COMMENT

RULE 606(B) AND THE SIXTH AMENDMENT: THE IMPRACTICALITIES OF A STRUCTURAL CONFLICT

LINDSEY Y. ROGERS†

Federal Rule of Evidence 606(b) provides the instruction that a jury may not impeach itself after a verdict has been reached.[1] This is the codification of the long-held belief that jury deliberations should be secret and not subject to public scrutiny.[2] However, at times this rule may come into conflict with the Sixth Amendment's guarantee of an impartial jury.[3] The Supreme Court has yet to address this issue[4] and the circuit courts have approached it with varying results.[5] This comment addresses this issue and proposes that, while Rule 606(b) may be unconstitutional, an amendment to Rule 606(b) may result in far greater issues than the risks posed by the current version of the rule. Part I addresses Rule 606(b) and the Sixth Amendment, part II addresses the approaches various circuit courts have taken with this conflict, and part III analyzes the issues that arise from the conflict along with other policy considerations.

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† Lindsey Y. Rogers is a third-year student at Wake Forest University School of Law and graduated *magna cum laude* with a bachelor of arts degree from Wake Forest University in 2013. The author would like to thank her family for their unconditional support, love, and encouragement, as well as the *Journal*'s Board of Editors for their assistance.

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

2. *See* Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 510 ("From the time of Lord Mansfield until the present, courts and legislatures have zealously protected the secrecy of jury deliberations . . . .").

3. U.S. CONST. amend. VI.

4. The Supreme Court addressed Rule 606(b) in *Wagner v. Shauers*, 135 S. Ct. 521, 526 (2014), but only in relation to the issue of jurors lying during *voir dire*.

5. *See generally* United States v. Villar, 586 F.3d 76, 79 (1st Cir. 2009); United States v. Benally, 546 F.3d 1230, 1231 (10th Cir. 2008) .

I. LEGAL BACKGROUND

A. Rule 606(b)

Vaise v. Delaval[6] first espoused what later came to be known as the "Mansfield Rule," whereby a "juror's testimony or affidavit about juror misconduct may not be used to challenge the verdict."[7] This common law rule was soon adopted in the United States[8] and later codified at Federal Rule of Evidence 606(b)(1), providing that:

> 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]

Prior to adopting this rule, the House of Representatives proposed a version of the rule that did not specifically prohibit testimony regarding deliberations, and instead it only prohibited testimony regarding the effect of deliberations on the jury.[10] The Senate Judiciary Committee later added the phrase "about any statement made or incident that occurred during the jury's deliberations"[11] prior to the final adoption of Rule 606(b).[12]

Despite this desire to shield members of the jury from inquiries into their thought processes, Congress passed exceptions

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6. Vaise v. Delaval, (1785) 99 Eng. Rep. 944, 944.

7. *Mansfield Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8. *Wagner*, 135 S. Ct. at 526.

9. FED. R. EVID. 606(b)(1).

10. H.R. 5463, 93d Cong. (1974) ("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 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 concerning a matter about what he would be precluded from testifying be received for these purposes.").

11. FED. R. EVID. 606(b)(2).

12. *Id.* at 606.

to Rule 606(b)(1) which allowed jury members to testify to certain types of influences.[13] These exceptions include "whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; (B) an outside influence was improperly brought to bear on any juror; or (C) a mistake was made in entering the verdict on the verdict form."[14] These exceptions to Rule 606(b)(1) are the result of the desire to balance jury secrecy with the threat that outside influences pose to an impartial jury.[15] In excluding certain types of evidence, Congress sought to promote freedom of deliberation, stability and finality of verdicts, and protection of the jury from harassment and embarrassment.[16]

The Supreme Court has continually recognized the need for free jury deliberations.[17] If jurors could impeach what was said in the deliberation room, jurors might become hesitant to have a frank and open discussion of the issue. The Court stated that the "result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference."[18] Additionally, all trials must end, and without Rule 606(b), all jury trials would be followed by an inquiry searching for any and all evidence of jury misconduct that could invalidate the final verdict.[19] It is vital not only for the defendant, but also for the court, to know that a verdict is final and will not be reopened for trial.[20] The Senate Report on Rule 606(b) noted these policy considerations, saying:

> Public policy requires finality of litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. 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

13. *Id.* at 606(b)(2).
14. *Id.*
15. *See* United States v. Benally, 546 F.3d 1230, 1234 (10th Cir. 2008).
16. McDonald v. Pless, 238 U.S. 264, 267–68 (1915).
17. *Id.*; *see also* Tanner v. United States, 483 U.S. 107, 119–20 (1987).
18. *McDonald*, 238 U.S. at 267–68; *see also Tanner*, 483 U.S. at 120.
19. *McDonald*, 238 U.S. at 267.
20. *See* United States v. Stansfield, 101 F.3d 909, 915 (3d Cir. 1996).

> system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.[21]

While these are valid policy considerations and important in ensuring jury secrecy, Rule 606(b) may at times come into direct conflict with the guarantees of the Sixth Amendment.

B. The Sixth Amendment

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury . . . ."[22] The Supreme Court recognized the right to a jury removed from outside influences as early as 1907,[23] and, in *Remmer v. United States*, recognized that some errors and outside influences are too great to be ignored.[24] The prejudice of even one juror violates this right.[25] An impartial jury is one that renders a verdict only on the evidence presented to it without the influence of its own personal biases.[26] Chief Justice Marshall recognized the great value of an impartial jury, yet also warned that in the future it may be "perhaps impossible, and therefore will not be required," to find a jury without any predispositions.[27] The guarantees of the Sixth Amendment and Rule 606(b) come into direct conflict with one another when allegations of racial bias in the jury deliberation room arise. While such racial bias directly violates the Sixth Amendment, Rule 606(b) prohibits courts from inquiring into the allegations to determine if the alleged bias influenced the jury's deliberations.[28]

The Supreme Court addressed this potential conflict between the Sixth Amendment and Rule 606(b) in *Tanner v.*

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21. S. REP. NO. 93-1277, at 14 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

22. U.S. CONST. amend. VI (emphasis added).

23. Patterson v. Colo. *ex rel.* Att'y Gen. of Colo., 205 U.S. 454, 462 (1907).

24. Remmer v. United States, 347 U.S. 227 (1954).

25. United States v. Booker, 480 F.2d 1310, 1311 (7th Cir. 1973).

26. Smith v. Phillips, 455 U.S. 209, 217 (1982) ("[An impartial] jury [is] capable and willing to decide the case solely on the evidence before it . . . .").

27. United States v. Burr, 25 F. Cas. 49, 50–51 (C.C.D. Va. 1807); *see also* Rachel Morelli, Comment, *The Connected Juror's Effect on the Sixth Amendment Right to an Impartial Jury and Georgia's Presumption of Prejudice*, 7 J. MARSHALL L.J. 527, 540 (2014).

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

United States.[29] In *Tanner*, the defense attorney received a phone call from one juror alleging that several other jurors consumed alcohol during lunch breaks and at times throughout the trial.[30] The defense attorney attempted to impeach the jury's verdict on the grounds of incompetence due to their alleged intoxication; however, the district court found the juror's testimony regarding juror intoxication inadmissible under Rule 606(b).[31] The defendant appealed, alleging that, regardless of the language in Rule 606(b), the Sixth Amendment compelled the court to accept the testimony.[32] The Supreme Court found that the alleged drug and alcohol use was not an "outside influence," thus it did not fall into the exceptions listed in Rule 606(b)(2).[33] In addition, the Court found that the defendant's Sixth Amendment rights were adequately protected by multiple aspects of the trial process.[34] These protections included: that questions were asked in *voir dire*; that the jury was observable by the court throughout the trial; that jurors could report the inappropriate behavior of another juror during the trial or deliberations; and that the verdict could be impeached by non-juror testimony.[35]

While *Tanner* addressed the conflict between Rule 606(b) and the Sixth Amendment in regards to juror competence, it did not address how a similar issue regarding impartiality would be decided. Because prejudice—specifically racial bias—is incredibly more difficult to detect visually than a sleeping or intoxicated juror, the protections listed by the Supreme Court in *Tanner* may not be sufficient to protect a defendant's Sixth Amendment right to an impartial jury. As the Supreme Court has not addressed this issue in regards to impartiality, multiple circuit courts have taken varying positions on the topic.

29. Tanner v. United States, 483 U.S. 107 (1987).
30. *Id.* at 113.
31. *Id.*
32. *Id.* at 116–17.
33. *Id.* at 122.
34. *Id.* at 127.
35. *Id.*

II. THE CIRCUIT SPLITS

A. The First Circuit

In *United States v. Villar*, the First Circuit held that while Rule 606(b) prohibited an inquiry into the validity of a jury verdict based on allegations of racial bias,[36] such a prohibition on the admission of evidence of racial bias was unconstitutional.[37] While the court did acknowledge the important policy considerations behind Rule 606,[38] it also noted that the "rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury."[39] Therefore, the First Circuit held that the lower court did have the discretion to inquire into the validity of a verdict when determining if racial bias affected the outcome of the trial.[40]

B. The Third and Seventh Circuits

The Third and Seventh Circuits both confronted cases of alleged racial bias in jury deliberations and came to the same conclusion.[41] Both circuits held that the evidence relating to a juror's mental process concerning bias was banned under Rule 606(b)[42] and that the application of this rule did not deprive defendants of a fair trial.[43]

In *United States v. Shalhout*, the Third Circuit examined a case whereby a juror claimed that "there was discussion among the jurors in [her] presence wherein it was asserted that the defendants [were] . . . guilty because they were of Arabic descent . . . ."[44] The court found that racial bias does not fall within the

36. United States v. Villar, 586 F.3d 76, 81 (1st Cir. 2009). One juror alleged that another juror said, "I guess we're profiling, but they cause all the trouble." *Id.*

37. *Id.* at 87–88.

38. *Id.* at 83.

39. *Id.* at 87.

40. *Id.*

41. *See* United States v. Shalhout, 507 F. App'x 201 (3d Cir. 2012); *see also* Shillcutt v. Gagnon, 827 F.2d 1155 (7th Cir. 1987).

42. *Shalhout*, 507 F. App'x at 205; *Shillcutt*, 827 F.2d at 1159.

43. *Shalhout*, 507 F. App'x at 206; *Shillcutt*, 827 F.2d at 1159.

44. *Shalhout*, 507 F. App'x at 203.

exceptions found in Rule 606(b)(2)[45] and that stray comments or remarks by jurors do not make Rule 606(b) unconstitutional.[46] The court also noted that despite the alleged racial comments, the jury acquitted the defendants of forty-three counts of wire fraud, and thus, it was clear that the jury was not racially biased against the defendants.[47]

Shillcutt v. Gagnon, a case in the Seventh Circuit, came to a similar conclusion when examining a case where a juror allegedly stated, "[l]et's be logical; he's a black, and he sees a seventeen year old white girl—I know the type."[48] The Seventh Circuit found that testimony as to racial bias in jury deliberations was banned under Rule 606(b)[49] and the application of Rule 606(b) did not violate fundamental fairness, especially as stray racial comments cannot make a ruling unconstitutional.[50] However, the Seventh Circuit, unlike the Third Circuit, did acknowledge that at times a rigid application of Rule 606(b) may render it unconstitutional.[51]

C. The Sixth Circuit

United States v. Logan,[52] a 2001 case out of the Sixth Circuit, addressed Rule 606(b) and held that, while external influences may fall under the exceptions found in Rule 606(b)(2), internal influences on jury deliberations are not subject to post-verdict questioning.[53] Therefore, in each case it must be determined whether bias presents an external or internal jury influence.[54]

D. The Ninth Circuit

In *United States v. Henley*, the Ninth Circuit found that evidence of racial bias is not subject to Rule 606(b).[55] In *Henley*,

45. *Id.* at 206.
46. *Id.* at 207.
47. *Id.*
48. *Shillcutt*, 827 F.2d at 1159.
49. *Id.*
50. *Id.*
51. *Id.*
52. United States v. Logan, 250 F.3d 350 (6th Cir. 2001).
53. *Id.* at 379.
54. *Id.* at 380–81.
55. United States v. Henley, 238 F.3d 1111, 1120 (9th Cir. 2001).

the defendants sought to overturn a conviction based on alleged juror bias.[56] The court held:

> Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine. It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony.[57]

However, the Ninth Circuit did not determine "to what extent the rule prohibits juror testimony concerning racist statements . . . ."[58] The Ninth Circuit held that, as racial bias was outside the scope of Rule 606(b), courts could consider the impartiality imposed by racial bias.[59]

E. The Tenth Circuit

In *United States v. Benally*, a juror alleged that the jury foreman made racist remarks about the Native American defendant and stated that the jury needed to "send a message back to the reservation."[60] The court reasoned that the state of a juror's mind is an internal, rather than an external, influence.[61] Therefore, these statements were neither extraneous information nor outside influences and did not fall under the Rule 606(b)(2) exceptions.[62] The Tenth Circuit noted that "[i]mpropriety alone . . . does not make a statement extraneous. That would unravel the internal/external distinction and make anything said in jury deliberations 'extraneous information' so long as it was

56. *Id.* at 1113.

57. *Id.* at 1120.

58. *Id.* at 1121.

59. *Id.* at 1120. The Ninth Circuit recently affirmed this holding in *United States v. Hayat*, 710 F.3d 875, 887 (9th Cir. 2013) (addressing juror bias in relation to *voir dire* while at the same time holding that determinations of bias during jury deliberations should be at the trial court's discretion).

60. United States v. Benally, 546 F.3d 1230, 1231–32 (10th Cir. 2008).

61. *Id.* at 1237.

62. *Id.* at 1236–37.

inappropriate."[63] Relying on *Tanner*, the court stated, "the Sixth Amendment embodies a right to 'a fair trial but not a perfect one, for there are no perfect trials.'"[64] Ultimately, the Tenth Circuit found that Rule 606(b) was not unconstitutional, but expressed skepticism whether constitutional concerns could ever overrule the Federal Rules of Evidence.[65]

III. ANALYSIS

As noted by the circuit courts above, Rule 606(b)'s exceptions for "extraneous prejudicial information"[66] and "outside influences"[67] do not encompass the potential racial bias jurors may bring into the deliberation room. The advisory committee note to Rule 606(b) provides that extraneous prejudicial information only encompasses influences such as newscasts, radio news reports, and newspaper articles,[68] while outside influences include the threat to the safety of a juror's family member.[69] As racial bias is not analogous to any of these examples provided by the drafters of the rule, racial bias was clearly not meant to be encompassed within Rule 606(b)'s exceptions. Racial biases are internal influences brought into the jury deliberation room by the jury itself; even when one juror's racial bias influences the other jury members, the interpretation of Rule 606(b) remains the same.[70] Therefore, because Rule 606(b) prohibits inquiry into potential juror bias, Rule 606(b) likely violates the Sixth Amendment guarantee to an impartial jury and is unconstitutional.

Although Rule 606(b) is likely unconstitutional as written, it would be nearly impossible to resolve this structural conflict without significant changes to our judicial system. As early as 1807, in Aaron Burr's trial for treason, Chief Justice Marshall warned that in the future it may be "perhaps impossible, and therefore

63. *Id.* at 1237–38.

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

65. *Id.* at 1241.

66. FED. R. EVID. 606(b)(2)(A).

67. *Id.* at 606(b)(2)(B).

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

69. *Id.*

70. United States v. Shalhout, 507 F. App'x 201, 206 (3d Cir. 2012).

will not be required," for a jury to be without "prepossessions whatever respecting the guilt or innocence of the accused."[71] The Court in *Tanner* noted that "[t]here 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."[72] As a "defendant is entitled to a fair trial but not a perfect one,"[73] despite the structural conflicts that may arise, Rule 606(b) should be upheld as written.[74]

A. Jurors are People

Jurors are people who bring their own life experiences into the courtroom with them. There is no such thing as a completely impartial juror, as jurors do not live in a vacuum. The Supreme Court has defined an impartial juror as one who can "lay aside his impression or opinion and render a verdict based on the evidence presented in court."[75] However, the Court has never laid out a bright-line test to determine when and if a juror is impartial.[76] Although jurors may bring their personal experiences with them into the jury deliberation room, a juror, as a rational person, should be able to set aside his preconceived notions and focus solely on the facts at hand.[77] Although an individual may be prejudiced, this does not automatically render him disqualified as an impartial juror.

In *United States v. Duzac*, the jury, during deliberations, sent a message to the trial judge stating that due to prejudices and biases amongst jury members, they could not come to a unanimous verdict.[78] The judge responded by reminding the jury

71. United States v. Burr, 25 F. Cas. 49, 50–51 (C.C.D. Va. 1807).

72. Tanner v. United States, 483 U.S. 107, 120 (1987).

73. Lutwak v. United States, 344 U.S. 604, 619 (1953).

74. *But see* United States v. Fuentes, No. 2:12-CR-50-DBH, 2013 WL 4483062, at *7 (D. Me. Aug. 19, 2013).

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

76. *Id.* at 724.

77. This especially may be the case when a juror is asked in *voir dire* if he or she can render a verdict based solely on the facts. In answering in the affirmative, the juror is not stating that he or she has absolutely no preconceived ideas, but that he or she believes he or she can set aside and look past those preconceived ideas to render a fair verdict.

78. United States v. Duzac, 622 F.2d 911, 913 (5th Cir. 1980).

of their obligation to render a verdict without regard to prejudice.[79] The Fifth Circuit upheld the conviction stating that "[t]he prejudice complained of [was] alleged to be the product of personal experiences unrelated to this litigation."[80] Therefore, although the jury held some prejudices related to the life experiences of its members, the verdict was not reversed as the jury rendered a verdict on the facts presented.[81]

Just as jurors can choose to set aside their biases, jurors also cannot be separated from their past experiences and understanding of the world. Jurors' past experiences inform their interpretation of the evidence presented in open court. The courts have affirmed the value of a juror's life experience, saying:

> Jurors are expected to bring commonly known facts and their experiences to bear in arriving at their verdict. "We cannot expunge from jury deliberation the subjective opinions of juror, their attitudinal expositions, or their philosophies. These involve the very human elements that constitute one of the strengths of our jury system."[82]

The jury member's past experiences help contribute to their understanding of the world and represent the experiences of the wider community from which the jury is drawn.

As *United States v. Benally* noted, courts must be careful not to confuse a juror's personal experiences with a juror who brings outside information into the jury room.[83] In *Marquez v. City of Albuquerque*, a juror discussed her experience training police dogs when the jury was asked to determine if the use of a police dog had constituted excessive force.[84] Despite the juror's experience being very specific to the case at hand, the Tenth Circuit found the prejudice was simply part of the juror's life experience and that the prejudice did not violate the defendant's right to an

79. *Id.*

80. *Id.*

81. *Id.*

82. Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987) (quoting State v. Poh, 343 N.W.2d 108, 113 (Wis. 1984)); *see also* United States v. Villar, 586 F.3d 76, 83 (1st Cir. 2009).

83. United States v. Benally, 546 F.3d 1230, 1237 (10th Cir. 2008).

84. Marquez v. Albuquerque, 399 F.3d 1216, 1223 (10th Cir. 2005).

impartial jury.[85] Similarly, in *Hard v. Burlington Northern Railroad Company*, a negligence suit seeking damages for a back injury, one juror had specialized knowledge of x-ray interpretation.[86] The Ninth Circuit upheld the jury's verdict, stating, "[i]t is expected that jurors will bring their life experiences to bear on the facts of a case."[87] Therefore, there is clear common law precedent recognizing the value of a juror's life experiences and understanding of the world. Courts value this experience—which may amount to prejudice—and have found that jurors are able to set aside biases and experiences that may be truly prejudicial. Rule 606(b) is a further extension of these values, as we cannot divorce jurors from who they are as individuals.[88] Simply because a juror brings his or her past life experiences into the jury room does not automatically render the individual an impartial juror.

B. Juror Actions Not Found to be in Violation of the Sixth Amendment

If a verdict is to be reversed on claims of racial bias, there is a multitude of other potential juror misconduct that would violate the impartial jury guarantee as well.[89] It is not right to limit Rule 606(b)'s exceptions to claims of racial bias when other types of misconduct may undermine the defendant's right to an impartial and fair jury.[90]

> Where the attempt to cure defects in the jury process—here, the possibility that racial bias played a role in the jury's deliberations—entails the sacrifice of structural features in the justice system that have important systemic benefits, it is not necessarily in the interest of overall justice to do so.[91]

85. *Id.*
86. Hard v. Burlington N. R.R. Co., 870 F.2d 1454, 1462 (9th Cir. 1989).
87. *Id.* (citing Head v. Hargave, 105 U.S. 45, 49 (1881)).
88. Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987).
89. United States v. Benally, 546 F.3d 1230, 1241 (10th Cir. 2008).
90. *Id.*
91. *Id.* at 1240.

As multiple circuits have found a variety of jurors' actions not in violation of the Sixth Amendment, racial bias should fall into this same category of what may be deemed "permissible misconduct."[92]

Just as a juror may fall asleep, misunderstand jury instructions, or disregard evidence, so too might he or she bring racial bias into the deliberation room. In 1967, the Eighth Circuit found that the defendant's right to a fair trial was not violated when the jury misinterpreted instructions.[93] Notably, the Supreme Court denied certiorari in this case.[94] Even earlier, in 1962, the Sixth Circuit found that a defendant's right to a fair trial was not violated when a juror was prohibited from testifying that there had been a mistake in returning the verdict.[95] Other permissible internal influences on the jury have been found to include: pressure of one juror on another,[96] a verdict reached through compromise,[97] and jurors agreeing to a time limit to reach a verdict.[98] Even "evidence of discussions among jurors, intimidation or harassment of one juror by another, and other intra-jury influences on the verdict is within the rule, rather than the exception, and is not competent evidence to impeach a verdict."[99] If racial bias was allowed to come within Rule 606(b)(2)'s exceptions it would be a slippery slope as to what other misconduct could be included and would go against the types of jury misconduct multiple courts have already deemed permissible.

The Supreme Court, in 1936, recognized that the laws of many states permitted citizens to serve on juries even when the juror was related to the defendant as closely as the third degree.[100] While the bias found between family members may not be as extreme as racial bias, a family member serving on the jury clearly raises questions of impartiality. It is highly likely that should a

92. *Id.* at 1241.

93. Farmers Coop. Elevator Ass'n Non-Stock v. Strand, 382 F.2d 224, 230 (8th Cir. 1967).

94. Farmers Coop. Elevator Ass'n Non-Stock v. Strand, 389 U.S. 1014 (1967).

95. United States v. Chereton, 309 F.2d 197 (6th Cir. 1962).

96. *See* Smith v. Brewer, 444 F. Supp. 482 (S.D. Iowa 1978).

97. *See* United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982).

98. *See* United States v. Badolato, 710 F.2d 1509 (11th Cir. 1983).

99. Virgin Islands v. Gereau, 523 F.2d 140, 150 (3d Cir. 1976).

100. United States v. Wood, 299 U.S. 123, 147 (1936).

family member of the third degree be permitted to serve on the jury, he would have a difficult time remaining impartial and would likely be inclined to influence the other jurors based on his personal knowledge of and relationship with the defendant. Therefore, as the Supreme Court has recognized that family members in the third degree do not violate the Sixth Amendment's demand for an impartial jury, other prejudices, such as racial biases, should be viewed in the same way.[101] The risk of partiality is just as likely between a family member and a defendant as with a juror harboring racial biases and a defendant. Therefore, racial bias must also be excluded because[102] there is no clear line to draw or distinction to make between permissible and non-permissible juror misconduct, and testimony of racial bias is likely to become a slippery slope that would open the jury up to scrutiny.

C. Not All Racist Statements are Cause for Concern

Although a juror may make racist statements, those statements do not always rise to the level that would cause concerns. The statements must be analyzed in the context in which they occur, why they were made, and the motivation behind them.[103] However, analyzing the thought process behind a juror's decision is the exact type of intrusion Rule 606(b) attempts to protect jurors from. Perhaps only in the most extreme cases could off-color remarks raise concerns; however, even then the most extreme statements are unlikely to survive the scrutiny of other jurors. Thus, because inquiry into the thought process behind racist statements is prohibited, it is impossible to distinguish between those that violate the Sixth Amendment and those that are simply off-color remarks.[104] The neutrality of the other jurors must be relied on to combat these off-color statements.

101. *Id.*

102. United States v. Benally, 546 F.3d 1230, 1238–39 (10th Cir. 2008).

103. *Cf.* Elizabeth Ingriselli, Note, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1346 (2015) (examining the effect the timing of jury instructions has on the results of jury verdicts through three explanatory theories).

104. *See* Wright v. United States, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983).

The First and Seventh Circuits both held that stray comments do not render Rule 606(b) unconstitutional.[105] In order to understand these stray comments, they must be examined in context.[106] In *United States v. Hayat*, the court reasoned that while the jury foreperson made racist statements in the jury deliberation room, those statements served a nonbiased purpose when examined in context.[107] The court determined that referencing someone's background alone does not show actual bias against any particular group of individuals.[108] Racial statements alone do not indicate whether the individual allowed those thoughts to influence their deliberations, especially when those statements are taken out of context.[109]

"Not every juror misstatement during a trial necessarily invalidates a verdict."[110] Suppose a juror, after visiting a bar on a Saturday night, makes an inappropriate statement but later chooses to conscientiously disregard his prejudice and render a verdict solely on the evidence presented.[111] Until the juror states that this is not the case, there is no basis upon which to make an assumption that the defendant did not have twelve impartial jurors.[112] However, as *United States v. Villar* noted, "there are certain rare and exceptional cases involving racial or ethnic prejudice that require hearing jury testimony to determine whether a defendant received a fair trial under the Sixth Amendment."[113] Despite these concerns, it should be noted that when one juror presents his or her interpretation of the evidence and this interpretation is completely off-base, the other rational

105. United States v. Shalhout, 507 F. App'x 201, 207 (3d Cir. 2012) (citing United States v. Villar, 586 F.3d 76, 87 (1st Cir. 2009)); Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987).

106. *See* United States v. Hayat, 710 F.3d 875, 887 (9th Cir. 2013); *see also Wright*, 559 F. Supp. at 1151.

107. *Hayat*, 710 F.3d at 887.

108. *Id.* at 888.

109. *See id.*

110. United States v. Fuentes, No. 2:12-CR-50-DBH, 2013 WL 4483062, at *5 (D. Me. Aug. 19, 2013).

111. *Id.*

112. *Id.*

113. United States v. Villar, 586 F.3d 76, 88 (1st Cir. 2009); *see also* McDonald v. Pless, 238 U.S. 264, 268–69 (1915) ("[I]t would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice. This might occur in the gravest and most important cases . . . .").

jurors are unlikely to be persuaded by these views and the chance that one juror can sway eleven others with an extreme viewpoint is unlikely.[114] Therefore, not all racial statements cause concern, and even those which pose a concern are unlikely to affect the jury's decision. Thus, Rule 606(b) does not violate a defendant's Sixth Amendment rights.

D. Allowing Racial Bias to Fall Under Rule 606(b)'s Exceptions May Violate a Defendant's Right to a Trial by Jury

If every jury verdict could be overturned, losing parties would harass jurors seeking any possible reason to justify overturning the verdict in order to obtain a new trial.

> If 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. Final authority would be exercised by whomever is empowered to decide whether the jury's decision was reasonable enough, or based on proper considerations.[115]

If Rule 606(b) included an exception for evidence of racial bias, every verdict would be scrutinized for any hint of bias and, in effect, the verdict would become the judge's verdict and not the jury's. The Supreme Court itself recognized this potential problem, stating:

> But let it once be established that verdicts solemnly made and publically returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding.[116]

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114. United States v. Hendrix, 549 F.2d 1225, 1230 (9th Cir. 1977).
115. United States v. Benally, 546 F.3d 1230, 1233 (10th Cir. 2008).
116. *McDonald*, 238 U.S. at 267.

Therefore, in order to completely guarantee a defendant's right to an impartial jury, the defendant could lose his Sixth Amendment right to a trial by jury. This forces the court to choose between the injury to a private litigant and the public injury, which would result if jurors were allowed to impeach themselves.[117]

The Second Circuit addressed this conflict in 1997, finding that the basic necessity of protecting jury deliberations outweighs any benefit that may be gained from allowing jury testimony, even when that protection "placed some instances of willful disregard of the applicable law beyond the reach of the court's corrective power."[118] Therefore, although protecting jury deliberations may result in violating a defendant's Sixth Amendment right to an impartial jury, amending Rule 606(b) to include an exception for racial bias poses a far greater threat to the Sixth Amendment's right to a jury trial. This risk would outweigh the benefits incurred from amending the rule.

IV. CONCLUSION

"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."[119] In order to maintain the integrity of the jury room and allow jurors to speak freely, Rule 606(b), although potentially unconstitutional, should not be amended to include an exception for racial bias. Such an exception would only cause further constitutional violations by effectively removing the Sixth Amendment right to a jury trial. As not all racial statements will impact the verdict, the jury is assumed to be comprised of reasonable people who put aside their prejudice to render a verdict on the facts;[120] and, as the courts have found other jury misconduct to not violate the jury's impartiality,[121] Rule 606(b) should stand as written. It should be noted that Rule 606(b) does not prohibit jurors from notifying the judge of racial bias *during*

117. *Id.*

118. United States v. Thomas, 116 F.3d 606, 623 (2d Cir. 1997).

119. Remmer v. United States, 347 U.S. 227, 229 (1954).

120. *See* Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL OF RTS. J. 75, 103 (2009).

121. *See supra* notes 89–102 and accompanying text.

deliberations; it only prohibits them from testifying about these biases *after* the verdict has been rendered.[122] As such, courts should make clear to jurors that they may report bias and misconduct at any time during deliberations. Such explicit jury instructions may significantly reduce any potential jury misconduct that violates a defendant's Sixth Amendment rights.

122. *See* CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE 480 (2007); *see also* FED. R. EVID. 606.