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When Secrecy Breeds Injustice: Preventing Discriminatory Convictions through Limited Pre-Verdict Judicial Access to Jury Deliberations

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by

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INTRODUCTION

In 1933, Justice Cardozo opined that providing a right of public access to jury deliberations could inhibit the provision of a fair trial for a defendant, as "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[1] Although longstanding common law traditions support a system of secrecy for juries, a lack of access to jury deliberations may prejudice a defendant by allowing jurors to make decisions based on improper discriminatory motive without judicial check.[2] Adding to common law traditions, within the United States legal system, both Congress and the judiciary have generally protected the secrecy of juries through case law and legislation.[3] The American legislature has taken special precautions to prevent meaningful access post-verdict to jury deliberations through the passage of Federal Rule of Evidence 606(b), which prohibits the use of juror testimony regarding deliberations to impeach a verdict.[4]

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[1] Clark v. United States, 289 U.S. 1, 13 (1933).

[2] *See* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 829 (2012) ("The intractable problem is the challenge of creating a fair process . . . [because current] doctrine fails to address the fact that jurors harbor not only explicit, or conscious bias, but also implicit, or unconscious, bias.").

[3] Andrew C. Helman, *Racism, Juries, and Justice: Addressing Post-Verdict Juror Testimony of Racial Prejudice During Deliberations*, 62 ME. L. REV. 327, 331-32 (2010).

[4] Fed. R. Evid. 606(b) ("Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.").

Congress has clearly limited access to jury deliberations for post-verdict impeachment purposes, yet recently, federal appellate courts and scholars have begun to question the legitimacy of Rule 606(b) in light of research demonstrating many jurors still harbor racial prejudices.[5] And "[a]lthough these prejudices are often subtle and only indirectly manifested in jury conduct, they sometimes result in overtly racist behavior in the jury room."[6] Seeking to prevent the role of discrimination in jury decisions, some courts have by-passed the plain language requirements of Rule 606(b), and have instead drawn a broad exception for post-verdict juror testimony that would allow jurors to testify in limited instances where discrimination may have played a significant and improper role in a jury's decision.[7] Likewise, some commentators have proposed alternative methods of judicial inquiry after the jury reaches its verdict.[8] These commentators argue that greater judicial access post-verdict would protect some of the policy

[5] *See* United States v. Henley, 238 F.3d 1111, 1119-20 (9th Cir. 2001) (refusing to apply Rule 606(b) dogmatically because "a powerful case can be made that Rule 606(b) is wholly inapplicable to racial bias," and arguing that racial bias need not be characterized as an extraneous influence in order to allow juror testimony); *see also* Collin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to a Present Defense*, 61 BAYLOR L. REV. 872, 879 (2009) ("[W]hen courts preclude jurors from impeaching their verdicts through evidence of juror racial, religious, or other bias, they apply Rule 606(b) in a way that is arbitrary and disproportionate to the purposes that the Rule is designed to serve and thus violate criminal defendants' rights to present a defense.").

[6] Harvard Law Review Assoc., *Racist Juror Misconduct during Deliberations*, 101 HARV. L. REV. 1595, 1597 (1988).

[7] *Henley*, 238 F.3d at 1119-20; United States v. Villar, 586 F.3d 76, 80 (1st Cir. 2009); Tobias v. Smith, 468 F. Supp. 1287, 1290-91 (W.D.N.Y. 1979).

[8] *See* Clifford Hold Ruprecht, *Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy*, 146 U. PA. L. REV. 217, 241-44 (1997) (arguing that jury deliberations should be transcribed for limited post-verdict review); Torrence Lewis, *Toward a Limited Right of Access to Jury Deliberations,* 58 FED. COMM. L. J. 195, 210-11 (2006) (arguing the public should act as a check on jury conduct during deliberations).

concerns behind juror secrecy while allowing inquiry into a jury's deliberations to provide a check against jurors using discrimination to support their verdict.[9]

Although the problem of juries using improper prejudice to reach conclusions in jury deliberations is of great concern to the U.S. legal system specifically and the greater cause of justice generally, commentators and federal appellate courts seeking remedies have focused primarily on post-verdict solutions. [10] Unfortunately, many of these post-verdict solutions ignore important social and legal concerns, such as maintaining stable decisions and the secrecy of deliberations after the jury has reached a verdict. What is more, when commentators and courts draw broad exceptions to Rule 606(b), they trample the plain language of the statute and reject a policy that was carefully debated and adopted by elected representatives.[11] Thus, while the problem of discrimination in jury deliberations certainly should be addressed, I suggest that a better approach to combat discrimination would be to address the problem pre-verdict through use of limited judicial inquiry and a mechanism for notice to inform a judge that a juror may have improper discriminatory motives.

To provide a backdrop of the principles enshrouding jury secrecy, in Part One of this paper, I will examine the history and commonly noted justifications surrounding secrecy in jury deliberations. After describing why the policy and societal concerns for maintaining a secret jury have merit, in Part Two, I will argue that the mechanisms used to protect jury secrecy in the U.S. legal system are flawed because they lean too heavily in favor of jury secrecy, especially before

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[9] Ruprecht, *supra* note 8, at 241-44.
[10] Lee Goldman, *Post-Verdict Challenges to Racial Comments Made during Juror Deliberations*, 61 SYRACUSE L. REV. 1, 9 (2010) ("The policies underlying Rule 606(b) are compelling, and . . . there are alternative methods to protect defendants' interests in a fair trial. A finding that Rule 606(b) is unconstitutional is also bad policy and would create fundamental problems for the justice system.").
[11] *See* Fed. R. Evid. 606(b).

the jury reaches a verdict, while failing to provide any check on the improper use of discrimination in juror decision-making. As a result, in Part Three of this paper, I will propose that a possible solution to dealing with discrimination during jury deliberations would be to use a limited jury instruction that addresses discrimination, and informs jurors that they should notify the trial judge if discriminatory statements and conduct occur during deliberations. I will then provide an outline of how a trial judge could remedy situations involving juror discrimination.

I. THE HISTORICAL BACKDROP SURROUNDING SECRECY IN JURY DELIBERATIONS.

While several features surrounding juries have endured consistent experimental flux over the history of the U.S. legal system, the place of jury secrecy has consistently remained fundamental to the deliberative process.[12] Evidence suggests that as early as the mid-1300s, juries deliberated in secret in order to protect against bribery and improper external influences.[13] As Sir William Holdsworth explained concerning ancient Europe, "it was a very ancient rule that the jurors could not separate till after they had given their verdict – the quasi-corporate character of this band of judges must be maintained till they had discharged their duty; and to hasten their deliberations it was the law that they could neither eat nor drink till they had given their verdict."[14] Likewise, in more recent European history, in The History of Common Law of England, Lord Hale remarked on the secret nature of jury deliberations and their justifications under the law, describing the process as follows:

> When the evidence is fully given, the Jurors withdraw to a private Place, and are kept from all Speech with either of the Parties till their Verdict is delivered up,

[12]Harvard Law Review Assoc., *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 886 (1983) ("Although such features of the jury as its size and its role relative to the trial judge may still be open to some experimentation, the notion that a jury deliberates in secret has long been taken for granted by every American jurisdiction.") [hereinafter *Public Disclosures*].

[13] Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 215 (2005).

[14] SIR WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW, Volume 1 318 (Nabu Press ed. 2010).

> and from receiving any Evidence other than in open Court, where it may be search'd into, discuss'd and examin'd. In this Recess of the Jury they are to consider their Evidence, and if any Writings under Seal were given in Evidence, they are to have with them; they are to weigh the Credibility of Witnesses, and the Force and Efficacy of their Testimonies, wherein . . . they are not precisely bound to the Rules of the Civil Law . . . for the Trial is not simply by Witnesses, but by Jury. . . .When the whole Twelve Men are agreed, then, and not until then, is their Verdict to be received.[15]

Following ancient traditions of secrecy and finality in the jury decision-making process, rules governing juror impeachment of verdicts first arose in the mid-eighteenth century in England.[16] In 1785, Chief Justice Mansfield, writing for the high court of England in *Vaise v. Delaval*, asserted that the testimony of a juror should not be admissible to impeach a jury's verdict.[17] Mansfield "deemed the affidavits of juror misconduct inadmissible by applying the then-popular Latin maxim, nemo turpitudinem suam allegans audietur (a witness shall not be heard to allege his own turpitude)."[18] According to Lord Mansfield, jurors were not competent to impeach their own verdicts because "a person testifying to his own wrongdoing was, by definition, an unreliable witness."[19]

Legal commentators have suggested that Lord Mansfield's refusal to allow juror testimony to impeach verdicts had no foundation in English precedents, yet, the tradition gained vast acceptance in the United States, with little evidence that early American legislators ever sought to question the principle.[20] The broad tradition of disallowing inquiry into jury

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[15] MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 160-67 (John Clive & Charles M. Gray eds. 1971) (describing procedures governing juries).
[16] Alison Markovitz, *Jury Secrecy during Deliberations*, 110 YALE L.J. 1493, 1501 (2001) (citing Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785)).
[17] *Vaise*, 99 Eng. Rep. at 944.
[18] Miller, *supra* note 5, at 881.
[19] *Id.* (quoting David A. Christman, *Federal Rule of Evidence 606(b) and the Problem of 'Differential' Jury Error*, 67 N.Y.U. L. REV. 802, 815 n.78 (1992)).
[20] JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN THE COMMON LAW §2352 (3d ed. 1940).

deliberation after the verdict is now commonly known as the Mansfield rule.[21] The English common law tradition of post-verdict secrecy was unquestionably accepted in the United States until the latter half of the nineteenth century.[22] In the 1851 Supreme Court case of *United States v. Reid*, the Supreme Court stated in dicta that "cases might arise in which it would be impossible to refuse [juror affidavits concerning juror misconduct during deliberations] without violating the plainest principles of justice."[23] However, the trend has been to increasingly isolate juries from public scrutiny.[24]

Although the tradition of refusing to allow a juror to impeach a jury verdict was vastly accepted, two early American exceptions to the rule did soon arise.[25] One exception, commonly referred to as the Iowa rule, was first articulated by the Supreme Court of Iowa in *Wright v. Illinois & Mississippi Telegraph Co.*, and excluded juror testimony about matters that "adhered to the verdict itself," but allowed testimony concerning "independent facts."[26] In *Wright*, the court allowed testimony that the jury had reached an improper verdict because the information requested was empirically verifiable and did not delve into the actual thought process of the jurors themselves.[27] The other significant deviation from the Mansfield exception, referred to as the Mattox exception, permitted a juror to testify regarding any "external" influences that may

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[21] Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Post-Verdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, 1472-73 (2006).
[22] *Id.*
[23] United States v. Reid, 53 U.S. 361, 366 (1851).
[24] Courselle, *supra* note 13, at 217 ("Although the conditions in which juries deliberate have improved, the isolation has continued for deliberating juries throughout the history of the United States. That isolation fosters the secrecy and independence of the jury's deliberative process.").
[25] Markovitz, *supra* note 16, at 1502.
[26] Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 210-11 (1866); *see also* Timothy C. Rank, *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 MINN. L. REV. 1421, 1426 (1992) (explaining that the Iowa rule was the "first major deviation in the United States from the Mansfield rule").
[27] *Wright*, 20 Iowa at 210-11.

have played a part in the jury's deliberation, while excluding any testimony concerning the "internal" decision-making process of specific jurors.[28] Under this exception, a juror would be permitted to testify post-verdict about whether a fellow juror was intoxicated during deliberations, but could not speak to, for example, an individual's personally held moral or religious code.[29] Although both of these exceptions were occasionally used by courts over the next half century, in recent times, Congress ultimately rejected these broad evidentiary proposals in favor of the strict confines of the Mansfield rule.[30]

A. Judicial and Public Concerns over Post-Verdict Jury Secrecy.

Longstanding American tradition has prohibited jurors from testifying to impeach their verdicts.[31] This tradition is grounded in both English common law traditions and a multitude of judicial and societal policy concerns over post-verdict secrecy, such as the following:

1. Finality.

The Supreme Court has consistently cited finality as one of the primary reasons to support secrecy in matters concerning the deliberative process of juries.[32] In the 1915 case of *McDonald v. Pless*,[33] the Supreme Court refused to allow juror testimony that would show the jury reached an improper quotient decision, despite the fact that it would prevent an individual litigant from revealing jury misconduct. The Court explained,

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an

[28] Mattox v. United States, 146 U.S. 140, 150-51 (1892).
[29] *Id.*
[30] Fed. R. Evid. 606(b).
[31] Courselle, *supra* note 13, at 219.
[32] Tanner v. United States, 483 U.S. 107, 117 (1987); United States v. Powell, 469 U.S. 57, 67 (1984).
[33] McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

> inquiry in { "pageset": "Star the hope of discovering something which might invalidate the finding.[34]

More recently, in *Tanner v. United States*, the Supreme Court emphasized the social and legal importance of finality in jury verdicts when it refused to allow post-verdict evidence that a juror was intoxicated during deliberations.[35] Looking at the Congressional history behind Rule 606(b), the Court reaffirmed that,

> [P]ublic policy requires finality to litigation. . . . Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, Rule 606 should not permit any inquiry into the internal deliberations of jurors.[36]

The Court noted that ensuring finality post-verdict not only protected the interests of deliberating jurors individually, but also the broader legal system generally because it maintained efficiency and clarity, two things necessary to sustain a criminal justice system.[37]

2. Freedom of Discussion.

Attempts at protecting juror secrecy have also long been entrenched in the idea that secrecy promotes full and frank discussion during jury deliberations, which lends itself to the jury reaching the best outcome based on the evidence.[38] The interest of full and frank discussion dates back to ancient English tradition, where secrecy during deliberations provided legitimacy and public confidence in verdicts, since jurors could not be influenced by bribe or coercion.[39] In *Clark v. United States*, the Supreme Court explained that "[f]reedom of debate might be stifled

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[34] *Id.* at 267.
[35] *Tanner*, 483 U.S. at 117.
[36] *Id.* at 124 (citing U.S. CODE CONG. & ADMIN. NEWS 7060 (1974)).
[37] *Id.* at 119 ("Substantial policy considerations support the common-law rule against the admission of jury testimony to impeach a verdict.").
[38] *Clark*, 289 U.S. at 13.
[39] *See* Abraham Abramovsky & Jonathan I. Edelstein, *Cameras in the Jury Room: Education or Danger?*, 28 ARIZ. ST. L.J. 865, 892 (1996) ("Arguing against the filming of jury deliberations . . . is a centuries-old tradition of jury privacy that is a treasured part of the jurisprudence of federal and state courts.").

and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."[40] Jurors, especially those who may feel less confident about their ideas and opinions, may choose to forego full participation in the deliberative process if they believe public or judicial observation could expose their lack of understanding or intelligence. Thus, the interest of robust discussion has long suppressed any increased attempt to intervene in the jury's deliberative process.[41]

3. Harassment and Retaliation.[42]

Yet another important concern of jury secrecy is the possibility that juror safety might be compromised if a jury reached an unpopular decision and jury deliberations were accessible to the public.[43] Abraham Goldstein once posited that "[p]ersons asked to serve as jurors have a right to protection, not only in their private interest but in the larger social interest . . . [and as such,] access can and should be restricted."[44] Not only have legal commentators expressed a concern for juror safety if deliberations were made public, but Congress specifically addressed this interest when legislators chose to prevent post-verdict juror testimony to impeach verdicts.[45] When Congress crafted the language of Rule 606(b), Senate committee notes indicate that one of the primary reasons the Senate rejected broad language from the original Iowa rule was because

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[40] *Id.*
[41] Courselle, *supra* note 13, at 218.
[42] *McDonald*, 238 U.S. at 267.
[43] *See* David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 2-3 (1997).
[44] Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Post Verdict Interviews*, 1993 U. ILL. L. REV. 295, 308 (1993).
[45] S. Rep. No. 93-1277, at 13-14 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060 (discussing how a more restrictive version of Rule 606(b) was essential to prevent harassment of former jurors by a losing party and the possible exploitation of badly-motivated jurors).

the language of that "rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors."[46]

4. Public Trust.

Finally, a consistent concern with secret jury deliberations is that of public trust in the criminal justice system.[47] Scholars have suggested that although a jury deliberating in secret may not always reach the correct result, the public will be more likely to trust the validity of a jury decision if they cannot scrutinize deliberations.[48] As the Supreme Court in *Tanner* articulated, "[p]ermitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court."[49] Congress also cited the need for public trust in a consistently hidden jury deliberation when it rejected exceptions to the strict common law Mansfield rule during the construction of Rule 606(b).[50] Legislative history indicates that Congress denied these exceptions because they "would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations."[51]

B. Congressional Acceptance of the English Common Law Jury Secrecy Tradition.

Following the English lead of preventing jurors from testifying to impeach their decisions, in 1969, Congress formally codified the Mansfield common law tradition through the

[46] *Id.*
[47] *See Tanner*, 483 U.S. at 124.
[48] Goldstein, *supra* note 44, at 314.
[49] *Tanner*, 483 U.S. at 124.
[50] S. Rep. No. 93-1277, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.
[51] *Id.*

enactment of Federal Rule of Evidence 606(b).[52] Rule 606(b) states that a "juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions . . . [or] concerning the juror's mental process."[53] The three primary components of this rule are that it applies only once there is an inquiry into a verdict or indictment; the rule prohibits a juror from testifying about jury deliberations; and there are three limited testimonial exceptions for: (1) extraneous prejudicial information, (2) outside influences, and (3) mistakes on the verdict form. Under the plain language of the statute, any juror testimony regarding improper discriminatory statements made during jury deliberations would be excluded from evidence post-verdict, unless the statements fell within one of the limited statutory exceptions.

When Congress first passed the language that ultimately became Rule 606(b), the initial drafting committee explained that providing a broad rule prohibiting jurors from impeaching their decisions post-verdict supported classic values of jury secrecy including "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment."[54] As such, the initial language of the 1969 draft read as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.[55]

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[52] *See* JOHN HENRY WIGMORE, EVIDENCE 696-97 (J. McNaughton Rev. ed. 1961) (explaining that Rule 606(b) originated from an opinion by Lord Mansfield in 1785 and "came to receive in the United States an adherence almost unquestioned").
[53] Fed. R. Evid. 606(b).
[54] Preliminary Draft of Proposed Rules of Evidence, 46 F.R.D. 161, 290 (1969).
[55] Preliminary Draft of Proposed Rules of Evidence, Advisory Committee Notes, 46 F.R.D. 161, 291 (1969).

Following this initial draft, a debate arose between the Senate and House over the language of the proposed rule.[56] The House wanted to enact a less strict rule that would comport with the Iowa rule, which would prevent inquiry into the "internal" decision-making process of the jury, while allowing inquiry into any "external" factors that could inappropriately affect a jury's decision.[57] Under the House's proposed rule, a juror would be allowed, for example, to "testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations."[58]

Conversely, the Senate supported the initial draft of the rule embodying the strict English Mansfield rule that would prevent any inquiry into the internal deliberative process of the jury.[59] The Senate cited the need for finality in verdicts, and suggested that fairness standards required "absolute privacy" on behalf of the jurors.[60] Ultimately, Congress enacted the version of Rule 606(b) supported by the Senate's broad ban on juror testimony concerning jury deliberations.[61] As such, both the plain language of the statute and legislative history make clear that Congress wished to strictly prevent juror testimony from being used to impeach a jury's decision.

II. THE PROBLEM OF DISCRIMINATION: THE CIRCUIT SPLIT AND SCHOLARLY DEBATE OVER EVIDENTIARY USE OF POST-VERDICT JUROR TESTIMONY.

While Congress intended to prevent all inquiry post-verdict into the jury's deliberative process, problems have recently begun to arise regarding juror misconduct and discrimination

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[56] H.R. Rep. No. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7083 (explaining that the House rejected this new draft being convinced that the standard for better practices was provided in earlier drafts); *see also* Miller, *supra* note 5, at 889-90.
[57] H.R. Rep. No. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7083.
[58] *Id.*
[59] S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.
[60] *Id.*
[61] H.R. Rep. No. 93-1597 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7102.

during deliberations, and the appropriate remedy in light of such conduct.[62] In *Tanner v. United States*, one of the most important cases addressing juror misconduct and the constitutionality of Rule 606(b), two convicted defendants sought a new trial after a juror made several unsolicited statements that other jurors consumed alcohol during breaks and slept during afternoon trial proceedings.[63] The defendants claimed the juror's testimony should be admissible in evidence in order to impeach the jury's verdict.[64] In her majority opinion rejecting the defendants' claim, Justice O'Connor noted that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry" post-verdict, and that the petitioners' Sixth Amendment interests in a competent jury were protected by other aspects of the trial process such as voir dire.[65] In rejecting the defendants' Sixth Amendment claims, the Supreme Court adopted an internal/external framework to examine jury impeachment proceedings.[66] Under this judicial framework, subsequent courts have generally allowed jurors to testify regarding improper "outside" influences, such as coercion by a judge, bailiff, or family members, while disallowing testimony concerning "internal" jury deliberation matters, such as confusion about jury instructions, threats between jurors, or the refusal of a defendant to testify.[67]

A. Circuit Split Reveals Inadequate Mechanisms to Prevent Discrimination.

Although in *Tanner* the Supreme Court only addressed the issue of general juror misconduct and did not specifically mention discrimination, since *Tanner*, several circuit courts have grappled with whether to allow juror testimony concerning discrimination to impeach a

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[62] *See* Victor Gold, *Juror Competency to Testify that a Verdict Was the Product of Racial Bias*, 9 ST. JOHN'S J. LEGAL 125, 128 (1993).
[63] *Tanner*, 483 U.S. at 113.
[64] *Id.* at 115.
[65] *Id.* at 127.
[66] *Id.* at 117-19.
[67] *See generally* United States v. Kelley, 461 F.3d 817, 831-32 (6th Cir. 2006); United States v. Scisum, 32 F.3d 1479, 1481-83 (10th Cir. 1994).

verdict.[68] In *United States v. Benally*, the Tenth Circuit considered whether testimony regarding racial discrimination was admissible post-verdict under Rule 606(b) in a case involving allegations that a Native American participated in a violent crime.[69] Defendant Benally was "charged with forcibly assaulting a Bureau of Indian Affairs officer with a dangerous weapon."[70] According to a jury member, the jury foreman told other jurors that he used to live near an Indian Reservation, and that "'[w]hen Indians get alcohol, they all get drunk' and when they get drunk they get violent."[71] Other jurors then made statements supporting the foreman's racist generalization, and the defendant was ultimately convicted at the hands of the jury.[72] The juror who desired to testify further alleged that during deliberations, some jurors spoke of the need to "send a message back to the reservation" that you cannot "mess with police officers and get away with it."[73]

Even after learning of the improper statements during deliberations, the Tenth Circuit held that the juror's testimony was inadmissible even if being offered to prove a juror may have lied during voir dire, because it could ultimately be used to obtain a new trial.[74] The court concluded that racial discrimination did not constitute an impermissible "external" influence that would reasonably fall under both a statutory exception to Rule 606(b) and the Supreme Court's framework adopted in *Tanner*.[75] The court expressly refused to find an exception to the general

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[68] *See* United States v. Benally, 546 F.3d 1230 (10th Cir. 2008); *Henley*, 238 F.3d at 1119-20; *see also* Brandon C. Pond, Juror *Testimony of Racial Bias in Jury Deliberations: United States v. Benally and the Obstacle of Federal Rule of Evidence 606(b)*, 17 B.Y.U. L. REV. 236, 238-39 (2010).
[69] *Benally*, 546 F.3d at 1231.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Benally*, 546 F.3d at 1232.
[74] *Id.*
[75] *Id.*

ban on juror testimony to impeach a verdict based on evidence of improper racial bias.[76] Instead, upholding the constitutionality of Rule 606(b), the Tenth Circuit explained that the policy considerations behind secret jury deliberations trumped the defendant's right to expose the discriminatory motives of a juror.[77]

The Seventh and Third Circuits in *United States v. Shalhout*[78] and *Shillcutt v. Gagnon*[79] also addressed cases where racially discriminatory statements were made during jury deliberations and a defendant sought to use the testimony of juror post-verdict to impeach the verdict. In *Shalhout*, following the conviction of two Arab Muslims, a juror came forward asserting that "[t]here was discussion among the jurors in [her] presence wherein it was asserted that the defendants where [sic] in [sic] guilty because they were of Arabic descent or as they call them hear [sic] in St. Thomas, 'Arabs.'"[80] In *Shillcutt*, a black defendant was convicted of soliciting prostitutes.[81] After the verdict, a juror informed the defense attorney that a white juror on the panel made the statement, "Let's be logical. He's black and he sees a seventeen year old white girl—I know the type."[82] Despite the presence of blatantly racist remarks during deliberations, in both cases, the courts determined that Rule 606(b) adequately comported with

[76] *Id.*
[77] *Id.* at 1231.
[78] *See* United States v. Shalhout, 507 F. App'x. 201, 205-07 (3d Cir. 2012) (holding that allegations of juror racial bias were barred by Rule 606(b)).
[79] Shillcutt v. Gagnon, 827 F.2d 1155, 1156 (7th Cir. 1987) ("We are asked to decide whether a racial comment uttered by a juror during jury deliberations violates a criminal defendant's constitutional right to an impartial jury. Because, under the facts of this case, we hold that the rule prohibiting impeachment of verdicts sufficiently protects the petitioner's constitutional right, we affirm the district court's denial of the petition for habeas corpus.").
[80] *Id.* at 203.
[81] *Shillcutt*, 827 F.2d at 1156.
[82] *Id.*

the constitutional rights of the defendants, and evidence of racial discrimination did not fall within any previous exceptions articulated by Congress with regard to 606(b).[83]

In contrast, in *United States v. Henley*,[84] the Ninth Circuit admitted juror testimony concerning racial bias during jury deliberations. After Defendant Henley was convicted of multiple drug offenses, a member of the jury came forward alleging that a fellow jury member made several racist remarks during deliberations, including the statement, "All the niggers should hang."[85] The court relied on Supreme Court precedents that allowed jurors to testify about mental bias that is unrelated to issues presented before the jury in order to admit the testimony of the juror regarding the racist statements during deliberations.[86] Although the court ultimately remanded the case to determine whether the racist juror lied during voir dire, such that the case could be decided on other grounds,[87] the Ninth Circuit presented a compelling argument that racially discriminatory statements should constitute mental bias so that Rule 606(b) would not apply to prevent juror testimony on such matters.

Likewise, the First Circuit has suggested that Rule 606(b) should not provide a complete bar to admittance of juror testimony of racial bias during jury deliberations.[88] In *United States v. Villar*, after a Hispanic man was convicted of armed robbery, a juror came forward alleging that several jurors were uncooperative, and made their decisions accompanied by statements such as "I guess we're profiling but they cause all the trouble."[89] On appeal, the First Circuit explained that "the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony

[83] *Shalhout*, 507 F. App'x. at 207; *Shillcutt*, 827 F.2d at 1159-60.
[84] *Henley*, 238 F.3d at 1119-22.
[85] *Id.* at 1113.
[86] *Id.* at 1120-21.
[87] *Id.* at 1121.
[88] United States v. Villar, 586 F.3d 76, 83 (1st Cir. 2009).
[89] *Id.* at 81.

in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury."[90] As such, the court in *Villar* allowed testimony that a juror made discriminatory statements during deliberations because it suggested the interests of preventing unjust discrimination outweighed congressional interests in maintaining finality and secrecy in the jury decision-making process.[91]

Still other courts would characterize any evidence of racial prejudice as an outside influence that would fall within the statutory exceptions to Rule 606(b).[92] In *Tobias v. Smith*, a defendant moved to set aside a verdict after hearing that the jury foreman made statements that a witness's inability to identify the defendant in a photograph was irrelevant since "[y]ou can't tell one black from another."[93] The court explained that the "race of a defendant is an improper consideration for a jury, just as ethnic origin and religion are."[94] Accordingly, the court allowed inquiry into the statements made during jury deliberations to determine whether the "juror was so biased as to be disqualified from serving on a jury."[95]

A. Failed Scholarly Attempts to Solve the Problem of Discrimination.

In response to the broad circuit split concerning use of testimony regarding juror discrimination during deliberations, several scholars have attempted to deal with the problem of discrimination through post-verdict remedies.[96] Some scholars have suggested that public transcripts should be made available,[97] other have suggested that Congress or the judiciary

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[90] *Id.* at 87.
[91] *Id.* at 88.
[92] *Tobias*, 468 F. Supp. at 1290-91.
[93] *Id.* at 1289.
[94] *Id.* at 1291.
[95] *Id.*
[96] Ruprecht, *supra* note 8, at 241-44.
[97] *Id.*

should simply draw a bright line exception for cases involving discriminatory juror statements,[98] while still others have suggested that post-verdict inquiry is required to protect a defendant's Sixth Amendment rights.[99] Some have suggested that jury deliberations should be transcribed as part of the ordinary trial record and subject to post-verdict judicial review to ensure the propriety of the deliberations.[100] Others have taken the concept of reviewable transcripts even a step farther by suggesting that access should not only be granted to a limited judicial review, but also, in some manner, to the public at large.[101] Others scholars agree with the First and Ninth Circuits, and have proposed that juror testimony regarding the internal jury decision-making process should always be allowed post-verdict if the testimony reveals improper discriminatory statements or motive.[102]

While these scholars acknowledge the principles cited in support of post-verdict jury secrecy, most of them either discount the policy interests or suggest that the possibility of an individual's discriminatory motives playing a part in a defendant's conviction trump the concerns Congress articulated when it enacted Rule 606(b).[103] Many of these suggested approaches are problematic for two reasons. First, many scholarly proposals ignore valid legal and social policy concerns of preventing post-verdict inquiry into jury deliberations. And second,

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[98] Miller, *supra* note 5, at 879-80.
[99] 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)*, U.C.L.A.L. Rev. 262, 289 (2012).
[100] *See* Ruprecht, *supra* note 8, *at* 241-44.
[101] Lewis, *supra* note 8, at 210-11 ("Where government activity must be conducted in secret, so that the actors are not accountable directly to the public, those actors should be overseen by, and accountable to, other government representatives. The jury, however, is essentially accountable to no one. Jurors decide whether the coercive power of the state should be invoked to deprive a party of liberty, property, or even life. Such governmental decision-makers should be accountable to the people. Jury secrecy, as currently practiced, does not properly balance the pragmatic tolerance of imperfection and the public's demand for accountability.").
[102] *Shalhout*, 507 F. App'x. at 207; *Shillcutt*, 827 F.2d at 1159-60.
[103] S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

many of these proposals substantially disregard the plain language of Rule 606(b) and congressional intent.

III. A PROPOSAL TO PREVENT DISCRIMINATORY INJUSTICE THROUGH GREATER PRE-VERDICT TRANSPARENCY.

A. Appreciating the Distinctions between Pre- and Post-Verdict Judicial Inquiry.

One of the primary concerns with many of the judicial and scholarly innovations to dealing with a juror who makes discriminatory statements during deliberations is the substantial disregard for the many social and legal principles undergirding Rule 606(b)'s ban on post-verdict juror testimony. Importantly, many of the concerns surrounding post-verdict access to juror statements are not equally present before the jury has reached its verdict. Consider the following:

1. Finality.

One of the primary arguments in favor of jury secrecy rests in the concern that use of juror testimony post-verdict to impeach a verdict could bring instability to the criminal justice system.[104] Yet, this is one of the most crucial differences between pre-verdict and post-verdict inquiry into the deliberative process of a jury, because before a verdict is reached, any information obtained could not be used to displace a recorded verdict. Likewise, much of statutory law and Supreme Court precedents reveal that many principles protecting the near absolute secrecy of a jury are only applicable to post-verdict inquiries.[105] For example, Rule 606(b) only applies when a defendant seeks to admit testimony of a juror to impeach a jury's verdict.[106] Likewise, in *McDonald v. Pless*, the Supreme Court refused to allow inquiry into a

[104] *See Pless*, 238 U.S. at 267-68.
[105] *Tanner*, 483 U.S. at 117.
[106] Fed. R. Evid. 606(b).

jury's deliberation, explaining that such inquiry is prohibited in "instances in which a private party seeks to use a juror as a witness to impeach the verdict."[107]

Scholars have also suggested that although many policies other than finality were discussed when Congress initially codified the Mansfield prohibition on juror testimony to impeach a verdict, "preserving the finality of a jury's verdict is the only policy effectively protected by Rule 606(b) . . . [all] other concerns remain secondary."[108] After a jury releases its verdict, nothing in Rule 606(b) prevents jurors from discussing the deliberations with involved parties, family, friends, or the public media. Instead, the rule only governs the use of juror statements as evidence to impeach a reached verdict.[109] John Henry Wigmore in his commentaries on evidence has also argued that although Congress was willing to articulate several concerns regarding jury secrecy when debating the language of Rule 606(b), ultimately, Congress viewed finality as the most important interest because it is the only interest Rule 606(b) truly protects.[110] Accordingly, even if Congress mentioned the interests listed below, it did not specifically address any of those issues through Rule 606(b).

2. Freedom of Discussion.

Unlike finality, the idea that secrecy protects full and frank discussion in jury deliberations is not altered depending on whether the inquiry occurs pre- or post-verdict. Many scholars have held Justice Cardozo's statements in *United States v. Clark* as the seminal argument supporting juror secrecy to protect free debate.[111] Although some commentators have

[107] *Pless*, 238 U.S. at 267.
[108] Markovitz, *supra* note 16, at 1501.
[109] Fed. R. Evid. 606(b).
[110] WIGMORE, *supra* note 50, at 696-97.
[111] *Clark*, 289 U.S. at 16 ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."); *see also* Benjamin S. Duval, *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579,

used Justice Cardozo's statements in *Clark* to support a broad protection of secrecy in jury deliberations to support free discussion, Justice Cardozo himself favored preventing juror misconduct over protecting the possibility that inquiry into the deliberative process could silence a juror. As he stated,

> A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. . . . The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.[112]

Based on this language from *Clark*, Justice Cardozo believed that although full and frank discussion is an important value underlying jury secrecy, it does not trump the interests of protected a jury from basing its decisions on misconduct, discrimination, or partiality.

Further, another problem with the argument that jury deliberations should remain wholly secret is the lack of evidence showing that intrusion into jury deliberations stifles freedom of discussion amongst jurors.[113] What is more, researchers who have attempted to determine the impact of videotaping jury deliberations have found no conclusive evidence that this kind of heightened access to jury deliberations has any impact on a juror's ability and willingness to participate in debate and discussion of the evidence of a case.[114] Research has found no significant correlation between juror knowledge of monitoring and the outcome of a case.[115] As

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582 (1986); *Public Disclosures*, *supra* note 12, at 890 (1983) ("Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.").

[112] *Clark*, 289 U.S. at 16.

[113] Shari Seidman Diamond et al., *Inside the Jury Room: Evaluating Juror Discussions during Trial*, 87 JUDICATURE 54, 58 (2003).

[114] *Id.*

[115] *Id.*

such, even if limited judicial access could possibly impact the willingness of a juror to freely voice his or her opinions; there is not significant statistical evidence to support that concern.

3. Harassment and Retaliation.

Another significant policy concern supporting juror secrecy suggests that any inquiry into a jury's deliberation could expose the jurors to dangerous harassment and retaliation. Importantly, although this concern has significant weight after a jury reaches its verdict, during deliberations, the concern is less prevalent because the criminal justice system has built in mechanisms to prevent juror harassment. For example, after a jury is selected and before they present their verdict, attorneys and parties are generally not permitted to interact with jurors.[116] Likewise, juries are specifically instructed in criminal proceedings not to discuss the case with any other persons.[117]

Beyond lawyers, parties to the case, and members of the general public, who are prohibiting from speaking with jurors regarding an ongoing proceeding, the only other reasonable source of harassment could be the judge overseeing the trial. Yet, it is unlikely that a trial judge, whose actions are constantly checked by appellate courts, would choose to harass a member of the jury to identify a juror's mistake or misconduct. What is more, if a judge did act inappropriately, his or her actions would likely be reviewable and could be remedied by a court on appeal.

4. Public Trust.

The interest of maintaining public trust in the criminal justice system through jury secrecy is also less applicable in a pre-verdict context. As the Supreme Court explained in *United States v. Tanner*, a barrage of post-verdict scrutiny by the public of a jury's decision could

[116] For example, Rule 3.5 of the Model Rules of Professional Conduct imposes significant boundaries for any communication between a lawyer and a juror or potential juror.
[117] Manual of Model Civil Jury Instructions for the Dist. Courts of the Ninth Circuit §2.1 (1997).

certainly have the effect of eroding public trust in the criminal justice system.[118] However, because possible public access pre-verdict is in most cases severely limited, this concern is less prevalent. Assuming limited judicial scrutiny of a jury's deliberative process occurred pre-verdict, if the interaction between a judge and juror was broadcast to the public, it could also discourage public confidence in jurors. Yet, unlike inherently public inquiries post-verdict, such as what occurs when a juror agrees to an interview with a public media organization, judicial inquiry during deliberations could be legally shielded from community scrutiny through keeping any possible interactions confidentially sealed.

B. A Proposal of Limited Pre-Verdict Judicial Intervention.

With the understanding that discrimination sometimes unjustly infiltrates the deliberative process of jurors, and the knowledge of the inherent interests underlying principles of post-verdict jury secrecy, the questions becomes, "How do we best prevent the possibility of discrimination playing a part in a jury's decision?" One possibility that would respect the interests of post-verdict secrecy while attempting to dispel improper discrimination during deliberations would be to include a statement in jury instructions informing jurors that they are not to use personal bias as a factor in their decision-making process.

For example, currently, in cases where race may be a prevalent issue during trial, a judge may choose to include an instruction that says something similar to, "Remember that under our justice system the race, religion, national origin, or social status of a party or his or her attorney must not be considered by you in the discharge of your sworn duty as a juror."[119] However, the problem with this is that an express instruction on race is usually only given in extremely racially

[118] *Tanner*, 483 U.S. at 124.
[119] Vernon's Okla. Forms 2d, OUJI-CIV 1.5 (2012 ed.)

charged cases, and not in cases where race is not a predominant an issue.[120] Researchers who have studied the impact of racial bias in jury deliberations have shown that when race is made a salient or obvious issue during trial, white jurors are significantly more likely to treat black and white defendants equally.[121] Yet, studies have also found that when race is a non-salient issue at trial, white jurors were significantly more likely to discriminate against minority defendants by giving them more frequent convictions and harsher sentences.[122] Other researchers have found that the general white population in the U.S. is aversive to racism, yet when their possible biases are not pointed out, white jurors are more likely to act on their subconscious biases.[123] For example, a study by Samuel Gaertner and John Dovidio found that when a situation threatens to make the negative portions of a white juror's attitude salient, aversive racists will vigorously attempt to avoid acting wrongly on the basis of their feelings.[124] However, this same study also found that in situations where the negative portions of a person's bias were not pointed out to them, white jurors were more likely to express the underlying negative portions of their subconscious discriminatory attitudes.[125] Based on these studies, the need for a jury instruction that informs jurors they are not to act on any racial or other prejudice would be helpful, if not necessary, to cure possible discrimination during jury deliberations in all cases, and not only those where race is a prevalent issue.

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[120] SEVENTH CIRCUIT JUDICIAL CONFERENCE COMMITTEE ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES § 2.03 (1965); COMMITTEE ON PATTERN JURY INSTRUCTIONS, DISTRICT JUDGES ASSOCIATION OF THE FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS 2A (1979).
[121] Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, PERSONALITY & SOC. PSYCHOLOGY BULLETIN, 1367-79 (2000).
[122] Tara L. Mitchell, Ryann M. Haw, Jeffrey E. Pfeifer & Christian A. Meissner, *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, LAW & HUM. BEHAVIOR 621, 621-37 (2005).
[123] SAMUEL L. GAERTNER & JOHN F. DOVIDIO, PREJUDICE, DISCRIMINATION, AND RACISM, 61-89 (1986).
[124] *Id.*
[125] *Id.*

Yet, some scholars suggest that a jury instruction on race would not be helpful to cure the harmful effects of discrimination.[126] For example, in a study performed by Jeffrey Pfeifer and James Ogloff, researchers found that in a sample of mock jurors who were not given jury instructions, jurors were more likely to act on internal racial prejudices.[127] Yet, Pfeifer and Ogloff found that if those same jurors were given jury instructions simply specifying the requisite conditions needed to find a defendant guilty, even without explicitly mentioning race, the improper racial preferences of the mock jury members disappeared.[128] Based on these findings, Pfeifer and Olgoff discredit many of the studies that found white jurors were more likely to discriminate against minority defendants, because many of those sample scenarios did not involve giving the mock jurors proper instructions. Still, other research suggests that Pfeifer and Ogloff's conclusion that any instruction, even if it does not address race, will curb discrimination is faulty because jurors often either disregard or do not comprehend jury instructions.[129]

Some researchers have also attempted that argue that including an instruction that specifically addresses race could be harmful because evidence in mock juror studies shows that instructing jurors to disregard a certain fact often results in greater emphasis being given to that fact.[130] However, the problem with applying this kind of research to a jury instruction that warns

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[126] Jeffrey E. Pfeifer & James R. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCHOLOGY 1713, 1713-25 (1991).
[127] *Id.*
[128] *Id.*
[129] *See* AMIRAM ELWORK, BRUCE SALES & JAMES ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); *see also* David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480-82 (1976).
[130] *See generally* Stanley Sue, Ronald E. Smith & Cathy Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOLOGY 345, 346 (1973); Sharon Wolf & David A. Montgomery, *Effects of Inadmissible*

against using racial prejudice during deliberations is that it has never been tested specifically pertaining to the issue of race. Or discrimination[131] Thus, its application here is questionable. Some scholars have also argued that racial prejudice is often unconscious for jurors, so instructing them to ignore their racial preferences would be unhelpful because the jurors would disregard the warning, consciously believing they are treating the defendant with fairness.[132] The problem with this argument is that it has not yet been supported by social science research data.

Ultimately, whether and to what extent a jury instruction including a discrimination warning could be helpful in preventing improper prejudice during jury deliberations has been largely untested by social psychological research. Future research efforts would be necessary and helpful to determine whether this kind of instruction would be an effective method of preventing prejudicial actions during deliberations. However, regardless of whether a jury instruction warning against discrimination would be a proper element of an integrated system of pre-verdict judicial review, judges should also, at a minimum, inform jurors during jury instructions that discriminatory comments made by fellow jurors should be reported to the trial judge before releasing the verdict. If a juror informs the trial judge of improper discrimination occurring during deliberations, the judge could then begin a limited inquiry regarding the propriety of the alleged statements or conduct. The judge could pursue this inquiry through interviews of members of the jury to determine whether improper discrimination occurred.

Under this part of a system for limited pre-verdict judicial access to jury deliberations, if a trial judge concluded that a member of the jury in fact made a discriminatory statement or

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Evidence and Level of Judicial Admonishment to Disregard on the Judgment of Mock Jurors, 7 J. APPLIED SOC. PSYCHOLOGY 205, 205 (1977).

[131] Wolf & David, *supra* note 130, at 205.

[132] Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1678-79 (1985) ("Jurors who believe they *are* being fair will not be affected by even the sternest warnings that they must be fair.").

acted with discriminatory conduct directed at the defendant in a criminal proceeding, the judge at that point should be permitted to dismiss the juror for cause. Under Federal Rule of Criminal Procedure 23(b), "a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins."[133] Importantly, because the federal rules do not define the meaning "good cause" under Rule 23(b), either Congress would be required to expressly include discriminatory statements of a juror to constitute "good cause" under the rule comments, or it would be left to courts to determine that such statements adequately qualified for a "good cause" juror removal. In an ideal world, Congress could add a comment or provisions to Rule 23(b) that would expressly include discriminatory statements under a statutory definition of "good cause." A provision like this could ensure that judges are given legal authority to intervene if jurors use discriminatory statements during deliberations.

Yet, even if Congress refused to include such an explicit definition for "good cause" under Rule 23(b), case law suggests that discriminatory statements of a juror could easily rise to the level of "good cause" for purposes of excusing a specific juror. For example, courts have been willing to find good cause for juror removal in cases including where a court determined a juror's mental competence and stability were questionable,[134] where a juror's ability to be impartial was brought into question,[135] where a juror refused to follow the law or raised objections due to personal religious beliefs,[136] and where a juror's statements and conduct were

[133] Fed. R. Crim. P. 23(b)(2)(B).
[134] United States v. O'Brien, 898 F.2d 983, 986 (5th Cir. 1990) (dismissing a juror who suffered from depression); United States v. Molinares Charris, 822 F.2d 1213, 1222-23 (1st Cir. 1987) (dismissing a juror who was crying and took a tranquilizer).
[135] United States v. Egbuniwe, 969 F.2d 757, 761-63 (9th Cir. 1992) (dismissing a juror whose girlfriend was arrested and mistreated by the police).
[136] United States v. Burrous, 147 F.3d 111, 117-18 (2d Cir. 1998).

deemed a "distraction" of the primary issues before the jury.[137] Based on relevant case law, discriminatory statements by a juror should allow a judge to remove that juror for "good cause" under Rule 23(b).

Some could argue that a proposal favoring pre-verdict judicial inquiry is most problematic because of the potential to stifle juror debate and discussion during the deliberative process if a judge was given the ability to interview jurors about their allegedly discriminatory statements. While free discussion is certainly an important concern of jury secrecy under this proposed use of Rule 23(b), this mechanism to prevent discrimination is premised on the willingness of a juror to inform the trial judge about the discriminatory statements of a fellow juror, and does not support judicial intervention without such foundational evidence. What is more, as scholars have explained regarding judicial inquiry under 23(b), "unlike questions posted by a member of the press who may wish to conduct a far-ranging investigation into a jury's deliberations, a judge's inquiry [could be] limited to establishing whether just cause for dismissal exists."[138] Although concerns may exist about the ability of jurors to function effectively under the possibility of judicial oversight of their discriminatory statements, the interest of preserving justice for a defendant, and the safeguards built into a pre-verdict limited inquiry weigh in favor of such limited judicial intervention.

CONCLUSION

[137] United States v. Walsh, 75 F.3d 1, 4-5 (1st Cir. 1996) (dismissing a juror for erratic, disruptive behavior); United States v. Fajardo, 787 F.2d 1523, 1525-26 (11th Cir. 1986) (dismissing a juror for a distracting sinus issue).
[138] Markovitz, *supra* note 16, at 1513.

There is no doubt that many jurors harbor racial prejudices.[139] Although these prejudices are often only internally manifested in subtle ways, they sometimes result in overtly discriminatory conduct and statements during jury deliberations. While many courts and scholars have suggested discarding or bypassing Federal Rule of Evidence 606(b), doing so would ignore express congressional intent and significant policy interests that undergird the prohibition on post-verdict juror testimony to impeach a verdict. Instead, a better option is to address discrimination before the jury reaches its verdict. Two possible mechanisms to curb discrimination pre-verdict include a jury instruction that specifically addresses improper prejudices, even in cases where something like race may not be a central issue, and also an instruction that jurors may inform the trial judge if discriminatory statements or conduct occur during deliberations. Although both of these mechanisms would require additional research to determine whether they are effective at preventing improper discrimination during jury deliberations, further efforts should be made to prevent improper prejudices from impacting jury decisions, while consciously protecting the significant judicial and social concerns of maintaining post-verdict jury secrecy.

[139] *See* Helman, *supra* note 3, at 333 ("Social science research also suggests that racial prejudice remains a problem in deliberations, despite Tanner's conclusion that Sixth Amendment rights are adequately protected by measures taken before the verdict is returned.").