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CONTAMINATING THE VERDICT: THE PROBLEM OF JUROR MISCONDUCT

BENNETT L. GERSHMAN[†]

I. INTRODUCTION

The jury has been hailed as one of the greatest attributes of democracy. Described as a “magistracy” by Alexis de Tocqueville two centuries ago,¹ the jury system affords ordinary citizens the opportunity to participate in the administration of justice.² These citizens act as the conscience of the community and provide a bulwark against governmental oppression.³ The Constitution guarantees a criminal defendant the right to a jury trial, understood preeminently as the right to a fair trial by an impartial jury.⁴ In two recent high-profile criminal trials in New York, the right to an impartial jury may have been compromised by questionable conduct by jurors.

Following their convictions in federal court for conspiracy, obstruction of justice, and making false statements to government officials, Martha Stewart and co-defendant Peter Bacanovic alleged that one of the jurors deliberately concealed material information from his jury questionnaire and thereby prevented the defendants from exposing possible biases he may have harbored against them.⁵ Defendants Stewart and Bacanovic also sought a new trial on the ground that jurors considered information during their deliberations that was not received in evidence.⁶ The defendants sought an evidentiary hearing to prove their allegations.

In the highly-publicized “Tyco International” trial in New York County Supreme Court, in which former Tyco chief executives L. Dennis Kozlowski and Mark H. Swartz were charged with grand larceny and falsifying business records, the media reported that during tense and lengthy jury deliberations one of the jurors, upon returning to the courtroom, made a friendly hand gesture to the defendants that appeared to signal “O.K.”⁷ The same juror earlier in the trial was admonished in a note from the court clerk for appearing to nod in approval when the defense had the floor.⁸ After the juror’s identity was disclosed in the

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1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 264 (2000 ed.).

2. *Powers v. Ohio*, 499 U.S. 400, 406 (1991).

3. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (labeling jury as “conscience of community”); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (characterizing jury as bulwark “to prevent oppression by the Government”).

4. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976) (stating that criminal defendant’s right to an impartial jury derives from both the Sixth Amendment and principles of due process); *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (“Due process requires that the accused receive a trial by an impartial jury free from outside influences.”).

5. *United States v. Stewart*, 317 F. Supp. 2d 426, 428 (S.D.N.Y. 2004).

6. *Id.*

7. David Carr & Adam Liptak, *In Tyco Trial, an Apparent Gesture Has Many Meanings*, N.Y. TIMES, March 29, 2004, at C1.

8. Andrew Ross Sorkin, *The Tyco Mistrial: The Overview: Tyco Trial Ended as a Juror Cites*

media, she apparently was contacted by an outside source who questioned her motives, forcing the judge to declare a mistrial.⁹ The issue of this juror's possible prejudgment and bias was never subjected to a formal investigation and evidentiary proceeding.

The problem of juror misconduct raised by the Stewart and Tyco cases is not unusual. Indeed, the issue of juror misconduct has been the subject of pre-trial skirmishing in the highly-publicized murder trial of Scott Peterson in California.¹⁰ Although a considerable body of scholarship on the jury system,¹¹ jury selection techniques,¹² and jury decision-making exists,¹³ the issue of juror misconduct has not been as closely or systematically studied. Cases and commentaries typically address isolated instances of aberrant and prejudicial conduct by jurors that arguably may have contaminated the trial. Rarely, however, do these discussions attempt to provide a coherent framework in which to analyze the diverse kinds of misconduct by jurors that may impair the integrity of the trial and the defendant's constitutional right to a fair trial by an impartial jury. Nor do these discussions examine in a comprehensive manner the available and appropriate legal responses to juror misconduct and the obstacles that may frustrate effective judicial inquiry.

Part II describes the myriad ways in which misconduct by jurors can contaminate a trial and verdict and the ability of courts to remedy such misconduct. This Part examines the case law in which criminal defendants have challenged their convictions on the basis of juror misconduct. Defendants have claimed that jurors were influenced by external contacts with third parties,¹⁴ exposed to extraneous, non-evidentiary information,¹⁵ engaged in contrived experiments and improper reenactments in the jury room,¹⁶ made dishonest and misleading statements during jury selection,¹⁷ engaged in conduct demonstrating bias and prejudgment,¹⁸ suffered from physical and mental impairments,¹⁹ engaged in pre-deliberation discussions of the evidence,²⁰ and willfully violated

Outside Pressure, N.Y. TIMES, April 3, 2004, at A1.

9. Jonathan D. Glater, *The Tyco Mistrial: The Chief*, N.Y. TIMES, April 3, 2004, at C5.

10. See *infra* notes 216-24 and accompanying text.

11. See, e.g., JEFFREY ABRAMSON, *WE, THE JURY* (1994); STEPHEN J. ADLER, *THE JURY* (1994).

12. See, e.g., V. HALE STARR & MARK MCCORMICK, *JURY SELECTION* (3d ed. 2001); JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION* (2d ed. 1990).

13. See, e.g., REED HASTIE, ET AL., *INSIDE THE JUROR* (1993); Judy Platania & Gary Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials*, 23 LAW & HUM. BEHAV. 471 (1999); Bobby J. Calder, Chester A. Insko & Ben Yandell, *The Relation of Cognitive and Memorial Processes to Persuasion in a Simulated Jury Trial*, 4 J. APPLIED SOC. PSYCHOL. 62 (1974); Stanley Sue, Ronald E. Smith & Cathy Caldwell, *The Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345 (1973).

14. See discussion *infra* Part II.A.

15. See discussion *infra* Part II.B.

16. See discussion *infra* Part II.C.

17. See discussion *infra* Part II.D.

18. See discussion *infra* Part II.E.

19. See discussion *infra* Part II.F.

20. See discussion *infra* Part II.G.

the trial court's legal instructions.²¹

Part III provides a framework to analyze the reasons for juror misconduct. This Part examines recent developments in criminal trial litigation that have encouraged jurors to take a more active role in the proceedings while at the same time protecting the juror's privacy and security. Given the easy accessibility of the Internet and the attempt by some jurors to thrust themselves into the public arena in highly publicized trials, there is a heightened danger that some jurors will misuse their power and contaminate the verdict. Moreover, strong public policies caution against probing verdicts and exposing juror misconduct.²² When a report of juror misconduct is made during the trial and before deliberations commence, the trial judge's ability to remedy the problem is greatest. When a report of juror misconduct is made during deliberations, as in the Tyco case, or after a verdict, as in the Stewart trial, overriding policy considerations may severely limit a trial court's ability to investigate and remedy the irregularity. As a consequence, the integrity of some verdicts may be undermined by a tainted jury.

The Article concludes that the problem of juror misconduct is not insignificant, and that courts have had mixed success in dealing with the problem effectively. Although the quest for the perfect trial may be illusory, the ability of some jurors to contaminate the proceedings may deprive a criminal defendant of a fair trial by an impartial jury.

II. JUROR BIAS AND MISCONDUCT

Bias and misconduct by jurors have been demonstrated in several different ways. Instances of jurors violating their oath and engaging in improper conduct have produced a significant body of case law analyzing the juror's conduct, the nature and seriousness of the impropriety, the extent to which the conduct may have prejudiced the trial, and the appropriate methods available to the trial judge to remedy the problem. The kinds of misconduct include the following: contacts by third parties with jurors; exposure by jurors to extra-judicial non-evidentiary materials; efforts by jurors to conduct experiments and reenactments to test the evidence; untruthful statements by jurors during the voir dire; conduct by jurors that evinces bias and prejudice; physical and mental impairment of jurors; pre-deliberation discussions by jurors; and efforts by jurors to repudiate the trial court's instructions on the law.

A. THIRD PARTY CONTACTS

It is fundamental that "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of

21. See discussion *infra* Part II.H.

22. See *infra* notes 36-39 and accompanying text.

counsel.”²³ Violations of these protections occur when third parties engage in private contacts or communications with jurors concerning matters pending before the jury. The leading case involving juror exposure to external influences is *Remmer v. United States*.²⁴ There, the jury foreman was contacted by an unknown caller and offered a bribe to acquit the defendant. Without advising the defense, the judge asked the FBI to investigate the matter and concluded that the approach was harmless. The Supreme Court remanded for a hearing, holding that a “presumption of prejudice” should apply to any extra-judicial contact with a juror about the case. The Court stated:

In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror . . . about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.²⁵

The Court in two subsequent jury-intrusion cases found inherent prejudice in the jury’s exposure during the trial to external influences. In *Turner v. Louisiana*,²⁶ the Court reversed a murder conviction on the ground that the jury was contaminated by the continuing association throughout the trial between the jurors and two deputy sheriffs in charge of the jury, who were also key prosecution witnesses. In *Parker v. Gladden*,²⁷ the Court reversed another murder conviction because a court bailiff, who had supervised the jury, told several jurors privately that the defendant was guilty.²⁸

The trial court’s authority to protect the jury from tampering is clear. When a court is informed during the trial that a juror has been contacted by an outside party or has engaged in conversations with a third party about the case, the court has a duty to investigate the matter.²⁹ A court should begin the inquiry with “the presumption that the jury is impartial.”³⁰ However, if a colorable claim of extrinsic influence on impartiality has been made, a court may be obligated to

23. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965).

24. 347 U.S. 227 (1954).

25. *Id.* at 229.

26. 379 U.S. 466 (1965).

27. 385 U.S. 363 (1966).

28. *See also* *Agnew v. Leibach*, 250 F.3d 1123 (7th Cir. 2001) (stating defendant denied right to fair trial before impartial jury as a result of substantive testimony by court bailiff who had been in charge of jury through most of the trial); *State v. Merricks*, 831 So. 2d 156 (Fla. 2002) (holding bailiff’s improper communication with deliberating jury is per se reversible error).

29. *United States v. Smith*, 26 F.3d 739, 760 (7th Cir. 1994) (stating “no judge could adequately assess [the allegation of impropriety] without investigation and factual findings”); *United States v. Davis*, 15 F.3d 1393, 1412 (7th Cir. 1994) (holding “[o]nce a defendant has made a sufficient showing that a juror may have been improperly influenced, the court must ascertain whether the juror was or was not tainted.”).

30. *United States v. Sedigh*, 658 F.2d 1010, 1014 (5th Cir. 1981).

investigate the allegation even in the absence of a defense request.³¹ A court is given extremely broad discretion to determine the appropriate way to handle such a report.³² The more serious and credible the allegation, the more extensive investigation would be required.³³ Frivolous or incredible allegations may be disposed of summarily. A pre-verdict inquiry generally is preferred.³⁴ However, there are problems with a formal, pre-verdict inquiry. When the subject matter of the contact involves a threat or a bribe, presumably by a person associated with the defendant, questioning jurors before the verdict may so focus their attention on the defendant's conduct that a jury otherwise capable of delivering an impartial verdict may no longer be able to do so.³⁵

When the allegation of an improper contact is made after the verdict, different considerations come into play. Courts are naturally reluctant "to 'haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct, or extraneous influences.'"³⁶ Courts also are justifiably concerned that post-verdict inquiries may inhibit jury-room discussions, deter jurors from returning an unpopular verdict, subject jurors to harassment, or burden courts with frivolous and time-consuming applications.³⁷ Moreover, by creating uncertainty in jury verdicts, the policy of finality is jeopardized.³⁸ Finally, the inadmissibility of juror testimony to impeach a verdict renders a factual determination of jury taint much more difficult.³⁹

31. *State v. Brown*, 668 A.2d 1288, 1302 (Conn. 1995) (stating that the "circumstances required a sua sponte preliminary inquiry by the trial court").

32. *United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 443 (1st Cir. 1993).

[I]n light of the infinite variety of situations in which juror misconduct might be discerned and the need to protect jurors and the jury process from undue imposition, the trial judge is vested with the discretion to fashion an appropriate and responsible procedure to determine whether misconduct actually occurred and whether it was prejudicial.

Id. See also *United States v. Williams*, 822 F.2d 1174, 1190 (D.C. Cir. 1987) (stating that the trial court has broad discretion over the methodology of inquiries into third party contacts with jurors).

33. *United States v. Corrado*, 227 F.3d 528 (6th Cir. 2000) (holding district court abused its discretion by failing to conduct an adequate evidentiary hearing into serious allegations of extraneous influences on jury).

34. *Smith*, 26 F.3d at 759.

35. *United States v. Ruggiero*, 928 F.2d 1289, 1301 (2d Cir. 1991).

36. *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989) (quoting *U.S. v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)) (refusing to allow defendant to investigate jurors merely to conduct fishing expedition).

37. *Tanner v. United States*, 483 U.S. 107, 120-21 (1987).

38. See *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915) ("[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside . . .").

39. See FED. R. EVID. 606(b). Rule 606(b) of the Federal Rules of Evidence, the "anti-impeachment rule," states:

Upon 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 or to 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.

Id.

Nevertheless, some investigation may be required, and an evidentiary hearing may be necessary. Here again, a trial court is vested with extremely broad discretion to fashion an appropriate and responsible procedure to determine whether misconduct actually occurred and whether it was prejudicial.⁴⁰

The continuing viability of *Remmer*'s "presumption of prejudice" test when jurors have been subjected to extra-judicial contacts has been questioned. The Supreme Court has suggested that the presumption should not be invoked automatically but should be reserved for instances involving very serious intrusions.⁴¹ Some lower courts have questioned whether the presumption still exists in light of intervening Supreme Court decisions.⁴² Moreover, even courts that continue to apply the presumption do so inconsistently.⁴³ There is plainly a strong justification for applying a presumption in cases of serious jury tampering.⁴⁴ Such conduct is pernicious, likely to poison the integrity of the process, and damaging to the appearance that juries behave fairly and impartially. Requiring the government to disprove prejudice in such cases is readily understandable. By the same token, applying an inflexible presumption in cases of technical, trivial, and arguably insignificant although improper

40. *United States v. Corrado*, 227 F.3d 528 (6th Cir. 2000) (stating the district court abused its discretion by failing to conduct an adequate evidentiary hearing into allegations of extraneous influences on jury); *United States v. Davis*, 177 F.3d 552 (6th Cir. 1999) (holding juror's mid-trial request to be excused from service because of fears for his safety and his revelation that he discussed those fears with fellow jurors should have prompted the trial court to do more than merely discharge juror; the trial court should have conducted an inquiry into the possible effect of juror's remarks on other jurors).

41. *United States v. Olano*, 507 U.S. 725, 739 (1993). "There may be cases where an intrusion should be presumed prejudicial." *Id.* See also *Rushen v. Spain*, 464 U.S. 114 (1983) (stating ex parte contact between trial court and juror reviewed for actual prejudice); *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.").

42. *United States v. Williams-Davis*, 90 F.3d 490, 496 (D.C. Cir. 1996) (suggesting that the *Remmer* test has been reconfigured by subsequent Supreme Court decisions); *United States v. Madrid*, 842 U.S. 1090, 1093 (9th Cir. 1988) (stating that post-*Remmer* Supreme Court decisions "firmly establish that a defendant must demonstrate 'actual prejudice' resulting from an ex parte contact to receive a new trial"); *United States v. Pennell*, 737 F.2d 521, 532-33 (6th Cir. 1984) (asserting that presumption of prejudice has been abrogated by recent Supreme Court decisions and that burden is now on the defendant to demonstrate prejudice). But see *United States v. Martinez*, 14 F.3d 543, 550 (11th Cir. 1994) ("As a matter of established law, the burden of proving prejudice does not lie with the defendant because prejudice is presumed the moment the defendant establishes that 'extrinsic contact with the jury in fact occurred.'").

43. Compare *United States v. Dutkel*, 192 F.3d 893 (9th Cir. 1999) (stating that although juror misconduct or other improper juror contacts may require evidence of prejudice to gain relief, jury tampering is a much more serious intrusion into the jury's processes and still gives rise to a presumption of prejudice) with *United States v. Sylvester*, 143 F.3d 923 (5th Cir. 1998) (opining that jury tampering should not necessarily be presumed prejudicial; the trial court must first assess the severity of the suspected intrusion, and only when the court determines that prejudice is likely should the government be required to prove its absence). See also *United States v. Frost*, 125 F.3d 346, 377 (6th Cir. 1997) (requiring the trial court to conduct a *Remmer* hearing only when alleged contact presents "a likelihood of affecting verdict;" courts should not presume that contact was prejudicial, and the defendant has the burden to show that unauthorized contact created actual juror bias).

44. *United States v. Smith*, 26 F.3d 739 (7th Cir. 1994) (alleging that juror was threatened); *United States v. Maree*, 934 F.2d 196, 202 (9th Cir. 1991) (stating that friends told juror that "people like [the defendant] should be incarcerated"); *United States v. Ianniello*, 866 F.2d 540 (2d Cir. 1989) (alleging that the judge and federal marshal pressured the jury to reach a verdict); *Stockton v. Virginia*, 852 F.2d 740, 743 (4th Cir. 1988) (relating that owner of diner told jurors "they ought to fry the son of a bitch"); *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988) (alleging that deputy sheriff told jurors that the defendant has a criminal record).

transgressions, may be an excessive and unjustifiable response.⁴⁵

If a court does invoke a presumption of prejudice when evidence of an outside contact with a juror has been shown, then the prosecution bears the ultimate burden of disproving prejudice.⁴⁶ A court should consider several factors in determining whether the presumption has been rebutted, including the nature and seriousness of the communication, whether the extrinsic communication was shared with other members of the jury, the manner in which it was discussed, the length of time it was available to the jury, whether the communication related to factual evidence not developed at the trial, whether it was disseminated before the verdict or during deliberations, and whether the communication was reasonably likely to influence the verdict, especially in light of the strength of the government's case.⁴⁷ The ultimate legal question for the court is whether there is a reasonable possibility that the extra-judicial contact could have affected the verdict.⁴⁸ If a court chooses not to apply a presumption of prejudice, then the court would evaluate the severity of the suspected intrusion, and only if the court determines that prejudice is likely would the government be required to prove its absence.⁴⁹

B. EXPOSURE TO EXTRA-JUDICIAL MATERIALS

A jury's exposure to extraneous information not presented as evidence in the courtroom can contaminate a verdict as readily as third-party contacts.⁵⁰ When such extrinsic information relates to a material issue in the trial, it can seriously impair a defendant's right to a fair trial and an impartial jury. Such information may reveal a defendant's guilt,⁵¹ prior criminal record,⁵² prior misconduct,⁵³ reputation for violence,⁵⁴ or a co-defendant's guilty plea.⁵⁵

45. *Williams-Davis*, 90 F.3d at 497 (stating "isolated" and "trivial" remarks demonstrated no "likelihood of prejudice" to justify assigning to government burden of proving harmlessness); *United States v. Gilsenan*, 949 F.2d 90, 95 n.7 (3d Cir. 1991) ("We do not find that the circumstances of this case are close to being sufficiently aggravated to give rise to a presumption of prejudice.").

46. *Remmer v. United States*, 347 U.S. 227, 229 (1954) (stating that the "burden rests heavily upon government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant").

47. *United States v. Blumeyer*, 62 F.3d 1013, 1016-17 (8th Cir. 1995).

48. *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991); *see also* *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986) (stating that the equivalent of asking whether it can be concluded beyond a reasonable doubt that extra-judicial information did not contribute to verdict).

49. *See* *United States v. Martha Stewart*, 317 F. Supp. 2d 432 (S.D.N.Y. 2004) (dismissing as "idle gossip" a post-trial allegation that a juror during the trial received an anonymous telephone call containing derogatory information about Ms. Stewart, including information that Ms. Stewart possessed a very expensive handbag and the high hourly rates she paid her lawyers); *see also* *United States v. Sylvester*, 143 F.3d 923 (5th Cir. 1998).

50. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

51. *United States v. Gaston-Brito*, 64 F.3d 11 (1st Cir. 1995) (noting that the case agent sitting at the prosecutor's table gestured toward the defendant when the prosecution's witness was asked to identify the person who stole the money).

52. *Jeffries v. Blodgett*, 5 F.3d 1180 (9th Cir. 1993); *Dickson v. Sullivan*, 849 F.3d 403 (9th Cir. 1988).

53. *United States v. Ruggiero*, 56 F.3d 647 (5th Cir. 1995).

54. *Lawson v. Borg*, 60 F.3d 608 (9th Cir. 1995).

55. *See* *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002); *United States v. Winkle*, 587 F.2d

Extrinsic information may come from a juror's personal knowledge,⁵⁶ the jury's exposure to mid-trial publicity,⁵⁷ or from official documents and records made available to the jury.⁵⁸ The distinction between intrusions from extra-judicial contacts by third parties and exposure to extra-judicial information ordinarily has no bearing in determining whether the verdict was tainted by the event.⁵⁹ The nature of extra-judicial information to which jurors have been exposed ranges from the very prejudicial to the insignificant. Exposures to external information that required a new trial included knowledge by one juror that was imparted to other jurors that the federal defendant had been convicted in state court for the same conduct;⁶⁰ jurors' pre-existing knowledge of specific facts surrounding the crime and defendant's connection to it;⁶¹ an opinion by two jurors who had professional expertise in medicine on whether defendant's explanation for blood loss was credible;⁶² and the trial court's acceding to the jury's request, after the close of the evidence and during deliberations, to return to the courtroom to observe the defendant's ears, which were covered during the trial for Spanish translation through headphones.⁶³

Jurors also may acquire extraneous information relating to the facts of the case or the meaning of certain legal principles by engaging in extra-judicial research. A juror's acquisition of extra-judicial, non-evidentiary knowledge, particularly when the juror disseminates the information to the other jurors, may produce sufficient prejudice to require reversal. Moreover, the ready accessibility of the Internet makes such research not only easy, quick, and extremely informative, but also potentially highly prejudicial. Examples of jurors engaging in extrinsic research include consulting an encyclopedia to confirm that a blood type is rare,⁶⁴ researching law treatises to ascertain the

705 (5th Cir. 1979); *United States v. Brown*, 913 F. Supp. 1324 (D. Minn. 1996).

56. *Solis v. Cockrell*, 342 F.3d 392, 393-94 (5th Cir. 2003) (stating that a juror told other jurors that the defendant and his brothers broke into people's homes); *Lawson*, 60 F.3d at 610 (relating that a juror told other jurors the defendant had a reputation for violence); *United States v. Howard*, 506 F.2d 865, 866 (5th Cir. 1975) (stating that the juror told other jurors the defendant had been in trouble before).

57. *United States v. Boylan*, 898 F.2d 230 (1st Cir. 1990) (noting that a magazine article about the defendant's attorney circulated in the jury room); *United States v. Littlefield*, 752 F.2d 1429 (9th Cir. 1985) (stating that a magazine article about material related to the case was left in jury room); *United States v. Aburahmah*, 827 F. Supp. 612 (D. Ariz. 1993) (relating that a newspaper was left in the jury room); *United States v. Caro-Quintero*, 769 F. Supp. 1564 (C.D. Cal. 1991) (stating that a newspaper was left in the jury room); *Keen v. State*, 639 So.2d 597 (Fla. 1994) (noting a magazine article in the jury room).

58. *United States v. Harber*, 53 F.3d 236 (9th Cir. 1995) (documenting a case where a copy of the case agent's report containing an opinion that the defendant was guilty had been left in the jury room); *United States v. Luffred*, 911 F.2d 1011 (5th Cir. 1990) (relaying the situation where a government chart that was not in evidence was brought into the jury room); *Hughes v. Borg*, 898 F.2d 695 (9th Cir. 1990) (stating that the police report inadvertently was left in the jury room); *United States v. Vasquez*, 597 F.2d 192 (9th Cir. 1979) (stating that the court file was inadvertently left in the jury room); *Osborne v. United States*, 351 F.2d 111 (8th Cir. 1965) (documenting a situation where the grand jury transcript depicting defendant's criminal history was made available to jury).

59. *Jeffries v. Blodgett*, 5 F.3d 1180, 1190 n.2 (9th Cir. 1993).

60. *United States v. Keating*, 147 F.3d 895 (9th Cir. 1998).

61. *Titus v. State*, 963 P.2d 258 (Alaska 1998).

62. *People v. Maragh*, 729 N.E.2d 701 (N.Y. 2000).

63. *United States v. Santana*, 175 F.3d 57 (1st Cir. 1999).

64. *Gibson v. Clanon*, 633 F.2d 851, 853 (9th Cir. 1980).

meaning of legal concepts such as “malice,”⁶⁵ or the possible penalties for first and second degree murder,⁶⁶ and gaining access to a dictionary to define prominent terms associated with the case, such as “enterprise” in a RICO prosecution,⁶⁷ or “callous” and “wanton” in a homicide trial.⁶⁸ *People v. Wadle* is a recent example of a jury verdict being tainted by a juror’s unauthorized use of the Internet to acquire information relevant to the case.⁶⁹ The defendant was charged with the shaking death of her 4-month-old step-grandchild.⁷⁰ The prosecution presented evidence that the defendant was taking the anti-depressant Paxil for stress and holiday season depression.⁷¹ During deliberations, a juror who had training as an emergency medical technician told the other jurors that Paxil was a “very strong drug” that was “used for people who are antisocial, violent, or suicidal.”⁷² Despite the trial judge’s denial of the jury’s request to consult a pharmacological reference, a juror downloaded from the Internet a description of Paxil and the next day read the description to the jury. The description stated that the drug is used to treat “mental depression, obsessive-compulsive disorder, panic disorder, and social anxiety disorder.”⁷³

Following a conviction, and learning of the jury’s action, the trial court conducted an evidentiary hearing and concluded that the juror’s use of the Internet constituted misconduct, but denied the defendant’s motion for a new trial on the ground that there was no reasonable possibility that the extraneous information affected the verdict.⁷⁴ The appellate court reversed, finding that the juror’s use of the Internet, in direct violation of the trial judge’s order, tainted the verdict.⁷⁵ The court noted that given the sharp conflict in the testimony, the jury may have used the specialized and complex terminology from the Internet to assess the defendant’s motive, state of mind, and credibility as a witness.⁷⁶ The fact that the defendant was taking an anti-depressant, anti-anxiety medication for panic attacks may have been a determining factor in the jury’s verdict.⁷⁷ Recognizing the problems created by the availability and widespread use of the Internet, the court instructed trial judges to emphasize to jurors that they “should not consult the Internet or any other extraneous materials” during the trial and deliberations.⁷⁸

As in the previous section, the court’s determination of whether a juror’s

65. *Marino v. Vasquez*, 812 F.2d 499, 502 (9th Cir. 1987).

66. *Bayramoglu v. Estelle*, 806 F.2d 880, 882 (9th Cir. 1986).

67. *United States v. Williams-Davis*, 90 F.3d 490, 502 (D.C. Cir. 1996).

68. *United States v. Cheyenne*, 855 F.2d 566, 567 (8th Cir. 1988).

69. 77 P.3d 764 (Colo. Ct. App. 2003), *aff’d*, 97 P.3d 932 (Colo. 2004).

70. *See id.* at 765-66.

71. *Id.* at 769-70.

72. *Id.* at 769.

73. *Id.* at 770.

74. *Id.*

75. *Id.* at 771.

76. *Id.*

77. *Id.*

78. *Id.*

exposure to extraneous information may have tainted the verdict may require the use of a presumption of prejudice. A jury is presumed to be impartial.⁷⁹ However, when a sufficient showing is made that jurors have been exposed to extrinsic evidence, some courts will apply a presumption of prejudice, particularly when the extraneous information is of a very serious nature.⁸⁰ Exposure to mid-trial publicity ordinarily is not considered sufficiently serious to require a court to presume prejudice.⁸¹ Nevertheless, if a court learns during the trial that jurors have been exposed to extraneous information about the trial, the court is required to conduct an appropriate inquiry, including an evidentiary hearing when necessary, to determine whether jurors were tainted by the exposure.⁸²

C. EXPERIMENTS AND REENACTMENTS

Jurors do not live in capsules. It is not expected that jurors should leave their common sense and cognitive functions at the door before entering the jury room. Nor is it expected that jurors should not apply their own knowledge, experience, and perceptions acquired in the everyday affairs of life to reach a verdict.⁸³ However, a juror's procurement of new knowledge gained through extra-judicial means may contaminate the deliberations and upset the verdict.⁸⁴ The line between the two sources of information, needless to say, is not easily drawn.

Courts are much more likely to recognize as appropriate a juror's knowledge gained from ordinary life experiences. For example, there is no impediment to a juror's knowledge gained from personal experience that a particular neighborhood is busy all night,⁸⁵ drawing a map to show the location of buildings in a certain area,⁸⁶ or describing a person's ability to make an accurate identification from a moving automobile.⁸⁷ These mental processes

79. *United States v. O'Keefe*, 722 F.2d 1175, 1179 (5th Cir. 1983).

80. *United States v. Lloyd*, 269 F.3d 228, 238-39 (3d Cir. 2001); *United States v. Harber*, 53 F.3d 236, 240 (9th Cir. 1995).

81. *United States v. Williams-Davis*, 90 F.3d 490, 501 (D.C. Cir. 1996). "The few decisions in the courts of appeals that explicitly address juror exposure to mid-trial publicity have not applied the *Remmer* presumption." *Id.*

82. See *United States v. Gaston-Brito*, 64 F.3d 11, 12 (1st Cir. 1995); *Waldorf v. Shuta*, 3 F.3d 705, 709-10 (3d Cir. 1993); *State v. R.D.*, 785 A.2d 450, 454-55 (N.J. Super. Ct. App. Div. 2001).

83. *Bibbins v. Dalsheim*, 21 F.3d 13, 17 (2d Cir. 1994) (stating that a juror's "observation concerning the life of this community is part of the fund of ordinary experience that jurors may bring to the jury room and may rely upon"); *People v. Szymanski*, 589 N.E.2d 148, 152 (Ill. App. Ct. 1992) ("[T]he law is well established that the jury has a right to consider the evidence in light of its own knowledge and observations in the affairs of life."); *People v. Brown*, 399 N.E.2d 51, 53 (N.Y. 1979). "It is not expected that their selection as jurors should cripple their cognitive functions." *Brown*, 399 N.E.2d at 53.

84. A jury's critical analysis of evidence by ordinary means, even if not specifically approved by the court, is not necessarily improper. See *United States v. Brewer*, 783 F.2d 841, 843 (9th Cir. 1986) (stating that the use of a magnifying glass to examine photographic evidence is no different than using corrective eyeglasses).

85. *Bibbins v. Dalsheim*, 21 F.3d 13, 15 (2d Cir. 1994).

86. *People v. Szymanski*, 589 N.E.2d 148, 151 (Ill. App. Ct. 1992).

87. *People v. Cooper*, 157 Cal. Rptr. 348, 353 (Cal. Ct. App. 1979).

involve no more than the application of everyday observations and common sense to the factual issues in the trial. By the same token, the application by a juror, trained as a professional engineer, of his technical knowledge of physics to refute an opinion offered by a defense witness also was permissible.⁸⁸

By contrast, a juror's deliberately contrived investigation or experiment that relates to a material issue in the trial ordinarily undermines the integrity of the verdict. Acquiring relevant factual information in this manner puts the jury in possession of evidence not presented at the trial and not subjected to confrontation and cross-examination. Examples of improper juror experimentation include a juror who placed a heavy load in the trunk of his car as a conscious way to determine whether such weight in a trunk would have imparted knowledge to the defendant of the presence of drugs,⁸⁹ a juror's experiment in attempting to fire a weapon while holding it in a position consistent with the defendant's account,⁹⁰ clocking how long it would take to drive a certain distance,⁹¹ and simulating a witness's use of binoculars to determine whether the witness could possibly have seen what he claimed he saw.⁹² The same principle that forbids jurors from acquiring specialized knowledge through extra-judicial means also accounts for the prohibition against jurors making unauthorized visits to locations described in the trial testimony.⁹³

The distinction between the proper use of everyday acquired knowledge to evaluate the evidence and the improper procurement of specialized knowledge to test the evidence often may be tenuous. For example, in *People v. Brown*,⁹⁴ the defendant was convicted by a New York jury of robbery for having been the driver of the escape car.⁹⁵ A police officer, the only prosecution witness to identify the defendant, testified that while driving with two other officers in an unmarked General Motors van, he spotted a car moving slowly with three occupants looking into store windows.⁹⁶ When the car stopped at a red light, the van pulled up alongside the driver's side and the officer, who was seated in the second seat of the van, looked at the driver for 37 seconds.⁹⁷ The police van followed the car and ultimately engaged in a running gun battle, which ended when the escape car rammed another vehicle and all three suspects escaped on foot.⁹⁸ The defendant was arrested later that evening after the police traced the

88. *State v. Mann*, 11 P.3d 564, 573 (N.M. Ct. App. 2000).

89. *United States v. Navarro-Garcia*, 926 F.2d 818, 820-21 (9th Cir. 1991).

90. *Marino v. Vasquez*, 812 F.2d 499, 503-06 (9th Cir. 1987).

91. *State v. Hartley*, 656 A.2d 954, 957 (R.I. 1995).

92. *People v. Castro*, 229 Cal. Rptr. 280, 281-82 (Cal. Ct. App. 1986).

93. *United States v. Sanchez-Sotelo*, 8 F.3d 202, 212-13 (5th Cir. 1993); *United States v. Posner*, 644 F. Supp. 885, 889-90 (S.D. Fla. 1986), *aff'd sub nom. United States v. Scharrer*, 828 F.2d 772 (11th Cir. 1987); *People v. Holmes*, 372 N.E.2d 656, 658-59 (Ill. 1978); *People v. Crimmins*, 258 N.E.2d 708, 709-10 (N.Y. 1970). *See also Sherman v. Smith*, 89 F.3d 1134, 1137-38 (4th Cir. 1996) (holding unauthorized visit improper but harmless).

94. 399 N.E.2d 51, 53-54 (N.Y. 1979).

95. *Id.* at 52.

96. *Id.*

97. *Id.*

98. *Id.*

escape car to him.⁹⁹

One of the key issues at trial was the officer's opportunity to accurately observe the defendant from his position in the van. After the verdict, it was learned that one of the jurors had conducted a test from her Volkswagen van, after which she told the other jurors that it was possible to see the face of a driver of an adjacent car.¹⁰⁰ Since this test supported the accuracy of the officer's testimony, the defendant claimed that it constituted misconduct requiring a new trial. At a hearing on the defendant's motion to set aside the verdict, the juror acknowledged conducting the test but said it was not pre-planned, had not been conducted at the scene of the incident, and was prompted by her curiosity to see if such identification was possible.¹⁰¹ The trial court found no irregularity in the juror's conduct, believing that the juror's test was merely an application of everyday perceptions and common sense to issues at the trial; the intermediate appellate court affirmed.¹⁰² The court of appeals reversed the conviction.¹⁰³ Acknowledging that jurors are allowed to apply their education, experience, and cognitive functions to sift the evidence and reach a verdict, the court concluded that the juror's conduct was not an application of everyday experience but rather a "conscious, contrived experimentation."¹⁰⁴ Importantly, the juror's test bolstered an issue that was critical to the prosecution's theory and, by communicating her conclusion to the other jurors, created a substantial risk that the verdict was tainted by the jury's use of the extrinsic experiment.

It is likely that the juror's test would have been acceptable if the juror had simply represented to the other jurors that her experience with vans confirmed the accuracy of the officer's observation. It is also likely that the jury would have been able to conduct an experiment in the jury room, for example, by placing a chair on a table to simulate the angle of observation by the officer. Moreover, it is commonly understood that jurors are typically much more observant of everyday events when a similar issue arises in a trial and are more likely to engage in unplanned observations or simulations similar to the events depicted at trial.¹⁰⁵

Reenactments in the jury room based on the jury's recollection of the testimony are usually allowed as an application of the jury's common sense and deductive reasoning to determine the truth of the facts in dispute.¹⁰⁶ The reenactments by jurors portrayed in the classic film *Twelve Angry Men*¹⁰⁷ illustrate the use of critical analysis by jurors of the evidence based on their

99. *Id.*

100. *Id.*

101. *Id.*

102. *People v. Brown*, 407 N.Y.S.2d 911, 914 (N.Y. App. Div. 1978).

103. *Brown*, 399 N.E.2d at 55.

104. *Id.* at 53.

105. *Id.* at 54-55 (Fuchsberg, J., concurring).

106. *United States v. Hephner*, 410 F.2d 930, 936 (7th Cir. 1969); *State v. Balisok*, 866 P.2d 631, 633 (Wash. 1994) (quoting *People v. Harris*, 84 A.D.2d 63, 105 (N.Y. App. Div. 1981)).

107. *TWELVE ANGRY MEN* (MGM/United Artists 1957).

knowledge and experience. One of the reenactments in the film involved a juror who, based on his experience as an adolescent familiar with the use of a switchblade knife, described the manner in which a switchblade knife ordinarily would be opened and thrust outward, thereby contradicting a key theory of the prosecution. Another reenactment in the film portrayed a juror simulating the time it would take for an elderly, crippled witness to go from his bedroom to the door of his apartment in order to determine whether the witness's estimate of the time it took to travel the distance – a critical issue in the trial – was accurate and believable.

However, if the reenactment is not merely a more critical analysis of the evidence but puts the jury in possession of extraneous information that might be based on flawed and irrelevant conclusions, the reenactment may be found improper. For example, a juror engaged in improper conduct by biting another juror to observe the resulting bruises.¹⁰⁸ Also improper was a reenactment by a juror with machinery that had been admitted into evidence but was operated under conditions wholly unlike the conditions relevant to the charges.¹⁰⁹

D. UNTRUTHFUL STATEMENTS DURING VOIR DIRE

The Sixth Amendment and the Due Process Clause guarantee a defendant the right to an unbiased jury.¹¹⁰ The voir dire of prospective jurors serves to protect a defendant's right to an impartial jury "by exposing possible biases, both known and unknown, on the part of potential jurors."¹¹¹ Bias of prospective jurors may be actual or implied.¹¹² Actual bias is a bias in fact; implied bias is a bias that is presumed as a matter of law.¹¹³ Actual bias may be established by showing that a juror failed to respond honestly to questions during voir dire and that a truthful response "would have provided a valid basis for a challenge for cause."¹¹⁴ As the Supreme Court observed, "[t]he necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious."¹¹⁵ Bias also may be presumed or imputed to a juror by establishing from the circumstances that the juror is unable to exercise independent and impartial judgment.¹¹⁶ Proof of juror bias necessitates a new trial.¹¹⁷

There is a presumption that prospective jurors answer the voir dire

108. *Miller v. Harvey*, 566 F.2d 879, 881 (4th Cir. 1977).

109. *United States v. Beach*, 296 F.2d 153, 158 (4th Cir. 1961).

110. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976).

111. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984).

112. *United States v. Wood*, 299 U.S. 123, 134 (1936).

113. *Id.*

114. See *McDonough Power Equip., Inc.*, 464 U.S. at 556. Challenges for cause require the challenging party to articulate clearly on the record the precise reason for challenging a prospective juror that demonstrates as a matter of law that the juror is not qualified to serve. See *Gray v. Mississippi*, 481 U.S. 648, 652 n.3 (1987).

115. *McDonough Power Equip., Inc.*, 464 U.S. at 554.

116. *Leonard v. United States*, 378 U.S. 544 (1964).

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

questions truthfully.¹¹⁸ There is also a presumption that a juror's failure to respond honestly during voir dire is indicative of bias.¹¹⁹ Prospective jurors for various reasons may give deliberately untruthful answers.¹²⁰ Deliberate concealment or misleading responses also may impair a party's right to meaningfully exercise challenges to the juror's ability to serve and ordinarily provide a basis for relief.¹²¹ However, only intentionally dishonest or misleading responses provide a basis for relief.¹²² Forgetfulness or honest mistakes, by contrast, do not establish dishonesty and are not grounds for a new trial.¹²³ As the Supreme Court noted, "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."¹²⁴

Determining whether a juror gave willfully false answers is a factual issue for the court to determine. Thus, in a prosecution of a defendant for sexual offenses against members of his family, a juror was found not to have been dishonest during voir dire examination when she denied being involved in a "similar incident," although she had been the victim of a date rape several years earlier.¹²⁵ By contrast, a juror's failure to disclose that she had been married to the prosecution's lead-off witness and that she had once been represented in a lawsuit by the trial prosecutor was dishonest and required an evidentiary hearing to enable the defendant to prove actual bias.¹²⁶ Similarly, a juror's failure to reveal that her brother-in-law was a government attorney, when asked that specific question during voir dire, was arguably dishonest, particularly in circumstances strongly suggesting that the juror wanted to sit on the case.¹²⁷ Also dishonest and not simply inadvertent were responses denying any acquaintance with the defendant,¹²⁸ denying any experience with explosives,¹²⁹ denying being the victim of domestic physical abuse,¹³⁰ and concealing familiarity with the case or having discussed the case with others.¹³¹

The above principles were applied in *United States v. Martha Stewart*,¹³²

118. *United States v. Droge*, 961 F.2d 1030, 1036 (2d Cir. 1992).

119. *United States v. North*, 910 F.2d 843, 904 (D.C. Cir. 1990).

120. *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989); *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984).

121. *Williams v. Taylor*, 529 U.S. 420 (2000); *United States v. Greer*, 285 F.3d 158 (2d Cir. 2000); *Green v. White*, 232 F.3d 671 (9th Cir. 2000); *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990); *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988); *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981).

122. *Gonzalez v. Thomas*, 99 F.3d 978, 984 (10th Cir. 1996).

123. *United States v. Williams-Davis*, 90 F.3d 490, 503 (D.C. Cir. 1996); *United States v. Edmond*, 43 F.3d 472, 474 (9th Cir. 1994).

124. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984).

125. *Gonzalez*, 99 F.3d 978.

126. *Williams*, 529 U.S. at 420-21.

127. *United States v. Colombo*, 869 F.2d 149, 150 (2d Cir. 1989).

128. *United States v. Perkins*, 748 F.2d 1519, 1522 (11th Cir. 1984).

129. *United States v. St. Clair*, 855 F.2d 518, 522 (8th Cir. 1988).

130. *Burton v. Johnson*, 948 F.2d 1150, 1153 (10th Cir. 1991).

131. *In re Hitchings*, 860 P.2d 466 (Cal. 1993) (en banc).

132. 317 F. Supp. 2d 432 (S.D.N.Y. 2004).

where the defendants sought a new trial, claiming that a juror deliberately concealed material information in his jury questionnaire and that his conduct "betray[ed] a pattern of deliberate omissions that concealed his bias against them."¹³³ The defendants claimed that the juror concealed a prior arrest and arraignment, that he and his family had been sued in court, that his son had been convicted of attempted robbery, that the juror had been accused of embezzlement, and that he was terminated from his job for wrongdoing. After carefully examining each of the claims, the trial court concluded that although two of the juror's answers were dishonest, the defendants did not show that truthful answers would have provided the basis for a challenge for cause based on a finding of bias. For example, even if the juror had deliberately concealed his arrest, the fact of his arrest would have provided no basis for a challenge for cause because it would not have revealed a bias sufficient to support such a challenge.¹³⁴ By the same token, the failure to disclose his son's conviction would not justify an inference that the juror would be biased against the defendants.¹³⁵ In denying an evidentiary hearing, the court concluded that the juror's "lack of candor," however troubling, "in the absence of evidence of bias, [did] not undermine the fairness of defendants' trial."¹³⁶

E. BIAS AND PREJUDGMENT

Apart from showing that a juror gave dishonest or misleading answers during voir dire, a party still may be entitled to relief by demonstrating that a juror harbors an actual bias or that a bias may be imputed to the juror based on the juror's conduct and the surrounding context and circumstances.¹³⁷ As noted above, the ability to substantiate a claim of bias may be hampered by the rule against impeaching a juror's verdict,¹³⁸ which would probably disallow testimony by jurors concerning negative or inappropriate comments made by a juror during deliberations.¹³⁹ In *Smith v. Phillips*,¹⁴⁰ the Supreme Court suggested that only proof of actual bias could be the basis for a new trial.¹⁴¹ The Court stated: "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."¹⁴² In *Smith*, a juror submitted during the trial an application for

133. *Id.* at 438.

134. *Id.* at 439.

135. *Id.*

136. *Id.* at 443.

137. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (Blackmun, J., concurring).

138. *See supra* notes 36-45 and accompanying text.

139. *See United States v. Bolling*, 900 F.2d 926, 935 (6th Cir. 1990) (stating that ambiguous testimony from non-jurors that one juror stated, "It's all bullshit," was not capable of corroboration by testimony of jurors).

140. 455 U.S. 209 (1982).

141. *Id.*

142. *Id.* at 215. As authority for this principle the Court cited *Chandler v. Florida*, 449 U.S. 560 (1981); *Remmer v. United States*, 347 U.S. 227 (1954); and *Dennis v. United States*, 339 U.S. 162 (1950).

employment as an investigator with the same district attorney's office that was prosecuting the case.¹⁴³ At a post-trial hearing on whether to grant a new trial for juror bias, the trial court found that the letter "was indeed an indiscretion" but that the letter did not demonstrate bias or prejudice.¹⁴⁴ Thereafter, on a petition for habeas corpus, the federal district court granted the writ by imputing bias to the juror as a matter of due process, finding that "the average man in [the juror's] position would believe that the verdict of the jury would directly affect the evaluation of his job application."¹⁴⁵ The Court of Appeals for the Second Circuit affirmed.¹⁴⁶ However, the Supreme Court rejected the conclusion that bias should be imputed to this juror and made the following observation:

[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.¹⁴⁷

Under *Smith*, proof of actual bias ordinarily must be demonstrated to obtain relief.¹⁴⁸ Nor did the Court believe that proof of an actual bias would be difficult to show. As the Court observed, "one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter."¹⁴⁹ However, the Court's confidence that a juror can be trusted to acknowledge an actual bias may be questioned.¹⁵⁰

Apart from proving an actual bias, there is a suggestion in *Smith* that proof of an "implied bias" also may be an appropriate basis for relief in "extreme" or "exceptional" situations.¹⁵¹ Such situations might include the revelation that a

143. *Phillips*, 455 U.S. at 215.

144. *Id.* at 213-14.

145. *Id.* at 214 (quoting *Phillips v. Smith*, 485 F. Supp. 1365, 1371-72 (S.D.N.Y. 1980)).

146. *Phillips v. Smith*, 632 F.2d 1019 (2d Cir. 1980).

147. *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

148. *Id.* at 216. See also *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002) (holding that the trial court erred in empanelling a juror whose answers displayed actual bias, resulting in a jury that failed to meet Sixth Amendment impartiality requirement).

149. *Phillips*, 455 U.S. at 217 n.7 (quoting *Dennis v. United States*, 339 U.S. 162, 171 (1950)).

150. See *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558 (1984) (Brennan, J., concurring) ("[T]he bias of a juror rarely will be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it . . .'). For an illustration of Justice Brennan's concern, see *Hunley v. Godinez*, 975 F.2d 316 (7th Cir. 1992) (relaying the story that sequestered jurors who were almost evenly divided on the defendant's guilt for murder committed during a burglary returned a quick verdict of guilty the morning after several jurors' rooms had been burglarized, but the jurors claim that the burglaries did not influence their quick decision).

151. *Phillips*, 455 U.S. at 221-22 (O'Connor, J., concurring). Whether a juror's bias may be implied from the circumstances is a question of law for the court, and doubts regarding a juror's bias should be resolved against the juror. See *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991). For an example of implied bias, see *Leonard v. United States*, 378 U.S. 544 (1964) (prospective jurors who

juror is an employee of the prosecuting agency, is a close relative of one of the participants in the trial, or was a witness to or involved in the criminal transaction.¹⁵² Other extreme situations that might provide the basis for imputing bias include a murder-burglary conviction rendered shortly after several of the sequestered jurors themselves had been burglarized,¹⁵³ a guilty verdict against a defendant announced in the presence of a jury panel about to try the defendant for the same crime,¹⁵⁴ a verdict against a defendant for the crime of escape rendered shortly after several of the same jurors convicted a co-defendant of the same offense,¹⁵⁵ a verdict polluted by a shocking display of a jury's racial and ethnic bigotry,¹⁵⁶ and a murder conviction involving the defense of battered-wife syndrome where a juror herself had been involved in an abusive family situation.¹⁵⁷

A trial court faced with an allegation of juror bias has a duty to carefully investigate the claim.¹⁵⁸ A court has broad "discretion to determine the extent and nature of its inquiry into allegations of juror bias."¹⁵⁹ Indeed, the failure to conduct a voir dire of the other jurors may be reversible error when a juror's highly prejudicial responses may have tainted the other jurors.¹⁶⁰ A court has a special responsibility to investigate an allegation of racial bias on the part of a juror and should conduct an extensive inquiry that includes detailed questioning of the person who made the allegation and a thorough questioning of the juror who is alleged to have exhibited the bias.¹⁶¹ A court has various options when

heard the trial judge announce the defendant's guilty verdict in the first trial should be automatically disqualified from sitting on a second trial involving similar charges).

152. *Phillips*, 455 U.S. at 222 (O'Connor, J., concurring). "In those extraordinary situations involving implied bias, state-court proceedings resulting in a finding of 'no bias' are by definition inadequate to uncover the bias that the law conclusively presumes." *Id.* (O'Connor, J., concurring).

153. *Hunley*, 975 F.2d at 320 ("Our holding is limited to the very unique facts stated herein and that this case should not be construed as adopting a *per se* rule that the court presume bias when a juror is victimized during trial.").

154. *Leonard v. United States*, 378 U.S. 544 (1964).

155. *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001).

156. *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (stating that an inquiry conducted by the trial judge to dispel proof of actual bias was "superficial at best" for "[i]t is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could have thus expunged themselves of the pernicious taint of anti-Semitism"). Allegation of racial prejudice may constitute extraneous information and, therefore, an exception to the rule against allowing jurors to testify to impeach their verdict. *See State v. Bowles*, 530 N.W.2d 521, 536 (Minn. 1995). *But see Fields v. Woodford*, 309 F.3d 1095 (9th Cir. 2002) (holding post-trial juror declarations concerning other jurors' racial bias inadmissible).

157. *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991).

158. *Smith v. Phillips*, 455 U.S. 209, 215-17 (1982).

159. *United States v. Corbin*, 590 F.2d 398, 400 (1st Cir. 1979) (stating that the court adequately inquired into an allegation that a juror was overheard stating during jury selection that the defendant was guilty).

160. *Mach v. Stewart*, 129 F.3d 495, 498 (9th Cir. 1997); *United States v. Barnes*, 604 F.2d 121, 143-44 (2d Cir. 1979) (following an allegation that during recess a juror made a physical gesture toward defense counsel indicating clear distaste, the court gave the jury a general instruction but properly declined to question the individual juror or conduct voir dire of the jury, which might have engendered resentment).

161. *See United States v. McClinton*, 135 F.3d 1178 (7th Cir. 1998) (holding that a court's voir dire of the jury with participation of counsel after two jurors made racially biased comments was a reasonable response to a difficult situation); *State v. Varner*, 643 N.W.2d 298 (Minn. 2002) (finding that

faced with an allegation of juror bias. The court must declare a mistrial if it concludes that the jury has been tainted,¹⁶² may dismiss the offending juror and replace the juror with an alternate,¹⁶³ and, in some jurisdictions, allow the parties to stipulate to a jury of less than twelve persons.¹⁶⁴ The judge's handling of the matter is reviewed for an abuse of discretion.¹⁶⁵

F. PHYSICAL AND MENTAL INCOMPETENCE

A necessary corollary of the right to an impartial jury is the right to a jury in which all of its members are physically and mentally competent.¹⁶⁶ Proof that a juror was mentally impaired, intoxicated, or unconscious would appear to cast grave doubt on the integrity of the verdict.¹⁶⁷ When such claims are raised during the trial, the judge is in a position to correct the problem and permit the trial to continue.¹⁶⁸ When such claims are raised after the verdict, attempts to take corrective action become much more difficult. As noted earlier, the courts are reluctant to allow a post-verdict inquiry into a juror's mental state.¹⁶⁹ The rule against admitting juror testimony to impeach a verdict is based on several policy considerations: the need for finality of the process, the interest in encouraging "full and frank discussion in the jury room," the interest in encouraging jurors to return an unpopular verdict without fear of community resentment, and the interest in inspiring the "community's trust in a system that relies on the decisions of laypeople."¹⁷⁰ These interests routinely prevent jurors

the court committed reversible error by failing to question all jurors about one juror's racial comment to the other jurors); *State v. Santiago*, 715 A.2d 1 (Conn. 1998) (stating that the court has a special responsibility to investigate an allegation of racial bias by jurors).

162. *United States v. Heller*, 785 F.2d 1524 (11th Cir. 1986).

163. *United States v. Webster*, 750 F.2d 307, 337 (5th Cir. 1984); *Corbin*, 590 F.2d at 400.

164. *United States v. Shenberg*, 89 F.3d 1461, 1472-73 (11th Cir. 1996). See FED. R. CRIM. P. 23(b) (allowing parties to stipulate to a jury of less than twelve persons at any time prior to verdict and holding that court may excuse a juror for cause during deliberations and accept a verdict by the remaining eleven jurors).

165. *United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001) (finding abuse of discretion for the court's failure to question a juror to determine whether that juror was honest and unprejudiced); *United States v. Thompson*, 744 F.2d 1065, 1068 (4th Cir. 1984) (finding abuse of discretion for failure to dismiss a juror who became emotionally upset and equivocated about her ability to remain impartial); *United States v. Taylor*, 554 F.2d 200, 202 (5th Cir. 1977) (finding abuse of discretion for failure to dismiss a juror who expressed fear of the defendants and whose reluctance to continue to sit, even if dismissal required a declaration of mistrial).

166. *Tanner v. United States*, 483 U.S. 107, 126 (1987); *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912).

167. See *Peters v. Kiff*, 407 U.S. 493, 501 (1972) (stating that due process requires jurors be sane and competent during trial).

168. *Perez v. Marshall*, 119 F.3d 1422 (9th Cir. 1997) (upholding the trial court's removal of a dissenting juror during deliberations based on the juror's emotional instability); *Lee v. United States*, 454 A.2d 770, 773 (D.C. 1982) (rejecting a motion for mistrial but agreeing to dismiss an intoxicated juror or to recess the trial for three days).

169. See *supra* notes 36-39 and accompanying text. *Tanner*, 483 U.S. at 120-21; *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915). See also FED. R. EVID. 606(b) (distinguishing between inadmissibility of juror testimony relating to internal matters of a juror's mental or emotional state that may have influenced the verdict and admissibility of statements relating to extraneous prejudicial information or outside influence or pressure brought to bear upon juror).

170. *Tanner*, 483 U.S. at 120-21.

from giving testimony to invalidate a verdict based on allegations that jurors considered prejudicial and irrelevant matters,¹⁷¹ may have engaged in bizarre behavior during trial,¹⁷² were inattentive during the testimony,¹⁷³ did not understand the judge's instructions,¹⁷⁴ or disregarded those instructions.¹⁷⁵ These policy reasons are often strong enough to overcome post-verdict proof that a juror was mentally impaired and to justify a court's refusal to conduct any formal investigation into her condition.¹⁷⁶

The same policy considerations supported the Supreme Court's decision in *Tanner v. United States*,¹⁷⁷ upholding the trial judge's refusal to conduct an investigation into broad allegations that a jury "was on one big party" and numerous claims alleging jurors' excessive use of alcohol and drugs.¹⁷⁸ The Court rejected the defendant's contention that substance abuse constituted an improper external influence.¹⁷⁹ According to the Court, "drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or lack of sleep."¹⁸⁰ As an internal matter, ingestion of drugs and alcohol was within the rule prohibiting juror testimony to upset a verdict.

G. PRE-DELIBERATION DISCUSSIONS

Whereas some courts and commentators have argued that it should be permissible for jurors to have intra-jury discussions about the case during the trial,¹⁸¹ it is well-settled that jurors are forbidden to discuss the case before they

171. *United States v. Gonzalez*, 227 F.3d 520 (6th Cir. 2000) (stating information provided by juror that during deliberations, several jurors mentioned that it would not matter if they convicted defendant because he was charged with white collar crime and would only get a slap on the wrist was inadmissible; also inadmissible was jury foreman's alleged statement that defense counsel always represented guilty clients).

172. *United States v. Beltempo*, 675 F.2d 472, 481 (2d Cir. 1982) (stating juror wrote love letter to prosecutor, sent her a picture of himself, and invited her to dinner).

173. *Virgin Islands v. Nicholas*, 759 F.2d 1073, 1080 (3d Cir. 1985) (relating that juror claimed hearing impairment interfered with his ability to understand the evidence); *United States v. Pellegrini*, 441 F. Supp. 1367 (E.D. Pa. 1977), *aff'd*, 586 F.2d 836 (3d Cir. 1978) (claiming that juror did not understand the English language).

174. *Davis v. United States*, 47 F.2d 1071 (5th Cir. 1931) (rejecting testimony that jurors had not heard judge's instructions).

175. *United States v. Martinez-Monoivais*, 14 F.3d 1030, 1036 (5th Cir. 1994) (rejecting juror's claim that other jurors stated that if defendant had not been guilty he would have taken stand); *Devoney v. State*, 717 So. 2d 501 (Fla. 1998) (stating testimony by juror that other jurors violated trial court's instruction not to consider certain inadmissible evidence cannot be considered as basis for new trial).

176. *United States v. Dioguardi*, 492 F.2d 70, 80 (2d Cir. 1974) (suggesting that post-verdict inquiry would be allowed if there existed "substantial if not wholly conclusive evidence of incompetency," as shown by an adjudication of insanity or mental impairment closely in advance of trial). *But see Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir. 1980) (reversing and remanding for hearing into juror's alleged incompetence after sufficient showing was made that juror suffered from mental incompetency during trial).

177. 483 U.S. 107 (1987).

178. *Id.* at 115.

179. *Id.* at 123.

180. *Id.* at 122.

181. *See United States v. Williams-Davis*, 90 F.3d 490, 505 n.1 (D.C. Cir. 1996) (citing critics of the prohibition).

have heard all of the evidence, closing arguments, and the court's legal instructions, and have begun formally deliberating as a collective body.¹⁸² Judges routinely admonish juries at the outset and throughout the trial to not discuss the case among themselves prior to deliberations.¹⁸³ There are several reasons for this admonition. Premature discussions are likely to be unfavorable to a defendant, incline jurors who expressed opinions prematurely to adhere to those opinions, impair the value of collective decision-making, lack the context of the court's legal instructions, prejudice a defendant who may not have had the opportunity to present evidence, and benefit the prosecution by reducing the burden of proof.¹⁸⁴

Courts recognize a distinction between extra-judicial influences on a jury and intra-jury misconduct.¹⁸⁵ External influences completely evade the safeguards of the judicial process, whereas internal violations do not raise the fear that the jury based its decision on reasons other than the trial evidence.¹⁸⁶ Although some courts have applied a *Remmer*-like presumption of prejudice to extra-judicial misconduct,¹⁸⁷ no such presumption applies to internal misconduct.¹⁸⁸ Trial judges are afforded very broad discretion to determine the method for handling claims of internal misconduct discovered during the trial.¹⁸⁹ Courts conducting an inquiry during the trial typically conduct an interview of the jurors collectively or individually with the lawyers present,¹⁹⁰ or interview the jurors outside the presence of counsel.¹⁹¹ However, when an allegation is made during the trial that jurors discussed the case, a court's complete failure to evaluate the nature of the misconduct or the existence of prejudice ordinarily is an abuse of discretion mandating a new trial.¹⁹²

182. *Id.*; *United States v. Resko*, 3 F.3d 684, 688-89 (3d Cir. 1993).

183. *United States v. Wiesner*, 789 F.2d 1264, 1269 n.3 (7th Cir. 1986) (holding that such admonishment is a "critical and important duty and cannot be over-emphasized").

184. *Resko*, 3 F.3d at 689-90.

185. *United States v. Sotelo*, 97 F.3d 782, 796 (5th Cir. 1996). "This circuit has afforded trial courts broader discretion in dealing with intrinsic influences due to jury misconduct than it has afforded in cases of extrinsic influences . . . because it would hamper the judge's discretion." *Id.* See also *Resko*, 3 F.3d at 690 (stating that "there is a clear doctrinal distinction between evidence of improper intra-jury communications and *extra-jury* influences").

186. *Resko*, 3 F.3d at 690.

187. See *supra* notes 41-49 and accompanying text.

188. *Sotelo*, 97 F.3d at 796-97; *United States v. Caldwell*, 83 F.3d 954, 956-57 (8th Cir. 1996).

189. Compare *United States v. Williams-Davis*, 90 F.3d 490, 505 (D.C. Cir. 1996) (stating that a decision of a trial judge not to hold a post-trial hearing on a claim of pre-deliberation discussions was "clearly within that discretion") with *Resko*, 3 F.3d at 684 (3d Cir. 1993) (finding abuse of discretion for failure to conduct proper inquiry on a claim of premature discussions). For other cases upholding convictions despite evidence of premature discussions, see *Stockton v. Virginia*, 852 F.2d 740 (4th Cir. 1988), *United States v. Wiesner*, 789 F.2d 1264 (7th Cir. 1986), and *United States v. Chiantese*, 582 F.2d 974 (5th Cir. 1978).

190. *Sotelo*, 97 F.3d at 794-96.

191. *United States v. Webster*, 750 F.2d 307, 336-37 (5th Cir. 1985) (stating that a trial court faced with a jury tainted from within had broad discretion to interview jurors without the participation of counsel because of the "potentially disruptive and coercive effect" of interrogation by attorneys and holding that the court may even refuse to consult counsel entirely).

192. *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993). But see *United States v. Klee*, 494 F.2d 394-96 (9th Cir. 1974) (finding no abuse of discretion by the trial judge for failure to investigate allegations of misconduct).

By contrast, when an allegation of pre-deliberation discussions by the jury is raised for the first time after the verdict, a court may properly refuse to conduct any inquiry.¹⁹³ However, the anti-impeachment rule does not bar juror testimony regarding pre-deliberation discussions discovered during the trial.¹⁹⁴ Although a court could properly question jurors after the verdict regarding pre-deliberation conversations, a court "is virtually automatically justified in declining to pursue such an inquiry."¹⁹⁵

H. NULLIFICATION

Jury nullification is understood as a refusal by a jury to apply the law as instructed by the court. Nullification has been condemned as "lawless,"¹⁹⁶ an "aberration,"¹⁹⁷ and a "denial of due process."¹⁹⁸ As one court observed,

[a] jury has no more "right" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant "guilty," and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law.¹⁹⁹

The dangers of nullification were described by Judge Simon Sobeloff in an oft-quoted statement:

To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos. No legal system could long survive if it gave every individual the option of disregarding with impunity any law which by his personal standard was judged morally untenable. Toleration of such conduct would not be democratic, as appellants claim, but inevitably anarchic.²⁰⁰

It is commonly recognized that juries have the power to nullify the law, although they do not have the right to do so.²⁰¹ It has thus been the settled rule

193. See *Tanner v. United States*, 483 U.S. 107, 108 (1987); *United States v. Caldwell*, 83 F.3d 954 (8th Cir. 1996); *State v. Reiner*, 731 N.E.2d 662 (Ohio 2000).

194. *Sotelo*, 97 F.3d at 797 (holding that an anti-impeachment rule was no bar to juror testimony regarding juror discussions discovered during the trial); *Resko*, 3 F.3d at 684 (finding abuse of discretion for failure to conduct a more searching inquiry into juror discussions discovered during trial).

195. *United States v. Williams-Davis*, 90 F.3d 490, 504 (D.C. Cir. 1996). See also *Caldwell*, 83 F.3d at 956 (determining the judge properly precluded juror testimony in a post-verdict proceeding regarding intra-jury remarks made prior to deliberations, such as "this is just a bunch of crap" and "I've heard all of this I need to hear"); *Reiner*, 731 N.E.2d at 662 (finding no error in the court's refusal to conduct an inquiry into allegations of improper jury discussions during trial that were raised for first time after the verdict).

196. *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983).

197. *United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983).

198. *Washington*, 705 F.2d at 494.

199. *Id.*

200. *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969). But see *United States v. Dougherty*, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) (stating that "[nullification] permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice"); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910) (arguing that jury nullification is "the greatest corrective of law in its actual administration").

201. *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920). Justice Holmes stated that "the jury has the power to bring in a verdict in the teeth of both law and facts." *Id.*

in federal courts and virtually all state courts for over a century that the jury's function is to accept the law that is given to it by the court and to apply that law to the facts, and that no instruction should be given to a jury that it has the power to nullify.²⁰² Counsel's invitation to a jury during summation to disregard the law is misconduct and subject to contempt.²⁰³ Jurors who engage in the practice may be removed.²⁰⁴

A trial judge has the power to remove jurors who become incapacitated or otherwise become unavailable during the course of deliberations.²⁰⁵ Whether a court has the power to remove a juror who refuses to follow the law has received much less attention. However, the few cases that have addressed the question emphatically support the judge's power of removal.²⁰⁶ The major difficulty in administering this power is being able to conduct an appropriate investigation into the allegation of misconduct without jeopardizing the traditional rule of secrecy in jury deliberations.²⁰⁷

Since any judicial investigation necessarily requires an intrusion into the jurors' mental processes during deliberations, such investigation must be subject to extremely stringent limitations.²⁰⁸ The often difficult question is whether the juror favors acquittal because she is purposefully disregarding the judge's instructions on the law or whether the juror is simply not persuaded by the government's evidence.²⁰⁹ The standard for removal that has been adopted by

202. *Sparf v. United States*, 156 U.S. 51, 102 (1895); *United States v. Edwards*, 101 F.3d 17, 19 (2d Cir. 1996); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993); *State v. Hatori*, 990 P.2d 115 (Haw. Ct. App. 1999); *People v. Sanchez*, 69 Cal. Rptr. 2d 16 (Cal. Ct. App. 1998). See *People v. Engelman*, 92 Cal. Rptr. 2d 416 (Cal. Ct. App. 2000) (holding it permissible to instruct the jury that it must inform the judge if any juror either "refuses to deliberate or expresses an intention to disregard the law or to decide the case based on . . . any . . . improper basis"). Pattern jury instructions advise jurors not to question any rule of law stated by the court in its instructions. See *United States v. Bruce*, 109 F.3d 323, 327 (7th Cir. 1997). By contrast, two states – Indiana and Maryland – have constitutional provisions that require judges to advise juries that the legal instructions are only advisory. See *Dougherty*, 473 F.2d at 1133 n.40.

203. *United States v. Renfro*, 634 F. Supp. 1536, 1550 (W.D. Pa. 1986).

204. See *United States v. Thomas*, 116 F.3d 606, 608 (2d Cir. 1997).

205. See FED. R. CRIM. P. 23(b) (stating that a judge may excuse a juror during deliberations for just cause). Just cause for removal was found in the following cases: *United States v. Shenberg*, 89 F.3d 1461, 1472 (11th Cir. 1996) (recounting a situation when a pregnant juror went into labor); *United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994) (relating where a juror had to leave for a business trip); *United States v. Egbuniwe*, 969 F.2d 757, 763 (9th Cir. 1992) (stating that a juror learned that his girlfriend had been arrested and mistreated by the police); *United States v. Ruggiero*, 928 F.2d 1289, 1294-95 (2d Cir. 1991) (stating that a juror was fearful after receiving a threat); *United States v. Wilson*, 894 F.2d 1245, 1249 (11th Cir. 1990) (stating that a juror became ill).

206. *United States v. Baker*, 262 F.3d 124, 132 (2d Cir. 2001) (upholding the trial court's dismissal of a deliberating juror who refused to discuss evidence with her fellow jurors, on ground that a juror who refuses to deliberate is refusing to perform her duty as a juror); *United States v. Thomas*, 116 F.3d 606, 617 (2d Cir. 1997) (stating that a "a juror's purposeful refusal to apply the law as set forth in a jury charge constitutes an appropriate basis for that juror's removal"); *United States v. Geffrard*, 87 F.3d 448, 450-52 (11th Cir. 1996) (holding that a juror was properly removed after asserting that her religious beliefs led her to conclude that the defendants were victims of governmental entrapment).

207. See *supra* notes 36-39 and accompanying text.

208. *Thomas*, 116 F.3d at 621 (recognizing "the often difficult distinction between the juror who favors acquittal because he is purposefully disregarding the court's instructions on the law, and the juror who is simply unpersuaded by the Government's evidence").

209. *United States v. Abbell*, 271 F.3d 1286, 1302 (11th Cir. 2001) (upholding the court's ability to dismiss a deliberating juror who is alleged to be willfully refusing to apply the law if there is no

some courts holds that “if the record evidence discloses any possibility that the request to discharge stems from the juror’s view of the sufficiency of the government’s evidence, the court must deny the request.”²¹⁰ This strict standard protects not only against the wrongful discharge of a juror who may be deliberating in good faith but also protects against overly intrusive judicial inquiries into the substance of jury deliberations. Thus, judges who remove jurors precipitously for alleged lawlessness without very good reason abuse their discretion and invite reversal.²¹¹

III. WHY JURORS MISBEHAVE?

Commentary on the U.S. jury typically attempts to explain the nature of the jury system, the role of the jury, and the decision-making authority of the jury.²¹² Curiously, despite abundant evidence that jurors misbehave, there has been little systematic effort to describe in a comprehensive way the phenomenon of jury misconduct, the reasons why jurors misbehave, and the available methods to remedy the misconduct. There seems to be little question that some jurors violate the rules, either deliberately or inadvertently, although measuring the extent of these violations is difficult. Extrapolating from the cases and anecdotal evidence suggests that jurors have infected trials by harboring conscious and latent biases, engaged in conduct in violation of the trial judge’s instructions, given dishonest and misleading answers during voir dire, suffered from physical and mental impairments, been intoxicated and otherwise inattentive, and flaunted the trial court’s instructions. Given the policies that seek to preserve jury verdicts, there is probably no satisfactory way to entirely eradicate the effects of such behavior, particularly after a verdict.²¹³ As the Supreme Court has repeatedly observed, invalidating a verdict after irresponsible and improper jury behavior would undermine the existence of the jury system.²¹⁴

“substantial possibility” that the juror is basing his or her “decision on the sufficiency of the evidence”); *United States v. Symington*, 195 F.3d 1080, 1088 (9th Cir. 1999) (holding a request that a deliberating juror be dismissed may not be granted if there is any reasonable possibility that the request is motivated by the juror’s views on the merits of the case). *But see* *People v. Hightower*, 77 Cal. Rptr. 2d 1123, 1154 (Cal. Ct. App. 2000) (stating that the trial court’s inquiry into allegations of misconduct by a deliberating juror may continue beyond the point at which there arises possibility that the request for removal stems from his or her view of the sufficiency of the evidence).

210. *Thomas*, 116 F.3d at 621-22 (quoting *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987)). *See* *United States v. Hernandez*, 862 F.2d 17, 23 (2d Cir. 1988). “That a juror may not be removed because he or she disagrees with the other jurors as to the merits of a case requires no citation.” *Hernandez*, 862 F.2d at 23.

211. *Thomas*, 116 F.3d at 608-09; *People v. Cleveland*, 21 P.3d 1225 (Cal. 2001) (holding that the trial court has authority to remove a juror who expresses unwillingness to follow the judge’s instructions, but the trial court abused its discretion by discharging a juror whom other jurors accused of not deliberating, but who in reality merely viewed the evidence in a different way).

212. *See supra* notes 11-13 and accompanying text.

213. *See* *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (stating that “there are no perfect trials”). “To invalidate the result of a 3-week trial because of a juror’s mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give.” *Id.* at 555.

214. *Tanner v. United States*, 483 U.S. 107, 120 (1987); *McDonough Power Equip., Inc.*, 464 U.S. at 555.

The discussion of juror bias and misconduct in Part II provides a foundation in the case law to try to synthesize the types of jurors who are most likely to engage in improper behavior. These jurors can be classified in the following five groups: (1) stealth jurors; (2) activist jurors; (3) impaired jurors; (4) biased jurors; and (5) evasive jurors.

A. STEALTH JURORS

Efforts by criminal defendants to subvert the jury process are not unexpected or unusual. One method to engineer an acquittal or a hung jury is to surreptitiously approach sitting jurors and offer bribes or make threats to induce the juror to acquit the defendant.²¹⁵ The integrity of the process also can be poisoned by the voluntary actions of potential jurors themselves who seek to inject themselves into the process for self-serving reasons. For example, recent disclosures suggest that some jurors have engaged in improper behavior in order to be selected to serve on a jury and then to single-handedly attempt to undermine the process.²¹⁶ A juror who engages in such conduct has been described as a “stealth juror,” that is, a person who secretly works his or her way onto a jury venire in order to poison the jury pool and convict the defendant.²¹⁷

Given the extraordinary media frenzy that attends trials of celebrity figures, it is not surprising that some people for different reasons might want to be part of the judicial process. Indeed, some jurors who have served in recent high-profile trials have garnered momentary fame in the aftermath of the verdict. For example, the controversial juror in the Martha Stewart trial who gave several media interviews after the conviction was accused by Stewart’s lawyers of misconduct by lying to get on the jury.²¹⁸ His statements to the media after the verdict proclaiming Stewart’s conviction as “a victory for the little guy who loses money in the markets because of these types of transactions” were used by the lawyers for the defendants to argue that the verdict was tainted by this juror’s alleged agenda to convict.²¹⁹ Similarly, in the recent Texas murder trial of millionaire Robert Durst, a juror appeared on television after the defendant’s acquittal promoting her book, “Durst Is Not The Worst,” in which she describes her experience on the jury that acquitted Mr. Durst of a grisly killing, a verdict that many observers contended was a gross miscarriage of justice.²²⁰ Also, in

215. *Hoffa v. United States*, 385 U.S. 293 (1966) (describing efforts by a defendant to bribe members of a jury); *Remmer v. United States*, 347 U.S. 227 (1954) (relating a caller’s efforts to bribe the foreman to acquit the defendant); *United States v. Ruggiero*, 928 F.2d 1289 (2d Cir. 1991) (finding that the judge properly dismissed a juror after ascertaining that the juror was in a state of fear resulting from an encounter with unknown men just before the deliberations commenced).

216. Diana Walsh & Stacy Finz, *Peterson Prosecutors Call Any Move to L.A. a Bad Trip*, SAN FRANCISCO CHRONICLE, May 11, 2004, at B2 (describing litigation in the Scott Peterson murder trial).

217. Joel Cohen, *Celebrity Jurors*, N.Y.L.J., April 7, 2004, at 2 (stating a “‘stealth juror’ worked her way onto jury venire” in the Scott Peterson murder trial); Brian Skoloff, *Venue Change Argued; Peterson Trial: Prosecution Says Move Pointless*, MONTEREY COUNTY HERALD, May 11, 2004 (referring to three “stealth jurors” who allegedly lied to get on the Peterson jury).

218. *United States v. Martha Stewart*, 317 F. Supp. 2d 432, 439-40 (S.D.N.Y. 2004).

219. *Id.* at 440 n.4.

220. See Cohen, *supra* note 217.

the Tyco trial, a juror made a spectacle of herself by visibly appearing throughout the trial to favor the defendants, suggesting that she deliberately sought to become a member of the jury for questionable motives.²²¹

This phenomenon of persons seeking fame and fortune through jury service has most recently been alleged in the trial of Scott Peterson, who was accused of killing his wife and their unborn son. In requesting a change of venue of the trial from Redwood City, California to Los Angeles, Peterson's lawyers contended that at least three "stealth jurors" lied to get on the jury in order to convict Peterson.²²² The lawyers argued that "[b]y getting on a nationally famous case . . . [these jurors] . . . may have aspirations of working their jury service into a book, interviews or some other form of celebrity and possible monetary benefit."²²³ Peterson's lawyers argued that his client's best chance of getting a fair trial would be in Los Angeles. However, describing Los Angeles as the "entertainment capital of the world," the prosecutor argued in response that "[p]ublicity-hungry jurors eager to sneak their way onto Scott Peterson's jury and frenzied media coverage of the case are far more likely to be a problem in Los Angeles than in Redwood City"²²⁴

B. ACTIVIST JURORS

The jury system in several ways encourages jurors to take a much more active role in the trial proceedings. Most jurors use their powers responsibly. Many jurors, however, have engaged in excessive, extra-judicial conduct that has the potential to taint the verdict. Jurors typically are alerted by the trial court that they are allowed to use their knowledge and expertise in sifting the evidence and deciding on their verdict.²²⁵ Moreover, whereas jurors historically were prohibited by statute and case law from taking notes during the trial,²²⁶ today virtually all courts allow jurors to take notes during the trial.²²⁷ Similarly, the practice of jurors posing questions to witnesses, although discouraged by many courts,²²⁸ has been allowed in cases presenting sufficiently complex or compelling circumstances.²²⁹

Some jurors, however, bent on solving the case or trying to test the evidentiary hypotheses presented to them, may impair the integrity of the verdict. These jurors have abused their function by engaging in extra-judicial investigations and research, in violation of the trial court's instructions, thereby

221. See *supra* notes 7-9 and accompanying text.

222. See Skolof, *supra* note 217.

223. See Walsh & Finz, *supra* note 216.

224. *Id.*

225. See *supra* notes 83-88 and accompanying text.

226. Price v. State, 887 S.W.2d 949, 951 (Tex. Crim. App. 1994) (en banc).

227. Esaw v. Friedman, 586 A.2d 1164, 1167-68 nn.8-9 (Conn. 1991) (observing "[t]he federal courts are virtually unanimous and our sister states nearly so.").

228. United States v. Collins, 226 F.3d 457, 461-63 (6th Cir. 2000); State v. Costello, 646 N.W.2d 204, 209-12 (Minn. 2002); State v. Gilden, 759 N.E.2d 468 (Ohio Ct. App. 2001).

229. United States v. Bush, 47 F.3d 511, 516 (2d Cir. 1995); United States v. Cassiere, 4 F.3d 1006, 1018 (1st Cir. 1993); United States v. Sutton, 970 F.2d 1001, 1005 (1st Cir. 1992).

putting themselves in a position to taint the deliberations with extraneous, non-evidentiary information. While jurors have the right to use their expertise, jurors do not have the right to conduct their own experiments outside the courtroom to verify the testimony,²³⁰ make unauthorized visits to the places mentioned in testimony,²³¹ and engage in extra-judicial research to ascertain the meaning of legal concepts or acquire extraneous information relevant to the case.²³² Although reenactments of the evidence are generally allowed, some reenactments may be unduly prejudicial and may taint the verdict.²³³

Jurors may also engage in activist conduct by deliberately consulting outside sources, not to investigate the evidence or to acquire extraneous information relevant to the case but to allay any concerns they may have about fulfilling their responsibilities as jurors. For example, in one recent capital murder trial, deliberating jurors consulted their pastors and, together with their families, read several Bible passages relevant to the death penalty, arguably to reinforce their decision to execute the defendant, which conduct likely diminished their sense of responsibility for imposing the death penalty.²³⁴ Indeed, the pastor showed one of the jurors several passages from the Book of Numbers that supported capital punishment²³⁵ and stated that he would impose the death penalty on the defendant if he were a juror.²³⁶

Finally, juror activism is most powerfully illustrated in the debate over juror nullification.²³⁷ Whereas jurors historically had the power to decide questions of law,²³⁸ today the federal courts and virtually all state courts forbid jurors from disregarding the law as given by the trial judge.²³⁹ Of course, there are two sides to jury nullification. Nullification may be an appealing albeit controversial doctrine when used by jurors to promote a higher justice according to their conscience. However there is also a "vicious side to jury nullification," as exemplified by all-white juries in the South refusing to convict white persons charged with murdering blacks.²⁴⁰

C. IMPAIRED JURORS

Some jurors are physically or mentally incompetent.²⁴¹ The presence on a

230. See *supra* notes 89-101 and accompanying text.

231. See *supra* note 93 and accompanying text.

232. See *supra* notes 64-79 and accompanying text.

233. See *supra* notes 106-09 and accompanying text.

234. *People v. Danks*, 82 P.3d 1249, 1268-79 (Cal. 2004).

235. *Id.* at 1268-69.

236. *Id.* at 1269.

237. See discussion *supra* Part II.H.

238. See ABRAMSON, *supra* note 11, at 42-45.

239. See *supra* notes 201-04 and accompanying text.

240. See ABRAMSON, *supra* note 11, at 61-62. See also Eric Lichtblau & Andrew Jacobs, *U.S. Reopens '55 Murder Case, Flashpoint of Civil Rights Era*, N.Y. TIMES, May 11, 2004, at A1 (describing the 1955 acquittal by an all-white jury of two white men charged with lynching a 14-year-old black youth; the white defendants later bragged about killing the youth).

241. See discussion *supra* Part II.F.

jury of an incompetent juror violates the defendant's constitutional right to an impartial jury.²⁴² Impairment of a juror may be attributable to many causes: a juror may have a physical defect, such as a hearing problem;²⁴³ a mental defect, such as a psychological disorder;²⁴⁴ an emotional problem, such as stress resulting from the intensity of the trial experience;²⁴⁵ or an inability to follow the proceedings due to consumption of alcohol or drugs.²⁴⁶

Courts face a sometimes difficult task when an allegation is raised that a juror is impaired. When the allegation is raised during the trial, the court has the ability to conduct a hearing to determine whether the juror has the physical or mental capacity to continue sitting on the jury. When the allegation is raised during jury deliberations, the judge is faced with the dilemma of determining whether a juror should be dismissed for emotional reasons, particularly when that juror may be under stress for being the lone holdout juror seeking to maintain her principled position in the face of opposition from the other jurors.²⁴⁷

When a claim of juror incompetence is raised for the first time after the trial, the claim usually is unsuccessful, largely based on policy reasons against impeaching a jury's verdict.²⁴⁸ Courts are reluctant to probe the minds of jurors once they have deliberated and reached a verdict. The well-established "no-impeachment" rule makes a distinction between extraneous influences that may have affected the jury and internal matters affecting the jury.²⁴⁹ Physical and mental incompetence are regarded as internal matters about which jurors are barred from giving testimony.²⁵⁰ Thus, a claim that a juror was suffering from a psychological disorder during the trial was regarded as an internal abnormality that ordinarily could not provide the basis for challenging the verdict.²⁵¹ Similarly, a claim that jurors were asleep, intoxicated, and using drugs during the trial was an internal matter about which jurors could not testify.²⁵²

D. BIASED JURORS

In the nineteenth century, jurors who knew about the facts of a case and had not expressed or formed opinions about the facts were considered entirely

242. *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912).

243. *See supra* note 173 and accompanying text.

244. *See supra* note 176 and accompanying text.

245. *See supra* note 168 and accompanying text.

246. *See Tanner v. United States*, 483 U.S. 107, 115, 122 (1987).

247. *Perez v. Marshall*, 119 F.3d 1422, 1424, 1428 (9th Cir. 1997) (relating how a judge removed the lone dissenting juror during stressful deliberations based on the juror's alleged emotional instability).

248. *See supra* notes 36-39 and accompanying text.

249. *See Tanner*, 483 U.S. at 117-23.

250. *Id.*

251. *See United States v. Dioguardi*, 492 F.2d 70, 80 (2d Cir. 1974) (suggesting that the court will consider claims only when there exists proof that a juror has been adjudicated to be insane or mentally incompetent "closely in advance of the time of jury service").

252. *Tanner*, 483 U.S. at 122.

proper, indeed attractive, jurors.²⁵³ Today the reverse is the case. Commentators suggest that juror ignorance is a virtue and knowledge a vice.²⁵⁴ As the cases suggest, the problem of juror bias may be one of the most intractable issues in the jury system. Clearly, jurors who harbor actual biases may not serve, and if they do, the defendant's constitutional right to an impartial jury has been violated.²⁵⁵ However, demonstrating a juror's bias that is not actual, and perhaps may even be unconscious, becomes a much more difficult problem. The voir dire process is intended to expose juror biases based on a juror's attitudes toward such questions as race, ethnicity, religion, the media, law enforcement, the death penalty, and other subjects.

Researchers have attempted to investigate juror attitudes, juror biases, and the effect of juror biases on juror decision-making.²⁵⁶ Imputing bias and partiality to a juror is hazardous. To be sure, instances occur in which jurors openly express racist or other discriminatory views, and such expressions are usually capable of being remedied.²⁵⁷ In addition, certain instances where jurors openly express attitudes that potentially taint the other jurors are capable of being investigated and remedied.²⁵⁸ However, given the ambiguities inherent in trying to detect latent juror biases, the courts generally restrict the determination of implied bias to very extreme situations.²⁵⁹ Courts generally reject claims of implied bias. However, courts have recognized that in some instances jurors may be exposed to such highly inflammatory circumstances that presuming the existence of a bias is reasonable. Such imputed bias has been shown when jurors have learned of the defendant's guilt in an earlier trial on the same charges,²⁶⁰ have been exposed to extremely prejudicial pre-trial publicity,²⁶¹ have been exposed to highly prejudicial events during the trial,²⁶² have a very close relationship with one of the important actors in the case,²⁶³ were a victim of the crime and are emotionally involved in the case,²⁶⁴ and gave dishonest answers on the voir dire to get on the jury.²⁶⁵

E. EVASIVE JURORS

Some jurors may resent the intrusion into their privacy from having to

253. See ABRAMSON, *supra* note 11, at 38-45.

254. *Id.* at 49.

255. See *supra* notes 151-57 and accompanying text.

256. See REID HASTIE, *INSIDE THE JUROR* 46-50 (Cambridge Univ. Press 1993) (providing a generic model to study juror bias).

257. See *supra* note 161 and accompanying text.

258. See *supra* notes 162-63 and accompanying text.

259. See *supra* notes 151-57 and accompanying text.

260. See *supra* notes 155-56 and accompanying text.

261. *Rideau v. Louisiana*, 373 U.S. 723, 724 (1963) (describing how two months prior to trial a TV station broadcast three different times a twenty-minute film of the defendant giving a detailed confession).

262. See *supra* note 153 and accompanying text.

263. *Williams v. Taylor*, 529 U.S. 420 (2000).

264. *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991).

265. *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989).

reveal sensitive matters about their lives and background.²⁶⁶ Other jurors may fear for their safety as well as privacy.²⁶⁷ Typical inquiries of prospective jurors from the court and counsel relate to the jurors' health; personal income; affiliation with civic, social, religious charitable, volunteer, professional or business organizations; political party affiliations; interest in particular books, newspapers, magazines, or television shows; and whether the juror considers himself or herself a liberal, conservative, or moderate.²⁶⁸ A juror who refuses to answer such questions because they are embarrassing might be held in contempt.²⁶⁹ By the same token, a juror who answers such questions dishonestly or evasively may, if selected, impair the integrity of the trial.²⁷⁰

When a court believes that a jury needs to be protected from possible pressures, harassment, and intimidation, a court may empanel a so-called anonymous jury.²⁷¹ Empanelling "an anonymous jury is a drastic measure" that implicates a defendant's right to the presumption of innocence.²⁷² Virtually every court reviewing the procedure has approved its use where it is genuinely needed and properly used.²⁷³ One of the problems with empanelling an anonymous jury, of course, is the inability of lawyers to detect answers by jurors that may be false or evasive, or to uncover any latent juror biases about the case. Thus, a juror who may be reluctant to reveal sensitive information about his or her personal life may be able to conceal or disguise such information under the cloak of anonymity, with the result that hidden, even unconscious, biases may be less likely to be detected by the court and the lawyers.

The controversial juror in the Martha Stewart trial concealed several items of personal data that might have been used by the parties to challenge his qualifications to be a fair and impartial juror.²⁷⁴ This juror's false and evasive responses to a variety of personal and potentially embarrassing questions suggest that this juror sought to maintain his privacy and anonymity in the belief that his evasions would not be discovered. Although the court found that his failure to answer the questions truthfully did not demonstrate an implied bias, his misconduct in not giving the lawyers candid responses clearly disabled them from making an informed judgment as to whether this juror possessed the

266. See *Brandborg v. Lucas*, 891 F. Supp. 352 (E.D. Tex. 1995) (relating how a trial court held a juror in contempt for refusing to answer many personal questions).

267. See *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988). "Juror's fears of retaliation from criminal defendants are not hypothetical; such apprehension has been documented." *Id.*

268. See *United States v. Phibbs*, 999 F.2d 1053, 1071 (6th Cir. 1993) (finding questions about personal habits and activities, including what books jurors read and what television shows they watch, "might have aided defendants in identifying sympathetic jurors").

269. See *Brandborg*, 891 F. Supp. at 355 (describing how in response to a juror's refusal to answer personal questions the prosecutor stated that her refusal was an insult to the court and "she should do it or suffer the consequences").

270. See discussion *supra* Part II.D.

271. See *United States v. Shryock*, 342 F.3d 948, 972-73 (9th Cir. 2003).

272. *United States v. Ross*, 33 F.3d 1507, 1519 (11th Cir. 1994).

273. *Shryock*, 342 F.3d at 970-71. "Every circuit that has addressed this issue has held that a lower court's decision to empanel an anonymous jury is entitled to deference and is subject to abuse of discretion review." *Id.* at 970.

274. *United States v. Martha Stewart*, 317 F. Supp. 2d 432 (S.D.N.Y. 2004).

qualifications to be a fair and impartial juror.

IV. CONCLUSION

The problem of juror misconduct is not an insignificant problem in the justice system. Jurors engage in conduct that in different ways deviates from the rules of proper juror behavior. Jurors have been influenced by external contacts by third parties, engaged in extra-judicial investigations to satisfy their curiosity and test the evidence, given false and evasive answers during jury selection, engaged in conduct that revealed hidden biases, engaged in pre-deliberation discussions about the case, consumed drugs and alcohol and been otherwise inattentive to the evidence, and flaunted the trial court's instructions. Jurors who engage in misconduct can be categorized as rogue jurors, activist jurors, impaired jurors, biased jurors, and evasive jurors.

Attempts to remedy the problem of juror misconduct have produced mixed results. When the misconduct is discovered during the trial, the trial court's ability to remedy the problem is greatest. The court can conduct a searching investigation to determine whether misconduct was committed and the extent of the prejudice. When the misconduct is discovered during deliberations or after the trial, strong public policies usually militate against aborting the trial or upsetting the verdict. As the courts repeatedly observe, "there are no perfect trials."²⁷⁵ As a consequence, however, a verdict of guilt that has been tainted by the misconduct of some jurors may be immune from judicial review, with the consequence that a criminal defendant may have been denied his constitutional right to a fair trial by an impartial jury.

275. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984).