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## Party's Over: Admissibility of Post-Trial Juror Testimony Should Depend on the Nature of the Conduct

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COMMENT

**PARTY'S OVER: ADMISSIBILITY OF POST-TRIAL JUROR TESTIMONY SHOULD DEPEND ON THE NATURE OF THE CONDUCT**

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Justin Gillett\*

What do you call a weeklong period in which you and a handful of acquaintances drink alcohol every day at lunch,<sup>1</sup> sleep through the afternoons,<sup>2</sup> smoke marijuana<sup>3</sup> and ingest a couple lines of cocaine on occasion?<sup>4</sup> You call it the time when a jury convicted Anthony Tanner and William Conover of conspiracy to defraud the United States and commit various acts of mail fraud.<sup>5</sup> Under a current rule of evidence, which precludes juror testimony to impeach a verdict except on extraneous prejudicial information, juror intoxication is not an external influence about which jurors may testify.<sup>6</sup> A new test for the admissibility of post-trial juror testimony should be adopted so that juror testimony regarding jurors' consumption of drugs and alcohol during breaks can be received.<sup>7</sup>

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1. Tanner v. United States, 483 U.S. 107, 136 (1987) (Marshall, J., dissenting).

2. *Id.* at 135.

3. *Id.* at 136.

4. *Id.*

5. *See Tanner*, 483 U.S. at 136.

6. *Id.* at 125 (citing FED. R. EVID. 606).

7. Juror testimony admissibility after *Tanner* has been the subject of several scholarly articles, some proposing reform. *See, e.g.*, Mark A. Corti, *Tanner v. United States Did the Court Go Too Far in Its Interpretation of Federal Rule of Evidence 606(B)?*, 3 J. LEGAL ADVOC. & PRAC. 49, 57-58 (2001) (proposing judicial determination of misconduct in an in camera hearing); Benjamin T. Huebner, Note, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, 1491 (2006) (proposing several "practices for addressing juror testimony that would more effectively serve the relevant policy interests" of Fed. R. Evid. 606(b)); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 165, 170 (2011) (proposing mechanisms to reduce the influence of bias during deliberations and allowing evidence of biased juror statements where the juror materially misrepresents biases on voir dire). This note proposes that admissibility of juror testimony should turn on one principal: its ability to be objectively verified.

ADMISSIBILITY OF EVIDENCE OF JUROR MISCONDUCT DEPENDS ON  
THE *NATURE* OF THE CONDUCT

In both criminal and civil cases, judges may order a new trial if juror misconduct prejudiced the losing party and affected the jury's verdict.<sup>8</sup> The admissibility of evidence tending to prove misconduct depends on the nature of the conduct involved.<sup>9</sup> Subjective internal matters, such as "the juror's motives, the effect of jury discussions on the juror, and the reasoning processes of the juror," are inadmissible because they are considered to inhere in the verdict.<sup>10</sup> Conversely, objective external matters, such as overt acts, are not considered to inhere in the verdict and are generally admissible.<sup>11</sup> For example, evidence of inappropriate material conveyed to a juror is admissible objective external evidence, but testimony about the effect that such evidence had on the juror is inadmissible subjective internal matter.<sup>12</sup>

In criminal trials, juror intoxication implicates a defendant's Sixth Amendment right to an unimpaired jury.<sup>13</sup> It is "widely agreed" that the overt act of drinking intoxicating liquors during the course of a trial is improper.<sup>14</sup> The resulting state of intoxication can impair a juror's ability to carry out his or her responsibility to make a rational judgment based upon the evidence presented.<sup>15</sup> Therefore, judges should be able to grant a new trial when juror intoxication results in prejudice to the losing party.<sup>16</sup>

## POST-TRIAL JUROR TESTIMONY REGARDING DELIBERATIONS IS

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8. 24 AM. JUR. 2D Proof of Facts §633 (2010).

9. *Id.*

10. *Id.* ("[T]hose matters which inhere in the verdict are those which are personal to the juror and subjective in nature ... [M]isconduct relating to the motives, beliefs, or other mental operations or emotions of a juror are considered subjective matters, or matters which inhere in the verdict...").

11. *Id.*

12. *Id.* (citing *City of Columbia v. Lentz*, 282 S.W.2d 787, 787 (Tenn. Ct. App. 1955)).

13. See U.S. CONST. AMEND. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."); *Tanner v. United States*, 483 U.S. 107, 127 (1987) (citing *McIlwain v. United States*, 464 U.S. 972, 976-77 (1983) ("[D]ue process may well require the granting of a mistrial whenever a trial judge finds that a juror, already engaged in deliberations, is so drunk that the deliberations must be recessed.")).

14. 24 AM. JUR. 2D Proof of Facts §633 (2010).

15. *Id.*

16. See *id.*

## LIMITED FOR EXPRESS POLICY REASONS

Though juror intoxication is held to be misconduct, admissible sources of evidence to prove such misconduct is limited. In order to promote the justice and finality of jury findings, and to protect jurors from harassment and exploitation by unsatisfied litigants,<sup>17</sup> post-trial juror testimony regarding deliberations is limited.<sup>18</sup> Limitations on testimony regarding deliberations are meant to promote the “full and free debate” during deliberation that is necessary to attain just verdicts.<sup>19</sup> The fear is that, without the prohibition on post-trial scrutiny of jury deliberations, juror discussions would be less frank, and jurors would be less willing to return an unpopular, though just, verdict.<sup>20</sup> Further, if litigants were able to attack jury findings based on jury deliberations, many verdicts would be followed by investigations into those deliberations in the hopes of finding evidence of juror misconduct.<sup>21</sup> This would disrupt the finality of juries’ findings of fact.<sup>22</sup> Such investigations would also invite juror harassment, and even exploitation of disgruntled jurors.<sup>23</sup>

ADMISSIBILITY OF POST-TRIAL JUROR TESTIMONY DEPENDS ON  
THE *SOURCE* OF THE CONDUCT

To prevent the potential issues described above, the Federal Rules of Evidence outline the allowable scope of juror testimony in an inquiry into the validity of a verdict.<sup>24</sup> During such an inquiry, juror testimony relating to deliberations, effects on jurors’ votes, and jurors’ mental processes is limited to existence of prejudicial information, outside influences, and verdict form errors.<sup>25</sup>

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17. See *Tanner*, 483 U.S. at 124 (citing the U.S. Senate’s finding that inquiries into internal jury deliberations “would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors”).

18. *E.g., id.*

19. *Id.* at 124.

20. *Id.* at 120-21.

21. *Id.* at 119-20.

22. *Id.* at 120.

23. *Id.* at 120, 124.

24. FED. R. EVID. 606.

25. *Id.* The pertinent text of the rule reads:

(b) During an Inquiry Into the Validity of a Verdict or Indictment.

In *Tanner v. United States*, the United States Supreme Court confirmed that, according to the Rules of Evidence, juror testimony that relates to external influences is admissible, and that which relates to internal influences is not.<sup>26</sup> However, the *Tanner* Court proceeded to exclude post-trial juror testimony regarding juror alcohol and drug use during trial as an inadmissible internal influence.<sup>27</sup> It so held even though the jury showed external signs of intoxication.<sup>28</sup>

PROPOSED REFORM: ADMISSIBILITY OF JUROR TESTIMONY SHOULD  
TURN ON ITS ABILITY TO BE OBJECTIVELY VERIFIED; OBJECTIVE  
VERIFICATION IS A PROXY FOR INHERENCY

Admissibility of juror testimony should turn on its ability to be objectively verified. Testimony regarding subjective internal matters that inhere in the verdict, such as discussions and activities during deliberations that betray mental operations of a juror,<sup>29</sup> are unverifiable. Thus, they should be protected inadmissible matters. However, external objectively verifiable

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(1) Prohibited Testimony or Other Evidence. 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.

(2) Exceptions. 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.

26. *See Tanner*, 483 U.S. at 117 (“The [internal/external] distinction was not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation.”).

27. *Id.* at 125 (“[J]uror intoxication is not an ‘outside influence’ about which jurors may testify to impeach their verdict.”).

28. *Id.* at 126 (refusing to grant a new trial even if it were true that “several of the jurors fell asleep at times during the afternoon”).

29. 24 AM. JUR. 2D Proof of Facts §633 (2010) (“[T]he essence of the distinction [between subjective and objective misconduct] is that misconduct relating to the motives, beliefs, or other mental operations or emotions of a juror are considered subjective matters, or matters which inhere in the verdict, whereas misconduct relating to extraneous matters, overt acts, or external matters are considered objective matters, or matters that do not inhere in the verdict.”).

matters do not inhere in the verdict.<sup>30</sup> Juror testimony regarding objectively verifiable conduct that affects the outcome of the deliberations can be considered, while still protecting the promotion of “full and free” debate necessary to attain just verdicts.

ADMISSIBILITY OF JUROR TESTIMONY THAT TURNS ON  
INHERENCY WOULD OPTIMIZE THE OCCURRENCE OF FAIR RESULTS

In isolation, both promoting full and free debate and inquiring into jury decisions foster fair results. When combined without restriction, however, post-trial scrutiny of jury deliberations would undercut frank debate and detract from the overall likelihood of fair results. The test for admissibility of post-trial judicial testimony should strategically permit post-trial juror testimony that safeguards a defendant’s Sixth Amendment right to an unimpaired jury<sup>31</sup> without unduly discouraging the full and free debate necessary to attain just verdicts.

The complete lack of juror accountability is not necessary for full and free deliberations, nor does it best promote the higher aim of attaining just verdicts. Verdict accountability for factors that affect a jury’s ability to perform its duty would lead to better jury function. Permitting jurors to testify to matters that do not inhere to the verdict, such as jurors’ consumption of drugs and alcohol during breaks, would provide such accountability. By definition, only matters that inhere in the decision can constrain full and fair debate.<sup>32</sup> Thus, such a test for the admissibility of post-trial juror testimony would increase the quality of trial outcomes without unduly constraining full and free deliberations.

An inherency-based test would not unduly affect the finality of verdicts nor expose jurors to undue harassment and exploitation. The test would only permit a narrow inquiry based on objectively verifiable conduct. By definition, matters that do not inhere to the verdict, such as overt acts, are objective matters.<sup>33</sup> Thus, any post-verdict inquiry would be strictly limited to adducing evidence that is admissible even under the current test.

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30. *Id.*

31. *See* U.S. CONST. AMEND. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...”).

32. *See supra* text accompanying note 10.

33. *See supra* text accompanying note 11.

The admissibility test for post-trial judicial testimony should turn on the nature of the evidence proffered. Such a test would optimize the occurrence of fair results by balancing the promotion of “full and free debate” with the ability to inquire strategically into the validity of an individual verdict, and would not unduly affect the finality of verdicts or expose jurors to undue harassment and exploitation.