

Contaminating the Verdict: The Problem of Juror Misconduct

By 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

¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 334-337 (1961 ed.).

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

³ *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)(jury as “conscience of community”); *Williams v. Florida*, 399 U.S. 78, 100 (1970)(jury as bulwark “to prevent oppression by the Government”).

⁴ *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976)(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*, 2004 WL 954493 (S.D.N.Y.).

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 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 there exists a considerable body of scholarship on the jury system,¹¹ jury selection techniques,¹² and jury decision-making,¹³ the issue of juror misconduct has not

⁶ United States v. Stewart, 2004 WL 954493 (S.D.N.Y.).

⁷ David Carr and 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 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 206-214 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).

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 extaneous, 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 prejudice,¹⁸ suffered from physical and mental

¹³ See, e.g., REED HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JUROR* (1983); 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 *infra* notes 23-49 and accompanying text.

¹⁵ See *infra* notes 50-79 and accompanying text.

¹⁶ See *infra* notes 80-102 and accompanying text.

¹⁷ See *infra* notes 103-129 and accompanying text.

¹⁸ See *infra* notes 130-156 and accompanying text.

impairments,¹⁹ engaged in pre-deliberation discussions of the evidence,²⁰ and willfully violated 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.

¹⁹ See *infra* notes 157-170 and accompanying text.

²⁰ See *infra* notes 171-185 and accompanying text.

²¹ See *infra* notes 186-201 and accompanying text.

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

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.

1. 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 counsel.”²³ Violations of these protections occurs 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

²³ *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965).

²⁴ 347 U.S. 227 (1954).

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

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 123 (7th Cir. 2001)(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)(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)(“no judge could adequately assess [the allegation of impropriety] without investigation and factual findings”); *United States v. Davis*, 15 F.3d 1393, 1412 (9th

jury is impartial.³⁰ However, if a colorable claim of extrinsic influence on impartiality has been made, a court may be obligated to 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 an 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 external influences.”³⁶ Courts also are justifiably concerned that post-verdict inquiries may inhibit jury-room discussions, deter jurors from returning an unpopular verdict,

Cir. 1994)(“Once 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).

³¹ State v. Brown, 668 A.2d 1288, 1302 (Conn. 1995)(“circumstances required a sua sponte preliminary inquiry by the court”).

³² United States v. Ortiz-Arrigoitia, 996 F.2d 436, 443 (1st Cir. 1993)(“in 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”); United States v. Williams, 822 F.2d 1174, 1190 (D.C. Cir. 1987)(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)(district court abused its discretion by failing to conduct an adequate evidentiary hearing into serious allegations of extraneous influences on jury).

³⁴ United States v. Smith, 26 F.3d at 759.

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

subject jurors to harassment, and 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 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

³⁶ *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989)(refusing to allow defendant to investigate jurors merely to conduct "fishing expedition").

³⁷ *Tanner v. United States*, 483 U.S. 107, 120-121 (1987).

³⁸ See *McDonald v. Pless*, 238 U.S. 264, 267-268 (1915)("let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside").

³⁹ 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 of 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.

⁴⁰ *United States v. Corrado*, 227 F.3d 528 (6th Cir. 2000)(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)(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 trial court to do more than merely discharge juror; trial court should have conducted an inquiry into 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"); *Rushen v. Spain*, 464 U.S. 114 (1983)(ex parte contact between trial court and

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 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

juror reviewed for actual prejudice); *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (“due 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 *Remmer* test has been “reconfigured” by subsequent Supreme Court decisions); *United States v. Madrid*, 842 U.S. 1090, 1093 (9th Cir. 1988) (post-*Remmer* Supreme Court decisions have “firmly established 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, 532-533 (6th Cir. 1984) (asserting that presumption of prejudice has been abrogated by recent Supreme Court decisions and that burden now on 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) (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) (jury tampering should not necessarily be presumed prejudicial; 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) (trial court required to conduct *Remmer* hearing only when alleged contact presents a likelihood of affecting verdict; courts should not presume that contact was prejudicial and defendant has burden to show that unauthorized contact created actual juror bias).

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

⁴⁵ *United States v. Williams-Davis*, 90 F.3d 490, 497 (D.C. 1997) (“isolated” and “trivial” remarks demonstrated no “likelihood of prejudice” to justify assigning to government burden of proving harmlessness); *United States v. Gilson*, 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.”).

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

2. 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

⁴⁶ *Remmer v. United States*, 347 U.S. at 229 (“burden rests heavily on government to establish, after notice to the defendant, that such contact with the juror was harmless to the defendant”).

⁴⁷ *United States v. Blumeyer*, 62 F.3d 1013, 1016-1017 (8th Cir. 1995).

⁴⁸ *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991). See *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986)(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*, 2004 WL 954493 (S.D.N.Y.)(trial court dismisses 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).

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 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

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

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

⁵² Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993), *aff'd on rehearing en banc sub nom.* Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997); 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 United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002); United States v. Winkle, 587 F.2d 705 (5th Cir. 1979); United States v. Brown, 913 F. Supp. 1324 (D. Minn. 1996).

⁵⁶ Solis v. Cockrell, 342 F.3d 392, 393-394 (5th Cir. 2003)(juror tells other jurors that defendant and his brothers break into people's homes); Lawson v. Borg, 60 F.3d at 610 (juror tells other jurors that defendant has reputation for violence); United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975)(juror tells other jurors that defendant had been in trouble before).

⁵⁷ United States v. Boylan, 898 F.2d 230 (1st Cir. 1990)(magazine article about case circulated in jury room); United States v. Littlefield, 752 F.2d 1429 (9th Cir. 1984)(magazine article about case left in jury room); United States v. Aburahmah, 827 F. Supp. 612 (D. Ariz. 1993)(newspaper left in jury room); United States v. Caro-Quintero, 769 F. Supp. 1564 (C.D. Cal. 1991)(newspaper left in jury room); Keen v. State, 639 So.2d 597 (Fla. 1994)(magazine article in jury room).

⁵⁸ United States v. Harber, 53 F.3d 236 (9th Cir. 1995)(copy of case agent's report with opinion that defendant was guilty left in jury room); United States v. Luffred, 911 F.2d 1011 (5th Cir. 1990)(government chart not in evidence brought into jury room); Hughes v. Borg, 898 F.2d 695 (9th Cir. 1989)(police report inadvertently left in jury room); United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979)(court file inadvertently left in jury room); Osborne v. United States, 351 F.2d 111 (8th Cir. 1965)(grand jury transcript depicting defendant's criminal history made available to jury).

⁵⁹ Jeffries v. Blodgett, 5 F.3d at 1190 n.2.

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

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 had been covered during the trial by headphones used for Spanish translation.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 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 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*⁶⁹ 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. The

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, 854 (9th Cir. 1980).

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

⁶⁶ Bayramoglu v. Estelle, 806 F.2d 880 99th 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. App. 2003).

defendant was charged with the shaking death of her 4-month-old stepgrandchild. The prosecution presented evidence that the defendant was taking the anti-depressant Paxil for stress and holiday season depression. 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.”⁷⁰ 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.”⁷¹

Following his 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.⁷²

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.⁷³ 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. 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

⁷⁰ Id. at 769.

⁷¹ Id. at 770.

⁷² Ibid.

⁷³ *People v. Wadle*, 77 P.3d 764 (Colo. App. 2003).

verdict.⁷⁴ 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.⁷⁵

As in the previous section, the court's determination of whether a juror's 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.⁷⁶ 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.⁷⁷ Exposure to mid-trial publicity ordinarily is not considered sufficiently serious to require a court to presume prejudice.⁷⁸ 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.⁷⁹

3. 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 it is expected that jurors should not apply their own knowledge, experience, and perceptions

⁷⁴ Id. at 771.

⁷⁵ Ibid.

⁷⁶ *United States v. O'Keefe*, 722 F.2d 1175, 1179 (5th Cir. 1983).

⁷⁷ *United States v. Lloyd*, 269 F.3d 228 (3d Cir. 2001); *United States v. Harber*, 53 F.3d at 240.

⁷⁸ *United States v. Williams-Davis*, 90 F.3d at 501 ("The few decisions in the courts of appeals that explicitly address juror exposure to mid-trial publicity have not applied the *Remmer* presumption.").

⁷⁹ *United States v. Gaston-Brito*, 64 F.3d 11, 12 (1st Cir. 1995); *Waldorf v. Shuta*, 3 F.3d 705, 709-710 (3d Cir. 1993); *State v. R.D.*, 785 A.2d 450 (N.J. 2001).

acquired in the everyday affairs of life to reach a verdict.⁸⁰ However, a juror's procurement of new knowledge gained through extra-judicial means may contaminate the deliberations and upset the verdict.⁸¹ 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,⁸² drawing a map to show the location of buildings in a certain area,⁸³ or describing a person's ability to make an accurate identification from a moving automobile.⁸⁴ These mental processes 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.⁸⁵

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

⁸⁰ *Bibbins v. Dalsheim*, 21 F.3d 13, 17 (2d Cir. 1994)("[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. 1992)("the 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.").

⁸¹ 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 (9th Cir. 1986)(use of magnifying glass to examine photographic evidence no different than using corrective eyeglasses).

⁸² *Bibbins v. Dalsheim*, 21 F.3d 13 (2d Cir. 1994).

⁸³ *People v. Szymanski*, 589 N.E.2d 148 (Ill. App. 1992).

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;⁸⁶ a juror's experiment in attempting to fire a weapon while holding it in a position consistent with the defendant's account;⁸⁷ clocking how long it would take to drive a certain distance;⁸⁸ and simulating a witness's use of binoculars to determine whether the witness could possibly have seen what he claimed he saw.⁸⁹ 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.⁹⁰

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*,⁹¹ the defendant was convicted by a New York jury of robbery for having been the driver of the escape car. 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. 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. The police van followed

⁸⁴ *People v. Cooper*, 157 Cal. Rptr. 348 (Cal. App. 1979).

⁸⁵ *State v. Mann*, 11 P.3d 564 (N.M. 2000).

⁸⁶ *United States v. Navarro-Garcia*, 926 F.2d 818 (9th Cir. 1991).

⁸⁷ *Marino v. Vasquez*, 812 F.2d 499 (9th Cir. 1987).

⁸⁸ *State v. Hartley*, 656 A.2d 954 (R.I. 1995).

⁸⁹ *People v. Castro*, 229 Cal. Rptr. 280 (Cal. App. 1986).

⁹⁰ *United States v. Sanchez-Sotelo*, 8 F.3d 202 (5th Cir. 1993); *United States v. Posner*, 644 F. Supp. 885 (S.D. Fla. 1986), *aff'd sub nom. United States v. Scharrer*, 828 F.2d 773 (11th Cir. 1987); *People v. Holmes*, 372 N.E.2d 656 (Ill. 1978); *People v. Crimmins*, 258 N.E.2d 708 (N.Y. 1970). See *Sherman v. Smith*, 89 F.3d 1134 (4th Cir. 1996)(unauthorized visit improper but harmless).

⁹¹ 399 N.E.2d 51 (N.Y. 1979).

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. The defendant was arrested later that evening after the police traced the escape car to him.⁹²

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.⁹³ 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 an identification was possible.⁹⁴ 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, and the intermediate appellate court affirmed.⁹⁵

The Court of Appeals reversed the conviction.⁹⁶ 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."⁹⁷ Importantly, the juror's "test" bolstered an issue which was critical to the prosecution's theory, and by

⁹² Id. at 52.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ *People v. Brown*, 407 N.Y.S.2d 911 (App. Div. 1979).

⁹⁶ *People v. Brown*, 399 N.E.2d 51 (N.Y. 1979).

⁹⁷ Id. at 53.

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 be more likely to engage in unplanned observations or simulations similar to the events depicted at trial.⁹⁸

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.⁹⁹ The reenactments by jurors portrayed in the classic film *Twelve Angry Men*¹⁰⁰ illustrate the use of critical analysis by jurors of the evidence based on their 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 knives, 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

⁹⁸ Id. at 54-55 (Fuchsberg, J., concurring).

⁹⁹ *United States v. Hephner*, 410 F.2d 930 (7th Cir. 1969); *State v. Balisok*, 866 P.2d 631 (Wash. 1994); *People v. Harris*, 442 N.E.2d 1205 (N.Y. 1982).

¹⁰⁰ *MGM/United Artists* (1957).

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.¹⁰¹ 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.¹⁰²

4. Untruthful Statements During Voir Dire

The Sixth Amendment and the Due Process Clause guarantee a defendant the right to an unbiased jury.¹⁰³ 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."¹⁰⁴ Bias of prospective jurors may be actual or implied.¹⁰⁵ Actual bias is a bias in fact; implied bias is a bias that is presumed as a matter of law.¹⁰⁶ Actual bias may be established by showing that a juror's failed to respond honestly to questions during voir dire and that a truthful response would have provided a

¹⁰¹ Miller v. Harvey, 566 F.2d 879, 881 (4th Cir. 1977).

¹⁰² United States v. Beach, 296 F.2d 153 (4th Cir. 1961).

¹⁰³ Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976).

¹⁰⁴ McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984).

¹⁰⁵ United States v. Wood, 299 U.S. 123, 134 (1936).

¹⁰⁶ Ibid.

valid basis for a challenge for cause.¹⁰⁷ As the Supreme Court observed, “The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.”¹⁰⁸ 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.¹⁰⁹ Proof of juror bias necessitates a new trial.¹¹⁰

There is a presumption that prospective jurors answer the voir dire questions truthfully.¹¹¹ There is also a presumption that a juror’s failure to respond honestly during voir dire is indicative of bias.¹¹² Prospective jurors for various reasons may give deliberately untruthful answers.¹¹³ 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.¹¹⁴ However, only intentionally dishonest or misleading responses provide a basis for relief.¹¹⁵ Forgetfulness or honest mistakes, by contrast, do not establish dishonesty, and are not grounds for a new trial.¹¹⁶ As the Supreme Court noted, “[t]he motives for concealing information may vary, but only those

¹⁰⁷ *McDonough Power Equipment, Inc. v. Greenwood*, 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).

¹⁰⁸ *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 554.

¹⁰⁹ *Leonard v. United States*, 378 U.S. 544 (1964).

¹¹⁰ *Smith v. Phillips*, 455 U.S. 209 (1982).

¹¹¹ *United States v. Droge*, 961 F.2d 1030, 1036 (2d Cir. 1992).

¹¹² *United States v. North*, 910 F.2d 843, 903-904 (D.C. Cir. 1990).

¹¹³ *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989); *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984).

¹¹⁴ *Williams v. Taylor*, 529 U.S. 420 (2000); *United States v. Greer*, 285 F.3d 158 (2d Cir. 2002); *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. Goldstein*, 652 F.2d 654 (6th Cir. 1981).

¹¹⁵ *Gonzalez v. Thomas*, 99 F.3d 978, 984 (10th Cir. 1996).

¹¹⁶ *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).

reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."¹¹⁷

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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ Also dishonest and not simply inadvertent were responses denying any acquaintance with the defendant,¹²¹ denying any experience with explosives,¹²² denying being the victim of domestic physical abuse,¹²³ and concealing familiarity with the case or having discussed the case with others.¹²⁴

The above principles were applied in *United States v. Martha Stewart*,¹²⁵ where the defendants sought a new trial, claiming that a juror deliberately concealed material

¹¹⁷ *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 556.

¹¹⁸ *Gonzalez v. Thomas*, 99 F.3d 978 (10th Cir. 1996).

¹¹⁹ *Williams v. Taylor*, 529 U.S. 420 (2000).

¹²⁰ *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989).

¹²¹ *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984).

¹²² *United States v. St. Clair*, 855 F.2d 518 (8th Cir. 1988).

¹²³ *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991).

¹²⁴ *In re Hitchings*, 860 P.2d 466 (Cal. 1993)(en banc).

¹²⁵ 2004 WL 954483 (S.D.N.Y.).

information in his jury questionnaire and that his conduct “betray[ed] a pattern of deliberate omissions that concealed his bias against them.”¹²⁶ 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, that 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.¹²⁷ 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.¹²⁸ 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.”¹²⁹

5. 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

¹²⁶ Id. at 4.

¹²⁷ Id. at 4-6.

¹²⁸ Id. at 8.

¹²⁹ Ibid.

the surrounding context and circumstances.¹³⁰ As noted above, the ability to substantiate a claim of bias may be hampered by the rule against impeaching a juror’s verdict,¹³¹ which would probably disallow testimony by jurors concerning negative or inappropriate comments made by a juror during deliberations.¹³² In *Smith v. Phillips*,¹³³ the Supreme Court suggested that only proof of actual bias could be the basis for a new trial. 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.”¹³⁴ In *Smith*, a juror submitted during the trial an application for employment as an investigator with the same District Attorney’s office that was prosecuting the case. 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 prejudgment.¹³⁵ 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.”¹³⁶ The Court of Appeals for the Second Circuit affirmed.¹³⁷ 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

¹³⁰ *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. at 556-557 (Blackmun, J., concurring).

¹³¹ See notes , and accompanying text.

¹³² See *United States v. Bolling*, 900 F.2d 926, 935-936 (6th Cir. 1990)(ambiguous testimony from non-jurors that one of jurors stated “It’s all bullshit” not capable of corroboration by testimony of jurors).

¹³³ 455 U.S. 209 (1982).

¹³⁴ *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).

¹³⁵ *Smith v. Phillips*, 455 U.S. at 213-214.

¹³⁶ *Id.* at 214.

¹³⁷ *Smith v. Phillips*, 632 F.2d 1019 (2d Cir. 1981).

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.¹³⁸

Under *Smith*, proof of actual bias ordinarily must be demonstrated to obtain relief.¹³⁹ 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.”¹⁴⁰ However, the Court’s confidence that a juror can be trusted to acknowledge an actual bias may be questioned.¹⁴¹

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.¹⁴² Such situations might include the revelation that a juror is an employee of the prosecuting agency, is a close relative of one of the participants in the trial, or was a

¹³⁸ *Smith v. Phillips*, 455 U.S. at 217.

¹³⁹ *United States v. Nelson*, 277 F.3d 164 (2d Cir. 2002)(trial court erred in empaneling juror whose answers displayed actual bias, resulting in a jury that failed to meet Sixth Amendment impartiality requirement).

¹⁴⁰ *Id.* at 217, n.7 (quoting *Dennis v. United States*, 339 U.S. at 171).

¹⁴¹ See *McDonough Power equipment, Inc. v. Greenwood*, 464 U.S. at 558 (“the 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”)(Brennan, J., concurring). For an illustration of Justice Brennan’s concern, see *Huntley v. Godinez*, 975 F.2d 316 (7th Cir. 1992)(sequestered jurors almost evenly divided on defendant’s guilt for murder committed during a burglary return a quick verdict of guilty the following morning after several jurors’ rooms had been burglarized the night before, but jurors claim that burglary did not influence their quick decision).

¹⁴² *Smith v. Phillips*, 455 U.S. at 221-222 (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 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).

witness to or involved in the criminal transaction.¹⁴³ 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,¹⁴⁴ a guilty verdict against a defendant announced in the presence of a jury panel about to try the defendant for the same crime,¹⁴⁵ 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,¹⁴⁶ a verdict polluted by a “shocking” display of a jury’s racial and ethnic bigotry,¹⁴⁷ and a murder conviction involving the defense of battered-wife syndrome where a juror herself had been involved in an abusive family situation.¹⁴⁸

A trial court faced with an allegation of juror bias has a duty to carefully investigate the claim.¹⁴⁹ A court has broad discretion to determine the extent and nature of the inquiry into allegations of juror bias.¹⁵⁰ Indeed, the failure to conduct a voir dire of the other jurors may be reversible error when a juror’s highly prejudicial responses may

¹⁴³ *Smith v. Phillips*, 455 U.S. at 222 (“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.”)(O’Connor, J., concurring).

¹⁴⁴ *Huntley v. Godinez*, 975 F.2d 316, 320 (7th Cir. 1992)(“our holding is limited to the very unique facts stated herein and this case should not be construed as adopting a per se rule that the court presume bias when a juror is victimized during trial”).

¹⁴⁵ *Leonard v. United States*, 378 U.S. 544 (1964).

¹⁴⁶ *Qunitero v. Bell*, 256 F.3d 409 (6th Cir. 2001).

¹⁴⁷ *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986)(inquiry conducted by trial judge to dispel proof of actual bias “superficial at best” for “it is inconceivable that by merely denying that they would allow their earlier prejudiced comments to influence their verdict deliberations, the jurors could thus have 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)(post-trial juror declarations concerning other jurors’ racial bias inadmissible).

¹⁴⁸ *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991).

¹⁴⁹ *Smith v. Phillips*, 455 U.S. at 215.

¹⁵⁰ *United States v. Corbin*, 590 F.2d 398, 400 (1st Cir. 1979)(court adequately inquired into allegation that juror was overheard stating during jury selection that defendant was guilty).

have tainted the other jurors.¹⁵¹ 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.¹⁵²

A court has various options when faced with an allegation of juror bias. The court must declare a mistrial if it concludes that the jury has been tainted,¹⁵³ may dismiss the offending juror and replace the juror with an alternate,¹⁵⁴ and, in some jurisdictions, allow the parties to stipulate to a jury of less than twelve persons.¹⁵⁵ The judge's handling of the matter is reviewed for an abuse of discretion.¹⁵⁶

6. 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.¹⁵⁷ Proof that a juror was

¹⁵¹ *Mach v. Stewart*, 129 F.3d 495, 498 (9th Cir. 1997)(court's failure to conduct voir dire of panel when potential juror's highly prejudicial responses may have tainted other jurors was reversible error); *United States v. Barnes*, 604 F.2d 121, 144 (2d Cir. 1979)(following allegation that during recess juror made physical gesture towards defense counsel indicating clear distaste, court gave jury general instruction but properly declined to question individual juror or conduct voir dire of jury, which might have engendered resentment).

¹⁵² *United States v. McClinton*, 135 F.3d 1178 (7th Cir. 1998)(court's voir dire of jury with participation of counsel after two jurors made racially biased comments was reasonable response to difficult situation); *State v. Varner*, 643 N.W.2d 298 (Minn. 2002)(court commits reversible error by failing to question all jurors about one juror's racial comment to other jurors); *State v. Santiago*, 715 A.2d 1 (Conn. 1998)(court has special responsibility to investigate allegation of racial bias by jurors).

¹⁵³ *United States v. Heller*, 785 F.2d 1524 (11th Cir. 1986).

¹⁵⁴ *United States v. Webster*, 750 F.2d 307, 337 (5th Cir. 1985); *United States v. Corbin*, 590 F.2d at 400.

¹⁵⁵ *United States v. Shenberg*, 89 F.3d 1461, 1472-1473 (11th Cir. 1996). See FED. R. CRIM. P., Rule 23(b)(parties may stipulate to jury of less than 12 persons at any time prior to verdict and court may excuse juror for cause during deliberations and accept verdict by remaining 11 jurors).

¹⁵⁶ *United States v. Carpa*, 271 F.3d 962 (11th Cir. 2001)(abuse of discretion for court's failure to question juror to determine whether juror was honest and unprejudiced); *United States v. Thompson*, 744 F.2d 1065, 1068 (4th Cir. 1984)(abuse of discretion for failure to dismiss 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)(abuse of discretion for failure to dismiss juror who expressed fear of defendants and reluctance to continue to sit even if dismissal required declaration of mistrial).

¹⁵⁷ *Tanner v. United States*, 483 U.S. 107, 126 (1987); *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912).

mentally impaired, intoxicated, or unconscious would appear to cast grave doubt on the integrity of the verdict.¹⁵⁸ When such claims are raised during the trial, the judge is in a position to correct the problem and permit the trial to continue.¹⁵⁹ 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.¹⁶⁰ The rule against admitting juror testimony to impeach a verdict is based on the 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 lay people.¹⁶¹ These interests routinely prevent jurors from giving testimony to invalidate a verdict based on allegations that jurors considered prejudicial and irrelevant matters,¹⁶² may have engaged in bizarre behavior during trial,¹⁶³ were inattentive during the testimony,¹⁶⁴ did

¹⁵⁸ *Peters v. Kiff*, 407 U.S.493, 501 (1972)(due process requires that jurors be sane and competent during trial).

¹⁵⁹ *Perez v. Marshall*, 119 F.3d 1422 (9th Cir. 1997)(upholding trial court's removal of dissenting juror during deliberations based on juror's emotional instability); *Lee v. United States*, 454 A.2d 770, 773 (D.C. App. 1982)(judge rejects motion for mistrial but agrees to dismiss intoxicated juror or to recess trial for three days).

¹⁶⁰ See *supra* notes 36-39 and accompanying text. See also *Tanner v. United States*, 483 U.S. at 120-121; *McDonald v. Pless*, 238 U.S. 264 (1915); FED. R. EVID., Rule 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).

¹⁶¹ *Tanner v. United States*, 483 U.S. at 120-121.

¹⁶² *United States v. Gonzalez*, 227 F.3d 520 (6th Cir. 2000)(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, and that foreman allegedly said that defense counsel always represented guilty clients, constituted incompetent and inadmissible evidence from one juror about another juror's statements during deliberations).

¹⁶³ *United States v. Beltempo*, 675 F.2d 472, 481 (2d Cir. 1982)(juror writes love letter to prosecutor, sends her a picture of himself, and invites her to dinner).

¹⁶⁴ *Government of Virgin Islands v. Nicholas*, 759 F.2d 1073, 1079 (3d Cir. 1985)(juror claims that 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)(claim that juror did not understand English language).

not understand the judge's instructions,¹⁶⁵ or disregarded those instructions.¹⁶⁶ 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.¹⁶⁷

The same policy considerations supported the Supreme Court's decision in *Tanner v. United States*,¹⁶⁸ upholding the trial judge's refusal to conduct an investigation into broad allegations that a jury "was on one big party," and which involved numerous claims alleging jurors' excessive use of alcohol and drugs.¹⁶⁹ The Court rejected the defendant's contention that substance abuse constituted an improper external influence. 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."¹⁷⁰ As an "internal" matter, ingestion of drugs and alcohol was within the rule prohibiting juror testimony to upset a verdict.

7. Pre-Deliberation Discussions

¹⁶⁵ *Davis v. United States*, 47 F.2d 1071 (5th Cir. 1931)(rejecting testimony that jurors had not heard judge's instructions).

¹⁶⁶ *United States v. Martinez-Monviva*, 14 F.3d 1310, 1036 (5th Cir. 1994)(rejecting juror's claim that other jurors stated that if defendant had been innocent he would have taken stand); *Devoney v. State*, 717 So.2d 501 (Fla. 1998)(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).

¹⁶⁷ *United States v. Dioguardi*, 492 F.2d 70 (2d Cir. 1974)(courts suggests 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)(reversed and remanded for hearing into juror's alleged incompetence after sufficient showing made that juror suffered from mental incompetency during trial).

¹⁶⁸ 483 U.S. 107 (1987).

¹⁶⁹ *Id.* at 122.

¹⁷⁰ *Ibid.*

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,¹⁷¹ it is well-settled that jurors are forbidden to discuss the case before they have heard all of the evidence, closing arguments, and the court's legal instructions, and have begun formally deliberating as a collective body.¹⁷² Judges routinely admonish juries at the outset and throughout the trial to not discuss the case among themselves prior to deliberations.¹⁷³ 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.¹⁷⁴

Courts recognize a distinction between extra-judicial influences on a jury and intra-jury misconduct.¹⁷⁵ 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.¹⁷⁶ Although some courts have applied a *Remmer*-like presumption of prejudice to extra-judicial misconduct,¹⁷⁷ no such

¹⁷¹ See *United States v. Williams-Davis*, 90 F.3d 490, 505 n.1 (D.C. Cir. 1996)(citing critics of the prohibition).

¹⁷² *Id.*; *United States v. Resko*, 3 F.3d 684, 688-689 (3d Cir. 1993).

¹⁷³ *United States v. Wiesner*, 789 F.2d 1264, 1269 n.3 (7th Cir. 1986)(such admonishment a "critical and important duty and cannot be over-emphasized").

¹⁷⁴ *United States v. Resko*, 3 F.3d at 689-690.

¹⁷⁵ *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"); *United States v. Resko*, 3 F.3d at 690 ("there is a clear doctrinal distinction between evidence of improper intra-jury communications and extra-jury influences").

¹⁷⁶ *United States v. Resko*, 3 F.3d at 690.

¹⁷⁷ See *supra* notes 41-49 and accompanying text.

presumption applies to internal misconduct.¹⁷⁸ Trial judges are afforded very broad discretion to determine the method for handling claims of internal misconduct discovered during the trial.¹⁷⁹ Courts conducting an inquiry during the trial typically conduct an interview of the jurors collectively or individually with the lawyers present,¹⁸⁰ or interview the jurors outside the presence of counsel.¹⁸¹ 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.¹⁸²

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.¹⁸³ However, the anti-impeachment rule does not bar juror testimony regarding pre-deliberation discussions discovered during the trial.¹⁸⁴ Although a court could properly

¹⁷⁸ *United States v. Sotelo*, 97 F.3d at 796-797; *United States v. Caldwell*, 83 F.3d 954, 956-957 (8th Cir. 1996).

¹⁷⁹ Compare *United States v. Williams-Davis*, 90 F.3d 490 (D.C. Cir. 1996) (decision of trial judge not to hold post-trial hearing on claim of pre-deliberation discussions "clearly within that discretion") with *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993) (abuse of discretion for failing to conduct proper inquiry on 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. Weisner*, 789 F.2d 1264 (7th Cir. 1986); *United States v. Chiantese*, 582 F.2d 974 (5th Cir. 1978).

¹⁸⁰ *United States v. Sotelo*, 97 F.3d 782 (5th Cir. 1996).

¹⁸¹ *United States v. Webster*, 750 F.2d 307, 336-337 (5th Cir. 1985) (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 court may even refuse to consult counsel entirely).

¹⁸² *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993). But see *United States v. Klee*, 494 F.2d 394 (9th Cir. 1974) (no abuse of discretion by trial judge in failing to investigate allegations of misconduct).

¹⁸³ *Tanner v. United States*, 483 U.S. 107 (1987); *United States v. Caldwell*, 83 F.3d 954 (8th Cir. 1996); *State v. Reiner*, 731 N.E.2d 662 (Ohio 2000).

¹⁸⁴ *United States v. Sotelo*, 97 F.3d at 797 (anti-impeachment rule no bar to juror testimony regarding juror discussions discovered during the trial); *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993) (abuse of discretion for failure to conduct more searching inquiry into juror discussions discovered during trial).

question jurors after the verdict regarding pre-deliberation conversations, a court “is virtually automatically justified in declining to pursue such an inquiry.”¹⁸⁵

9. 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,”¹⁸⁶ an “aberration,”¹⁸⁷ and a “denial of due process.”¹⁸⁸ 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.”¹⁸⁹ 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.¹⁹⁰

¹⁸⁵ *United States v. Williams-Davis*, 90 F.3d at 504; *United States v. Caldwell*, 83 F.3d at 956 (judge properly precluded juror testimony in 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”); *State v. Reiner*, 731 N.E.2d 662 (Ohio 2000)(no error in court’s refusing to conduct inquiry into allegations of improper jury discussions during trial that were raised for first time after verdict).

¹⁸⁶ *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983).

¹⁸⁷ *United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983).

¹⁸⁸ *United States v. Washington*, 705 F.2d at 494.

¹⁸⁹ *Ibid.*

¹⁹⁰ *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)(“[nullification] permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice”)(Bazelon, J.); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910)(jury nullification “the greatest corrective of law in its actual administration”).

It is commonly recognized that juries have the power to nullify the law, although they do not have the right to do so.¹⁹¹ It has thus been the settled rule 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.¹⁹² Counsel's invitation to a jury during summation to disregard the law is misconduct and subject to contempt.¹⁹³ And jurors who engage in the practice may be removed.¹⁹⁴

A trial judge has the power to remove jurors who become incapacitated or otherwise become unavailable during the course of deliberations.¹⁹⁵ 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.¹⁹⁶ The major difficulty in administering this power is being

¹⁹¹ *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (“the jury has the power to bring in a verdict in the teeth of both law and facts”)(Holmes, J.).

¹⁹² *Sparf v. United States*, 156 U.S. 51, 102 (1895); *United States v. Edwards*, 101 F.3d 17, 19-20 (2d Cir. 1996); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993); *State v. Hatori*, 990 P.2d 115 (Hawaii 1999); *People v. Sanchez*, 69 Cal. Rptr.2d 16 (Cal. App. 1998). See *People v. Engelman*, 77 Cal. App.4th 1297 (2000)(permissible to instruct jury that it must inform judge if any juror either refuses to deliberate or expresses an intention to disregard the law or decide the case on an 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 *United States v. Dougherty*, 473 F.2d at 1133 n.40.

¹⁹³ *United States v. Renfro*, 634 F. Supp. 1536 (W.D. Pa. 1986).

¹⁹⁴ *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997).

¹⁹⁵ See FED. R. CRIM. P., Rule 23(b)(judge may excuse 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)(pregnant juror went into labor); *United States v. Reese*, 33 F.3d 166, 173 (2d Cir. 1994)(juror leaving for business trip); *United States v. Egbuniwe*, 969 F.2d 757, 762-763 (9th Cir. 1992)(juror learned that girlfriend had been arrested and mistreated by police); *United States v. Ruggiero*, 929 F.2d 1289 (2d Cir. 1991)(juror fearful after receiving threat); *United States v. Wilson*, 894 F.2d 1245, 1249-1251 (11th Cir. 1990)(juror became ill).

¹⁹⁶ *United States v. Baker*, 262 F.3d 124 (2d Cir. 2001)(trial court's dismissal of deliberating juror who refused to discuss evidence with her fellow jurors upheld on ground that 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)(“a juror's refusal to apply the law as set forth in a jury charge constitutes an appropriate basis for a juror's removal”); *United States v. Geffrard*, 87 F.3d 448, 450-452 (11th Cir. 1996)(juror properly removed after

able to conduct an appropriate investigation into the allegation of misconduct without jeopardizing the traditional rule of secrecy in jury deliberations.¹⁹⁷

Since any judicial investigation necessarily requires an intrusion into the jurors' mental processes during deliberations, such investigation must be subject to extremely stringent limitations.¹⁹⁸ 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.¹⁹⁹ The standard for removal that has been adopted by some courts holds that "if the record 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."²⁰⁰ 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.²⁰¹

asserting that her religious beliefs led her to conclude that the defendants were victims of governmental entrapment).

¹⁹⁷ See supra notes 36-39 and accompanying text.

¹⁹⁸ *United States v. Thomas*, 116 F.3d at 621 (court recognizes "the often difficult distinction between the juror who acquittal he is purposefully disregarding the court's instructions on the law and the juror who is simply not persuaded by the government's evidence").

¹⁹⁹ *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001)(deliberating juror who is alleged to be willfully refusing to apply the law may be dismissed if there is no "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 (9th Cir. 1999)(request that deliberating juror be dismissed may not be granted if there is any reasonable possibility that request is motivated by juror's views on the merits of the case). But see *People v. Hightower*, 77 Cal. App.4th 1123 (Cal. App. 2000)(trial court's inquiry into allegations of misconduct by 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).

²⁰⁰ *United States v. Thomas*, 116 F.3d at 621-622, 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.").

²⁰¹ *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997); *People v. Cleveland*, 21 P.3d 1225 (Cal. 2001)(trial court has authority to remove juror who expresses unwillingness to follow judge's instructions, but trial court abused its discretion by discharging juror whom other jurors accused of not deliberating, but who in reality merely viewed evidence in a different way).

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.²⁰² 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, gave dishonest and misleading answers during voir dire, suffered from physical and mental impairments, were 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.²⁰³ As the Supreme Court has repeatedly observed, invalidating a verdict after irresponsible and improper jury behavior would undermine the existence of the jury system.²⁰⁴

²⁰² See supra notes 11-13 and accompanying text.

²⁰³ See *Smith v. Phillips*, 464 U.S. 548, 553 (1984) (“there are no perfect trials”); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 555 (1984) (“To invalidate the result of a three-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.”).

²⁰⁴ *Tanner v. United States*, 483 U.S. 107, 120 (1987); *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 555 (1984).

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.

1. 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.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷

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

²⁰⁵ *Hoffa v. United States*, 385 U.S. 293 (1966)(describing efforts by defendant to bribe members of a jury); *Remmer v. United States*, 347 U.S. 227 (1964)(describing efforts by caller to bribe foreman to acquit defendant); *United States v. Ruggiero*, 928 F.2d 1289 (2d Cir. 1991)(judge properly dismissed juror after ascertaining that juror was in state of fear resulting from encounter with unknown men just before deliberations commenced).

²⁰⁶ 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 Scott Peterson murder

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.²⁰⁸ 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. 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.²⁰⁹ And in 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.²¹⁰

This phenomenon of persons seeking fame and fortune through jury service has most recently been alleged in the trial of Scott Peterson, 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.²¹¹ 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

²⁰⁷ Joel Cohen, *Celebrity Jurors*, N.Y.L.J., April 7, 2004, at 2 ("stealth juror" worked her way onto jury venire in Scott Peterson murder trial); Brian Skoloff, *Prosecutors Oppose Moving Peterson Trial*, A.P. Newswires, May 10, 2004 (referring to three "stealth jurors" who allegedly lied to get on Peterson jury).

²⁰⁸ See supra notes 125-129 and accompanying text.

²⁰⁹ See Joel Cohen, supra note 207.

²¹⁰ See supra notes 7-9 and accompanying text.

²¹¹ See Brian Skoloff, supra note 207.

monetary benefit.”²¹² 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 “publicity-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.”²¹³

2. 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.²¹⁴ Moreover, whereas jurors historically were prohibited by statute and case law from taking notes during the trial,²¹⁵ today virtually all courts allow jurors to take notes during the trial.²¹⁶ Similarly, the practice of jurors posing questions to witnesses, although discouraged by many courts,²¹⁷ has been allowed in cases presenting sufficiently complex or compelling circumstances.²¹⁸

²¹² See Diana Walsh & Stacy Finz, *supra* note 206.

²¹³ *Ibid.*

²¹⁴ See *supra* notes 80-85 and accompanying text.

²¹⁵ *Price v. State*, 887 S.W.2d 949, 951 (Tex. Crim. App. 1994)(en banc).

²¹⁶ *Esaw v. Friedman*, 586 A.2d 1164, 1167-1168 and nn. 8-9 (Conn. 1991)(“the federal courts are virtually unanimous and our sister states nearly so”).

²¹⁷ *United States v. Collins*, 226 F.3d 457 (6th Cir. 2000); *State v. Costello*, 646 N.W.2d 204 (Minn. 2002); *State v. Gildea*, 759 N.E.2d 468 (Ohio App. 2001).

²¹⁸ *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).

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, and thereby 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,²¹⁹ make unauthorized visits to the places mentioned in testimony,²²⁰ and engage in extra-judicial research to ascertain the meaning of legal concepts or acquire extraneous information relevant to the case.²²¹ Although reenactments of the evidence are generally allowed, some reenactments may be unduly prejudicial and may taint the verdict.²²²

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, rather, to allay any concerns they may have about fulfilling their responsibilities as jurors. For example, in one recent capital murder trial,²²³ 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, and which conduct likely diminished their sense of responsibility for imposing the death penalty. Indeed, the pastor showed one of the jurors several passages from the

²¹⁹ See supra notes 86-98 and accompanying text.

²²⁰ See supra note 90 and accompanying text.

²²¹ See supra notes 64-79 and accompanying text.

²²² See supra notes 99-102 and accompanying text.

²²³ *People v. Danks*, 82 P.3d 1249 (Cal. 2004).

Book of Numbers which supported capital punishment,²²⁴ and stated that he would impose the death penalty on the defendant if he were a juror.²²⁵

Finally, juror activism is most powerfully illustrated in the debate over juror nullification.²²⁶ Whereas jurors historically had the power to decide questions of law,²²⁷ today the federal courts and virtually all state courts forbid jurors from disregarding the law as given by the trial judge.²²⁸ 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. But 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.²²⁹

3. Impaired Jurors

Some jurors are physically or mentally incompetent.²³⁰ The presence on a jury of an incompetent juror violates the defendant’s constitutional right to an impartial jury.²³¹ Impairment of a juror may be attributable to many causes: a juror may have a physical defect, such as a hearing problem;²³² a mental defect, such as a psychological disorder;²³³ an emotional problem, such as stress resulting from the intensity of the trial

²²⁴ Id. at 1268-1269.

²²⁵ Ibid.

²²⁶ See supra notes 186-201 and accompanying text.

²²⁷ See J. ABRAMSON, supra note 11 at 42-45.

²²⁸ See supra notes 191-194 and accompanying text.

²²⁹ See J. 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 1955 acquittal by all-white jury of two white men charged with lynching 14-year-old black youth; white defendants later bragged about killing the youth).

²³⁰ See supra notes 157-170 and accompanying text.

²³¹ *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912).

²³² See supra note 164 and accompanying text.

²³³ See supra notes 167 and accompanying text.

experience;²³⁴ or an inability to follow the proceedings due to consumption of alcohol or drugs.²³⁵

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 the face of opposition from the other jurors.²³⁶

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.²³⁷ 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.²³⁸ Physical and mental incompetence are regarded as internal matters about which jurors are barred from giving testimony.²³⁹ Thus, a claim that a juror was suffering from a psychological disorder during the trial was regarded as an "internal"

²³⁴ See supra note 159 and accompanying text.

²³⁵ See supra notes 168-170 and accompanying text.

²³⁶ *Perez v. Marshall*, 119 F.3d 1422 (9th Cir. 1997)(judge removes lone dissenting juror during stressful deliberations based on juror's alleged emotional instability).

²³⁷ See supra notes 36-39 and accompanying text.

²³⁸ See *Tanner v. United States*, 483 U.S. 107, 117-123 (1987).

²³⁹ *Ibid.*

abnormality that ordinarily could not provide the basis for challenging the verdict.²⁴⁰

Similarly, a claim that jurors were asleep, intoxicated, and using drugs during the trial was an internal matter about which jurors could not testify.²⁴¹

4. 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 proper, indeed attractive jurors.²⁴² Today the reverse is the case. Commentators suggest that juror ignorance is a virtue, and knowledge a vice.²⁴³ 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.²⁴⁴ 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.²⁴⁵ Imputing bias and partiality to a juror is hazardous. To be sure, instances occur in which jurors openly express racist or other

²⁴⁰ See *United States v. Dioguardi*, 492 F.2d 70, 80 (2d Cir. 1974)(suggesting that court will consider claim only when there exists proof that juror has been adjudicated to be insane or mentally incompetent "closely in advance of jury service").

²⁴¹ See *supra* notes 168-170 and accompanying text.

²⁴² See J. ABRAMSON, *supra* note 11 at 38-45.

²⁴³ *Id.* at 45.

²⁴⁴ See *supra* notes 142-148 and accompanying text.

²⁴⁵ See REID HASTIE, *INSIDE THE JUROR* 46-50 (1993)(providing generic model to study juror bias).

discriminatory views, and such expressions are usually capable of being remedied.²⁴⁶ Even instances where jurors openly express attitudes that potentially taint the other jurors are capable of being investigated and remedied.²⁴⁷ 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.²⁴⁸

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,²⁴⁹ have been exposed to extremely prejudicial pre-trial publicity,²⁵⁰ have been exposed to highly prejudicial events during the trial,²⁵¹ have a very close relationship with one of the important actors in the case,²⁵² was a victim of the crime and is emotionally involved in the case,²⁵³ and gave dishonest answers on the voir dire to get on the jury²⁵⁴

5. Evasive Jurors

Some jurors may resent the intrusion into their privacy that comes from having to reveal sensitive matters about their lives and background.²⁵⁵ Other jurors may fear for

²⁴⁶ See supra note 152 and accompanying text.

²⁴⁷ See supra notes 149-150 and accompanying text.

²⁴⁸ See supra notes 142-148 and accompanying text.

²⁴⁹ See supra notes 145-146 and accompanying text.

²⁵⁰ *Rideau v. Louisiana*, 373 U.S. 723 (1963)(two months prior to trial TV station broadcasts three different times a 20-minute film of defendant giving detailed confession).

²⁵¹ See supra note 144 and accompanying text.

²⁵² *Williams v. Taylor*, 529 U.S. 420 (2000).

²⁵³ See supra note 148 and accompanying text.

²⁵⁴ *United States v. Colombo*, 869 F.2d 149 (2d Cir. 1989).

²⁵⁵ See *Brandborg v. Lucas*, 891 F. Supp. 352 (E.D. Tex. 1995)(juror held in contempt for refusing to answer many personal questions).

their safety as well as privacy.²⁵⁶ 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.²⁵⁷ A juror who refuses to answer such questions because they are embarrassing might be held in contempt.²⁵⁸ By the same token, a juror who answers such questions dishonestly or evasively may, if selected, impair the integrity of the trial.²⁵⁹

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.²⁶⁰ Empaneling an anonymous jury is a "drastic measure" that implicates a defendant's right to the presumption of innocence.²⁶¹ Virtually every court reviewing the procedure has approved its use where it is genuinely needed and properly used.²⁶² One of the problems with empaneling 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 bias 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

²⁵⁶ See *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988) ("Jurors' fears of retaliation from criminal defendants are not hypothetical; such apprehension has been documented").

²⁵⁷ See *United States v. Phibbs*, 999 F.2d 1053, 1071 (6th Cir. 1993) (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").

²⁵⁸ See *Brandborg v. Lucas*, 891 F. Supp. at 355 (in response to juror's refusal to answer personal questions, prosecutor stated that her refusal was an insult to the court and "she should do it or suffer the consequences").

²⁵⁹ See *supra* notes 103-129 and accompanying text.

²⁶⁰ See *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003).

²⁶¹ *United States v. Ross*, 33 F.3d 1507, 1519 (11th Cir. 1994).

²⁶² *United States v. Shryock*, 342 F.3d at 970 ("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.").

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.²⁶³ 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 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, gave 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 were 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.

²⁶³ See supra notes 125-129 and accompanying text.

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."²⁶⁴ 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.

²⁶⁴ Smith v. Phillips, 464 U.S. 548, 553 (1984).