



What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)

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ABSTRACT

The Sixth Amendment to the U.S. Constitution guarantees all criminal defendants the right to trial by an impartial jury—a jury that is free of bias and that decides the case solely on the evidence before it. If even one juror is biased or prejudiced, the defendant is denied this fundamental right.

Federal Rule of Evidence 606(b) generally prohibits jurors from testifying as to what occurred during deliberations, subject to certain exceptions that do not explicitly encompass the presence of a biased or prejudiced juror. But what happens when one juror voluntarily comes forward after a verdict claiming that another juror was biased or prejudiced? In such a situation, the Rule's prohibition of juror testimony conflicts with the defendant's constitutional right to trial by an impartial jury.

Some courts have held juror testimony of another juror's bias or prejudice to be admissible under an exception to Rule 606(b), while others have found this testimony inadmissible under the Rule's general prohibition. Still other courts have held that even if such testimony is inadmissible under the Rule's general prohibition, the Sixth Amendment right to an impartial jury requires the testimony's admittance.

This Comment contends that courts should admit such testimony. First, certain aspects of the trial process that are meant to protect a defendant's right to an impartial jury are not effective in the context of juror bias or prejudice. Second, psychological research has shown that it is very difficult to ascertain a person's bias or prejudice because people are often unaware of their biases or, if they are aware, are unwilling to reveal them.

This Comment also argues that the Rule should not bar admitting this type of testimony. First, testimony of another juror's bias or prejudice falls under an exception to the Rule. Second, admitting such evidence would not impede the policies underlying the Rule. Finally irrespective of whether this evidence is found to be admissible or inadmissible under the Rule, the Sixth Amendment requires that such testimony be admitted.

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INTRODUCTION

The Sixth Amendment to the U.S. Constitution¹ guarantees all criminal defendants the right to an impartial jury.² To ensure that the court empanels an impartial jury, voir dire is conducted,³ during which the prosecution, the defense attorneys, and the court ask members of the jury pool questions that are intended to reveal any biases or prejudices that may interfere with their ability to be impartial.⁴ Voir dire, however, may not uncover a juror's bias or prejudice, and, therefore, a biased or prejudiced juror may sit and render a verdict, thus depriving the defendant of his constitutional right to an impartial jury.

Notwithstanding the Sixth Amendment guarantee of an impartial jury, it is unsettled whether a juror who comes forward after a verdict⁵ and alleges that another juror made biased or prejudiced⁶ comments or engaged in biased or prej-

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1. "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ." U.S. CONST. amend. VI.
 2. "Impartial" is defined as "[u]nbiased; disinterested." BLACK'S LAW DICTIONARY 820 (9th ed. 2009); *see also* Hayes v. Missouri, 120 U.S. 68, 70 (1887) (holding that "impartiality requires . . . freedom from any biased against the accused"). Ensuring defendants an impartial jury has not been simple, however, because "[i]mpartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude . . . the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *Irvin v. Dowd*, 366 U.S. 717, 724–25 (1961) (quoting *United States v. Wood*, 299 U.S. 123, 145–46 (1936)); *see also* Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 632 (1991) ("Defining and impaneling 'impartial' juries have proven to be daunting tasks with which the United States' judicial system has struggled since before the founding of the nation.").
 3. *See* *United States v. McClinton*, 135 F.3d 1178, 1186 (7th Cir. 1998) ("The tool for examining . . . juror bias . . . is a voir dire.").
 4. "Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *see also* *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." (citing *Dennis v. United States*, 339 U.S. 162, 171–72 (1950))); *Smith v. Balkcom*, 660 F.2d 573, 578 (5th Cir. 1981) ("The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case.").
 5. This Comment will not address claims of jury misconduct or the extent and scope of postverdict jury interviews but rather only situations in which a jury member voluntarily comes forward with a claim of another juror's bias or prejudice.
 6. Only invidious biases or prejudices, such as racial, religious, or ethnic (as opposed to other biases, such as familiarity with a party or having been the victim of a similar crime), are the subject of this Comment. This Comment focuses on these particular biases and prejudices because they are "plainly . . . mental bias[es] that [are] unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine." *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001).

udiced behavior during deliberations may testify to what transpired.⁷ Federal Rule of Evidence 606(b), which governs the competency of jurors to testify, generally bars juror testimony regarding statements or events that occurred during deliberations. The Rule is subject to three exceptions, the first two of which are relevant to juror bias or prejudice.⁸ Rule 606(b) allows jurors to testify after a verdict to (1) extraneous prejudicial information improperly brought to the jury's attention; (2) outside influence improperly brought to bear on any jurors; or (3) a mistake made in entering the verdict on the verdict form.⁹

There is a potential conflict between the Sixth Amendment right to an impartial jury and Rule 606(b)'s general prohibition of juror testimony.¹⁰ The Sixth Amendment guarantees all criminal defendants the right to an impartial jury, one free of bias and prejudice. If a juror's bias or prejudice is not uncovered during voir dire but is subsequently expressed or revealed during deliberations, then a nonimpartial juror may sit and contribute to the verdict. In this situation, if Rule 606(b) is read to prohibit testimony by one juror that another juror was not impartial, a criminal defendant may be denied his constitutional right to an impartial jury.

Part I of this Comment examines the inherent conflict between the Sixth Amendment and Rule 606(b). This Part begins by exploring Rule 606(b)'s general prohibition and its exceptions. Included in this Part is a discussion of the policies and legislative history underlying Rule 606(b) and a consideration of whether bias or prejudice falls under Rule 606(b)'s general prohibition or one of its exceptions. Part I concludes with the U.S. Supreme Court's most extensive interpretation of Rule 606(b) in *Tanner v. United States*.¹¹

There is a split among the circuit courts regarding the intersection of the Sixth Amendment's guarantee of trial by an impartial jury and Rule 606(b)'s prohibition of juror testimony when a juror voluntarily raises allegations of another juror's

7. Indeed, there is no established procedure that courts must implement to assess this claim. Rather, the trial court has broad discretion in handling these allegations. Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920, 959–60 (1978); see also *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009).

8. This Comment addresses only the interpretation of the Rules by federal courts.

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

10. This conflict also implicates the defendant's right to due process under the Fifth Amendment, which is beyond the scope of this Comment.

11. 483 U.S. 107 (1987). *Tanner* did not specifically examine juror bias or prejudice but instead focused on the admissibility of juror testimony after trial that alleged juror *incompetence* because of intoxication. *Id.*

bias or prejudice after the verdict.¹² Part II addresses the circuit courts' divergent opinions stemming from their differing interpretations of Rule 606(b) and its relationship to the Sixth Amendment. One circuit has held that Rule 606(b) bars all inquiry into juror testimony implicating another juror's bias and that this bar does not compromise the Sixth Amendment right to an impartial jury.¹³ Another circuit has found that juror testimony implicating another juror's bias is admissible under one of the Rule's exceptions.¹⁴ Finally, a third circuit has held that even if Rule 606(b)'s general prohibition bars the juror testimony, the defendant's constitutional right to an impartial jury outweighs the Rule and, thus, this testimony may be admitted.¹⁵ In addition, this Part outlines the district courts' disparate decisions, further demonstrating the quandary courts face when confronted with this issue.

Part III addresses the need to admit juror testimony regarding a juror's biases or prejudices that are revealed during deliberations and raised after the verdict by another juror. First, this Part assesses aspects of the trial process that are deemed to protect a defendant's Sixth Amendment rights¹⁶ and concludes that they are insufficient in protecting a defendant's right to an impartial jury. Part III then analyzes psychological research identifying numerous impediments to eliciting a juror's actual bias or prejudice during voir dire, which is considered the major safeguard for ensuring an impartial jury.¹⁷ Because biases are often implicit and pervasive, potential jurors may not even be aware that they are biased or prejudiced and may genuinely believe that they can be fair and impartial. Also,

12. The courts remain divided on this issue because although the U.S. Supreme Court interpreted Rule 606(b) and considered the Sixth Amendment in *Tanner*, the Court narrowed its holding and reasoning to juror testimony concerning intoxication and the competency of the jurors.

13. In *United States v. Benally*, the Tenth Circuit held that Rule 606(b)'s general prohibition against inquiring into jury deliberations includes a juror's testimony that racial bias tainted the deliberations. 546 F.3d 1230 (10th Cir. 2008). It further held that the Sixth Amendment does not require an exception for such testimony. *Id.* at 1241.

14. In *United States v. Henley*, the Ninth Circuit classified evidence of racial bias as an extraneous influence (and thus included in one of Rule 606(b)'s exceptions) and held that juror testimony claiming juror bias may be admitted. 238 F.3d 1111 (9th Cir. 2001).

15. In *United States v. Villar*, the First Circuit concluded that the application of Rule 606(b) to prevent the admission of juror testimony regarding racial or ethnic biases revealed in jury deliberations violates a defendant's Sixth Amendment right to trial by an impartial jury. 586 F.3d 76 (1st Cir. 2009).

16. In *Tanner*, the Supreme Court enumerated four trial procedures that are in place to protect a defendant's Sixth Amendment rights to a *competent* jury: voir dire, the ability of the court and counsel to observe jurors during trial, the ability of jurors to report misconduct before rendering a verdict, and the ability to impeach a verdict with nonjuror evidence of misconduct. 483 U.S. at 127.

17. "Courts employ a variety of techniques in their attempt to minimize the partiality problem. The technique most heavily relied upon is the voir dire process, by which lawyers and judges question potential jurors to determine bias." Minow & Cate, *supra* note 2, at 633 (footnote omitted); *see also* Rosales-Lopez v. United States, 451 U.S. 182 (1981); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981).

potential jurors may not readily admit their biases in the presence of the judge and in the formal setting of the courtroom. Once in the informal setting of the jury deliberation room where jurors may not feel that they are being judged, however, some jurors may be more comfortable and, thus, more inclined to reveal their actual biases. Since the jury room may be the setting in which jurors expose their true biases or prejudices, a juror's actions or statements during deliberations that reveal his bias should be admitted when another juror raises them after the verdict.

Finally, Part IV contends that where a juror voluntarily raises another juror's bias or prejudice after a verdict, the court should admit juror testimony to ascertain whether the defendant's right to an impartial jury was violated.¹⁸ First, testimony about juror bias or prejudice should fall under an exception to Rule 606(b). Second, the admission of such testimony would not frustrate the policies underlying the Rule. Finally, regardless of whether such testimony falls under the Rule's general prohibition or under an exception to the Rule, exclusion of this testimony may violate a defendant's Sixth Amendment right to an impartial jury.¹⁹ The Constitution should trump the Federal Rules of Evidence, especially when such a fundamental right is implicated. If one juror voluntarily raises another juror's bias or prejudice after voting to convict, then the court, at a minimum, should conduct a hearing in which it admits such testimony to determine whether the defendant was denied his Sixth Amendment right to an impartial jury.

I. THE CONFLICT BETWEEN THE SIXTH AMENDMENT AND RULE 606(b)

The Sixth Amendment guarantees a criminal defendant the right to trial by "an impartial jury."²⁰ An impartial jury is one in which the jurors consider only the

18. This Comment does not suggest that the testimony be admitted for purposes of overturning the verdict; rather, it suggests that the testimony be admitted in a hearing to ascertain whether the juror was in fact biased and whether that bias deprived the defendant of his Sixth Amendment right to an impartial jury. Further, this Comment does not address the procedure to be followed if it is determined that the verdict was the result of a biased or prejudiced juror. This Comment also does not advocate that defense attorneys question jurors after trial to determine whether deliberations may have been influenced by a juror's bias or prejudice. It only addresses instances in which a juror voluntarily comes forward alleging that another juror was biased or prejudiced.

19. Exclusion *may* violate a defendant's Sixth Amendment right because the court may conclude after admission of the testimony that the juror in fact was not biased or prejudiced and, therefore, that the defendant's Sixth Amendment right was not infringed.

20. U.S. CONST. amend. VI; *see, e.g.*, *Turner v. Murray*, 476 U.S. 28, 40 (1986) ("The Sixth Amendment guarantees criminal defendants an impartial jury. This is not mere exhortation for it has been noted that 'the right to an impartial jury carries with it the concomitant right to take reasonable steps de-

evidence presented to them during the trial²¹ and do not take into account their own personal biases or prejudices.²² “If only one juror is unduly biased or prejudiced . . . , the criminal defendant is denied his Sixth Amendment right to an impartial panel.”²³ Rule 606(b), however, generally bars jurors from testifying to what transpired during deliberations.²⁴ Thus, when a juror presents a postverdict claim that another juror was biased or prejudiced, the Sixth Amendment and Rule 606(b) conflict if testimony from that juror cannot be admitted to ascertain whether the defendant was denied his right to an impartial jury.

A. Federal Rule of Evidence 606(b)

Rule 606(b) is based on the “near-universal and firmly established common-law rule in the United States [that] flatly prohibited the admission of juror testimony to impeach a jury verdict.”²⁵ It reads as follows:

Rule 606. Juror’s Competency as a Witness

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

(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.

(2) *Exceptions.* A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury’s attention;

signed to insure that the jury is impartial.” (quoting *Ham v. South Carolina*, 409 U.S. 524, 532 (1973) (Marshall, J., concurring in part and dissenting in part)); *United States v. Wood*, 299 U.S. 123 (1936).

21. The Court has held that an impartial trier of fact is “a jury capable and willing to decide the case solely on the evidence before it.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

22. *See, e.g., United States v. Maldonado-Rivera*, 922 F.2d 934, 971 (2d Cir. 1990) (holding that the court must be “able to conclude that the juror would be able to view the evidence with impartiality and to decide the case without bias”); *see also Turner*, 476 U.S. 28.

23. *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977); *see also Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (“The bias or prejudice of even a single juror would violate [the defendant]’s right to a fair trial.”).

24. As discussed in Part I.A.1, *infra*, this Rule is based in part on the policy of protecting the secrecy and unassailability of juror deliberations. *See* FED. R. EVID. 606(b) advisory committee’s note; *see also United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008).

25. *Tanner v. United States*, 483 U.S. 107, 117 (1987).

- (B) an outside influence was improperly brought to bear on any juror; or
- (C) a mistake was made in entering the verdict on the verdict form.²⁶

Although Rule 606(b) imposes a general prohibition on juror testimony regarding any statement or incident occurring during deliberations, this bar is subject to three exceptions. The first exception permits a juror to provide testimony regarding extraneous prejudicial information brought to the jury's attention.²⁷ The second exception allows testimony regarding outside influences improperly brought to bear on the deliberation process.²⁸ The third exception permits jurors to give testimony regarding clerical errors made in filling out the verdict form. The remainder of this Part examines the policies underlying the Rule, the Rule's legislative history, whether juror testimony of another juror's bias or prejudice falls under the general prohibition of the Rule or under one of the exceptions, and the Supreme Court's decision in *Tanner*.²⁹

1. Policies Underlying the Rule

By enacting Rule 606(b), the U.S. Congress intended to reconcile the competing interests of freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment on the one hand and preventing irregularity and injustice that would result if verdicts were put beyond effective reach on the other hand.³⁰ The Advisory Committee concluded that "[t]he [R]ule offers an accommodation between these competing considerations."³¹

The prohibition against permitting jurors to testify to impeach their own verdict has been justified on grounds of freedom of deliberation.³² Jurors should be able to discuss all aspects of the trial without fear that their comments and actions will be scrutinized. The Supreme Court has repeatedly stated that full and frank

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

27. The Advisory Committee's Note provides as an example of extraneous prejudicial information brought to the jury's attention a radio newscast or newspaper account. FED. R. EVID. 606(b) advisory committee's note.

28. The Advisory Committee's Note provides as an example of an outside influence improperly brought to bear upon a juror a threat to the safety of a member of his family. *Id.*

29. While these considerations provide some guidance on the issue of juror bias or prejudice, they are not dispositive.

30. *Id.*

31. *Id.*

32. *See* McDonald v. Pless, 238 U.S. 264, 267–68 (1915).

communication during jury deliberations might be impaired if jurors could impeach their verdict with what was said in the jury room.³³

Another purpose of Rule 606(b) is to further the stability and finality of verdicts.³⁴ Trials must end. As such, Rule 606(b) is designed to promote finality by removing the possibility of reopening a trial due to “any statement made or incident that occurred” during deliberations. Also, jurors should believe that when they render a verdict, it is final. If jurors knew that the verdict they reached and the method through which they reached it could be changed, then jurors might think that the decision they make does not really matter and might not take their obligation as seriously as they should.

Finally, Rule 606(b) is intended to protect jurors from harassment and embarrassment.³⁵ Those affected by a verdict should not harangue jurors about the method through which they reached it. If parties seeking to obtain evidence about the deliberation process were permitted to question jurors relentlessly after the verdict, then some people might be reluctant to serve as jurors. Also, permitting extensive postverdict questioning could place jurors in an embarrassing situation if, depending on what actually occurred during deliberations, the details were revealed.

However, Congress recognized that, notwithstanding these policies, jurors should be permitted to testify as to matters occurring during deliberations under certain circumstances. The Advisory Committee’s Note states that “[a]llowing [jurors] to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected.”³⁶ Thus, by enacting Rule 606(b), Congress attempted to balance the sanctity of the jury deliberation process (shielding the jurors from testifying as to what occurs during deliberations) with the need to allow inquiry into extraneous prejudicial information or outside influences improperly brought to bear on the jurors to ensure that justice is served. By not carving out an explicit exception for juror bias or prejudice, however, Congress failed to address that Rule 606(b) may compromise the Sixth Amendment.

33. *See id.* (“[T]he 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.”); *see also* *Tanner v. United States*, 483 U.S. 107, 120 (1987); James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN’S L. REV. 389, 394–95, 399 (1991).

34. *See* *United States v. Stansfield*, 101 F.3d 909, 915 (3d Cir. 1996).

35. *See id.*

36. FED. R. EVID. 606(b) advisory committee’s note.

2. Legislative History of the Rule

Before Congress ultimately adopted the current version of Rule 606(b),³⁷ the U.S. House of Representatives passed a bill that did not specifically prohibit testimony concerning statements or incidents that occurred during deliberations but only concerning their effects on the jurors. It read as follows:

Upon an inquiry into the validity of a verdict or indictment, 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. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.³⁸

The Senate Judiciary Committee, concluding that the “extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised,”³⁹ included the prohibition of testimony “about any statement made or incident that occurred during the jury’s deliberations.”⁴⁰ The Senate added this proscription because the version as passed by the House “would have the effect of opening verdicts up to challenge on the basis of what happened during the jury’s internal deliberations.”⁴¹ Thus, the version of the Rule proposed by the House was broader than the version adopted by Congress. The Conference Committee Report summed up the difference between the House and Senate versions of the Rule as follows:

[T]he House bill allows a juror to testify about objective matters occurring during the jury’s deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury’s deliberations.⁴²

37. The Rule was amended in 2006 to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form, but the part of the Rule relevant to this Comment is substantively the same as when enacted in 1974. In 2011, the Federal Rules of Evidence were restyled. This restyling aimed only to improve style and not to alter substance. Therefore, the current restyled version of Rule 606(b) contains the same substance as the 2006 amended rule.

38. H.R. 5463, 93d Cong. (1974).

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

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

41. FED. R. EVID. 606(b) advisory committee’s note.

42. H.R. REP. NO. 93-1597, at 8 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7102. However, the Conference Committee Report reveals an inconsistency. The Report states that “[t]he Senate bill does not permit juror testimony about any matter or statement,” yet Congress passed exceptions which do permit jurors to testify to what transpired during deliberations. *Id.*

Concluding that jurors should not be permitted to testify about objective matters occurring during the jury's deliberation, Congress adopted the Senate's version of Rule 606(b). However, Congress did not specifically address juror bias or prejudice and, thus, did not state whether it is the type of objective matter about which jurors should not be permitted to testify.

3. Whether Juror Testimony of Juror Bias or Prejudice Falls Under the General Prohibition or an Exception to the Rule

At first it appears that the language of Rule 606(b) provides an absolute prohibition on a juror testifying to what transpired during deliberations: Rule 606(b) states in part that "a juror may not testify about *any statement made or incident that occurred* during the jury's deliberations."⁴³ Congress, however, also added three exceptions to this bar, the first two of which are relevant to this Comment. "A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; [or] (B) an outside influence was improperly brought to bear upon any juror . . ."⁴⁴ According to the Advisory Committee's Note, these exceptions were codified because "[a]s to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out."⁴⁵ However, "the door of the jury room is not necessarily a satisfactory dividing point;" rather, the focus has been on insulating the manner in which the jury reached its decision.⁴⁶

In determining the admissibility of juror testimony of juror bias or prejudice raised after a verdict, courts have differed in their rulings on whether this evidence is prohibited by Rule 606(b) or falls under an exception to the Rule. Some courts have held that juror testimony of statements evidencing juror bias or prejudice are neither extraneous information nor outside influences and, therefore, not subject

43. FED. R. EVID. 606(b) (emphasis added).

44. *Id.*

45. *Id.* For example, a newspaper account read inside the jury room could be considered extraneous, and juror drinking outside the jury room could be considered internal. Rather than the location determining whether something is internal or external to the jury, it is the nature of the influence that is dispositive.

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

to an exception under Rule 606(b).⁴⁷ Other courts, however, have found juror testimony of bias or prejudice to be extraneous prejudicial information, interpreting “extraneous information” as information outside the evidence produced at trial. Still other courts have characterized this testimony as an outside influence, interpreting “outside influence” to mean an influence on the verdict “outside” the record and “the parameters of constitutionally acceptable values which the jury may use in its deliberations.”⁴⁸

B. The Supreme Court’s Examination of the Sixth Amendment and Rule 606(b) in *Tanner v. United States*

The Supreme Court has never directly considered the conflicting interests of Rule 606(b) and a defendant’s Sixth Amendment right to an *impartial* jury.⁴⁹ In *Tanner v. United States*,⁵⁰ however, the Court addressed a defendant’s attempt to introduce juror testimony to establish that an *incompetent* jury violated his Sixth Amendment right.⁵¹ The defendant in *Tanner* claimed that the jury that decided his case was incompetent because multiple jurors were impaired as a result of allegedly drinking alcohol and smoking marijuana throughout the trial. The only evidence presented to the Court supporting this claim was the testimony of one of the jurors, which the Court found to be “meager.”⁵² The Supreme Court read Rule

47. *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008); *Shilcutt v. Gagnon*, 602 F. Supp. 1280, 1283 (E.D. Wis. 1985), *aff’d*, 827 F.2d 1155 (7th Cir. 1987); *Smith v. Brewer*, 444 F. Supp. 482, 489 (S.D. Iowa 1978), *aff’d*, 577 F.2d 466 (8th Cir. 1978).

48. Victor Gold, *Juror Competency to Testify That a Verdict Was the Product of Racial Bias*, 9 ST. JOHN’S J. LEGAL COMMENT. 125, 142 (1993); *see, e.g.*, *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001); *Tobias v. Smith*, 468 F. Supp. 1287, 1290–91 (W.D.N.Y. 1979).

49. Indeed, the Court denied certiorari in *Benally*, 546 F.3d 1230, *cert. denied*, 130 S. Ct. 738 (2009), *Wright v. United States*, 559 F. Supp. 1139 (E.D.N.Y. 1983), *aff’d*, 732 F.2d 1048 (2d Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985), and *Smith*, 444 F. Supp. 482, *aff’d*, 577 F.2d 466, *cert. denied*, 439 U.S. 967 (1978).

50. 483 U.S. 107 (1987).

51. Although the Sixth Amendment does not mention the competence of the jury, the Court in *Tanner* stated that the defendants had “Sixth Amendment interests in an unimpaired jury.” *Id.* at 127. In its reasoning, the Court cited prior cases that found this right in the Due Process Clause, and thus, it appears that the Court based this Sixth Amendment right on Due Process. The Court in *McIlwain v. United States*, 464 U.S. 972 (1983), separately addressed juror impartiality and juror competence, holding that “a necessary corollary of the right to an impartial jury is the right to a jury in which all of the members are mentally competent. This Court as well as other courts have recognized the right to a mentally competent jury.” *Id.* at 975.

52. *Tanner*, 483 U.S. at 126. The Court summarized the juror’s testimony as follows:

[T]he alcohol consumption he engaged in with three other jurors did not leave any of them intoxicated. The only allegations concerning the jurors’ ability to properly consider the evidence were [the juror]’s observations that some jurors were “falling asleep

606(b) to prohibit the juror's testimony, concluding that "physical or mental incompetence of a juror [is treated] as 'internal' [subject to Rule 606(b)'s prohibition] rather than 'external' [falling under one of Rule 606(b)'s exceptions]."⁵³

Turning to the claim that exclusion of this testimony violates the defendant's Sixth Amendment rights, the Court held that the obstacle Rule 606(b) presents to investigating the incompetency of the jury does not create a constitutional violation.⁵⁴ The Court reached this conclusion by identifying four aspects of the trial process that serve to protect a defendant's Sixth Amendment right to a *competent* jury: voir dire, the ability of counsel and the court to observe the jury during trial, the ability of jurors to report the misconduct of other jurors before rendering a verdict, and the opportunity for a party to attempt to impeach a verdict based on nonjuror evidence of misconduct.⁵⁵ The Court's holding, however, was limited to a defendant's Sixth Amendment right to a competent jury, making no reference to an impartial jury.

all the time during the trial," and that his own reasoning ability was affected on one day of the trial.

Id. (citation omitted). The Court concluded that the juror's "allegations would not suffice to bring this case under the common-law exception allowing postverdict inquiry when an extremely strong showing of incompetency has been made." *Id.* The Court stated that "even if Rule 606(b) is interpreted to retain the common-law exception allowing postverdict inquiry of juror incompetence in cases of 'substantial if not wholly conclusive evidence of incompetency,' the showing made by petitioners falls far short of this standard" because the juror's "allegations of *incompetence* are meager." *Id.* at 125–26 (citation omitted) (quoting *United States v. Dioguardi*, 492 F.2d 70, 80 (2d Cir. 1974)).

53. *Id.* at 118. Reviewing the legislative history of Rule 606(b), the Court found that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations, including juror intoxication. This legislative history provides strong support for the most reasonable reading of the language of Rule 606(b)—that juror intoxication is not an "outside influence" about which jurors may testify to impeach their verdict.

Id. at 125. The Court further explained that the external–internal distinction "was not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation." *Id.* at 117.

54. *Id.* at 126–27.

55. *Id.* at 127. The Court reasoned that even the evidence of jurors falling asleep did not suffice as evidence of incompetency because the judge "had 'an unobstructed view' of the jury, and did not see any juror sleeping." *Id.* at 125. Thus, the Court relied on the efficacy of procedural aspects throughout the trial to protect the defendant's rights.

II. CIRCUIT AND DISTRICT COURTS' ANALYSES OF THE ADMISSIBILITY OF JUROR TESTIMONY ALLEGING JUROR BIAS OR PREJUDICE

While the *Tanner* Court analyzed Rule 606(b) with respect to the *competency* of a juror, it did not address Rule 606(b) with respect to the *impartiality* of a juror.⁵⁶ As a result, circuit courts and district courts have struggled in determining whether to admit juror testimony of a juror's bias or prejudice. The split among the circuit courts regarding the admissibility of juror testimony after a verdict has two main components: whether the evidence should be classified as inadmissible pursuant to Rule 606(b)'s general prohibition or as admissible under a Rule 606(b) exception and, if inadmissible, whether the bar on admitting this evidence violates a criminal defendant's Sixth Amendment right to an impartial jury.

A. The Tenth Circuit

In *United States v. Benally*,⁵⁷ a juror came forward after the verdict to allege that racial bias had tainted the jury.⁵⁸ The defendant moved for a new trial, arguing that the jurors lied about their racial bias during voir dire and that they considered information not in evidence. The defendant contended that Rule 606(b) was inapplicable since he was presenting the testimony to show that a juror lied during voir dire rather than to inquire "into the validity of [the] verdict."⁵⁹

The court rejected this argument, reasoning that the defendant's purpose in introducing the evidence to prove that two jurors lied during voir dire was to support a motion to vacate the verdict. The court concluded that "it does not fol-

56. See *United States v. Villar*, 586 F.3d 76, 85 (1st Cir. 2009) ("*Tanner* did not address the issue of racial bias but instead involved issues of juror competence."). However, some courts have extended *Tanner's* holding that the preclusion of testimony in that case did not violate the Sixth Amendment right to an *incompetent* jury to conclude that the preclusion of testimony concerning juror bias or prejudice does not violate the Sixth Amendment right to an *impartial* jury. See, e.g., *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008).

57. 546 F.3d 1230.

58. The juror reported that the foreman stated, and other jurors agreed, that "[w]hen Indians get alcohol, they all get drunk, and that when they get drunk, they get violent," *id.* at 1231 (alteration in original), and that the jurors needed to "send a message back to the reservation." *Id.* at 1232 (internal quotation marks omitted).

59. *Id.* at 1235.

low that juror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict.”⁶⁰ The court stated that “allowing juror testimony through the backdoor of a voir dire challenge risks swallowing [Rule 606(b)].”⁶¹

The court then addressed whether the juror testimony fell within one of Rule 606(b)'s enumerated exceptions. The court did not find that the statements were either “extraneous prejudicial information” or an “outside influence,” concluding that while the statements were improper, “[i]mpropriety alone . . . does not make a statement extraneous.”⁶² Next, the court considered whether it should imply an exception to Rule 606(b) for evidence alleging racial bias. The court concluded that Congress explicitly rejected a version of Rule 606(b) that had an exception broad enough to encompass racial bias, and, therefore, the court could not imply an exception for such testimony.⁶³ Rather, the *Benally* court stated that it would be up to Congress to amend Rule 606(b) to include an exception for evidence alleging racial bias.⁶⁴

Finally, the court considered whether the application of Rule 606(b) in *Benally* violated the defendant's Sixth Amendment right. The court relied on *Tanner* and the Supreme Court's enumerated procedural protections to conclude that the Rule is not unconstitutional as applied in *Benally*, stating that the “Sixth Amendment embodies a right to ‘a fair trial but not a perfect one, for there are no perfect trials.’”⁶⁵ The Tenth Circuit expressed concern about the implications of creating a constitutional exception to Rule 606(b) for racial bias, noting that “once it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations, we do not see how the courts could stop at the ‘most serious’ such violations.”⁶⁶ The court reasoned that “if every claim that, if factually supported, would be sufficient to demand a new trial warrants an exception to Rule 606(b), there would be nothing left of the Rule, and the great benefit of protecting jury decision-making from judicial review would be lost.”⁶⁷

60. *Id.*

61. *Id.* at 1236.

62. *Id.* at 1236–38.

63. *Id.* at 1238–39.

64. *Id.* at 1238.

65. *Id.* at 1240 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984)).

66. *Id.* at 1241.

67. *Id.*

B. The Ninth Circuit

In *United States v. Henley*,⁶⁸ the defendants sought to overturn their convictions on the grounds that the jury deliberations were tainted by racial bias,⁶⁹ which they argued was an extraneous influence, and that the juror testimony was evidence that a juror lied during voir dire. The Ninth Circuit noted the “apparent conflict between protecting a defendant’s right to fair trial, free of racial bias, and protecting the secrecy and sanctity of jury deliberations.”⁷⁰ The court stated that Rule 606(b) is wholly inapplicable to racial bias:

Racial 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. It would seem, therefore, to be 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.*⁷¹

The Ninth Circuit, however, did not decide “whether or to what extent the rule prohibits juror testimony concerning racist statements made during deliberations.”⁷² Instead, the court held

[w]here, as here, 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.⁷³

C. The First Circuit

In *United States v. Villar*,⁷⁴ the First Circuit agreed with the courts that concluded that Rule 606(b) “precludes any inquiry into the validity of the verdict based

68. 238 F.3d 1111 (9th Cir. 2001).

69. A juror reported that another juror had made many racist comments, including, “All the [expletive deleted] should hang.” *Id.* at 1113 (internal quotation marks omitted).

70. *Id.* at 1119.

71. *Id.* at 1120 (emphasis added).

72. *Id.* at 1121.

73. *Id.* The court stated that “[i]f appellants can show that a juror ‘failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause,’ then they are entitled to a new trial,” and the court therefore remanded the case to the district court to make a determination regarding the juror’s statements and racial bias. *Id.* at 1121–22 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)).

74. 586 F.3d 76 (1st Cir. 2009).

on juror testimony regarding racial or ethnic comments made ‘during the course of deliberations.’⁷⁵ The court held, however, that the application of Rule 606(b) to prohibit the admission of evidence concerning racial or ethnic biases⁷⁶ is unconstitutional. The court stated that it “believe[s] 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.”⁷⁷

While the court acknowledged the strong policy goal of encouraging a frank and candid jury deliberation process, the court also noted that “there are certain rare and exceptional cases involving racial or ethnic prejudice that require hearing juror testimony to determine whether a defendant received a fair trial under the Sixth Amendment.”⁷⁸ Thus, the court concluded that the lower court “did have the discretion to inquire into the validity of the verdict by hearing juror testimony to determine whether ethnically biased statements were made during jury deliberations and, if so, whether there is a substantial probability that any such comments made a difference in the outcome of the trial.”⁷⁹

D. District Courts

Because the Supreme Court has not resolved whether jurors are prohibited from testifying as to bias or prejudice revealed during deliberations and because the circuits have split, lower courts have also struggled with Rule 606(b) in the context of bias or prejudice, reaching disparate conclusions.

In *Smith v. Brewer*,⁸⁰ the court grappled with how to classify juror bias, noting that the “question of juror conduct arising within the jury room which injects a note of bias into the deliberations does not fit neatly on one side or the other of the dichotomy drawn in Rule 606(b).”⁸¹ The court ultimately concluded that the lan-

75. *Id.* at 84.

76. A juror voluntarily emailed the defense counsel after the trial to tell him that, among other racist comments, one juror said, “I guess we’re profiling but they cause all the trouble.” *Id.* at 81 (internal quotation marks omitted).

77. *Id.* at 87. Similarly, the Fifth Circuit in *Carson v. Polley*, 689 F.2d 562 (5th Cir. 1982), also left open the possibility that juror testimony regarding bias or prejudice could be admissible in some circumstances, noting that “[i]n an appropriate case, a letter from a juror to the court may reveal such a magnitude of prejudice as to move the court to grant a new trial rather than suffer an obvious default of justice.” *Id.* at 581–82.

78. *Villar*, 586 F.3d at 88.

79. *Id.* at 87.

80. 444 F. Supp. 482 (S.D. Iowa 1978), *aff’d*, 577 F.2d 466 (8th Cir. 1978).

81. *Id.* at 489.

guage and legislative history of Rule 606(b) render inadmissible juror testimony intended to impeach a verdict on the basis of an alleged bias or prejudice. The court reasoned that bias “cannot, in the usual sense, be deemed either to impart information or reflect outside influence.”⁸² The *Smith* court, while concluding that the juror testimony at issue was not admissible, did state that it

does not suggest that the rule of juror incompetency embodied in Rule 606(b) should be applied dogmatically and in complete disregard of what is alleged to have occurred in the jury room. . . . Where, for example, an offer of proof showed that there was a substantial likelihood that a criminal defendant was prejudiced by the influence of racial bias in the jury room, to ignore the evidence might very well offend fundamental fairness.⁸³

Similarly, the court in *Wright v. United States*⁸⁴ noted that “[d]espite the broad language of Rule 606(b), 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.”⁸⁵ The court went on to state that, while in that case the defendant did not make a sufficient showing of bias, “if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the [S]ixth [A]mendment’s guarantee to a fair trial and an impartial jury.”⁸⁶ Thus, rather than applying a per se rule prohibiting juror testimony regarding allegations of juror bias or prejudice, the *Wright* court concluded that “[g]iven the potential constitutional difficulties in applying Rule 606(b) to all allegations of racial prejudice, the better rule . . . is to analyze each such claim on a case-by-case basis.”⁸⁷

The court in *Tobias v. Smith*⁸⁸ required an evidentiary hearing when a juror alleged that other jurors made racially charged statements during deliberations. The court reasoned that regardless of the evidence rule preventing inquiry into the validity of a verdict, “a court determination of whether particular jury events are open or closed to inquiry must consider a defendant’s [S]ixth [A]mendment right[] . . . to an impartial jury.”⁸⁹ The *Tobias* court held that the alleged statements presented to the court were “sufficient to raise a question as to whether the jury’s

82. *Id.*

83. *Id.* at 490.

84. 559 F. Supp. 1139 (E.D.N.Y. 1983), *aff’d*, 732 F.2d 1048 (2d Cir. 1984).

85. *Id.* at 1151.

86. *Id.*

87. *Id.*

88. 468 F. Supp. 1287 (W.D.N.Y. 1979).

89. *Id.* at 1290.

verdict was discolored by improper influences and that they [were] not merely matters of jury deliberations.”⁹⁰ The court, therefore, admitted the juror’s statements, stating that “[t]here should be no injection of race into jury deliberations and jurors who manifest racial prejudice have no place in the jury room.”⁹¹

The following chart summarizes the differing courts’ determinations and rulings in analyzing the conflict between the Sixth Amendment right to an impartial jury and Rule 606(b):

Case	Rule 606(b) General Prohibition	Rule 606(b) Exception	Sixth Amendment Implications	Juror Testimony Admissible	Juror Testimony Inadmissible
Tanner v. U.S., 483 U.S. 107 (1987) (incompetence)	✓		Procedural Protections Sufficient		✓
U.S. v. Benally, 546 F.3d 1230 (10th Cir. 2008)	✓		Procedural Protections Sufficient		✓
U.S. v. Henley, 238 F.3d 1111 (9th Cir. 2001)		✓		✓	
U.S. v. Villar, 586 F.3d 76 (1st Cir. 2009)	✓		Trumps Rule 606(b)	✓	
Smith v. Brewer, 444 F. Supp. 482 (S.D. Iowa 1978)	✓		Might Trump Rule 606(b)		✓
Wright v. U.S., 559 F. Supp. 1139 (E.D.N.Y. 1983)			Might Trump Rule 606(b)		✓
Tobias v. Smith, 486 F. Supp. 1287 (W.D.N.Y. 1979)		✓	Trumps Rule 606(b)	✓	

90. *Id.*

91. *Id.* at 1291.

Courts addressing the admissibility of juror testimony concerning juror bias or prejudice alleged after the verdict are by no means consistent. The courts differ in their applications of Rule 606(b) to the admissibility of juror testimony and diverge in their opinions of whether the Sixth Amendment trumps Rule 606(b). Every court except for the Tenth Circuit in *Benally*, however, has either held that such testimony is admissible under an exception to the Rule or, if not, that the Sixth Amendment might require its admittance in certain situations.⁹² Until the Supreme Court decides this issue, courts will continue to struggle with the intersection of the Sixth Amendment and Rule 606(b).

III. THE NECESSITY OF ADMITTING JUROR TESTIMONY WHEN JUROR BIAS OR PREJUDICE IS ALLEGED AFTER A VERDICT

Courts should permit jurors to testify after a verdict to another juror's bias or prejudice revealed during deliberations since that testimony may be the only way in which to ensure that a defendant was not denied his Sixth Amendment right to an impartial jury. The *Tanner* Court's espoused procedural safeguards, while sufficient to protect a defendant's Sixth Amendment right to a *competent* jury, do not provide adequate protection to a criminal defendant's Sixth Amendment right to an *impartial* jury. Psychological studies reveal that some people are unable or unwilling to reveal their biases or prejudices before entering the intimate space of the deliberation room. Thus, since the deliberation room may be the only place in which to ascertain a juror's true bias or prejudice, courts should permit jurors to testify to biased or prejudicial comments or behaviors made during deliberations, notwithstanding *Tanner* or Rule 606(b).

A. The *Tanner* Trial Procedures Are Insufficient to Protect a Defendant's Sixth Amendment Right When Juror Bias or Prejudice Is Alleged

In *Tanner*, the Supreme Court, although not addressing the issue of bias or prejudice, held that the defendant's Sixth Amendment right to a *competent* jury is protected by four aspects of the trial process: voir dire, the ability of the court and counsel to observe jurors during trial, the ability of jurors to report misconduct before rendering a verdict, and the opportunity to impeach a verdict through

92. Although the district courts in *Smith* and *Wright* held the juror testimony to be inadmissible, they did state that the Sixth Amendment might trump Rule 606(b) in certain cases involving alleged juror bias or prejudice.

nonjuror evidence of misconduct.⁹³ The Court concluded that the trial judge and attorneys had ample opportunity to observe the intoxication of the jurors, thus providing the defendant with adequate protection of his Sixth Amendment rights.⁹⁴

Extending the ruling of *Tanner* to prohibit the admission of juror testimony concerning evidence of bias or prejudice would subordinate a criminal defendant's Sixth Amendment right to the Federal Rules of Evidence. In *Tanner*, the Court stated that there was no constitutional violation because there were procedural protections in place to ensure a competent jury.⁹⁵ These procedural protections, however, are much weaker where bias or prejudice is alleged to have occurred during deliberations.

The first procedural protection the Court identified is voir dire.⁹⁶ As is discussed in Part III.B, however, voir dire may not be ideal for ascertaining the presence of a potential juror's bias or prejudice because a juror's bias might not be revealed prior to deliberations.⁹⁷ The second procedural protection the Court noted is that "during the trial the jury is observable by the court, by counsel, and by court personnel."⁹⁸ This protection is rendered ineffective in the case of alleged bias or prejudice because one's bias often cannot be observed. Bias may be implicit, internal to the person harboring the prejudice, and, unlike intoxication or sleeping, likely cannot be readily observed by the judge, courtroom personnel, or counsel.

Third, the Court stated that jurors can report the misconduct of other jurors prior to reaching a verdict.⁹⁹ Until in the deliberation room, however, the jurors may not express their biases, and such biases are not ascertainable to other jurors until expressed. Unless instructed, jurors may not know that they have a duty—or even the ability—to report another juror's bias or prejudice. Furthermore, even those who know that they have this ability may not know that it is no longer available once they render a verdict. In addition, the other jurors, having gone through the same process of voir dire as the biased juror, may assume that the juror's bias is al-

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

94. *Id.*

95. *Id.*

96. *Id.* Presumably, one of the purposes of voir dire is to identify and eliminate "candidates for jury service who are irrevocably prejudiced." SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 6 (1988).

97. NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 105 (2007) ("The voir dire process in a courtroom . . . does not allow the deep analysis of people and their likely motives.").

98. *Tanner*, 483 U.S. at 127.

99. *Id.*

lowable since the court deemed that juror acceptable. Thus, jurors are less likely even to think there is a reason to report this behavior.

Fourth, the Court stated that a party may attempt to impeach the verdict based on nonjuror evidence of misconduct.¹⁰⁰ In a situation like *Tanner*, where the jurors were allegedly drinking alcohol and taking illegal drugs, it is possible that a nonjuror could see these acts and report them to the court. Since bias or prejudice is typically invisible to others, however, the only place a juror may reveal his bias is in the jury deliberation room, where there are no nonjurors who can observe the misconduct and report it to the court.

The *Benally* court, while acknowledging that two of the protections (voir dire and observation of the jury during trial) might not be effective in the context of alleged racial bias,¹⁰¹ concluded that, since “jury perfection is an untenable goal,” the procedural aspects noted in *Tanner* were adequate in protecting a defendant’s Sixth Amendment rights.¹⁰² The *Villar* court, however, recognized that the *Tanner* safeguards do not provide satisfactory protection when there is a claim of biased or prejudiced comments made during deliberations.¹⁰³ Although the procedural protections outlined in *Tanner* may be suitable in providing a defendant with a competent jury, they are not adequate in providing a defendant with an impartial one. Therefore, the Court’s identified procedural protections do not provide acceptable safeguards to a defendant’s constitutional rights when a juror alleges after a verdict that juror bias or prejudice was present during deliberations.

B. Psychological Studies Suggest That Juror Bias or Prejudice May Not Be Ascertained Through the Process of Voir Dire

Although voir dire and other procedures are generally assumed to protect a defendant’s Sixth Amendment rights, they do not adequately do so in the context of juror bias or prejudice. Voir dire, in fact, may not be capable of revealing a potential juror’s biases or prejudices. Some potential jurors may not be aware of their

100. *Id.*

101. It noted that

[e]ach protection might not be equally efficacious in every instance of jury misconduct. The judge will probably not be able to identify racist jurors based on trial conduct as easily as he could identify drunken jurors, for instance, and voir dire might be a feeble protection if a juror is determined to lie.

United States v. Benally, 546 F.3d 1230, 1240 (10th Cir. 2008).

102. *Id.*

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

biases and, therefore, will be unable to reveal them,¹⁰⁴ and those who are aware may not be willing to reveal their biases or prejudices in public.¹⁰⁵

In any man's memories there are those certain things that he doesn't reveal to all, but perhaps only to his friends. And then there are those he won't reveal even to his friends, but perhaps only to himself, and even then in confidence. But then, finally, there are those that a man is afraid to reveal even to himself, and any decent man accumulates quite enough of those things.¹⁰⁶

Thus, the process of voir dire may not ascertain potential jurors' biases or prejudices.¹⁰⁷

It is commonly recognized in psychology that people's attitudes, beliefs, and biases may be implicit¹⁰⁸ and outside their awareness.¹⁰⁹ In fact, people may hold implicit biases or prejudices even if they hold explicitly unbiased attitudes. Implicit biases are pervasive and predict behavior¹¹⁰—that is, even if a person claims he is impartial, his biases may nonetheless influence his actions and behaviors.¹¹¹

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104. See JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS 2 (2009), available at <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf> (“[P]eople may not know what is inside their heads. Indeed, a wealth of cognitive psychology has demonstrated that we are lousy at introspection.”); Nilanjana Dasgupta, *Mechanisms Underlying the Malleability of Implicit Prejudice and Stereotypes*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 267 (Todd D. Nelson ed., 2009); Arthur H. Patterson & Nancy L. Neuffer, *Removing Juror Bias by Applying Psychology to Challenges for Cause*, 7 CORNELL J.L. & PUB. POL’Y 97, 101 (1997) (“Psychologists have long known that people often do not know what affects their behavior, and are largely out of touch with their own cognitive states.”); see also VIDMAR & HANS, *supra* note 97, at 91 (arguing that some jurors “may not recognize their own biases”).
105. See KANG, *supra* note 104; Dasgupta, *supra* note 104; see also McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 558 (1984) (Brennan, J., concurring) (“[T]he bias of a juror will rarely be admitted by the juror himself, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.” (quoting Smith v. Phillips, 455 U.S. 209, 221–22 (1982))).
106. FYODOR DOSTOEVSKY, NOTES FROM THE UNDERGROUND 44 (Hugh Aplin trans., Hesperus Press 2006) (1864).
107. See generally Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).
108. Implicit biases are internal, as opposed to explicit biases, which are within the person’s cognitive awareness.
109. See Dasgupta, *supra* note 104; Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010); see also Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1090 (2006) (arguing that “many of us are convinced that we are race- or gender-blind”).
110. See, e.g., 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, 142–51 (2010).
111. See, e.g., Mark W. Bennett, *Essay, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 152 (2010) (“Implicit biases . . . are unstated and unrecognized and operate

Furthermore, people may take their lack of awareness of their biases to mean that they are in fact not biased or prejudiced. Thus, people generally will not reveal their biases because they are unaware they even harbor them.¹¹²

If a bias is implicit, then by definition the potential juror will not realize he is biased and “no amount of questioning will lead to an admission.”¹¹³ The Supreme Court has recognized that it is difficult to assess whether a juror is biased:

Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.¹¹⁴

In *Smith v. Phillips*,¹¹⁵ Justice Marshall dissented to assert that questioning jurors to prove that prejudice does not exist “ignores basic human psychology”¹¹⁶ since “[t]he unique nature of jury service strongly suggests that prospective jurors may not be accurate judges of their own ability to set aside experiences and attitudes in order to judge the facts of a case fairly and impartially.”¹¹⁷ The Court has also recognized that even when a juror is sincere in his assertion that he is fair and impartial, the “psychological impact requiring such a declaration before one’s fellows is often its father.”¹¹⁸ Thus, given that people are often unaware of their biases, jurors may not be able to determine whether they can be fair and impartial.

In addition to jurors’ lack of awareness of their own biases, they may not be willing to reveal those biases and prejudices of which they are aware. Jurors are

outside of conscious awareness. Social scientists refer to them as hidden, cognitive, or automatic biases, but they are nonetheless pervasive and powerful.”).

112. “[W]e unconsciously act on implicit biases even though we abhor them when they come to our attention. . . . Jurors . . . do not leave behind their implicit biases when they walk through the courthouse doors.” *Id.* at 150.

113. *Smith v. Phillips*, 455 U.S. 209, 230 (1982) (Marshall, J., dissenting).

114. *Crawford v. United States*, 212 U.S. 183, 196 (1909).

115. 455 U.S. 209.

116. *Id.* at 228 (Marshall, J., dissenting).

117. Patterson & Neuffer, *supra* note 104, at 101. The authors further discuss “numerous examples where jurors’ lack of awareness of their own cognitive states rendered them biased, despite their affirmation of their ability to be fair and impartial.” *Id.*; *see also* *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (“The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require. A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires.”).

118. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

subject to the “social desirability” phenomenon.¹¹⁹ “Social desirability . . . refers to a need for social approval and acceptance and the belief that this can be attained by means of culturally acceptable and appropriate behaviors.”¹²⁰ Potential jurors are particularly susceptible to social desirability, which threatens a defendant’s right to an impartial jury:

If some jurors hold attitudes that are prejudicial to one of the parties, yet believe that they will be seen as socially undesirable if they admit to being prejudiced, then some subset of those prejudiced jurors will state that they can be fair and impartial in order to obtain approval from the judge, counsel, or other jurors. Obviously, seating such a juror will result in a biased jury.¹²¹

Researchers have found that “the tendency to give socially desirable responses in self-description is a fairly stable personality characteristic.”¹²² Similarly, jurors are also under social pressure to conform.¹²³ Potential jurors

will not want to appear to be deviant in any way from their fellow jurors or what they believe to be the attitudes of their fellow jurors. . . . Jurors will certainly want to avoid the “shame” of expressing bias, and therefore be deviant when other jurors state that they can be fair and impartial. Pride can be obtained by denying bias and conforming to the stereotypical role of the fair juror.¹²⁴

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119. See generally DOUGLAS P. CROWNE & DAVID MARLOWE, *THE APPROVAL MOTIVE: STUDIES IN EVALUATIVE DEPENDENCE* 13 (1964) (studying how people seek approval by giving socially desirable responses); see also Hazel Markus & R.B. Zajonc, *The Cognitive Perspective in Social Psychology*, in 1 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 137, 184 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985) (observing that the “social desirability bias is frequently observed in responses to self-report questions”).
120. David Marlowe & Douglas P. Crowne, *Social Desirability and Response to Perceived Situational Demands*, 25 *J. CONSULTING PSYCHOL.* 109, 109 (1961); see also JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* 98–99 (1987).
121. Patterson & Neufer, *supra* note 104, at 102.
122. ALLEN L. EDWARDS, *THE SOCIAL DESIRABILITY VARIABLE IN PERSONALITY ASSESSMENT AND RESEARCH* 39 (1957).
123. See Marlowe & Crowne, *supra* note 120, at 110 (describing the difference between social desirability and conformity as a “motivational variable” as opposed to a “class of behaviors”).
124. Patterson & Neufer, *supra* note 104, at 102–03 (footnote omitted); see also *Smith v. Phillips*, 455 U.S. 209, 230 (1982) (Marshall, J., dissenting) (“[G]iven the human propensity for self-justification, it is very difficult to learn from a juror’s own testimony after the verdict whether he was in fact ‘impartial.’”); David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 *IND. L.J.* 245, 246 (1981) (“Since all of us like to think we can be fair, it is the rare juror indeed who will admit to being unable to set aside [a bias or prejudice].”); *id.* at 248 (critiquing the questioning of jurors because, when asked whether a juror will be fair, a juror will answer yes “even though Adolph Hitler himself would have answered that question in the affirmative” (internal quotation marks omitted)); *id.* at 259–60 (describing how questioning potential jurors in front of

In the context of voir dire, potential jurors experience social pressure to conform not only from their co-venire members but even more so from the judge. In addition to wanting social acceptance, potential jurors may also feel pressure to give the answer they believe the judge desires to hear since social pressure is more powerful when someone who is perceived to be higher in status exerts it. Many potential jurors perceive the judge as an authority figure or a person of high status.¹²⁵ Thus, if the judge asks potential jurors to be fair and impartial, it is likely that many jurors will declare they are both. One study has found that this “is likely to occur in the interview when there is social distance between interviewer and respondent. Status distance . . . may create a situation in which the respondent feels pressure to answer in the direction he believes will conform to the opinions or expectations of the interviewer.”¹²⁶

Without intending to do so, judges may urge potential jurors to avow that they are fair and impartial. If a juror expresses hesitancy as to his ability to be impartial, the judge may attempt to “rehabilitate” that potential juror, explaining to him that it is his duty to assess the case fairly and impartially and repeatedly asking him whether he can fulfill that duty and obligation.¹²⁷ Under those circumstances, potential jurors may capitulate to the judge’s insistence, as the judge is an authority figure and is clearly expressing his desired answer. Rehabilitation, therefore, may not be an effective mechanism to ensure that a juror is impartial. To the contrary, it may encourage a juror to state that he is impartial and serve on a jury even though

others is “grossly inadequate for producing honest self-disclosure because [it] engender[s] conformity of responses” and explaining that this is heightened during voir dire because people “perceive interrogation in a public forum to determine their suitability as jurors” to be a “threatening event,” increasing the need for affiliation and, thus, conformity since “there are sociopsychological factors at work which encourage group cohesiveness and conformity of response, thereby militating against honest self-disclosure”). It has also been found that the atmosphere of the courtroom leads to less self-disclosure. See *id.* at 267 (describing the courtroom in which voir dire takes place as “hard architecture,” which “tends to foster isolation and estrangement among people” and citing studies that have found that people disclose more in “soft” rather than “hard” rooms (internal quotation marks omitted)).

125. See Suggs & Sales, *supra* note 124, at 253 (“The judge obviously has the highest status of anyone in the courtroom. He is physically separated from and elevated above everyone else, and is addressed by jurors and attorneys alike as ‘your honor.’”).
126. J. Allen Williams, Jr., *Interviewer Role Performance: A Further Note on Bias in the Information Interview*, 32 PUB. OPINION Q. 287, 287 (1968) (footnote omitted).
127. See, e.g., Christopher A. Cosper, Note, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1474–75 (2003) (“[T]he juror rehabilitation procedure allows the court to ask the venire member a simple question: ‘If the court were to instruct you, as a matter of law, to only consider evidence that is presented from the witness stand, could you set aside your bias?’ After an affirmative response, the witness is considered ‘rehabilitated’ and permitted to remain on the jury panel.” (footnote omitted)).

he explicitly expressed his bias or prejudice previously.¹²⁸ The Court has stated that “[w]here so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight.”¹²⁹ Since most people are generally reluctant to admit publicly that they are biased or prejudiced, it seems that no amount of rehabilitation would make a person who candidly admits his bias impartial. Thus, a potential juror who is willing to admit under oath that he is biased or prejudiced should be excused before being empaneled.¹³⁰ If that juror is empaneled and subsequently renders a verdict, the court should admit testimony by other jurors that the juror engaged in biased behavior or made prejudiced statements during deliberations.

Once in the deliberation room, though, where there is no authority figure or higher-status person, jurors might be more prone to reveal their true biases. In a more intimate group of people with whom jurors will have spent a substantial amount of time, the pressures present during voir dire might lessen. Since the jurors no longer are subject to being selected, as when voir dire is conducted, the urge to give the socially desirable answer may dissipate. Furthermore, jurors may be more likely to conceal their biases when directly asked questions about them during voir dire, whereas their biases are likely to be revealed naturally during active deliberations.

In light of the impediments to assessing bias or prejudice during voir dire, inquiry into deliberations may be necessary upon a voluntary postverdict claim of juror bias or prejudice. Moreover, the other procedural protections listed in *Tanner* do not remedy the shortcomings of voir dire with respect to juror bias or prejudice. Because the Constitution guarantees all criminally accused the right to an impartial jury, courts should admit evidence that a defendant has been denied this fundamental right, regardless of the source of that information.

128. Neil Vidmar and Valerie Hans argue that jurors whose views and circumstances are strongly suggestive of bias commonly avoid elimination for cause by their simple assertion that they can be fair. Even when such responses are honest, and sometimes they are not, they are often mistaken. Human psychology is such that people cannot avoid their biases simply by vowing that they won't be affected by them.

VIDMAR & HANS, *supra* note 97, at 101.

129. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961).

130. Potential jurors may feign they are biased or prejudiced in an effort to be excused from serving on a jury. However, a defendant's constitutional rights are not worth the risk that the juror really is biased or prejudiced. Thus, rehabilitation in these circumstances will not render a potential juror servable—either because he truly is biased or prejudiced or because he is willing to lie under oath.

IV. COURTS SHOULD NOT PROHIBIT JUROR TESTIMONY WHEN A JUROR CLAIMS AFTER A VERDICT THAT ANOTHER JUROR WAS BIASED OR PREJUDICED

Congress enacted Rule 606(b) as a general prohibition against inquiring into the validity of jury verdicts to balance the competing considerations of promoting freedom of deliberation and preventing injustice.¹³¹ The jury room is meant to be a black box, and what happens in the jury room is meant to stay there. When claims of juror bias or prejudice are raised by another juror after the verdict, however, the black-box view creates a fundamental injustice to the defendant. As such, and to protect the defendant's constitutional rights, courts should permit jurors to testify to another juror's bias or prejudice. First, juror bias or prejudice falls under an exception to the Rule rather than the general prohibition. Second, the admission of such testimony would not thwart the policies underlying the Rule. Finally, regardless of the reading of the Rule and its application to juror testimony of juror bias or prejudice, the Sixth Amendment requires admitting this testimony.

A. Juror Testimony Regarding Juror Bias or Prejudice Falls Under an Exception to the Rule

Testimony concerning juror bias or prejudice is encompassed by the first two exceptions to Rule 606(b), which explicitly permit juror testimony concerning "extraneous prejudicial information" and "outside influence improperly brought to bear."¹³² A juror's bias can certainly be considered "extraneous prejudicial information" since it is a particular fact or circumstance (*information*) outside of the evidence presented to the jury (*extraneous*) concerning an unfavorable preconceived opinion or feeling (*prejudicial*).¹³³ Thus, if a juror proffers evidence concerning another juror's bias or prejudice, the court should admit this testimony pursuant to the first exception to Rule 606(b).¹³⁴ In his dissent from denial of rehearing en banc in *United States v. Benally*, Judge Briscoe recognized that juror bias constitutes

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

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

133. Juror bias or prejudice is no different than, as the Advisory Committee's Note states, reading a newspaper about the trial, since neither is part of the record nor intended to affect the jury's decision.

134. 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 248, at 69 (2d ed. 1994) (stating that "[a]rguably the rule bars juror testimony or statements on such points" but that "[c]onceivably such proof could be called outside influence").

“extraneous prejudicial information” and is, therefore, a proper predicate for impeachment under Rule 606(b).¹³⁵

Similarly, juror bias can be considered an “outside influence” since it is a compelling force on the actions, behavior, or opinions of others (*influence*) that is not part of the record on which the jury is to base its verdict (*outside*).¹³⁶ Thus, courts should also admit juror testimony that another juror was biased or prejudiced pursuant to the second exception to Rule 606(b). If the verdict is “based in all or part on a particular predisposition toward a party’s race . . . the verdict would appear to be based on extraneous information or outside influence.”¹³⁷

A different parsing of the language in the Rule’s exceptions might suggest this testimony could fall under the Rule’s prohibition rather than an exception. Juror bias or prejudice may not be “extraneous prejudicial information” since it is not really “information.”¹³⁸ However, “if bias manifests itself in the form of comments made by jurors during deliberations to sway other jurors, the comments may be thought of as the functional equivalent of information even though not presented in the form of hard data.”¹³⁹ It also might not be considered an “outside influence” since its source is the jury itself, not one extrinsic to the jury.¹⁴⁰ Nevertheless, “bias may be considered an outside influence if what is meant by that term is an influence on the verdict ‘outside’ of the record and the parameters of constitutionally acceptable values which the jury may use in its deliberations.”¹⁴¹

While the legislative history of Rule 606(b) could be cited to support the premise that this testimony should not be admissible under Rule 606(b), Congress actually left this open. Congress considered two versions of Rule 606(b)—a broader version, which would arguably allow inquiries into a jury’s verdict upon claims of juror bias or prejudice, and a narrower version, which arguably would not—before opting for the latter.¹⁴² Indeed, the Advisory Committee was cautioned

135. *United States v. Benally*, 560 F.3d 1151, 1154 (10th Cir. 2009) (Briscoe, J., dissenting from denial of rehearing en banc).

136. As Part III.B argues, bias is pervasive and affects people’s behaviors. Juror bias is no different than the influence that results from threatening a juror’s family, which the Advisory Committee’s Note cites as an example of an outside influence improperly brought to bear—both affect behaviors and decisions, and neither are presented to the jury as part of the record.

137. Peter N. Thompson, *Challenge to the Decisionmaking Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial*, 38 SW. L.J. 1187, 1204 (1985).

138. *See Gold*, *supra* note 48, at 142 (“[B]ias may not look like ‘extraneous prejudicial information’ since, while bias is arguably ‘extraneous’ and certainly ‘prejudicial,’ it is hard to think of it as ‘information.’”).

139. *Id.* at 143.

140. *See id.* at 142 (“Bias might not qualify as an ‘outside influence’ since it is imposed as a factor in decisionmaking by the jury itself, not some source extrinsic to the jury.”).

141. *Id.*

142. *See supra* Part I.A.2.

against enacting a rule that would allow jurors to testify as to the role of bias in the verdict.¹⁴³ Although Congress rejected a Rule that would permit broader juror testimony, it did not explicitly prohibit juror testimony concerning juror bias or prejudice. Instead, even in light of the Advisory Committee's caveat, Congress left this vague. As a result, the better inference from Congress's actions is that courts should admit juror testimony concerning another juror's bias or prejudice under one of the exceptions to Rule 606(b).¹⁴⁴ Since the judicial system does not want jurors to make decisions based on bias or prejudice, bias should be classified as an external matter, falling under one of Rule 606(b)'s exceptions, rather than as an internal matter and subject to Rule 606(b)'s prohibition.

The treatment of juror bias or prejudice can also be distinguished from the treatment of juror intoxication. Although the Court in *Tanner* classified jurors' drinking and drug use as "internal," juror bias and prejudice cannot be classified in the same manner. While many people have control of their drinking and drug use, most people do not have control over their biases since those biases are often implicit and outside their awareness—and thus could be considered external. The Court repeatedly stated that juror testimony reflecting the jurors' drinking and drug habits were "internal" for purposes of the rule, but the Court did not extend this reasoning to allegations of a nonimpartial jury. The *Tanner* Court, in reviewing the legislative history of the Rule, found that Congress specifically considered juror intoxication to be internal, falling under Rule 606(b)'s prohibition. Although Congress did reject a version of the Rule that would have permitted broader juror testimony, it did not explicitly classify juror bias or prejudice as internal and subject to Rule 606(b)'s prohibition. Furthermore, the Supreme Court confined its analysis of Rule 606(b) in *Tanner* to juror allegations of incompetency. Thus, it can be argued that the Court specifically left open the possibility that allegations of juror bias or prejudice require different treatment. As many courts have noted, testimony regarding juror bias or prejudice should not be subject to Rule 606(b)'s general prohibition.¹⁴⁵

143. Senator John McClellan was the most critical of the Advisory Committee's proposal (which the U.S. House adopted in its amendment to the Rule). See Letter From Sen. John L. McClellan to Judge Albert B. Maris, Chairman, Comm. on Rules of Practice & Procedure (Aug. 12, 1971), reprinted in 117 CONG. REC. 33,642, 33,645 (1971) ("I do not believe it would be possible to conduct trials, particularly criminal prosecutions, as we know them today, if every verdict were followed by a post-trial hearing into the conduct of the juror's [sic] deliberations.").

144. Congress, in enacting Rule 606(b), failed to address the relationship of the Rule to the Sixth Amendment, perhaps because Congress recognized that the Rule had to be subordinate to the U.S. Constitution.

145. See *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001); *Wright v. United States*, 559 F. Supp. 1139 (E.D.N.Y. 1983), *aff'd*, 732 F.2d 1048 (2d Cir. 1984); *Tobias v. Smith*, 468 F. Supp. 1287

The circuit and district courts have struggled when one juror makes postverdict allegations of another juror's bias or prejudice.¹⁴⁶ These courts differ on whether to extend the Court's reasoning in *Tanner* to cases involving alleged juror bias or prejudice, with some concluding that juror bias or prejudice is external and falls within an exception to the Rule's general prohibition¹⁴⁷ and others concluding that, as in *Tanner*, the testimony is subject to the Rule's general prohibition.¹⁴⁸

In both *United States v. Henley*¹⁴⁹ and *Tobias v. Smith*,¹⁵⁰ the courts found that juror testimony regarding another juror's bias or prejudice was not subject to Rule 606(b)'s prohibition. Conversely, the courts in *United States v. Benally*¹⁵¹ and *Smith v. Brewer*¹⁵² concluded that such testimony was subject to the Rule's prohibition.¹⁵³

The court in *Benally* held that the juror's testimony was inadmissible:

None of the statements that [the defendant] alleges his jurors made are "specific extra-record facts relating to the defendant." They are generalized statements, ostensibly based upon the jurors' personal experience. The statements might have been relevant to the matter before the jury, but that is not the inquiry. We instead ask whether the statements concerned specific facts about [the defendant] or the incident in which he was charged, and they did not.¹⁵⁴

However, the court read the exceptions too narrowly. Jurors are charged with considering only the evidence presented to them during trial and are not permitted to rely on anything outside the record. The mere fact that the statements the jurors made were not specific should not bring them within Rule 606(b)'s prohibition. The jurors made statements that consisted of "extra-record facts" and that were "relevant to the matter before the jury,"¹⁵⁵ and, thus, the court should have

(W.D.N.Y. 1979); *Smith v. Brewer*, 444 F. Supp. 482 (S.D. Iowa 1978), *aff'd*, 577 F.2d 466 (8th Cir. 1978).

146. See 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, 522 (1988).

147. See, e.g., *Henley*, 238 F.3d 1111; *Tobias*, 468 F. Supp. 1287.

148. Cf. *United States v. Benally*, 546 F.3d 1230, 1240 (10th Cir. 2008) (stating that *Tanner* demanded the same result).

149. 238 F.3d 1111.

150. 468 F. Supp. 1287.

151. 546 F.3d 1230.

152. 444 F. Supp. 482.

153. The court in *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), also concluded that Rule 606(b) barred such testimony. The court addressed the Rule's prohibition only cursorily, however, focusing instead on the need to admit this testimony under the Constitution. Because the court found that the testimony was admissible under the Constitution, it did not also need to find this juror testimony admissible under the Rule, as the Constitution trumps the federal rules.

154. *Benally*, 546 F.3d at 1237 (citation omitted); see *supra* notes 58, 73.

155. *Benally*, 546 F.3d at 1237 (internal quotation marks omitted).

admitted them to determine whether the defendant was denied his right to an impartial jury.

While the court in *Smith* ultimately concluded that the juror testimony was not admissible, it struggled over how to classify testimony concerning juror bias, noting that “[t]he problem is whether such wholly intra-jury statements can be viewed as ‘extraneous . . . information’ or an ‘outside influence’ and, if so, whether the proof of such statements can be separated from proof of the effect of the statements on the mental processes of the jurors.”¹⁵⁶ The court determined the testimony was inadmissible because the juror’s conduct comprised “two isolated incidents” that were “unrelated to any discussion of the facts of the case by the jury.”¹⁵⁷ The court erred, however, in concluding that the testimony was not admissible because the incidents did not occur consistently and did not factor into the jury’s discussion. The injection into deliberations of inappropriate facts and prejudiced behavior—no matter how seldom—has an influence and deprives a defendant of his Sixth Amendment right to an impartial jury. Regardless of whether the jurors explicitly discussed the statements during deliberations, there is no assurance that an impartial jury determined the defendant’s case. Once prejudices have been expressed, they are there, and they may implicitly affect the deliberations.¹⁵⁸

Even though various courts have interpreted Rule 606(b) differently, a literal reading of the Rule in its entirety dictates that courts should admit juror testimony concerning juror bias or prejudice under an exception to Rule 606(b). Because such bias or prejudice is not part of the record on which jurors are to rely in rendering their decision, it should be considered either extraneous prejudicial information or an outside influence.

B. Admitting Juror Testimony of Juror Bias or Prejudice Would Not Impede the Policies Underlying the Rule

Even if bias or prejudice is not found to be encompassed by one of Rule 606(b)’s exceptions, admitting juror testimony of juror bias or prejudice would not thwart the policies sought to be furthered by the enactment of Rule 606(b). To the contrary, the admission of this testimony would satisfy the balance Congress

156. *Smith*, 444 F. Supp. at 489 (alteration in original) (quoting FED. R. EVID. 606(b)).

157. *Id.* at 490.

158. See *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (“It is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of [prejudice].”); see also *Bennett*, *supra* note 111, at 150 (“Implicit biases cause subtle actions . . . , [b]ut they are also powerful and pervasive enough to affect decisions . . .”).

sought to strike between putting jury deliberations beyond reach and achieving just and fair results.

The rule prohibiting juror impeachment of a verdict is one that self-consciously strikes a balance between competing policies. On the one hand are policies that support the general rule: preventing juror harassment and abuse, shoring up the finality of verdicts, encouraging free and frank deliberations, and preventing post-verdict juror fraud. On the other hand is the defendant's—and society's—entitlement to a verdict based solely on the facts developed at trial and the law as instructed by the court.¹⁵⁹

One reason for the secrecy of the jury room is the belief that “jury deliberations may not live up to an ideal of enlightened exchange of views and sifting of evidence, and that the jury as an institution might not survive close scrutiny of its deliberative process.”¹⁶⁰ Verdicts reached based on bias or prejudice, however, should not go unchallenged simply to preserve the jury system. If juries are making their decisions based on consideration of bias or prejudice and those decisions are unchallengeable, then the institution of trial by an impartial jury may no longer be viable.

Permitting juror testimony regarding juror bias or prejudice would not stifle freedom of deliberation. The Rule does not prohibit all disclosures of what occurred in the jury room,¹⁶¹ as it clearly permits testimony concerning prejudicial extraneous information and outside influences. If the policies sought to be furthered by the Rule were strictly adhered to, then no exclusions should have been permitted, including those for extraneous information and outside influence, for those policies are also implicated by the evidence permitted under the exceptions.

Additionally, jurors are not informed that what occurs during deliberations will not be revealed to *anyone*. The Rule's prohibition only bars a juror from conveying testimony in court, but it does not prohibit jurors from speaking to other people. There is nothing to prevent the jurors from discussing the case with others after the verdict. In fact, many jurors have voluntarily revealed details of their deliberations, and some have even conducted postverdict interviews and written

159. Dean Sanderford, *The Sixth Amendment, Rule 606(b), and the Intrusion Into Jury Deliberations of Religious Principles of Decision*, 74 TENN. L. REV. 167, 188 (2007) (footnote omitted).

160. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 10 (6th ed. 2008).

161. In fact, it could not prohibit this without violating the First Amendment. See Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U. COLO. L. REV. 57, 76–77 (1993).

books.¹⁶² Thus, jurors could expect that their statements may be revealed to the media and to friends and family (not under oath), and, therefore, deliberations will not be any more hampered if this testimony were permitted to be related to the court (under oath). In the context of a court proceeding, this information would be relayed under oath and, therefore, would be more trustworthy and reliable than when revealed not under oath. Permitting jurors to discuss the internal processes of deliberations in every venue except the courtroom stands in contrast to the policies undergirding the Rule's prohibition, especially when such a serious right has been threatened. Moreover, if what is being protected is the freedom of the jury to reach verdicts on the basis of bias or prejudice without fear of discovery, then perhaps this is a policy that should not be furthered. The Supreme Court has stated that "the need is weighty that conduct in the jury room shall be untrammelled by fear of embarrassing publicity[, but t]he need is no less weighty that it shall be pure and undefiled."¹⁶³

The same information sometimes excluded under Rule 606(b) has been admitted for other reasons, such as to prove that a juror lied during voir dire.¹⁶⁴ A nonjuror would also be permitted to testify to this information if that nonjuror were able to observe the juror's bias. Since bias is implicit and not observable to outsiders, however, the need to permit jurors to testify to this is more compelling. Furthermore, jurors are allowed to testify to external information that has been improperly brought to bear on them during deliberations. This is justified on the grounds that jurors can testify to the information that was brought to bear, but they cannot testify to its effect on deliberations. The same can be said for juror bias or

162. See, e.g., Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U.ILL. L. REV. 295; Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-verdict Interviews of Jurors*, 82 IOWA L. REV. 465 (1997); Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y REV. 389 (1994); William R. Bagley, Jr., Note, *Jury Room Secrecy: Has the Time Come to Unlock the Door?*, 32 SUFFOLK U. L. REV. 481 (1999).

163. *Clark v. United States*, 289 U.S. 1, 16 (1933).

164. See *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) ("Where, as here, 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."); *Hard v. Burlington N. R.R.*, 812 F.2d 482, 485 (9th Cir. 1987) ("Statements which tend to show deceit during voir dire are not barred by [Rule 606(b)]."); *Urseth v. City of Dayton*, 680 F. Supp. 1084, 1089 (S.D. Ohio 1987) ("The scope of Rule 606(b) . . . does not extend to allegations of juror perjury on voir dire. Thus, statements made by a juror during deliberations (or prior thereto), which would tend to indicate that he or she had perjured himself or herself on voir dire, are not excluded by the rule, and so are competent, admissible evidence . . ."); *Tobias v. Smith*, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979) ("[W]here comments indicate prejudice . . . , statements may be admissible not under [Rule] 606(b) but because they may prove that a juror lied during the voir dire.").

prejudice. A juror could testify to the presence of biased comments or behavior without revealing the effect it had on the verdict. Thus, this testimony would not reveal the juror's internal mental process as it relates to the verdict ultimately reached. The Advisory Committee's Note states that it is "the mental operations and emotional reactions of jurors in arriving at a given verdict [that] would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment."¹⁶⁵ Thus, the policies would not be risked by permitting juror testimony concerning juror bias or prejudice to prove its presence and not its effect on the jury.¹⁶⁶

Admitting juror testimony of juror bias or prejudice would not subject the jurors to increased harassment and embarrassment. The Rule does not prohibit the contact that would cause the jurors to be harassed and embarrassed but rather only use of the evidence that may come from those contacts.¹⁶⁷ Also, since the Rule prohibits volunteered information, it is too broad for the jurors' protection.¹⁶⁸ If a juror comes forward willingly and chooses to testify to something as odious to the American criminal justice system as bias or prejudice, then it would appear that the policies sought to be protected by the Rule are not in fact at risk.

Furthermore, the Rule only applies after the verdict. Therefore, if jurors can testify after they begin deliberating but before they render a verdict, then the sanctity of the jury room is already broken, and the rendering of a verdict should not impose a different standard. The deliberation room's privacy is still invaded, so the point in the proceeding at which the justice system will cease to permit this invasion seems completely arbitrary.¹⁶⁹

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

166. The difference between admitting juror testimony of juror bias or prejudice to prove its presence and admitting the testimony to prove its effect is that testimony to prove presence would convey that there was a biased or prejudiced comment made, while testimony to prove effect would express how the presence of that bias or prejudice affected the juror's decisionmaking and influenced his or her vote.

167. The courts' integrity, however, seems to be sacrificed to spare twelve people from harassment. Because a juror can reveal in any setting except the courtroom after trial that a defendant was denied his Sixth Amendment right because of the presence of a biased juror, the justice system itself is at risk. The public may lose faith in the justice system if it is revealed that a biased juror rendered a verdict but that nothing can be done to remedy this situation.

168. See Cammack, *supra* note 161; Thompson, *supra* note 137.

169. Moreover, the Rule prohibits jurors from testifying "about any statement made or incident that occurred *during the jury's deliberations*." FED. R. EVID. 606(b) (emphasis added). This seems to imply, then, that a juror's biased or prejudiced behavior or statements that are revealed when jurors are in the jury room but before they have been charged with deliberating can be testified to by another juror. The fact that the same conduct or comments made not "during the jury's deliberations" can be admitted demonstrates an inconsistency. Although the sanctity of the deliberations is not breached

Some arguments can be made against invading jury privacy to expose bias- or prejudice-tainted verdicts. If the court invades the privacy of the jury to determine if bias or prejudice was present, then there is the risk that the search for bias or prejudice might be used as a pretext for reviewing the jury's use of other less offensive values. That is, if the judge discovers that the verdict was not based on bias or prejudice but on another value that is inconsistent with the letter of the law, the judge may still overturn the verdict. Since bias or prejudice is something the judicial system does not want jurors bringing into the jury room, however, the importance of ensuring that defendants receive trials by impartial juries outweighs this risk. It could also be argued that admitting juror testimony concerning juror bias or prejudice undermines the finality and stability of verdicts. However, a nonjuror could challenge a verdict. According to the language of Rule 606(b), a nonjuror would be permitted to testify to a juror's biased remarks and conduct even after the rendering of the verdict, yet a fellow juror would not be permitted to give the same testimony. As such, placing weight on the person who conveys the information (a nonjuror compared to a juror) does not further the finality and stability of verdicts in a fair manner. Additionally, a verdict based on bias or prejudice is not a verdict that should remain stable. The criminal justice system does not want to maintain verdicts rendered by biased or prejudiced jurors.

C. The Constitutional Right to Trial by an Impartial Jury Demands That Courts Admit Juror Testimony Upon Allegations of Juror Bias or Prejudice

The Sixth Amendment is one of the most fundamental rights guaranteed to a criminal defendant.¹⁷⁰ “Described as ‘inherent and invaluable’ by the First Congress of the American Colonies, and as a ‘great and inestimable privilege’ by the First Continental Congress, the right to an impartial jury stands among those fundamental rights most revered by the founding generation.”¹⁷¹ A defendant's right to trial by an impartial jury is infringed if a biased or prejudiced juror is empaneled and contributes to a verdict. Thus, courts should admit juror testimony that might

through admission of such testimony, such an admission can certainly still threaten the stability and finality of verdicts.

170. *See, e.g.*, *Robinson v. Polk*, 444 F.3d 225, 230 (4th Cir. 2006) (King, C.J., dissenting from denial of rehearing en banc) (“The Sixth Amendment right to an impartial jury has been long recognized as ‘fundamental to our system of justice.’” (quoting *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968))).

171. *Id.* (quoting *Duncan*, 391 U.S. at 152).

reveal that another juror was biased or prejudiced to ensure that a defendant was not denied his right to an impartial jury. In *Tanner*, Justice Marshall stated that

[p]etitioners are not asking for a perfect jury. They are seeking to determine whether the jury that heard their case behaved in a manner consonant with the minimum requirements of the Sixth Amendment. If we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless.¹⁷²

Although the *Tanner* Court found that prohibiting juror testimony of juror incompetency did not violate the Sixth Amendment, the need to admit juror testimony upon allegations of juror bias or prejudice is more compelling than the need to admit it upon the allegations of juror intoxication raised in *Tanner*. *Tanner* involved a challenge based on juror competence, not juror impartiality, and it does not mandate the exclusion of testimony regarding allegations of juror bias or prejudice. Although the Sixth Amendment has been held to address both competence and impartiality,¹⁷³ the legal system's history with biases and prejudices cautions against treating the two equally.¹⁷⁴ Judge Briscoe, in his dissent from denial of rehearing en banc in *United States v. Benally*, found that the Tenth Circuit improperly conflated the Sixth Amendment right to a competent jury with the Sixth Amendment right to an impartial jury. He asserted that there is a fundamental difference between the two rights, stating that "the Sixth Amendment right to an impartial jury is itself a 'structural feature' of the justice system, and . . . , as a consequence, a violation of this right is not susceptible to harmless error review."¹⁷⁵ Furthermore, the *Tanner* decision was quite narrow, leaving open the possibility that

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

173. The Sixth Amendment states the following:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. Thus, the Sixth Amendment guarantees a criminal defendant the right to an impartial jury but not the right to a competent jury. The Supreme Court, however, has determined that a criminal defendant has a Sixth Amendment interest in a competent jury. *See Tanner*, 483 U.S. at 127; *supra* note 51.

174. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1879); *see also Turner v. Murray*, 476 U.S. 28 (1986) ("The reality of race relations in this country is such that we simply may not presume impartiality.").

175. *United States v. Benally*, 560 F.3d 1151, 1156 (10th Cir. 2009) (Briscoe, J., dissenting from denial of rehearing en banc).

a challenge to Rule 606(b) on the basis of juror bias or prejudice could warrant a different result.

Besides the fact that it undermines the judicial system's guarantee of trial by an impartial jury, juror testimony of juror bias or prejudice should also be admitted because of the difficulties in ascertaining this information. Since human psychology demonstrates that people are either unable or unwilling to reveal their biases, when bias or prejudice does come out—wherever it comes out—jurors should be permitted to provide testimony revealing such bias or prejudice.

In light of human psychology, an inquiry into the juror's alleged bias may not even ensure that a defendant has been tried by a fair and impartial jury. Indeed, in his dissenting opinion in *Smith v. Phillips*,¹⁷⁶ Justice Marshall went even further than urging questioning to inquire into the juror's bias. Rather, he believed that

where the probability of bias is very high, and where the evidence adduced at a hearing can offer little assurance that prejudice does not exist, the juror should be deemed biased as a matter of law. . . . The right to a trial by an impartial jury is too important, and the threat to that right too great, to justify rigid insistence on actual proof of bias. Such a requirement blinks reality.¹⁷⁷

Justice Marshall doubted the efficacy even of posttrial questioning to examine claims of jury prejudice, reasoning that this “fails to accord any meaningful protection to the right to an impartial jury, one of the most valuable rights possessed by criminal defendants.”¹⁷⁸ He continued this theme in his *Tanner* opinion by stating that “[i]f the . . . policy considerations [supporting Rule 606(b)] seriously threaten the constitutional right to trial by a fair and impartial jury, they must give way.”¹⁷⁹

While Rule 606(b) is vital to the preservation of the jury system, a complete prohibition of juror testimony could potentially frustrate one of the most important rights of a criminal defendant.¹⁸⁰ When courts preclude jurors from impeaching their verdicts upon allegations of juror bias, they violate one of the plainest prin-

176. 455 U.S. 209 (1982).

177. *Id.* at 231–32 (Marshall, J., dissenting) (footnote omitted).

178. *Id.* at 244.

179. *Tanner*, 483 U.S. at 137 (Marshall, J., concurring in part and dissenting in part).

180. *See, e.g., Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (“The requirement that a jury’s verdict must be based upon the evidence developed at trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.” (internal quotation marks omitted)); *Robinson v. Polk*, 444 F.3d 225, 230 (4th Cir. 2006) (King, C.J., dissenting from denial of rehearing en banc) (“[T]he right to an impartial jury stands among those fundamental rights most revered by the founding generation.”).

principles of justice: the right to an impartial jury. And yet, by applying Rule 606(b), courts may prevent defendants from proving such bias.

“Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. Individuals are not expected to ignore as jurors what they know as [people].”¹⁸¹ While it is a given that jurors bring with them certain experiences, bias or prejudice should not be included because the Sixth Amendment right to an impartial jury is fundamental to the U.S. justice system. The judicial system has in place procedures to prevent jurors from basing their decisions on bias or prejudice. Indeed, the purpose of voir dire is to eliminate potential jurors who are biased or prejudiced or otherwise unable to decide the case impartially. Therefore, bias is one so-called experience jurors should not bring into the deliberation room with them.

Although there are no perfect trials, where juror bias or prejudice is alleged, the Sixth Amendment right to an impartial jury requires the admission of juror testimony.

[A]mong the most serious cases of jury bias are those involving racial prejudice. . . . This suggests that the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict. . . . This also suggests that the policy interests behind the enforcement of Rule 606(b) are at their weakest in such a case.¹⁸²

The Tenth Circuit’s concern—that “once it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations,” it would be hard to “see how the courts could stop at the ‘most serious’ such violations”¹⁸³—is misplaced because bias or prejudice is abhorrent to the criminal justice system and has no place in jury trials. The Sixth Amendment guarantees a criminal defendant an impartial jury—one free of bias and prejudice. It is difficult to rationalize not creating an exception to Rule 606(b) for evidence of bias or prejudice in light of the fact that “[n]o right ranks higher than the right of the accused to a fair trial.”¹⁸⁴

181. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (citation omitted) (internal quotation marks omitted).

182. 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6074, at 513 (2d ed. 2007).

183. *United States v. Benally*, 546 F.3d 1230, 1241 (10th Cir. 2008).

184. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

CONCLUSION

The Sixth Amendment right to an impartial jury squarely conflicts with Rule 606(b)'s general prohibition on juror testimony when postverdict claims of juror bias or prejudice arise. Although the jury room is meant to be a black box, rigidly viewing the jury room in such a way may lead to the deprivation of fundamental constitutional rights. In light of the policies underlying the Rule, the psychological research demonstrating that people are either unable or unwilling to reveal their biases, and the fundamentality of the right to an impartial jury, juror testimony of juror bias or prejudice must be admitted to ensure that a defendant's constitutional rights have not been infringed. Given the divergent analyses and discordant holdings reached by circuit and district courts on this matter, a timely decision by the Supreme Court is long overdue.