of overall justice," as it would "sacrifice . . . structural features in the justice system."[133] The court also expressed its concern that subordinating the rules of evidence to racial prejudice challenges under the Sixth Amendment would lead to a slippery slope where courts disregard the rules of evidence for less serious violations.[134]

This logic renders the Sixth Amendment an empty promise. Because courts acknowledge that no right is more essential to the fairness of a trial than the requirement that jurors be impartial and indifferent, "structural features" of the trial process should be secondary concerns. Furthermore, slippery slope arguments should not be justification for denying a defendant her constitutional rights. As Justice Marshall noted in the four-Justice *Tanner* dissent, when Rule 606(b)'s policy considerations of freedom of deliberation, finality of verdicts, and protection of jurors against harassment by dissatisfied litigants "seriously threaten the constitutional right to trial by a fair and impartial jury, they must give way."[135]

The shocking outcome in *Benally* leads one to wonder whether the *Tanner* protections should even be considered protections in the context of

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125. *Id.* at 1235.
126. *Id.* at 1238.
127. *Id.* at 1237.
128. *Id.*
129. *Id.*
130. *Id.* at 1236.
131. *Id.* at 1240.
132. *Id.*
133. *Id.*
134. *Id.* at 1241.
135. Tanner v. United States, 483 U.S. 107, 137 (1987) (Marshall, J., concurring in part and dissenting in part) (citing Parker v. Gladden, 385 U.S. 363 (1966); Mattox v. United States, 146 U.S. 140 (1892)).

prejudicial juror statements. Because juror deliberations are private, counsel and court personnel are unable to observe prejudicial statements made during deliberation. For the same reason, it is unlikely that there will be nonjuror evidence of prejudicial statements.[136] Additionally, observation by other jurors serves little purpose if jurors are deemed incompetent to testify to prejudicial statements made during deliberations. Finally, if courts acknowledge that jurors lie during voir dire, voir dire should not be the only way to prevent prejudiced venirepersons from polluting the fairness of deliberations and the result reached. Although potential jurors may be charged with contempt for dishonesty during voir dire, and juror testimony is admissible for this purpose,[137] courts that employ the narrow definition of "extraneous prejudicial information" hold that juror testimony regarding this deceit cannot be used to impeach a verdict.[138] The *Benally* court's misplaced reliance on *Tanner* has become precedent for circuits that employ the narrow definition of "extraneous prejudicial information."

The Third Circuit, also relying on the *Tanner* holding, has held that Rule 606(b) "categorically bar[s] juror testimony as to any matter or statement occurring during the course of the jury's deliberations even if the testimony is not offered to explore the jury's decision-making process" and the testimony indicates deceit during voir dire.[139] In *Williams v. Price*, jurors called one juror who was sympathetic to the African-American defendant names such as "nigger lover" and made statements such as "[a]ll niggers do is cause trouble."[140] During voir dire, the jurors were asked whether they believed African Americans as a group are more likely to commit crimes and whether each juror could give an African American's testimony the same weight as the testimony of a white person.[141] Each juror answered "no" to the first question and "yes" to the second question.[142] In holding that Rule 606(b) precluded juror testimony regarding these statements, the court reasoned that voir dire questions focus on matters that can affect jurors' decision-making processes, and allowing juror testimony to show that a juror lied during voir dire is similar to "permitting an inquiry into the decision-making process itself."[143] The court went so far as to conclude that the Rule would preclude testimony regarding prejudicial statements that occurred outside of the jury room before deliberations started.[144]

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136. *See* United States v. Villar, 586 F.3d 76, 87 (1st Cir. 2009) ("[N]on-jurors are more likely to report inappropriate conduct—such as alcohol or drug use—among jurors than racial statements uttered during deliberations to which they are not privy.").

137. *See* Clark v. United States, 289 U.S. 1, 12–14 (1933); McDonald v. Pless, 238 U.S. 264, 269 (1915).

138. *Benally*, 546 F.3d at 1235; Williams v. Price, 343 F.3d 223, 235 (3d Cir. 2003).

139. *Williams*, 343 F.3d at 235–36 (internal quotation marks omitted).

140. *Id.* at 227.

141. *Id.* at 226.

142. *Id.*

143. *Id.* at 236.

144. *Id.*

The Fifth Circuit, relying in part on the *Benally* holding, has held that prejudicial statements that are the product of emotions influencing the juror are not "extraneous prejudicial information."[145] In *United States v. Barraza*, a judge was prosecuted after he allegedly sought money and sexual favors in return for favorable treatment in a pending case.[146] During deliberations, a juror told the other jurors that "men with power always make sexual advances" and shared an experience where she suffered workplace sexual harassment.[147] The court held that Rule 606(b) precluded testimony regarding these statements because the statements were the result of emotions influencing the juror.[148] Despite the fact that the defendant had allegedly made sexual advances, the court noted without explanation that Rule 606(b) precluded the testimony because the statements were unrelated to the defendant or the situation at trial.[149]

Expressly relying on the *Benally* and *Price* holdings, the court in *Warger v. Shauers* determined that Rule 606(b) precludes juror testimony regarding prejudicial statements made during deliberations even when the statements are used to show that a juror lied during voir dire.[150] During voir dire, the jurors confirmed that they would be able to award damages if the plaintiff, who lost part of his leg in an automobile accident, proved liability.[151] After the jury returned a verdict for the defense,[152] a juror submitted an affidavit explaining that the jury ignored the facts and evidence of the case.[153] According to the affidavit, the foreperson told the other jurors that her daughter had been at fault in an automobile accident in which a man was killed.[154] The foreperson explained that her daughter's life would have been "ruined" had she been sued.[155] After hearing the foreperson's story, other jurors were also concerned about ruining the defendant's life.[156] The court found that the affidavit was inadmissible under Rule 606(b) despite the fact that the affidavit alleged that the foreperson lied about her ability to award damages impartially and persuaded other jurors to disregard the facts and evidence of the case.[157]

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145. United States v. Barraza, 655 F.3d 375, 380 (5th Cir. 2011).
146. *Id.* at 379.
147. *Id.*
148. *Id.* at 380.
149. *Id.*
150. Warger v. Shauers, No. CIV. 08-5092-JLV, 2012 WL 1252983, at *11–13 (D.S.D. Mar. 28, 2012), *aff'd*, 721 F.3d 606 (8th Cir. 2013).
151. *Id.* at *1, *8.
152. *Id.* at *1.
153. *Id.* at *8.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at *8–13.

2. Broad View of "Extraneous Prejudicial Information"

The Ninth Circuit has recognized the danger of jurors relying on personal experiences related to the issues being tried.[158] In *Hard v. Burlington Northern Railroad*, a juror concealed during voir dire the fact that he was formerly employed by the defendant.[159] Three jurors submitted affidavits alleging that the juror made statements regarding the defendant's settlement practices during deliberations, but the trial court refused to consider the affidavits or hold an evidentiary hearing.[160] The Ninth Circuit held that Rule 606(b) does not bar juror testimony regarding statements that tend to show deceit during voir dire.[161] The court acknowledged that jurors must rely on personal experiences, but where "those experiences are related to the litigation, . . . they constitute extraneous evidence which may be used to impeach the jury's verdict."[162] The court reasoned that Rule 606(b) prevents jurors from testifying about the subjective effects of extraneous information, but allows testimony regarding objective facts.[163] In other words, a juror cannot testify to the subjective effect of anything upon her or any other juror's thought process, but may testify to "whether extraneous prejudicial information was improperly brought to the jury's attention."[164] Because the statements in *Hard* were evidence of extraneous prejudicial information, the court held that Rule 606(b) did not bar testimony regarding the statements and that the district court abused its discretion by not hearing this juror testimony.[165]

Drawing on *Hard*'s logic, the Ninth Circuit later held that where "a juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful."[166] In *United States v. Henley*, three African-American defendants were convicted of conspiracy to possess and distribute cocaine.[167] After the conviction, a juror alleged that one of the jurors made several racist comments, including the remark, "All the niggers should hang."[168] The court held that the juror testimony was admissible to impeach the verdict and that the defendants were entitled to a new trial if they could show that a juror failed to give an honest answer to a material question on voir dire and that a

158. Hard v. Burlington N. R.R., 812 F.2d 482, 486 (9th Cir. 1987).
159. *Id.* at 483.
160. *Id.*
161. *Id.* at 485.
162. *Id.* at 486.
163. *Id.* at 485–86 (citing Abatino v. United States, 750 F.2d 1442, 1446 (9th Cir. 1985)).
164. *Abatino*, 750 F.2d at 1446 (quoting FED. R. EVID. 606(b)).
165. *Hard*, 812 F.2d at 486.
166. United States v. Henley, 238 F.3d 1111, 1121 (9th Cir. 2001) (citing *Hard*, 812 F.2d at 485).
167. *Id.* at 1112, 1119.
168. *Id.* at 1113.

correct response would have provided a basis for a challenge for cause.[169] Additionally, the court noted that "a powerful case can be made that Rule 606(b) is wholly inapplicable to racial bias because . . . 'a juror may testify concerning any mental bias in matters *unrelated to the specific issues that the juror was called upon to decide*.'"[170]

The District of Columbia Circuit has also held that Rule 606(b) does not preclude inquiry into a juror's deceit during voir dire.[171] In *United States v. Boney*, a juror lied during voir dire about his status as a convicted felon.[172] The court reasoned that lying about something as important as felon status "raises at least the inference that the juror had an undue desire to participate in a specific case, perhaps because of partiality."[173] After holding that the presence of a felon on the jury does not warrant automatic reversal of a conviction,[174] the court held that the trial court erred by not evaluating possible prejudices the felon–juror may have brought to the jury deliberations.[175] The court reasoned that it would be appropriate for the trial court to ask the felon–juror whether his status as a felon ever came up during deliberations, and noted that any discussion of the juror's status as a felon during deliberations "would surely seem to be 'extraneous' and possibly 'prejudicial' as well"; thus, Rule 606(b) would not preclude this testimony.[176]

The First Circuit has held that where extraneous information has *allegedly* infected the jury, juror testimony should be allowed.[177] In *United States v. Villar*, the jury convicted a Hispanic man of bank robbery.[178] After the conviction, a juror alleged that many of the jurors disregarded the evidence and that one of the jurors said, "I guess we're profiling, but [Hispanic people] cause all the trouble."[179] The First Circuit determined that the plain meaning of Rule 606(b) precludes inquiry

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169. *Id.* at 1121 (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984)).

170. *Id.* at 1119–20 (quoting Rushen v. Spain, 464 U.S. 114, 121 n.5 (1983) (per curiam)) (emphasis in original) (internal quotation marks omitted).

171. United States v. Boney (*Boney II*), 68 F.3d 497, 503 (D.C. Cir. 1995).

172. *Id.* at 498.

173. *Id.* at 501 (quoting United States v. Boney (*Boney I*), 977 F.2d 624, 634 (D.C. Cir. 1992) (internal quotation marks omitted)).

174. *Boney I*, 977 F.2d at 633–34.

175. *Boney II*, 68 F.3d at 502.

176. *Id.* at 503.

177. United States v. Boylan, 898 F.2d 230, 259 (1st Cir. 1990) (citing Rushen v. Spain, 464 U.S. 114, 121 n.5 (1983) (per curiam); Mattox v. United States, 146 U.S. 140, 149 (1892)); *see also* United States v. Lara-Ramirez, 519 F.3d 76, 87 (1st Cir. 2008) ("Although the district court has broad discretion to fashion an appropriate procedure for assessing whether the jury has been exposed to substantively damaging information . . . *the judge does not have discretion to refuse to conduct any inquiry at all regarding the magnitude of the taint-producing event and the extent of the resulting prejudice*." (emphasis added) (citation omitted); United States v. Bradshaw, 281 F.3d 278, 289 (1st Cir. 2002) (holding that when a "colorable claim of jury taint surfaces during jury deliberations, the trial court has a duty to investigate the allegation promptly").

178. United States v. Villar, 586 F.3d 76, 78 (1st Cir. 2009).

179. *Id.* at 81.

into the validity of a verdict based on juror testimony regarding statements made during deliberations, but reasoned that the application of the Rule to bar testimony regarding racial or ethnic statements made during deliberations violates due process under the Fifth Amendment and the Sixth Amendment right to a trial by an impartial jury.[180] The court held that the four protections on which the *Tanner* Court relied[181] are inadequate in the context of racially and ethnically biased comments made during deliberations.[182] The *Villar* court noted that voir dire "has shortcomings because some jurors may be reluctant to admit racial bias"; visual observation of the jury is unlikely to identify biased jurors; and "non-jurors are more likely to report inappropriate conduct—such as alcohol or drug use—among jurors than racial statements uttered during deliberations to which they are not privy."[183] Accordingly, the court held that Rule 606(b) "cannot be applied so inflexibly as to bar juror testimony in . . . cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury."[184] The court reasoned that a defendant's Sixth Amendment rights would be satisfied by allowing the trial judge to hear juror testimony regarding prejudicial juror statements.[185] The judge would then determine whether biased statements were made during deliberation and whether there is a substantial probability that the comments made a difference in the outcome of the trial.[186] The court recognized that not every "off-base statement made during deliberations requires a hearing at which jury testimony is taken," but concluded that the Sixth Amendment's guarantee to a fair trial requires this testimony in certain cases involving racial or ethnic prejudice.[187]

As illustrated, federal courts have divergent views on the admissibility of juror testimony regarding prejudicial juror statements made during deliberations. Courts utilizing the narrow definition of "extraneous" preclude juror testimony even when the testimony would show that the prejudicial statements are directly related to the issues at trial or indicate deceit during voir dire.[188] Some of these courts rely on *Tanner*'s four asserted protections—voir dire, observation by counsel and court personnel, observation by other jurors, and the use of nonjuror evidence of misconduct—to justify this broad preclusion, even though *Tanner* addressed juror intoxication and not prejudicial juror statements.[189] Courts that employ a broader definition of "extraneous" question the efficacy of *Tanner's*

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180. *Id.* at 84–87.

181. The *Tanner* Court held, in the context of an allegedly impaired jury, that a defendant's right to an impartial and competent jury was adequately protected by (1) voir dire, (2) observation by counsel and court personnel, (3) observation by other jurors, and (4) the use of nonjuror evidence of misconduct. Tanner v. United States, 483 U.S. 107, 127 (1987).

182. *Villar*, 586 F.3d at 87.

183. *Id.*

184. *Id.* at 87, 90.

185. *Id.* at 88.

186. *Id.* at 87.

187. *Id.* at 87–88.

188. *See supra* Part II.C.1.

189. *See supra* notes 131–32, 139–44 and accompanying text.

protections in the context of prejudicial juror statements and allow juror testimony that tends to show deceit during voir dire or ethnic or racial bias.[190] These courts have utilized different justifications for admitting this type of testimony. The Ninth Circuit has suggested that, even if Rule 606(b) broadly precludes juror testimony, the prohibition should not apply to racial or ethnic bias because jurors are permitted to testify about mental bias in matters unrelated to the specific issues the jury is to decide.[191] The District of Columbia Circuit held that lying about something as important as felon status during voir dire raises at least the inference of bias, and that Rule 606(b) does not preclude inquiry into the possible prejudices the deceitful juror may have brought to the jury deliberations.[192] The First Circuit, though affirming that Rule 606(b) precludes juror testimony regarding racial or ethnic comments made during deliberations, explained that the Rule cannot be applied in a manner that violates due process or the right to an impartial jury.[193]

III. MERITS OF A BROADER INTERPRETATION OF RULE 606(b)

As explained, the narrow definition of "extraneous" that some circuit courts apply raises constitutional issues.[194] The voir dire process seeks to ensure that all jurors selected are capable of deciding the case solely on the basis of law and evidence presented at trial, but the effectiveness of voir dire is contested.[195] Biased jurors are likely to conceal their prejudices during voir dire, either intentionally or subconsciously, and procedural obstacles often prevent effective means of drawing out these biases.[196] Additionally, *Tanner*'s four asserted protections of the right to an impartial jury are insufficient in the context of prejudicial juror statements made during deliberations.[197] As a result of Rule 606(b), many courts have held that jurors are unable to testify to statements made by other jurors that reveal bias and/or deceit during voir dire.[198] The effect of this narrow interpretation of the Rule is to deny litigants the opportunity to challenge verdicts tainted by juror bias. The common law concerns of freedom of deliberation, finality, and avoiding juror harassment must be accommodated without sacrificing fairness and just results. It is important that participants in the justice system perceive it as fair.[199] Fairness requires that litigants have an

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190. *See supra* Part II.C.2.

191. *See supra* notes 158–70 and accompanying text.

192. *See supra* notes 171–76 and accompanying text.

193. *See supra* notes 177–87 and accompanying text.

194. *See supra* Part II.A.

195. *See supra* Part I.B.

196. *Id*.

197. *See, e.g.*, United States v. Villar, 586 F.3d 76, 87 (1st Cir. 2009) (reasoning that voir dire "has shortcomings because some jurors may be reluctant to admit racial bias"; visual observation of the jury is unlikely to identify biased jurors; and "non-jurors are more likely to report inappropriate conduct—such as alcohol or drug use—among jurors than racial statements uttered during deliberations to which they are not privy").

198. *See supra* Part II.C.1.

199. 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, 534 (1988); *see also* Exxon Corp. v. Heinze, 32 F.3d 1399, 1403 (9th Cir. 1994) (citing

adequate opportunity to redress miscarriages of justice.[200] Additionally, a jury's consideration of issues not in evidence can lead to incorrect or unjust results, and the preclusion of juror testimony prevents judges from remedying these miscarriages of justice.[201]

While Rule 606(b) seeks to promote "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment,"[202] these policy goals can be accomplished through less restrictive means than an absolute bar on juror testimony regarding prejudicial statements made during deliberations. Some states have adopted rules that successfully balance litigants' rights and the policy concerns embedded in the Federal Rule.[203]

A. California

Section 1150 of California's evidence code permits juror testimony to prove that a juror concealed bias during voir dire[204] and regarding conduct that is likely to have influenced the verdict improperly,[205] but excludes evidence of the misconduct's effect on the jurors.[206] In *People v. Steele*, the defendant was charged with murder and claimed that he suffered from a psychological dysfunction caused by traumatic experiences in the Vietnam War.[207] After the jury returned a guilty verdict with a death sentence,[208] two jurors alleged that four of the jurors were Vietnam veterans and that they used their experience to determine that the defendant did not serve in Vietnam at a time when he would have been exposed to combat.[209] The two jurors who came forward explained that the jury relied on this input to discredit the defendant.[210] The jurors also reported that two other jurors had medical experience and that they expressed during deliberation that one of the medical tests presented at trial was inadequate based on their own experience.[211]

In re Murchison, 349 U.S. 133, 136 (1955) (holding that due process "is concerned not only with actual bias but also with 'the appearance of justice'")).

200. Crump, *supra* note 199, at 534.

201. *See id.* at 535.

202. FED. R. EVID. 606(b) advisory committee's note (citing McDonald v. Pless, 238 U.S. 264 (1915)); *see also* Remmer v. United States, 347 U.S. 227, 229 (1954) ("The integrity of jury proceedings must not be jeopardized by unauthorized invasions."); United States v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976) (explaining that Rule 606(b) codifies the common law rule regarding juror testimony).

203. For a description of how each state's rules compare to FRE 606(b), see Huebner, *supra* note 50, at app. A.

204. CAL. EVID. CODE § 1150(a) editor's notes (citing Williams v. Bridges, 35 P.2d 407 (Cal. App. 1934); Noll v. Lee, 221 Cal. App. 2d 81 (1963)).

205. CAL. EVID. CODE § 1150(a) (West 2005); Huebner, *supra* note 50, at 1489.

206. Huebner, *supra* note 50, at 1489 (citing CAL. EVID. CODE § 1150(a) (West 2005); People v. Steele, 47 P.3d 225, 248 (Cal. 2002)).

207. *Steele*, 47 P.3d at 231.

208. *Id.* at 230.

209. *Id.* at 244.

210. *Id.*

211. *Id.*

One of the jurors said this input helped her determine that the defendant was not suffering from a mental disorder.[212]

The California Supreme Court held that the effect of the statements on the jury was inadmissible, but the statements themselves were admissible because they were "objectively ascertainable overt acts [that were] subject to corroboration."[213] In other words, the jurors could testify that the statements were made during deliberations, but could not testify regarding the impact the statements had on the jury. The court reasoned that limiting juror testimony to overt acts occurring during deliberations, and barring juror testimony regarding the jury's subjective reasoning process, serves the policy goals on which Federal Rule 606(b) is based.[214] The distinction bars attacking the jury's reasoning process through unreliable proof of thought processes, thereby preserving the stability of verdicts.[215] Barring litigants from challenging the jury's thought process also reduces the risk of post-verdict jury tampering and ensures privacy of jury deliberations.[216]

Additionally, California has adopted other rules that protect jurors from harassment. Judges are required to inform jurors in criminal cases that they have a right to discuss or refrain from discussing the deliberations with anyone and that the defendant, defense counsel, and the prosecutor must obtain a juror's consent prior to discussing the case with her.[217] In criminal cases, the jurors' contact information is sealed and parties cannot access it unless they petition the court and show good cause at a hearing.[218] Judges deny petitioners' requests if there is a compelling interest against disclosure.[219] Further, attorneys are subject to sanctions for contacting jurors in violation of these rules.[220] California's approach gives trial courts the power to protect jurors' privacy and to ensure that contact with jurors is both consensual and reasonable.[221]

On the whole, the California Rule protects the stability of verdicts and allows proof of prejudicial statements made during deliberations through the best evidence—juror testimony.[222] The California Supreme Court reasoned that admitting this best evidence of misconduct would not undermine the privacy of jury deliberations but would merely enable the courts to consider the evidence and determine whether the alleged misconduct "is a recognized ground for new trial and whether it has prejudiced the losing party."[223] The court also noted that the use of juror testimony should have a prophylactic effect, thereby purifying the jury

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212. *Id.* at 244–45.
213. *Id.* at 248.
214. *See id.* at 246.
215. *Id.*
216. *Id.*
217. CAL. CIV. PROC. CODE § 206(a)–(b) (2001).
218. *Id.* §§ 206(g), 237(a)–(b).
219. *Id.* § 237(b).
220. *Id.* § 206(d)–(e).
221. Townsel v. Superior Court, 979 P.2d 963, 964 (Cal. 1999).
222. People v. Hutchinson, 455 P.2d 132, 137 (Cal. 1969) (In Bank).
223. *Id.*

room by making juror misconduct "capable and probable of exposure" and deterring its occurrence in the first place.[224] To the extent that California's rule clashes with the policy behind Federal Rule 606(b)—preserving the public administration of justice at the expense of individual litigants' rights—the California Supreme Court held that "the wrong to the individual cannot be considered the lesser of two evils."[225]

B. Connecticut and Hawaii

Connecticut and Hawaii have adopted similar approaches to California's, albeit without the additional safeguards that California utilizes. Both states bar testimony regarding the *effect* of juror misconduct but not testimony regarding the misconduct itself.[226] The Connecticut judiciary has explained that limiting juror testimony to objectively verifiable instances of misconduct serves the interests of preventing juror harassment and protecting the privacy of deliberations.[227] Inquiry into misconduct's subjective influence on jurors is dubious because "it is relatively easy to convince a juror that he has acted mistakenly" and judges are poorly equipped to reconstruct the jurors' thought process.[228] Allowing testimony regarding the effect of prejudicial statements would create an incentive for losing parties to harass jurors in order to obtain evidence that could establish sufficient misconduct to set aside verdicts.[229] Precluding jurors from testifying about the *influence* of misconduct prevents litigants from seeking defects in a jury's thought process. Connecticut's approach to juror testimony enables its judges to balance preserving the sanctity of the jury's deliberative process and ensuring that prejudice does not reach the jury room.[230]

Similarly, Hawaii Rule of Evidence 606(b) seeks to promote the Federal Rule's policy concerns by "excluding testimony relating to the internal deliberative process and allowing testimony about objective misconduct and irregularities."[231] The Hawaii Supreme Court has recognized that allowing inquiry into the subjective effect of misconduct during deliberations would undermine open discussion and the finality of judgments, thus unsettling the judicial system "out of

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224. *Id.*

225. *Hutchinson*, 455 P.2d at 136; *see also* People v. Simms, 24 Cal. App. 4th 462, 468, 29 Cal. Rptr. 2d 436 (1994) (holding that the "strong public interest in the ascertainment of truth in judicial proceedings, including jury deliberations" outweighs the policy considerations of protecting the privacy of jurors, preventing "stifled debate," and promoting finality of verdicts).

226. Huebner, *supra* note 50, at 1490 n.111 & app. 1 (citing CONN. SUPER. CT. R. § 16-34; HAW. REV. STAT. § 626-1, Rule 606(b)).

227. *See, e.g.*, State v. Phillips, 927 A.2d 931, 939 (Conn. App. Ct. 2007).

228. *Id.* (citing Wright v. United States, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) *aff'd*, 732 F.2d 1048 (2d Cir.1984)).

229. *Id.* at 938–39 (citing McDonald v. Pless, 238 U.S. 264, 267–68 (1915)); FED. R. EVID. 606(b) advisory committee's note (explaining that inquiry into the "mental operations and emotional reactions of jurors . . . would . . . invite tampering and harassment").

230. *Phillips*, 927 A.2d at 939.

231. HAW. REV. STAT. § 626-1, Rule 606(b) commentary.

all proportion to any expectable improvement in the administration of justice."[232] Because jurors are in the best position to observe and report prejudicial misconduct during deliberations, this limited juror testimony deters irregularities without undermining the values the Rule seeks to protect.[233]

C. Comparison of the State Rules to the Text and Purpose of the Federal Rule

The approaches to juror testimony that California, Connecticut, and Hawaii have adopted attempt to ensure that jury verdicts are not the result of prejudicial remarks during deliberations. These approaches are consistent with a textualist interpretation of Federal Rule 606(b), which allows juror testimony when "extraneous prejudicial information was improperly brought to the jury's attention."[234] Rule 606(b)'s preclusion of juror testimony is not absolute.[235] Because jurors have a duty to make decisions based solely on the law and evidence presented at trial, prejudicial statements based on a juror's personal experience are external to the matter under consideration and constitute extraneous information when brought to a jury's attention. In the *Apple v. Samsung* case, for example, Hogan's alleged statements regarding the legal standard for patent infringement, based on his experience with patents, constitutes extraneous prejudicial information and the other jurors must be permitted to testify that he made the statements during deliberations.

The California, Connecticut, and Hawaii approaches are also consistent with the purpose of Federal Rule 606(b). Although the Federal Rule seeks to promote "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment,"[236] the Advisory Committee on Rules noted that allowing jurors to "testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected."[237] California, Connecticut, and Hawaii allow jurors to testify to the occurrence of prejudicial statements, but not to the subjective effect of the statements. This approach insulates a jury's internal deliberative process but allows jurors to testify to misconduct with objectively verifiable manifestations. Limiting juror testimony in this manner promotes the Federal Rule's policy concerns by preventing litigants from seeking defects in a jury's thought process. Continuing with the *Apple v. Samsung* example, the jurors should be permitted to testify that Hogan made statements regarding the legal standard for patent infringement, but they should not

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232. State v. Kim, 81 P.3d 1200, 1208 (2003) (citing United States v. Barber, 668 F.2d 778, 786 (4th Cir. 1982)).

233. HAW. REV. STAT. § 626-1, Rule 606(b) commentary.

234. FED. R. EVID. 606(b). Courts give undefined terms in statutes their ordinary meaning, which may be gleaned through dictionary definitions. Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2002 (2012). For a definition of extraneous, see *supra* note 114.

235. Tanner v. United States, 483 U.S. 107, 138 (1987) (Marshall, J., concurring in part and dissenting in part).

236. FED. R. EVID. 606(b) advisory committee's note (citing McDonald v. Pless, 238 U.S. 264, 267 (1915)).

237. FED R. EVID. 606(b) advisory committee's note.

be permitted to testify about the effect these statements had on their thought process. The judge can then determine whether a new trial is warranted. Without juror testimony confirming that the statements were made, the judge would not be able to make this determination because only the jurors have first-hand knowledge regarding the statements.

D. Suggested Reforms

Federal Rule of Evidence 606(b)'s policy concerns can be protected through a means less restrictive than an absolute bar on juror testimony regarding prejudicial statements based on personal experiences. In order to protect litigants' rights and achieve uniformity in federal courts, Rule 606(b) should be amended to clarify that prejudicial statements based on a juror's personal experience are always extraneous, enable jurors to testify regarding these statements when they are made during deliberations, and preclude testimony regarding the statements' subjective effect. The Rule's framers explained that inquiry into the "mental operations and emotional reactions of jurors . . . would . . . invite tampering and harassment."[238] Limiting juror testimony to objectively verifiable instances of misconduct, however, poses "no particular hazard to the values sought to be protected."[239] Upon a showing that extraneous prejudicial information reached the jury, a new trial would be granted if the judge determined that there is a "reasonable possibility that the material could have affected the verdict."[240] Even with increased juror testimony, the inquiry would be limited to objectively verifiable instances of misconduct, and the jury's thought process would remain insulated.

Additionally, jurors should be permitted to come forward with allegations of prejudicial statements made during deliberations, but trial judges should have discretion on whether to allow parties to contact jurors.[241] Litigants should not be permitted to contact jurors as a matter of course in an effort to find grounds for reversal of verdicts. Judges could conduct juror debriefings in which the judge determines whether extraneous prejudicial statements were made during deliberations and encourages jurors to report such instances.[242] If necessary, courts could conduct in camera questioning of jurors, thus mitigating the risk of juror embarrassment.[243] Using courts as intermediaries between the parties and jurors would ensure that litigants do not contact jurors unless there is reason to believe misconduct occurred. This policy would enable jurors to report potentially prejudicial occurrences, while at the same time protecting them from annoyance, harassment, and embarrassment. This approach is also consistent with the advisory

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238. FED. R. EVID. 606(b) advisory committee's note.

239. *Id.*

240. Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co., 206 F.3d 900, 906 (9th Cir. 2000).

241. *See* Jeffrey D. Buchanan, Note, *Impeachment of Jury Verdicts in Arizona*, 21 ARIZ. L. REV. 821, 834-35 (1979) (reasoning that reasonable juror contact does not undermine the policy concern of preventing juror harassment).

242. Huebner, *supra* note 50, at 1495–96.

243. *Id.* at 1491–92.

committee's suggestion that "jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations."[244] Many jurisdictions already have local rules limiting litigants' access to jurors.[245] These rules range from stating that "[a]bsent an order of the Court, no juror shall be interviewed by anyone at any time concerning the deliberations of the jury"[246] to requiring juror examinations to be conducted by the court.[247] These local rules could serve as a template for mitigating the risks that potentially accompany increased post-verdict juror testimony.

Limiting the scope of post-verdict inquiries would protect the interest of freedom of deliberation.[248] Upon an allegation of extraneous prejudicial statements made during deliberations, the investigation should be limited to the specific instance or instances reported. This would preclude testimony regarding other matters bearing on how the jury reached its verdict and limit the inquiry to whether the statements are "a recognized ground for new trial and whether [they have] prejudiced the losing party."[249] Additionally, jurors should be warned that misconduct can be reported to the judge. This warning would have a prophylactic effect by informing jurors that their misconduct will likely be exposed.[250]

The finality of verdicts could be guarded by imposing a time limit on challenges to deliberations.[251] A short time limit for alleging juror misconduct would not disrupt the finality of verdicts any more than other federal rules already in effect. The Federal Rules of Civil Procedure, for instance, give litigants twenty-eight days to move for a new trial after a court enters judgment.[252] Imposing a similar time limit for securing juror testimony would ensure that the alleged misconduct is still fresh in the jurors' minds[253] and would prevent "fishing expeditions" for reasons to overturn the verdict.

CONCLUSION

Although the ordinary meaning of the term "extraneous" in Rule 606(b) seems to encompass prejudicial statements based on a juror's personal experiences, some courts have precluded juror testimony regarding these statements. The policy concerns behind Rule 606(b)'s preclusion of some juror testimony must be protected, but doing so at the expense of litigants' rights raises constitutional concerns and undermines the integrity of the judicial system. The voir dire process seeks to protect litigants' rights, but voir dire is often ineffective for this purpose. Biased jurors are likely to conceal their biases during voir dire,

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244. *Id.* (citing H.R. REP. NO. 93-1597 (1974) (Conf. Rep.)).
245. Crump, *supra* note 199, at 526–28 & nn.127–40.
246. *Id.* at 526 (quoting U.S. DIST. CT. M.D. LA. R. 16A(5)).
247. Huebner, *supra* note 50, at 1486 n.91 (citing S.D. CAL. CIV. R. 47.1).
248. Timothy C. Rank, *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 MINN. L. REV. 1421, 1444–46 (1992).
249. People v. Hutchinson, 455 P.2d 132, 137 (Cal. 1969) (In Bank).
250. *Id.*
251. Rank, *supra* note 246, at 1447–48.
252. FED. R. CIV. P. 59(b).
253. *See* Rank, *supra* note 246, at 1447.

either intentionally or subconsciously, and procedural obstacles often prevent effective voir dire. Additionally, *Tanner*'s four asserted protections of the right to a competent jury are insufficient in the context of prejudicial juror statements made during deliberations. Many courts interpret Rule 606(b) as a preclusion of juror testimony regarding statements that reveal bias and/or deceit during voir dire. The effect of this interpretation of the Rule is to deny litigants the opportunity to challenge verdicts tainted by juror bias. A new framework is needed.

This Note has surveyed various state rules that permit greater usage of juror testimony. These approaches balance the policy concerns embedded in the Federal Rule while at the same time protecting litigants' rights. These state rules could serve as a template for developing a new federal approach that accommodates both litigants' rights and Rule 606(b)'s policy concerns—freedom of deliberation, finality of verdicts, and protection of jurors against annoyance and embarrassment. Rule 606(b) should be amended to clarify that prejudicial statements based on a juror's personal experience are always extraneous, enable jurors to testify regarding these statements when they are made during deliberations, and preclude testimony regarding the statements' subjective effects. Opponents of increased juror testimony argue that the jury system may not survive efforts to perfect it. Preventing inquiry into juror misconduct may preserve the jury system, "but the constitutional guarantee on which it is based will become meaningless."[254]

254. Tanner v. United States, 483 U.S. 107, 142 (1987) (Marshall, J., concurring in part and dissenting in part).