(These materials replace pages 17 to 19 of the casebook.)

In the three decades since *Tanner*, the Supreme Court has returned in earnest to Rule 606(b) only twice—once to reaffirm *Tanner*'s central principles and once to carve out an important exception. Let's take up these rulings in turn.

WARGER V. SHAUERS: *Case Note*

Warger v. Shauers, 135 S. Ct. 521 (2014), called on the Justices to resolve whether Rule 606(b) "permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty."

The term *voir dire*—"to speak the truth"—refers to a preliminary examination at which a trial court considers the competency or potential bias of a juror or witness. At issue in *Warger* was the voir dire of prospective jurors held at the trial's start. A juror's dishonesty during voir dire, if proved, can supply grounds for a new trial. The challenging party "must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis [to] challenge" and remove the juror. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). But if evidence of a juror's dishonesty during voir dire emerges only during deliberations, Rule 606(b)(1)'s ban on juror testimony about statements or conduct during deliberations, if offered to unsettle a verdict, may frustrate proof of that dishonesty. *Warger v. Shauers* presented this difficulty.

Facts and Procedural History

The case arose out of a South Dakota highway collision between Gregory Warger's motorcycle and Randy Shauers's truck that cost Warger his left leg. Warger brought a diversity action in U.S. District Court, alleging negligence and seeking to

recover for medical expenses, permanent disability, and other losses. After a jury verdict for defendant Shauers, a juror approached Warger's counsel and reported that the jury foreperson had told the other jurors during deliberations that her daughter had been at fault in a fatal car accident several years earlier. The foreperson allegedly said that had her daughter been sued, it would have "ruined her life." The juror recorded these allegations in an affidavit. But the district judge concluded that Rule 606(b) barred admission of the affidavit and denied Warger's motion for a new trial. *See Warger v. Shauers*, 721 F.3d 606, 609 (8th Cir. 2013).

On appeal Warger argued that Rule 606(b) should not bar juror testimony about the foreperson's comments in deliberations because the remarks about her daughter constituted "extraneous prejudicial information" of the sort addressed by Rule 606(b)(2)(A). The Eighth Circuit Court of Appeals disagreed. The court distinguished communications from outsiders or the media, which could constitute "extraneous prejudicial information," from the "subjective prejudices or improper motives of individual jurors." The latter are not an exceptional aberration of jury deliberations, but rather the norm. "Jurors' personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room." *Id.* at 611.

Warger claimed in the alternative that juror testimony about the foreperson's comments during deliberations was admissible to show she lied during voir dire when she denied any potential bias in the lawsuit. Rule 606(b) doesn't bar such testimony, Warger argued, as the rule constrains only "inquir[ies] into the validity of a verdict or indictment," not challenges to the integrity of voir dire. *See id.* The appeals court rejected this approach too. Here it quoted the Tenth Circuit's decision in *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008): "'[A]llowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule. A broad question during voir dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict.'" *Warger*, 721 F.3d at 612 (quoting *Benally*, 546 F.3d at 1236). The

court therefore rejected the position of the Ninth Circuit, which had said flatly, "Statements which tend to show deceit during voir dire are not barred by [Rule 606(b)]." *Hard v. Burlington N. R.R.*, 812 F.2d 482, 485 (9th Cir. 1987).

At the Supreme Court

In his filings before the Supreme Court Warger added two claims. First he alleged that at common law the rule forbidding jurors to impeach their own verdicts did not apply when the truthfulness of a juror's responses during voir dire was at issue. Here the historical record was muddy. Though Rule 606(b) traces its lineage to early-eighteenth-century England, juror voir dire took rise on American shores. Hence American courts had struggled to decide whether the common-law forbears of Rule 606(b) had to yield when jurors' comments during deliberations showed they had lied during voir dire. The caselaw was mixed. Warger cited a handful of decisions in which courts had permitted juror testimony about comments made by a fellow juror during deliberations, when offered to invalidate a verdict based on the juror's dishonesty during voir dire. But as Warger admitted, some courts had reached the opposite conclusion. *See* Brief for Petitioner, *Warger v. Shauers*, No. 13-517 (U.S., May 27, 2014), at 28–29 & n.3. And as almost every case cited on the question predated Rule 606(b), which makes no provision for proof of juror dishonesty during voir dire, the significance of this common-law history was unclear.

Warger also argued that Rule 606(b) must yield to the constitutional guarantee of trial by an impartial jury. The Sixth Amendment expressly assures criminal defendants the right to "an impartial jury." And though "the right of trial by jury" secured by the Seventh Amendment in civil cases lacks that explicit guarantee, the Supreme Court has ruled that "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury." *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946). Because choosing an impartial jury requires effective voir dire to root out potential biases, "[t]he necessity of truthful answers by prospective jurors . . . is obvious." *McDonough*, 464 U.S. at 554. This constitutional imperative, Warger argued,

overcomes Rule 606(b) when juror testimony about comments made in deliberations can expose a juror's dishonesty during voir dire.

That's especially true, he said, when those comments reveal a juror's *racial* bias. Consider the statement attributed to a deliberating juror in *United States v. Villar*, 586 F.3d 76, 78 (1st Cir. 2009), *cert. denied*, 131 S. Ct. 2167 (2011), quoted in Problem I.1 at page 17 of the casebook: "I guess we're profiling, but they cause all the trouble." Even if *this* case does not involve such ethnic profiling, Warger argued, the Supreme Court should construe Rule 606(b) to permit exposure of racist comments during deliberations and therefore of false claims of impartiality during voir dire.

The Ruling

This claim—and all of Warger's claims—proved wanting. The Supreme Court held Rule 606(b) "applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during *voir dire*." Writing for a unanimous Court, Justice Sotomayor explained that the Justices simply gave "Rule 606(b)'s terms their plain meaning."

In her rather brief opinion Justice Sotomayor made five main points:

- Rule 606(b)(1) "applies '[d]uring an inquiry into the validity of a verdict.' A postverdict motion for a new trial on the ground of *voir dire* dishonesty plainly entails 'an inquiry into the validity of [the] verdict': If a juror was dishonest during *voir dire* and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated."

- Though common-law courts reached mixed results, most courts read the common-law forbears of Rule 606(b) broadly to exclude juror testimony about jury deliberations when used to challenge juror conduct during *voir dire*. More

recent Supreme Court rulings have followed this lower-court trend.

- Those cases that reached contrary results "predated Congress' enactment of Rule 606(b), and Congress was undoubtedly free to prescribe a broader version of the anti-impeachment rule than we had previously applied." And "[a]s enacted, Rule 606(b) prohibit[s] the use of *any* evidence of juror deliberations, subject only to the express exceptions for extraneous information and outside influences."

- A juror's past experiences, even if influential in the juror's assessment of the merits of the case, do not constitute "extraneous prejudicial information." FED. R. EVID. 606(b)(2)(A). Information generally "is deemed 'extraneous' if it derives from a source 'external' to the jury. 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room."

- "[A]ny claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*," where the Court "reasoned that the defendant's right to an unimpaired jury was sufficiently protected by *voir dire*, the observations of court and counsel during trial, and the potential use of 'nonjuror evidence' of misconduct. Similarly here, a party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased. Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias [including juror testimony] before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered."

Looking Ahead

In what otherwise struck the Court as an easy case, one concern gave the Justices pause. During oral argument Justice Alito posed the problem to Shauers's counsel:

> What would happen in the really egregious case? The jurors are asked during voir dire, can you be fair to every—to parties regardless of race. Oh, yes, yes, we can. And then after there's a verdict, a juror comes—comes forward and says during the jury deliberations, the jurors were making all kinds of biased statements and they were clearly prejudiced. What would happen there?

Justice Kagan followed up: "[D]o you think that with respect to the kind of case that Justice Alito has in mind, a case of racial bias—and let's put it in a criminal context—that maybe it's not up to Congress, that at some point one begins to run into constitutional issues?" Transcript of Oral Argument, *Warger v. Shauers*, No. 13-517 (U.S., Oct. 8, 2014), at 29–31.

Without engaging this constitutional question, the Justices pointedly reserved it for a later decision: "There may be cases of juror bias so extreme," they wrote, "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."

PEÑA-RODRIGUEZ V. COLORADO: *Case Note*

Sixteen months later the Justices deemed the question reserved in *Warger* ripe for decision. In April 2016 the Court granted certiorari in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), and agreed to review one question: "May a no-impeachment rule constitutionally bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury?" By a "no-impeachment rule," the Court meant Rule 606(b) or any state-law equivalent. These rules typically forbid jurors to testify in ways that impeach—or call in question—the validity of their verdicts. And by "racial bias," the Court later explained, it meant to include "bias . . . based on petitioner's Hispanic identity."

Facts and Procedural History

The case arose in a Colorado state court, where Miguel Angel Peña-Rodriguez was convicted of unlawful sexual contact and harassment after an alleged attack on two teenage sisters in the bathroom of his workplace. The girls separately identified Peña-Rodriguez as their assailant in a showup procedure shortly after the attack.

During pretrial voir dire, jurors affirmed they could decide the case fairly and impartially. Shortly after trial, however, two jurors approached defense counsel and alleged that a third juror, a former law-enforcement officer, had made several ethnically biased statements during deliberations, including:

- Where I "used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."

- "'I think he did it because he's Mexican and Mexican men take whatever they want.'"

- I do "not think the alibi witness was credible because, among other things, he was 'an illegal.'"

The trial judge denied a motion for new trial, holding that Colorado's equivalent of FRE 606(b) barred inquiry into the juror's alleged bias during deliberations. Both the Colorado Court of Appeals and the Colorado Supreme Court affirmed. They held that the juror's expressions of ethnic bias did not constitute "extraneous prejudicial information" under Rule 606(b)(2)(A), a phrase the Colorado Supreme Court limited to "'legal content and specific factual information learned from outside the record and relevant to the issues in a case.'" *Peña-Rodriguez v. People*, 350 P.3d 287, 290 (Colo. 2015).

In rejecting Peña-Rodriguez's claim that he was denied his Sixth Amendment right to trial by an impartial jury, the Colorado Supreme Court stated "a simple but crucial principle: Protecting the secrecy of jury deliberations is of

paramount importance in our justice system." Even in *Tanner*, where jurors faced allegations of mid-trial drug and alcohol abuse, Rule 606(b) did not yield to concerns about juror competency. "[W]e cannot discern a dividing line between different types of juror bias or misconduct," the Colorado high court wrote, "whereby one form of partiality would implicate a party's Sixth Amendment right while another would not." *Id.* at 293. And the court quoted the ruling of the Tenth Circuit in *United States v. Benally*, 546 F.3d 1230, 1240 (10th Cir. 2008), that "'[t]he safeguards that the Court relied upon for exposing the drug and alcohol use amongst jurors in *Tanner* are also available to expose racial biases . . . .'" True, the second *Tanner* protection—observation of jurors by court and counsel during trial—is unlikely to expose racial biases. But the Colorado court insisted that at least two of the *Tanner* protections help guard against racially biased decisionmaking: "Other jurors could have informed the court or counsel of [the biased juror's] statements prior to delivering the verdict, and any non-juror evidence of his bias remained admissible post-verdict."

At the Supreme Court

In March 2017 the United States Supreme Court reversed the Colorado high court and ruled "that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Peña-Rodriguez*, 137 S. Ct. at 869.

Writing for himself and Justices Ginsburg, Breyer, Sotomayor, and Kagan, Justice Kennedy stressed that "discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" Unlike the "anomalous" forms of juror misconduct involved in the Court's earlier cases—the drug and alcohol abuse of *Tanner*, for example, or the pro-defendant bias in *Warger*—racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."

Responding to Justice O'Connor's warning in *Tanner* that while juror testimony might remedy certain juror misconduct, it's "not at all clear . . . the jury system could survive such efforts to perfect it" (CB 12), Justice Kennedy wrote that "[a]n effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury." It is instead an effort to advance "our legal system . . . ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." If "[t]he jury is to be 'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice,"'" the law cannot ignore evidence that the jury itself has been infected by such prejudice.

Justice Kennedy acknowledged the ancient common-law lineage of the no-impeachment rule. Yet for over a century and half, he said, the Supreme Court repeatedly reserved the possibility that "'cases might arise in which it would be impossible to refuse'" juror testimony "'without violating the plainest principles of justice.'" (Quoting *United States v. Reid*, 53 U.S. 361, 366 (1852); *see McDonald v. Pless*, 238 U.S. 264, 269 (1915) (similar).) Moreover, the "imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments," which weakened originalist arguments staked in older practices.

Justice Kennedy denied this new exception to the no-impeachment rule would trigger the calamities predicted by Justice O'Connor in *Tanner*. The *Tanner* Court had said a firm no-impeachment rule was essential to avoid these four ills (CB 12):

- *Harassed jurors:* Justice Kennedy noted that state ethics rules and local court rules can protect jurors from post-trial harassment by banning unsolicited inquiries from defense counsel and others seeking to overturn a verdict. Moreover, at least fifteen states and the District of Columbia, together with at least one federal appeals court, already "have recognized a racial-bias exception to the no-impeachment rule—some for over half a century—with no signs of an increase in juror harassment . . . ."

- *Constrained deliberations:* The experience of those seventeen jurisdictions also has shown "no signs of . . . a loss of juror willingness to engage in searching and candid deliberations."

- *Disrupted finality:* Justice Kennedy emphasized that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." Instead the defense must show "that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." And judges can help preserve the finality of their trials by using voir dire to weed out biased jurors and by instructing jurors "to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind."

- *Undermined trust:* And far from undermining "the community's trust in a system that relies on the decisions of laypeople," as Justice O'Connor had feared, "[a] constitutional rule that racial bias in the justice system must be addressed . . . is necessary to prevent a systemic loss of confidence in jury verdicts . . . ."

The Dissents

Three Justices dissented. Writing only for himself, Justice Thomas declared "that the Court's holding . . . cannot be squared with the original understanding of the Sixth or Fourteenth Amendments." At the time of the founding, he said, many states already forbade juror testimony about misconduct during deliberations. And by 1868, when the Fourteenth Amendment was ratified, the no-impeachment rule "had become firmly entrenched in American law. . . . In the absence of a definitive common-law tradition permitting impeachment by juror testimony, we have no basis to invoke a constitutional provision"—here the right to an impartial jury—"that merely 'follow[s] out the established course of the

common law in all trials for crimes' to overturn Colorado's decision to preserve the no-impeachment rule." (Quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1785, at 662 (1833).)

Justice Alito, joined by Chief Justice Roberts and Justice Thomas, likewise condemned the Court's ruling as inconsistent with precedent. But he challenged more pointedly the majority's suggestion that expressions of racial bias warrant a firmer response than other misconduct in the jury room. "What the Sixth Amendment protects is the right to an 'impartial jury,'" Justice Alito wrote:

> Nothing in the text or history of the Amendment or in the inherent nature of the jury trial right suggests that the extent of the protection provided by the Amendment depends on the nature of a jury's partiality or bias. As the Colorado Supreme Court aptly put it, it is hard to "discern a dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while another would not." *Peña-Rodriguez v. People*, 350 P. 3d 287, 293, 2015 CO 31 (2015).

Where can the Court stop, Justice Alito asked, once it acts to expose racial bias in the jury room? "At a minimum, cases involving bias based on any suspect classification—such as national origin or religion—would merit equal treatment. So, I think, would bias based on sex or the exercise of the First Amendment right to freedom of expression or association."

Justice Alito alleged too that the majority's ruling will foster the very ills against which the no-impeachment rule is supposed to guard. Defense counsel and other defense partisans now have reason to harass trial jurors for revelations of biased comments. Fear that an artless comment could prompt a post-trial inquiry may constrain jurors in their deliberations. And if evidence of racial bias unsettles convictions, finality will suffer.

But Justice Alito made no mention in this context of the fourth fear underlying the no-impeachment rule. Justice O'Connor had written in *Tanner* that "the community's trust in a system that relies on the decisions of laypeople would . . . be undermined by a barrage of postverdict scrutiny of juror conduct." Justice Alito did not venture to suggest that this concern for the *legitimacy* of juries' verdicts weighed against the Court's ruling in *Peña-Rodriquez*. Perhaps he shared the Court's concern that the public's faith in the fairness of our system would suffer if the system stubbornly insists on looking the other way when a juror explains his vote to convict saying, "I think he did it because he's Mexican."

TANNER, WARGER, & PEÑA-RODRIGUEZ: *Afterthoughts*

The lesson of Rule 606(b) is that within our system's formal bounds, jury verdicts undergo little after-the-fact scrutiny. Only in the realm of racial injustice must the rule's protection of the secrecy of jury deliberations yield to a defendant's Sixth Amendment right to an impartial jury. Beyond such fraught social turf, the centuries-old no-impeachment rule stands strong, a monument to our systemic faith in the wisdom of twelve common persons gathered together.

Hence the jury resolves our most heated social conflicts privately and without explanation. In 1920 Professor Edson Sunderland explained how hidden jury deliberations protect the reputation of the justice system by concealing any possible source of error. The system's need for legitimacy, Sunderland wrote, demands that "[t]he record . . . be absolutely flawless, but such a result is possible only by concealing, not by excluding mistakes." Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 262 (1920). The jury's hidden decisionmaking process and its one- or two-word verdicts leave all mistakes and causes for criticism locked in the black box of the jury room. The jury's inscrutability, in Sunderland's marvelous imagery,

> covers up all the shortcomings which frail human nature is unable to eliminate from the trial of a case. . . . [C]oncrete details are swallowed up, and the eye of the law, searching

> anxiously for the realization of logical perfection, is satisfied . . . . It serves as the great procedural opiate, which draws the curtain upon human errors and soothes us in the assurance that we have attained the unattainable.

Id. Rule 606(b) and its counterparts in state evidence codes act to safeguard the jury's inscrutability. In the average case they "draw[] the curtain upon human errors" and frustrate any official inquiry into the nature and propriety of the jury's deliberations.

But what does this have to do with evidence law?

Our long tradition of secret jury deliberations, as embodied today in Rule 606(b), means our justice system engages in very little quality control at the back end. Though the system provides for review of procedural errors and judicial errors of law, errors in the way juries interpret evidence are virtually undetectable, much less correctable. With so little quality control at the back end of our trial process, it may be wise to have quality control at the front end. That is, since we don't scrutinize the deliberative process, we have to scrutinize and regulate the quality of the evidence fed into that process. *See* John H. Langbein, *The Criminal Trial Before the Jury*, 45 U. CHI. L. REV. 263, 289 (1978).

There is an irony here: Because our system invests such enormous trust in jurors' decisions, we need a system of evidence rules that betrays deep mistrust of jurors' ability to cull good evidence from bad. Because we apparently do not trust jurors to cast off and disregard meaningless, misleading, and unreliable evidence, we screen out such evidence before they ever hear it. This screening process—the quality control we exercise over the information juries hear—is the realm of evidence law.