

12 RACIST MEN: POST-VERDICT EVIDENCE OF JUROR BIAS

Jessica L. West*

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Juror 10: You're not gonna tell me you believe that phony story about losing the knife, and that business about being at the movies. Look, you know how these people lie! It's born in them! I mean what the heck? I don't have to tell you. They don't know

* Author is a Visiting Assistant Professor of Law at the University of Denver, Sturm College of Law. She wishes to acknowledge and thank the assistance of numerous colleagues for their generous comments regarding this article including: Jay Brown, Robert Chang, Roberto Corrada, Richard Delgado, Justin Levinson, Perry Moriearty, and Jean Stafancic. For their research assistance I also wish to thank Samantha Walls, Caryl Shipley, and Diane Burkhardt. The greatest thanks here, as elsewhere, are owed to my brilliant and loving spouse, Christine Cimini, for both her input and her unwavering support.

what the truth is! And lemme tell you, they don't need any real big reason to kill someone, either! No sir!¹

I. INTRODUCTION

Our system of jurisprudence demands that legal outcomes not be based on stereotypes, prejudices, or biases.² One method of ensuring the absence of bias is by enforcing the right to a “fair trial by a panel of impartial, ‘indifferent’ jurors.”³ When information comes to light that a juror has expressed racial, ethnic, religious, or gender bias during deliberations, a pall is cast not only on the verdict, but on these underlying precepts as well. Against this backdrop, the prohibition against introducing evidence of any statement made during jury deliberations sits uneasily.⁴ The rule means that courts reviewing post-verdict claims of juror misconduct will refuse to hear or consider evidence of racist or biased juror comments during deliberations.⁵

The roots of this evidentiary prohibition on inquiry into juror deliberative processes are historically deep.⁶ The early English rule began as an

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1. 12 ANGRY MEN (United Artists 1957). This quote, as well as the others in the article, is taken from the classic 1957 film. The movie features Henry Fonda as a juror who refuses to agree to a hasty verdict and requires the jury to seriously deliberate their verdict in a capital murder case. Set almost exclusively in the jury room, the jurors are referred to throughout the film by number rather than name. As the jurors openly address issues of bias and prejudice, it is clear that the defendant is an outsider, certainly by virtue of class and possibly by his race or ethnicity as well. By the end of the film, through the process of confronting each other's biases and the weak evidence, the jurors unanimously acquit the defendant. The film has often been the subject of legal commentary including a 2007 symposium. See Symposium, *The 50th Anniversary of 12 Angry Men*, 82 CHL-KENT L. REV. 549 (2007).
 2. See, e.g., *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”).
 3. *Irvin v. Dowd*, 366 U.S. 717, 721–22 (1961).
 4. The federal court prohibition is set forth in Federal Rule of Evidence 606(b). A recent article found that: twenty-five states have evidentiary prohibitions on post-verdict juror testimony that are at least as strong or stronger than Rule 606(b); six states have rules which, though substantially similar to Rule 606(b), include an additional exception to the bar; one state has a rule identical to Rule 606(b) but applies it only to civil actions; and three states have rules addressing juror testimony but differing substantially from Rule 606(b). See Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Post-Verdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, 1487–88 (2006).
 5. Federal Rule of Evidence 606(b) currently provides:
 “Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.”
 FED. R. EVID. 606(b). Subsection (3) was added in 2006.
 6. For a discussion of the history of the evidentiary prohibition, see *infra* section II.A.

absolute bar on post-verdict juror testimony and continued as such for almost one hundred years.⁷ The concerns underlying the prohibition are as well-established as the rule itself.⁸ From Lord Mansfield to Justice O'Connor, jurists have expressed the view that the jury system literally could not survive without a prohibition on inquiry into juror deliberative processes.⁹ Also of concern have been interests in verdict finality, prevention of juror harassment, and the protection of deliberative privacy and juror candor.

Despite significant Congressional debate over scope, the evidentiary exclusion is now formalized in Rule 606(b).¹⁰ The leading case interpreting the rule is the 1986 opinion in *Tanner v. United States*¹¹ in which, confronting evidence that jurors had been intoxicated during trial deliberations, Justice O'Connor left little doubt that post-verdict inquiry into juror competence, or juror bias, was not permitted by the Rule or required by the Constitution.¹² Critical to the constitutional analysis was the Court's view that a litigant's right to a competent and impartial jury is adequately protected by trial and pre-trial mechanisms including voir dire and peremptory challenges. Tanner's analysis all but foreclosed the potential of a successful Sixth Amendment challenge to Rule 606(b).

Tanner's promise that current trial mechanisms operate to minimize the risks of juror incompetence or bias was not well-founded. Social science has shown that bias, racial or otherwise, is entrenched and pervasive throughout the jury system.¹³ In most places, venire panels do not ade-

7. *Vaise v. Delaval*, (1785) 99 Eng. Rep. 944 (K.B.); 1 T.R. 11.

8. For a discussion of the interests served by the prohibition, see *infra* section II.B.

9. In *Tanner v. United States*, discussed *infra* section II.C, Justice O'Connor wrote, "There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Tanner v. United States*, 483 U.S. 107, 120 (1987) (opinion of O'Connor, J.); see also *Vaise*, 99 Eng. Rep. 944.

10. See *supra* note 5 for the text of Rule 606(b). A discussion of the Congressional debate can be found *infra* section II.A.

11. 483 U.S. 107.

12. *Id.* at 126–27. The significant juror misconduct at issue in *Tanner* is discussed more fully *infra* section II.C.

13. See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001); see also *United States v. Morrison*, 529 U.S. 598, 619–20 (2000) (noting, in a majority opinion by Justice Rehnquist, that "a voluminous congressional record" supports the claims of "pervasive bias in various state justice systems against victims of gender-motivated violence"); HOWARD N. SYNDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 188 (2006), available at <http://ojdp.ncjrs.org/ojstatbb/nr2006/downloads/NR2006.pdf> (documenting racial and ethnic disparities that occur at various decision points within the juvenile justice system); Amelia Craig Cramer, *Discovering and Addressing Sexual Orientation Bias in Arizona's Legal System*, 11 AM. U. J. GENDER SOC. POL'Y & L. 25 (2002) (discussing the prevalence of homophobia and sexual orientation discrimination in the Arizona bar and justice system); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) (examining numerous components of the criminal justice system and finding evidence that discrimination exists against African Americans at almost every stage of the criminal process).

quately represent a cross section of the community;¹⁴ voir dire on juror biases is not permitted or is insufficient to discern biases;¹⁵ trial lawyers frequently exercise their peremptory challenges in a racially discriminatory manner;¹⁶ and jurors are inadequately instructed about how to meet the dual expectation that they bring their “experience” and “common sense” to deliberations without relying on “bias, sympathy or prejudice.”¹⁷ Upon review, pre-trial procedures do not actually function to ameliorate the likelihood of juror bias as *Tanner* promised.

In this context, a deep tension exists between the aspiration that verdicts be free from bias and the important interests underlying the rule excluding post-verdict juror testimony.¹⁸ Part of the difficulty in addressing this tension directly is that the legal system remains mired in the fiction of blind justice, refusing to acknowledge or address the likelihood that some of the “common sense and personal experience” that jurors bring into the jury room include undesirable and impermissible biases. Despite that social science, anecdotal, and experimental data indicate that bias is pervasive, the justice system in the United States does relatively little to address bias preemptively. This deliberate “colorblindness” has been described as significantly responsible for the lack of success in directly addressing racial bias.¹⁹ Thus, even as evidence of bias percolates up from the “black box” of juror deliberations, the justice system has not

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14. See Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury Of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 319 (2005) (addressing the systemic problems causing jury venires to suffer from the underrepresentation of racial and ethnic minorities); see also *infra* section IV.A.
 15. See, e.g., David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 247 (1981) (concluding that the current process of voir dire serves to “inhibit rather than facilitate juror self-disclosure”); see also *infra* section IV.B.
 16. See EQUAL JUSTICE INITIATIVE, *ILLEGAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* 5 (2010), available at <http://eji.org/eji/files/62510%20Edited%20Tutwiler%20version%20Final%20Report%20from%20printer%20online.pdf> (concluding that “[r]acially biased use of peremptory strikes . . . remains widespread”); see also *infra* section IV.C.
 17. Jurors are commonly instructed that, in reaching their verdict, they should rely upon “common sense” and “personal experiences.” See, e.g., *PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT* 3.04 (1998); see also *infra* section IV.D.
 18. See, e.g., *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”).
 19. On colorblindness generally, see JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS, JEAN STEFANCIC & STEPHANIE M. WILDMAN, *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2d ed. 2008). See *id.* at 933 (“One of the most popular public attitudes toward race today is the attitude of color-blindness. For example, many people argue that with respect to the practices and institutions of public life, we should not ‘notice race,’ or at least not let race matter.”). For critiques of colorblindness within the context of discussions of jurors see, e.g., Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1824–27 (1993) (critiquing the “notion that equality goals are generally best served by a colorblind approach”); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027–30 (discussing a “blind spot” that courts exhibit regarding unconscious racism).

affirmatively or proactively addressed the potential for juror biases to affect verdicts.²⁰

Some scholars and litigants have proposed, and some courts have embraced, methods of circumventing Rule 606(b)'s evidentiary prohibition.²¹ Others have proposed a broad exception to Rule 606(b), allowing inquiry into all claims of juror bias during deliberations.²² A broad exception, however, could threaten the interests underlying the rule and pose difficulties distinguishing between inappropriate statements of juror bias and permissible juror discussion.²³ Finally, since the vast majority of juror biases do not exhibit themselves as overt or easily-identifiable racial name-calling, many juror biases will never come to the attention of a court or litigant.²⁴ The more common instances of bias—those that are covert—will not be addressed regardless of the adoption of an exception to the evidentiary bar.

Rather than the adoption of a broad exception to Rule 606(b), this Article proposes that pre-deliberation trial mechanisms be expanded to allow inevitable juror biases to be more reliably discovered and addressed. These mechanisms include expanded jury venires, more robust and effective voir dire, less discretion for parties to remove jurors on the basis of race, and the development of jury instructions and admonitions that directly address deliberative biases. By honestly and systematically acknowledging, addressing, and excising juror biases prior to deliberation, overt acts of bias during deliberations, and the consequent pressure to carve a broad exception to the evidentiary prohibition, can be reduced.

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20. "[T]he mental processes for making decisions remain an opaque feature at the heart of legal discourse." Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 511 (2004); see also, Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 441–43 (2008) (discussing "the black box of the human mind").
 21. See *infra* section III.B; see also *United States v. Henley*, 238 F.3d 1111, 1115 (9th Cir. 2001) (noting that "courts and commentators have struggled with the apparent conflict between protecting a defendant's right to a fair trial, free of racial bias, and protecting the secrecy and sanctity of jury deliberations"); *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) ("Courts faced with the difficult issue of whether to consider evidence that a criminal defendant was prejudiced by racial bias in the jury room have hesitated to apply the rule dogmatically.").
 22. *Wright*, 559 F. Supp. at 1151; see also 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 248, at 69 (2d ed. 1994) (finding "problematic" the application of Federal Rules of Evidence 606(b) to exclude evidence of racial bias); Victor Gold, *Juror Competency to Testify that a Verdict was the Product of Racial Bias*, 9 ST. JOHN'S J. LEGAL COMMENT. 125, 143 (1993) (arguing that the social costs are too high to justify application of Rule 606(b)); *Developments in the Law—Race and the Criminal Process*, *supra* note 13, at 1598–99 (advocating the modification of Rule 606(b) to allow post-verdict evidence of juror bias).
 23. For example, one Massachusetts case confronted the issue of whether a juror's referencing of defendant as "a black man" illustrated juror racism sufficient to warrant overturning the verdict. Mary Ann Bragg, *Is "Black Man" a Racist Term?*, CAPE COD TIMES, Jan. 12, 2008, available at <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20080112/NEWS/801120344/-1/special02>.
 24. For an excellent compilation and analysis of literature describing the rise of indirect, covert, and unconscious racism, see Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027–28 (1988).

Even with these types of reforms, however, not all jurors will disclose their biases. Whether for reasons of embarrassment, inattention, lack of understanding, or deliberate intent, some jurors will misrepresent material biases during questioning. In most instances of juror misrepresentation, for example where a juror falsely indicates a lack of criminal convictions, evidence of the inaccuracy can be proven by facts external to the juror and Rule 606(b) is not implicated. Because a juror's racial, ethnic or gender biases are more likely to be evidenced by the juror's statements or actions during deliberations, however, juror misrepresentation of bias is more likely than other types of misrepresentation to fall within the Rule 606(b) evidentiary bar. To address this disparity between misrepresentations of bias and other types of juror misrepresentations, the Article proposes that Rule 606(b) be amended to allow a juror to testify about "whether, during voir dire or other questioning under oath, a juror misrepresented a material bias."²⁵ A narrow exception along these lines strikes a balance between upholding the goals underlying Rule 606(b) and the right to a fair trial by an impartial jury.

Setting the stage for the remainder of the analysis, Part II of the Article discusses the history, interests, and contemporary interpretation of the limitation on inquiry into juror deliberative processes. Part III describes the evidentiary prohibition within the context of post-verdict evidence of juror bias during deliberations and explores the tensions between the interests protected by Rule 606(b) and the goal of ensuring verdicts free from prejudice and bias. Part IV discusses how the adoption of systemic reforms, both before and after a verdict, can promote verdicts free from bias while protecting the interests underlying the evidentiary rule. Section IV.A proposes mechanisms to reduce the influence of bias during deliberations, including: expanded juror venires, effective voir dire, reduced discriminatory use of peremptory challenges, and express jury instructions on issues of bias. Section IV.B advocates the adoption of a narrow exception to Rule 606(b) to allow evidence of juror statements of bias where a juror materially misrepresents biases on voir dire.

25. If the exception recommended here were adopted, Federal Rule of Evidence 606(b) would read: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form, or (4) *whether, during voir dire or other questioning under oath, a juror misrepresented a material bias.* A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying." (Suggested language in italics and omitted word stricken through).

II. THE PROHIBITION ON POST-VERDICT INQUIRY INTO JUROR DELIBERATIONS

Juror 10: Six to six? I'm telling you, some of you people in here must be out of your minds. A kid like that . . .

Juror 9: I don't think the kind of boy he is has anything to do with it. The facts are supposed to determine the case.

Juror 10: Don't give me that. I'm sick and tired of facts! You can twist 'em anyway you like, you know what I mean?²⁶

This Part explores the development of the evidentiary prohibition on post-verdict inquiry into jury deliberations and the interests it serves, providing a backdrop for the analysis that follows.

A. *The History of the Evidentiary Prohibition on Inquiry into Juror Deliberations*

The roots of the evidentiary prohibition on inquiry into juror deliberative processes are historically deep, preceding formal adoption of the Federal Rules of Evidence by almost a hundred years.²⁷ Most scholars trace the common law origins of the rule²⁸ to the 1785 English case, *Vaise v. Delaval*,²⁹ in which Lord Mansfield confronted the situation of jurors who, being divided as to outcome, decided the case with a coin toss.³⁰ Not believing that a juror could be a reliable witness against him or herself, Lord Mansfield held that neither affidavits nor testimony could be received as evidence as to impeach a verdict.³¹ The ruling in *Vaise* formed the foundation of what became known as the "Mansfield Rule," a complete ban on post-verdict juror testimony to impeach a verdict.³²

The Mansfield Rule was transplanted to the United States and adopted by many, but not all, courts.³³ Nonetheless, fissures began to

26. 12 ANGRY MEN, *supra* note 1.

27. For an excellent summary of the history of the evidentiary bar see Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 880–81 (2009). Though the prohibition on inquiry into juror misconduct can be traced back to Lord Marshall, one commentator has astutely noted that the roots of juror misconduct go even deeper. See Huebner, *supra* note 4, at 1469 ("Ever since there have been juries, there has been juror misconduct.").

28. Prior to 1785, English courts sometimes, "though always with great caution," permitted post-verdict evidence of juror misconduct. *McDonald v. Pless*, 238 U.S. 264, 268 (1915); see also Miller, *supra* note 27, at 880.

29. (1785) 99 Eng. Rep. 944 (K.B.); 1 T.R. 11.

30. *Id.*; see also David A. Christman, *Federal Rule of Evidence 606(b) and the Problem of 'Differential' Jury Error*, 67 N.Y.U. L. REV. 802, 815 n.76 (1992); Miller, *supra* note 27, at 881.

31. *Vaise*, 99 Eng. Rep. 944; see also Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 513 (1988).

32. Miller, *supra* note 27, at 881.

33. See, e.g., Benjamin Lawsky, *Limitations on Attorney Postverdict Contact with Jurors: Protecting the Criminal Jury and its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950, 1954 (1994); Miller, *supra* note 27, at 882.

appear. In 1851, the Supreme Court, in *United States v. Reid*,³⁴ shied away from the Mansfield Rule's unconditional nature, noting that "[i]t would perhaps hardly be safe to lay down any general rule upon this subject."³⁵ Though reaffirming that any post-verdict juror evidence should always be received with caution, the Court foresaw that "cases might arise in which it would be impossible to refuse [to admit post-verdict juror evidence] without violating the plainest principles of justice."³⁶

Fifteen years later, the Iowa Supreme Court expressly rejected the Mansfield Rule.³⁷ In *Wright v. Illinois & Mississippi Telegraph Company*,³⁸ addressing the issue of an improper quotient verdict, the court declined to adopt a categorical exclusion of juror testimony.³⁹ Instead, in what became known as the "Iowa Rule," the court held that juror evidence may be admitted "to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself."⁴⁰ Expressly included among matters for which evidence would be allowed were: that a juror was approached by a party, the drawing of lots to reach a verdict, a quotient verdict, or the expression of extraneous facts to the jury.⁴¹ Not admissible was evidence of "any matter which does essentially inhere in the verdict itself," including "that the juror did not assent to the verdict; that he misunderstood the instructions of the court; . . . that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast."⁴² The line the court drew, essentially, was between evidence of "the mental processes of jurors," which was inadmissible, and of "overt acts," which was admissible.⁴³

Following Iowa's example, other states developed their own exceptions to the Mansfield Rule.⁴⁴ For example, in a case involving an allegation that a juror consumed alcohol during a trial recess, the Kansas Supreme Court ruled that "overt acts" by jurors which are "open to the knowledge of all the jury" were admissible to impeach the verdict.⁴⁵ In another case involving post-verdict evidence that a juror had formed an opinion on the outcome of the case and expressed it to his fellow jurors before the end of the trial, the Massachusetts Supreme Court adopted a different approach.⁴⁶ In *Woodward v. Leavitt*,⁴⁷ that court applied a test that

34. 53 U.S. 361 (1851).

35. *Id.* at 366.

36. *Id.*

37. *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa 195, 211–12 (1866).

38. 20 Iowa 195.

39. *Id.* at 211–12. A quotient verdict is one in which the jurors determine damages by averaging rather than through a process of consensus. See, e.g., *McDonald v. Pless*, 238 U.S. 264, 266–67 (1915) (discussing the long-standing prohibition against a quotient verdict).

40. *Wright*, 20 Iowa at 210.

41. *Id.*

42. *Id.*

43. See Jack Pope, *The Mental Operations of Jurors*, 40 TEX. L. REV. 849, 851 (1962).

44. See Christman, *supra* note 30, at 817; Miller, *supra* note 27, at 882.

45. *Perry v. Bailey*, 12 Kan. 539, 545 (1874).

46. See Crump, *supra* note 31, at 516–17.

47. 107 Mass. 453 (1871).

was more conservative than the Iowa Rule but looser than Mansfield's and that focused on juror privacy and a desire to ensure that juror deliberations are "free and secret to avoid 'distrust, embarrassment, or uncertainty' in the verdict."⁴⁸ That test essentially drew a line at the jury room door, permitting testimony to juror statements made outside of the strict confines of deliberations but prohibiting intrusion into the jury room.⁴⁹

Faced with these divisions, the U.S. Supreme Court in *Mattox v. United States*⁵⁰ addressed the admissibility of evidence that a juror brought a newspaper into the jury room and that a bailiff told the jury that the defendant had killed other men.⁵¹ Perhaps attempting to provide clarity in the face of numerous state variations,⁵² the Court approvingly cited the privacy analysis utilized by the Massachusetts court in *Woodward* and adopted the general rule of exclusion with an exception to allow evidence showing "external causes tending to disturb the exercise of deliberate and unbiased judgment."⁵³

Twenty-three years later, in *McDonald v. Pless*,⁵⁴ the Supreme Court declined to extend the extraneous influence exception to evidence of a quotient⁵⁵ verdict.⁵⁶ Setting forth the numerous public policy reasons for excluding post-verdict juror evidence, the Court stressed the importance of limiting evidence of juror deliberations.⁵⁷ While acknowledging that under some courts' test the evidence might be admissible, the Court expressed significant concern that allowing evidence of a quotient verdict "would be replete with dangerous consequences."⁵⁸ According to the Court, only in the "gravest and most important cases" should post-verdict juror testimony be permitted to impeach a verdict.⁵⁹ In the period leading up to the adoption of the Federal Rules of Evidence, some states adopted the *Mattox* extraneous influence test, though numerous questions arose as to what constituted extraneous influence.⁶⁰

48. Crump, *supra* note 31, at 516–17 (quoting *Woodward*, 107 Mass. at 460).

49. *Woodward*, 107 Mass. at 460.

50. 146 U.S. 140 (1892).

51. *Id.* at 142–43.

52. See Miller, *supra* note 27, at 883.

53. *Mattox*, 146 U.S. at 149.

54. 238 U.S. 264 (1915).

55. For a definition of a quotient verdict, see *supra* note 39.

56. *McDonald*, 238 U.S. at 268.

57. *Id.* at 267–68. The Court set forth policy reasons for the rule including: upholding the privacy of the deliberation process, preserving the frankness of jurors' deliberations, protecting the jurors from constant scrutiny and harassment, and not providing an incentive for the losing party to search for evidence to overturn the verdict. *Id.*

58. *Id.* at 268 (quoting *Cluggage v. Swan*, 4 Binn. 155 (Pa. 1811)) (internal quotation mark omitted). Parading the horrible potential results more fully, the Court stated: "[A] change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' 'The practice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse' and 'no verdict would be safe.'" *Id.* (quoting *Cluggage*, 4 Binn. 155).

59. *Id.* at 269.

60. See, e.g., *State v. Henry*, 198 So. 910, 921 (La. 1940); *Emmert v. State*, 187 N.E. 862, 866 (Ohio 1933); see also Huebner, *supra* note 4, at 1477.

The drafting of the initial Federal Rules of Evidence between 1969 and 1973 engendered significant debate regarding codification of the evidentiary prohibition on post-verdict inquiry into juror deliberations.⁶¹ The initial draft of what was to become Rule 606(b) adopted a balance along the lines of the Iowa Rule,⁶² stating that “a juror may not testify concerning the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.”⁶³ Adoption of this early version of the rule likely would have allowed admission of evidence of improper jury room conduct.⁶⁴

In 1971, however, the initial draft of the Rule was substantially rewritten following lobbying by Senator John McClellan of Arkansas and the Justice Department.⁶⁵ Senator McClellan authored an apparently persuasive letter to the Senate Committee Chair in which he stated that the “mischief in the Rule ought to be plain for all to see.”⁶⁶ McClellan warned specifically about the danger of permitting a verdict to be overturned due to juror “bias” stating that contemporary precedent “wisely prohibits this sort of inquiry.”⁶⁷

The House and Senate committees wrangled over the appropriate scope of the prohibition. The House favored the original draft of the Rule, which permitted evidence of improper juror conduct during the deliberations.⁶⁸ The Senate’s version expressly disagreed with the Advisory Committee’s assertion that the trend was toward the liberalization of the evidentiary exclusion, instead finding “continued adherence to the rule that jurors cannot testify about irregularities in their deliberations.”⁶⁹ Ultimately, the language of Rule 606(b) adopted in 1974 closely resembled the Senate version,⁷⁰ with a broad exclusion against post-verdict juror tes-

61. See Crump, *supra* note 31, at 520.

62. Miller, *supra* note 27, at 887.

63. Preliminary Draft of Proposed Rules of Evidence, 46 F.R.D. 161, 289–90 (1969).

64. See Miller, *supra* note 27, at 890.

65. *Id.* at 888.

66. 117 CONG. REC. 33,645 (1971) (testimony of, and letter submitted by, Sen. John L. McClellan). For a discussion, and criticism, of congressional involvement in the drafting of the Federal Rules of Evidence, see generally Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153 (2008).

67. 117 CONG. REC. 33,645 (1971). Senator McClellan concludes his comments on Rule 606 stating, “I urge that you recognize that trials are human processes and that perfect trials, using lay jurors as the Sixth Amendment rightly commands, are an illusory goal.” *Id.*

68. See Miller, *supra* note 27, at 889–90.

69. 117 CONG. REC. 33,655 (1971).

70. Compare 117 CONG. REC. 33,654 (1971), with FED. R. EVID. 606(b). The only significant amendment to Rule 606(b) came in 2006. That amendment incorporated an exception into the Rule to allow a juror to testify, post-verdict as to a “pure error” or mistake in entering the verdict onto the verdict form. FED. R. EVID. 606(b) advisory committee’s note. For a discussion of the types of jury errors (conceptual error, pure error, and differential error), see David Christman, *Federal Rule of Evidence 606(b) and the Problem of “Differential” Jury Error*, 67 N.Y.U. L. REV. 802, 817 (1992) (defining “pure error” as resulting, “when the answers that the jury has agreed upon are different from those announced in court, either because of an error in writing or

timony and two narrow exceptions allowing inquiry into evidence of “extraneous prejudicial information” brought to the attention of the jury or improper “outside influence,” such as bribery or a threat, brought to bear upon a juror.⁷¹

B. Concerns Protected by the Evidentiary Prohibition

The version of Rule 606(b) that was ultimately adopted is justified by a number of important concerns. Perhaps primary among these is that loosening the restriction on inquiry into verdicts could implicate a large number of cases and undermine the entire jury system. Courts and commentators have long assumed that jurors, willfully or negligently, do not follow their obligations precisely. For example, jurors: bully each other,⁷² misunderstand instructions,⁷³ discuss the case prior to deliberations,⁷⁴ are motivated by personal interests,⁷⁵ and impermissibly reach quotient verdicts.⁷⁶ Though none of these examples describe “permissible” juror ac-

recording the agreed upon verdict, or because of a misstatement by the foreman, bailiff, or judge reading the decision”).

71. The outside influences exception allows evidence of juror bribery or threats. *See* FED. R. EVID. 606(b) advisory committee’s note.
72. *See, e.g.,* *Jacobson v. Henderson*, 765 F.2d 12, 14 (2d Cir. 1985) (noting that during six days of juror deliberations, some of the jurors screamed, cried hysterically, banged fists, called each other names, and used of obscene language and one of the jurors allegedly threw a chair at another). However, where juror conduct reaches the coercive level of threats or bribery, the coercion is considered “extraneous” to the deliberative process and evidence thereof is admissible. *See, e.g.,* *Virgin Islands v. Gereau*, 523 F.2d 140, 152 (3d Cir. 1975); *see also* *Remmer v. United States*, 347 U.S. 227, 228–30 (1954) (finding that where a juror was told he might profit by verdict for defendant, a court should hold a hearing to assess prejudice).
73. *See, e.g.,* *Scogin v. Century Fitness, Inc.*, 780 F.2d 1316, 1320 (8th Cir. 1985) (intent of jury to award plaintiff a portion of damages in comparative negligence case); *Procter & Gamble Co. v. Haugen*, 627 F. Supp. 2d 1287, 1299 (D. Utah 2008) (noting statements of jurors that they misunderstood an instruction); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 186 F.R.D. 453, 457 (N.D. Ohio 1999) (noting juror’s post-trial statements regarding difficulty understanding court’s instructions); *Stevens v. Cessna Aircraft Co.*, 634 F. Supp. 137, 141, 143 (E.D. Pa. 1986) (noting that jurors incorrectly thought they were awarding a verdict to plaintiff in answering special interrogatories).
74. *See, e.g.,* *United States v. Cuthel*, 903 F.2d 1381, 1382 (11th Cir. 1990) (evidence of premature deliberations by jury); *United States v. Siegelman*, 467 F. Supp. 2d 1253, 1278–79 (M.D. Ala. 2006) (noting that jurors sent emails to each other discussing the case prior to deliberations); *United States v. Camacho*, 865 F. Supp. 1527 (S.D. Fla. 1994) (noting evidence of premature deliberations, deliberations with fewer than all members of jury present, and improper consideration of the penalty not based on extraneous information).
75. *See* *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980) (“Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations.”); *see also* *Johnson v. Knapp*, 74 F.R.D. 505, 507 (S.D.N.Y. 1976) (noting evidence that juror developed romantic infatuation with one of lawyers during trial barred).
76. *See, e.g.,* *Complete Auto Transit, Inc. v. Wayne Broyles Eng’g Corp.*, 351 F.2d 478, 479 (5th Cir. 1965) (“[A]fter the jury had deliberated unsuccessfully for more than an hour on the question of the amount of damages to be awarded,” each juror submitted “the amount of damages he thought would be reasonable to award [and] those amounts [were] added and the aggregate divided by twelve”); *Machesney v.*

tivities, evidence of juror misconduct is generally not permitted in any of these situations. With such a huge number of cases implicated, courts are understandably reluctant to become “Penelopes,” unraveling verdicts in trials over which they painstakingly preside.⁷⁷ Thus, the prohibition on inquiry directly addresses the concern that the jury system quite literally could not survive inquiry into jury deliberations.⁷⁸

Abutting this concern is interest in the certainty and finality of verdicts.⁷⁹ Congressional committee hearings indicate that finality was among Congress’ primary objectives in adopting the federal rule. In rejecting the House’s more liberal version, the Senate concluded that “[p]ublic policy requires a finality to litigation.”⁸⁰ This concept of finality has been recognized in many contexts as an important judicial, and societal, goal.⁸¹

Bruni, 905 F. Supp. 1122, 1133 (D.D.C. 1995) (noting foreperson’s statements that each juror submitted figure representing his or her perspective of value of case, and that those numbers were then averaged).

77. *Jorgensen v. York Ice Mach. Corp.*, 160 F.2d 432, 435 (2d Cir. 1947). Judge Learned Hand expressively summarized the concern that the jury system could not survive without the prohibition on inquiry into juror deliberative processes:

[I]t would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test; and although absolute justice may require as much, the impossibility of achieving it has induced judges to take a middle course, for they have recognized that the institution could not otherwise survive; they would become Penelopes, forever engaged in unraveling the webs they wove. Like much else in human affairs, its defects are so deeply enmeshed in the system that wholly to disentangle them would quite kill it.

Id.

78. The jury system has been recognized as fundamental to the system of justice. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 721 (1961) (“England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury.”).
79. *See, e.g., McDonald v. Pless*, 238 U.S. 264, 267 (1915) (“[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding.”). *But see* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 225 (1989) (arguing that Rule 606(b) promotes finality “in a haphazard, backhanded way, relying on the fact that no one other than jurors usually is able to testify to their misconduct”).
80. S. REP. NO. 93-1277, at 14 (1974), reprinted in 1974 U.S.C.A.N. 7051, 7060; *see also* Alison Markovitz, *Jury Secrecy During Deliberations*, 110 YALE L.J. 1493, 1505–06 (2001) (discussing finality as a principal justification for Rule 606(b)); Miller, *supra* note 27, at 889–90 (discussing the Congressional debates and the concern over finality).
81. *See, e.g., Tanner v. United States*, 483 U.S. 107, 120 (1987) (“Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.”); *see also* Sanchez-Llamas v. Oregon, 548 U.S. 331, 356 (2006) (“Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate ‘the law’s important interest in the finality of judgments.’” (quoting *Massaro v. United States*, 538 U.S. 500, 504 (2003))); *Grayson v. King*, 460 F.3d 1328, 1342 (11th Cir.

Also underlying the rule against inquiry into deliberative processes are concerns that secrecy and privacy are required in order to encourage jurors to engage in open debate during deliberations.⁸² In one frequently cited passage, Justice Cardozo raised concerns of juror privacy, writing, “[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.”⁸³ Courts and commentators frequently, and in a number of contexts, have affirmed the interest in protecting the confidentiality of juror deliberations.⁸⁴

Finally,⁸⁵ though not necessarily least importantly, the rule reflects an interest in preventing abuse of the system. One concern is that jurors might be “harassed and beset by the defeated party in an effort to secure . . . evidence of facts which might establish misconduct sufficient to set aside a verdict.”⁸⁶ Similarly, jurors themselves could tamper with the process, for example, by acceding in a verdict and later seeking to abrogate the verdict by claiming that they did so based upon impermissible motivations.⁸⁷

2006) (stating that “the government has a strong interest in the finality of duly adjudicated criminal judgments”); *Webbe v. Commissioner*, 902 F.2d 688, 689 (8th Cir. 1990) (noting, in a tax case, that finality and stability are important); *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998) (refusing to recognize a claim for evidence spoliation based upon concerns of finality).

82. For discussions of the interest in juror secrecy, see MUELLER & KIRKPATRICK, *supra* note 22, at 923–24; Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 893–94 (1983).
83. *Clark v. United States*, 289 U.S. 1, 13 (1933); see also *McDonald*, 238 U.S. at 267–68 (noting that if evidence of juror deliberations were admissible, “the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference”).
84. See, e.g., Note, *supra* note 82, at 889 (“Juror privacy is a prerequisite of free debate, without which the decisionmaking process would be crippled. The precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a thoroughgoing exchange of ideas and impressions. For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just deserts [sic] of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.”); see also *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997) (“The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system.”); *United States v. Antar*, 38 F.3d 1348, 1367 (3d Cir. 1994) (Rosenn, J., concurring) (“We must bear in mind that the confidentiality of the thought processes of jurors, their privileged exchange of views, and the freedom to be candid in their deliberations are the soul of the jury system.”); *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990) (“[T]he secrecy of jury deliberations fosters free, open and candid debate in reaching a decision.”).
85. John Henry Wigmore offered an additional justification for the rule, maintaining that a jury verdict “is an operative act, like a will or a contract or a judgment” and that parole evidence rules govern to preclude evidence contradicting the verdict. JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2345 (McNaughten rev. 1961). This rationale has not been cited recently as a basis for the rule and is not discussed further here.
86. *McDonald*, 238 U.S. at 267.
87. *United States v. Eagle*, 539 F.2d 1166, 1170 (8th Cir. 1976) (noting that a “central purpose of juror incompetency is the prevention of fraud by individual jurors who

C. *Contemporary Interpretation of the Rule: TANNER v. U.S.*

The broad evidentiary exclusion reflected in Rule 606(b) received considerable validation from the Supreme Court in *Tanner v. United States*.⁸⁸ *Tanner* involved a challenge to the exclusion of juror affidavits indicating juror misconduct during trial and deliberations.⁸⁹ The jury misconduct at issue in *Tanner* was significant. Following the trial verdict, a juror contacted defense counsel in order to “clear [his] conscience” and “[b]ecause [he] felt . . . that the people on the jury didn’t have no [sic] business being on the jury.”⁹⁰ According to the juror who came forward, seven of the jurors drank alcohol during the noon recess, four jurors consumed between them “a pitcher to three pitchers” of beer, three other jurors consumed mixed drinks, and the foreperson had “a liter of wine on each of three occasions” during the trial.⁹¹ Additionally, four jurors smoked marijuana regularly during the trial, at least two jurors used cocaine repeatedly, and one juror “sold a quarter pound of marijuana to another juror during the trial, and took marijuana, cocaine, and drug paraphernalia into the courthouse.”⁹²

Defendant asserted that the trial court’s exclusion of evidence of the juror misconduct ruling was both an incorrect interpretation of Rule 606(b) and violative of the Sixth Amendment right to trial by a competent jury.⁹³ Writing for the majority, Justice O’Connor looked, in the first instance, to the language of Rule 606(b), and rejected the claim that juror affidavits or testimony were admissible under the exception for “outside influences.”⁹⁴ Rather, she analogized the alcohol and drug use to the paradigmatic internal influences of “a virus, poorly prepared food, or lack of sleep.”⁹⁵

Finding that the evidentiary bar applied, the Court turned to the constitutional questions. The analysis balanced the historical interests served by the rule and the right to a competent jury.⁹⁶ According to the Court, the values protected by Rule 606(b) implicate deep concerns, including

could remain silent during deliberations and later assert that they were influenced by improper considerations”); see also MUELLER & KIRKPATRICK, *supra* note 22, at 924.

88. 483 U.S. 107 (1987).

89. *Id.* at 115–16.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 116–17, 126.

94. *Id.* at 121–22.

95. *Id.* An exception to Rule 606(b) permits evidence of “any outside influence . . . improperly brought to bear upon any juror.” See *supra* note 5 for full text of the rule.

96. The majority opinion does not specifically indicate that it conducted a balancing of the constitutional Sixth Amendment right to a competent jury against the Congressionally-enacted rule. It did, however, juxtapose the constitutional and Congressional analyses in a manner that tends to indicate a measuring. For example, the opinion stated, “As described above, long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry. Petitioners’ Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process.” *Tanner*, 483 U.S. at 127.

the viability of the jury system, the finality of verdicts, candor during deliberations, and the prevention of abuse by litigants.⁹⁷

Critical to the Court's conclusion that the Sixth Amendment was not violated by application of the rule to bar the evidence was the supposition that a litigant's constitutional right to a competent jury is adequately protected throughout the trial process.⁹⁸ Justice O'Connor specifically pointed to voir dire, direct observation of the jury by counsel and the court, and the admissibility of non-juror testimony of juror misconduct as mechanisms by which the Sixth Amendment is protected.⁹⁹ In the absence of its conclusion that pre-verdict protections adequately "guarantee . . . a fair trial before an impartial and competent jury," the Court's conclusion that Rule 606(b) evidentiary restrictions are constitutional would not have been warranted. As will be discussed in section IV.A, however, the promise and premise of *Tanner*, that pre-trial mechanisms adequately protect the right to a competent and unbiased jury, is not well-founded.

III. JUROR BIAS DURING DELIBERATIONS

Juror 8: It's always difficult to keep personal prejudice out of a thing like this. And wherever you run into it, prejudice always obscures the truth. I don't really know what the truth is. I don't suppose anybody will ever really know.¹⁰⁰

A. Post-Verdict Allegations of Juror Bias

Also integral to the system of justice, and sometimes in tension with the rule excluding post-verdict juror testimony, is the need to ensure that verdicts are free from bias and prejudice. The jury is central to our "concepts of individual liberty" and the Supreme Court has confirmed that the right to a jury includes the right to a "fair trial by a panel of impartial, 'indifferent' jurors."¹⁰¹ The constitutional imperative to ensure that verdicts are free from bias and prejudice can conflict with Rule 606(b)'s attempt to protect juror deliberations from inquiry.

The tension may be greatest when, after a verdict, information arises indicating that jurors made racially- or ethnically-biased statements during the course of their deliberations. The following examples are drawn from situations illustrating the dilemma and provide a good context for a discussion of the tensions confronting courts facing evidence made inadmissible by Rule 606(b).

A Hispanic defendant is tried for robbery in a small New England state where less than 3% of the population is Hispanic.¹⁰² Follow-

97. *Id.* at 120–21.

98. *Id.* at 127.

99. *See id.* at 126–27. Section IV.A of this Article addresses more fully these pre-trial mechanisms which, though having the potential to both protect Sixth Amendment rights and to reduce the impact of juror biases in deliberations, fall short of *Tanner's* promise.

100. 12 ANGRY MEN, *supra* note 1.

101. *Irvin v. Dowd*, 366 U.S. 717, 721–22 (1961).

102. Population statistic according to the U.S. Census Bureau as of 2008, available at <http://quickfacts.census.gov/qfd/states/33000.html>.

ing a guilty verdict, a juror sends an email to defense counsel informing the attorney of racial statements made by a juror during deliberations including the statement, “I guess we’re profiling but they [Hispanics] cause all the trouble.” Prior to being seated on the jury, potential jurors were asked no questions related to biases they might hold.¹⁰³

In a jury trial against a management company, the corporate defendant called a company officer as its sole witness. During the deliberations, a juror refers to the witness as a “cheap Jew.”¹⁰⁴

During deliberations in a first-degree murder prosecution of an African American man, one juror refers to another juror as a “nigger lover” and another tells the same juror that he “hope[s] [his] daughter marries one of them.” All jurors had been asked on voir dire whether they “personally believe that blacks as a group are more likely to commit crimes of a violent nature involving firearms” and whether they “[c]ould listen to and judge the testimony of a black person in the same fashion as the testimony of a white person.” All prospective jurors answered “no” to the first question and “yes” to the second.¹⁰⁵

In each of these examples, the prevailing interpretation of Rule 606(b) would prevent the admission of evidence, by testimony or affidavit, of the juror bias. Within this context, and even in the face of significant interests served by the restrictions on inquiry into juror deliberative processes, there have been a number of voices advocating a loosening of the prohibition. Courts express reluctance in applying the rule to exclude evidence of juror bias and face arguments that evidentiary prohibitions should not, or cannot, prevent admitting evidence of bias.¹⁰⁶ Scholars likewise note the pressures inherent in application of the evidentiary bar and have posited a number of suggestions to circumvent the rule.¹⁰⁷ The following section will outline arguments that the evidentiary bar does not by its own terms, or cannot constitutionally, operate to exclude evidence that a juror has expressed bias during deliberations.

B. Claims that the Prohibition Does Not, or Cannot, Preclude Inquiry into Juror Bias

Some courts have embraced the argument that an inquiry into juror bias falls within an express exception to evidentiary bar, and, thus, evidence is permitted pursuant to the rule itself.¹⁰⁸ The rule contains limited exceptions and the only one with potential to allow post-verdict inquiry

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

104. *After Hour Welding, Inc. v. Laniel Mgmt.*, 324 N.W.2d 686 (Wisc. 1982).

105. *Williams v. Price*, 343 F.3d 223 (3d Cir. 2003).

106. *See supra* note 21.

107. *See* MUELLER & KIRKPATRICK, *supra* note 22, at 69; Gold, *supra* note 22, at 153; *Developments in the Law—Race and the Criminal Process*, *supra* note 13, at 1598–99.

108. *See, e.g., United States v. Henley*, 283 F.3d 1111, 1120 (9th Cir. 2001); *Dobbs v. Zant*, 720 F. Supp. 1566, 1573 (N.D. Ga. 1989), *aff'd*, 963 F.2d 1403 (11th Cir. 1991), *rev'd on other grounds*, 506 U.S. 357 (1993); *Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979).

into juror bias is the “extraneous information” exception.¹⁰⁹ Despite intuitive difficulties, some judges and scholars have nonetheless advanced the view that internal bias constitutes an extraneous influence.¹¹⁰

Wisconsin confronted this argument head-on in *State v. Shillcutt*.¹¹¹ In that case, following the verdict of guilty against an African American man for promoting prostitution, a juror reported to defense counsel that, during deliberations, one juror stated, “Let’s be logical, he’s black, and he sees a seventeen year old white girl—I know the type,” following which another expressed agreement with the statement.¹¹² Though the majority of the justices on the court rejected the argument that the statement constituted extraneous information, Justice Bablitch argued in dissent that the juror’s statement constituted “extraneous prejudicial information” falling within an exception to that state’s prohibition against admitting juror statements.¹¹³ Justice Bablitch believed that the juror’s statement brought outside “facts” to the attention of the other jurors and was thereby extraneous.¹¹⁴

The Ninth Circuit took a related position in *United States v. Henley*.¹¹⁵ *Henley* involved the trial of four African American defendants, including a Los Angeles Rams player and a cheerleader, on the charge of conspiracy

109. Rule 606(b) provides that evidence is admissible to establish “whether extraneous prejudicial information was improperly brought to the jury’s attention.” FED. R. EVID. 606(b). Extraneous prejudicial information is generally read as meaning extrarecord information by jurors outside the confines of the trial evidence and not subject to adversarial challenge. See 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 6075 (2d ed).

110. See, e.g., *State v. Shillcutt*, 350 N.W.2d 686, 707 (Wis. 1984) (Bablitch, J., dissenting); Christopher B. Mueller, *Jurors’ Impeachment of Verdicts and Indictments in Federal Courts Under Rule 606(b)*, 57 NEB. L. REV. 920, 942 (1978) (noting that “it is . . . at least arguable that [racial or ethnic prejudices] amount to ‘outside influence’ as to which impeaching evidence should be allowed”); Robert E. Shumaker, Note, *Racial Slurs by Jurors as Grounds for Impeaching a Jury’s Verdict: State v. Shillcutt*, 1985 WIS. L. REV. 1481, 1493. Though not involving juror bias, Justice Marshall’s dissent in *Tanner* argues that the drugs and alcohol consumed by the jurors in that case constituted “outside influences” sufficient to fall under the Rule’s exception. *Tanner v. United States*, 483 U.S. 107, 140–41 (1987).

111. 350 N.W.2d 686.

112. *Id.* at 688.

113. Though the Wisconsin statute does not contain identical language to that contained in Rule 606(b), it contains a very similar exception, providing for the admissibility of evidence “on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.” WIS. STAT. § 906.06(2) (2009).

114. Justice Bablitch stated that the facts brought to the attention of the jury by the racist statement were, essentially: “Let’s be logical. Here’s a black man charged with soliciting prostitutes and keeping a place of prostitution. I know the way these things work. You should know it too. The fact is that the way black pimps work is to get young white girls working for them and that’s what happened here.” *Shillcutt*, 350 N.W.2d at 707 (Bablitch, J., dissenting).

115. 238 F.3d 1111 (9th Cir. 2001); see *id.* at 1120. The court in *Henley* based its holding in part upon a footnote in *Rushen v. Spain*, 464 U.S. 114 (1983), a case involving ex parte contact with a juror, which stated that “[a] juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide and whether extraneous prejudicial information was improperly brought to the juror’s attention” and cited Rule 606(b). *Rushen*, 464 U.S. at 121 n.5 (per curiam).

to distribute cocaine.¹¹⁶ Following the trial, a juror indicated that another juror said during deliberations that he believed that “[a]ll the niggers should hang.”¹¹⁷ In its opinion, the court found that, “even without characterizing racial bias as ‘extraneous,’ a powerful case can be made that Rule 606(b) is wholly inapplicable to racial bias” because “[r]acial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine.”¹¹⁸ The court concluded that it is “consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)’s prohibitions against juror testimony.”¹¹⁹

In addition to arguments that Rule 606(b) permits the admissibility of juror statements to show deliberative bias are claims that the evidentiary rule must give way to constitutional rights. A number of constitutional provisions may be implicated by the prohibition on post-verdict inquiry into juror bias. The Sixth Amendment states that a criminal defendant “shall enjoy the right to a speedy and public trial, by an impartial jury.”¹²⁰ Prior to *Tanner*, courts wrestled with the issues of whether, and when, the right to an impartial jury overrode the interests embodied in the evidentiary exclusion.¹²¹ *Tanner*, however, all but foreclosed the argument that the evidentiary bar set out in Rule 606(b) violates the right to an impartial jury.¹²² The argument that juror racial bias is more compelling and de-

116. *Henley*, 238 F.3d at 1112.

117. *Id.* at 1113–14. The case was marred by numerous other allegations of misconduct as well including jury tampering and discussions between some jurors before the end of the trial.

118. *Id.* at 1119–20. Despite the court in *Henley* reasoning that Rule 606(b) does not bar inquiry into jurors’ racial bias, the Ninth Circuit did not hold the evidence admissible on that ground, finding it unnecessary to do so based upon its ultimate holding that the evidence was admissible to show that a juror may have been dishonest during voir dire. See *infra* section V.B.

119. *Henley*, 238 F.3d at 1121. This reasoning has not been adopted by other federal circuit courts. See *United States v. Villar*, 586 F.3d 76, 82–84 (1st Cir. 2009); *United States v. Benally*, 546 F.3d 1230, 1236–38 (10th Cir. 2008); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987); *Martinez v. Food City, Inc.*, 658 F.2d 369, 373 (5th Cir. 1981).

120. U.S. CONST. amend. VI.

121. See, e.g., *Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979); *State v. Levitt*, 36 N.J. 266, 269–70 (1961).

122. See *Miller*, *supra* note 27 (noting that “[m]ost courts have extrapolated from *Tanner* that applying Rule 606(b) to preclude jury impeachment concerning jurors using racial, religious, or other slurs similarly does not violate the Sixth Amendment right to an impartial jury”); *Developments in the Law—Race and the Criminal Process*, *supra* note 13, at 1596 (“The Supreme Court’s recent decision in *Tanner v. United States*, moreover, seems to insulate rule 606(b) from constitutional attack.”). But see *Commonwealth v. Laguer*, 410 Mass. 89, 97 (1991) (concluding that, under the state’s non-impeachment rule, which is similar to Federal Rules of Evidence 606(b), a hearing on the question of whether ethnic slurs had been made was required because the “possibility . . . that the defendant did not receive a trial by an impartial jury, which was his fundamental right, cannot be ignored”).

mands greater scrutiny than the drug and alcohol abuse engaged in by the *Tanner* jurors, while having merit, has not met with success.¹²³

Professor Colin Miller has argued that the application of Rule 606(b) to preclude evidence of juror racial, ethnic, or religious bias violates a criminal defendant's right to present a defense.¹²⁴ Miller proposes that the evidentiary preclusion arbitrarily and baselessly presumes the unreliability of jurors in a manner that the Supreme Court has held to violate the right to present a defense.¹²⁵ Miller also argues that the application of the rule excluding post-verdict evidence of juror deliberative biases is disproportionate to the purposes behind the rule and therefore violative of the right to present a defense.¹²⁶ Though Miller presents impressive arguments, similar reasoning has been rejected by the Third Circuit.¹²⁷ Given the importance of the objectives behind the evidence rule, these arguments will likely meet the same fate elsewhere.

A more successful approach has been to challenge the impartiality of the trier of fact based on the due process requirement that verdicts be based solely on the evidence presented at trial.¹²⁸ The issue arose in *United States v. Villar*¹²⁹ where, following the guilty verdict against a Hispanic defendant for robbery, a juror sent an email to defense counsel informing the attorney that, during deliberations, a juror stated to the others, "I guess we're profiling but they [Hispanics] cause all the trouble."¹³⁰ Basing its ruling on constitutional due process grounds, the First Circuit held that "the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury."¹³¹ The court characterized its holding as providing "a constitutional outer limit" to the application of the Rule 606(b) evidentiary bar.¹³² On remand, the district court was not required to hold a hearing on the admissibility of the juror's racial statements, but rather given discretion to conduct a hearing and admit the evidence if it chose to.¹³³

123. See, e.g., *Developments in the Law—Race and the Criminal Process*, *supra* note 13, at 1598 (positing that "[t]he unique evils associated with racism alter the balance implicitly struck by the *Tanner* Court, making disclosure considerably more compelling").

124. Miller, *supra* note 27, at 872.

125. *Id.* at 880. The Court first addressed the arbitrary exclusion of evidence as a violation of the a defendant's right to compulsory process required to present a defense in *Washington v. Texas*, 388 U.S. 14, 19 (1967).

126. Miller, *supra* note 27, at 880; see, e.g., *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) ("[T]he Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote.").

127. *Williams v. Price*, 343 F.3d 223, 231–32 (2003).

128. U.S. CONST. amends. V, VI, XIV; see also *United States v. Villar*, 586 F.3d 76, 86–88 (1st Cir. 2009).

129. 586 F.3d 76; see also *id.* at 86–88.

130. *Id.* at 81.

131. *Id.* at 87.

132. *Id.* at 88.

133. *Id.* In light of the constitutional nature of the violation alleged, the First Circuit took the unusual position of allowing the trial court discretion to inquire into a potential violation rather than requiring it to do so. The appellate court's position may re-

Thus, within the federal system, the First, Seventh, and Ninth Circuits appear willing to allow, or at least permit the trial court discretion to allow, evidence of juror racial bias, while the Third and Tenth Circuits prohibit admission of such evidence. Even courts that agree that the evidence can, or must be, admitted under some circumstances have set forth clearly divergent rationales for their approaches.¹³⁴ This split reflects the lack of clear direction in balancing the tension between the important objectives embodied in the Rule 606(b) exclusion and the distastefulness of turning a blind eye to information that racial, ethnic or other bias played a part in juror deliberations. It also reflects the failure of *Tanner's* premise that issues of juror misconduct are adequately addressed prior to jury deliberation.

C. *The Problems with a Broad Exception to the Evidentiary Prohibition*

As discussed in Part II, limitations on inquiry into juror deliberative processes have a deep history and are seen as vital to maintenance of the jury system. The *Tanner* decision expressly recognizes that Rule 606(b) protects important interests, that distinguishing between numerous types of juror irregularities is difficult, and that loosening the restriction on inquiry into verdicts could implicate a huge percentage of cases.¹³⁵ In acknowledgment of the import of these interests, the general rule of exclusion historically has been modified by very narrow exceptions only for evidence of a juror's use of extraneous information, of outside influences improperly brought to bear upon a juror, or of a mistake in entering the verdict.¹³⁶

To open a broad exception to Rule 606(b) to allow evidence of all types of juror misconduct would implicate so many cases as to be unworkable. Difficulty distinguishing between juror misconduct of which evidence should be allowed and barred, however, may be insurmountable. In order to address these difficulties, some commentators recommend that an exception be made to the Rule to allow evidence of a juror's bias only where that bias is racial.¹³⁷ The argument that juror expressions of racial

present a compromise in light of its conclusion that "the policies embodied in Rule 606(b) and underscored in *Tanner* are extremely important." *Id.*

134. The Ninth Circuit's reasoning appears to be based in part on its acceptance of the position that the evidence fell within an exception to the rule either because the juror may have been dishonest during voir dire or because the injection of racial bias into deliberations is equivalent to the introduction of extraneous information. Compare *id.* at 86–88, with *United States v. Henley*, 238 F.3d 1111, 1119 (9th Cir. 2001).

135. See Mueller, *supra* note 110, at 922 (describing the rule as "convenient" way to "avoid the need to decide what kinds of irregularities in the decision-making process should suffice to upset a verdict").

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

137. For an argument that concern for fairness of proceedings and accuracy of outcome outweigh the interests behind Rule 606(b) when a court has information that a juror has expressed racial bias during deliberations, see Gold, *supra* note 22, at 139–40. See also Andrew C. Helman, Comment, *Racism, Juries, and Justice: Addressing Post-Verdict Juror Testimony of Racial Prejudice During Deliberations*, 62 ME. L. REV. 327, 348 (2010) (proposing that Maine adopt an exception to its 606(b) exclusion to allow evidence into "whether jurors made statements of racial prejudice").

bias should be intensely scrutinized is well-grounded, since concerns about racial bias lie at the heart of the Fourteenth Amendment¹³⁸ and racial bias is viewed as structural error.¹³⁹ However, it may be seen as arbitrary or unjust to allow evidence of racial bias by jurors while excluding evidence of bias on the basis of religion, gender, national origin, or sexual orientation.¹⁴⁰

In addition, not all discussions of race, or even expressions of racial bias may be inappropriate during deliberations.¹⁴¹ Trial and jury experts advise attorneys to address race and racial bias with jurors in a straightforward manner, especially where their case involves racial issues, or where their client or a witness is a racial minority.¹⁴² Distinguishing those juror comments which are appropriate discussions of race from those where which are impermissible statements of juror bias could present significant difficulties.¹⁴³

Biases not only impact whether a juror may like or dislike a party; they also impact the manner in which trial information is understood by jurors. Rather than being blank slates upon which a trial is written, studies indicate that, during a trial, jurors develop explanation-based stories

138. See Gold, *supra* note 22, at 141; see also *Strauder v. West Virginia*, 100 U.S. 303, 308–09 (1879) (recognizing that an equal protection violation can occur where an all-white criminal jury is influenced by racial bias).

139. Though applying a state statute quite different from 606(b), for a discussion of this point see *State v. Santiago*, 715 A.2d 1, 20 (Conn. 1998), which held that “[a]llegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct because such conduct is, ipso facto, prejudicial”. See also *State v. Phillips*, 927 A.2d 931, 937 (Conn. App. 2007) (accord). But see *Miller*, *supra* note 27, at 926 (arguing that all juror bias is structural error).

140. See, e.g., *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (discussing that the “religious prejudice displayed by the jurors in the case presently before us is so shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice, that we must act decisively to correct any possible harmful effects on this appellant”); Barbara Allen Babcock, *A Place in the Palladium: Women’s Rights and Jury Service*, 61 U. CIN. L. REV. 1139 (1993) (discussing the injury caused by the exclusion of women from juries and arguing that gender should be treated like race when evaluating the use of peremptories); Tisha R.A. Wiley & Bette L. Bottoms, *Effects of Defendant Sexual Orientation on Jurors’ Perceptions of Child Sexual Assault*, 33 LAW. HUM. BEHAV. 46 (2009) (discussing juror bias against gay men in child sexual abuse cases).

141. Race can be a relevant topic of discussion during deliberations where, for example: racial bias is an issue in the case or was part of evidence presented at trial; there is a cross-racial identification; a relevant statement must be given cultural context; or where jurors must attempt to determine the intent of, or impact of an action upon, a person of another race.

142. See, e.g., NATIONAL JURY PROJECT, *JURYWORK: SYSTEMATIC TECHNIQUES* § 21:11 (“Race and ethnicity permeate almost all aspects of a case. Judges and jurors may try to deny this fact and pretend they are color-blind. But, since people will perceive the evidence through the prism of their stereotypes, it is necessary to meet those stereotypes head on in the preparation and delivery of the case—from jury selection through closing arguments.”).

143. See, e.g., *United States v. Davis*, 1 F.3d 1014, 1016–17 (10th Cir. 1993) (confronting the question of whether it was racial bias where the jury sent a note asking to re-listen to audio tapes without the African American defendant’s family in the courtroom); Bragg, *supra* note 23.

that describe “what happened” during the key events at issue.¹⁴⁴ In formulating and completing these stories, jurors rely significantly upon their implicit assumptions and expectations.¹⁴⁵ Not surprisingly, implicit biases alter the stories that jurors construct and individuals tend to rely on their biases when confronting situations of divergent facts.¹⁴⁶ In the absence of preemptive actions to address biases before juror deliberation, it is unreasonable to expect juror biases to disappear from deliberations.

Further, while it may be relatively rare for information about overtly racist statements made during deliberations to emerge, this does not mean that bias is absent from the majority of deliberations. Expressions of juror bias are likely occur without being brought to the attention of courts or litigants and arbitrary factors may well determine whether juror biases are discovered. Because only jurors are present for deliberations, statements of bias therein only come to light through affirmative juror disclosure. For a juror to affirmatively report the biased statements requires that she recognize the expression of bias, believe the expression is inappropriate, and be sufficiently motivated to report the incident. In the absence of any one of these factors, expressions of juror bias during deliberations are unlikely to come to the attention of anyone outside the jury room. It would be fallacious, however, to equate the absence of post-verdict disclosure of juror bias with juror impartiality.

An additional problem with relying on an exception to Rule 606(b) to resolve juror bias is that the majority of juror biases do not exhibit as overt racial name-calling. Instead, most biases are implicit or even unconscious, and these biases form the framework upon which our brains hang all that we hear or experience.¹⁴⁷ It appears that these implicit biases, which are obviously less likely to be made express and, therefore, are less likely to surface following jury verdicts, actually impact juror decisions more than overt statements of bias.¹⁴⁸ These perhaps more-com-

144. See Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 189–90 (1992); see also Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 515–18 (2004) (proposing a “coherence-based reasoning” approach to understanding decisionmaking which posits that decisions are the product of a both biased assumptions as well as rational thought).

145. See, e.g., Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 342–44 (2010); see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498–1506 (2005) (discussing “schemas” or categories of knowledge into which, when activated, we map incoming information); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 414–15 (2007) (discussing the ways in which race impacts the “misremembering” of facts).

146. See Kang, *supra* note 145; Levinson & Young, *supra* note 145, at 337.

147. One recent empirical study conducted by law and psychology professors discusses the “Biased Evidence Hypothesis” or how “exposing jurors to simple racial cues can trigger stereotypes and affect how they evaluate evidence in subtle but harmful ways.” Levinson & Young, *supra* note 145, at 310.

148. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 954–55 (2006) (“Importantly, implicit measures of bias have relatively greater predictive validity than explicit measures in situations that are socially sensitive, like racial interactions, where impression-management processes might inhibit people from expressing negative attitudes or unattractive

mon, but covert, biases will not be addressed regardless of the adoption of an exception to the evidentiary bar.

IV. ADDRESSING JUROR BIAS WHILE PRESERVING THE INTERESTS UNDERLYING THE EVIDENTIARY EXCLUSION

Juror 10: You're not gonna tell me that we're supposed to believe this kid, knowing what he is. Listen, I've lived among them all my life—you can't believe a word they say, you know that. I mean they're born liars.¹⁴⁹

...

Juror 10: He's a common ignorant slob. He don't even speak good English.¹⁵⁰

A. *Pre-Verdict Mechanisms to Address Juror Bias*

As we have seen, the *Tanner* opinion relied heavily on procedural mechanisms before and during trial to diminish the likelihood of juror partiality or incompetence during deliberations.¹⁵¹ In fact, however, though they contain the potential to preempt many instances of juror bias or misconduct, these mechanisms have failed to deliver on the promise of providing adequate protections from racial bias in the deliberative process. As a result, claims of deliberative bias have proliferated while courts and litigants have struggled with the limitations imposed by Rule 606(b). Rather than discard the evidentiary rule, however, another possibility is to address the deficiencies in the pre-deliberative process, in an effort to achieve the promise set out in *Tanner*.

While it is beyond the scope of this Article to comprehensively address all methods with the potential to reduce juror bias, this section evaluates the current and potential efficacy of pre-deliberative methods in uncovering and preventing juror expressions of bias. The mechanisms include jury venires, juror voir dire, peremptory challenges, and jury admonitions. Though these mechanisms currently fail to address the problem fully, expansion of these mechanisms to address juror bias directly, effectively, and systematically has the potential to reduce expressions of juror bias. Such expansion may also reduce the pressure to carve out a broad exception to the evidentiary prohibition on inquiry into deliberative processes.

To inform the analysis, this section relies in part on experimental and social science data. Though courts have recognized difficulties applying social science data to conclusively demonstrate a constitutional violation in an individual case,¹⁵² it is significantly less problematic to apply experi-

stereotypes.”); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027–28 (1988) (describing the literature documenting the rise of indirect, covert, and unconscious racism).

149. 12 ANGRY MEN, *supra* note 1.

150. *Id.*

151. *Tanner v. United States*, 483 U.S. 107, 127 (1987).

152. The majority opinion in *McCleskey v. Kemp*, 481 U.S. 279, 297–99 (1987), describes the Court's concerns in applying social science data to predict impact in a specific case.

mental information to broader systematic issues, including bias.¹⁵³ Looking to experimental evidence with an eye toward removing juror bias pre-deliberation, it becomes apparent that a number of potential de-biasing mechanisms hold a promise of reducing the likelihood of expressions of juror bias during deliberations.

1. *Making Bias Salient: Voir Dire*

For the purpose of determining whether jurors hold relevant biases that may impact deliberations, voir dire is the most important moment of juror inquiry.¹⁵⁴ In fact, aside from a questionnaire that may have been completed by jurors prior to voir dire or circumstances where an irregularity is brought to the attention of the court during trial, voir dire comprises the only opportunity for such inquiry.¹⁵⁵

Though the rules governing voir dire vary from state to state and between federal and state court,¹⁵⁶ trial courts are given broad discretion to limit voir dire in time and topic.¹⁵⁷ A trial court is not constitutionally required to allow inquiry into the biases of jurors except in a narrow set of circumstances, namely in a criminal trial where issues of race, gender, or ethnicity are “inextricably bound up with the conduct of the trial.”¹⁵⁸

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153. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 556–59 (2000) (O’Connor, J., dissenting) (discussing the impact of empirical studies on the development of the federal sentencing guidelines); *United States v. Leon*, 468 U.S. 897, 907 n.6 (1984) (relying on social science research to show the costs of the exclusionary rule and to justify creating a good-faith exception to that rule); *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (citing empirical studies showing that small size juries impede effective group deliberation to find unconstitutional five-person juries).
154. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143–44 (1994) (“Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.”); *Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991) (“Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.”).
155. See, e.g., Lauren A. Rousseau, *Privacy and Jury Selection: Does the Constitution Protect Prospective Jurors from Personally Intrusive Voir Dire Questions*, 3 *RUTGERS J.L. & URB. POL’Y* 287, 294–96 (2006) (discussing the methods of collecting information from jurors); see also *Gomez v. United States*, 490 U.S. 858, 873 (1989) (“Jury selection is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice.”).
156. For a good discussion of contemporary voir dire see NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES* 89 (Prometheus Books, 2007).
157. “Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.” *Ristaino v. Ross*, 424 U.S. 589, 594–95 (1976) (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895)) (internal quotation marks omitted).
158. *Id.* at 596–97; see also *Rosales-Lopez v. United States*, 451 U.S. 182, 191 (1981) (explaining that, in exercising its supervisory authority over state court proceedings, the federal courts will not overturn a state court conviction even where a criminal defendant may have had the right to inquire into racial bias on voir dire unless there is a reasonable possibility that racial or ethnic prejudice might have influenced the jury). The Supreme Court has held that the Constitution does not require questioning about racial prejudice absent “special circumstances.” *Turner v. Murray*, 476 U.S. 28, 33 (1986). Though a capital charge is a “special circumstance,” “the mere fact that [a defendant] is black and his victim white” does not constitute a “special circumstance” sufficient to constitutionally require that a party be allowed

That the race of a criminal defendant and the race of a victim of a crime are different is not independently sufficient to require that a party be allowed to inquire into racial prejudice of jurors.¹⁵⁹ Rather, a “special circumstance” must exist which indicates a “substantial likelihood that racial or ethnic bias will impact jurors.”¹⁶⁰ Though trial courts have wide discretion in conducting voir dire, there are some limits to that discretion.¹⁶¹

Even where voir dire does include discussions of bias, studies indicate that courts and litigants ineffectively utilize voir dire to discern the exis-

to voir dire jurors on racial bias. *Id.* at 32; see also *People v. Ramos*, 101 P.3d 478, 495 (Cal. 2004) (holding that, in trial of capital defendant who had pleaded guilty to killing three women, the trial court was not required to allow voir dire on subject of gender bias).

159. *Ristaino*, 424 U.S. at 597.

160. *Rosales-Lopez*, 451 U.S. at 189–90. A capital proceeding involving an interracial offense presents the requisite special circumstances and a capital defendant is constitutionally entitled to voir dire prospective jurors on racial or ethnic bias. *Turner*, 476 U.S. at 36–37. A number of commentators have criticized the Court’s narrow approach to the need for voir dire on juror bias. See, e.g., Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1670–76 (1985); Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 527–29 (1986); Nancy L. Alvarez, Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS L.J. 959, 983 (1982).

161. For a good analysis of appellate decisions reviewing trial court discretion to refuse to allow inquiry into juror bias, see Barry P. Goode, *Religion, Politics, Race, and Ethnicity: The Range and Limits of Voir Dire*, 92 KY. L.J. 601, 679 (2004), which found that “[f]ew courts have found ‘special circumstances’ requiring reversal of a district court’s ruling”. For example, in *United States v. Barber*, 80 F.3d 964, 968–69 (4th Cir. 1996), where an interracial couple was charged with laundering the proceeds from the sale of marijuana was denied the ability to question jurors regarding their racial attitudes, the court stated that it was not prepared to entertain the thesis that there might be some jurors who would be inclined to convict because of a bias against interracial couples. Likewise, in a civil rights case where an African American plaintiff claimed that he was beaten by Caucasian police officers for taking pictures of their execution of a search warrant, the trial and appellate courts found that race was not a sufficiently important factor to permit the request to voir dire on racial bias. *Hollins v. City of Milwaukee*, 574 F.3d 822, 828 (7th Cir. 2009); see also *United States v. Okoronkwo*, 46 F.3d 426, 433–35 (5th Cir. 1995) (upholding the trial court’s refusal to question prospective jurors about racial and national origin bias where a Nigerian defendant was alleged to have participated in a conspiracy to file false income tax returns despite the claim that Nigerians had a reputation in Texas for fraud); *United States v. Kyles*, 40 F.3d 519, 524–26 (2d Cir. 1994) (finding no error in the trial court’s refusal to question prospective jurors about racial prejudice where an African American defendant was on trial for an armed robbery against Caucasian victims, finding the level of violence insufficient to constitutionally requiring inquiry into bias). But see *State v. Jackson*, 358 So. 2d 1263, 1266 (La. 1978) (granting a new trial after finding that the trial court “failed to afford sufficiently wide latitude to counsel for defendants in their examination of prospective jurors on voir dire”); *State v. Petersen*, 368 N.W.2d 320, 322 (Minn. Ct. App. 1985) (granting a new trial where the trial court “unreasonably restricted voir dire by limiting counsel to five minutes” of examination for each juror); *Ratliff v. State*, 690 S.W.2d 597, 601 (Tex. Crim. App. 1985) (reversing based upon the trial court’s “unreasonable” limitation of time allotted for voir dire).

tence of juror bias.¹⁶² Social scientists concur that a significant problem with the current state of voir dire is that it is too limited to effectuate the full disclosure of the information necessary to determine juror biases.¹⁶³ Most frequently, voir dire questions to jurors from court and counsel focus on demographics (for example, “What part of town do you live in?” or “Where did you work before you retired?”). Studies have shown, however, that individual juror attitudes, formed from life experiences, are “much more powerful predictors of verdict choices than demographic characteristics.”¹⁶⁴ Currently, “the procedures used during voir dire and the psychological atmosphere in which it takes place are virtually guaranteed to inhibit rather than facilitate [juror] self-disclosure.”¹⁶⁵

Despite the current ineffectiveness of most voir dire, effective questioning has the potential to engage jurors in honest communication about bias.¹⁶⁶ Though jurors may not always be aware of their biases, studies have shown that open conversations have the potential to reveal juror bias and thereby allow litigants to seek to remove jurors for cause or with their peremptory challenges.¹⁶⁷ According to empirical studies, in order for jurors to disclose meaningful information on biases, voir dire must “facilitate juror self-disclosure.”¹⁶⁸ This type of voir dire¹⁶⁹ requires moving beyond the rudimentary, sterile, one-way, demographic-focused set

162. On the basis of post-trial interviews, one study concluded that the voir dices conducted in the federal court trials did not provide sufficient information for attorneys to identify prejudiced jurors. Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 528 (1978); see also Rachel A. Ream, *Limited Voir Dire*, 23 CRIM. JUST., Winter 2009, at 22, 25–26 (collecting information on ineffectiveness of limited voir dire).

163. See Ream, *supra* note 162, at 22–25; Suggs & Sales, *supra* note 15, at 268–70.

164. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1180 (2003).

165. Suggs & Sales, *supra* note 15, at 247; see also VIDMAR & HANS, *supra* note 156, at 90–93 (discussing the problems associated with inadequate time spent on juror voir dire).

166. See VIDMAR & HANS, *supra* note 156, at 91 (concluding that the conduct of voir dire can “minimize or exacerbate” the disclosure of juror biases). For three of the many litigation aids instructing lawyers on actually effective voir dire techniques, see Lisa A. Blue, *How to Improve Your Chances for Selecting a Favorable Jury: Proven Psychological Principles to Use During Voir Dire to Uncover Juror Bias*, in 1 ATLA ANNUAL CONVENTION REFERENCE MATERIALS (2002), available at 1 Ann.2002 ATLA-CLE 1273 (Westlaw); Patrick Brayer, Batson, *Empowerment and New Jury Models, The Case for Open Inquiry*, CHAMPION, July 2009, at 26, available at 33-Jul Champion 26 (Westlaw); and Amy Singer, *Selecting Jurors: What To Do About Bias*, 780 PRACTISING L. INST. 131 (2008).

167. Noting the connection between effective voir dire and the non-discriminatory exercise of peremptory challenges, one commentator has written, “The Supreme Court should . . . issu[e] an opinion in the near future which acknowledges the essential linkage of a thorough voir dire to the non-discriminatory exercise of peremptory challenges.” Barat S. McClain, Note, *Turner’s Acceptance of Limited Voir Dire Renders Batson’s Equal Protection a Hollow Promise*, 65 CHI.-KENT L. REV. 273, 306 (1989).

168. For a social science analysis that incorporates concrete suggestions for facilitating juror self-disclosure, see Suggs & Sales, *supra* note 15, at 268–71. The fairly easily implemented recommendations for improving the ability of voir dire to discern juror bias made by Suggs and Sales include: attorney rather than judge-led questioning; focusing on individual, rather than group, questioning of jurors; preceding

of questions that currently substitute for real juror inquiry on bias. Instead, all participants, lawyers, courts, and jurors must encourage the engagement of jurors in dialogue¹⁷⁰ regarding prejudice and bias in an unhurried, relaxed, and non-judgmental environment.¹⁷¹ When conducted effectively, voir dire can assist jurors in making meaningful self-disclosures as to their biases.¹⁷²

In addition to its effectiveness in discerning bias for the purpose of removing jurors, studies indicate that race-related voir dire can be a useful tool for moderating jurors' own racial attitudes.¹⁷³ A study evaluating the effects of racial diversity within jury groups found that even setting aside the effectiveness of voir dire in identifying biased jurors, a discussion of race and bias in voir dire "may influence prospective jurors by reminding them of the importance of rendering judgments free from prejudice."¹⁷⁴ A number of studies indicate that discussions with jurors about bias and prejudice help make egalitarian goals contextually "salient" for jurors and that this salience, coupled with the issuance of strong normative goals to avoid bias, can help jurors "successfully avoid prejudice."¹⁷⁵ Consistent with these findings, juror racial bias appears to

juror questioning with self-disclosing statements by lawyers; and employing positive reinforcement. *Id.* at 268–69.

169. Because prospective jurors may feel freer to express honest thoughts and opinions in a questionnaire, some scholars suggest that pretrial questionnaires would be an efficient and reliable way to obtain information from prospective jurors. In addition, questionnaires can quickly pinpoint the specific areas that require individual follow-up questioning. Robert J. Hirsh et al., *Attorney Voir Dire and Arizona's Jury Reform Package*, 32 ARIZ. ATT'Y 24, 29 (1996).
170. For an intriguing suggestion that prospective jurors be given the Implicit Association Test (IAT) during voir dire, see Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. FOR SOC. JUST. 139 (2010). The IAT measures relative speeds of responding to categories as subjects distinguish African American faces from European American faces. See generally Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998). For additional discussion of the IAT in the context of racial schemas, see Kang, *supra* note 145, at 1509–11.
171. Suggs & Sales, *supra* note 15, at 268–71.
172. *Id.*
173. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733, 770 (1995) (arguing that voir dire "present[s] an excellent opportunity to search not only for avowedly prejudiced venirepersons, but also to signal to prospective jurors the importance of consciously monitoring their habitual responses to the stereotyped litigant").
174. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 606 (2006); see also Samuel R. Sommers & Omoniyi O. Adekanmbi, *Race and Juries: An Experimental Psychology Perspective*, in CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE & LAW 78, 86 (Gregory S. Parks, Shayne Jones & W. Jonathan Cardi eds., 2008) (finding that making salient the issue of race reduced the influence of race on Caucasian jurors).
175. See Armour, *supra* note 173, at 770; Kristin A. Lane, Jerry King & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. LAW. SOC. SCI. 427, 438 (2007); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1011–13 (2003) (summarizing the literature supporting this principle). Section IV.D,

be most significant when bias is neither discussed nor otherwise injected into the trial.¹⁷⁶

Thus, Justice O'Connor's opinion in *Tanner* was correct in pointing to voir dire as a trial mechanism with the potential to protect litigants from juror bias and incompetence.¹⁷⁷ It also appears, however, that current procedures and trial court discretion operate to reduce the efficacy of voir dire in revealing juror biases. In order for voir dire to reduce juror bias, courts must allow litigants to inquire into bias utilizing procedures that operate to facilitate disclosure.

2. *Providing Normative Expectations: Jury Instructions*

Despite the prevalence of juror bias, jurors are given minimal instruction or guidance regarding bias and prejudice.¹⁷⁸ Generally, a jury is given some preliminary instructions at the beginning of trial, including admonitions not to seek out extraneous information or discuss the case during recesses, and then is fully instructed at the end of the evidence. Potentially contradicting an instruction that bias is undesirable, jurors are also instructed that they should rely upon their own common sense, perceptions, and experience.¹⁷⁹ Pattern instructions do not expressly instruct

infra, discusses how jury instructions can set normative goals for jurors that include the expectation that they reveal, or repress, any bias.

176. Sommers & Ellsworth, *supra* note 175, at 1014.

177. See also Barat S. McClain, Note, *Turner's Acceptance of Limited Voir Dire Renders Batson's Equal Protection a Hollow Promise*, 65 CHI.-KENT L. REV. 273, 306 (1989) ("The Supreme Court should . . . issu[e] an opinion in the near future which acknowledges the essential linkage of a thorough voir dire to the non-discriminatory exercise of peremptory challenges.")

178. Jurors are likely given a lengthy set of instructions at the end of the trial which informs them of all of the law applicable to the case, their responsibilities in deliberating and completing verdict forms, the expectations regarding the evidence (for example, to disregard stricken evidence and to judge a witness' potential bias or interest), and including a sentence along the lines of "Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way." See, e.g., MODEL CIV. JURY INSTR. 3D CIR. 3.1 (2010). But see COLO. REV. STAT. § 18-3-408 (2008) (providing that in some sexual assault cases, "the jury shall be instructed not to allow gender bias or any kind of prejudice based upon gender to influence the decision of the jury").

179. See, e.g., PATTERN CRIM. JURY INSTR. 1ST CIR. 3.04 (1998) ("Although you may consider only the evidence presented in the case, you are not limited in considering that evidence to the bald statements made by the witnesses or contained in the documents. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw from facts that you find to have been proven such reasonable inferences as you believe are justified in the light of common sense and personal experience."); see also PATTERN CIV. JURY INSTR. 5TH CIR. 3.1 (2009) ("While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case."); PATTERN CRIM. JURY INSTR. 5TH CIR. 1.07 (2001) ("In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence."). According to one scholar of the American jury, "Prejudice is the darkside of commonsense justice." VIDMAR & HANS, *supra* note 156, at 341.

jurors that, though racial and other biases may be socially pervasive, biases must be set aside in the determination of the matter before them and that an awareness and discussion of the potential for bias can help them avoid bias.¹⁸⁰

Studies indicate that judicial instructions can impact whether or not jurors exhibit racial bias during deliberations.¹⁸¹ For example, in one study involving mock jurors in a rape trial, Caucasian mock jurors who had been given no specific instructions making issues of bias salient gave higher guilt ratings to the Black defendant than to the Caucasian defendant.¹⁸² However, Caucasian jurors who had been given instructions emphasizing the importance of juror impartiality and the requirement that jurors be free from bias or prejudice did not display bias.¹⁸³ For this reason, commentators have recommended that courts specifically instruct juries, at the beginning of trial, to be aware of biases and to refrain from allowing prejudice to impact the verdict.¹⁸⁴

In addition, instructions regarding specific issues such as the special problem of cross-racial eyewitness identification may prime jurors for discussions related to race. Recent DNA exonerations, as well as decades of scientific research, spotlight the fact that eyewitness misidentification is a leading cause of wrongful convictions, of which a high percentage involve cross-racial identifications.¹⁸⁵ As with instructions on bias and

180. The Fifth Circuit has a pattern instruction admonishing jurors against bias against corporations, stating “[a] corporation and all other persons are equal before the law and must be treated as equals in a court of justice.” PATTERN CIV. JURY INSTR. 5TH CIR. 2.13 (2009). Colorado also has an instruction on gender bias that is required in some sexual assault cases. See COLO. REV. STAT. § 18-3-408.

181. Jeffrey E. Pfeifer & James R.P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCHOL. 1713 (1991); see also Erick L. Hill & Jeffrey E. Pfeifer, *Nullification Instructions and Juror Guilt Ratings: An Examination of Modern Racism*, 16 CONTEMP. SOC. PSYCHOL. 6 (1992); Sommers & Ellsworth, *supra* note 175, at 78 (reviewing the literature and noting the consensus that instructions appear to affect the likelihood of bias).

182. Pfeifer & Ogloff, *supra* note 181, at 1718.

183. *Id.*; see also Sommers & Ellsworth, *supra* note 175, at 78 (reviewing the literature and noting the consensus that instructions appear to affect the likelihood of bias).

184. Armour, *supra* note 173, at 770 (arguing that instructions are one of many “opportunities for legal actors to encourage prospective or sitting factfinders to guard against their prejudice-like responses”); Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1851–52 (1993) (arguing that judges should specifically instruct juries about racial bias and the effect of stereotype as a means of educating jurors to “identify and neutralize their own unconscious biases”); J.C. Goldberg, Comment, *Memory, Magic, and Myth: The Timing of Jury Instructions*, 59 OR. L. REV. 451, 452 (1981) (making a case that jury instructions be given to jurors at the beginning of the trial rather than at the end). *But see* Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1679 (1985) (suggesting that instructing jurors “to put racial prejudice out of their minds or to ignore the defendant’s race in assessing the evidence is unlikely to be productive”).

185. According to the Innocence Project, “Eyewitness misidentifications contributed to over 75% of the more than 220 wrongful convictions in the United States overturned by post-conviction DNA evidence.” *Eyewitness Identification Report*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php (last visited Mar. 9, 2011); see also Paul Barkowitz & John C. Brigham, *Recognition of Faces: Own Race Bias, Incentive and Time-Delay*, 12 J. APPLIED SOC.

prejudice generally, instructing jurors that cross-racial identifications may pose special issues not present in same-race identifications can help juries develop a framework for thinking about and discussing these issues during deliberations.¹⁸⁶ Though a number of appellate courts have held that it is within the discretion of a trial judge whether to instruct a jury to consider the cross-racial nature of witness identification, only New Jersey courts have consistently held that there may be a right to such an instruction.¹⁸⁷

In addition to instructions that make bias salient, jurors could also be informed of the existence of the Rule 606(b) evidentiary prohibition and that evidence of jury deliberations, statements, or processes is not admissible.¹⁸⁸ Not only would an instruction along these lines promote the goal of juror deliberative candor by informing jurors that their deliberations will be secret, such an instruction also would encourage jurors to report concerns about misconduct prior to deliberations since jurors would be aware of the prohibition on the post-verdict admission of the evidence.¹⁸⁹

As with the other pretrial and trial mechanisms discussed below, expressly instructing jurors that bias is inappropriate has the potential to provide concrete normative goals and make bias salient to jurors, and thus to reduce juror expressions of bias during deliberations. Like the other mechanisms addressed in this section, such reforms have the bene-

PSYCHOL. 255 (1982); John C. Brigham, *Perspectives on the Impact of Lineup Composition, Race and Witness Confidence on Identification Accuracy*, 4 L. & HUM. BEHAV. 315, 318–19 (1980).

186. See, e.g., Bethany Shelton, Note, *Turning a Blind Eye to Justice: Kansas Courts Must Integrate Scientific Research*, 56 U. KAN. L. REV. 949, 962–66 (2008) (arguing that instructions on own-race bias are necessary); see also Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1850 (2003); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 211 (2001). Professor David Aaronson formulated the following proposed jury instruction on cross-racial identification:

In this case, the defendant, (insert name), is of a different race than (insert name of identifying witness), the witness who has identified [him] [her]. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race. You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. [For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he] [she] would not have greater difficulty in making a reliable identification.]

David E. Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction*, CRIM. JUST., Spring 2008, at 4.

187. See, e.g., *State v. Cromedy*, 727 A.2d 457, 458 (N.J. 1999) (holding that the trial court erred in failing to instruct the jury on own-race bias); *State v. Ways*, 850 A.2d 440, 455–56 (N.J. 2004) (same).
188. See Edward T. Swain, Note, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 202 (1988) (arguing that jurors should be instructed as to the existence of the Rule 606(b) bar, common types of juror misconduct, and the importance of reporting misconduct before deliberations).
189. *Id.*

fit of reducing bias while preserving the interests embodied in Rule 606(b).

3. *Ensuring Jury Diversity: Jury Venires and the Use of Peremptory Challenges*

Among the mechanisms with the promise to reduce the incidence of expressions of juror bias during deliberations is a diverse jury. Social science studies indicate that increasing jury diversity has the potential to reduce juror expressions of bias during deliberations in a number of ways.¹⁹⁰

First, social scientists have long understood that the presence of minority group jurors “may inhibit majority group members from expressing prejudice, especially if the defendant is from the same group as the minority group jurors.”¹⁹¹ This result has been confirmed more recently. For example, in one study directed at racial diversity, when issues of racism arose, jurors in the racially diverse group were “less frequently caught off guard . . . and more receptive to discussing the topic [of bias]” than were the jurors in an all-Caucasian group.¹⁹² Other studies have confirmed these conclusions.¹⁹³

In addition, jury diversity has been shown to increase a juror’s ability to consider a variety of perspectives.¹⁹⁴ One study found that the racial composition of a jury “had clear effects on deliberation content” in that it led to “broader information exchange” between jurors.¹⁹⁵ Similarly, from the perspective of group functioning, diversity can also counterbalance individual juror biases by combining “jurors who individually cannot be characterized as strictly impartial, but who as a whole create a balanced and impartial jury, a jury that is composed of jurors with varying backgrounds and experiences.”¹⁹⁶ In this way, the jury, as a diverse group, balances “multiple citizens with diverse backgrounds, relying on them to pool their varying perceptions to arrive at a verdict that comports with common (i.e., shared) sense.”¹⁹⁷ This group “balancing” is not explained solely by information exchange; it appears that even without the express

190. See, e.g., Levinson, *supra* note 145, at 414–15.

191. Valerie P. Hans & Neil Vidmar, *Jury Selection*, in *THE PSYCHOLOGY OF THE COURTROOM* 39, 42 (Norbert L. Kerr & Robert M. Bray eds., 1982).

192. Sommers, *supra* note 174, at 607.

193. *Id.* at 606 (concluding that “the presence of Black group members translated into fewer guilty votes,” even when such jurors are not active participants).

194. See, e.g., Leslie Ellis & Shari Seidman Diamond, *Race, Diversity and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1036–37 (2003) (discussing the differing life experiences, expectations, and predispositions that predispose jurors to view evidence differently).

195. Sommers, *supra* note 174, at 606.

196. Ellis & Diamond, *supra* note 194, at 1036; see also VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 50 (1986) (“What may appear to white jurors as a black defendant’s implausible story may ring true to black jurors with greater knowledge of the context and norms of black experience.”).

197. Ellis & Diamond, *supra* note 194, at 1036.

sharing of information, the existence of diversity on a jury impacts the group as a whole by expanding the view of even biased jurors.¹⁹⁸

Finally, it appears that diverse groups of jurors actually render more accurate decisions. A study of jury diversity found that Caucasian jurors in a diverse group setting, rather than in an all-Caucasian group, made fewer inaccurate statements during deliberations.¹⁹⁹ The racially diverse group also spent more time deliberating, discussed a wider range of facts and perspectives, corrected each other's factual inaccuracies more often, and otherwise outperformed the all-Caucasian group on "every deliberation measure examined" in the study.²⁰⁰

a. Jury Venires

The Sixth Amendment guarantees to criminal defendants the right to a trial by a "fair and impartial jury"²⁰¹ and the Supreme Court has held that an "impartial jury" is one drawn from "a representative cross section of the community."²⁰² In 1968, Congress enacted the Jury Selection and Service Act²⁰³ which codifies a criminal defendant's constitutional right to a jury "selected at random from a fair cross section of the community" and extends the fair cross-section privilege to some civil litigants in federal court.²⁰⁴

These fair cross-section requirements acknowledge the value of jury diversity. Underlying these acknowledgments is the recognition that individual jurors have interpretive biases, that a jury consisting of people with different perspectives will "expose" and "check" each others' biases,²⁰⁵ and that "the input of several voices may reduce the possibility of an unfair, short-sighted, or erroneous decision."²⁰⁶

In order for juries to be diverse, the pools from which they are selected must be diverse.²⁰⁷ However, even within geographic areas where community diversity is high, venires tend to be less diverse than the populations from which they draw.²⁰⁸ In practice, the "promise of a 'jury of our peers' remains largely unfulfilled in many jurisdictions throughout the

198. Sommers, *supra* note 174, at 607–08 (finding that the benefits of diversity are not always dependent upon the contributions of minority individuals).

199. *See id.* at 606–07.

200. *Id.* at 608.

201. U.S. CONST. amend. VI.

202. Taylor v. Louisiana, 419 U.S. 522, 528 (1975); *see also* VIDMAR & HANS, *supra* note 156, at 341 (concluding that "the jury system is strong to the extent that its members reflect a broad range of the community")

203. Pub. L. No. 90-274, 82 Stat. 53 (1968) (codified as amended at 28 U.S.C. §§ 1861–1878).

204. 28 U.S.C. §§ 1861–1869 (2006).

205. *See* Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 56 (1994).

206. Massaro, *supra* note 160, at 512; *see also* Mitchell S. Zuklie, *Rethinking the Fair Cross-Section Requirement*, 84 CALIF. L. REV. 101, 137–38 (1996).

207. Ronald Randall, James A. Woods & Robert G. Martin, *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 JUST. SYS. J. 71, 72 (2008).

208. *See, e.g., id.* at 71 ("Despite progress in bringing diversity to juries in America, there is persuasive evidence that 'racial and ethnic minorities are consistently under-represented in the vast majority of both federal and state courts.'").

country.”²⁰⁹ Studies have found lacking the representation of racial and ethnic minorities in jury pools.²¹⁰ The cause of this underrepresentation includes system-level problems as well as problems with potential jurors themselves.²¹¹ Many jurisdictions rely exclusively on voter registration lists as the major source for potential jurors, though census data indicate that doing so excludes a significant number of racial, ethnic, and socioeconomic minorities.²¹² Scholars have proposed a number of suggestions for improving the representativeness of jury venires, including drawing jury pool information from multiple sources rather than solely from lists of voters or drivers and implementing better procedures to track and enforce jury summonses.²¹³ Some courts have also made changes to address the relative lack of diversity in their jury venires, but many have not.²¹⁴

Empirical studies confirm that jury venire diversity impacts the likelihood that jurors will express bias during deliberations. Improving the cross-sectional representation of minority jurors will counterbalance individual juror biases and lead to more thorough and reasoned jury verdicts. In addition, the implementation of systemic improvements in the composition of the jury pool offers the promise of reducing juror expressions of bias during deliberations.

b. Peremptory Challenges

Although a party has no constitutional right to peremptory challenges, they have long been a feature of the jury system.²¹⁵ Even assuming jury venire diversity, potential jurors who are members of a racial or ethnic minority are much more likely to be removed from the deliberative process through the use of peremptory challenges than are Caucasian jurors.²¹⁶ The result of this discriminatory use of peremptory challenges is

209. Walters, Marin & Curriden, *supra* note 14, at 319; *see also* VIDMAR & HANS, *supra* note 156, at 341 (concluding that “the low participation rates observed in some jurisdictions, and the problems with seating representative juries in others, constitute a serious threat to the jury’s integrity and strength as a community fact finder”).

210. Walters, Marin & Curriden, *supra* note 14, at 319; *see also* Stephen E. Reil, *Who Gets Counted? Jury List Representativeness for Hispanics in Areas with Growing Hispanic Populations Under Duren v. Missouri*, 2007 BYU L. REV. 201.

211. *See* VIDMAR & HANS, *supra* note 156, at 76.

212. *See Developments in the Law—Race and the Criminal Process*, *supra* note 13, at 1562.

213. *See* Ellis & Diamond, *supra* note 194, at 1053–58; Randall, Woods & Martin, *supra* note 207, at 76, 82.

214. Pennsylvania, for example, determined to increase the minority populations in its juror pools, began using multiple sources in compiling jury lists, including names from the Departments of Revenue, Transportation, Welfare, and State, as well as taxpayers, drivers, and voters. *See* Jeannine Turgeon & Elizabeth A. Francis, *Improving Pennsylvania’s Justice System Through Jury System Innovations*, 18 WIDENER L.J. 419, 449 (2009); *see also* FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 61–62, http://www.painterbranchcommission.com/_pdfs/FinalReport.pdf (last visited Mar. 10, 2011).

215. *See* Swain v. Alabama, 380 U.S. 202, 213–17 (1965).

216. *See, e.g.,* Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 2008 AM. PSYCHOLOGIST 527, 532 [hereinafter Sommers & Norton, *Race and Jury Selection*] (concluding that “[a] prospective juror’s race likely impacts peremptory challenge use in many instances”); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifi-*

the reduction in the diversity of jurors serving on trials which, in turn, increases the likelihood of expressions of juror bias.²¹⁷ Reducing the removal of minority jurors through peremptory challenges is an important step to removing juror bias.

In 1986, the United States Supreme Court, in *Batson v Kentucky*,²¹⁸ held that it was impermissible for prosecutors in a criminal case to exercise peremptory challenges to remove jurors on the basis of race.²¹⁹ In 1991, the Court clarified that the defendant did not need to be a member of a racial minority for use of peremptory challenges in a racially discriminatory manner to be impermissible.²²⁰ That same term, the *Batson* holding was expanded to civil litigants²²¹ and, the following year, to defense attorneys in criminal cases.²²² Shortly thereafter, the Court prohibited peremptory challenges based on gender.²²³

Despite *Batson* and its progeny, it appears that discrimination in the exercise of peremptory challenges remains quite prevalent.²²⁴ *Batson* has not been effective in reducing bias in peremptory challenges mainly be-

cations: Experimental Examination of Peremptory Use and the Batson Challenge Procedure, 31 L. & HUM. BEHAV. 261, 261–73 (2007) [hereinafter Sommers & Norton, *Race-Based Judgments*] (presenting the results of a study confirming that race influences the use of peremptory challenges and are then justified in race-neutral terms masking the bias); Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge*, 78 CHI.-KENT L. REV. 1061, 1062 (2003); *Illegal Discrimination in Jury Selection: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE 5 (2010), <http://eji.org/eji/files/62510%20Edited%20Tutwiler%20version%20Final%20Report%20from%20printer%20online.pdf> (concluding that “[r]acially biased use of peremptory strikes . . . remains widespread”); see also *Miller-El v. Dretke*, 545 U.S. 231, 270 (2005) (Breyer, J., concurring) (noting that “the use of race- and gender-based stereotypes in jury selection seems better organized and more systematized than ever before”); *Flowers v. State*, 947 So. 2d 910 (Miss. 2007) (noting discrimination in jury selection in Mississippi).

217. For a good analysis of the effect of peremptory challenges on reducing the diversity, and the impartiality, of juries, see Roger Allen Ford, *Modeling the Effects of Peremptory Challenges on Jury Selection and Jury Verdicts*, 17 GEO. MASON L. REV. 377 (2010). According to Ford, peremptory challenges will reduce juror diversity regardless of bias on the part of those exercising the challenges.
218. 476 U.S. 79 (1986).
219. *Id.* at 89. Prior to *Batson*, it was ostensibly impermissible to exercise peremptory challenges based on race, but courts would not examine a prosecutor’s motives behind allegedly discriminatory use of peremptory challenges in a single case. See *Swain*, 380 U.S. at 222.
220. *Powers v. Ohio*, 499 U.S. 400, 416 (1991).
221. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991).
222. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).
223. *J.E.B. v. Alabama*, 511 U.S. 127, 141–42 (1994).
224. See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1992) (presenting empirical study regarding the use of peremptory challenges and concluding that it is “the refuge for some of the silliest, and sometimes nastiest, stereotypes our society has been able to invent”); *id.* at 503; see also VIDMAR & HANS, *supra* note 156, at 97. One study found that, anonymously, almost 90% of attorneys “openly admitted to relying on stereotypes” in the exercise of peremptory challenges. Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 388 (2005).

cause its standard is so easy to meet.²²⁵ If a party believes that her opponent has exercised a peremptory challenge based upon impermissible bias, she must so assert to the court.²²⁶ At that point, the burden of production shifts to the proponent of the strike, who must proffer a race-neutral explanation, which need not be persuasive or even plausible, to justify the peremptory challenge.²²⁷ If a race-neutral explanation is tendered by the proponent of the challenge, the court decides whether the opponent of strike has proved purposeful racial discrimination.²²⁸ “Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.”²²⁹ Even if a party admits, or a trial court finds, that race was one factor in the use of the peremptory challenge, the peremptory challenge will not be considered impermissible unless race was found to be a substantial factor in the challenge.²³⁰

Studies have confirmed the obvious: when confronting a *Batson* challenge, attorneys are extremely unlikely to cite bias as a reason for their decision.²³¹ In fact, attorneys will report that bias was *not* a factor regardless of whether it actually *was* a conscious motivating factor in the choice to remove the juror.²³² Further, judges are extremely unlikely to reject a purportedly race-neutral explanation by an attorney.²³³

In light of the problems that render *Batson* so ineffectual, a number of commentators have advocated that abolishing peremptory challenges may be the only solution to the biased exercise of peremptory chal-

225. See, e.g., Leonard L. Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 504 (arguing that the *Batson* standard is so vague as to have created significant complexities in identifying discriminatory uses of peremptory strikes).

226. *Batson v. Kentucky*, 476 U.S. 79, 96–98 (1986).

227. *Id.*; *Purkett v. Elem*, 514 U.S. 765, 767–78 (1995).

228. *Batson*, 476 U.S. at 96–98; *Purkett*, 514 U.S. at 767–78.

229. *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (plurality opinion).

230. See, e.g., *Weaver v. Bowersox*, 241 F.3d 1024, 1032 (8th Cir. 2001) (observing that prosecutor’s explanation was that he did not believe the prospective juror could give the death penalty “to a fellow black person” but finding no *Batson* violation because the prosecutor’s claims also included reference to the juror’s “hesitation, lack of eye contact, flippancy and other intangibles”); see also *United States v. Tokars*, 95 F.3d 1520, 1533–34 (11th Cir. 1996); *Wallace v. Morrison*, 87 F.3d 1271, 1274–75 (11th Cir. 1996). For an excellent critique of the mixed-motive analyses used by many courts, Professor Russell Covey proposes that a mixed-motive analysis similar to the type employed in Title VII cases, be applied to *Batson* challenges. Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279 (2007).

231. See Sommers & Norton, *Race-Based Judgments*, *supra* note 216, at 267–78 (indicating that attorneys have little trouble coming up with plausible race-neutral explanations for the use of their peremptory challenges, even where the decision to strike the juror was motivated wholly or partially by race); see also Sommers & Norton, *Race and Jury Selection*, *supra* note 216, at 532–33 (summarizing the studies addressing *Batson* justifications).

232. See Sommers & Norton, *Race and Jury Selection*, *supra* note 216, at 532–33. Professors Samuel Sommers and Michael Norton find that race is very likely to be a factor in an attorney’s use of peremptory challenges, though very unlikely to be reported as a factor. *Id.* at 529–30.

233. *Id.* at 533 (summarizing the studies).

lenges.²³⁴ However, despite evidence that peremptory challenges are often exercised in a racially discriminatory manner, they serve important functions²³⁵ and practitioners view their continued existence as important.²³⁶

There may be methods of retaining the peremptory challenge while more effectively addressing its biased application. First, trial and appellate courts must actually scrutinize a party's proffered bias-neutral explanations for removing a juror. One recent example of careful analysis of an explanation is *Miller El v. Dretke*.²³⁷ The Supreme Court looked closely at the facts and the record, including the prosecutor's use of peremptory challenges (ten to eleven African American members of the jury venire were peremptorily struck by the prosecution) and the prosecutor's race-neutral reasons for the strikes. The Court ultimately found that, comparing the responses of Caucasian jurors who remained on the jury with those of the African Americans who were removed, "[i]t blinks reality to deny that the State struck [the jurors] because they were black."²³⁸

Methods of reducing juror bias discussed elsewhere in this Article have the added beneficial consequence of reducing the discriminatory use of peremptory challenges.²³⁹ For example, discussions as to the preva-

234. See Arthur L. Burnett, Sr., *Abolish Peremptory Challenges: Reform Juries To Promote Impartiality*, CRIM. JUST., Fall 2005, at 26, 27 (2005); Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809 (1997); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995); Jere W. Morehead, *When a Peremptory Challenge is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination from Jury Selection*, 43 DEPAUL L. REV. 625 (1994); Camille A. Nelson, *Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy*, 93 IOWA L. REV. 1687, 1723–24 (2008); *The Supreme Court: 2007 Term—Leading Cases*, 122 HARV. L. REV. 276, 353 (2008); Brent J. Gurney, *Note, The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227 (1986); Note, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2142 (2006); Robert M. O'Connell, *Note, The Elimination of Racism from Jury Selection: Challenging the Peremptory Challenge*, 32 B.C. L. REV. 433 (1991).

235. Peremptory challenges are a backstop for a party who believes, but cannot convince the trial court, that a juror should be removed for cause. They also insulate a party who, in attempting to establish a juror's bias, may alienate the juror. See *Swain v. Alabama*, 380 U.S. 202, 213–17 (1965).

236. See, e.g., Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 389 (2005) (finding that all criminal and civil attorneys who participated in their study agreed that peremptory challenges should not be eliminated). For a good summary of the functions of the peremptory challenge as well as its supporters, see Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 552–54 (1975).

237. 545 U.S. 231 (2005).

238. *Id.* at 240–41, 266.

239. Numerous commentators have written about *Batson* and a number have proposed intriguing remedies to the problems plaguing *Batson* challenges. Covey proposes that a mixed-motive analysis similar to the type employed in Title VII cases, be applied to *Batson* challenges. Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279 (2007). Professor Maureen Howard has suggested that criminal prosecutors voluntarily waive their peremptory challenges. Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369 (2010).

lence and persistence of biases during voir dire and in preliminary jury instructions are likely to be helpful in reducing the biased use of peremptory challenges.²⁴⁰ Increasing the saliency of race for all participants in the trial has the potential to decrease both the unconscious bias that impacts the use of peremptory challenges as well as the court's evaluation of those challenges.²⁴¹ In addition, allowing adequate voir dire of issues (including, for example, venireperson bias) would reduce the likelihood of lawyers making hurried, category-based peremptory challenges.²⁴²

The cessation of the practice of impermissibly removing jurors through peremptory challenges is not only constitutionally required, it is also a necessary step to removing juror bias. Ensuring diversity on the petit jury by limiting the removal of diverse jurors would increase the ability of jurors to expose and check each other's biases and inhibit the effect of prejudices during deliberations.

B. *Post-Verdict Evidence of Juror Misrepresentation*

Even if adequate trial mechanisms existed to discern juror biases pre-deliberation, not all jurors with material biases would disclose those biases. There have been, and will continue to be, jurors who, for reasons including embarrassment, inattention, lack of knowledge or understanding, or deliberate intent will withhold or misrepresent material facts during voir dire.²⁴³ Because jurors may have difficulty recognizing or admitting their biases, the potential for misrepresentations of bias may be even greater than it is for other types of juror misrepresentations.

Though many juror misrepresentations do not implicate the Rule 606(b) bar, misrepresentations of juror biases are likely to fall within the evidentiary preclusion. For example, if a juror states on voir dire that he has no relatives in government service or has never been involved in litigation, the inaccuracy of the statement can be proven by means other

240. See *supra* section IV.B. for a discussions of voir dire and *infra* section VI.D. for a discussion of jury instructions.

241. Sommers & Norton, *Race and Jury Selection*, *supra* note 216, at 535. Increasing consciousness will not have a significant impact on the conscious and deliberate use of bias in exercising peremptory challenges, however. *Id.*

242. *Id.* at 530 ("Stereotypes are particularly likely to affect judgments that are based on limited information, made under cognitive load, and hurried by time pressure."); see also Zalman & Tsoudis, *supra* note 224, at 388 (concluding that one reason for lawyers reliance on stereotypes during the exercise of peremptory challenges is that voir dire is often too "truncated" to permit the probing of actual differences between jurors).

243. See, e.g., Dale W. Broder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 511–513, 528 (1965) (finding that jurors justify dishonesty for numerous reasons); see also *United States v. Scott*, 854 F.2d 697, 699–700 (5th Cir. 1988) (noting that a juror deliberately concealed the fact that his brother was a deputy sheriff because he did not think it would impact his impartiality); *United States v. Casamayor*, 837 F.2d 1509, 1515 (11th Cir. 1988) (noting a juror's nondisclosure due to inattentiveness during voir dire of the fact that he had been a police trainee); *United States v. Howard*, 752 F.2d 220, 225 (6th Cir. 1985) (noting nondisclosure of a number of connections between juror's family and defendant's due to lack of knowledge at time of voir dire); *United States v. Bynum*, 634 F.2d 768, 770 (4th Cir. 1980) (noting that, due to embarrassment, juror did not disclose relatives' criminal histories).

than juror testimony and with reference to facts other than statements made during deliberations.²⁴⁴ Only if the evidence of the misrepresentation requires juror testimony as to a “matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions” will the evidentiary bar apply.²⁴⁵ Because a juror’s racial, ethnic, or gender biases are more likely to be evidenced by the juror’s statements or actions during deliberations than by facts external to jury service, juror misrepresentations of bias are more likely than other types of misrepresentation to fall within the Rule 606(b) evidentiary bar. Thus, Rule 606(b) creates a hurdle for post-verdict evidence of juror bias that may not exist for evidence of other types of juror misrepresentations.²⁴⁶

This situation of a juror misrepresenting her biases during voir dire is sufficiently discrete that the prohibition against inquiry into deliberative processes can be reasonably and workably narrowed to address it. Specifically, Rule 606(b) should be amended to allow a juror to testify about “whether, during voir dire or other questioning under oath, a juror misrepresented a material bias.”²⁴⁷ Some courts have already acknowledged the distinction between evidence of juror misrepresentations during voir dire regarding biases and inquiry into general statements of bias, and have found that Rule 606(b) does not apply to the former.²⁴⁸

Removing the Rule 606(b) evidentiary hurdle to allow inquiry into juror misrepresentations does not require that a verdict must be overturned any time a juror fails to disclose bias. An exception to Rule 606(b) would

244. See, e.g., *United States v. Colombo*, 869 F.2d 149, 151–52 (2nd Cir. 1989) (noting that juror did not reveal that her brother-in-law was a government attorney); *United States v. Perkins*, 748 F.2d 1519, 1529–32 (11th Cir. 1984) (noting that juror failed to disclose that he was involved in prior litigation as a witness and defendant).

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

246. See generally *Alschuler*, *supra* note 79, at 221–22 (arguing the “incongruity and unfairness” of the Rule 606(b) bar).

247. Though likely to apply in cases of actual bias, for ease of application the test does not distinguish between actual and implied biases. If the exception recommended here were adopted, Rule 606(b) would read: “Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form, or (4) *whether, during voir dire or other questioning under oath, a juror misrepresented a material bias*. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.” (Suggested language in italics and omitted word stricken through).

248. The Ninth Circuit, in *Henley*, found that the evidentiary rule did not bar inquiry into whether a juror misrepresented his biases on voir dire. *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001). The court 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.” *Id.*

serve only to permit evidence of juror statements in order for a litigant to attempt to meet the test adopted by the Supreme Court to evaluate whether juror misrepresentations require a new trial. That standard, set out in *McDonough Power Equipment, Inc. v. Greenwood*,²⁴⁹ requires proof that a juror “failed to answer honestly a material question on voir dire” and that a correct response by the juror would have provided a valid basis for the juror’s removal for cause.²⁵⁰ Thus, even assuming the adoption of an exception to the Rule 606(b) bar, the *McDonough* standard would still need to be met.²⁵¹

Adoption of the limited proposed exception would preserve the finality of the vast majority of verdicts as well as the existence of the jury system. At the same time, the exception would address valid concerns about juror misrepresentation and the injection of bias and misrepresentation into juror deliberations. As an additional benefit, it would encourage courts and litigants to inquire about bias on voir dire, increasing the salience of those issues and potentially reducing juror expressions of bias.²⁵² Overall, the exception represents a good balance between preservation of the goals of Rule 606(b) and inquiry into juror misrepresentations of bias.

V. CONCLUSION

Juror 8: I just think we owe him a few words, that’s all.

Juror 10: I don’t mind telling you this, mister: we don’t owe him a thing. He got a fair trial didn’t he? What do you think that trial cost? He’s lucky he got it.²⁵³

This Article has examined the evidentiary rule precluding post-verdict evidence of juror statements or actions indicating bias, focusing on the tension between the rule and the justice system’s guarantee to litigants of a fair trial by an impartial jury. Where information emerges after trial that one or more jurors made statements of bias during deliberations, the already strained relationship between the evidentiary rule and constitutional guarantees begins to unravel.

In *Tanner*, Justice O’Connor looked to pre-trial and trial mechanisms to protect against juror partiality and incompetence. Despite this promise of *Tanner*, however, empirical studies confirm what the anecdotes of recent cases have suggested: that these mechanisms do not currently operate to effectively disclose or remove juror biases. Studies also indicate that

249. 464 U.S. 538 (1984).

250. *Id.* at 556 (Blackmun, J., plurality opinion); see also Robert G. Loewy, Note, *When Jurors Lie: Differing Standards for New Trials*, 22 AM. J. CRIM. L. 733, 739–40 (1995).

251. For example, Professor Colin Miller argues that many circumstances of juror bias may meet *McDonough* since, when “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.” Miller, *supra* note 27, at 933.

252. See *supra* notes 202–205.

253. 12 ANGRY MEN, *supra* note 1.

these mechanisms could be vastly improved to more adequately realize the promise of excising expressions of juror deliberative bias.

Finally, even assuming adequate trial and pre-trial tools for screening and excising juror bias, it is likely that some jurors will intentionally or unintentionally misrepresent their biases during voir dire. For purposes of an inquiry into whether a juror made misrepresentations during voir dire, Rule 606(b) should be amended to allow evidence of juror statements. Such an exception would do little else than put inquiry into juror misrepresentations of bias on par with other types of juror misrepresentations. The proposed amendment embraces a good balance between the goals of Rule 606(b) and the right to a fair trial by an impartial jury.