

COLOR IN THE “BLACK BOX”: ADDRESSING RACISM IN JUROR DELIBERATIONS[†]

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The idea of trial by an impartial jury lies at the core of American criminal justice. Yet racism—both explicit and implicit—often has profound impacts on the administration of criminal law and criminal procedure. Such bias manifests itself at all levels of the system, including the deliberative process itself. Currently, however, defendants of color have limited options in challenging racism in juries. This Note analyzes a current circuit split over whether Rule 606(b) provides defendants with one avenue of recourse by introducing juror testimony about statements made during the deliberative process. By looking at the history leading up to the Rule’s enactment, this Note centers institutional legitimacy in the discussion, arguing that the Rule was born out of a desire to preserve the legitimacy of a jury trial following the demise of the trial by ordeal. By barring the introduction of juror testimony about allegedly racist statements made during deliberations, this Note goes on to posit, a strict textual interpretation of Rule 606(b) actually delegitimizes the jury trial in the eyes of communities of color. A strict commitment to the text, therefore, flies in the face of the very purposes of the Rule.

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I. INTRODUCTION

“The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box. As you grow older, you’ll see white men cheat black men every day of your life, but let me tell you something and don’t you forget it - whenever a white man does that to a black man, no matter who he is, how rich he is, or how fine a family he comes from, that white man is trash.”

~Harper Lee, *To Kill A Mockingbird*

The notion of a trial by jury is one of the cornerstones of the American justice system, codified as a fundamental right by the Sixth Amendment to the U.S. Constitution.¹ As such, the protections of the Sixth Amendment guarantee more than just the right to any jury; rather, the text specifically guarantees all criminal defendants the right to trial “by an *impartial* jury.”² The Supreme Court has stressed that this impartiality requirement is an added protection of the Amendment, repeatedly overturning verdicts where a jury was predisposed to come to a certain conclusion.³ While a juror need not be completely ignorant of all aspects of the case,⁴ he must be able to “lay aside his impression or opinion and render a verdict based on the evidence presented in court.”⁵ Preconceived notions of guilt and innocence should have no bearing on a trial; evidence alone should persuade an otherwise neutral body of jurors to come to a verdict.

This impartiality is paramount for many reasons. First, and most obviously, it guarantees each defendant a fair chance to litigate his or her case without the specter of bias. Juries predisposed to find a defendant guilty lessen the state’s burden of proof and fail to grant a criminal defendant a fair trial,

† This Note was written before the Supreme Court issued its decision in *Warger v. Shauers*, No. 13-517 (Dec. 8, 2014). Though the Court rejected *Warger*’s attempts to create an implied exception to Rule 606(b) of the Federal Rules of Evidence in situations where jurors lie during voir dire, it did not squarely address the question taken up in this Note: may allegations of *racial* bias in jury deliberations trump the text of the Rule and allow juror testimony to serve as grounds for a new trial?

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¹ See *Duncan v. Louisiana*, 391 U.S. 145, 153-154 (1968) (“Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court.”); see also *Thompson v. State of Utah*, 170 U.S. 343, 349-50 (1968) (“Those who emigrated to this country from England brought with them this great privilege ‘as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.’”) (quoting J. Story, *Commentaries on the Constitution of the United States* 1779).

² U.S. Const. amend. VI (emphasis added).

³ See, e.g., *Irvin v. Dowd*, 366 U.S. 717 (1961) (“In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as ‘indifferent as he stands unsworne.’ His verdict must be based upon the evidence developed at the trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall. ‘The theory of the law is that a juror who has formed an opinion cannot be impartial.’”) (internal citations omitted); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that jurors’ exposure to inherently prejudicial publicity due to community news saturation rendered the trial fundamentally unfair); *Morgan v. Illinois*, 504 U.S. 719 (1992) (emphasizing how central jury impartiality is in the context of capital trials).

⁴ See *Holt v. U.S.*, 218 U.S. 245 (1910) (finding a juror sufficiently neutral despite allegations that he had read about the case in the news).

⁵ *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

“violating even the minimal standards of due process.”⁶ Courts have suggested, however, a second—yet no less important—function of this requirement: the appearance of impartiality is needed to lend credibility to the entire enterprise of a jury trial.⁷ Incredible powers are trusted to juries composed of average men and women. Decisions of life and death are often made by twelve randomly chosen members of a community. For people to trust the system and continue to accept its validity, the jury’s decrees must be seen as Truth.⁸ Accordingly, the jury must be seen as something of a “black box,” a mysterious entity which produces a verdict from a set of facts through an unknown—and *unknowable*—deliberation process. The less the public knows about the decision-making process, the less able it is to criticize or question the resulting verdict. In America, such efforts were codified in Rule 606 of the Federal Rules of Evidence, subsection (b)(1):

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.⁹

In protecting the mystery of the deliberation process, the drafters of the Federal Rules of Evidence sought to preserve the legitimacy of the jury system by protecting it from undue public scrutiny; concerns of

⁶ *Id.* at 722.

⁷ *See, e.g.*, *U.S. v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997) (“It is well understood, for example, that disclosure of the substance of jury deliberations may undermine public confidence in the jury system.”); *U.S. v. Ebron*, 683 F.3d 105, 125 (5th Cir. 2012) (“[I]t is recognized that the secrecy of deliberations is essential to the success of the jury system.”).

⁸ I use a capital “T” in describing this concept to distinguish between “truth” (what actually happened in a given transaction) and “Truth” (what is pronounced to have occurred by the jury).

⁹ Fed. R. Evid. 606(b)(1). This Note focuses exclusively on the Federal Rules of Evidence, rather than addressing the various state rules that exist. Aside from workability concerns and the fear of making this Note overly lengthy, the federal focus makes sense because many state rules either parallel Rule 606(b) or impose stricter burdens. *See, e.g.*, *Il. R. Evid. Rule 606* (2010) (employing the same language as the federal rule); *Ala. R. Evid. 606* (1996) (mirroring the federal statute but leaving out the third exception); *Wy. R. Evid. 606* (1977) (employing only the first two exceptions found in the federal rule); *Pa. R. Evid. 606* (employing only the first two exceptions of the federal rule); *Oh. R. Evid. 606* (1980) (allowing jurors to testify as to external influences only after “outside evidence” was introduced). Some states offer comparatively more protections in their statutes, *see, e.g.*, *In. R. Evid. 606* (containing all three exceptions found in the federal rule and an additional exception for “any juror’s drug or alcohol use”); *N.D. R. Evid. 606* (containing the three federal exceptions and an exception for testimony about “whether . . . the verdict was arrived at by chance”); *Mont. R. Evid. 606* (allowing jurors to testify as to “whether any juror has been induced to assent to any general or special verdict, or finding on any question submitted to them by the court, by a resort to the determination of chance”), but do not do so in a way that would allow testimony about racial bias. Only a few states seem to leave open the option of this kind of testimony. Rule 5-606 of the Maryland Code seems to start from a general presumption that jurors should be allowed to testify, only disallowing juror testimony as to “(A) any matter or statement occurring during the course of the jury's deliberations, (B) the effect of anything upon that or any other sworn juror's mind or emotions as influencing the sworn juror to assent or dissent from the verdict, or (C) the sworn juror's mental processes in connection with the verdict.” *Md. Rule 5-606* (1993). California, on the other hand, has expressly allowed such testimony as a matter of state law. The California Supreme Court has interpreted Section 1150 of the California Evidence Code to allow juror testimony about statements made in the deliberative process. *People v. Steele*, 47 P.3d 225 (Cal. 2002). Importantly, juror testimony is still limited to only the actual statements made; jurors may not testify as to the likely effects of the statements. *Id.* at 248. Connecticut and Hawaii also seem to take this approach. For a comparison of these three states’ rules with the federal rules and a discussion of the benefits and disadvantages of each, *see* Nicholas Bauman, “*Extraneous Prejudicial Information*”: *Remedying Prejudicial Juror Statements Made During Deliberations*, 55 *ARIZ. L. REV.* 775 (2013).

finality and secrecy outweighed the potential value of more accurate verdicts.¹⁰ This Note accepts as a valid and, indeed, valuable, premise the legitimizing role of “black box” deliberation; important considerations of the judiciary’s image generally favor this sort of approach to adjudication.¹¹ However, this Note posits that in the context of racial politics, the justice system’s refusal to acknowledge the well-documented impacts of explicit and implicit racial bias on jury deliberations has had the opposite effect, undermining its legitimacy in the eyes of communities of color. Part II explores the rationale for treating the jury as a black box, tracing the concept to its origins at common law to explain how the idea became so central to our judiciary. Part III examines the American approach to this principle, looking at its codification in Rule 606(b) of the Federal Rules of Evidence and its treatment in subsequent Supreme Court jurisprudence. Part IV shifts focus and looks at the ways in which the law currently allows defendants to address issues of racism in the jury pool. It then traces a current circuit split over the question of whether Rule 606(b) conflicts with the Fourteenth Amendment’s guarantee of racial equality. Finally, Part V introduces social science research showing the effects of implicit racial bias on juries’ decision-making processes and explores the impacts of racially disparate treatment on the legitimacy of the system as a whole to suggest that, as a prudential matter, 606(b)(1) should not bar defendants from alleging racial bias in the jury in post-conviction motions for new trials.¹²

II. A RATIONAL BLIND FAITH: THE HISTORICAL ORIGINS OF THE JURY AS A BLACK BOX

In order to understand the contemporary legal landscape surrounding Rule 606(b) and the importance of jury secrecy to the American system, it is important to trace their historical origins. Though considered one of the bedrocks of contemporary criminal procedure, the secrecy of jury deliberations may have arisen as a historical accident. The concept originated in medieval England. Before the adoption of the jury system as we know it today, courts settled disputes by subjecting parties to a trial by ordeal.¹³ Under this system, a trial would begin upon accusation by a presentment jury.¹⁴ This jury, however, served no adjudicative purpose; their duty was merely to “report every crime and every suspect.”¹⁵ Once so accused, a defendant would swear an oath of innocence before a priest or clergyman.¹⁶ The clergyman overseeing the ordeal would then subject the accused to some sort of extreme physical test or punishment to allow a divine determination of his guilt or innocence.¹⁷ The nature of the punishment varied; so long as the burden served as a “test of deed or word, fraught with moral danger that yielded the Deity’s judgment mediated through man’s practical wisdom,”¹⁸ any sort of punishment would do. Most common was the

¹⁰ S. Rep. No. 93-1277, at 13-14 (1974).

¹¹ For a discussion of the arguments on the other side, see Andrew J. Hull, *Unearthing Mansfield’s Rule: Analyzing the Appropriateness of Federal Rule of Evidence 606(b) in Light of Common Law Tradition*, 38 S. ILL. U. L.J. 403 (2014) (arguing that Rule 606(b) represents a break from older common law tradition and hampers important policy ends).

¹² Of course, many different forms of bias play out in the criminal justice system. For an in-depth treatment of other types of bias that affect criminal defendants in the trial process, see generally Joey L. Mogul, *The Dykier, The Butcher, The Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. CITY L. REV. 473 (2005) (describing sexism and homophobia through the trial process); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497 (2003) (describing xenophobia and anti-immigrant bias); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349 (2012) (describing bias against poor ex-felons in requirements for regaining voting privileges). This Note, however, focuses only on the question of racial bias.

¹³ George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575 (1997).

¹⁴ Roger Groot, *The Jury of Presentment Before 1215*, 26 AM. J. LEGAL HIST. 1 (1982). The idea of a “jury” was probably first seen in 1166. *Id.* at 3.

¹⁵ *Id.* at 5.

¹⁶ CARL STEPHENSON & FREDERICK GEORGE MARCHAM, *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 77-78 (1972).

¹⁷ Trisha Olson, *Of Enchantment: The Passing of Ordeals and the Rise of Jury Trials*, 50 SYRACUSE L. REV. 109, 118 (2000).

¹⁸ *Id.*

ordeal of the iron, in which the accused would be required to carry a red-hot iron a distance of approximately three meters.¹⁹ The accused was found to be innocent if the resulting burns healed completely within three days. Other examples of ordeals included the ordeal of the cauldron (in which the accused could prove innocence by seizing a small object from the bottom of a cauldron filled with boiling water without sustaining burns),²⁰ the ordeal of cold water (in which the accused proved innocent if, after being submerged into a pool of blessed water, she sank),²¹ the ordeal of hot ploughshares (in which the accused would prove innocence by walking unharmed over a bed of hot coals),²² and the ordeal of the cursed morsel (in which the accused would prove innocence by swallowing roughly one ounce of cheese).²³ The trial by ordeal was, at its core, premised on the belief that a divine power would intervene to protect those who were truly innocent.²⁴ Medieval rulers acknowledged the link between ordeals and divine protection and, indeed, valued it; one of the earliest Carolingian capitularies proclaimed: "[l]et doubtful cases be determined by the judgment of God."²⁵ When the accused passed these tests, therefore, he showed divine favor; God, after all, could never make a mistake about a person's guilt.

This element of divinity that underpinned the trial by ordeal also served to cement people's faith in the verdict of a case. The ordeal was "enforced in an exercise of power, yet [it] represented submission to that power as submission to the deity."²⁶ Submitting to the trial process was thus explicitly considered a submission to God. By presenting the adjudicative process as something beyond the control of man, beyond his prejudice and bias, the ordeal brought the divine into the trial and rendered the verdict itself unassailable. Thus, trial by ordeal established an early emphasis on the finality of a verdict. In this system, to question the verdict would be to question God itself. Such doubt was unheard of in the deeply religious world of early medieval England.

The trial by ordeal met its end in 1215, when the Fourth Lateran Council forbade members of the cloth from presiding over such ordeals.²⁷ Without a priest to ensure God's presence in the ritual, the trial was fundamentally disrupted. The presence of the priest at the ordeal had affirmed the divine aspects of the trial, thus stripping the ordeal of its divine imprimatur deprived the ritual of authority, and the ordeals quickly became meaningless.²⁸ Neither the Council nor the Crown, however, seems to have posited a substitute; scholars suggest that the English criminal courts began using the presentment jury to determine questions of fact and deliver final verdicts, simply "substitut[ing] one ordeal for another."²⁹ Though this use of the jury was initially rejected,³⁰ by 1229, the practice seems to have become commonplace.³¹

¹⁹ *Id.* at 117.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Fisher, *supra* note 13, at 585-587.

²⁵ Olson, *supra* note 17, at 122.

²⁶ ROBERT BARTLETT, TRIAL BY FIRE AND WATER 100 (1986).

²⁷ Fisher, *supra* note 13, at 586.

²⁸ James Fitzjames Stephen noted that the author of the *Mirror* complained during the reign of Edward I (1272-1307), "It is an abuse that proofs and purgations be not by the miracle of God where other proof faileth." JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 253 (1883) (quoting article 127 of the *Mirror*).

²⁹ Fisher, *supra* note 13, at 586.

³⁰ See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 44 (1950) ("Leave to the inadequate judgments of mere human judges the testing of the truth-telling of witnesses, when life or property are at stake? By no means."). Indeed, in the early years of the jury trial as we know it today, people were so reluctant to consent to a trial by jury that English courts began threatening defendants to get them to do so. Fisher, *supra* note 13, at 588-89.

³¹ Olson, *supra* note 17, at 172.

The shift from a divine arbiter to a human one brought with it important considerations of institutional legitimacy and finality of judgments. The trial by ordeal was believed precisely because it was divine. Guilt or innocence was pronounced through the infallible judgment of God.³² What could make a verdict rendered by mere men, as opposed to such a divine being, final and legitimate? And if the verdicts themselves were illegitimate, how could the system be trusted? As a note in the Harvard Law Review suggests, the Crown responded by creating a highly formalized body of rules that enshrouded the entire process of jury deliberation in secrecy to maintain the sense of mystery and wonder that had accompanied the ordeal and rendered verdicts final.³³ Procedural legitimacy became of paramount importance in filling the void:

“If the public is to be persuaded to entrust controversies to the judicial system, what is crucial, even more than that the ‘truth’ be found, is that it appear to be found through a legitimate, reliable process; as long as the ultimate determination of closely contested issues continues to depend on jury verdicts, the law has an obligation to maintain general respect for those verdicts, to avoid exposing them ‘to easy and obvious criticism.’”³⁴

Rules of procedure that removed the deliberative process further and further from public imagination served this legitimizing role.³⁵ By the mid-1300s, juries in England seem to have begun deliberating in a physically distinct space: the juror room.³⁶ No one was allowed access to the jury room until the verdict was delivered.³⁷ Conversely, no juror was allowed to leave the jury room until a verdict had been reached.³⁸ This secrecy led to an important consequence: verdicts could not be impeached by questioning the validity of the jurors' deliberations.³⁹ By shrouding the jury and the deliberation process to the greatest extent possible, these procedural rules obscured the fact that the decision was made by fallible humans. Just as the divine verdict of the ordeal was seen as superhuman, immune to individual prejudices, the jury verdict was presented as the result of an inexplicable and unassailable process. Once the process was mystified, it became impossible to critique. The rules allowed the community to suspend its disbelief, maintaining a blind faith that the process was working justice.

III. TRUST IN THE SYSTEM: THE DEVELOPMENT OF THE JURY “BLACK BOX” IN AMERICAN JURISPRUDENCE

American courts generally accepted the British tradition of secrecy surrounding jury deliberations. Early courts in colonial Virginia required jury deliberations to be conducted in complete isolation. Like their British counterparts, Virginia juries were unable to interact with the outside world in any way before rendering a verdict.⁴⁰ By the early 20th Century, therefore, evidence scholars noted that the firmly

³² *Id.* at 120.

³³ Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 891 (Feb. 1983).

³⁴ *Id.*

³⁵ See generally WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 298-350 (6th ed. 1938) (describing the origin and development of juries in England).

³⁶ *Id.* at 318.

³⁷ WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 114 (James Appleton Morgan ed., 1857) (1853).

³⁸ Diane E. Courselle, *Struggling With Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 215 (Autumn 2005).

³⁹ PATRICK DEVLIN, TRIAL BY JURY 48 (1966) (“The court will not listen to any juryman who has second thoughts or allow any of them to assert thereafter that he was not a consenting party to the verdict.”).

⁴⁰ Courselle, *supra* note 38, at 217; see also Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 946-47 (2003) (noting an early Virginia opinion that permitted a convicted defendant to go free because the court allowed a juror to visit his family for five minutes during deliberations).

established common law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict.⁴¹ Courts thus accepted the underlying philosophy that the finality interests protected by deliberative secrecy outweighed the risk of some juror misconduct during deliberations.⁴² As jury verdicts became increasingly difficult to question, mistakes became harder to find. In *Hyde v. U.S.*,⁴³ petitioners convicted of conspiracy to defraud the United States sought to vacate their convictions by alleging juror misconduct and bargaining in the deliberative process. After the jury twice failed to reach a verdict, the presiding judge told the jurors that they had to come to a unanimous verdict, and sent them back for further deliberation. One juror alleged that certain members of the jury, fearing that the judge would make all stay until a verdict was reached, had simply bargained away their votes. The petitioner claimed that this agreement amounted to undue coercion by the judge's orders. The Supreme Court rejected petitioner's claim, however, declaring that "the testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors, and can receive no corroboration."⁴⁴

American courts did recognize, however, that concerns of fairness outweighed finality at a certain point. As early as 1907, the Supreme Court recognized that defendants had a right to a jury free from outside influences.⁴⁵ In the 1950's, the Supreme Court emphasized this freedom from external influences in *Remmer v. U.S.*, holding that certain errors were too egregious to overlook in the name of finality.⁴⁶ There, the Court was forced to address the issue of whether or not allegations of bias in the jury (based on one juror's potential pecuniary gain from returning a guilty verdict) required that petitioner be granted a new hearing.⁴⁷ Justice Minton, in a unanimous opinion, was careful to point out the secrecy concerns at stake. Allowing post-conviction inquiry into the validity of the deliberation would open a veritable Pandora's Box, for "a juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions."⁴⁸ On the other hand, the Court noted the axiom that "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . ."⁴⁹ These two principles were in conflict in *Remmer*: allowing the petitioner to successfully challenge the verdict would destabilize the jury system, but rejecting the petition would effectively condone bribery in the justice system. Ultimately, the Court found that the bribery made the risk of prejudice too high, granting petitioner's motion for rehearing, but provided no reason for the balancing.

Such was the state of deliberative secrecy at common law in the United States. Congress, in adopting the Federal Rules of Evidence, believed that it was merely codifying the state of these common law principles about deliberative secrecy in Rule 606 of the Federal Rules of Evidence (hereafter, the "Rule"), which speaks generally to circumstances in which members of a juror may testify as a witness.⁵⁰ The Rule specifically states that:

⁴¹ See 8 J. Wigmore, Evidence § 2352, pp. 696-697 (J. McNaughton rev. ed. 1961) (noting that the common law rule, originating from a 1785 opinion of Lord Mansfield, "came to receive in the United States an adherence almost unquestioned.").

⁴² Courselle, *supra* note 38, at 219.

⁴³ 225 U.S. 347 (1912)

⁴⁴ *Id.* at 384

⁴⁵ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

⁴⁶ 347 U.S. 227 (1954).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 229

⁵⁰ S. Rep. No. 93-1277, at 13-14 (1974); Fed. R. Evid. 606.

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.⁵¹

Thus, by its plain terms, the Rule generally bars jurors from testifying as to any issues affecting the deliberative process. In its notes about the Rule, the Advisory Committee explained: "The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment."⁵² Allowing judges to conduct an ex post facto review of jury deliberations would open every verdict to questioning. The stability of the entire system would be undermined, and the legitimacy of the jury trial would be compromised.

This protection is not without exceptions, however. The Rule itself acknowledges three specific exceptions to the general principle of the jury "black box." Jurors may be forced to discuss their deliberative process when: "(A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form."⁵³ The first two exceptions seemed to codify the earlier common law tradition, under which judges handled such challenges by drawing a distinction between external and internal influences on a jury: influences from someone who was not physically in the jury room were "external," while anything about the jurors themselves was "internal."⁵⁴ Under this analysis, petitioners could only challenge their sentences and force jurors to testify when the jury had improper interactions with the outside world. For example, the Supreme Court found that a jury's improper conversations with the bailiff,⁵⁵ a juror's pending application with the District Attorney's office,⁵⁶ and a purported bribe offered to a juror⁵⁷ were all impermissible "external" influences that empowered the court to explore what, if any, prejudice resulted to the defendants. On the other hand, internal matters such as the conduct and disagreements of the jurors⁵⁸ or the bargaining process that took place in deliberations⁵⁹ were inappropriate considerations for review.

Years later, the Supreme Court clarified this standard in the case of *Tanner v. U.S.*,⁶⁰ reaffirming its commitment to a jury "black box" in interpreting Rule 606(b). Petitioner Tanner was charged with and convicted of conspiring to defraud the United States and committing mail fraud by an allegedly intoxicated jury. After a juror revealed this information to Tanner's attorney in an unsolicited phone call, Tanner appealed, alleging that intoxication was an impermissible external influence that warranted a new trial. According to the juror who came forward, the behavior was extreme: throughout the trial, several jurors had consumed significant quantities of alcohol, which caused them to fall asleep in the middle of trial.

⁵¹ Fed. R. Evid. 606(b)(1).

⁵² Fed. R. Evid. 606(b), notes of Advisory Committee.

⁵³ Fed. R. Evid. 606(b)(2).

⁵⁴ *Tanner v. United States*, 483 U.S. 107, 117-18 (1987).

⁵⁵ *Parker v. Gladden*, 385 U.S. 363 (1966).

⁵⁶ *Smith v. Phillips*, 455 U.S. 209 (1982).

⁵⁷ *Remmer*, *supra* note 46.

⁵⁸ *McDonald v. Press*, 238 U.S. 264 (1915).

⁵⁹ *Hyde v. U.S.*, 225 U.S. 347 (1912) (denying a motion for a new trial based on allegations that jurors bargained away their votes in order to end the deliberations sooner).

⁶⁰ 483 U.S. 107.

Prosecutors, defense counsel, and even the judge noticed this pattern, but simply thought nothing of it.⁶¹ In rejecting a petitioner's challenge of potential bias in the jury, the Court wrote:

There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. . . . Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.⁶²

In this candid recognition of the system's imperfections, the Court acknowledged that the hardline rule of jury secrecy could potentially lead to injustice in certain cases. Juror bias would be allowed to play out behind closed doors, effectively immune to challenges by convicted defendants. Gross misbehavior in the courthouse—the supposed bastion of justice—would simply be forgiven. Yet the Court feared the catastrophic effects of juror questioning would be even more harmful to society.⁶³ The injustice caused by unfair verdicts, in its view, was far less than the legitimacy that would be lost if the curtain were raised and jury determinations were subject to a sort of appellate review. In explaining the exceptions put forth in Rule 606(b)(1)(A) and (B), the Court emphasized that the external/internal distinction was *not* a spatial one. The fact that the jurors had obtained the alcohol and become intoxicated outside of the jury room was thus not relevant to the 606(b) question. Rather, the Court held, the distinction focused on the nature of the interference itself.⁶⁴ An interference that was entirely internal—such as conflicts between jurors or an individual juror's bias or prejudice—was not reviewable after a verdict was rendered. Internal biases and interferences could not easily be avoided or excised from the process; so long as human juries are to be used, individual bias will enter into the deliberative process. Allowing such challenges of the internal deliberation process, therefore, would be to allow challenges to the validity of the entire system. External interferences, on the other hand, did not present the same legitimacy concerns. In fact, the Court reasoned, reviewing a juror's interactions with the outside world enhanced the legitimacy of the jury trial by ensuring that only the jurors at the trial (and nobody else who had improper contact with them) would return the verdict.⁶⁵ Juror conduct during the trial and deliberations was not sufficiently external to be properly challenged in a post-conviction motion. Regardless of the efficacy of this distinction or its wisdom as a matter of policy,⁶⁶ one thing is clear from the Court's discussion: by the time of *Tanner*, it was accepted that the core purpose of Rule 606(b) was to preserve the legitimacy of the jury process.

⁶¹ *Id.* at 114–15

⁶² *Id.* at 120–21.

⁶³ *Id.* at 121.

⁶⁴ *Id.* at 117–18 (“The 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. Clearly a rigid distinction based only on whether the event took place inside or outside the jury room would have been quite unhelpful.”).

⁶⁵ *Id.* at 120 (“The Court’s holdings requiring an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations do not detract from, but rather harmonize with, the weighty government interest in insulating the jury’s deliberative process.”).

⁶⁶ Perhaps part of the justification for this rule can be found in the asymmetry of appellate remedies. This asymmetry results from the general principle that while defendants may appeal convictions, the government may never appeal an acquittal. *See* *Kepner v. United States*, 195 U.S. 100, 133 (1904) (holding that the government may not appeal an acquittal). One could argue that, given this powerful remedy available only to defendants, judgments of conviction

IV. SHADES OF GREY: RACIAL BIAS IN CRIMINAL PROCEEDINGS

Racial disparities exist at all levels of the criminal justice system.⁶⁷ The courtroom is no exception.⁶⁸ Defendants of color—generally litigating their cases in front of white judges and predominantly white juries—have long raised challenges to their trials and convictions by alleging racial bias in the judicial process itself.⁶⁹ Racism in the jury can be challenged in two main ways: the voir dire process, which allows a defendant to question jurors before the trial begins for the purposes of striking certain members of the pool, or a 606(b) exception, which allows a defendant to solicit juror testimony after a verdict has been returned for the purpose of seeking a new trial.

Over the 20th Century, the Supreme Court's attitude towards voir dire has changed significantly: while at first the Court seemed to allow broad inquiry into racial bias in the jury pool, the limits it has recently placed on voir dire rights have rendered the process relatively weaker, unable to root out deep-seated racism in juries. As 606(b) is a newer rule, there is less case law on the subject. However, the current circuit split on the Rule may give the Court an opportunity to limit post-conviction challenges in the same way. Given this potential parallel, both processes are addressed in turn.

A. Voir Dire

One way defendants may seek to examine potential racism in jurors through the voir dire process, by which defendants are given the opportunity to question prospective jurors before the trial begins. During voir dire, defendants are allowed to ask direct questions to jurors “in relation to their ability to decide a particular case.”⁷⁰ This right is not absolute, however.⁷¹ Recognizing the potential for excessively long or irrelevant voir dire, many courts have imposed additional limits on proper voir dire questioning. Some courts, for example, limit the types of questions that may be asked during voir dire to only those

should be protected from complete scrutiny. However, as this Note focuses only on comparing the experiences of defendants of color raising post-conviction challenges to white defendants raising similar challenges, these broader issues are less relevant. As the rest of this Note will show, defendants of color face the unique challenge of racism in deliberations; thus, while it accepts the general bar on postconviction juror testimony, this Note still argues for a limited exception to place defendants of color and white defendants on a more even playing field.

⁶⁷ See generally Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541 (2012) (describing ways in which racial disparities are maintained through prosecutors' discretionary decisions before and after trial and the external influence of institutional policies and culture).

⁶⁸ See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (describing the various ways in which Black communities experience courtrooms and jury trials).

⁶⁹ See, e.g., *Ellis v. Harrison*, 2010 WL 3385206 (C.D. Cal. July 20, 2010) (alleging biased counsel); *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003) (alleging a biased jury); *Love v. State*, 543 N.W.2d 621 (Iowa Ct. App. 1995) (pointing to jury orientation instruction drawing attention to Black defendant and White victim); *Marshall v. State*, 854 So.2d 1235 (Fla. 2003) (alleging a biased jury); *Smith v. Mitchell*, 348 F.3d 177 (6th Cir. 2003) (alleging bias in charge and prosecution of capital offenses and discrimination in selection of jury); *State v. Kinder*, 942 S.W.2d 313 (Mo. 1996) (en banc) (alleging biased judge and disqualification of juror potentially favorable to Black defendant); *Villafuerte v. Stewart*, 142 F.3d 1124 (9th Cir. 1998) (alleging biased judge).

⁷⁰ Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power”*, 27 STAN. L. REV. 545, 545 (1975).

⁷¹ Indeed, the Supreme Court has never held voir dire as constitutionally required, though several states have suggested as much. See, e.g., *State v. Sanko*, 658 S.E.2d 94, 96 (S.C. 2008) (“A capital defendant’s right to voir dire, while grounded in statutory law, is also rooted in the Due Process Clause of the Fourteenth Amendment of the United States Constitution.”), cert. denied 555 U.S. 875 (2008); *State v. Ball*, 824 So. 2d 1089, 1110 (La. 2002) (holding as a matter of state constitutional law that “[a]s a general matter, an accused in a criminal case is constitutionally entitled to a full and complete voir dire examination.”).

which are “directly relevant” to the trial.⁷² Importantly, the determination of “direct relevance” is left to the discretion of the court, and a trial judge’s refusal to allow even proper lines of questioning is often found to be errorless on appeal.⁷³

In the later Nineteenth and early Twentieth Centuries, as litigants of color first began entering the system in larger numbers, courts faced a new question: was voir dire about jurors’ potential racial biases an acceptable or reasonable ground of questioning? The Supreme Court first addressed this question in the case of *Aldridge v. U.S.*, where a Black defendant charged with and convicted of first degree murder of a white man challenged his trial judge’s refusal to question the jury about racial bias.⁷⁴ The defendant’s counsel noted that “at the last trial of this case” at least one juror, a white woman, mentioned that “the fact that the defendant was [Black] and the deceased a white man perhaps somewhat influenced her.”⁷⁵ The Court, in an 8-1 opinion, held that the trial judge’s refusal was erroneous, reasoning that the risk of prejudice in such an instance was simply too high.⁷⁶ The Court rejected the argument that the juror could simply put aside her racist beliefs in reaching a verdict, particularly where the juror had made a statement that overtly showed bias.⁷⁷ Notably, the Court based its decision, in part, on the fact that refusing to acknowledge racial bias in the jury system would surely bring the system into disrepute.⁷⁸ Thus legitimacy was still at the forefront of the Court’s mind, even when addressing questions of racism. Nearly four decades later, the Court revisited the issue and affirmed its stance in *Ham v. South Carolina*, this time grounding its decision in the Fourteenth Amendment’s Due Process Clause.⁷⁹ Noting that “a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race.”⁸⁰ Justice Rehnquist—in a part of the opinion without dissent—held that the trial judge had a constitutional duty to ask about racial bias in voir dire when such questions were proposed by the defendant even without the overt evidence of racial bias that was present in *Aldridge*.⁸¹

⁷² See, e.g., *People v. Semone*, 35 P.2d 379, 383 (Cal. Ct. App. 1934) (limiting “examination of jurors within reasonable bounds so as to expedite trial.”); *People v. Crowe*, 8 Cal. 3d 815, 818-19 (Cal. 1973) (holding that it is appropriate under statute for judge to limit questions posed to potential jurors to those “within the scope of reasonable examination.”). For a more thorough discussion of the various limits courts may impose and the broad latitude they are given in doing so, see generally R. Brent Cooper & Diana L. Faust, *Procedural and Judicial Limitations on Voir Dire—Constitutional Implications and Preservation of Error in Civil Cases*, 40 ST. MARY’S L.J. 751 (2009).

⁷³ Babcock, *supra* note 70, at 546.

⁷⁴ 283 U.S. 308 (1931).

⁷⁵ *Id.* at 310.

⁷⁶ *Id.* at 314-15.

⁷⁷ See *id.* at 314 (“if any one of them [the jurors] was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit. . . . we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry.”).

⁷⁸ *Id.* at 314-15 (“The argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.”).

⁷⁹ 409 U.S. 524 (1973). Petitioner, a Black, bearded civil rights advocate who had lived the majority of his life in South Carolina, was on trial for marijuana possession. In voir dire, the petitioner sought to have the jury questioned about potential biases against (1) Black people, (2) bearded people, and (3) drug use. The trial judge declined to inquire about any of the subjects, instead asking only generally about bias and prejudice. *Id.* at 526.

⁸⁰ *Id.* at 526-7.

⁸¹ See *id.* at 525 (noting only that defendant was a civil rights advocate who lived in the South, and presenting no additional evidence of any particular juror’s bias).

Ham's seemingly broad holding—namely, that a defendant *always* has a right to question prospective jurors about racial bias—was narrowed just three years later, in *Ristaino v. Ross*.⁸² Writing for the majority, Justice Powell emphasized that *Ham* did not create an unqualified and generally applicable right to examine a jury's racial bias. Determining bias, Justice Powell wrote, was “particularly in the province of the trial judge.”⁸³ He distinguished *Ham* by discussing the particular factual circumstances that made an inquiry into racial bias necessary in that case: since the defendant was a civil rights advocate, Justice Powell determined, “[r]acial issues . . . were inextricably bound up with the conduct of the trial.”⁸⁴ The petitioner in *Ristaino*, on the other hand, only contended that racial bias was possible because of the interracial nature of his crime (he was Black, and the alleged victim was white).⁸⁵ The Court refused to find that there was a significant likelihood of prejudice to a defendant based on nothing more than an interracial crime.⁸⁶ Rather than articulate a clear test for determining when such questioning would be proper, the Court merely said courts must “[assess] whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as indifferent as they stand unsworn.”⁸⁷

The uncertainty created by this ambiguous language led to a circuit split over the question of when race-based voir dire was acceptable. Thus, seven years later, the Court was forced to reconsider the issue and clarify its ruling in *Ristaino* in *Rosales-Lopez v. U.S.*, in which a Mexican American sought to examine the jury's racial bias in his trial for his part in a plan to smuggle illegal immigrants across the border.⁸⁸ At first glance, the *Ristaino* language would seem to allow such questioning; illegal immigration is viewed as a heavily racialized practice, the stereotypes of which disproportionately affect Latinos and, specifically, Mexicans.⁸⁹ Thus it seems it would have been extremely prejudicial to have jurors associate the defendant with illegal immigration in the trial. In a plurality opinion by Justice White, however, the Court rejected petitioner's argument. *Ristaino* and *Ham*, according to Justice White and the plurality, only required a trial judge to allow race-based questioning where racial issues were “inextricably bound up with the conduct of

⁸² 424 U.S. 589 (1976). Respondent, a Black male, was tried for armed robbery, assault, and battery of a White security guard. Before the start of voir dire, respondent's counsel asked to have the jury questioned about racial prejudices. The following exchange occurred:

“THE COURT: . . . I thought from something Mr. Donnelly (counsel for a codefendant) said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.

“Is there anything peculiar about it, Mr. Donnelly?”

“MR. DONNELLY: No, just the fact that the victim is white, and the defendants are black.

“THE COURT: This, unfortunately, is a problem with us, and all we can hope and pray for is that the jurors and all of them take their oaths seriously and understand the spirit of their oath and understand the spirit of what the Court says to them this Judge anyway and I am sure all Judges of this Court would take the time to impress upon them before, during, and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.

“I believe that that is the best that can be done with respect to the problems which as I said, I regard as extremely important”

Id. at 591.

⁸³ *Id.* at 595 (citing *Rideau v. Louisiana*, 373 U.S. 723, 733 (1963)).

⁸⁴ *Id.* at 597.

⁸⁵ *Id.* at 591 (noting that defense counsel, when asked for reasons why he wished to question jurors about racial bias, replied: “just the fact that the victim is white, and the defendants are black.”).

⁸⁶ *Id.* at 597-98.

⁸⁷ *Id.* at 596 (internal quotations and citations omitted).

⁸⁸ 451 U.S. 182 (1981).

⁸⁹ See generally Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (noting how racialized stereotypes about illegal immigration have become increasingly prevalent in the wake of *Brignoni-Prince* and the acceptance of “Mexican appearance” as a relevant factor in making an immigration stop).

the trial.”⁹⁰ This link required “more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case. . . .”⁹¹ Importantly, *Rosales-Lopez* altered the presumption in such cases; whereas *Aldridge* and *Ham* presumed the validity of a defendant’s proposed line of questioning, the *Rosales-Lopez* Court specifically stated that “[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups.”⁹² Where their decisions about voir dire questioning had previously been entitled to some deference, petitioners now bore the heavy burden of making a “substantial indication” that racial issues were “inextricably bound up” with the trial. Importantly, however, the Court again emphasized that such rules were in place to preserve the legitimacy of the jury trial, echoing the *Aldridge* Court’s concerns.⁹³ Thus, even while curtailing defendants’ rights to inquire about racism in voir dire, the Court reaffirmed that concerns of institutional legitimacy were central to questions of jury procedure and selection. Curiously, however, the *Rosales-Lopez* Court went on to deny petitioner’s requests,⁹⁴ without providing any further discussion about legitimacy of the jury trial.

B. Rule 606(b)

Defendants may also challenge potential bias in the jury after their convictions by seeking permission to interview jurors after the verdict has been rendered. Nearly all courts in the United States have some procedure by which an attorney may obtain permission from the court to take juror testimony pursuant to Rule 606(b). As a gatekeeping matter, however, a defendant must show that her case falls into one of the three exceptions to the Rule. The ability of a defendant to request such permission specifically for the purpose of uncovering racial bias, however, is hotly contested. Textualists may argue that Rule 606(b) specifically enumerates only three exceptions to the general bar on juror testimony: (1) extraneous prejudicial information improperly brought to the jury’s attention, (2) outside influences improperly brought to bear on any juror, and (3) mistakes on the verdict form.⁹⁵ The need to protect juries and jury verdicts, under this view, requires a narrow construction of any rule which interferes with the jury’s privacy.⁹⁶ Opponents of this approach, on the other hand, argue that the guarantee of a fair trial afforded by the Sixth Amendment supersedes the text of the Federal Rules of Evidence, and thus jury racism is properly questioned to impeach a verdict.⁹⁷

The Supreme Court has remained silent on this issue. *Tanner*, discussed above, is the only Supreme Court case that interprets Rule 606(b) and its limitations of juror testimony. The petitioner in *Tanner* sought to interview jurors after the entry of a verdict to determine whether or not one of the jurors had been intoxicated for one day of the trial. In rejecting petitioner’s argument, the Court noted that significant protections already existed to guarantee defendants a Sixth Amendment impartial jury. Voir dire, observations of the jury by counsel and the court during trial, opportunities for jurors to report inappropriate juror behavior prior to rendering a verdict, and the admissibility of non-juror testimony as to wrongdoing all were sufficient procedural safeguards that adequately prevented juror bias from affecting the deliberation process.⁹⁸

⁹⁰ *Rosales-Lopez*, 452 U.S. at 189 (citing *Ristaino*, 424 U.S. at 597).

⁹¹ *Id.* at 190.

⁹² *Id.*

⁹³ *Id.* at 191 (citing *Aldridge*, 283 U.S. at 314-5).

⁹⁴ *Id.* at 193-4.

⁹⁵ Fed. R. Evid. 606(b)(2).

⁹⁶ See generally Scott Ritter, *Beyond the Verdict: Why Courts Must Protect Jurors from the Public Before, During, and After High-Profile Cases*, 89 IND. L.J. 911 (Spring 2014).

⁹⁷ See Amanda R. Wolin, *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)*, 60 U.C.L.A. L. REV. 262 (October 2012).

⁹⁸ *Tanner*, 483 U.S. at 127. Scholars, however, have subsequently addressed the shortcomings of these measures. See, e.g., Leah S. P. Rabin, *The Public Injury of an Imperfect Trial: Fulfilling the Promise of Tanner and the Sixth*

In the wake of *Tanner*, however, the circuits have split over whether or not evidence of racial bias in the jury warrants granting a defendant's request to interview jurors and compel testimony. The Tenth Circuit read *Tanner* to its logical end and adopted a textualist view of Rule 606(b) in *U.S. v. Bennally*.⁹⁹ In *Bennally*, a Native American defendant convicted of assault with a dangerous weapon sought a new trial after one juror came forward with an allegation that racially charged statements had been made during deliberations.¹⁰⁰ A second juror made statements to the defense investigator corroborating the first juror's charges, but refused to sign an affidavit to that effect. Bennally moved to vacate the verdict pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Even though the trial court had allowed the defendant to ask about racial bias in voir dire, Bennally contended that the statements of the jurors clearly showed that they had lied. The government, in opposition, argued that Rule 606(b) barred impeachment of the verdict based on the purely personal beliefs of jurors. The district court held that racist beliefs constituted "extraneous prejudicial information" and were thus excepted from the bar on juror testimony.

On appeal, the Tenth Circuit reversed, finding the statutory terms unambiguous that any prejudicial information must be "extraneous," or external to the juror, to be properly considered. The court recognized that Bennally likely had been prejudiced by the jurors' racism, yet stressed the countervailing interest of the state in maintaining the jury "black box":

To treat the jury as a black box may seem to offend the search for perfect justice. The rule makes it difficult and in some cases impossible to ensure that jury verdicts are based on evidence and law rather than bias or caprice. But our legal system is grounded on the conviction, borne out by experience, that decisions by ordinary citizens are likely, over time and in the great majority of cases, to approximate justice more closely than more transparently law-bound decisions by professional jurists.¹⁰¹

In so noting, the court reiterated the importance of jury mystery: "[i]f what went on in the jury room were judicially reviewable for reasonableness or fairness, trials would no longer truly be by jury, as the Constitution commands."¹⁰² Allowing a court to intervene whenever a jury verdict was purported to be unfair or unreasonable, the court worried, would put the entire legitimacy of the jury system at stake. Nobody could rely on a jury verdict that could so easily be overturned. The court, in denying Bennally's claim, saw itself as "preserv[ing] the community's trust in a system that relies on the decisions of laypeople

Amendment Through Post-Verdict Inquiry Into Truthfulness at Voir Dire, 14 U. PA. J. CONST. L. 537 (2011) (arguing that the jurors are likely to be unaware of or unwilling to admit racial biases during voir dire, and that racism in the deliberations—as opposed to during the trial itself—would be largely unobservable by non-jurors because of existing protections for deliberative secrecy).

⁹⁹ 546 F.3d 1230 (10th Cir. 2008).

¹⁰⁰ *Id.* at 1231-32 (describing how the foreman told the jury that "[w]hen Indians get alcohol, they all get drunk," and that "when they get drunk, they get violent." When a juror protested that not all Indians get drunk, the foreman responded "Yes, they do." Several other jurors nodded along, or indicated agreement with the statement. In another instance, the juror overheard several other members of the jury agreeing that they needed to "send a message back to the reservation.").

¹⁰¹ *Id.* at 1233. Interestingly, the court also noted: "We do not deny that the jurors' alleged statements were entirely improper and inappropriate. The statements about Native Americans in particular were gross generalizations built upon prejudice and had no place in the jury room. Impropriety alone, however, does not make a statement extraneous."

¹⁰² *Id.*

that would all be undermined by a barrage of postverdict scrutiny.”¹⁰³ The Seventh Circuit has also adopted this approach for largely the same reasons.¹⁰⁴

Not all circuits have adopted this approach, however. In *U.S. v. Villar*, the First Circuit addressed the same question on a nearly identical fact pattern.¹⁰⁵ Villar, a Hispanic man, was convicted of bank robbery by a jury. Shortly after the jury handed down the verdict, one of the jurors emailed Villar’s counsel about racially charged statements made by another juror during deliberations.¹⁰⁶ Upon Villar’s motion for a court inquiry into the verdict, the district court looked to the text of Rule 606(b) and found that the unambiguous text barred consideration of the juror’s email. On appeal, the First Circuit agreed that the juror’s email could not be considered under Rule 606(b). However, the court went on to reverse the lower court’s decision and remand for a new trial on Sixth and Fourteenth Amendment grounds. Allegations of racial bias, according to the court, so severely compromised the jury’s impartiality that it independently violated the Sixth Amendment.¹⁰⁷ Further, given the racial nature of the bias, the court found that such comments implicated the Fourteenth Amendment’s Due Process clause.¹⁰⁸ Under this framework, race is categorically different; the court expressed concern that the *Tanner* safeguards—voir dire, conduct in the courtroom, and juror reports before the handing down of a verdict—would do little to combat racism in the deliberation process:

While individual pre-trial voir dire of the jurors can help to disclose prejudice, it has shortcomings because some jurors may be reluctant to admit racial bias. In addition, visual observations of the jury by counsel and the court during trial are unlikely to identify jurors harboring racial or ethnic bias. Likewise, non-jurors are more likely to report inappropriate conduct—such as alcohol or drug use—among jurors than racial statements uttered during deliberations to which they are not privy.

Thus, the court found, no other procedural safeguards could weed out invidious racial bias from entering into the courtroom. 606(b) was declared unconstitutional insofar as it conflicted with the Sixth and Fourteenth Amendment rights of a defendant.¹⁰⁹

¹⁰³ *Id.* at 1234.

¹⁰⁴ *See* *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158 (7th Cir. 1987). Importantly, however, the court said in dicta that 606(b) “cannot be applied in such an unfair manner as to deny due process.” *Id.* at 1159. This suggests that, were a more severe case of racial bias in a jury to come up, the Seventh Circuit may adopt the reasoning of the First and Ninth Circuits.

¹⁰⁵ 586 F.3d 76, 78 (1st Cir. 2009).

¹⁰⁶ *Id.* Petitioner alleged, and indeed the state conceded, that a juror said “I guess we’re profiling but they cause all the trouble.”

¹⁰⁷ *Id.* at 86.

¹⁰⁸ *Id.* at 87.

¹⁰⁹ While no other federal circuits have weighed in on this question, districts within the Second Circuit have previously indicated their agreement with the First Circuit’s approach in *Villar*. *See, e.g.,* *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983), *aff’d*, 732 F.2d 1048 (2d Cir. 1984) (rejecting petitioner’s motion, but suggesting that “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.”); *Tobias v. Smith*, 468 F. Supp. 1287, 1290-91 (W.D.N.Y. 1979) (requiring evidentiary hearing because alleged racial comments were “sufficient to raise a question as to whether the jury’s verdict was discolored by improper influences and that they [were] not merely matters of jury deliberations. . . . There should be no injection of race into jury deliberations and jurors who manifest racial prejudice have no place in the jury room.”). The Ninth Circuit has been asked to address this question as well, and has taken a somewhat different approach. In *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001), the court held that Rule 606(b) does not bar inquiries into racial bias because the Rule could not apply to questions of mental bias. Writing for the unanimous panel, Judge Reinhardt explained that “Racial prejudice is plainly a mental bias that is

This past term, the Supreme Court granted certiorari from the Eighth Circuit to address the related question of whether Rule 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.¹¹⁰ Though the facts of the case itself are not about racial bias, amici have raised the race question for the Court's consideration.¹¹¹ This Note suggests that, in rendering its decision, the Court should consider some of the social realities of criminal trials and the role of race in contemporary criminal justice, the subject of Part IV.

V. MOVING FORWARD: EMPIRICAL REALITIES OF A TRIAL

Other commentators have analyzed this split, positing various reasons for why the issue should be resolved to allow post-conviction inquiry into juror racial bias. A main point of their critiques, however, has been that the constitutional protections put forth by the *Tanner* Court are particularly insufficient in the context of racial bias.¹¹² Much of the literature on the subject this far seems to echo this concern.¹¹³ As mentioned above, the *Tanner* majority identified four key safeguards that rendered inquiry into internal juror misconduct unnecessary: (1) voir dire, (2) observations of the jury by counsel and the court during trial, (3) opportunities for jurors to report inappropriate juror behavior prior to rendering a verdict, and (4) the admissibility of non-juror testimony as to the misconduct.¹¹⁴ In the context of racial bias, scholars argue, none are effective.

Aside from the limits on its usage discussed above, voir dire is unlikely to uncover racial bias. As an initial matter, voir dire is usually performed by the judge, not defense counsel.¹¹⁵ Without an incentive to advocate for a defendant, judges are less likely to inquire into juror racism. Even where counsel is permitted to conduct the questioning, strategic considerations may advise against doing so. The effects of bringing racial bias up are unpredictable at best; often, such questioning will simply draw more attention to the defendant's race or ethnicity, increasing the effect of race on the trial.¹¹⁶ Finally, even when the questions are asked, they are unlikely to actually uncover anything. Given the level of generality with which courts ask questions during voir dire, a juror's subtler biases may easily go undetected. As Sherri Lynn Johnson has pointed out, “[a]sking a general question about impartiality and race is like asking whether

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.” *Id.*

¹¹⁰ *Warger v. Shauers*, 134 S. Ct. 1491 (2014), granting cert. to 721 F.3d 606 (8th Cir. 2014).

¹¹¹ Brief for Nat'l Assoc. of Crim. Defense Lawyers as Amicus Curiae Supporting Petitioners, *Warger*, No. 13-517 (June 3, 2014).

¹¹² Rabin, *supra* note 98, at 549-53.

¹¹³ See, e.g., Brandon C. Pond, Note, *Juror Testimony of Racial Bias in Jury Deliberations: United States v. Bennally and the Obstacle of Federal Rule of Evidence 606(b)*, 2010 B.Y.U. L. REV. 237 (2010) (explaining why the procedural safeguards suggested by the *Tanner* Court are particularly poor protections in the context of racism); Bauman, *supra* note 9, at 796-97 (emphasizing the shortcomings of the *Tanner* procedures in the context of implicit bias); Dov Fox, *Neuro-Voir Dire and the Architecture of Bias*, 65 HASTINGS L.J. 999, 1010-13 (2014) (discussing the emerging psychological evidence that in many cases, bias cannot be consciously recognized); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Jury Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 187-89 (2011) (pointing out the difficulty of uncovering bias in voir dire).

¹¹⁴ *Tanner*, 483 U.S. at 127.

¹¹⁵ 1 Fed. Jury Prac. & Instr. § 4:7 (6th ed.).

¹¹⁶ See TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION STRATEGY AND SCIENCE §33:1, (3d ed. 2000) (“Race and gender bias may be appropriate reasons for excusing prospective jurors, but the subjects should probably not be specifically addressed, in any voir dire, unless the facts of the case suggest that racism could be a dispositive factor On the other hand, whenever a prospective juror uses a choice of terms that suggest a tendency to racial or gender bias, attorneys should weigh the possibility of exposing such a bias through further questions against the effect of such an examination on other jurors.”).

one believes in equality for blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet oppose interracial marriage and believe that blacks are more prone to violence."¹¹⁷ Thus, to the extent that voir dire relies on individuals being aware of and admitting to their own biases, it is unlikely to uncover more subtle forms of discrimination that jurors may harbor.

Critics of the *Tanner* safeguards also note that racial bias, unlike juror intoxication or other misconduct like that observed in *Tanner*, is not easily observed by the court or either party. It is difficult, if not impossible, to ascertain a silent jury's racial beliefs just by looking at its members during the trial. Even where such racism can somehow be observed, the standard of proof is often insurmountably high. In *United States v. Abcasis*, a defendant convicted of various narcotics-related offenses sought post-trial relief after his counsel claimed to have observed a juror making "mocking gestures" and anti-Semitic remarks to her fellow jurors.¹¹⁸ Even accepting counsel's allegations as true, the court denied relief. For a new trial, the court held, the defendant would have to show not just that the juror harbored bias, but that she had actually been influenced by that bias in the deliberation itself.¹¹⁹ It is difficult to imagine how an attorney, viewing the jury only during the trial itself, could ever meet this burden. Without the ability to observe the jurors in the deliberative process, one cannot prove that racial bias was actually used in the deliberation. This same problem would prevent jurors from effectively policing each other; jurors are not able to discuss the case with each other until the deliberations themselves, so it would be quite difficult for one juror to identify a peer/s racial bias in the context of the case before the deliberations.

While these arguments are all compelling, they present a series of complications that would make them difficult to argue in front of a court. Most of the objections Rabin and other scholars like her raise are equally applicable to other forms of bias; difficulty of observation will be a problem whenever a juror's internal thoughts or beliefs are at issue. Thus under this approach, no principled reason exists to allow questioning of racial bias while disallowing questioning as to any other form of internal bias. It is unlikely that courts would be willing to use this rationale to allow questions as to any and all forms of bias, fearing that such a result would effectively undercut the entire purpose of Rule 606(b). The need for proof that bias operated in the deliberations themselves would be equally difficult for other types of bias as well. This high burden of proof renders most allegations of bias or prejudice nearly impossible to prove.

While voir dire may be particularly difficult in the context of race, the fundamental challenge remains the same for other forms of bias: people are often unwilling to admit their prejudices, or are simply unaware of them. As most psychologists today agree, bias operates in subconscious ways; implicit prejudices are often not consciously recognized by their holders, but can impact behavior in profound ways that can alter the course of a criminal trial.¹²⁰ Given how brief the voir dire period usually is, short and straightforward questions are all that most judges and attorneys will be able to ask.¹²¹ Few people would respond to these questions in a way suggesting bias, although they could hold deeply prejudiced views.¹²²

A more persuasive rationale for exempting race from 606(b)'s categorical bar on post-conviction juror testimony about the deliberative process lies in the very rationale posited for the Rule itself:

¹¹⁷ Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1670 (1985).

¹¹⁸ 811 F. Supp. 828, 830 (E.D.N.Y. 1992).

¹¹⁹ *Id.* at 835 ("[E]vidence of bias may be sufficient to establish a constitutional violation if there is 'clear and incontrovertible' or 'substantial if not wholly conclusive evidence' that it was 'more likely than not' that a juror was biased and that his bias affected the actual deliberations.").

¹²⁰ See generally Anthony S. Greenawald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006)

¹²¹ Johnson, *supra* note 117, at 1673.

¹²² *Id.*

institutional legitimacy. While the past century has seen massive improvements in racial minorities' treatment in the American criminal justice system, it is hard to deny that inequity, persecution, and racism still permeate all levels of the process. From disparate policing practices to unequal prosecution rates, from biased convictions to uneven sentencing to rampant prison abuses, young Black and Latino men still suffer by virtue of their race.¹²³ The Supreme Court's unwillingness to address these issues with anything more than empty, albeit sympathetic, rhetoric has not given them much hope; indeed, when confronted with clear evidence that such problems exist, courts have turned a blind eye. Such indifference has delegitimized the courts in the eyes of communities of color. A strict textual enforcement of Rule 606(b) would thus undercut the very policy reasons for its adoption.

A. Race in Criminal Justice: Rhetoric vs. Reality

The Reconstruction Amendments to the United States Constitution had the collective effect of guaranteeing legal and political equality to all citizens of the United States regardless of color. Particularly in the context of juries, the Supreme Court interpreted this promise to mean that criminal defendants of all colors possessed the same right to an impartial jury. In the canonical case of *Strauder v. West Virginia*, the Court held that a defendant's right to a fair trial was violated by a statute categorically barring Black men from serving on juries.¹²⁴ Writing for the unanimous Court, Justice Strong determined:

[T]he constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.¹²⁵

Justice Strong went on to note particularly that the potential for prejudice in the jury ran high, warning that “prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.”¹²⁶ A categorical exclusion of Blacks from juries was impermissible partially because it exacerbated the potential for this prejudice. This principle was reiterated in *Batson v. Kentucky*, where the Court emphasized the important goal of “eradicat[ing] racial discrimination in the procedures used to select the venire from which individual jurors are drawn.”¹²⁷ “Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial,” the Court reasoned, and racial bias had no part in such a system.¹²⁸ Thus, while the holding focused purely on racism in the peremptory strike process, the Court's opinion strongly suggested that such racial bias was as improper in the juror's mind as it was in the prosecutor's. Reiterating the central concerns of judicial legitimacy, the Court warned that such biases “undermine public confidence in the fairness of our system of justice.”¹²⁹

¹²³ See generally CORAMAE RICHEY MANN, *UNEQUAL JUSTICE: A QUESTION OF COLOR* 129-219 (1993) (discussing different outcomes for communities of color and white communities in criminal justice processes); THOMAS M. UHLMAN, *RACIAL JUSTICE: BLACK JUDGES AND DEFENDANTS IN AN URBAN TRIAL COURT* 13 (1979); David Cole, *The Paradox of Race and Crime: A Comment On Randall Kennedy's "Politics of Distinction"*, 83 *GEO. L.J.* 2547 (1995); *Developments in the Law -- Race and the Criminal Process*, 101 *HARV. L. REV.* 1472 (1988).

¹²⁴ 100 U.S. 303, 305 (1879).

¹²⁵ *Id.* at 308.

¹²⁶ *Id.* at 309.

¹²⁷ 476 U.S. 79, 85 (1986).

¹²⁸ *Id.* at 87.

¹²⁹ *Id.*

As much as these statements suggest a commitment towards full racial equality in the courtroom, racism and implicit bias are still disturbingly common at all levels of the justice system. From the earliest points of law enforcement, racial minorities are disproportionately targeted. Police units are frequently deployed in heavily minority neighborhoods simply without reason.¹³⁰ Professor Ian Ayres has conducted an extensive study in the context of Southern California, surveying the methods and incidence of routine pedestrian and motor vehicle stops (searching for weapons or drugs) in the greater Los Angeles metropolitan area in the period between July 2003 and June 2004. Even after correcting for potential error, the results were shocking: per 10,000 residents, the stop rate for Blacks was found to be 3,400 stops higher than that for Whites, while the stop rate for Latinos was nearly 360 stops higher than that for Whites.¹³¹ Given that contemporary estimates suggest that Blacks represent just 12% of monthly drug users,¹³² this disparity makes little sense. Beyond the disproportionate targeting, however, Professor Ayres' research convincingly demonstrated that the stops were highly inaccurate, and indeed were unlikely to uncover anything at all. When compared to frisked Whites, frisked Blacks were 42.3% less likely to be found carrying a weapon, while frisked Latinos were 31.8% less likely to be so found.¹³³ Thus, the disproportionate targeting of Black and Latino persons in Los Angeles made stops ultimately less likely to uncover anything. When stopped subjects consented to the searches, the numbers were similar: consensual searches of Blacks were 37.0% less likely to uncover weapons, 23.7% less likely to uncover drugs, and 25.4% less likely to uncover *anything* else.¹³⁴ Consensual searches of Latinos were similarly ineffective: such searches were 32.8 less likely to uncover weapons, 34.3% less likely to uncover drugs, and 12.3% less likely to uncover *anything* else.¹³⁵ Despite these numbers, stopped Blacks were 29% more likely, while stopped Latinos were 32% more likely, to be arrested than stopped whites.¹³⁶ Such statistics are not merely a factor of racism in a particular police force or a particular context; the recent controversy over the New York Police Department's Stop-and-Frisk Program demonstrates the same racial disparities. For every year the program operated, over 80% of the "suspicious" persons stopped were young Black or Latino persons.¹³⁷ Weapons were seized in only 1% of stops of Blacks, and 1.1% of stops of Latinos.¹³⁸ Similarly, contraband materials other than weapons were recovered in just 1.8% of Blacks and 1.7% of Latinos.¹³⁹

Once targeted by police forces in such racially disparate ways, Black and Latino people face starkly different rates of prosecution. Given how much discretion is afforded to prosecutors in their decisions whether to prosecute certain offenders, these determinations are almost never subject to review. Professor Sonja B. Starr has studied how this discretion contributes to racial inequalities in the criminal justice, showing that Black defendants are routinely charged with harsher sentences across all vectors.¹⁴⁰ When

¹³⁰ Andrew Guthrie Ferguson & Damien Bernache, *The High-Crime Area Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587 (2008) (discussing the difficulties of quantifying and reliably designating areas as "high risk" or "high crime").

¹³¹ IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (2008), available at <http://www.aclusocal.org/issues/police-practices/racially-disparate-outcomes-in-the-los-angeles-police-department/>.

¹³² *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Mar. 13, 2014).

¹³³ AYRES, *supra* note 131, at 26.

¹³⁴ *Id.*

¹³⁵ *Id.* at 27.

¹³⁶ *Id.*

¹³⁷ *Stop-and-Frisk Data*, NEW YORK CIVIL LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Sept. 26, 2014).

¹³⁸ Floyd v. City of New York, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013).

¹³⁹ *Id.*

¹⁴⁰ Sonja B. Starr & Marit Rehati, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 2 (Oct. 2013).

Blacks and Whites committed nearly identical crimes, prosecutors were more than twice as likely to charge Black defendants with offenses carrying higher minimum sentences.¹⁴¹

Finally, despite narratives of color-blind justice, racism is often overt in the trial itself. In *U.S. v. Calhoun*, the Fifth Circuit addressed the question of whether or not a prosecutor's racist statements to a jury constituted clear error.¹⁴² Defendant, an African American man, was on trial for drug-related offenses. During the course of the trial, the state prosecutor said to the jury: "You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you—a light bulb doesn't go off in your head and say, 'This is a drug deal?'"¹⁴³ The message of the question was clear: Calhoun, by virtue of his race, was more likely to be involved in a cocaine conspiracy. Yet the Fifth Circuit refused to hold that such a statement was prejudicial to Calhoun. Because "the improper racial overtone of the question was isolated" and the question "focused on the presence of the large sum of money rather than the race of the participants," Calhoun had not been significantly prejudiced.¹⁴⁴ Further, the court instructed the jury "that the statements and arguments of the attorneys were not evidence and that the verdict must be based only on the evidence."¹⁴⁵ While concurring judges noted that "the prosecutor's racial remark was unquestionably improper," nobody dissented as to this conclusion. The *Calhoun* decision shows how unwilling courts are to accept that the ugly specter of racial bias works in subconscious ways. Such overt racism is, unfortunately, far from uncommon.¹⁴⁶

Thus racial bias, in the subtle form of implicit bias, pervades the criminal justice process. It has been clearly established that broad discretion afforded to each of the above mentioned actors in the criminal justice system results in heavily racialized patterns of incarceration.¹⁴⁷ Most of these decisions, however, are likely not made from a conscious form of racism. Disaggregating intent from the definition of racism reveals that most Americans are socialized to exhibit automatic preferences for white people and automatic biases towards Black and Latino people.¹⁴⁸ Jurors are far from immune to this process. Allegations of juror bias permeated the discussion of George Zimmerman's notorious trial just this past year.¹⁴⁹ Importantly, this bias is often subconscious. In one of the first large-scale surveys that studied the phenomenon of juror bias, Johan M.G. van der Dennen developed the theory that juries

¹⁴¹ *Id.* at 29.

¹⁴² 478 Fed. App'x 193 (5th Cir. 2012), *cert denied*, 113 S. Ct. 1136 (2013).

¹⁴³ *Id.* at 195.

¹⁴⁴ *Id.* at 195.

¹⁴⁵ *Id.*

¹⁴⁶ *See, e.g.*, *State v. Jackson*, 520 N.W.2d 291 (Wis. 1994) (juror allegedly said "Eenie, meenie, minie, moe, catch a n---r by the toe."); *State v. Brye*, 1993 WL 525057 at *1 (Conn. Dec. 10, 1993) (at trial, a juror said "I know 'that neighborhood' better than anyone and I'm sure he is guilty;" "the defendant was simply not worth all this time and trouble;" and "Joan, he's an animal; don't you want his kind off the street? He should be put away for a long time or he'll get out and come after us. Aren't you afraid?"); *Ex parte Guzman*, 730 S.W.2d 724 (Tex. Crim. App. 1987) (counsel referred to her own client as a "wetback"); *Callins v. Collins*, 998 F.2d 269 (5th Cir. 1993) (venireman referred to the defendant as a "n---r").

¹⁴⁷ AYRES, *supra* note 131, at 32; Marc Maurer, *Justice For All? Challenging Racial Disparities in the Criminal Justice System*, HUMAN RIGHTS MAGAZINE, Vol. 37 No. 4, (Fall 2010); Jerry Kang et. al., *Implicit Bias in the Courtroom*, 59 U.C.L.A. L. REV. 1124, 1135-37 (June 2012).

¹⁴⁸ Devon Carbado, Kimberle Crenshaw, Cheryl I. Harris & Valerie Purdie-Vaughns, *Race Undercover: The Matter of Bias in the Zimmerman Trial*, HUFFINGTON POST BLOG (August 7, 2013, 2:21 PM), http://www.huffingtonpost.com/devon-carbado/race-undercover-the-matte_b_3715071.html.

¹⁴⁹ *See* Tom Foreman, *Analysis: The Race Factor in George Zimmerman's Trial*, CNN (July 15, 2013, 9:10 AM), <http://www.cnn.com/2013/07/14/justice/zimmerman-race-factor/>. George Zimmerman was charged with murder for shooting the 17-year old Trayvon Martin. He was acquitted by a jury of six who found that he had acted in self-defense under Florida's stand-your-ground law, which allows an individual to use lethal force in response to a reasonable belief that lethal force is about to be used upon them.

subconsciously perform a sort of in-group selection, favoring defendants to whom they relate.¹⁵⁰ Thus, White jurors were more likely to sympathize with and acquit White defendants, while Black jurors were more likely to favor Black defendants. A key point in van der Dennen's study was the insight that "an individual will discriminate against a member of an out-group even when there is no conflict of interest and there is no past history of intergroup hostility . . ." ¹⁵¹ Thus conscious animus is not a necessary component to biased decision-making.¹⁵² The stand-your-ground laws at issue in Zimmerman's trial are always applied in racially disparate ways: Whites who kill Blacks are over four times as likely to be exonerated under stand-your-ground protections as Blacks who kill Whites in the same jurisdictions.¹⁵³ In states in which the death penalty is used, a famous study by David Baldus demonstrated that the death penalty was applied in twenty-two percent of murders involving Black murderers and White victims, but only three percent of murders involving White murderers and Black defendants.¹⁵⁴ When confronted with such drastic disparities in *McCleskey v. Kemp*, however, the Supreme Court refused to find undue racial bias.¹⁵⁵ Such disparities are not limited to the criminal context; in civil cases, studies have shown that Black plaintiffs are significantly less likely to win their cases, while Black defendants are significantly more likely to lose.¹⁵⁶ Thus, while jurors may not recognize their biases, empirical studies seem to show that they administer "justice" in an extremely racially disparate manner.

B. Distrust in the System

Academics have recently begun developing theories of compliance with the law that focus on legitimacy. Procedural justice, or the fairness of the manner in which authorities exercise their authority, is one of the most important factors in shaping individuals' views on a legal system's legitimacy.¹⁵⁷ When communities feel a sense of procedural justice in their interactions with the criminal justice system, studies show, they are more likely to

. . . cooperate, comply, and accept the state's monopoly on the use of force Feelings of trust and confidence in the police and courts—and a willingness to defer to their instructions—generate the belief that authorities have the right to define appropriate behaviour; encourage the perception that authorities are justified in expecting feelings of obligation and responsibility from citizens; and strengthen identification with the goals, motives, and moral purpose of legal authorities.¹⁵⁸

¹⁵⁰ Johann M.G. van der Dennen, *Ethnocentrism and In-group/Out-group Differentiation: A Review and Interpretation of the Literature*, in THE SOCIOBIOLOGY OF ETHNOCENTRISM 1, 17 (Vernon Reynolds et al. eds., 1987).

¹⁵¹ *Id.*

¹⁵² *Id.* van der Dennen posits several theories of why such bias may exist, including realistic conflict theory, evolutionary theory, sociopsychological theories, frustration-aggression-displacement theory, group narcissism theory, reference group theory, and many others. For an exhaustive list of possible explanations, and an explanation of each one, see *Id.* at 10-16.

¹⁵³ John K. Roman & Shebani Rao, *The Logic of Racial Disparities*, REAL CLEAR POLICY (July 19, 2013), http://www.realeclearpolicy.com/articles/2013/07/19/the_logic_of_racial_disparities__575.html.

¹⁵⁴ *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

¹⁵⁵ *McCleskey*, 481 U.S. 279.

¹⁵⁶ Robert J. MacCoun, *Getting Inside the Black Box: Toward a Better Understanding of Civil Jury Behavior*, RAND CORP. 1 (1987), available at www.rand.org/content/rand/pubs/notes/2009/N2671.pdf.

¹⁵⁷ Tom R. Tyler & Jonathan Jackson, *Future Challenges in the Study of Legitimacy and Criminal Justice*, in LEGITIMACY AND CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION 83, 84 (Justice Tankebe, J. & Alison Liebling eds., 2013). Indeed, Tyler and Jackson introduce statistical evidence that suggests that procedural justice is *more* important in preserving institutional legitimacy than actual performance. *Id.* at 84-85.

¹⁵⁸ *Id.* at 88.

Thus, community members are more likely to engage and cooperate with criminal justice actors and accept the entire system as a valid exercise of state power when they feel the system treats them fairly.¹⁵⁹

Unfortunately, as discussed above, Black and Latino communities often find themselves disadvantaged in the criminal justice system in ways that delegitimize law enforcement in their eyes. Such delegitimizing effects are also at work in the courthouse. Professor Peggy Davis has extensively described the effects of subconscious racial biases on defendants of color. Davis characterizes the law as a system of subtle racial hierarchies which act as a series of microaggressions—“...subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders.”¹⁶⁰ Decisions such as *McCleskey* and *Zimmerman* do nothing but reify colored communities' perceptions of the law as maintaining a status quo of racial hierarchy. From the minute Black and Latino persons enter the courthouse, Davis posits, they are subjected to a series of unconscious and unspoken assumptions. Take, for instance, the story of John T. Harvey, III. In 1992, Harvey was assigned to defend a Black man charged with assault with intent to murder in front of a White judge. On June 11, Harvey showed up in front of the judge wearing a suit adorned with a small kente cloth, a multicolored woven cloth traditionally worn by African royalty and adopted in the 1960s by the Black community in America as a symbol of racial pride. Upon seeing Harvey, the judge warned that Harvey would not be allowed to wear the cloth in front of the jury for fear that it would send “a hidden message to jurors.”¹⁶¹ Harvey was later removed from the case.¹⁶² While the judge was concerned about propriety and distraction in the trial, the decision to remove Harvey as counsel sent a clear message: any hint of “Africanness” was just a distraction, and had no place in the courthouse. Black defendants and Black jurors in particular feel silenced by such microaggressions, and Blacks consequently lose faith in what they see as a broken system.

These microaggressions have the net effect of breeding a deep distrust of the criminal justice system in communities of color. The Stop Snitchin' campaign, popularized in late 2004 by Baltimore filmmaker Rodney Bethea, was one manifestation of this wariness. The campaign focused on convincing urban Black arrestees to stop cooperating with police in exchange for leniency.¹⁶³ From its outset, the movement's racial undertones were clear.¹⁶⁴ This message had similarly found acceptance in Black and Latino subcultures; hip hop culture began to shift, reflecting a belief that something was fundamentally wrong with the criminal justice system.¹⁶⁵

¹⁵⁹ See generally Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 263 (Fall 2008).

¹⁶⁰ Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (citing Pierce, *Psychiatric Problems of the Black Minority*, in AMERICAN HANDBOOK OF PSYCHIATRY 66 (S. Arieti ed. 1974)).

¹⁶¹ *Black D.C. Atty. Is At Odds With Judge Over Kente Cloth*, JET, June 22, 1992, at 35.

¹⁶² *Id.*

¹⁶³ PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE, 85-87 (2009).

¹⁶⁴ “Stop Snitching’ Movement Confounding Criminal Justice (NPR broadcast May 8, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=90280108> (“What is really going on is that, after centuries of bad treatment at the hands of the outside world, and law enforcement is part of that outside world, most recently enormously exacerbated by 20 years of drug enforcement and a mass incarceration policy in this country. It has become mainstream thought in many minority, especially African-American communities, that law enforcement is the enemy, and good people do not treat with the enemy. So this is not primarily fear, and it's not primarily recent, you know, special cultural influences. Again, those things matter. But this is mostly the price we're paying for American history and especially for having 2.2 million people in prison, most of them drawn from very troubled neighborhoods. They're mad, and they're disengaging.”). The movement gained national attention when New York rapper Cam'ron discussed his refusal to cooperate with police in an interview on 60 Minutes. *60 Minutes: Stop Snitchin'* (CNN television broadcast Apr. 22, 2007).

¹⁶⁵ BUTLER, *supra* note 163, 124-25.

Indeed, scholars have argued that the pervasive racism in the criminal justice system has left black with only one option: race-based jury nullification.¹⁶⁶ Given the disproportionate policing and incarceration rates for Black defendants in drug-related offenses, Butler calls for all Black jurors to uniformly find Black defendants not guilty in non-violent crimes.¹⁶⁷ The reasons for this are twofold: first, Butler argues, the current state of disparate policing and prosecution has led to imprisonment of large swaths of the young Black male population.¹⁶⁸ Entirely excising such a large segment of the community has spillover consequences; communities stay poor, children grow up without parents, and cycles of crime and poverty continue. Second, and more radically, Butler suggests that the criminal law itself is an instrument of White supremacy.¹⁶⁹ Laws written, enforced, and adjudicated by white people cannot ever adequately govern the needs and realities of life for Black America. Such a system, Butler claims, is worthy of no deference. Although a depressing view of the prospects of Black defendants, Butler's arguments are not wholly unfounded. Laws such as the Sentencing Reform Act and its disparate treatment of crack and powder cocaine are evidence of the ways in which laws are written to disadvantage communities of color independent of their administration. This, combined with the sorts of implicit bias discussed above, means Black defendants are inherently at a disadvantage in any sort of legal proceeding. Several other scholars have picked up on this idea, calling for all communities of color to engage in similar race-based nullification.¹⁷⁰

While these proposals have both merits and drawbacks that can be debated at length, the very fact of their existence is meaningful. Such calls speak volumes to these communities' perceptions of the law and legal system. This is the central hypocrisy of American legal thought on jurors; while courts have been nearly entirely focused on preserving the law's legitimacy in interpreting various rules governing jury secrecy, their refusal to protect defendants of color against racial bias in jury deliberations has in fact caused a deep distrust of the law enforcement system in communities of color. In the context of Rule 606(b), courts' refusal to allow questioning into allegations of racial bias in the deliberative process—lauded by courts as a great defender of the legitimacy of the deliberations—has actually had the converse effect, *delegitimizing* courts in minority communities. Decisions like *Bennally* can be seen as further microaggressions; they send clear messages that the institution of "law" does not care about the concerns about minority communities. If the Supreme Court hears a case dealing with this question, it should continue to focus on the legitimacy of the jury system. However, it should be sure to bear in mind: legitimacy to whom? Thus, the Court should amend the Federal Rules of Evidence to create an express fourth exception for allegations of racism in the deliberative process in the name of institutional legitimacy.

Opponents of such an amendment of FRE 606(b) need not fear about opening the Pandora's Box of never-ending challenges to valid verdicts. In every case that has addressed the issue so far, petitioners have only raised their claims once a member of the jury actively reached out and alerted them of racist comments or behaviors that took place. If such a limit were imposed as a matter of law, petitioners could only challenge their convictions by asserting racial bias *after* a juror independently contacted the petitioner or her lawyer describing racist behavior in the deliberation process. It seems unlikely that this would seriously upset the stability of trial verdicts; the rarity of such an occurrence is reflected in the paucity of

¹⁶⁶ Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677 (1995).

¹⁶⁷ *Id.* at 679-680, 717-718.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See, e.g., Long X. Do, *Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake*, 47 UCLA L. REV. 1843 (2000); Richard R. W. Brooks, *Fear and Fairness in the City*, 73 S. CAL. L. REV. 1219 (2000).

cases that actually deal with this question at all.¹⁷¹ Opponents who take the opposite critique—that the benefits of this additional safeguard would be *de minimis*—are likely correct; requiring a juror to independently contact the defendant with evidence of deliberative racism before allowing the motion would severely limit the number of successful claims brought. However, given the importance of eliminating all racial prejudice from the courtroom, these incremental benefits would be worth pursuing, especially given the relatively low costs of implementing such procedures.

The arguments in this Note may seem to beg the question of what makes racial bias in the deliberative process unique—that is, if racial bias is such a problem in society, why is this Note limiting its discussion to just Rule 606(b), rather than addressing arguably more common problems, such as racialized policing or discriminatory prosecution? The answer lies in the history discussed above. While it is true that racial bias pervades the criminal justice process, few other procedural protections exist almost exclusively to preserve the legitimacy of a jury trial. This Note does not suggest a complete restructuring of the trial system; rather, it limits its suggestions to the context of FRE 606(b). While it would be naïve to view this narrow determination as a panacea to the racism that permeates the criminal justice system, the unique purpose of 606(b)—preserving legitimacy—makes it particularly important to think about bias in this context. Given the Court’s express commitment to using 606(b) to legitimize jury trials and jury verdicts, the delegitimizing effects of racism in deliberations are particularly troubling. As defendants of color are already subject to such disparate forms of “justice” as a result of the implicit bias discussed above, the trial system should seek to minimize further harms worked by overt racism demonstrated in the deliberative process. While communities of color are subject to disparate treatment in society on a daily basis, the trial process should be examined even more stringently for evidence of possible racism. Nowhere else are determinations of an individual’s most fundamental liberties trusted to a body of twelve strangers.

VI. CONCLUSION

As the history of American jurisprudence, legislative history, and subsequent judicial interpretations show, the core purpose of Rule 606(b) of the Federal Rules of Evidence was to instill confidence in the jury system. This Note has sought to demonstrate the historical reasons for such a rationale by tracking the evolution of trials through medieval England. In shifting from the trial by ordeal to the modern trial by jury, courts gave up the divine backing that had previously rendered verdicts unassailable. No longer was God the decisionmaker, weighing in on a criminal defendant’s guilt or innocence. Such decisions were now to be rendered by twelve ordinary members of the community. This new, more fragile system needed credibility; to lend credence to verdicts delivered by man instead of God, American courts developed procedural safeguards to guarantee jury secrecy. Federal Rule 606(b) was born from this sentiment, from this very desire to preserve jury legitimacy by shrouding the process in secrecy. Courts interpreting the Rule have admitted this, indeed prioritizing it over a “correct” outcome in many cases.

Yet these concerns of institutional legitimacy have thus far been limited to the attitudes of mainstream white society; jurisprudence on the subject has repeatedly failed to acknowledge and address the problems of racial bias that pervade all aspects of the American criminal justice system. By tracing the use of *voir dire* to examine racial bias in a jury through history, this Note has shown that defendants of color are left effectively powerless to challenge the very real impacts of race on their trials. This, when combined with other lines of jurisprudence that show courts’ unwillingness to recognize implicit bias

¹⁷¹ Indeed, only the seven cases discussed in this Note seem to have arisen out of a juror approaching the defendant without any sort of prompting or independent questioning. Pandora’s Box could not have been opened for only four cases to arise in the entire 50-year period since the adoption of the Federal Rules of Evidence.

pervasive in modern criminal justice, has delegitimized the entire system in the eyes of communities of color. Calls for extreme measures such as race-based jury nullification show that such communities have no faith in the system's ability to render fair verdicts. To combat this increasing disillusionment with a system purported to be the hallmark of justice, courts should take greater efforts to combat racism in juries. Given the limits placed on the use of voir dire (as well as those inherent in the process itself), Rule 606(b) stands alone today as the only process by which defendants can weed out racism from jury deliberations, already a particularly difficult process to review in any capacity. Resolving the tension between Rule 606(b) of the Federal Rules of Evidence and the Fourteenth Amendment in a way that foregrounds a commitment to true racial equality would help generate fair trials and bolster institutional legitimacy in the eyes of the most marginalized. Till then, however, our jurisprudence will remain dishonest; courts will remain focused on jury legitimacy in the eyes of whites alone.