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Juror Competency to Testify That a Verdict Was the Product of Racial Bias

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Recent trials involving racial incidents have made it increasingly difficult to distinguish between those judicial proceedings and the conflict being waged on the streets. Verdicts, sentences, and even seemingly innocuous procedural nuances have inflamed passions, occasionally resulting in destructive civil unrest. Actions by the trial courts in such cases may have exacerbated racist attitudes or otherwise undermined respect for the law. These effects extend far beyond the community in which the trial occurs. Media attention and the resultant public scrutiny transformed certain trials into political and social events of national importance. Consequently, trial courts have been thrust into the center of society's racial problems.

It is essential, to both the rule of law and the independence of the judiciary, that in racially sensitive cases the result is not dictated by its perceived political or social acceptability. A judgment motivated by concern over potential civil unrest is as objectionable as a judgment motivated by racial bias. But while results should not be dictated by racial concerns, process sometimes should be influenced by them. In cases involving racial issues, the use of more racially sensitive procedures could make a marked difference in how an otherwise unpopular result is received by both the
parties and the community.\textsuperscript{3} If procedures are in fact fair and do not bias the decisionmaking process, neither judicial independence nor the rule of law will be jeopardized by conducting a trial in a racially sensitive manner.

Within these parameters, the law of evidence should be concerned with racial sensibilities. This does not mean that there should be one set of rules for cases involving racial matters and another set for all other cases. It also does not suggest that evidence law should always avoid irritating those sensibilities. It means only that, where the values underlying the law of evidence can be accommodated with a racially sensitive approach, the social benefits suggest that the courts should embrace that approach.

Generally, this requires no departure from business as usual; evidence law is virtually color blind and rarely directly implicates racial matters. But there is at least one exception. Federal Rule of Evidence 606(b) ("Rule 606(b)") states: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror . . . ." This Rule has repeatedly been held to preclude a juror from testifying, in support of a motion for a new trial, that juror conduct during deliberations suggests the verdict was tainted by racial bias.

This Essay suggests that such testimony should not be excluded under Rule 606(b). Part One describes the Rule and the cases that have precluded juror testimony concerning evidence of racial bias. Part Two analyzes the policies underlying the Rule. Finally, Part Three proposes a manner of interpreting Rule 606(b) consistent with these policies and the language of the Rule. This interpretation suggests juror testimony concerning racial bias on the jury should be admissible under Rule 606(b).

\section{The Current State of the Law Under Rule 606(b)}

There are three basic components to the principle of witness dis-

qualification contained in Rule 606(b). First, the principle applies only in a specific procedural context: “an inquiry into the validity of a verdict or indictment.” Second, the provision lists the forms of evidence barred: testimony, affidavit, or any statement of a juror. Third, the exclusionary principle applies only to evidence on certain specified subjects: (1) “any matter or statement occurring during the course of the jury’s deliberations”; (2) “the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment”; or (3) “the juror’s mental processes in connection therewith.” Disqualification follows under these circumstances unless an exception applies. Rule 606(b) creates two exceptions, permitting testimony “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.”

On its face, Rule 606(b) appears to make jurors incompetent to testify as to the effect of any sort of bias on the jury since such testimony would disclose the jury’s mental or emotional processes. Most authorities agree with this interpretation, maintaining that the Rule precludes a juror from testifying that issues in a case were prejudged and that a juror was motivated by irrelevant or improper personal considerations. In addition, substantial au-

4 See Fed. R. Evid. 606(b). This rule provides in relevant part: Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror’s affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. Id.

5 Id.

6 Id.

7 Id.

8 Id.

9 Fed. R. Evid. 606(b).

10 Id.

11 See Brofford v. Marshall, 751 F.2d 845, 853 (6th Cir. 1985). A juror stated on voir dire that, based upon pretrial publicity, she thought the defendant was guilty, but believed she could put aside her preconceived notions. Id. Rule 606(b) was held to preclude a juror from later stating she had been unable to put those notions aside and that, in fact, her decision was based on her original bias. Id.

12 See United States v. Duzac, 622 F.2d 911, 913 (5th Cir. 1980) (“Although the jury is
authority supports the proposition that Rule 606(b) precludes admission of juror testimony concerning statements or conduct of jurors during deliberations that suggest their verdict was animated by racial bias. For example, in applying Rule 606(b) courts have rejected the following evidence: a juror stated during deliberations that a party “should be taught a lesson” for hiring Mexican nationals holding green cards;\(^1\) eleven white jurors racially intimidated a lone black juror;\(^1\) a juror, describing a defendant charged with soliciting prostitutes, said during deliberations: “Let’s be logical. He’s black and he sees a seventeen-year-old white girl. I know the type;”\(^1\) during deliberations a juror strutted like a minstrel and mimicked a black dialect because the defendant and his attorney were black;\(^1\) and jurors, who were Native Americans, used racial comments to pressure another juror to vote guilty in a case involving theft of horses from other Native Americans.\(^1\) It is not difficult to imagine how a similar ruling in a widely publicized case could exacerbate racial tensions and undermine popular respect for the law.

Commentators seem to agree that these results are mandated by Rule 606(b).\(^1\) While substantial authority suggests that constitutional issues are raised when Rule 606(b) is applied in this manner, there is little dissent from the proposition that the provision compels such results.\(^2\) However, a detailed analysis of the poli-

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\(^1\) State v. Finney, 337 N.W.2d 167, 169 (S.D. 1983).

\(^1\) See 3 DAVID LOUISELL & CHRISTOPHER MUELLER, FEDERAL EVIDENCE § 287, at 131-32 (1979). “Serious and sensitive problems may arise if it can be made to appear that a verdict was the product of egregious racial or ethnic prejudice... Clearly the counsel of the Rule, however, is to be conservative in the approach to such problems and to err upon the side of exclusion rather than receipt of evidence in close cases.” Id.; see also 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE § 606(04), at 606-42 to -43 (1987). “But what should be done in terms of Rule 606(b) if a juror has... commented adversely on the religion or nationality of a witness... and proof of these statements is offered on a motion for a new trial?... Generally, it seems better to draw [the line] in favor of juror privacy; in the heat of juror debate all kinds of statements may be made which have little effect on outcome, though taken out of context they seem damning and absurd.” Id.

\(^1\) But see Tobias v. Smith, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979). In Tobias, a bur-
cies underlying the Rule questions the continued viability of this conclusion.

II. THE POLICIES OF RULE 606(b)

The common-law rule precluding a juror from impeaching her verdict was first justified as a means of preventing fraud. The concern was that, if a juror could testify as to jury misconduct, the juror might be able to perpetrate fraud in two ways. First, the juror might intentionally induce the rest of the jury to engage in misconduct, such as deciding the case by flipping a coin. This would enable that same juror to later impeach the verdict by testifying as to the jury's misconduct. The juror might employ this strategy when it appeared that the jury otherwise would return a verdict which she did not favor. Second, the juror might falsely testify that she concurred in a verdict due to bias, mistake, or other improper motive. The policy of averting these fraudulent acts has sometimes been described in terms of eliminating the incentive for jury tampering. This is because it is assumed that a juror will rarely develop the desire to engage in fraud without an incentive from some outside source.

The threat of fraud does not satisfactorily explain or justify Rule 
606(b). As to the first type of fraud described in the preceding paragraph, it seems unlikely that the problem would occur with any reasonable frequency even in the absence of any limits on the competency of jurors to testify. The prospect of testifying under oath in court is usually a disincentive to fraud, not an invitation. Rather than discourage fraud, it seems likely that declaring jurors incompetent to testify would promote fraud because it disqualifies the very individuals who could testify as to the involvement of fraud in inducing a verdict. The second type of fraud is arguably a more plausible threat. The potential exists for a juror to falsely allege that she acted with improper motives without any fear that her testimony will be successfully challenged in court. She is the only witness to her own thoughts. However, this would only justify a Rule which precludes a juror from testifying to her own mental process or emotional reactions and, in fact, the original version of Rule 606(b) was limited to such testimony. But the Rule as enacted goes further, precluding testimony as to statements made by other jurors during deliberations and other objectively apparent facts or events. In the cases excluding evidence of racial bias on the jury, that evidence has referred to just such statements, facts, or events.

An additional policy argument frequently advanced in support of the Rule preventing jurors from impeaching their verdict is based on concern that counsel will harass jurors after a verdict is returned. The concern is that losing counsel will question jurors as to the basis for their decision and pressure them to testify as to possible errors. This would make jury service even more onerous by prolonging the jury's connection with the case past trial and into appeal. But again, this policy does not fully justify Rule

24 For a comparison with the preliminary draft of Rule 606(b), see 46 F.R.D. 161, 289-90 (1969).
25 See McDonald v. Pless, 238 U.S. 264, 267-68 (1915). The court stated: But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. Id.
26 During the hearings conducted on Rule 606, the Justice Department suggested this policy was particularly important. See H.R. 5463, 93d Cong., 2d Sess. (1974) (statement of W. Vincent Rakeshaw, Assistant Attorney General). Mr. Rakeshaw commented: Many grand and petit jurors serve at considerable personal sacrifice, and protection is due them after their service so that they may not be pestered by investigators, disap-
606(b). Essential parts of that provision are the exceptions for "extraneous information" and "outside influence." These exceptions are somewhat ambiguous and have provided losing counsel ample room to fish for potentially admissible testimony concerning jury misconduct. While a more carefully drafted statute might eliminate some juror harassment, the amount of litigation arising under the exceptions to Rule 606(b) suggests that provision has not advanced, and does not focus upon, this policy goal.

Restrictions on the competency of jurors to testify also have been justified on the grounds that such restrictions advance the value of finality and stability of verdicts. It is unquestionably true that a law that makes a juror incompetent to impeach her verdict enhances finality and certainty. It is also unquestionably true that finality and certainty are process values important to any system of justice. These values are particularly important to the jury system since there are probably few, if any, verdicts totally uninfluenced by bias or untainted by some sort of improper conduct. But it is also clear that the values of finality and cer-

pointed suitors, or others, whether looking for grounds for a new trial or reacting to the contentions of some one of the jurors, nor should the law tolerate jurors being pitted against each other in post-trial litigation.

Id. 27 FED. R. EVID. 606(b).

28 See Peter N. Thompson, Challenge to the Decisionmaking Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial, 38 SW. L.J. 1187, 1224 (1985).

Since the competency rule has numerous exceptions, and in criminal cases inquiries into constitutional violations might be appropriate despite the language of the rule, the rule does not eliminate the need for the conscientious lawyer to interview jurors to assess whether the jurors have committed misconduct and whether this particular type of misconduct is susceptible to juror testimony.

Id. 29 Any rule of partial juror incompetency will inevitably leave some room for juror harassment. But since jury misconduct may inflict serious injustice, some harassment to uncover that injustice may be justifiable. Perhaps the most sensible way to deal with abusive and unnecessary harassment is through the rules of ethics, with appropriate professional disciplinary sanctions to support those rules, and the exercise of judicial controls over post-verdict contact between counsel and jurors.

30 See United States v. Moten, 582 F.2d 654, 664 (2d Cir. 1978). "[C]ertain limits on post-trial inquiry into jury verdicts are necessary in the interest of finality lest judges 'become Penelopes, forever engaged in unraveling the webs they wove.'" Id. (citing Jorgensen v. York Ice Mach. Corp., 160 F.2d 432, 435 (2d Cir. 1947)); see also Sims' Crane Serv. v. Ideal Steel Prod., Inc., 800 F.2d 1553, 1556 n.9 (11th Cir. 1986). "The effect of Rule 606(b) is, in some instances, to place greater weight on finality than accuracy. While this policy decision may be open to philosophical attack, any alteration is for those who create the rules and not this court." Id.

31 The importance of finality in this context is, in theory, enhanced by the fact that the verdict to be given final effect is the product of community values. Thus, finality and privacy are interrelated policy justifications for Rule 606(b). See infra notes 47-55.

tainty frequently compete in the law of evidence with concerns for fairness and accuracy. An absolute rule of juror incompetency would incorrectly presuppose that finality and certainty are always superior to such competing concerns. The legitimacy of our jury system, at least in part, depends on the correctness of the assumption that the jury system usually produces decisions based on fair procedures, accurate fact-finding, and community values. In totalitarian states, process values of efficiency and economy always achieve ascendancy because the primary purpose of the legal system is to maintain order. The legitimacy of the courts in such states is not dependent upon accuracy or fairness. However, in this country, it is not enough merely to make the judicial trains run on time.

Thus, the policies of finality and certainty do not justify an absolute rule of juror incompetency. The importance of finality and certainty is mitigated by competing policies and justifies only a

Probably there are not many cases in which each of the twelve jurors fully understands and meticulously performs a juror's theoretical function, observing all its limitations and fulfilling all its affirmative obligations. If all that went on in the jury room were open to public and official scrutiny either most verdicts would fall or embarrassing questions would be raised about the extent to which the law should openly tolerate and sanction deviations from the conduct and the thought processes of the ideal juror.

Rule 102 explicitly recognizes the importance of all these values to the Federal Rules of Evidence, while ignoring the fact that the values are often in conflict. See generally James, Jr., supra note 32, § 7.19. The author states:

The jury system can survive, however, despite frank recognition of its shortcomings. If few verdicts actually reflect rigorously correct performance by every juror, then the system should not be preserved by forcibly concealing that fact. The point is that the system expresses the values of popular participation in the judicial process, a nontechnical view of the legal dispute shared by a group of lay persons, and giving effect to the community's sense of what the law ought to be and sometimes is not.

See Thompson, supra note 28, at 1191, 1193. While the role of the jury as a check on governmental tyranny was central to the inclusion of the right to jury trial in the Constitution, values such as accuracy and fairness seem to have become the focus of modern Supreme Court decisions concerning the functioning of the jury. The author states:

Community sense of justice, not truth, was the primary concern of our forefathers. The main concerns about the inclusion of a right to jury trial in the Constitution stemmed not from a fear that the judiciary would inaccurately enforce the law, but more from a hope that a lay jury might choose not to enforce the law if the law were unjust or offended the local community sense of justice. . . . Although the United States Supreme Court has recognized the traditional role of the jury as a check on governmental tyranny, recent decisions suggest a trend focusing on truth and accuracy as the predominant considerations in evaluating the role of the jury.

Id.
partial rule of incompetency. The drafters and the courts have recognized that Rule 606(b) was intended to embody a balance of these competing policies.\textsuperscript{36} Of course, exactly where the rule draws the balance between competency and incompetency is not altogether clear. Perfect fairness and accuracy is unattainable and could be approached only at a prohibitive cost.\textsuperscript{37} But some procedures employed by a jury to reach a verdict might be so fun-

\textsuperscript{36} See \textit{Fed. R. Evid. 606(b)} advisory committee's note. The Advisory Committee's Note admits that the rule reflects a balance between these policies. The Note states:

The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. . . . On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

\textit{Id.} See 56 F.R.D. 183, 265 (1973). Rule 606(b) may be said to reflect two efforts to balance competing policies. The rule first concludes that, in the usual case, the balance tips in favor of policies which compel the juror witness to be silenced. See \textit{Peveto v. Sears, Roebuck & Co.}, 807 F.2d 486, 489 (5th Cir. 1987). The \textit{Peveto} court explained:

Of course, in the jury trial process there is always some danger that jurors will misunderstand the law or consider improper factors in reaching their verdict, but, by implementing Rule 606(b), Congress has made the policy decision that the social costs of such error are outweighed by the need for finality to litigation, to protect jurors from harassment after a verdict is rendered, and to prevent the possible exploitation of disgruntled ex-jurors.

\textit{Id.}; see also \textit{Maldonado v. Missouri P.R. Co.}, 798 F.2d 764, 770 (5th Cir. 1986), \textit{cert. denied}, 480 U.S. 932 (1987). The rule then concludes that there are exceptional cases where the balance tips in the other direction. See \textit{State v. Shillcutt}, 350 N.W.2d 686, 689-90 (Wis. 1984) (construing state version of Rule 606(b)). The \textit{Shillcutt} court stated:

Important as the policies underlying jury secrecy are, there are situations where these interests must give way to the competing interest in ensuring a fair trial and a just resolution of the issues in the individual case. The statute accommodates the two opposing policies by making an exception to the general rule of incompetence for juror testimony 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.

\textit{Id.} It is important to bear in mind that Rule 606(b) does not empower the courts to balance these competing interests. That balance has already been struck by Congress. One prominent judge urged Congress to not codify the law of juror competency and leave the issue to the courts to resolve on a case-by-case basis. His advice was not heeded. See \textit{Hearings on the Proposed Rules of Evidence Before the Spec. Subcomm. on the Reform of the Federal Criminal Laws of the Comm. on the Judiciary}, 93d Cong., 1st Sess. 246, 250 (1973) (testimony of Henry J. Friendly). On the other hand, it could be contended that the exceptions to Rule 606(b) are broadly drafted and left undefined for the purpose of permitting the courts discretion to balance in difficult cases. See \textit{Shillcutt}, 350 N.W.2d at 705 n.7 (Abrahamson, J., dissenting) (there exists trend towards broadening exceptions to general rule that juror cannot testify).


It would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test; and although absolute justice may require as much, the impossibility of achieving it has induced judges to take a middle course, for they have recognized that the institution could not otherwise survive.

\textit{Id.}
damentally unfair and likely to produce inaccurate results, it can be safely concluded that there is little reason to protect through competency law the finality of the resulting verdict. For example, under our theory of adjudication, we rely upon the adversary process to uncover the truth by confronting the witnesses and the evidence in open court. The opportunity to be heard by a fact-finder that has not prejudged the case on extra-record evidence is essential to due process. Where a jury considers evidence or other matters that have not been heard in open court and thus, have not been subject to adversarial challenge, the interests of accuracy and fairness typically outweigh the value of finality. Similarly, due process contemplates that decisionmaking be based on a rational evaluation of the evidence, not on some arbitrary process like the flip of a coin. Thus, where the jury employs such an irrational procedure, the value of finality is reduced and may be outweighed by competing values because of the manner in which the decision in question was reached. This analysis makes some sense of the exceptions for "extraneous prejudicial information" and "outside influence," and suggests when Congress intended those exceptions to be applicable.

See Farese v. United States, 428 F.2d 178, 180 (5th Cir. 1970). The court stated: Judicial control of the juror[s'] knowledge of the case pursuant to the laws of evidence is fundamental to the prevention of bias and prejudice. Our rules of evidence are designed to exclude from consideration by the jurors those facts and objects which may tend to prejudice or confuse. Evidence presented under the exclusionary rules is subject to cross-examination and rebuttal. It is therefore necessary that all evidence developed against an accused "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 counsel."

Id. (quoting Turner v. Louisiana, 379 U.S. 466, 472-73 (1965)); see, e.g., Parker v. Gladden, 385 U.S. 363, 364 (1966) (accused Sixth Amendment rights violated where bailiff engaged in communications with jury relating to accused); Tanner v. United States, 483 U.S. 107, 137 (1987) (Marshall, J., concurring in part and dissenting in part) ("If the policy considerations [supporting Rule 606(b)] seriously threaten the constitutional right to trial by a fair and impartial jury, they must give way."); Government of Virgin Islands v. Gereau, 523 F.2d 140, 149-51 (3d Cir. 1975) (rule prohibiting jury from impeaching verdict could not constitutionally prevent disclosure of consideration by jury of news items concerning case, extra-record facts, communications between third parties and jurors concerning the case, and pressures or partiality on part of the court); United States v. Howard, 506 F.2d 865, 867 (5th Cir. 1975) (court should have received juror's affidavit alleging that another juror revealed extra-record facts concerning defendant during deliberations).

See generally In re Japanese Elec. Prods., 631 F.2d 1069, 1084 (3d Cir. 1980) (Due Process precludes trial by jury when jury is unable to reach verdict rationally due to complexity of facts and issues). Of course, precluding trial by jury on the grounds the jury cannot make a rational decision raises Seventh Amendment issues that are beyond the scope of this essay.

See generally United States v. Day, 830 F.2d 1099, 1104 (10th Cir. 1987) (Rule 606(b) is intended to insure jurors will decide cases solely on basis of admitted evidence).
Finally, restrictions on the competency of jurors to testify have been justified on the grounds that such restrictions protect the privacy of the jury’s deliberations.\footnote{See McDonald v. Pless, 238 U.S. 264, 267-68 (1915). “If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.” \textit{Id.}} Of course, privacy in this context is not necessarily a virtue. If the only point of privacy is to give the jury freedom to engage in misconduct and perpetrate error without fear of discovery, privacy is not a policy to be valued. In his famous treatise, John Henry Wigmore concluded that jury privacy was essential because statements by jurors during deliberations were entitled to protection as privileged confidential communications.\footnote{8 \textsc{John H. Wigmore, Evidence} § 2346 (McNaughton rev. 1961).} Some relatively recent decisions expressly hold that limits on juror competency are based on this privilege.\footnote{See Bays v. Petan Co., 94 F.R.D. 587, 591 (D. Nev. 1982) (Rule 606(b) held to establish privilege).} Other cases, while not explicitly recognizing a privilege, rely on reasoning typical of privilege analysis. These cases justify Rule 606(b) on grounds that the willingness of jurors to speak freely during deliberations would be impaired without protection.\footnote{See \textit{In re Beverly Hills Fire}, 695 F.2d 207, 213 (6th Cir. 1982) (Rule 606(b) “ensures that jurors will not feel constrained in their deliberations for fear of later scrutiny by others.”).}

This privilege analysis is an unconvincing explanation for the law of juror incompetency. The holder of a privilege may customarily waive it. However, nothing in the law of juror competency suggests that juror willingness to testify is important.\footnote{See Tanno v. S.S. President Madison, 830 F.2d 991, 993 (9th Cir. 1987). In \textit{Tanno}, the entire jury voluntarily included on the verdict form explanations for answers given to special interrogatories. \textit{Id.} The statements were held to constitute an attempt to explain the mental processes of the jury which must be disregarded under Rule 606(b). \textit{Id.; see also Domeracki v. Humble Oil & Refining Co., 443 F.2d 1245, 1247 (3d Cir. 1971)} (court may not inquire into jury’s decisional process even when information is voluntarily given); Mauch v. Manufacturer Sales & Serv., Inc., 345 N.W.2d 338, 342-43 (N.D. 1984) (all jurors signed affidavits concerning possible irregularities in jury proceedings and trial court held to have improperly considered affidavits); Grenz v. Werre, 129 N.W.2d 681, 692 (N.D. 1964) (all 12 jurors signed affidavits stating that they believed defendant not guilty of gross negligence, contrary to their verdict; court relied upon privilege analysis in holding affidavits could not be received to show juror mental processes or reasoning).} Moreover, if the confidentiality of juror communications was worthy of protection under privilege law, that protection should extend generally to various proceedings. Instead, the law of juror competency protects jury privacy only at a hearing into the validity of the
jury’s decision.46

Maintaining jury privacy may be a legitimate policy goal of Rule 606(b) for a reason that the courts and commentators have never explicitly developed. That reason has to do with the role of the jury and its relationship to the judge and the law. The jury is the courtroom embodiment of those democratic ideals central to American social and political life. In theory, the jury is composed of individuals reflecting a representative cross-section of the people living in the community in which the case arises.47 Those individuals are given the power to decide what values will control the resolution of the case, even in the extreme instance when the jury’s values conflict with the law created by the legislature or the courts and described by the judge in instructions.48 This power exists to advance community values, thus preventing legislatures and the courts from fostering a morality of the elite.49

Rule 606(b) is justifiable as a means of protecting this power. If jurors could be made to testify as to the thought processes that formed the foundation of a verdict, then any exercise of their power inconsistent with the values of the judge could be detected

46 Wigmore recognized the difficulties in characterizing the law of juror competency as privilege. See Wigmore, supra note 42, § 2348.

47 See 28 U.S.C. § 1862 (1968) ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status."); see also Glasser v. United States, 315 U.S. 60, 86 (1942) ("[T]he officials charged with choosing federal jurors . . . must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community."); Smith v. Texas, 311 U.S. 128, 130 (1940) ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.").

48 See United States v. Powell, 936 F.2d 1056, 1062 (9th Cir. 1991) ("The concept of jury nullification allows the jury to acquit the defendant even when the government has proven its case beyond a reasonable doubt."); see also United States v. Ogle, 613 F.2d 233 (10th Cir. 1979). The court held:

After jurors are armed with the Constitution and are aware of their power, they have the final authority to acquit one of their fellow citizens accused of a crime that the jurors do not consider to be a crime based on their consideration or determination of the justice of the law. This is described as the jury’s right of nullification . . . . [T]he verdict of the jury cannot be challenged or retried or overturned by any higher court. Id. at 236. See generally Alan W. Scheflin, Jury Nullification: The Right to Say No, 45 CAL. L. REV. 168 (1972); PAULA D. PERNA, JURIES ON TRIAL 183 (1984).


The purpose of the jury trial . . . is to prevent oppression by the Government. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge." . . . Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group’s determination of guilt or innocence. Id. at 100 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).
and controlled. Thus, protecting the privacy of the jury's collective deliberations, as well as the individual juror's mental and emotional processes, is essential to securing the role of the jury in our system of justice. Absent some form of restriction on juror competency, "the result would be that every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave." 50

While this analysis justifies some protection for jury privacy, it does not go so far as to make an argument for a rule of absolute incompetency. Instead, it identifies a policy basis for a partial rule of incompetency while offering insight into the circumstances where a juror should be allowed to impeach her verdict. The clearest case for permitting a juror to testify is where the policy reasons for maintaining jury privacy are not pertinent. Thus, if the reason to protect jury privacy is to permit the jury to express its own values in a verdict, it should be clear that testimony may be admitted to show that the verdict was influenced by bribery, threats of violence, or other forces outside the jury. 51 Such testimony reveals the influence of matters that are unrelated to the

50 See United States v. D'Angelo, 598 F.2d 1002, 1005 (5th Cir. 1979). While the courts have not developed this policy argument in the detail presented here, they have frequently made general statements suggesting that the rule limiting juror competency is essential to protecting the jury system. See United States v. Calbas, 821 F.2d 887, 896 (2d Cir. 1987) ("open-ended inquiry into the questions considered by the jury and into the deliberations of that jury will, if not kept on under very close check, undermine the entire nature and integrity of our jury system"); Carson v. Polley, 689 F.2d 562, 581 (5th Cir. 1982) ("the ultimate consequence of permitting the impeachment of jury verdicts by examination of the jurors' hidden thoughts ... would destroy the effectiveness of the jury process which substantial justice demands and the constitution guarantees."); Government of Virgin Islands v. Ger- eau, 523 F.2d 140, 148 (3d Cir. 1975) ("[t]he rule was formulated to ... [maintain] the viability of the jury as a judicial decision making body."); see also Thompson, supra note 29, at 1222. The author contends:

The interest in juror privacy is cited as an important consideration in the proper functioning of the jury and has been relied on as justification for the limited competency of jurors in post-trial hearings. Jurors must be free to engage in robust debate without fearing governmental or public reprisals for the views expressed in the debate. ... If the essential role of the jury is to serve as a check on governmental tyranny in the exercise of the laws, then the jurors must be free from governmental scrutiny and possible retaliation.

Id.

51 The courts generally permit jurors to testify to such matters on the grounds they are covered by the exception for "outside influence." See Tanner v. United States, 483 U.S. 107, 117 (1986) ("[E]xceptions to the common law rule were recognized only in situations in which 'extraneous influence' was alleged to have affected the jury." (citing Mattox v. United States, 146 U.S. 140, 149 (1892))); Remmer v. United States, 347 U.S. 227, 229-30 (1954) (trial court should have received juror testimony concerning whether jury foreman had been influenced by bribery attempt); Krause v. Rhodes, 570 F.2d 563, 566-70 (6th Cir. 1977) (threats to juror and family).
internal values of the jury and, in fact, may undermine those values.

Both the legislative history and language of Rule 606(b) affirm the importance of this notion of privacy as a means of protecting the jury's value choices from judicial scrutiny. Congress and the drafters considered two versions of the rule. Both versions rendered a juror incompetent to testify as to her mental processes or the effect of anything on her mind or emotions. Protection of such information is obviously essential to maintaining the privacy of a juror's value judgments, which originate in the emotional and mental realms. The version enacted into law went a step further, protecting statements and other events occurring during deliberations. This is also consistent with the privacy policy since that policy would be ineffective if only the privacy of each individual juror's thoughts was insulated from judicial inspection. Deliberations reflect the collective thinking of the jury, which produces the value choices underlying a verdict.

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52 See Preliminary Draft, Federal Rules of Evidence, Rule 606(b), 46 F.R.D. 161, 289-90 (1969) (prohibiting juror from testifying as to mental process, this draft was silent as to testimony relating to statements made during course of deliberations); Revised Draft, Federal Rules of Evidence, Rule 606(b), 51 F.R.D. 315, 386-87 (1971) (retained language with respect to mental processes); Federal Rules of Evidence, Rule 606(b), 56 F.R.D. 183, 265 (1973) (substantial changes made in order to exclude a juror's testimony concerning any matters or statements made during deliberations).

53 See supra note 4; see also Tanner v. United States, 483 U.S. 107, 108 (1987) (district court did not err in its refusal to hold hearing in which jurors could testify with respect to juror intoxication); United States v. Gilsenan, 949 F.2d 90, 95-96 (3rd Cir. 1991) (not abuse of discretion to refuse to order new trial based on affidavit by juror stating that plea bargain had been brought to attention of jury); John W. Strong, McCormick on Evidence § 68, at 95-96 (4th ed. 1992) ("Each juror has a privilege against the disclosure in court of her communication to the other jurors during their retirement."); Wigmore, supra note 42, § 680, at 678. Communications among jurors are confidential. "[T]his confidence is essential to the due attachment of the jury's constitutional purpose . . . . [I]njury from disclosure would certainly overbalance the benefits thereby gained . . . . [A] juror is [therefore] privileged not to have his communications to a fellow juror disclosed." Id.

54 See Wigmore, supra note 42, § 2346, at 680 ("The verdict as finally agreed upon and pronounced in court by jurors must be taken as the sole embodiment of the jury's act. Hence, it stands irrespective of what led up to it in the privacy of the jury room . . . ."); see also Note, Public Disclosure of Jury Deliberations, 96 Harv. L. Rev. 886, 890 (1983) ("The precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a thoroughgoing exchange of ideas and impressions.").

On the other hand, it may be argued that prohibiting jurors from testifying as to events that occur during deliberations has nothing to do with protecting the values underlying the verdict. While it is easy to see why juror values would be revealed by testimony concerning the mental or emotional processes of the juror, it is harder to understand how those values might be revealed by testimony concerning, for example, the manner in which the jury reached its verdict. The response to this argument is simply that the values underlying the verdict often can be revealed not only by what the juror thinks, but also by what she says and does.
Rule 606(b) as enacted created exceptions to juror incompetency, permitting testimony as to whether "extraneous prejudicial information" or "outside influence" affected the jury.\(^{55}\) The exception for "outside influence" gives support to this policy analysis, which in turn provides a basis for interpreting the meaning of that exception. Assume a juror testifies that someone off the jury offered a bribe or made a threat. As described above, judicial scrutiny of such testimony does not offend policy since it is not the jury's values that are scrutinized, but factors affecting the verdict that are external to those values. Thus, something is an "outside influence" when its revelation would not betray to the judge those value judgments of the jury underlying its verdict. Likewise, testimony exposing a verdict reached by flipping a coin or some other completely arbitrary decisionmaking method would also be considered an "outside influence." Such testimony would not reveal jury value judgments but, instead, the attempt to escape making such judgments.

In summary, Rule 606(b) has two policy goals. First, finality and certainty of judgment are pursued in order to conserve resources. Second, the privacy of the jury's thought process is protected in order to insulate jury value judgments from judicial review. Neither goal is an absolute. Privacy is abandoned when jury value judgments are not in jeopardy. Finality and certainty of judgment give way when jury misconduct raises very serious issues of fairness and accuracy.

### III. Interpreting Rule 606(b) in Light of its Policies

When a jury employs racial bias in reaching a verdict, concern for fairness and accuracy outweigh the policy goal of finality. Employing racial bias to reach a verdict is analogous to flipping a coin. The verdict is no less arbitrary and irrational. Letting the verdict go unchallenged would be a serious affront to notions of equity. There is little societal value in protecting such a decision.

However, an argument based on the privacy policy still can be made to support the prevailing assumption that Rule 606(b) precludes juror testimony concerning racial bias. As noted in the preceding section, the jury is in theory composed of individuals re-

\(^{55}\) See supra note 51 and accompanying text.
reflecting a representative cross section of the people living in the community in which the case arises. 56 Those individuals are given the power to decide what values or biases will control the resolution of the case. This is true even in the extreme instance when the jury's values conflict with the law created by the legislature and described by the judge in instructions. 57 Giving juries such power can be justified on the grounds that it advances community values, thus preventing legislatures and the courts from engaging in oppression and fostering a morality of the elite. 58 The admission of testimony concerning the effect of any bias on jury decisionmaking would undermine this power. If jurors could be made to testify as to the biases that formed the foundation of a verdict, the exercise of their power inconsistent with the biases or values of the judge could be detected and controlled.

But a deeper policy analysis reveals a serious problem in using Rule 606(b) to exclude juror testimony of jury racial bias. As noted above, the very purpose of protecting jury privacy is to permit the jury to control the inclinations of the legislature and the courts to abuse their powers by engaging in oppression and fostering the values of a small elite. But democratic institutions like the jury system can themselves produce oppression when the majority uses its values to demean the rights of minorities. 59 If the jury supplplants the judge as a source of oppression, the justification for the jury system is undermined and both the need and desirability of protecting jury decisions through evidence law are diminished. Thus, where a verdict is animated by bias in the form of racial, ethnic, or other prejudice against a minority group, it may make sense from a policy standpoint to permit exposure of that bias.

Three arguments can be advanced in opposition to this contention. First, if it is conceded that the judge may invade the privacy of the jury to search for the use of a value such as racial prejudice, then the exercise of jury nullification based on any value is in jeopardy. If the judge discovers the verdict was not based on racial prejudice but employs another value inconsistent with the letter of the law, the judge might use that inconsistency as a basis to

56 See supra note 47 and accompanying text.
57 See supra note 48 and accompanying text.
58 See supra note 49 and accompanying text.
overturn the verdict. Thus, the search for racial bias could be employed as a pretense for reviewing the jury's use of other less offensive values and admitting evidence thereof. But like most "slippery slope" arguments, it loses momentum if the specific case can be distinguished from the general rule. There are sound policy reasons to draw a bright line permitting courts to consider under Rule 606(b) evidence of racial bias while excluding evidence of other biases. American jurisprudence has for decades treated racial bias differently from other biases. Eradication of the evil of state-supported racial prejudice is at the heart of the Fourteenth Amendment. More than a century after adoption of that provision, racial prejudice remains arguably the most significant social problem in the nation. Trial procedures which remain oblivious to racial sensibilities run the risk of seriously exacerbating that problem. Since Rule 606(b) recognizes exceptions to its general rule of exclusion, it is clear that the provision contemplates a balance between the values promoted by exclusion and those undermined thereby. While the balance may be difficult to strike in many cases, it should be clear that the costs of excluding evidence of racial bias under Rule 606(b) are generally greater than the costs of admitting such evidence.

A second objection to admitting evidence of jury racial bias might be based on the fact there is legislative history suggesting that Rule 606(b) does not permit juror testimony regarding any bias. An influential Senator played a significant part in the drafters' final selection among the competing draft versions of Rule 606(b). Senator McClellan specifically cautioned the Advisory Committee against proposing a version of the Rule that would permit jurors to testify as to the role of bias in the verdict. However,

60 See, e.g., Vasquez v. Hillery, 474 U.S. 254, 262 (1986) ("[W]e reaffirm our conviction that discrimination on the basis of race in the selection of grand jurors 'strikes at the fundamental values of our judicial system and our society as a whole.'" (quoting Rose v. Mitchell, 443 U.S. 545, 553 (1979))); Rose, 443 U.S. at 554 (respondents indicted for murder sought dismissal on grounds that jury foreman was selected in racially discriminatory manner); Reece v. Georgia, 350 U.S. 85, 87 (1955) (indictment of defendant by jury from which members of his race have been systematically excluded is denial of equal protection); Smith v. Texas, 311 U.S. 128, 130 (1940) (racial discrimination which results in exclusion from jury service violates Constitution and basic concepts of a democratic society); Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (concerns about racial discrimination was "inducement to bestow upon the national government the power to enforce the provision that no state shall deny . . . the equal protection of the laws.").

61 See 117 Cong. Rec. 33642, 33645 (1971) (letter from Senator McClellan). The Senator stated:

I have no objection to permitting jurors to testify that improper information came to
it is also true that the entire Congress endorsed the notion that
the Federal Rules of Evidence should be construed in a manner to
"secure fairness in administration, elimination of unjustifiable ex-
 pense and delay, and promotion of growth and development of the
law of evidence to the end that the truth may be ascertained and
proceedings justly determined." Growth and development occurs
when the law changes to meet the evolving needs of society. Cur-
rent events suggest a pressing need to promote respect for our
laws and judicial system by avoiding procedures that are associ-
ated with racial bias.

A final objection to the interpretation of Rule 606(b) advocated
here is that it may be difficult to justify admitting testimony con-
cerning racial bias under the language of the exceptions in Rule
606(b). Bias might not qualify as an "outside influence" since it is
imposed as a factor in decisionmaking by the jury itself, not some
source extrinsic to the jury. On the other hand, bias may be con-
sidered an outside influence if what is meant by that term is an
influence on the verdict "outside" of the record and the parameters
of constitutionally acceptable values which the jury may use in its
deliberations. Similarly, bias may not look like "extraneous prej-
udicial information" since, while bias is arguably "extraneous" and
certainly "prejudicial," it is hard to think of it as "information."

their attention . . . . Were it possible to overturn a decision because, in fact, it was not
based on precedent, but bias, and this was an issue that could be litigated, it would
indeed be brought before the courts. Present law, as I read it, wisely prohibits this sort
of inquiry. . . .

Id. 62 FED. R. EVID. 102.

63 See, e.g., Martinez v. Food City, Inc., 658 F.2d 369, 373 (5th Cir. 1981) (testimony
regarding subjective prejudices or improper motives of individual jurors within prohibition
of Rule 606(b) rather than within exception for "extraneous influences"); United States v.
Duzac, 622 F.2d 911, 913 (5th Cir. 1980) (no evidence of any external influence on members
of the jury, prejudice complained of is product of unrelated personal experiences); Simmons
prejudices or experiences do not constitute external influences); Smith v. Brewer, 444 F.
Supp. 482, 489 (S.D. Iowa) (juror's racist comments and gestures during deliberations do
not reflect outside influence), aff'd, 577 F.2d 466 (8th Cir. 1978); State v. Shillcutt, 350
N.W.2d 686, 690 (Wis. 1984) (statement of juror during deliberations evidencing racial
prejudice was not an outside influence).

64 See Tobias v. Smith, 468 F. Supp. 1287, 1290-91 (W.D.N.Y. 1979). In Tobias, a juror
submitted an affidavit stating that, during deliberations, the jury foreman had said: "You
can't tell one black from another," and another juror had suggested that the jury should
take the word of the white victims over the black defendant. Id. at 1289-90. The court ruled
that the affidavit may be received under Rule 606(b) since "the statements in the juror's
affidavit are sufficient to raise a question as to whether the jury's verdict was discolored by
improper influences. . . ." Id.

65 See, e.g., Carson v. Polley, 689 F.2d 562, 581 (5th Cir. 1982) (juror's letter to judge
On the other hand, if bias manifests itself in the form of comments made by jurors during deliberations to sway other jurors, the comments may be thought of as the functional equivalent of information even though not presented in the form of hard data.66

CONCLUSION

Justice mandates that the law be color blind. But this means that the law should neither provide favor nor impose disadvantage based upon race. It does not follow that the law must be blind to its effect on the racial problems that beset society. If employed to exclude evidence that a verdict was rooted in racial bias, Rule 606(b) could exacerbate racial problems. Process values like finality of judgment are not substantially advanced by excluding such evidence. While it may be true that the privacy of the jury is compromised by admitting this evidence, the social cost of protecting that privacy has become too high.

revealing juror's prejudices did not constitute extraneous prejudicial information since it did not reveal presence of any extrinsic material improperly placed before jury); Shillcutt v. Gagnon, 602 F. Supp. 1280, 1283 (Wis. 1985), aff'd, 827 F.2d 1155 (7th Cir. 1987) (juror's remark was neither "extraneous" nor "information" but an expression of racial stereotype); Brewer, 444 F. Supp. at 489 (juror's racist comments and gestures during deliberations did not impart information); Shillcutt, 350 N.W.2d at 690 (statements of juror exhibiting racial prejudice did not constitute extraneous prejudicial information).

See, e.g., Shillcutt, 350 N.W.2d at 700 (Steinmetz, J., concurring) (statements of juror exhibiting racial prejudice should be considered extraneous prejudicial information); After Hour Welding Inc. v. Laneil Management Co., 324 N.W.2d 686, 690 (Wis. 1982) (juror competent to testify as to anti-semitic statements made by other jurors concerning defendant's witness since they were "extraneous prejudicial information"); see also Thompson, supra note 28, at 1204. The author noted:

Presumably any information that is used by the jurors to decide the case could be classified as extraneous if it did not come from the admitted evidence and the juror's general knowledge. To the extent that the juror's decision is based in all or part on a particular predisposition toward a party's race, age, sex, facial hair, economic status, personal belief about facts not introduced into evidence, or improper understanding of the law, the verdict would appear to be based on prejudicial information or outside influence. . . . Nonetheless, the legislative history urges a more restrictive reading of the language, but no clear definition is given.

Id.