

**THE PUBLIC INJURY OF AN IMPERFECT TRIAL: FULFILLING
THE PROMISES OF *TANNER* AND THE SIXTH AMENDMENT
THROUGH POST-VERDICT INQUIRY INTO TRUTHFULNESS AT
VOIR DIRE**

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“You can’t tell one black from another. They all look alike;”¹ “All the niggers should hang;”² “I guess we’re profiling but they cause all the trouble;”³ “Let’s be logical. He’s black and he sees a seventeen year old white girl—I know the type.”⁴ Despite the American ideals of equality and justice for all, these words, among others equally or more abhorrent, have echoed through jury deliberation rooms across the country.

Though the United States judicial system is rooted in concepts of fairness and impartiality, our courts have long held that “[a] defendant is entitled to a fair trial but not a perfect one.”⁵ Nonetheless, our society demands that our trial system strive to reflect the tenets of basic fairness and a sincere search for justice. Indeed, the Constitution, through the Sixth Amendment, enumerates and protects certain rights of criminal defendants as a necessary underpinning to the

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1 *Tobias v. Smith*, 468 F. Supp. 1287, 1289 (W.D.N.Y. 1979) (internal quotation marks omitted).

2 *United States v. Henley*, 238 F.3d 1111, 1113 (9th Cir. 2001) (internal quotation marks omitted).

3 *United States v. Villar*, 586 F.3d 76, 81 (1st Cir. 2009) (internal quotation marks omitted).

4 *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) (internal quotation marks omitted).

5 *See, e.g.*, *Brown v. United States*, 411 U.S. 223, 231–32 (1973) (citations omitted) (internal quotation marks omitted); *Bruton v. United States*, 391 U.S. 123, 135 (1968) (citations omitted) (internal quotation marks omitted); *Lutwak v. United States*, 344 U.S. 604, 619 (1953). *See generally* *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (“It seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload.”).

integrity of criminal trials.⁶ These rights form the basic foundation of a fair trial and include the right to a speedy and public trial,⁷ the right to an attorney,⁸ and the right to an impartial jury.⁹ Beyond the Sixth Amendment, criminal defendants also find protections in the Federal Rules of Evidence (“the Rules”).¹⁰ However, tensions sometimes manifest between these two sources of protection regarding the right to an impartial jury.¹¹

Under Rule 606(b), jurors are generally prohibited from providing post-verdict testimony as to influences or matters discussed during jury deliberations (subject to the certain enumerated exceptions).¹² In *Tanner v. United States*, the Supreme Court declared that Rule 606(b)’s prohibition on inquiry into the validity of verdicts after allegations of juror incompetency did not conflict with the Sixth Amendment’s guarantee of an impartial jury because the trial process provided four sufficient protections for the Constitutional right.¹³ According to *Tanner*, observation of the jury during trial, jurors’ pre-verdict observations of each other, impeachment of a verdict by “non-juror evidence of misconduct,” and the voir dire process together

6 See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).

7 *Id.*

8 *Id.*

9 *Id.*

10 See, e.g., FED. R. EVID. 404 (limiting admissibility of character evidence of the accused); FED. R. EVID. 410 (limiting admissibility of pleas, plea discussions, and related statements).

11 See, e.g., *Tanner v. United States*, 483 U.S. 107 (1987) (addressing the interplay between the Sixth Amendment right to an impartial jury and Rule 606(b)’s general prohibition on post-verdict testimony by jurors regarding jury deliberation).

12 FED. R. EVID. 606(b) (“Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.”).

13 *Tanner*, 483 U.S. at 127 (“In light of these other sources of protection of petitioners’ right to a competent jury, we conclude that the District Court did not err in deciding, based on the inadmissibility of juror testimony [under Rule 606(b)] and the clear insufficiency of the nonjuror evidence offered by petitioners, that an additional postverdict evidentiary hearing was unnecessary.”).

adequately protect a defendant's right to a competent and unimpaired jury.¹⁴

Though juror impropriety of any kind threatens the crux of our judicial system, racial discrimination in the jury deliberation room is particularly abhorrent to our cardinal values of fairness and neutrality. Unfortunately, discrimination in this setting is also particularly difficult to combat. The First Circuit has addressed this issue, providing an approach to dealing with the tension arising between the competing objectives of investigating jury verdicts possibly tainted by racism and protecting the policy considerations surrounding 606(b).¹⁵ This approach recognizes the salience of the issue of racial bias in the context of a jury trial. The First Circuit acknowledged the weaknesses of the *Tanner* protections at trial in holding that a district court judge has the discretion to inquire into the validity of the verdict following legitimate allegations of ethnically biased statements during jury deliberations.¹⁶ In so holding, the First Circuit recognized the need for the Rules of Evidence to accommodate concerns of racial bias. Where racial discrimination infects a verdict, constitutional implications may and must supersede the requirements under the Rules of Evidence; whether by interpretation or by override, 606(b) must be flexible enough to accommodate to concerns about racial bias.

Other circuits have focused on issues concerning *Tanner's* specifically enumerated protections. Though *Tanner* listed the voir dire process as an aspect of trial protecting a defendant's Sixth Amendment rights,¹⁷ recent opinions (including the First Circuit in *Villar*) have questioned the strength of this protection, particularly when juror racial bias is alleged.¹⁸ Appellants have attempted to apply *Tan-*

¹⁴ *Id.*

¹⁵ *See* United States v. Villar, 586 F.3d 76, 87 (1st Cir. 2009) ("While the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury.").

¹⁶ *See id.* at 87–88 ("[T]he need to protect a frank and candid jury deliberation process is a strong policy consideration. Still, at the other extreme, there are certain rare and exceptional cases involving racial or ethnic prejudice that require hearing jury testimony to determine whether a defendant received a fair trial under the Sixth Amendment.").

¹⁷ *Tanner*, 483 U.S. at 127 ("Petitioners' Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*.").

¹⁸ *See, e.g., Villar*, 586 F.3d at 87 ("In our view, the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations.").

ner's voir dire protection by claiming that trials in which jurors denied racial bias during voir dire, but allegedly exposed such biases during deliberations, were structurally defective.¹⁹ While the Ninth Circuit has held that post-verdict inquiry can be made into juror truthfulness during voir dire in this context,²⁰ the Tenth Circuit has countered that inquiries into truthfulness at voir dire are identical to inquiries into the validity of a jury verdict and thus impermissible.²¹ The Tenth Circuit based its decision in large part on Third Circuit precedent decided at habeas.²²

This Comment will explore the tensions among the Sixth Amendment protection of trial by an impartial jury, juror racism, and Rule 606(b)'s prohibition on post-verdict inquiry into juror bias, examining specifically the voir dire protection enumerated in *Tanner*. Despite the weakness of the voir dire protection and the compelling justifications for proscribing inquiry into jury deliberations, a greater public injury is inflicted when the voir dire protection is not properly enforced.

Part I of this Comment will discuss the four protections against juror impropriety described in *Tanner* and Justice Marshall's critique of that majority opinion. Part II will examine the recent set of cases addressing juror racial bias that comprise the circuit split between the Ninth and Tenth circuits regarding the voir dire protection as applied to allegations of racial discrimination post-verdict. Theoretically, voir dire protects the Sixth Amendment right to an impartial jury because attorneys can inquire into juror bias, examine juror conduct, and ultimately challenge jurors in that setting; however, whether lawyers can allege a structural defect in the trial post-verdict due to juror misconduct in lying during voir dire remains undefined. Part III will endorse the First Circuit's approach in resolving the conflicts arising among *Tanner*, 606(b), and combating racial bias in the jury deliberation room. Part IV will argue that, aside from the voir dire protection, the remaining three protections enumerated in *Tanner* are not

19 See, e.g., *Villar*, 586 F.3d 76; *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008); *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001).

20 See *Henley*, 238 F.3d at 1121 (finding that "evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful").

21 See *Benally*, 546 F.3d at 1235 (finding that evidence of alleged racial bias is in essence a challenge to the validity of the verdict and therefore inadmissible).

22 See *Williams v. Price*, 343 F.3d 223, 235 (3d Cir. 2003) (holding that "juror testimony as to any matter or statement occurring during the course of the jury's deliberations" is categorically barred, "even if the testimony is not offered to explore the jury's decision-making process in reaching the verdict" (internal quotation marks omitted)).

effective in the context of juror racial bias. Part V will discuss the extent to which the voir dire protection actually protects at trial, even if this protection were optimally enforced. Ultimately, this protection is weak at best. Lastly, Part VI will conclude that while there are significant justifications for prohibiting inquiry into jury deliberations, a greater public injury results when inquiry into truthfulness at voir dire is barred. Not only would excluding this exception essentially incentivize jurors to lie about racial bias during voir dire, but without this protection such lies would be virtually undiscoverable. The voir dire protection may be weak, but because the other three *Tanner* protections are so ineffective in the juror racial bias context, without properly enforcing the voir dire protection, *Tanner's* promises are left largely unfulfilled and the Sixth Amendment right to an impartial jury becomes an aspiration rather than an expectation.

I. *TANNER'S* PROMISE

Though some might describe serving on a jury as an honor, a civic duty, or maybe even an onerous obligation, at least one juror impaneled in *Tanner v. United States* viewed the process as “one big party.”²³ Not only did the *Tanner* jurors allegedly sell and consume alcohol and illegal drugs throughout the trial, but one juror allegedly invoked the word “flying” to summarize his condition throughout.²⁴ After rendering a guilty verdict, another juror was so stunned by the entire process that he felt compelled to admit these acts because “the people on the jury didn’t have no business being on the jury.”²⁵ Despite these appalling allegations, the Supreme Court upheld the district court’s denial of an evidentiary hearing concerning the jurors’ drug and alcohol use at trial based on Rule 606(b) and the “[s]ubstantial policy considerations support[ing] the common-law rule against the admission of jury testimony to impeach a verdict.”²⁶

The Court quoted an earlier decision in *McDonald v. Pless* to explain the imperative need to protect the privacy of jury deliberations post-verdict:

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

²³ *Tanner v. United States*, 483 U.S. 107, 115 (1987).

²⁴ *Id.* at 115–16 (internal quotation marks omitted).

²⁵ *Id.* at 116 (internal quotation marks omitted).

²⁶ *Id.* at 119.

by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.²⁷

Ultimately, Justice O'Connor, writing for the *Tanner* majority, concluded that though post-verdict inquiry into juror misconduct in many cases would very likely reveal improper jury behavior and lead to the invalidation of such verdicts, “[i]t is not at all clear, however, that the jury system could survive such efforts to perfect it.”²⁸

The policy concerns in shielding jury verdicts from juror testimony are not outweighed by the Sixth Amendment right to a fair and impartial jury, according to the *Tanner* majority, because the trial process itself offers sufficient protections of the constitutional right.²⁹ These protections include the voir dire process, observation of the jury by the court and attorneys, observation of the jurors by each other, and the opportunity to impeach the verdict by non-juror evidence of misconduct.³⁰ Though the *Tanner* majority found these four protections satisfactory, trials such as *Tanner*'s nonetheless continue to yield unsavory results. This problem is compounded when allegations suggest juror racism as opposed to readily observable and provable qualities such as intoxication. In such cases, the *Tanner* protections are even less effective—if not completely ineffective—in preserving the Sixth Amendment right to an impartial jury.

The idea that *Tanner*'s protections were inadequate was suggested as early as the case itself, in Justice Marshall's dissent from the majority opinion.³¹ According to Justice Marshall, the enumerated protections failed in *Tanner*'s case because a juror's intention to utilize drugs during trial is not readily discoverable during voir dire, the jurors were not observed consuming illegal substances and actually

27 *Id.* at 119–20 (alteration in original) (quoting *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915)).

28 *Tanner*, 483 U.S. at 120.

29 *See id.* at 127 (“Petitioners’ Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel. Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict. Finally, after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct.” (internal citations omitted)).

30 *Id.*

31 *Id.* at 141–42 (Marshall, J., dissenting) (“Reliance on these safeguards, to the exclusion of an evidentiary hearing, is misguided.”).

purposefully evaded such observation, and these acts could not be proven through non-juror testimony.³² Justice Marshall agreed with Justice O'Connor's contention that the jury system cannot be perfect,³³ but noted that to protect the Sixth Amendment right, the Court must determine not whether the trial was a perfect one, but "whether the jury that heard the[] case behaved in a manner consonant with the minimum requirements of the Sixth Amendment. If we deny [litigants] . . . this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless."³⁴

II. RACISM IN THE COURTS: THE CIRCUIT SPLIT OVER VOIR DIRE

Since *Tanner* was decided in 1987, the circuits have split over how to address the application of precedent and the interplay between Rule 606(b) and the Sixth Amendment right to an impartial jury when juror racial bias is alleged post-verdict. Whether *Tanner's* voir dire protection can be invoked to allege a structural defect in a trial when post-conviction juror evidence suggests a juror has failed to be truthful at voir dire remains an open question. While the First and Ninth Circuits' precedents suggest that those courts may be receptive to such arguments, the Third and Tenth Circuits' precedents imply a converse approach.

One of the earliest cases to discuss the racial bias issue in conjunction with Rule 606(b), preceding even *Tanner*, was the Western District of New York's decision in *Tobias v. Smith*, which granted a hearing to investigate such allegations of racial bias.³⁵ In *Tobias*,³⁶ a juror submitted an affidavit to defense counsel post-conviction asserting that several members of the all-white jury had been prejudiced against the black defendant.³⁷ In response, the Western District of New York held that in order to uphold the fundamental tenet of the judicial system that every defendant receive a fair trial, an evidentiary hearing must be granted to further explore the accusation of racial

³² *Id.*

³³ See generally Andrew C. Helman, Comment, *Racism, Juries, and Justice: Addressing Post-Verdict Juror Testimony of Racial Prejudice During Deliberations*, 62 ME. L. REV. 327, 332 (2010) (discussing and analyzing Justice Marshall's dissent in *Tanner*).

³⁴ *Tanner*, 483 U.S. at 142 (Marshall, J., dissenting) (emphasis added).

³⁵ 468 F. Supp. 1287, 1291 (W.D.N.Y. 1979).

³⁶ *Tobias* involved a petition for a writ of habeas corpus. *Id.* at 1287.

³⁷ According to that juror, the jury foreman had instructed the other jurors that the photo identification was irrelevant because "[y]ou can't tell one black from another. They all look alike." *Id.* at 1289. Another juror had voiced that the white victims ought to be believed over the black defendant. *Id.*

bias.³⁸ In addressing the 606(b) conflict, the court referenced the voir dire process:

[W]here comments indicate prejudice or preconceived notions of guilt, statements may be admissible not under F.R.E. 606(b) but because they may prove that a juror lied during the voir dire. Such evidence can be used to show that a juror should be disqualified by his prejudice and that the verdict in which he participated was a nullity.³⁹

Following this analysis, the court concluded that the affidavit served as a sufficient signal that racial bias inflicted an inappropriate influence on the jury's verdict, necessitating a hearing to further investigate because such improper influences cannot be deemed "merely matters of jury deliberations."⁴⁰

After the Supreme Court's decision in *Tanner*, however, the reasoning supporting the Western District of New York's decision in *Tobias* seems murkier. The Ninth Circuit addressed the conflict between truthfulness during voir dire and Rule 606(b) in *United States v. Henley* in 2001, holding that Rule 606(b) does not bar evidence of juror racial bias when a juror may have lied during voir dire.⁴¹ In *Henley*, jurors, who later convicted the defendants of conspiracy to distribute cocaine, had been posed specific questions regarding their feelings on race at voir dire and answered in the negative.⁴² After trial, however, one juror provided a deposition stating that another juror had made racist comments while carpooling to and from court, including stating that "all the niggers should hang."⁴³ Although the Ninth Circuit noted the conflict with Rule 606(b), it concluded:

Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine. It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony.⁴⁴

38 *Id.* ("The integrity of the judicial system depends on the guarantee that every litigant receive a fair trial. The concomitant policy of redressing the injury of the private litigant, where a verdict was reached by a jury which was not impartial in an individual case, requires an accommodation of the conflicting policies." (internal quotation marks omitted)).

39 *Id.* at 1290 (citations omitted).

40 *Id.*

41 238 F.3d 1111 (9th Cir. 2001).

42 *Id.* at 1111–14. Jurors had been asked "what their overall views were of interracial dating, whether they had ever had a bad experience with a person of a different race, and whether race would influence their decisions in any way." *Id.* at 1114.

43 *Id.* at 1113 (internal quotation marks omitted).

44 *Id.* at 1120 (footnote omitted).

The court then proceeded to explain that in order to constitute a Sixth Amendment violation, prejudice need not have “pervaded the jury room;” rather, even “[o]ne racist juror would be enough.”⁴⁵ Ultimately the Ninth Circuit’s decision turned on the lack of truthfulness during voir dire, holding that

[w]here, as here, a juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror’s alleged racial bias is indisputably admissible for the purpose of determining whether the juror’s responses were truthful.⁴⁶

According to the Ninth Circuit, if a litigant is able to demonstrate that a juror answered dishonestly during voir dire and a truthful answer would have resulted in a valid for-cause challenge, the litigant is entitled to a new trial.⁴⁷ Notably, however, the Ninth Circuit’s decision is somewhat cabined as in *Henley*, the challenged statements were made outside the courthouse while carpooling rather than in the jury deliberation room.⁴⁸ However, because the Ninth Circuit allowed inquiry based on a structural defect in the trial’s voir dire, it avoided the issue of whether the Rules’ protection extended to statements made outside of deliberations but during trial.⁴⁹

Since *Henley* was decided, the courts have not been entirely clear on the precedent the case sets.⁵⁰ The Ninth Circuit itself has, in at least one case, *United States v. Decoud*,⁵¹ limited *Henley*’s analysis that racial bias may be an exception to 606(b) prohibition on juror testimony to dictum.⁵² The dissent in *Decoud*, however, argued for an opposite interpretation of *Henley*, stating:

⁴⁵ *Id.* (internal quotation marks omitted).

⁴⁶ *Id.* at 1121.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1112.

⁴⁹ *Id.* at 1121 (“[W]e need not decide today whether or to what extent the rule prohibits juror testimony concerning racist statements made during deliberations or, as in this case, outside of deliberations but during the course of the trial.”).

⁵⁰ See Helman, *supra* note 33, at 335 (“[T]he apparent split between the Ninth and Tenth Circuits shows that the federal courts have little clarity or unanimity to offer on this issue and seem to disagree on the meaning of the rule and these cases.”).

⁵¹ 456 F.3d 996 (9th Cir. 2006).

⁵² *Id.* at 1018–19 (“Although *Henley* implied in dictum that evidence of racial prejudice might be exempt from Rule 606(b)’s restriction on post-trial evidence, *Henley* was specifically referring to racial bias ‘unrelated to the specific issues that the juror was called upon to decide.’” (quoting *Henley*, 238 F.3d at 1120)). The *Decoud* majority attempted to distinguish *Henley* by arguing that while in *Henley* the allegations indicated that a juror had been racially biased, the juror in *Decoud* had been dismissed on a completely distinct ground: her religious convictions. *Id.* Though that juror had not participated in the verdict, she later indicated that as the sole black juror she had felt racial pressure because she had been a “holdout” vote. *Id.* at 1019; see also Helman, *supra* note 33, at 335 n.68 (“In

[T]he majority misconstrues . . . *Henley*, which persuasively reasons that racial prejudice is a mental bias that is *never* acceptable in the jury room. Instead of disregarding *Henley*, we should apply its reasoning to hold that Federal Rule of Evidence 606(b) does not bar testimony regarding evidence of racial prejudice within the jury.⁵³

Citing to *Henley*, the dissent continued, “[w]e refuse to be a society in which a defendant’s guilt or innocence is decided by the color of her skin. Accordingly, the Sixth Amendment entitles every defendant to an impartial, unbiased jury.”⁵⁴

Following the *Henley* decision, however, the Tenth Circuit has taken the opposite approach in *United States v. Benally*, holding that juror testimony that another juror failed to answer truthfully during voir dire cannot be used to overturn a verdict.⁵⁵ *Benally*, a Native American, had been accused of assault with a dangerous weapon, and prior to his trial the judge had questioned jurors as to possible racial bias at voir dire.⁵⁶ Following *Benally*’s conviction, however, a juror approached the defense to reveal that racist comments against Native Americans had clouded the deliberations.⁵⁷ Unlike the Ninth Circuit in *Henley*, however, the Tenth Circuit provided a contrary analysis, denying a hearing to investigate a structural defect in voir dire, holding that

[a]lthough the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial. That is a challenge to the validity of the verdict. . . . [I]f the purpose of the post-verdict proceeding were to charge the jury foreman or the other juror with contempt of court, Rule 606(b) would not apply. However, it does not follow that juror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict.⁵⁸

According to the Tenth Circuit, if it followed the Ninth Circuit’s precedent of “allowing juror testimony through the backdoor of a

Decoud, a three judge panel of the Ninth Circuit characterized *Henley*’s argument on racial prejudice as dicta, while the dissent forcefully disagreed with that characterization.”).

53 *Decoud*, 456 F.3d at 1022 (Ferguson, J., dissenting) (citations omitted).

54 *Id.* at 1023.

55 *United States v. Benally*, 546 F.3d 1230, 1241 (10th Cir. 2008).

56 *Id.* at 1231. The judge asked: “Would the fact that the defendant is a Native American affect your evaluation of the case?” and “Have you ever had a negative experience with any individuals of Native American descent? And, if so, would that experience affect your evaluation of the facts of this case?” All jurors replied in the negative. *Id.* (internal quotation marks omitted).

57 *Id.* at 1231–32. According to the juror, the foreman stated, “[w]hen Indians get alcohol, they all get drunk,” and jurors discussed “send[ing] a message back to the reservation.” *Id.* (internal quotation marks omitted).

58 *Id.* at 1235 (citations omitted).

voir dire challenge”⁵⁹ it would risk “swallowing the rule.”⁶⁰ The Tenth Circuit concluded its analysis by referencing Justice O’Connor’s proposition in *Tanner* that “[w]e must remember that the Sixth Amendment embodies a right to ‘a fair trial but not a perfect one, for there are no perfect trials.’”⁶¹

Although the Tenth Circuit acknowledged the Ninth Circuit’s decision in *Henley* in its analysis, it was swayed ultimately by Third Circuit precedent in *Williams v. Price*,⁶² which held that a state court’s decision that the no impeachment-rule bars post-verdict juror testimony as to statements made during deliberation was not “contrary to” or “an unreasonable application of, clearly established federal law.”⁶³ Because the Third Circuit decided *Williams* at habeas, however, it has been suggested that the core precedent underlying the *Benally* decision is not entirely persuasive, limiting the implications of the Tenth Circuit’s response to the Ninth.⁶⁴ Moreover, as other notes have ar-

⁵⁹ *Id.* at 1236.

⁶⁰ *Id.*

⁶¹ *Id.* at 1240 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984)).

⁶² *Benally*, 546 F.3d at 1235–36 (“The Third Circuit, by contrast, has held that such an interpretation would be ‘plainly too broad,’ and that Rule 606(b) ‘categorically bar[s] juror testimony ‘as to any matter or statement occurring during the course of the jury’s deliberations’ even if the testimony is not offered to explore the jury’s decision-making process in reaching the verdict.’ . . . The Third Circuit’s approach best comports with Rule 606(b), and we follow it here.” (quoting *Williams v. Price*, 343 F.3d 223, 235 (3rd Cir. 2003))).

⁶³ *Williams*, 343 F.3d at 237 (“We emphasize that we do not hold that testimony of the type at issue is inadmissible under Rule 606(b) or any other particular version of the ‘no impeachment’ rule. We express no view on those questions. We hold only that the exclusion of such testimony is not irrational and does not contravene or represent an unreasonable application of clearly established federal law.” (emphasis added)).

⁶⁴ *See id.* at 239 (“Our role in this case, however, is not to interpret Rule 606(b) or any other version of the ‘no impeachment’ rule but merely to determine whether the state courts contravened or unreasonably applied ‘clearly established Federal law, as determined by the Supreme Court.’ . . . [No] Supreme Court decision clearly establishes that it is unconstitutional for a state to apply a ‘no impeachment’ rule that does not contain an exception for juror testimony about racial bias on the part of jurors.”); *see also Benally*, 546 F.3d at 1230, *reh’g en banc denied*, 560 F.3d 1151, 1154 (10th Cir. 2009) (Briscoe, J., dissenting) (“Further, although the panel suggests its conclusion is consistent with the Third Circuit’s decision in *Williams v. Price*, that decision is distinguishable because it involved an appeal from the denial of a state prisoner’s habeas petition, and decided only that Supreme Court precedent did not ‘clearly establish[] that it [wa]s unconstitutional for a state to apply a ‘no impeachment’ rule that d[id] not contain an exception for juror testimony about racial bias on the part of jurors.’ In other words, the Third Circuit did not directly resolve the issue we now face.” (alterations in original) (citations omitted)); Brandon C. Pond, Note, *Juror Testimony of Racial Bias in Jury Deliberations*: United States v. Benally and the Obstacle of Federal Rule of Evidence 606(b), 2010 B.Y.U. L. REV. 237, 246–47 (2010) (“Under this strict standard, the Third Circuit was not evaluating whether challenges to voir dire must comply with the requirements of Rule 606(b), but whether it was

gued, the Tenth Circuit's argument that allowing evidence for the purpose of examining voir dire, as opposed to challenging the validity of the verdict based on juror testimony, is weaker than at first glance because "[t]he Rules of Evidence constantly permit evidence to be admitted for one purpose while forbidding it for others—even though the practical effect is the same."⁶⁵ As Judge Briscoe clarified in his dissent to the Circuit's denial of rehearing en banc, holding a hearing to investigate whether jurors responded truthfully during voir dire does not equate challenging the validity of the verdict because if the jurors did, in fact, reply dishonestly, the defendant's Sixth Amendment right to an impartial jury had been violated.⁶⁶ Judge Briscoe states "[t]hus, contrary to being an 'inquiry into the validity of the verdict' rendered by the jury in his case, Mr. Benally's claim is more properly viewed as an inquiry into 'the legitimacy of [the] pre-trial procedures,' and, in turn, the constitutionality of the overall proceedings."⁶⁷

Currently, the split between the Ninth and Tenth Circuits remains unresolved.

III. THE FIRST CIRCUIT APPROACH TO *TANNER* AND RACIAL BIAS, "A CONSTITUTIONAL OUTER LIMIT"

Most recently, the First Circuit has addressed the issue of post-verdict allegations of juror racial bias in *United States v. Villar*,⁶⁸ which considered the extent of a district court's discretion to hold a hearing following allegations of racial bias and stated that the applicability of the *Tanner* precedent is limited in this context.⁶⁹ In *Villar*, the defendant's lawyer received an e-mail from a juror admitting that some jurors had engaged in racial profiling in convicting Villar, a Hispanic man, of bank robbery.⁷⁰ In reaching its decision, the First Circuit considered the varying interpretations of 606(b) and racial bias pro-

clearly established that voir dire challenges are beyond the scope of Rule 606(b). . . . [T]he Third Circuit's decision seems appropriate under a 'clearly established' standard, but ultimately unhelpful to the *Benally* controversy. Once the Third Circuit decision is limited to its appropriate contours, the only circuit to squarely address the issue is the Ninth Circuit.")

⁶⁵ Pond, *supra* note 65, at 247.

⁶⁶ See *Benally*, 560 F.3d at 1153 (Briscoe, J., dissenting).

⁶⁷ *Id.* (alteration in original).

⁶⁸ 586 F.3d 76 (1st Cir. 2009).

⁶⁹ Although *Villar* did not concern allegations of a structural defect in voir dire, the court reaches relevant discussion of the implication of allegations of racism in jury trials and the protections our system provides. See *infra* notes 71 and 72 and accompanying text.

⁷⁰ *Villar*, 586 F.3d at 78.

vided by the Ninth and Tenth Circuits and first concluded, as the Tenth Circuit had, that under its express terms, 606(b) prohibits juror testimony about comments made during deliberations, including racial comments.⁷¹ However, the First Circuit ultimately embraced a much different approach from the Tenth, holding:

While the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury. In our view, the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations.⁷²

This Comment endorses the First Circuit approach. According to that Court, racial bias is an exceptional context in which the *Tanner* protections are simply too deficient to guard the Sixth Amendment right to an impartial jury.⁷³ Essentially, though Rule 606(b) and *Tanner* protect significant policy concerns, there is a “constitutional outer limit” to their applicability.⁷⁴ Racial discrimination stands in opposition to the very essence of a fair trial; at the point where racial bias taints a jury verdict, constitutional implications must supersede the policy considerations of precluding inquiry into jury verdicts.

IV. THE WEAKNESS OF *TANNER*'S PROTECTIONS IN THE FACE OF RACIAL BIAS

In the years since Justice Marshall's dissent in *Tanner*, legal scholarship and case law have continued to address the limits and insufficiencies of the case's four Sixth Amendment protections.⁷⁵ In the

⁷¹ *See id.* at 83–84 (“We are persuaded by the courts that have held that Rule 606(b), by its express terms, precludes any inquiry into the validity of the verdict based on juror testimony regarding racial or ethnic comments made ‘during the course of deliberations.’”).

⁷² *Id.* at 87.

⁷³ *See id.* at 87–88 (“[T]here are certain rare and exceptional cases involving racial or ethnic prejudice that require hearing jury testimony to determine whether a defendant received a fair trial under the Sixth Amendment.”).

⁷⁴ *Id.* at 88.

⁷⁵ *See, e.g.,* Helman, *supra* note 33, at 332 (“While *Tanner* played a pivotal role in the Tenth Circuit's conclusion that juror testimony is barred, anecdotal evidence, recent court decisions, and social science research raise serious questions about . . . the Court's conclusion that Sixth Amendment rights are adequately protected earlier in the trial process.”); *see also Villar*, 586 F.3d at 87 (“In our view, the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations.”); *United States v. Benally*, 546 F.3d 1230, 1240 (10th Cir. 2008) (acknowledging that “[e]ach protection might not be equally efficacious in every instance of jury misconduct” but concluding that “[t]hese protections might not be

context of allegations of juror racial bias, the *Tanner* protections are particularly weak.⁷⁶ It is true that *Tanner's* first protection of visual observation by court personnel, the court itself, and attorneys might prove effective in some instances of readily observable conduct such as intoxicated behavior. However, racist opinions and biases are internal feelings that are not evident to the naked eye, except in particularly extreme and egregious circumstances.⁷⁷ Unlike the influence of drugs, racism is not revealed by overt physical features or demarcations. Moreover, accusations of racism are particularly incendiary and a court will likely be hesitant to inflict such a charge absent clear evidence. To support the protection of the observation by court, court personnel, and counsel, the *Tanner* Court cited to *United States v. Provenzano*.⁷⁸ In *Provenzano*, counsel consented to a judge's decision not to take action after two jurors were observed smoking marijuana while sequestered during trial and the Third Circuit affirmed the conviction on appeal because the lawyer's decision had been a tactical one.⁷⁹ However, like *Tanner*, *Provenzano* is equally inapplicable to issues pertaining to juror racial bias because unlike drug use, racism need not manifest in any physical, observable act.⁸⁰

Moreover, even in rare cases where counsel is able to visually identify racism, a mere allegation may prove insufficient.⁸¹ For example, in *United States v. Abcasis*, though defense counsel was able to observe a juror gesturing in a manner that signaled her bias against the defendants and making Anti-Semitic comments regarding the defendants, the court found the allegations insufficient without counsel proffering concrete evidence.⁸² Ultimately, the jury rendered a guilty verdict and the district court denied the motion for a new trial due to

sufficient to eliminate every partial juror, just as in *Tanner* they proved insufficient to catch every intoxicated juror, but jury perfection is an untenable goal").

76 See *Villar*, 586 F.3d at 87 (stating that *Tanner's* protections prove inadequate in the context of racial comments made during jury deliberations). But see *Benally*, 546 F.3d at 1240 ("The safeguards that the Court relied upon for exposing the drug and alcohol use amongst jurors in *Tanner* are also available to expose racial biases of the sort alleged in Mr. Benally's case.").

77 See *Villar*, 586 F.3d at 87 ("[V]isual observations of the jury by counsel and the court during trial are unlikely to identify jurors harboring racial or ethnic bias.").

78 *United States v. Provenzano*, 620 F.2d 985, 996–97 (3d Cir. 1980).

79 *Id.*

80 See *Benally*, 546 F.3d at 1240 ("Each protection might not be equally efficacious in every instance of jury misconduct. The judge will probably not be able to identify racist jurors based on trial conduct as easily as he could identify drunken jurors, for instance . . .").

81 See, e.g., *United States v. Abcasis*, 811 F. Supp. 828, 830 (E.D.N.Y. 1992) (denying a defendant a new trial post-verdict despite claims of observing a juror making racist gestures throughout trial).

82 *Id.* at 830.

misconduct because the court determined counsel had not fully and adequately presented the allegations and thus waived the right.⁸³

The second protection enumerated by the *Tanner* court, juror observations of each other during the course of trial, proves equally problematic to the first protection. Even more so than court personnel, a judge, or a lawyer, a juror may be extremely hesitant to accuse a fellow juror of racism without clear evidence, and such accusations are by their nature ambiguous as it is not possible to know what is in another's mind.⁸⁴ Furthermore, jurors are prohibited from deliberating before the completion of trial and so any discussion among jurors before the end of trial would, in an optimal situation, be limited.⁸⁵ Though *Tanner* cited *McIlwain v. United States* to support this protection, that case, in which jurors informed the judge that the foreperson was unable to preside during trial because he was intoxicated, is easily distinguishable from the race context because intoxication is overtly recognizable.⁸⁶

The last protection enumerated by *Tanner* (aside from voir dire), non-juror evidence of misconduct, faces comparable challenges in the racial bias context.⁸⁷ In support of this protection, *Tanner* cited *United States v. Taliaferro*.⁸⁸ In *Taliaferro*, the court was able to review the dining records of the jurors in question and consider the testimony of a marshal who accompanied the jurors in deciding whether jurors were intoxicated during deliberations.⁸⁹ However, such specific evidence would rarely be available in the context of racial bias. Even if evidence such as membership in an openly racist group or atten-

⁸³ *Id.* at 831–32.

⁸⁴ *Cf.* *United States v. Villar*, 586 F.3d 76, 87 n.5 (1st Cir. 2009) (“Because the bias of a juror will rarely 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,’ . . . it necessarily must be inferred from surrounding facts and circumstances.” (quoting *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 558 (1984) (Brennan, J., concurring)) (alteration in original)).

⁸⁵ However, juries do not always abide by this instruction. *See generally* Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 49–51 (2003) (analyzing pre-deliberation jury discussions and considering whether such discussion leads to premature judgments or otherwise negatively influences deliberations).

⁸⁶ *Tanner v. United States*, 483 U.S. 107, 127 (1987) (citing *Lee v. United States*, 454 A.2d 770 (D.D.C. 1982), *cert. denied sub nom. McIlwain v. United States*, 464 U.S. 972 (1983)).

⁸⁷ *See Villar*, 586 F.3d at 87 (“Likewise, non-jurors are more likely to report inappropriate conduct—such as alcohol or drug use—among jurors than racial statements uttered during deliberations to which they are not privy.”).

⁸⁸ *Tanner*, 483 U.S. at 127 (citing *United States v. Taliaferro*, 558 F.2d 724, 725–26 (4th Cir. 1977)).

⁸⁹ *Taliaferro*, 558 F.2d at 725–26.

dance of a racially targeted event were available, such evidence would not be conclusive as to a person's inner sentiment. A dining bill, however, can readily demonstrate how much alcohol was consumed in one sitting.⁹⁰

Essentially, setting aside the voir dire protection, the other three protections of the Sixth Amendment right presented by the *Tanner* court are largely—if not wholly—inapplicable in the context of racial bias.

V. THE WEAKNESS OF VOIR DIRE AS A SIXTH AMENDMENT PROTECTION

As the First Circuit concluded in *Villar*, all four *Tanner* protections for the Sixth Amendment right are insufficient in the context of racial bias.⁹¹ Though the Ninth Circuit in *Henley* recognized voir dire as a somewhat stronger protection, allowing a litigant to challenge structural defects in the trial if jurors were dishonest, the protection is overall weak at best. First, the power of voir dire depends on how the process is conducted and to what extent issues are probed; this decision lies in the discretion of the trial judge, who (subject to some limitations) holds significant power.⁹² Second, jurors may choose to conceal information regarding their racial bias during voir dire, and might even have motivation to do so in cases where such bias would

⁹⁰ See, e.g., *id.* (“It appears from the records of the club where the jurors ate dinner . . . that the group of twelve jurors ordered ten cocktails and two soft drinks. The Marshal who accompanied the jurors to the club testified that only one round of drinks was ordered. The most obvious inference from these two facts is that ten of the twelve jurors had one cocktail apiece and the remaining two jurors had soft drinks.”).

⁹¹ See *Villar*, 586 F.3d at 87 (“In our view, the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations.”).

⁹² See M.A. Widder, *Neutralizing the Poison of Juror Racism: The Need for a Sixth Amendment Approach to Jury Selection*, 67 TUL. L. REV. 2311, 2324 n.48 (1993) (“[T]he means of ensuring juror impartiality are themselves inadequate to prevent the infiltration of even detectable racial bias into the jury . . . [Q]uestions of whether voir dire on racial bias may be conducted, and the permitted scope of such an examination, are largely left to the trial court's discretion. However, very few state courts have recognized a universal state statutory or constitutional requirement for voir dire on racial prejudice, and most do not recognize the right even under inflammatory factual circumstances.” (internal quotation marks omitted)); see also *United States v. Heller*, 785 F.2d 1524, 1527–28 (11th Cir. 1986) (holding that a District Judge abused his discretion when he conducted a voir dire during jury deliberations upon learning anti-Semitic jokes had been made, but allowed the jurors to continue after they claimed they had not been “affected” by the prejudiced comments); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1670 (1985) (stating the purposes of voir dire cannot “be fulfilled unless sufficient questions are asked to probe relevant attitudes” but notes that in recent cases, “disputes over what questions must be allowed overwhelmingly predominate”).

be implicated.⁹³ Even the Tenth Circuit in *Benally* noted that “voir dire might be a feeble protection if a juror is determined to lie.”⁹⁴ Moreover, as Judge Briscoe noted in his dissent to the denial of rehearing en banc for *Benally*, racial prejudice is particularly subject to this weakness of identification in voir dire as it can be easily concealed.⁹⁵

Third, the voir dire protection is weak because many attorneys may strategically refrain from requesting voir dire questions regarding racial bias as such questioning can lead to problematic and antithetical results.⁹⁶ As discussed above, the other protections offered by *Tanner* are largely unsuccessful in the context of racial bias; therefore, by effectively requiring a criminal defendant to discuss prejudice during voir dire in order to preserve even some protection, such

⁹³ See e.g., *United States v. Benally*, No. 2:07CR256 DAK, 2007 U.S. Dist. LEXIS 85620, at *5 (D. Utah November 20, 2007), *rev'd*, 546 F.3d 1230 (10th Cir. 2008) (granting a motion for a new trial post-verdict after determining that two jurors had dishonestly remained silent during voir dire when asked whether they held any prejudice or preconceived notions about Native Americans that might result in bias and they failed to disclose bias developed after living near a reservation). Though it was later reversed by the Tenth Circuit, the District Court originally argued that “[b]y failing to give truthful answers to the voir dire questions targeted at determining racial prejudice, the jurors were allowed to sit on the jury despite their bias. As a result, Mr. Benally was denied his Sixth Amendment right to an impartial jury.” *Id.* at *5.

⁹⁴ *Benally*, 546 F.3d at 1240. *But see id.* (“This does not mean that defendants’ interest in an impartial jury will go unprotected. Voir dire can still uncover racist predilections, especially when backed up by the threat of contempt or perjury prosecutions.”).

⁹⁵ *Id.* at 1230, *reh’g en banc denied*, 560 F.3d 1151, 1155 (10th Cir. 2009) (Briscoe, J., dissenting) (“Unlike jurors’ ingestion of alcohol or drugs, the act and effect of which can be observed by others and brought to the attention of the district court, jurors’ racial biases can be much more easily hidden from observation. Indeed, that appears to be precisely what occurred here: despite the district court’s best efforts at protecting Mr. Benally’s Sixth Amendment right to an impartial jury, the jury foreman clearly lied during the voir dire proceedings about his ability to be impartial.”).

⁹⁶ See Brief of Appellee at 10–11, 26–27, *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009) (No. 08-1154) (“The court did consider that a way to address the possibility of prejudice playing a part in the deliberative process was through jury voir dire, but acknowledged that defense attorneys may shy away from such inquiries and highlighting the ethnic origin of their clients . . . Understandably Villar’s defense may have chosen not to suggest voir dire questions regarding ethnic bias for tactical reasons. It may work to a defendant’s benefit not to draw the jury’s attention to his background, especially when it may become an issue in the case, such as in Villar’s.”); see also Ted A. Donner & Richard K. Gabriel, *Jury Selection Strategy and Science* (database), § 33:1 (3d Ed.) *Significance of Questions Concerning Race and Gender Bias* (“Race and gender bias may be appropriate reasons for excusing prospective jurors, but the subjects should probably not be specifically addressed, in any voir dire, unless the facts of the case suggest that racism could be a dispositive factor . . . On the other hand, whenever a prospective juror uses a choice of terms that suggest a tendency to racial or gender bias, attorneys should weigh the possibility of exposing such a bias through further questions against the effect of such an examination on other jurors.”).

a litigant may be ultimately tactically disadvantaged by the “backlash effect” of bringing these issues to the forefront.⁹⁷ Lastly, even when voir dire as to racial bias is conducted, the questions posed may be insufficient to reveal racist tendencies that might be exposed during deliberations because jurors may not be fully conscious of their prejudices.⁹⁸ As Sherri Lynn Johnson elaborated on the weakness of voir dire questioning in her article, *Black Innocence and the White Jury*:⁹⁹

First, superficial questions concerning whether the jurors harbor prejudice against blacks that would prevent them from being impartial are extremely unlikely to provoke disclosure of such bias. General questions do not reach hidden inconsistent attitudes, which research has shown are now prevalent about race. Asking a general question about impartiality and race is like asking whether one believes in equality for blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet oppose interracial marriage and believe that blacks are more prone to violence. Those attorneys who have been permitted to

97 See, e.g., David A. Anglier & Janet Kenton-Walker, *Impaneling the Jury*, in MASSACHUSETTS CONTINUING LEGAL EDUCATION, MASSACHUSETTS SUPERIOR COURT CRIMINAL PRACTICE MANUAL 11-19 (Hon. Robert H. Bohn, Jr., ed. 2006) (“Most importantly, discuss with your client the possibility of a ‘backlash’ effect from voir dire questions about racial or ethnic bias. Persons who hold biases or prejudices are often unconscious of them or reluctant to admit them. Juror questions on bias may bring those biases to the forefront, but the jurors holding them may not respond honestly to the specific questions. Thus, specific questions on racial or ethnic bias may inject racial bias into a trial rather than remove it.”). But see Brief of Appellee, *supra* note 96, at 27 (“But enforcing Rule 606(b) does not mean that the defendant is totally stripped of remedy and that he cannot or did not have a fair trial by a competent jury under the Sixth Amendment.”).

98 See Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1030–31 (2008) (“[T]he harsh reality for judges conducting voir dire aimed at seating only fair and impartial jurors is that the jurors themselves may not be able to assist because . . . ‘we restrict our own speech because we cannot bear admitting our own racism.’ If true, how can judges posing such questions, as I have, expect to get valid responses, particularly where an honest response about one’s operative biases requires conscious insight into one’s unconscious? . . . I took little reassurance from these jurors’ sincere belief that they held no racial attitudes that had played any role in their verdict.” (footnotes omitted)); Regina A. Schuller et al., *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 L. & HUM. BEHAV. 320, 321 (2009) (arguing self-assessment of prejudice and discrimination may often be incorrect as “people may be unaware of existing biases and often maintain that they are personally fair and egalitarian” and “even if people are able to identify the possibility that they may be biased against Blacks, they may not fully understand how and to what extent biases can affect their decisions”); see also Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV 149, 158–60 (2010) (arguing that the practice of judge-dominated voir dire may actually allow jurors with implicit bias to be empanelled, stating: “[J]udges commonly ask questions such as, ‘Can all of you be fair and impartial in this case?’ This question does not begin to address implicit bias, which by its nature is not consciously known to the prospective juror. Thus, a trial court judge schooled in the basics of implicit bias would be delusional to assume that this question adequately solves implicit bias”).

99 Johnson, *supra* note 92.

conduct extended voir dire report that it is only when numerous sensitive and specific questions are asked that prospective jurors reveal racial prejudice. Furthermore, even if extensive questions were asked, jurors might not answer honestly. Most prejudiced attitudes are now highly disapproved, and jurors would naturally be reluctant to admit them, particularly since they know that social disapproval will be publicly expressed by dismissing them from the venire. This natural reluctance is probably exacerbated by the practice of questioning the entire venire as a group, for it is easier to stay quiet untruthfully than to respond untruthfully. Even if extensive individual questioning were routinely permitted in black defendants' cases, fear of social disapproval would probably inhibit many individuals from expressing their true views.¹⁰⁰

In sum, in the context of racial bias, the voir dire protection is weak at best and, even if litigants are able fully take advantage of the opportunity, they might harm their case in other ways by discussing race in such a central way.

VI. A GREATER PUBLIC INJURY

Ultimately, it is undeniable that there are many persuasive justifications for proscribing inquiry into jury verdicts,¹⁰¹ even in cases where racial bias of a juror is alleged.¹⁰² These justifications are all the more convincing, when one considers how weak the protection of allowing post-verdict juror testimony as to a structural defect at voir dire provides.¹⁰³ However, allowing verdicts to stand without inquiry after legitimate allegations of juror racism have been presented is an affront to the very foundation of our judicial system.¹⁰⁴

¹⁰⁰ *Id.* at 1675 (footnotes omitted).

¹⁰¹ *See, e.g.,* *Tanner v. United States*, 483 U.S. 107, 120–21 (1987) (“It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors’ willingness to return an unpopular verdict, and the community’s trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.” (citation omitted)).

¹⁰² *See, e.g.,* *United States v. Benally*, 546 F.3d 1230, 1234 (10th Cir. 2008) (“The rule protects the finality of verdicts. It protects jurors from harassment by counsel seeking to nullify a verdict. It reduces the incentive for jury tampering. It promotes free and frank jury discussions that would be chilled if threatened by the prospect of later being called to the stand. Finally, it preserves the ‘community’s trust in a system that relies on the decisions of laypeople [that] would all be undermined by a barrage of postverdict scrutiny.’” (alteration in original) (quoting *Tanner*, 283 U.S. at 121)).

¹⁰³ *See* discussion, *supra* Part V.

¹⁰⁴ *See* Victor Gold, *Juror Competency to Testify that a Verdict was the Product of Racial Bias*, 9 ST. JOHN’S J.L. COMMENT. 125, 139 (1993) (“When a jury employs racial bias in reaching a verdict, concern for fairness and accuracy outweigh the policy goal of finality. Employing racial bias to reach a verdict is analogous to flipping a coin. The verdict is no less arbi-

In *United States v. Dean*¹⁰⁵ the Eastern District of Arkansas granted a defendant a new trial post-verdict after learning that a juror intended to convict regardless of evidence presented at trial;¹⁰⁶ however, the district court later reversed its own decision and reinstated the original verdict upon obtaining evidence that the defendant had been aware of the juror bias during trial and failed to inform the court in a timely fashion.¹⁰⁷ Ultimately, however, the Eighth Circuit reversed the district court because, while the appellant was wrong in sitting silently on the evidence until after the verdict, the Sixth Amendment right to an impartial jury was so violated by the knowledge that a juror had been actually biased, that a new trial could not be denied.¹⁰⁸ Upon review, the Eighth Circuit wrote:

We cannot permit actual, proven bias which prevents a juror from impartially deciding the case, without doing incalculable harm to the jury system as an institution. “The truth pronounced by Justinian more than a thousand years ago that, ‘Impartiality is the life of justice,’ is just as valid today as it was then.” The actual bias in this case goes to the heart of the integrity of the judicial proceeding.¹⁰⁹

Although *Dean* dealt with “actual, not potential, juror bias,”¹¹⁰ the reasoning must apply when legitimate allegations of juror racial bias are presented. Such a bias is so odious and so arbitrary that to brush it off—even due to such a great interest as preserving jury verdicts—violates the very essence of our judicial system. As Judge Briscoe pointed out in his dissent to the Tenth Circuit’s denial of rehearing en banc in *Benally*, “[T]he Sixth Amendment right to an impartial jury is itself a ‘structural feature’ of the justice system.”¹¹¹

The Court has suggested that when it allows jurors to testify post-verdict as to matters discussed in the jury room, it inflicts a “public injury.”¹¹² The truth of this characterization is undeniable. Nonetheless, when defendants are not able to rely on the juror truthfulness

trary and irrational. Letting the verdict go unchallenged would be a serious affront to notions of equity. There is little societal value in protecting such a decision.”).

105 647 F.2d 779 (8th Cir. 1981).

106 *Id.* at 782.

107 *Id.* at 781.

108 *Id.* at 783.

109 *Id.* (citations omitted).

110 *Id.*

111 *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), *reh’g en banc denied*, 560 F.3d 1151, 1156 (10th Cir. 2009) (Briscoe, J., dissenting).

112 *See McDonald v. Pless*, 238 U.S. 264, 267 (1915) (“When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial[,] the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.”).

during voir dire, and when they are then unable to challenge their trials as defective simply because another juror unduly delayed in revealing this dishonesty post-verdict, a *greater* and more significant public injury results, one that violates the basic premises of fairness, impartiality, and justice at trial. According to the Tenth Circuit in *Benally*, however, allowing the courts to investigate jury verdicts would cause a slippery slope as judges would not stop at the most serious allegations or confine their inquiries to allegations of racial prejudice.¹¹³ But, as Judge Briscoe points out: “The distinction between an ‘impartial jury’ and a sober one is the confining characteristic that the panel opinion ignores in its effort to grease the proverbial ‘slippery slope.’ . . . The clear stopping point, in my view, rests in the Sixth Amendment requirement of juror impartiality.”¹¹⁴

Ultimately, it must be for judges to decide in their discretion whether allegations of racial prejudice are sufficient to investigate whether jurors were truthful at voir dire.¹¹⁵ While this policy may be risky and result in some abuse, if our system prohibits jurists from engaging in such investigation at all, we would essentially incentivize jurors to lie, and in making such lies virtually undiscoverable, unhinge the entire judicial process.

As Justice Brennan wrote in his concurrence in *Turner v. Murray*:¹¹⁶

A trial to determine guilt or innocence is, at bottom, nothing more than the sum total of a countless number of small discretionary decisions made by each individual who sits in the jury box . . . A racially biased juror sits with blurred vision and impaired sensibilities and is incapable of fairly making the myriad decisions that each juror is called upon to make in the course of a trial. To put it simply, he cannot judge because he has prejudged . . . To sentence an individual to death on the basis of a proceeding tainted by racial bias would violate the most basic values of our criminal justice system. This the Court understands. *But what it seems not to comprehend is that to permit an individual to be convicted by a prejudiced jury violates those same values in precisely the same way.*¹¹⁷

Justice O’Connor pointed out in the *Tanner* majority opinion that while the goal of verifying the fairness of every trial was a noble one,

113 See *Benally*, 546 F.3d 1230 at 1241 (“It may well be true that racial prejudice is an especially odious, and especially common, form of Sixth Amendment violation. But once it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations, we do not see how the courts could stop at the ‘most serious’ such violations.”).

114 *Id.* at 1155–56 (Briscoe, J., dissenting).

115 See, e.g., *United States v. Heller*, 785 F.2d 1524, 1529 (11th Cir. 1986) (“The people cannot be expected to respect their judicial system if its judges do not, first, do so.”).

116 476 U.S. 28 (1986).

117 *Id.* at 42–43 (Brennan, J., concurring) (emphasis added).

“[i]t is not at all clear . . . that the jury system could survive such efforts to perfect it.”¹¹⁸ However, as Justice Brennan and Judge Briscoe have observed, eliminating racial bias cannot simply be reduced to an effort to ‘perfect’ the jury system. The distinction between a racially biased juror and an intoxicated juror is glaring. The Sixth Amendment to our Constitution guarantees an impartial jury in criminal trials; thus, the decision of a racially biased juror must be vacated as he “cannot judge because he has prejudged.”¹¹⁹ Upholding such a conviction renders the constitutional guarantee of the Sixth Amendment guarantee meaningless.¹²⁰

CONCLUSION

While our judicial system is rooted in the ideals of equality, neutrality, and fundamental fair play, these ideals hinge on assumption of a trial by an impartial jury as guaranteed by the Sixth Amendment. Jurors who harbor silent biases only to be revealed during deliberation and to infect the ultimate verdict threaten these tenets, the fundamental underpinnings of our system.¹²¹

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

119 *Turner*, 476 U.S. at 43.

120 *See Tanner*, 483 U.S. at 142 (Marshall, J., dissenting) (“Petitioners are not asking for a perfect jury. They are seeking to determine whether the jury that heard their case behaved in a manner consonant with the minimum requirements of the Sixth Amendment. If we deny them this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless.”).

121 This Comment addresses racial bias and the particular odiousness of such discrimination when it infects jury deliberation. Of course there are other types of biases a juror can harbor that are equally abhorrent, such as gender bias or homophobia, and these biases may mar a jury verdict in much the same fashion. A slippery slope question remains as to whether and to what extent any allegations of bias, whether racial or otherwise, ought to open the doors to post-verdict inquiry. This topic merits further exploration in another note. Initially, however, it seems the First Circuit’s reasoning in *Villar* provides guidance. In that case, the court first observed generally that “[m]any courts have recognized that Rule 606(b) should not be applied dogmatically where there is a possibility of juror bias during deliberations that would violate a defendant’s Sixth Amendment rights.” *United States v. Villar*, 586 F.3d 76, 85–86 (1st Cir. 2009). The court then concluded:

[T]here are certain rare and exceptional cases involving racial or ethnic prejudice that require hearing jury testimony to determine whether a defendant received a fair trial under the Sixth Amendment. The determination of whether an inquiry is necessary to vindicate a criminally accused’s constitutional due process and Sixth Amendment rights is best made by the trial judge, who is most familiar with the strength of the evidence and best able to determine the probability of prejudice from an inappropriate racial or ethnic comment.

Id. at 88. Though it merits further consideration, at first glance it seems this same analysis ought to apply to questions of gender or sexual orientation bias: if any type of bias raises a legitimate possibility of a violation of the Sixth Amendment right to an impartial jury, the verdict simply may not lie undisturbed. In any case, a trial judge who is most fa-

Though the *Tanner* Court presented four protections against jury impropriety, the protections of observations of the jury by the court and counsel, observation by other members of the jury, or non-juror evidence of misconduct, are largely ineffective in the context of juror racial bias. It seems the only protection litigants have to ensure that the impaneled jury is free of the stain of racial prejudice is probing the issue during voir dire. Unfortunately, the effectiveness of the voir dire process in this respect is extremely limited given the extent of questions which may be asked, a racist juror's possible determination to hide his inclinations or even a juror's unconsciousness as to his own prejudicial feelings, and tactical reasons for counsel to avoid probing into such issues of race prior to trial.

Nonetheless, though the protections offered by the voir dire process are limited, it is, ultimately, all we have. While there are many convincing policy justifications for proscribing the disclosure of matters discussed during jury deliberations, in the end a much more significant "public injury"¹²² results if the voir dire protection is denied. Holding a hearing to investigate whether jurors were truthful during voir dire concerns a structural defect in the trial and is not analogous to considering the validity of the verdict itself as the *Benally* Court has held. It is possible, and the Rules of Evidence allow, for information to be considered for one purpose and not for another.¹²³

When racial bias taints a jury verdict, the verdict cannot be upheld as simply the result of an imperfect, but fair trial.¹²⁴ In such a case, the odiousness of the imperfection intensifies the imperfection to an injustice. Denying that injustice inflicts a greater public injury than

miliar with the facts of the case at bar, is in the best position to make a determination as to whether a post-verdict hearing is merited, and the Rules of Evidence, in order to uphold the Sixth Amendment right, must allow a district court judge the discretion to do so.

122 See generally *McDonald v. Pless*, 238 U.S. 264, 267 (1915) ("When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial[,] the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.").

123 See *Pond*, *supra* note 65, at 237 ("In looking at the operative effect of other evidence rules, however, the Tenth Circuit's fears appear to be overstated. The Rules of Evidence constantly permit evidence to be admitted for one purpose while forbidding it for others—even though the practical effect is the same. For example, a statement may be inadmissible hearsay if offered for the truth of the matter asserted but may be admissible for some other purpose.").

124 See *Brown v. United States*, 411 U.S. 223, 231–32 (1973) ("A defendant is entitled to a fair trial but not a perfect one." (internal quotation marks omitted)); *Bruton v. United States*, 391 U.S. 123, 135 (1968) (asserting the same proposition); *Lutwak v. United States*, 344 U.S. 604, 619 (1953) (same).

that which would be suffered by investigating statements made during deliberations. Ultimately, if the voir dire exception is banned by our judicial system, none of *Tanner's* promises will be fulfilled and the Sixth Amendment right to an impartial jury will be reduced to an aspiration rather than an expectation.