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## Racism, Juries, and Justice: Addressing Post-Verdict Juror Testimony of Racial Prejudice During Deliberations

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# RACISM, JURIES, AND JUSTICE: ADDRESSING POST-VERDICT JUROR TESTIMONY OF RACIAL PREJUDICE DURING DELIBERATIONS

*Andrew C. Helman*

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## RACISM, JURIES, AND JUSTICE: ADDRESSING POST-VERDICT JUROR TESTIMONY OF RACIAL PREJUDICE DURING DELIBERATIONS

*Andrew C. Helman\**

“There is little doubt that postverdict [sic] 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.” – Justice O’Connor.<sup>1</sup>

“Petitioners are not asking for a perfect jury. They are seeking to determine whether the jury that heard their case behaved in a manner consonant with the minimum requirements of the Sixth Amendment. If we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless.” – Justice Marshall.<sup>2</sup>

### I. INTRODUCTION

#### *A. A Tale of Two Juries*

From the beginning, race played a role in the prosecution of Christopher McCowen for the rape and murder of well-known fashion writer Christa Worthington.<sup>3</sup> To some, the trial was even a spectacle and treated as “one of the most spectacular homicide cases in [Massachusetts]’ history.”<sup>4</sup> It quickly became a “made-for-cable-news tale of the heiress fashion writer and her lowly Portuguese fisherman lover, illicit sex, and an out-of-wedlock child,” all set in a seaside village.<sup>5</sup> McCowen, an African-American garbage man, was right in the middle of it; police and prosecutors did not believe his assertions that he had consensual sex

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\* J.D. Candidate, 2010, University of Maine School of Law. I would first like to thank my wife Sara for supporting me in every way imaginable. In addition, many thanks to Professor Melvyn Zarr, Professor Christopher Knott, and Hon. Andrew M. Horton. All mistakes, of course, are my own.

Additionally, I would like to point out a few limitations of this Comment. First, the Comment primarily focuses on criminal trials because of the constitutional protections of the Sixth Amendment. However, I think the same basic fairness arguments should apply in a civil context. Second, this Article is limited in its scope to racial prejudice because of the extent of scholarship, available case law, and incremental way the law moves forward. However, I think all the arguments presented here are equally as persuasive with other forms of prejudice—whether based on ethnicity, religion, gender, or sexual orientation. Third, largely absent from this Article is a substantial discussion of the standards a court should use once it has decided to take evidence from a juror. It deserves more discussion than could be provided here.

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

2. *Id.* at 142 (Marshall, J., dissenting).

3. Jonathan Saltzman, *Jury in Cape Murder Ordered Back to Court*, BOSTON GLOBE, Nov. 30, 2007, available at [http://www.boston.com/news/local/articles/2007/11/30/jury\\_in\\_cape\\_murder\\_ordered\\_back\\_to\\_court/](http://www.boston.com/news/local/articles/2007/11/30/jury_in_cape_murder_ordered_back_to_court/).

4. Peter Manso, *An Unjust Conclusion*, BOSTON MAGAZINE, March 2007, available at [http://www.bostonmagazine.com/articles/an\\_unjust\\_conclusion/](http://www.bostonmagazine.com/articles/an_unjust_conclusion/).

5. *Id.*

with Worthington and that someone else killed her.<sup>6</sup> And after eight days of deliberations, it appeared that jurors also did not believe McCowen's defense.<sup>7</sup> They convicted him of Worthington's rape and murder.<sup>8</sup> Arguably, for some legal experts and scholars, that is where the story started to get more interesting.

A few days after the deliberations, three jurors contacted McCowen's lawyer and said that racial prejudice tainted the deliberations and that at least one juror felt pressure to convict.<sup>9</sup> The three jurors alleged that a white juror "used the term 'black man' in a racist manner," that another white juror "told fellow jurors she feared McCowen because he was a black man staring at her," and that a Cape Verdean juror said "blacks had a tendency toward violence."<sup>10</sup> Based on the jurors' affidavits, McCowen's lawyer filed a motion for a new trial, arguing, among other things, that racial prejudice denied McCowen a fair trial.<sup>11</sup>

Similar to Maine and the federal courts, Massachusetts' evidentiary guidelines bar jury testimony to impeach a verdict, except for evidence of extraneous prejudicial information or outside influences.<sup>12</sup> There is disagreement among courts and scholars as to whether evidence of racial prejudice during deliberations is considered to be barred by the rule, within an exception to the rule, or whether racially prejudiced statements present constitutional problems to which the rule must give way.<sup>13</sup> In Massachusetts, however, juror testimony to prove that racial prejudice tainted deliberations is allowed because doing otherwise "might well offend fundamental fairness."<sup>14</sup> In practice, however, only a few jurors had ever been recalled at one time.<sup>15</sup>

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6. Saltzman, *supra* note 3.

7. Manso, *supra* note 4.

8. *Id.*

9. *Id.*

10. Mary Ann Bragg, *McCowen-Jury Racial Bias Hearing Continues*, CAPE COD TIMES, Jan. 19, 2008.

11. Manso, *supra* note 4. The motion for new trial was subsequently denied and an appeal is pending. Jonathan Saltzman, *Judge Rules No New Trial in Slaying of Writer*, BOSTON GLOBE, Apr. 5, 2008, available at [http://www.boston.com/news/local/articles/2008/04/05/judge\\_rules\\_no\\_new\\_trial\\_in\\_slaying\\_of\\_writer/](http://www.boston.com/news/local/articles/2008/04/05/judge_rules_no_new_trial_in_slaying_of_writer/).

12. Massachusetts has yet to formally adopt rules of evidence; however, it has put together an evidentiary guide that reads like a set of rules. For more information, go to <http://www.mass.gov/courts/sjc/guide-to-evidence/introduction.htm>. The Massachusetts guide says the following:

(b) Inquiry into Validity of Verdict or Indictment. 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, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

13. See *infra* Parts II, III.

14. Commonwealth v. Laguer, 571 N.E.2d 371, 376 (Mass. 1991) (quoting Commonwealth v. Tavares, 430 N.E.2d 1198 (Mass. 1982)).

15. David E. Frank, "Unprecedented" Public Hearing on Alleged Juror Bias to Get Under Way in Mass. Superior Court, MASS. LAW. WKLY., Jan. 7, 2008.

As a result, many in the legal community were surprised when the trial court responded to McCowen's motion for a new trial by recalling the *entire* jury to testify in open court.<sup>16</sup> A former Massachusetts prosecutor and specialist on juries said, "I have not come across such a case," though he did acknowledge that judges in Massachusetts will occasionally question jurors in private.<sup>17</sup> One Massachusetts judge laid out the policy dilemma succinctly: "We're all against racial bias, but how far can you trace it in the system without invading equally important public policy questions like the freedom of the jury to discuss the case?"<sup>18</sup>

In contrast to Massachusetts, the Tenth Circuit does not allow jurors to testify to show whether racial prejudice infected deliberations, though that does not mean deliberations are free from racial prejudice.<sup>19</sup> For example, one day after a jury convicted a member of the Ute Mountain Ute tribe of forcibly assaulting a Bureau of Indian Affairs officer with a dangerous weapon, a juror alleged that deliberations had been tainted by racial prejudice against Native Americans.<sup>20</sup> The juror alleged, for example, that during deliberations the foreman had claimed that Native Americans who drink alcohol become drunk and violent.<sup>21</sup> Additionally, the juror alleged that that some jurors said they needed to "send a message back to the reservation."<sup>22</sup> However, the Tenth Circuit rejected the defendant's arguments in support of a new trial and concluded that Rule 606(b) was a total bar to all juror evidence that would impact the verdict.<sup>23</sup>

Here in Maine, the law on juror testimony is not entirely clear. Trial courts have ample authority to allow post-verdict juror testimony in some instances,<sup>24</sup> but the right case has not yet emerged to test the law on testimony to prove racial prejudice tainted deliberations. Accordingly, this article will explore whether the rule pits process values against notions of fairness; whether Maine trial judges have the authority to admit juror testimony in some instances; and whether it is possible to do so without undermining important process values, both before and after the verdict.

The rest of Part I will provide an overview of the problem, showing why the general rule against post-verdict juror testimony presents a problem in the limited

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16. *Id.*

17. Saltzman, *supra* note 3.

18. *Id.*

19. *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008), *reh'g denied en banc*, 560 F.3d 1151, *petition for cert. filed* (July 20, 2009) (No. 09-5429). *But see United States v. Villar*, 586 F.3d 76 (1st Cir. 2009). In *Villar*, the court concluded that trial judges have "the discretion to inquire into the validity of the verdict by hearing juror testimony to determine whether ethnically biased statements were made during jury deliberations and, if so, whether there is a substantial probability that any such comments made a difference in the outcome of the trial." *Id.* at 87. The court believed "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." *Id.*

20. *Id.* at 1231.

21. *Id.* at 1231-32.

22. *Id.* at 1232.

23. *Id.* at 1231.

24. *See Alexander, Maine Jury Instruction Manual* § 9-6 at 9-12 to 9-14 (4th ed. 2009); *State v. Chesnel*, 1999 ME 120, ¶¶ 14-31, 734 A.2d 1131, 1136-41; *State v. Watts*, 2006 ME 109, ¶¶ 15-21, 907 A.2d 147, 150-52.

instance where racial prejudice appears to have tainted jury deliberations. Part II will show that the federal courts are unable to offer any guidance because of a split between the Ninth and Tenth Circuits on how to apply federal Rule 606(b), which is substantially the same as the Maine rule. Part III will consider Maine's law in this area, including whether there are steps that can be taken earlier in the process to avoid confronting Rule 606(b), while also considering four arguments in support of allowing juror testimony after the verdict has been returned. However, Part IV provides a better approach, suggesting an amendment to Maine's Rule 606(b) that would expressly allow judges to consider when and how to tackle post-verdict allegations that racial prejudice tainted deliberations.

### B. Overview of the Problem

Allegations of racial prejudice during jury deliberations raise significant problems. On one hand, there are many sound policies underlying secret jury deliberations: stability of verdicts, finality of judgments, ensuring deliberations are secret, protecting jurors from harassment by disappointed litigants, and preventing jurors with second thoughts from trying to upset the verdict.<sup>25</sup> On the other hand, racial prejudice arguably offends notions of fairness, undermines confidence in the judicial system, results in decisions not based on the facts, and threatens a defendant's right to a fair and impartial jury trial. As a result, the challenge for the courts "is to find the means of guaranteeing . . . impartiality, without so crippling or altering the institution of the jury as to deny the . . . right to be tried by a jury."<sup>26</sup>

The Supreme Court faced a similar balancing dilemma in *Tanner v. United States*, a case where jurors allegedly became intoxicated from drugs and alcohol to the point that they were falling asleep and the trial became "one big party."<sup>27</sup> Not only were jurors allegedly using marijuana, cocaine, and alcohol throughout the trial and deliberations, but they also were allegedly selling drugs to each other.<sup>28</sup> At least one juror reported that he was "flying" during portions of the trial.<sup>29</sup> As a result, the juror became so concerned after the verdict that he contacted defense counsel "to clear [his] conscience . . . [b]ecause [he] felt . . . that the people on the jury didn't have no business being on the jury. [He] felt Mr. Tanner should have a better opportunity to get somebody that would review the facts right."<sup>30</sup>

The Court considered and rejected several arguments for the admissibility of juror testimony. First, the Court concluded an exception for outside influences did not apply because voluntarily ingested drugs and alcohol are "no more an 'outside influence' than a virus, poorly prepared food, or lack of sleep."<sup>31</sup> Second, the Court concluded that the legislative history showed that Congress considered and rejected a proposed rule that would have allowed this sort of testimony, so the Court could not find a retained exception at common law.<sup>32</sup> Third, the Court

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25. *Patterson v. Rossingol*, 245 A.2d 852, 857 (Me. 1968).

26. *State v. Shillcutt*, 350 N.W.2d 686 (Wis. 1984).

27. 483 U.S. 107, 115 (1987).

28. *Id.* at 115-16.

29. *Id.* at 116.

30. *Id.*

31. *Id.* at 122.

32. *Id.*

concluded that the defendants were not denied a constitutionally fair trial under the Sixth Amendment because this right is protected at several earlier places in the trial process: during voir dire, in-court observations, and post-verdict hearings based on non-juror testimony.<sup>33</sup> While Justice O'Connor acknowledged that post-verdict inquiries would certainly reveal some irregularities probably warranting a new trial, "[i]t is not at all clear, however, that the jury system could survive such efforts to perfect it."<sup>34</sup>

However, *Tanner* is not without its critics. For example, in dissent, Justice Marshall reached the opposite conclusion.<sup>35</sup> While he agreed with Justice O'Connor that perfection cannot be the goal, he said the courts should "determine whether the jury that heard [the] case behaved in a manner consonant with the minimum requirements of the Sixth Amendment. If we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless."<sup>36</sup> Additionally, while Justice O'Connor cited Wigmore's treatise on evidence for the proposition that the rule "flatly" barring juror testimony gained "near-universal" adherence,<sup>37</sup> a closer reading of Wigmore supports Justice Marshall's dissent because Wigmore expressly stated that jurors should be able to testify to show they were intoxicated.<sup>38</sup> However, like Justice O'Connor, many courts simply rely on "the shibboleth that 'a juror *cannot impeach his verdict*.'"<sup>39</sup>

While *Tanner* played a pivotal role in the Tenth Circuit's conclusion that juror testimony is barred, anecdotal evidence, recent court decisions, and social science research raise serious questions about the logical inference to draw from the majority opinion in *Tanner*—that the jury system cannot function if juror testimony to prove racial prejudice is allowed—and the Court's conclusion that Sixth Amendment rights are adequately protected earlier in the trial process. For example, as part of a recent symposium, Hon. Janet Bond Arterton, U.S. District Judge for the District of Connecticut, shared a few anecdotes that shed light on the challenges judges face when trying to ensure that juries are free from prejudice.<sup>40</sup> She recounted a letter from an anonymous white juror, who was on a panel that delivered a verdict against three black plaintiffs in a civil rights case.<sup>41</sup> The letter said:

During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about "those people" rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now

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

34. *Id.* at 120.

35. *See generally id.* at 134 (Marshall, J., dissenting).

36. *Id.* at 142.

37. *Id.* at 117 (majority opinion) (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2349 at 681-82, 690 (John T. McNaughton ed., 1961) (1904)).

38. 8 WIGMORE, EVIDENCE § 2349 at 681-82, 690.

39. *Id.* at 690.

40. Hon. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1023 (2008).

41. *Id.* at 1032.

regret my inaction).<sup>42</sup>

Had the case been focused on a “fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome.”<sup>43</sup>

Additionally, Judge Arterton occasionally points out the defendant’s race during jury selection and asks if it would impact any juror’s deliberations; in two instances, jurors said it “might.”<sup>44</sup> Judge Arterton was not entirely certain whether the jurors just wanted out of jury service, which left her with a larger question:<sup>45</sup> How can judges expect to get honest answers about whether jurors harbor racial or ethnic prejudices, “particularly where an honest response about one’s operative biases requires conscious insight into one’s unconscious?”<sup>46</sup>

Despite efforts to ensure fair trials by *Tanner*’s methods, recent cases show that racial prejudice is still appearing as a post-verdict issue. For example, in Washington State, a trial judge recently granted a motion for a new trial based on juror affidavits of racial and ethnic prejudice towards the defendant’s lawyer, who was of Japanese ancestry.<sup>47</sup> The judge concluded the jurors’ affidavits tended to show jurors intentionally referred to the lawyer, Mark D. Kamitomo, as “Mr. Kamikaze,” “Mr. Miyashi,” or “Mr. Miyagi,” though the jurors later claimed they did so because they had difficulty pronouncing his name.<sup>48</sup> Additionally, the court found that at least one juror said the plaintiff’s verdict was “almost appropriate” because it was returned on Pearl Harbor Day.<sup>49</sup> The court reached its conclusion without a hearing because it reasoned that “people are never forthcoming with their prejudice.”<sup>50</sup>

Similarly, the New Jersey Supreme Court ordered a new trial for an African-American criminal defendant almost thirteen years<sup>51</sup> after his conviction because a juror remained on the panel after the trial court learned he had told co-workers he intended to “get me a good rope so when we hang him, it won’t break.”<sup>52</sup> The court deemed it presumptively prejudicial to allow the juror to stay on the panel because his views made him unfit to serve as a juror and could have tainted the rest of the jury.<sup>53</sup> While the court would have preferred to conduct a hearing with juror testimony, it concluded that too much time had passed to ensure accurate recollections.<sup>54</sup>

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. For example, one study compared challenge for cause procedures and concluded that

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42. *Id.* at 1033 (quoting anonymous juror letter).

43. *Id.*

44. *Id.* at 1030.

45. *Id.*

46. Arterton, *supra* note 40, at 1030.

47. *Turner v. Stime*, No. 05-2-05374-1, 2008 WL 4375521 (Wash. Super. Ct., Mar. 27, 2008).

48. *Id.*

49. *Id.*

50. *Id.*

51. *State v. Loftin*, 922 A.2d 1210, 1226 (N.J. 2007).

52. *Id.* at 1217.

53. *Id.* at 1226.

54. *Id.*



voir dire eliciting reflective responses, as opposed to closed-ended yes-or-no questioning, which is the norm in Maine,<sup>55</sup> is more likely to reduce bias or prejudice.<sup>56</sup> The study noted there may be little value to yes-or-no questions because recent research “suggests that such self-assessments may often be incorrect.”<sup>57</sup> In particular, the study suggested it would be more useful to ask jurors “*how* race might impact” their decision-making because “it may make them aware of the general influences it can have and the extent to which it can influence decisions.”<sup>58</sup> Another study also suggested that bias based on the defendant’s characteristics may influence jury decision-making.<sup>59</sup> For example, the “study reveals clear evidence of bias against gay defendants in child sexual abuse cases, particularly when victims are boys.”<sup>60</sup> The study showed that jurors were driven by moral outrage and anti-gay bias when they perceived the defendant to be gay and the victim to be straight.<sup>61</sup> Similarly, another study suggests that non-evidentiary factors are more likely to influence jury verdicts in close cases.<sup>62</sup> While jurors will typically rely on the evidence presented at trial when it clearly favors one side or the other, when the evidence is ambiguous jurors will be “liberated” from its constraints, which implies that verdicts are most “susceptible to non-evidentiary influences when the evidence is ‘close.’”<sup>63</sup> The study did, however, note that more research is needed to fully understand how racial prejudice operates in this context.<sup>64</sup>

Taken together, scholarship and case law suggest there are instances where racial prejudice does, at times, play a role in jury deliberations. Yet, there is significant disagreement over whether to allow defendants a means to gather evidence in support of a Sixth Amendment or corresponding state law violation.<sup>65</sup> Even if a remedy is theoretically available, it may become a nullity if Rule 606(b) is allowed to operate as a bar to gathering evidence in this limited instance. However, what remains to be seen is how the courts will respond.

## II. THE CIRCUIT SPLIT ON RACIAL PREJUDICE

### A. Introduction to the Circuit Split

Federal decisions on Rule 606(b) provide a reference point for understanding Maine’s rule for several reasons. First, the language of the two rules is nearly

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55. Alexander, *supra* note 24, at § 2-4 at 2-5.

56. Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320, 320 (2008).

57. *Id.* at 321.

58. *Id.* at 326.

59. Tisha R. A. Wiley & Bette L. Bottoms, *Effects of Defendant Sexual Orientation on Jurors’ Perceptions of Child Sexual Assault*, 33 LAW & HUM. BEHAV. 46, 55 (2008).

60. *Id.*

61. *Id.*

62. Dennis J. Devine et al., *Strength of Evidence, Extraevidentiary Influence, and the Liberation Hypothesis: Data from the Field*, 33 LAW & HUM. BEHAV. 136, 136 (2008).

63. *Id.*

64. *Id.* at 147.

65. See *supra* Part I(B). See *infra* Part II-III.

identical.<sup>66</sup> Second, the Maine Supreme Judicial Court has said “we should not plunge down doctrinal trails in disregard of the lessons of the federal experience.”<sup>67</sup> Third, the broader issue is the right to a fair trial, which is protected by both the Sixth Amendment and Article I, Section 6 of the Maine Constitution.

However, the apparent split between the Ninth and Tenth Circuits shows that the federal courts have little clarity or unanimity to offer on this issue and seem to disagree on the meaning of the rule and these cases.<sup>68</sup> On one hand, the Tenth Circuit held that Rule 606(b) is a bar to all juror testimony, when the remedy implicates the verdict.<sup>69</sup> On the other hand, the Ninth Circuit argued in favor of allowing juror testimony of racial or ethnic prejudice to show juror dishonesty during voir dire and also reasoned that racial prejudice is a mental bias that is never appropriate during deliberations.<sup>70</sup>

### B. *The Tenth Circuit’s Opinion*

In response to allegations that jurors made racially prejudiced statements about Native Americans, the Tenth Circuit, in *United States v. Benally*, considered and rejected four arguments in support of admitting testimony of the jurors.<sup>71</sup> First, the defendant argued that testimony of racial prejudice falls outside the scope of the rule because it was not offered to impeach the verdict, but rather to show a juror materially lied during voir dire.<sup>72</sup> However, the court had said that the true purpose of the testimony was to support a motion for a new trial, which challenged the verdict’s validity.<sup>73</sup> The court reasoned that “allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule.”<sup>74</sup>

Second, the court considered whether the juror testimony would fall within an exception to the rule.<sup>75</sup> Treating extraneous prejudicial information and outside influences together as “extraneous influences,” the court pointed to several cases where juror misconduct—e.g., reading news reports, communication with third parties, bribes, and tampering—was considered to fall within an exception to the rule, which meant testimony was admissible.<sup>76</sup> In contrast, the court considered

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66. Compare FED. R. EVID. 606(b) (allowing jurors to testify to “whether there was a mistake in entering the verdict onto the verdict form”), with ME. R. EVID. 606(b) (omitting only this clause).

67. *State v. Bouchles*, 457 A.2d 798, 803 (Me. 1983).

68. See, e.g., *United States v. Decoud*, 456 F.3d 996 (9th Cir. 2006). In *Decoud*, a three judge panel of the Ninth Circuit characterized *Henley*’s argument on racial prejudice as dicta, while the dissent forcefully disagreed with that characterization. See generally *id.* at 1018 (citing *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001)). Additionally, when serving on the Third Circuit, Justice Alito characterized *Henley*’s argument for admitting juror testimony to prove racial prejudice during deliberations as dicta. *Williams v. Price*, 343 F.3d 223, 237 (3d Cir. 2003) (citing *Henley*, 238 F.3d at 1120).

69. *Benally*, 546 F.3d at 1231.

70. *Henley*, 238 F.3d at 1119-20.

71. 546 F.3d at 1234-41.

72. *Id.* at 1235 (quoting FED. R. EVID. 606(b)).

73. *Id.*

74. *Id.* at 1236. The court did say that juror testimony can be used for contempt proceedings against the dishonest juror, but that leaves the defendant without a remedy. *Id.* at 1235 (citing *Clark v. United States*, 289 U.S. 1, 12-14 (1933)).

75. *Benally*, 546 F.3d at 1236.

76. *Id.* at 1236-37.

racial prejudice to be a personal experience that did not fall within an exception to the rule because personal experiences are not outside influences or extra-record facts about the defendant.<sup>77</sup> While the court said the statements were certainly improper, they were not held to be extraneous.<sup>78</sup>

Third, the court considered whether it should put a gloss on the rule to create an exception for evidence of racial prejudice or bias.<sup>79</sup> However, the court claimed doing so would be the job of the legislature, not the courts, because “[o]ur commission is to apply the Rules of Evidence as written and interpreted to the case at hand.”<sup>80</sup> Additionally, the court said implying “a broader exception would be inconsistent with congressional intent” because Congress had considered and rejected a version of the rule that might have allowed testimony in these instances.<sup>81</sup>

Lastly, the court considered whether Rule 606(b) is unconstitutional as applied because it functioned as a bar to obtaining relief for what the defendant perceived as a Sixth Amendment violation.<sup>82</sup> However, the court pointed to *Tanner* and contended it was sufficiently analogous to dispose of the issue.<sup>83</sup> Essentially, the *Benally* court followed the Supreme Court’s lead and concluded that process values outweighed a defendant’s right to expose flawed deliberations.<sup>84</sup> As a result, the court rejected the constitutional challenge to Rule 606(b). Otherwise, the court said, “it is hard to see why, under this theory, *Tanner* should not have been decided the other way.”<sup>85</sup>

### C. *The Ninth Circuit’s Opinion*

In contrast to *Benally*, the Ninth Circuit, in *United States v. Henley*, persuasively argued that racial prejudice is a mental bias unrelated to the true issues of a case and, as a result, it should never be tolerated during deliberations.<sup>86</sup> In *Henley*, allegations of racial prejudice and other juror misconduct surfaced a few days after the verdict, when two former jurors accused a third of saying “[t]he niggers are guilty.”<sup>87</sup> Based on this information, the defendants, three of whom

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77. *Id.* at 1237.

78. *Id.* However, this reasoning is flawed because treating racial bias as a “personal experience” legitimizes it in a way that does not match the generally understood notions of racial discrimination as decisions or actions based on the assumption that race is a determining factor of behavior. See “racism,” MERRIAM-WEBSTER UNABRIDGED DICTIONARY 1591 (2d ed. 1999); “discrimination,” *id.* at 564.

79. *Benally*, 546 F.3d at 1238 (“Racial bias, according to *Henley*, is so ‘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’ that any statement indicative of such bias cannot be deemed protected by an evidentiary rule.”) (quoting *Henley*, 238 F.3d at 1120).

80. *Id.*

81. *Id.* at 1238-39. The court said the proposal rejected by Congress would have adopted the Iowa rule, which would allow testimony of any matter during deliberations, provided it does not inhere in the verdict itself. *Id.*

82. *Id.* at 1239.

83. *Id.*

84. *Id.* at 1240.

85. *Benally*, 546 F.3d at 1241.

86. 238 F.3d 1111, 1119-20 (9th Cir. 2001).

87. *Id.* at 1113-14.

were African American,<sup>88</sup> filed a motion for a new trial.<sup>89</sup> First, they contended that testimony of racial prejudice should be considered an extraneous influence, which is admissible under an exception to Rule 606(b).<sup>90</sup> Alternatively, they argued even if the testimony is barred by Rule 606(b), it is admissible to prove that a juror lied materially during voir dire, which would be a sufficient ground to compel the court to grant a new trial.<sup>91</sup>

Instead of simply relying on the “shibboleth” that jurors shall not testify to impeach their verdicts, the court engaged in doctrinal analysis and persuasively argued that juror testimony is admissible to prove racial prejudice tainted the process.<sup>92</sup> Noting that many courts have hesitated to apply Rule 606(b) dogmatically in similar circumstances, the court said “a powerful case can be made that Rule 606(b) is wholly inapplicable to racial bias,” and that racial bias or prejudice did not need to be characterized as an extraneous influence in order to allow juror testimony.<sup>93</sup> To reach this conclusion, the court coupled its premise that racial prejudice is a mental bias unrelated to the specific issues that a juror can legitimately be called on to determine<sup>94</sup> with a Supreme Court opinion holding that jurors may testify about mental bias that is unrelated to the issues before the jury.<sup>95</sup> Further, the court pointed to *Dobbs v. Zant*, a district court opinion that distinguished *Tanner* based on its contention that “racial bias is not as observable as intoxication.”<sup>96</sup> From there, the *Henley* Court identified a two-step process to use when determining whether racial prejudice pervaded jury deliberations.<sup>97</sup> First, a trial court would have to hear the juror testimony.<sup>98</sup> Second, the trial court would have to find prejudice to the defendant, and, in the Ninth Circuit, “[o]ne racist juror would be enough” to require a new trial.<sup>99</sup>

However, the *Henley* Court ultimately remanded for findings on whether a juror may have lied during voir dire because the defendants would be entitled to a new trial if they could show that “a correct response would have provided a valid basis for a challenge for cause.”<sup>100</sup> By stopping short of formally deciding “whether or to what extent the rule prohibits racial statements during deliberations or, as in this case, outside of deliberations but during the course of the trial,” the court avoided challenging the policy considerations of Rule 606(b).<sup>101</sup>

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88. *Id.* at 1119.

89. *Id.* at 1114.

90. *Id.* at 1119.

91. *Id.*

92. *See Henley*, 238 F.3d at 1119-22.

93. *Id.* at 1119-20 (quoting *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983) (per curiam)).

94. *Id.* at 1120.

95. *Rushen*, 464 U.S. at 121 n.5.

96. *Henley*, 238 F.3d at 1120 n.13 (citing *Dobbs v. Zant*, 720 F.Supp. 1566, 1573-74 (N.D. Ga. 1989)).

97. *Id.* at 1120.

98. *Id.*

99. *Id.*

100. *Id.* at 1121 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)).

101. *Id.* at 1121.

#### D. Other Views

Another view, suggested by *Tobias v. Smith*, would characterize evidence of racial prejudice as an outside influence that is admissible within an exception to Rule 606(b).<sup>102</sup> In *Tobias*, after trial but before sentencing, the defendant moved to set aside the verdict or for a hearing based on a juror affidavit alleging, among other things, that the foreman told the jury a witness's inability to identify the defendant from a photograph was irrelevant because "[y]ou can't tell one black from another. They all look alike."<sup>103</sup> The court reasoned that "the race of a defendant is an improper consideration for a jury, just as ethnic origin and religion are."<sup>104</sup> As a result, the court, sitting in habeas, ordered a hearing where the parties could question the jurors to clarify "whether statements occurred which created a probability of prejudice . . . or whether a juror was so biased as to be disqualified from serving on a jury."<sup>105</sup>

Nearly fifty years ago in *State v. Levitt*, New Jersey took a similar approach, concluding that religious prejudice by a jury during deliberations was an improper influence and grounds to overturn a verdict.<sup>106</sup> In *Levitt*, one day after the verdict was returned, a juror telephoned the trial judge and, at a later meeting, told the judge that several discriminatory comments about the Jewish defendant and his religion prejudiced the deliberations.<sup>107</sup> The New Jersey Supreme Court concluded that the trial judge "should investigate the truth of the charges" to consider whether a new trial is required.<sup>108</sup> Acknowledging the "delicacy" of questioning jurors, the court said the proper practice was for a trial judge to take the testimony of jurors himself in the presence of counsel.<sup>109</sup> If "even one juror was so biased as to prevent him or her from objectively weighing the evidence, it was sufficient to set the verdict aside."<sup>110</sup>

### III. MAINE'S UNSETTLED LAW

#### A. Introduction

Like the federal courts, the state of the law in Maine is still unsettled on this issue. It is, however, clear that trial courts have the authority during the trial and in some post-verdict instances to allow some types of juror testimony.<sup>111</sup> From that starting point, several arguments will be considered here to address the problem of racial prejudice by jurors—both before and after a verdict. The arguments are based upon the conclusion—drawn from notions of fairness as well as the cases

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102. 468 F.Supp. 1287, 1290-91 (W.D.N.Y. 1979).

103. *Id.* at 1289.

104. *Id.* at 1291.

105. *Id.*

106. *See generally* 176 A.2d 465 (N.J. 1961).

107. *Id.* at 466, 468.

108. *Id.* at 467.

109. *Id.* at 468.

110. *Id.*

111. *See Alexander, supra* note 24, at §§ 2-4, at 2-5, 4-18, at 4-32 to 4-35, and 9-6 at 9-12 to 9-14; *State v. Chesnel*, 1999 ME 120, ¶¶ 14-31, 734 A.2d 1131, 1136-41; *State v. Watts*, 2006 ME 109, ¶¶ 15-21, 907 A.2d 147, 150-52.

and available social science research—that racial prejudice is a pernicious influence that should be routed out whenever it is possible to do so. Not only is racial prejudice harmful to individual defendants and the judicial system as a whole, but the cases outside of Maine show that some judges are struggling to find the right approach, given the existing framework of the rule.

Further, the apparent disagreement among the federal courts increases the need for state action because no clear rule has emerged. Fortunately, Maine courts have significantly more room to maneuver than their federal counterparts because Maine courts are not hampered by the same legislative history surrounding the enactment and amendment of the federal rules.<sup>112</sup> As a result, Maine has an opportunity to guard jealously the rights of its citizens in an area where the federal government has yet to take decisive action or offer clear guidance.<sup>113</sup> The task for the Maine bench and bar is clear: to ensure that criminal defendants have the opportunity to gather evidence in support of rights and remedies already in place, even in response to post-verdict allegations that racial prejudice animated jury deliberations.

### *B. Addressing the Problem Earlier in the Process*

As noted in *Tanner*, there are several places before the verdict where a criminal defendant's right to a fair trial is protected—for example, voir dire, in-court observation by the court, observations by other jurors, and post-verdict hearings with non-juror testimony.<sup>114</sup> Each of these steps presents a procedural opportunity to weed out jurors who plainly hold racist views or, at least, to investigate whether a problem exists. After pointing out those opportunities, I will present some of the arguments for and against doing so.

#### *1. Voir Dire*

Voir dire, arguably, provides the earliest opportunity to determine whether prospective jurors harbor racist beliefs. While attorneys may question prospective jurors, the nearly universal practice in Maine is for the court to conduct the initial examination of the venire panel to determine whether there is any prejudice that would prevent a prospective juror from being objective.<sup>115</sup> Within this framework, there are at least three strategies that could be useful when there is a credible concern of racial prejudice. First, as Judge Arterton has done, the court can broadly ask jurors whether they are able to decide the case without racial prejudice. Doing so would flag the issue for jurors, which could make them less tolerant of racial prejudice during deliberations. It would also provide some jurors an opportunity to honestly answer they hold a prejudice. However, there are valid criticisms of this practice. As Judge Arterton noted, many jurors are unlikely to know themselves well enough to know their subconscious prejudices, or be honest about them.<sup>116</sup> Additionally, flagging racial prejudice might alter the way deliberations function and drive prejudice further underground; however, this is a

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112. See, e.g., FED. R. EVID. 606(b) *advisory committee's note*.

113. THE FEDERALIST NO. 51 (James Madison).

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

115. 1 Cluchey & Seitzinger, *Maine Criminal Practice* § 24.2 at V-52 (Gardner ed. 1995).

116. Arterton, *supra* note 40, at 1030.

risk already inherent in jury deliberations, and it seems likely that in the right case asking jurors this question could do more good than harm. Racial prejudice deprives defendants of fair trials. Therefore, flagging racial prejudice during voir dire, where appropriate, would help to further the underlying purpose of questioning jurors: ensuring that the panel hearing the evidence is impartial.

Second, while individual and small group voir dire is the exception, not the rule, in Maine,<sup>117</sup> the trial court has broad discretion to question the venire panel as needed, especially when there are “unusually sensitive issues,”<sup>118</sup> or there is “an unusual potential for prejudice.”<sup>119</sup> This second strategy would be helpful for the implementing the third strategy, which would be to ask open-ended questions. Research has shown open-ended questions—which ask “how”, instead of just “yes or no”—tend to be more effective at exposing racial prejudice than traditional closed-ended questioning.<sup>120</sup> However, weighing against these options are legitimate concerns about administrative efficiency, especially because individual voir dire and open-ended questioning would be time consuming. Additionally, Justice Alexander, in his jury manual, cautioned against extending the selection process beyond a single day because it increases the risk that venire panel members may be exposed to pre-trial publicity.<sup>121</sup> However, Justice Alexander also noted that the trial court has considerable discretion to balance “the competing considerations of fairness to the defendant, judicial economy, and avoidance of embarrassment to potential jurors.”<sup>122</sup>

## 2. During Trial

Before the verdict is returned, the trial court has wide discretion to fashion a remedy to counter racial prejudice.<sup>123</sup> Falling on a spectrum, the court can instruct or reprimand jurors, substitute an alternate juror, or declare a mistrial. In general, however, if prejudice or misconduct is suspected, the trial court should interview the juror in question to determine whether he or she can remain impartial.<sup>124</sup> The trial court’s determination of whether a juror is impartial will be reviewed

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117. See generally Alexander, *supra* note 24, at § 2-6; Cluchey & Seitzinger, *supra* note 115, at § 24.2 at V-52.

118. Alexander, *supra* note 24, at § 2-6, at 2-8.

119. Cluchey & Seitzinger, *supra* note 115, at § 24.2 at V-53.

120. See *supra* Part I(B). Additionally, it might be worth amending the statutory juror oath to specifically mention racial prejudice as being barred, in order to raise juror attention to it. For example, legislative language could read:

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 15 MRSA § 1254, as amended by PL 1979, c. 541, § B21 is further amended as follows:

The following oath shall be administered to jurors in criminal cases: "You swear, that in all causes committed to you, you will give a true verdict therein, according to the law and evidence given you, free from all racial prejudice. So help you God." Any juror, conscientiously scrupulous of taking an oath, may affirm in the mode described in section 1253.

121. Alexander, *supra* note 24, at § 2-6 at 2-8 to 2-9.

122. *Id.* (quoting *State v. Woodburn*, 559 A.2d 343, 344 (Me. 1989)).

123. *Id.* § 4-18 at 4-34 (citing *United States v. Rodriguez-Ortiz*, 455 F.3d 18, 23 (1st Cir. 2006)).

124. *Id.* § 4-18 at 4-32 (citing *State v. Durant*, 2004 ME 136, ¶ 15, 861 A.2d 637, 640-41).

deferentially.<sup>125</sup> If the trial judge concludes there is a “reasonable possibility of prejudice” it will trigger a presumption of prejudice, shifting to the state the burden of proving by clear and convincing evidence that there is no prejudice.<sup>126</sup>

### 3. *During Deliberations but Before Verdict*

It is possible for the court to provide a general instruction immediately before deliberations begin that would remind jurors to consider only the facts, not to insert personal prejudices. Flagging racial prejudice could make jurors aware that it is a form of misconduct that is not allowed and that should be reported to the judge. If a trial judge does learn of prejudice, there are several remedial options available, such as examining the jury, providing another instruction, replacing a juror, or even declaring a mistrial.

While the policy considerations of Rule 606(b) should be considered at all times, a strong argument can be made that the text of the rule would not apply before a verdict is reached; therefore, juror testimony would be admissible because it would not attack the validity of a verdict.<sup>127</sup> Maine’s pattern jury instructions already tell jurors to engage in an “impartial consideration of the evidence” with an “open mind.”<sup>128</sup> In the right case, it would only be an incremental step to extend those instructions by telling jurors to avoid racial prejudice and to decide the case solely on the facts in evidence. Of course, it is possible to criticize this suggestion out of concern that such an instruction might have a chilling effect on deliberations or send bias and prejudice underground. However, as the Law Court has previously said, “If during the progress of a trial it shall become known to the court that some of the jury do not stand indifferent, whether toward the state or the accused, it would be a travesty on the administration of justice if the trial must proceed.”<sup>129</sup>

#### *C. Arguments for Allowing Post-Verdict Juror Testimony of Racial Prejudice*

The challenge for defendants is marshalling legal support for the admission of juror testimony to prove racial prejudice tainted deliberations. There are four key arguments that will be explored here: (1) racial prejudice is misconduct outside the scope of Rule 606(b) and, therefore, does not implicate the verdict; (2) racial prejudice raises constitutional problems to which Rule 606(b) must give way; (3) racial prejudice is an outside influence and is admissible under an exception to the rule; and (4) testimony of racial prejudice might be admissible to prove a juror lied materially during voir dire. While the arguments presented here will not answer all possible criticisms, they will attempt to chart a defensible position.

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125. *Id.* § 4-18 at 4-32 (citing *State v. Melanson*, 2002 ME 145, ¶ 11, 804 A.2d 394, 398).

126. *Id.* § 4-18 at 4-35 (citing *State v. Coburn*, 1999 ME 28, 724 A.2d 1239; *State v. Royal*, 590 A.2d 523, 524-25 (Me. 1990)).

127. 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE 2D* § 6074 (2007) [hereinafter *WRIGHT & GOLD*].

128. Alexander, *supra* note 24, at § 6-64 at 6-100.

129. *State v. Slorah*, 118 Me. 203, 210, 106 A. 768, 771 (1919).



1. *Racial Prejudice Is Misconduct Outside the Scope of Rule 606(b)*

A policy argument can be made that the Law Court should consider racial prejudice to be severe misconduct that would take supporting testimony outside the scope of Rule 606(b). Because juror testimony would uncover this misconduct, it does not impeach the verdict itself and instead reveals gross misconduct. Three policies supporting Rule 606(b) are relevant here: (1) protecting the jury's thought process to "insulate jury value judgments from judicial scrutiny," (2) finality, and (3) certainty, which should be promoted to ensure that scarce judicial resources are not wasted.<sup>130</sup> However, a leading treatise on federal practice has argued that these policy goals cannot be considered absolute.<sup>131</sup> "Privacy is abandoned when jury value judgments are not in jeopardy or embrace values that are simply beyond the pale, such as racial discrimination."<sup>132</sup> While one of the great purposes of juries is to "control the biases of the government reflected in the law and by the judge, they also bring their own biases into the courtroom."<sup>133</sup> Even when those biases accurately reflect the values of the community, it is less desirable to protect them because "majority rule itself can produce oppression when the majority uses its values to demean the rights of minorities."<sup>134</sup> When the "jury supplants the judge as the source of oppression . . . for example, where a verdict is animated by racial prejudice, it may make sense from a policy standpoint to invade jury privacy to expose such abuse."<sup>135</sup>

It is difficult to find textual support for this argument because juror testimony could reveal statements made during deliberations that influenced whether jurors assented to the verdict.<sup>136</sup> However, in most instances, testimony could be limited to the objectively verifiable fact of whether the statement was made, as opposed to the subjective effect it had on the minds of jurors. From there, the Law Court could develop standards to consider whether specific statements are prejudicial, in a similar fashion to how the court handles extraneous information, which is subject to a rebuttable presumption of prejudice.<sup>137</sup>

2. *Constitutional Concerns Trump Rule 606(b)'s Policies*

In Maine, the right to a fair trial is protected by article 1, section 6 of our state constitution, as well as by the Sixth Amendment of the United States Constitution through the Fourteenth Amendment.<sup>138</sup> The right to "an impartial trial encompasses the right to be tried by an impartial jury,"<sup>139</sup> and justice requires that verdicts be the result of "honest deliberations absolutely free from prejudice or

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130. WRIGHT & GOLD, *supra* note 127, at § 6074.

131. *Id.*

132. *Id.* at § 6072.

133. *Id.*

134. *Id.*

135. *Id.*

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

137. Alexander, *supra* note 24, at § 9-6 at 9-13 (citing *State v. Kaler*, 1997 ME 219, ¶ 12, 691 A.2d 1226, 1230-31).

138. *State v. Thibeault*, 390 A.2d 1095, 1098 (Me. 1978).

139. *State v. Collin*, 441 A.2d 693, 696 (Me. 1982).

bias.”<sup>140</sup> As mentioned above, the Law Court has also said that “it would be a travesty on the administration of justice” if a defendant had a trial by a partial or biased jury.<sup>141</sup> For a verdict to be void, the jury does not need to be *actually* biased, “[i]f [bias] *may* have affected their ability to render an impartial verdict, it is sufficient.”<sup>142</sup> As a signal of how highly the Law Court values this right, it “will go beyond the technicalities of appellate review to ensure compliance with the guaranty of an impartial trial.”<sup>143</sup>

As a result, a strong argument can be made that Rule 606(b) must yield to the constitutional provisions protecting a fair trial, at least in some instances. “Eradication of the evil of state supported racial prejudice is at the heart of the Fourteenth Amendment,” which “suggests that the constitutional interests of the effected party are at their strongest when a jury employs racial bias in reaching its verdict.”<sup>144</sup> Correspondingly, the policy interests supporting Rule 606(b) would be weakest in these instances.<sup>145</sup> That is because prejudice “undermines the jury’s ability to . . . function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression.”<sup>146</sup>

Critics of this argument could turn to the 10th Circuit’s decision in *Benally*, which argued that concluding Rule 606(b) is unconstitutional as applied would force the court to engage in difficult line-drawing about juror misconduct and that it would also be “hard to see why, under this theory, *Tanner* should not have been decided the other way.”<sup>147</sup> However, there are three responses to *Benally*. First, *Tanner* may have been wrongly decided. For example, Justice O’Connor cited Wigmore to show that the general rule flatly bars juror testimony, yet Wigmore thought that juror intoxication was an exception to the rule that required juror testimony.<sup>148</sup> Second, racial prejudice is distinguishable from intoxication because the other procedural protections of the right to a fair trial—voir dire, observation during trial by the court and other jurors, and a post-trial hearing based on non-juror testimony—are less useful at routing out racial prejudice because it is difficult to observe and detect.<sup>149</sup> In fact, it may be that the only way to learn about racial prejudice is from juror testimony. Third, while the *Tanner* court thought process values outweighed the rights of individual defendants, it appears that the assumptions underlying that conclusion have proven to be wrong. Massachusetts, Washington State, New Jersey and several federal courts have all allowed juror testimony to prove racial prejudice during deliberations without any apparent ill effect.<sup>150</sup> As the Massachusetts Supreme Judicial Court said, to ignore evidence of

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140. *Slorah*, 118 Me. at 210, 106 A. at 771.

141. *Id.*

142. *Id.*

143. MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE 35 (1992) (citing *State v. Dipietrantonio*, 152 Me. 41, 48, 122 A.2d 414, 418 (1956)).

144. WRIGHT & GOLD, *supra* note 127, at § 6074.

145. *Id.*

146. *Id.*

147. *Benally*, 546 F.3d at 1241.

148. *Tanner*, 483 U.S. at 117 (1987) (citing 8 WIGMORE, EVIDENCE § 2352, at 696-97, 690 (McNaughton rev. 1961)).

149. *Henley*, 238 F.3d at 1120 n.13 (9th Cir. 2001) (citing *Dobbs*, 720 F. Supp. at 1573).

150. *See supra* Parts I & II.

racial prejudice “might well offend fundamental fairness.”<sup>151</sup> From there, it is a small step to conclude that the “right to use juror evidence necessarily implies a method to gather that evidence,” and that judges are able to supervise inquiries of jurors.<sup>152</sup>

### 3. *Racial Prejudice Can Be Characterized as an Outside Influence*

The text of Rule 606(b) specifically allows juror testimony to show “whether *extraneous prejudicial information* was improperly brought to the jury’s attention or whether any *outside influence* was improperly brought to bear upon any juror.”<sup>153</sup> In what appears to be an effort to avoid the constitutional arguments, some courts and scholars have argued that racial prejudice could be considered an outside influence, placing it squarely within one of the textual exceptions to the rule.<sup>154</sup> The obvious advantage to doing so is that it avoids the need to create an exception by way of judicial gloss, or to challenge the constitutionality of the rule as applied. However, it seems unlikely that a court would reach this conclusion unless it found racial prejudice repugnant to fundamental fairness. In that case, it makes little sense to apply strained readings to words like “outside” and “influence,” when it may be more sound analytically to ground a decision to admit juror testimony on fundamental fairness or the right to a fair trial. That being said, it is worth exploring the grist of this argument because it is entirely possible that it could be the most successful for the very reason that it avoids a constitutional problem.

The first step in the analysis requires classifying statements of racial prejudice as an “outside influence.” Before the adoption of the Rules of Evidence, the Law Court said “[a] juryman may testify to any facts bearing upon the question of the existence of the *disturbing influence*, but he cannot be permitted to testify how far that influence operated upon his mind.”<sup>155</sup> That same basic premise seems to be encapsulated in Rule 606(b).<sup>156</sup> The Law Court has defined extraneous information as “information introduced to the jury from outside the normal deliberative process.”<sup>157</sup> By way of example, the Law Court has held the following to be extraneous: information from a coworker who knew a defendant, a dictionary, a real estate appraisal book, a pamphlet with evidence from a former trial between the parties, and all information from jurors’ own investigations.<sup>158</sup> In contrast, the Law Court has said that “[i]nformation communicated among jurors during the deliberation process, however, is not considered to be extraneous, and may not be

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151. *Tavares*, 430 N.E.2d at 1208 n.25 (Mass. 1982) (quoting *Smith v. Brewer*, 444 F. Supp. 482, 490 (S.D. Iowa 1978)).

152. *Id.* at 1207 (quoting *Commonwealth v. Fidler*, 385 N.E.2d 513 (Mass. 1979)).

153. M.R. EVID. 606(b).

154. WRIGHT & GOLD, *supra* note 127, at § 6075. Victor Gold, *Juror Competency to Testify that a Verdict was the Product of Racial Bias*, 9 ST. JOHN’S J. LEGAL COMMENT. 125, 142-43 (1993); *Tobias*, 468 F. Supp. 1287.

155. *Driscoll v. Gatcomb*, 112 Me. 289, 290, 92 A. 39, 39 (Me. 1914).

156. *Cf.* FED. R. EVID. 606.

157. *State v. Fuller*, 660 A.2d 915, 917 (Me. 1994).

158. *Id.* at 917-18 (internal citations omitted).

inquired into even if the information is improper.”<sup>159</sup>

The Law Court’s approach characterizes “outside” based on legal, rather than spatial, notions, which is a view explored by a leading treatise, *Federal Practice and Procedure*, as well as supported by one of the treatise’s current authors, Professor Victor Gold.<sup>160</sup> Professor Gold wrote that “bias might be considered an outside influence if what is meant by that term is an influence on the verdict ‘outside’ of the record and the parameters of constitutionally acceptable values which the jury may use in its deliberations.”<sup>161</sup> As a result, outside “can be understood in a legal sense, referring to those influences that the law deems to be an improper basis for decisionmaking,” as opposed to a view of “outside” that is spatial, which would not permit juror testimony of racial prejudice, or even reading a newspaper in the jury room, because it “originates within the jury.”<sup>162</sup> Using a spatial notion of “outside influence” allows the jury, which is supposed to be a democratic institution, to become a vehicle for oppression.<sup>163</sup> Well before the exception for outside influences was codified in Rule 606(b), the Law Court allowed juror testimony of a “disturbing influence,” and it is difficult to think of an influence that is disturbing that would not also be outside the boundary of legally permissible conduct.<sup>164</sup> While the Law Court has, however, protected juror discussions of “personal information,” racial prejudice is arguably different from information.<sup>165</sup> The word “information” has a factual, newsy, or knowledge-based definition.<sup>166</sup> In contrast, racial discrimination and bias encompasses decisions or actions based on the assumption that race is a determining factor of behavior.<sup>167</sup>

Once a criminal defendant proves a juror was exposed to an outside influence, “a presumption of prejudice is established, which then shifts the burden to the State to demonstrate by clear and convincing evidence that the information did not prejudice the case.”<sup>168</sup> This is a high burden for the state, but one that makes sense in this context given the state’s goal of pursuing justice. Because Rule 606(b) and Maine case law would bar an inquiry into the effect of any outside influence on a juror’s mind, the court’s task is really to determine whether racially discriminatory statements were made and, if so, they would be prejudicial.<sup>169</sup>

Some courts have already labeled racial prejudice as an outside influence.<sup>170</sup> For example, in *Tobias v. Smith*, the United States District Court for the Western District of New York ordered a hearing and questioning of jurors based on allegations in a juror affidavit that other jurors made racially prejudiced statements

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159. *Id.* at 918.

160. WRIGHT & GOLD, *supra* note 127, at § 6075; GOLD *supra* note 154 at 142-43.

161. GOLD, *supra* note 154, at 142.

162. WRIGHT & GOLD, *supra* note 127, at § 6075.

163. *Id.*

164. *Driscoll*, 112 Me. at 290, 92 A. 915, at 39

165. *Fuller*, 660 A.2d at 918 (citing *Marr v. Shores*, 495 A.2d 1202, 1204-05 (Me. 1985)).

166. *Supra* note 78.

167. *Id.*

168. Alexander, *supra* note 24, at § 9-6 at 9-13 (citing *Coburn*, 1999 ME 28, 724 A.2d 1239; *Royal*, 590 A.2d at 524-25).

169. ME. R. EVID. 606(b); *Driscoll*, 112 Me. 915 at 290, 92 A. at 39.

170. See WRIGHT & GOLD, *supra* note 127, at § 6075 n.77.

during deliberations.<sup>171</sup> The court reached this conclusion after reviewing a juror affidavit that attributed to a white juror the statement that it was irrelevant that witnesses could not identify a photograph of the defendant because “[y]ou can’t tell one black from another. They all look alike.”<sup>172</sup> Further, the juror alleged that another juror said the panel should credit “two white victims as opposed to this black defendant.”<sup>173</sup> The court reasoned that a hearing was needed because the allegations in the affidavit were “sufficient to raise a question as to whether the jury’s verdict was discolored by improper influences and that they are not merely matters of jury deliberations.”<sup>174</sup> The heart of the court’s conclusion rested on the premise that “[t]here should be no injection of race into jury deliberations and jurors who manifest racial prejudice have no place in the jury room.”<sup>175</sup>

#### 4. *Juror Testimony Is Admissible to Prove a Juror Lied During Voir Dire*

The Law Court has said that a post-trial hearing is the appropriate forum to explore the accuracy of a juror’s voir dire response and whether there was any potential bias.<sup>176</sup> To obtain a new trial on these grounds, a litigant would have to show that “(i) the juror failed to honestly or correctly answer a material question, and (ii) a correct response would have provided a valid basis for a challenge for cause.”<sup>177</sup> The trial court will only order a new trial if “the nondisclosure prevented the discovery of juror bias as probably, not speculatively existent.”<sup>178</sup> However, counsel must exercise “due diligence” during voir dire, which means the parties cannot raise on appeal an error that could have been corrected earlier in the process.<sup>179</sup> Practically, for counsel, that means asking “specific questions during voir dire designed to elicit the concealed information from the prospective juror,” and notifying the court immediately “of any evidence they have, or should have, concerning the validity of the juror’s responses.”<sup>180</sup>

Two recent Maine cases demonstrate the Law Court’s approach to a motion for a new trial based on allegations that jurors lied or were less than accurate during voir dire. In *State v. Chesnel*, the Law Court held that silence in the face of vague voir dire questions is insufficient to show a juror failed to answer a material question, when the only evidence to show the juror lied was gathered in a post-verdict investigation overseen by the defendant’s lawyer.<sup>181</sup> Citing Rule 606(b) as a bar to juror testimony, the trial court denied the defendant’s request to allow jurors to testify in support of the investigator’s affidavit.<sup>182</sup> The Law Court

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171. 468 F.Supp at 1291.

172. *Id.* at 1289.

173. *Id.*

174. *Id.* at 1290.

175. *Id.* at 1291.

176. *Chesnel*, 1999 ME 120, ¶ 29, 734 A.2d at 1140.

177. *Id.*

178. *Id.*

179. *Id.* ¶ 31, 734 A.2d at 1140-41 (citing Robert G. Loewy, *When Jurors Lie: Differing Standards for New Trials*, 22 AM. J. CRIM. L. 733, 744 (1995)).

180. *Id.*

181. *Id.* ¶ 30, 734 A.2d at 1140.

182. *Id.* ¶ 19, 734 A.2d at 1137.

rebuked the trial court, saying not only that Rule 606(b) allows a post-verdict hearing in this instance, but also that it is the “appropriate forum in which the accuracy of a juror’s voir dire response and potential bias can be explored.”<sup>183</sup> However, because defense counsel had not joined a later request by the state to stay the appeal for an evidentiary hearing, the Law Court concluded that the evidence before it was insufficient to show a “nonanswer” was in fact evidence of a “dishonest or incorrect” answer.<sup>184</sup> While lawyers are ethically obligated to report any juror misconduct that comes to their attention,<sup>185</sup> the Law Court’s decision seems to be influenced by its view that post-verdict investigations are generally disfavored because they may frighten jurors and induce answers that are less than truthful.<sup>186</sup>

In *State v. Watts*, the Law Court held a juror did not engage in misconduct by failing to disclose an uncomfortable prior sexual experience that she later relayed to the jury during deliberations in a sexual assault case.<sup>187</sup> As is typical in a sexual assault case, the venire panel had to complete a confidential questionnaire in an attempt to screen out jurors who might have difficulty remaining impartial.<sup>188</sup> The parties agreed in advance that a “yes” answer to any of the questions<sup>189</sup> would automatically disqualify any juror from serving on the panel.<sup>190</sup> At a post-verdict hearing, a juror said that she recounted to the jury an uncomfortable sexual experience that required medical treatment, but that she had neither thought of it until deliberations, nor considered herself to be a sexual assault victim.<sup>191</sup> Based on this evidence, among other things, the trial court granted a motion for a new trial, which the Law Court reversed.<sup>192</sup> The Law Court reasoned that the juror never considered herself to be a victim of sexual assault or sexual abuse, which was the focus of one voir dire question, and that the defendant’s lawyer had “repeatedly implored the members of the jury to call on their own sexual experiences in

183. *Id.* ¶ 29, 734 A.2d at 1140 (citing *Loewy*, *supra* note 179, at 737).

184. *Id.* ¶ 30, 734 A.2d at 1140.

185. ME. R. PRO. CONDUCT 3.5(e) (effective Aug. 1, 2009); *see also* former ME. BAR RULE 3.7(f)(3).

186. *Chesnel*, 1999 ME 120, ¶¶ 24-27, 734 A.2d at 1138-40.

187. *Watts*, 2006 ME 109, ¶¶ 12, 20, 907 A.2d 147, 150, 152.

188. *Id.* ¶ 3, 907 A.2d at 148.

189. The questions were:

1. Have you or a close relative or friend ever been a victim of sexual abuse or sexual assault?
2. Have you or a close relative or friend ever been subjected to a charge of sexual abuse or sexual assault or been investigated for sexual abuse or sexual assault?
3. Have you and other family members ever been separated from one another due in whole or in part to sexual abuse or sexual assault or claims of sexual abuse or sexual assault?
4. Have you had any experiences in life that would make [it] difficult or impossible for you to consider evidence in a case of alleged sexual abuse or sexual assault objectively and impartially?
5. Is there any reason why you could not consider evidence in a case of alleged sexual abuse or sexual assault objectively or impartially?

*Id.* at n.1.

190. *Id.* ¶ 3, 907 A.2d at 148.

191. *Id.* ¶ 12, 907 A.2d at 150.

192. *Id.* ¶ 20-21, 907 A.2d at 152.

assessing the credibility of the witnesses.”<sup>193</sup> As a result, the Law Court concluded the trial judge “misapprehended the meaning of the evidence,” especially considering that the juror’s answers during voir dire were given before she knew about the facts of the case and before defense counsel implored the jurors to “view the evidence from the perspective of their own sexual experiences.”<sup>194</sup>

There are a few lessons to be learned for trial counsel. First, it is possible to make an argument that a juror lied during voir dire, but questions during voir dire must be specific, and silence alone may not be enough to show a juror withheld information or lied materially. Second, counsel should strongly consider asking specific questions during voir dire to avoid the problems faced by the defendant in *Chesnel*. Third, the context in which the questions are asked will prove to be very significant. It is worth noting that in *Watts*, the Law Court may have been reluctant to uphold the trial court’s ruling, in part because doing so would have essentially characterized the juror’s prior sexual experience as an assault, which is something the juror herself had not done.

#### IV. A PROPOSED AMENDMENT TO RULE 606(b)

Outside of Maine, courts dealing with allegations of racial prejudice during deliberations have struggled to accommodate the competing policies of Rule 606(b). Yet, the results so far have been mixed. Some courts have barred the evidence, while others have endeavored to strain words like “outside” and “influence,” to try to make the text of the rule accommodate our understood notions of fairness.

However, here in Maine, a better approach would be to amend the text of the rule. Doing so would provide clear guidance to the courts and an opportunity to consider this issue with an eye to the future. Amending the rule as proposed here would place this issue where it belongs—in the discretion of the trial court to determine, at least as an initial matter, whether racist comments prejudiced the defendant. The addition of an advisory comment could offer initial guidance to the bench and bar, and over time the Law Court could develop standards on a case-by-case basis.

A proposed amendment to the rule could read:

(b) Inquiry into Validity of Verdict or Indictment. 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 juror’s or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning any juror’s mental processes in connection therewith, except that a juror may testify on (1) the question whether extraneous prejudicial information was improperly brought to the jury’s attention, ~~or~~ (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether jurors made statements of racial prejudice. Nor may a juror’s affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received.

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193. *Watts*, 2006 ME 109, ¶ 18, 907 A.2d at 151-52.

194. *Id.* ¶ 20, 907 A.2d at 152.

Doing so would eliminate many of the problems discussed above. In particular, it would avoid any constitutional challenges to the rule or need for the courts to put a gloss on the rule. It would also avoid the need for a strained reading of “outside influence.” Lastly, it would also avoid the need for a back-door entrance to a motion for a new trial by trying to prove a juror lied materially during voir dire, which functionally challenges the validity of a verdict, even if that is not the explicit intention.

#### V. CONCLUSION

There is little doubt that racial prejudice taints some jury deliberations. As a result, it seems reasonable to conclude that this issue will eventually surface here in Maine. Considering the four arguments presented in support of juror testimony, it seems fairly unlikely that a court would be persuaded by them unless it first reached the conclusion that racial prejudice has no place in deliberations. Two arguments acknowledge this directly, and the Law Court would benefit from considering them. First, the court may want to hold that racial prejudice is a mental bias and misconduct, allowing testimony as a gloss on the rule. Second, the court might want to consider that Rule 606(b) could be unconstitutional in some instances. While these arguments address the issue directly, the first is better than the second because it provides a basis for a decision that does not require a direct challenge to the constitutionality of the rule.

However, a better approach would be for the advisory committee to amend Rule 606(b), so that the trial courts have a textual basis to rely on when considering the admissibility of post-verdict juror testimony that would prove racial prejudice animated deliberations. From there, the courts could develop standards for different types of comments to determine whether they should be deemed presumptively prejudicial, subject to a rebuttable presumption, or whether another standard is best. While there are certainly strong arguments in favor of absolute secrecy of deliberations, it seems clear that the fears of Justice O’Connor in *Tanner* are unfounded based on the examples of Massachusetts, New Jersey, and Washington State. In all three states, juror evidence is allowed to show racial prejudice during deliberations without any apparent ill effect.

Rule 606 serves a valuable purpose and should not be discarded because it protects the integrity of the jury process. However, racial prejudice during deliberations presents an instance when the rule must yield to notions of fairness. To conclude otherwise would leave hollow the right to a fair trial by denying defendants the only viable way to gather evidence to prove racial prejudice tainted jury deliberations.