

BREAKING THE BLACK BOX: WHEN JURY EXPERIMENTATION BECOMES JURY MISCONDUCT

Abstract: For centuries, juries in criminal trials have retreated to the privacy of their “black box” to deliberate and decide a defendant’s guilt or innocence. The secrecy of the deliberation process is a hallmark of a democratic system that tasks the public with holding their neighbors accountable to community standards. What happens, however, when this curtain of confidentiality shields troubling impropriety? Jury experimentation with evidence is one circumstance that may justify a look inside the black box. Although jurors are encouraged during deliberations to *examine* trial evidence, *experiments* in the jury room may violate a defendant’s rights to due process and a fair trial by introducing “new evidence” that the defendant does not have the opportunity to challenge in open court. Moreover, procedural “no-impeachment” rules often prohibit jurors from testifying to the process through which they reached their verdict after it has been delivered. In the absence of clarification from the U.S. Supreme Court, courts at the state and federal level are deeply split on how to approach the issue of juror experimentation with evidence. This Note examines the tension between the judicial system’s policy of jury secrecy and the potentially competing commitment to upholding the constitutional rights of defendants. This Note argues against revising the federal and state no-impeachment rules to create additional windows into the juror deliberation process, which would disturb the important function of judicial finality. Rather, trial counsel should utilize the full breadth of in-court mechanisms available to prevent improper experimentation. Judges should consider the extent to which pre-verdict remedies were used and whether the defendant was prejudiced when determining whether juror misconduct occurred.

INTRODUCTION

On August 18, 1993, twenty-one-year-old Samuel Fields of Grayson, Kentucky, spent his day drinking beer, smoking marijuana, and taking hallucinogenic drugs.¹ That evening, he lost control.² Around 11:30 p.m., a heavily-

¹ Fields v. Jordan (*Fields IV*), 86 F.4th 218, 226–27 (6th Cir. 2023) (en banc), *aff’g* Fields v. White (*Fields II*), 2016 WL 3574396, at *1 (E.D. Ky. June 23, 2016), *cert. denied*, Fields v. Plappert, 144 S. Ct. 2635 (2024) (mem.); Fields v. Jordan (*Fields III*), 54 F.4th 871, 874 (6th Cir. 2022), *rev’g* Fields II, 2016 WL 3574396, at *1, *vacated*, Fields v. Jordan, 60 F.4th 1023 (6th Cir. 2023) (mem.). Fields began drinking at the time he awoke. *Fields III*, 54 F.4th at 874. He and his friends, including his girlfriend Minnie Burton, drank beer throughout the day and made at least two additional stops for beer that evening. *Id.*; *Fields IV*, 86 F.4th at 227. After the first beer stop, Fields allegedly took the hallucinogenic drug phencyclidine (PCP), colloquially known as “horse tranquilizer.” *Fields IV*, 86 F.4th at 227. PCP is an illicit drug that creates the sensation of euphoria, strength, and sexual prowess,

intoxicated Fields and his girlfriend, Minnie Burton, were together in Fields' apartment when he suddenly became violent and erratic.³ He flipped a table, punched holes in the wall, and threw a knife in Burton's direction.⁴ Frightened, Burton fled.⁵ Fields soon followed her, shouting and banging on street signs as he made his way to Burton's apartment, where he found Burton locked out and sitting on the front porch.⁶ Fields handed Burton a knife and falsely told her that he murdered his brother.⁷ Burton again escaped, fleeing to a family member's home.⁸

Fields wandered off as a neighbor who heard the altercation between Burton and Fields called the police.⁹ About half an hour later, officers found Fields in the bedroom of Mrs. Bess Horton, Burton's landlady, who lived nearby.¹⁰ Fields had blood on his clothes and many knives and razors in his pockets.¹¹ Eighty-four-year-old Horton lay deceased on the bed, with a knife buried in her

and is often characterized by psychosis and violent behavior that can result in self-inflicted trauma. Tareg Bey & Anar Patel, *Phencyclidine Intoxication and Adverse Effects: A Clinical and Pharmacological Review of an Illicit Drug*, 8 CAL. J. EMERGENCY MEDIC. 9, 9, 11 (2007) (discussing the symptoms experienced by patients who ingest PCP).

² *Fields IV*, 86 F.4th at 227.

³ *Id.* Fields and Burton continued to drink after returning to the apartment. *Id.*

⁴ *Id.* Fields lived in the apartment with his brother, who was asleep upstairs at the time but awoke to the sound of shattering glass during the altercation between Fields and Burton. *Id.*

⁵ *Id.* After Burton fled the apartment, Fields began to direct his erratic behavior at his brother. *See id.* (describing how Fields began to rub a butcher knife along his brother's arm). It is unclear how long Fields stayed with his brother, who gave conflicting statements about what time Fields eventually left. *Id.*

⁶ *Id.* Burton lived in a duplex, with her neighbor, Elmer Pritchard, inhabiting the second apartment. *Id.* The duplex was owned by eighty-four-year-old Bess Horton. *Id.* Burton and Horton were actively involved in an ongoing dispute. *Id.* In place of paying rent, Burton drove Horton around and ran errands for her—a privilege Burton allegedly abused by occasionally taking Horton's car without permission. *Id.* At the time, Horton was attempting to evict Burton and had recently asked Pritchard to change the locks on Burton's door. *Id.*

⁷ *Id.* Fields also attempted to help Burton get into her apartment by punching in a front window, cutting his hand on shattered glass, and leaving behind blood. *Id.* at 227–28. This incident at Burton's apartment took place at around 1:55 a.m. on August 19, 1993. *Id.*

⁸ *Id.* at 227.

⁹ *See id.* at 228 (detailing how Pritchard called the police at around 1:55 a.m. to report a break-in at Burton's apartment and reportedly witnessed Fields leave the duplex and walk toward Bess Horton's home).

¹⁰ *Id.* Officers found Fields in Horton's home with the interior lights on, rummaging through a drawer in her bedroom. *Id.* At first, Fields appeared to be calm but then became agitated and frantic. *Id.*

¹¹ *Id.* at 228–29. DNA testing on Fields' clothes only identified blood from Fields himself, not blood from Horton. *Id.* at 229. The absence of Horton's blood on Fields became a significant part of Fields' defense at trial. *Id.*

temple.¹² Fields confessed to the crime at the scene and prosecutors charged him with Horton's murder.¹³

At trial, prosecutors alleged that after leaving Burton's apartment, Fields made his way to Horton's home and gained entry by using a knife to remove seventeen screws from the porch window.¹⁴ The prosecution submitted this knife, which they referred to as the "twisty knife," to the jury for their consideration.¹⁵ The defense contended that it was impossible for Fields to walk to Horton's apartment, unscrew all seventeen screws with a knife that did not fit, and murder Horton all within approximately thirty-five minutes and while under the influence of PCP.¹⁶ The defense did not object to the jury having the twisty knife during deliberations.¹⁷

In the deliberation room, the jurors examined the knife and grappled with a question: if Fields was as heavily intoxicated as prosecutors claimed, was it physically possible for him to act with the precision required to unscrew the porch window in such a short time frame?¹⁸ As the jury mulled over the issue, one juror proposed an experiment.¹⁹ Another juror then used the twisty knife to unscrew a cabinet door in the deliberation room.²⁰ They removed the screws with ease.²¹ The jury returned a guilty verdict and later sentenced Fields to death.²²

¹² *Id.* at 228. An officer testified that Horton's throat was also slashed. *Id.*

¹³ *Id.* Fields allegedly told officers, "Kill me . . . just kill me . . . I stabbed her, and I'm into it big time this time." *Id.* Fields also allegedly confessed his crime to an emergency room technician. *Id.* at 229.

¹⁴ *Id.* at 229. One of the knives found on Fields was a butter knife with a missing tip. *Id.* at 228. Prosecutors noted that there was white paint on both the unscrewed screws and end of this knife. *Id.* at 229.

¹⁵ *Id.* at 230. During opening statements, Fields' lawyer told the jury that they would be able to "hold this knife, and feel this knife and look at this knife." *Id.*

¹⁶ *Id.* at 229. The estimated thirty-five-minute period came from the time Fields allegedly left Burton's apartment (approximately 1:55 a.m.) to when officers discovered him in Horton's home (approximately 2:30 a.m.). *Id.* The defense also contended that the twisty knife would not have fit in the Phillips head screws. *Id.* Moreover, the defense relied heavily on the fact that, at the time Fields was found, he did not have any of Horton's blood on him. *Id.* The defense also noted that Burton had a potential motive to harm Horton due to their dispute. *Id.*

¹⁷ *Id.* at 230.

¹⁸ *Id.* at 229–31. On a post-conviction motion, Fields provided the affidavits of two jurors who discussed the jury's examination and ultimate experimentation with the knife. *Id.* at 230–31. The two jurors disagreed as to when this conversation took place, with one juror asserting that the discussion occurred during the verdict phase of the trial and the other stating that it could have occurred during the sentencing phase. *Id.* at 231.

¹⁹ *Id.* at 230–31. In her affidavit, one of the jurors accepted responsibility for proposing the experiment. *Id.* at 230.

²⁰ *Id.* at 230–31.

²¹ *Id.* at 230. The jurors reported that it "didn't take long" to remove the screws. *Id.*

²² *Id.* at 229. This trial was Fields' second trial. *Id.* After a first trial, where Fields was convicted and sentenced to death, the Kentucky Supreme Court reversed on the grounds that the trial court had wrongly admitted a "dramatic videotaped reenactment" prepared by investigators and also failed to

On a post-conviction motion in state court, Fields argued that the jury's experiment violated his constitutional rights to a fair trial, due process, and confrontation of witnesses.²³ Specifically, he contended that the jury's experiment amounted to the introduction of new evidence which he lacked the ability to test or rebut.²⁴ In support of his motion, Fields called two jurors to describe the experiment that took place.²⁵ Though the Kentucky Rules of Criminal Procedure prohibited the jurors from testifying, the trial court allowed Fields to proffer the jurors' testimony.²⁶ Notwithstanding the jurors' statements, the trial court found that no juror misconduct occurred.²⁷ The Kentucky Supreme Court affirmed the decision, holding that juries may conduct a thorough examination of physical evidence submitted to them using their observations, senses, and experiences.²⁸

Having exhausted all state avenues for post-conviction relief, Fields applied for a writ of habeas corpus in federal district court.²⁹ The district court

instruct the jury about the lesser included offense of second-degree manslaughter. *Id.* Fields again appealed after the second trial, but the Kentucky Supreme Court upheld the conviction. *Id.*

²³ *Fields v. Commonwealth (Fields I)*, No. 2013-SC-000231-TG, 2014 WL 7688714, at *3 (Ky. Dec. 18, 2014). Along with his claims of juror misconduct, Fields argued various instances of ineffective assistance of counsel. *Id.* at *2.

²⁴ *Fields II*, No. 15-38, 2016 WL 3574396, at *9 (E.D. Ky. June 23, 2016), *aff'd*, *Fields IV*, 86 F.4th at 249–50, *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024) (mem.).

²⁵ *Fields I*, 2014 WL 7688714, at *3.

²⁶ *Fields IV*, 86 F.4th at 230. Kentucky Rule of Criminal Procedure 10.04 dictates that “[a] juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot”, such as a coin toss or any other decision made by chance. Ky. R. Crim. P. 10.04.

²⁷ *Fields I*, 2014 WL 7688714, at *4. The Supreme Court of Kentucky relied on one case from the Sixth Circuit and one case from the Eighth Circuit to hold that jurors are allowed to experiment with evidence given to them using their own perceptions, experiences, and senses. *Id.*; *see also* *United States v. Avery*, 717 F.2d 1020, 1025–26 (6th Cir. 1983) (finding no juror misconduct when a jury conducted an experiment—at the prosecutor's suggestion—to determine whether it was possible to move milk cartons filled with gasoline in a certain amount of time); *Banghart v. Origoverken*, A.B., 49 F.3d 1302, 1305–06 (8th Cir. 1995) (finding that a jury permissibly experimented with matches and toothpicks to determine the veracity of expert witness testimony that a certain stove could catch on fire if a match fell into it). The court held that the jury did experiment with evidence—but did so in a permissible way by using their own perceptions, experiences, and senses. *Fields I*, 2014 WL 7688714, at *4. Moreover, the court held that, even if the experiment were improper, any error was harmless given that the experiment did not go toward establishing whether Fields actually killed Horton, but rather whether it was possible to unscrew the screws using the twisty knife. *Id.*

²⁸ *Fields I*, 2014 WL 7688714, at *4. The court began by assuming, for the sake of argument, that the proffered juror testimony was admissible. *Id.* at *3. The relevant inquiry thus became whether the jury's behavior constituted misconduct. *Id.* The court held that it did not. *Id.* Specifically, the court noted that the jurors conducted their experiment with admitted evidence. *Id.* at *4. The court also determined that, although the experiment may have convinced jurors that it was possible to use the twisty knife as a screwdriver, it did not prove that Fields murdered Horton. *Id.* Accordingly, the reenactment was not a contributing factor to the verdict. *Id.*

²⁹ *Fields II*, 2016 WL 3574396, at *6. A person in state custody may apply for a writ of habeas corpus as a form of post-conviction relief where they ask a federal court to review the constitutionality of their conviction and sentence. 28 U.S.C. §§ 2254, 2255. At the time of applying, petitioners must

denied relief and Fields appealed.³⁰ A split panel of justices on the U.S. Court of Appeals for the Sixth Circuit reversed the lower court's decision, granting Fields relief after finding that the jury experiment was unconstitutional and thus constituted grounds for a new trial.³¹ The appeals court then voted to hear the case en banc.³² The court once again denied Fields relief in a split decision.³³

have a) exhausted all available state court remedies; and b) demonstrated an absence of, or ineffective access to, corrective processes at the state level. *Id.* § 2254.

³⁰ *Fields II*, 2016 WL 3574396, at *6. In his opinion, then-district judge Amul Thapar walked through each of Fields' thirty claims for relief, ultimately denying relief. When conducting his analysis, Judge Thapar examined Fields' claims under the standard of the Antiterrorism and Effective Death Penalty Act (AEDPA), which limits a federal court's ability to grant habeas relief to prisoners in state custody to instances where the state court affirmed the conviction on the merits and the decision "involved an unreasonable application of . . . clearly established Federal Law, as determined by the Supreme Court of the United States." *Id.* (quoting 28 U.S.C. § 2254). The district court held that the state court did not err in its application of clearly established federal law. *Id.* at *10. Judge Thapar recognized that the question of jury experimentation is a tricky one, admitting that a reasonable argument exists as to why such experiments should be impermissible. *Id.* at *9. He proposed a number of hypothetical situations where the line between jurors relying on common sense and jurors relying on extrinsic evidence is unclear, such as the case where a juror says, "in my experience, I don't think it could have happened that way." *Id.* Judge Thapar ultimately decided that "[t]hankfully, this Court need not address those questions; it is enough to say that the Supreme Court has not answered them yet, either." *Id.* at *10.

³¹ *Fields III*, 54 F.4th 871, 882 (6th Cir. 2022), *rev'g Fields II*, 2016 WL 3574396, at *1, *vacated*, *Fields v. Jordan*, 60 F.4th 1023 (6th Cir. 2023) (mem.). Here, the court looked at different case precedent from the district court, which it interpreted as suggesting that jury experimentation amounts to the introduction of extrinsic evidence and thus presents constitutional issues. *Id.* at 877–78. One case that the Sixth Circuit relied on was *Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001). There, the defendant was charged with endangering and murdering his girlfriend's child, who was found deceased with burn marks on her face and bruises on her body. *Id.* at 726. Defendant testified that he had not seen the bruises on the child given that it was dark in the home where he was babysitting her. *Id.* at 725. Following the trial and during jury deliberation, one juror went home and tried to recreate a bruise on her arm using lipstick. *Id.* at 726–27. She then tried to view the lipstick "bruise" in a dark room and was unable to do so. *Id.* at 727. She informed other jurors of the results of her experiment during the deliberations. *Id.* After being convicted and before sentencing, the defendant moved for a new trial on the grounds of juror misconduct, which was denied. *Id.* The Sixth Circuit held that jurors did improperly rely on extrinsic evidence and that the defendant suffered a violation of his constitutional rights—however, the resulting error was harmless, and the trial court's decision was ultimately upheld. *Id.* at 739. In *Fields III*, the Sixth Circuit found error when it determined that "[t]here is a stark difference between examining evidence in the record and using tangible objects in the deliberation room as an integral part of an experiment to prove the prosecution's theory." 54 F.4th at 878–79. For example, the cabinet door was different from the storm window; the screws on the cabinet were not painted and were not Phillips head; it was unclear if the screws were as tightly secured in the cabinet door as they were in the storm window; the lighting was not the same; and jurors did not have a blood alcohol content that matched Fields' at the time of his alleged crime. *Id.*

³² *Fields*, 60 F.4th at 1023 (mem.), *granting rehearing en banc and vacating Fields III*, 54 F.4th at 874. "En banc" translates in French to "on the bench." Bailey Wharton, *En Banc in the Sixth Circuit: A Rarely Used, but Important Procedure*, U. CIN. L. REV. BLOG (Oct. 15, 2021), <https://uclawreview.org/2021/10/15/en-banc-in-the-sixth-circuit-a-rarely-used-but-important-procedure/> [<https://perma.cc/W5S4-KXFA>]. In the Sixth Circuit, cases heard en banc are argued before a full panel of all active judges on the circuit court. *Id.* En banc hearings are reserved for situations where it is "neces-

Fields' argument that jury experimentation with evidence amounts to a violation of constitutional rights is not unprecedented, nor is the Sixth Circuit's difficulty in assessing the related juror misconduct claim.³⁴ For more than a century, state and federal courts have struggled to draw the line between a jury's permissible examination of evidence and a jury's improper investigation that jeopardizes or violates a defendant's constitutional rights.³⁵ The U.S. Supreme Court has yet to provide a clear answer to this question, and state and federal courts remain split on the correct approach to addressing claims of juror misconduct that result from experimentation with evidence.³⁶

Part I of this Note explores the purpose and province of the jury in criminal trials, focusing on the historic development of juror secrecy as a strongly-guarded policy.³⁷ Part II discusses the deep schisms in the approaches state and federal courts adopt to address jury experimentation today.³⁸ Part III argues in favor of procedural rules barring jurors from discussing their deliberations and advises trial counsel to instead use available pre-verdict remedies to avoid issues with improper juror experimentation.³⁹ Additionally, Part III proposes that judges addressing the question of juror experimentation on post-conviction motions should consider a number of non-dispositive factors that analyze the extent to which counsel availed themselves of pre-verdict remedies.⁴⁰

I. BUILDING THE BOX: THE ORIGINS AND EVOLUTION OF SECRET JUROR DELIBERATIONS

At the heart of the American criminal judicial system is the jury, a body of persons tasked with deciding questions of fact and determining a defend-

sary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance." F. R. APP. P. 35(a).

³³ *Fields IV*, 86 F.4th 218, 236 (6th Cir. 2023) (en banc) (finding that Fields did not meet the standard for habeas relief under AEDPA, this time because the court found that no clearly established law existed on the issue of jury experimentation), *aff'g Fields II*, 2016 WL 3574396, at *1, *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024) (mem.).

³⁴ *See id.* at 237 (recognizing the "wide divergence that has existed on this issue for over a century").

³⁵ *Id.*

³⁶ *Id.* Until the Supreme Court weighs in on the issue of juror experimentation, defendants making similar claims as Fields in a petition for federal habeas corpus are likely to be unsuccessful, given AEDPA's requirement that the outcome depends on the existence of a "clearly established" holding from the Court. *See Williams v. Taylor*, 529 U.S. 362, 381 (2000) (finding that AEDPA requires that only the Supreme Court, and not the lower federal courts, may establish a constitutional principle upon which a defendant might petition for federal habeas corpus).

³⁷ *See infra* notes 41–136 and accompanying text.

³⁸ *See infra* notes 137–227 and accompanying text.

³⁹ *See infra* notes 228–250 and accompanying text.

⁴⁰ *See infra* notes 251–263 and accompanying text.

ant's guilt or innocence.⁴¹ Juries are an essential safeguard of democratic principles, particularly because they prevent oppressive decision-making from an all-powerful judge or ruler.⁴² They act as an independent component of the judicial process in which members of a community are responsible for holding each other accountable for violations of the law and social order.⁴³ Yet, the jury system only succeeds in this pursuit where juries are truly independent from outside influence.⁴⁴ Secrecy is key to the modern jury model because insulation is paramount to achieving the ultimate goal of impartiality.⁴⁵ The jury thus exists as a "black box"—six to twelve people behind a curtain weighing, examining, and debating evidence to reach a unanimous decision.⁴⁶

The policy of jury secrecy emerged as a safeguard on tyrannical rule and continues to exist today as a democratic approach to resolving public and private matters.⁴⁷ Section A of this Part discusses the evolution of jury secrecy as a tool of dispute resolution and political resistance during oppressive regimes.⁴⁸ Section B explores the modern procedural rules that exist to protect the policy of jury privacy and current debates about breaking open the black box.⁴⁹

⁴¹ See Stephan Landsman & James F. Holderman, *The Evolution of the Jury Trial in America*, 37 LITIG. 32, 32 (2010) (discussing the modern dictionary definition of "jury" as a body of twelve individuals sworn to consider evidence at trial and come to a verdict).

⁴² See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994) (referencing the role that juries played in protesting oppressive royal policies in the lead up to the American Revolution).

⁴³ See generally *Why Jury Trials Are Important to a Democratic Society*, THE NAT'L JUD. COLL., <https://www.judges.org/wp-content/uploads/2020/03/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf> [<https://perma.cc/AA49-W8BM>] (summarizing the importance of juries in setting community standards and as a means by which citizens participate directly in governance).

⁴⁴ See Samuel P. Weaver, *The Penn Cases*, 4 WASH. L. REV. 49, 57–58 (1929) (quoting the opinion of Chief Justice Vaughan following the trial of William Penn in 1670, in which he highlighted the importance of an independent jury free from any corrupting influence of the court or absolute ruler). But see Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 597 (2021) (contending that secrecy in jury deliberations can have the adverse effect of hiding juror bias and misconduct, leading to potential violations of a defendant's Sixth Amendment rights).

⁴⁵ See Harawa, *supra* note 44, at 606–07 (noting that juries have been deliberating in private since the fourteenth century, as part of a generally accepted principle that litigants should not interfere with the jury's deliberation process after evidence had been presented at trial).

⁴⁶ See Michael M. O'Hear, *Supreme Court Permits Some Light Into the Black Box of Jury Deliberations*, MARQ. UNIV. L. SCH. FAC. BLOG (March 24, 2017), <https://law.marquette.edu/facultyblog/2017/03/supreme-court-permits-some-light-into-the-black-box-of-jury-deliberations/> [<https://perma.cc/KF8F-KWE5>] (explaining the analogy of the jury as a "black box" because deliberations are conducted privately). The U.S. Supreme Court held in *Ramos v. Louisiana* that the Sixth Amendment mandates unanimous verdicts for convictions in criminal trials at both the state and federal levels. 590 U.S. 83, 93 (2020).

⁴⁷ See Landsman & Holderman, *supra* note 41, at 33 (describing the evolution of the jury as a "political entity"); see also *infra* notes 73–101 and accompanying text, discussing historical examples of juries combatting oppressive government rule.

⁴⁸ See *infra* notes 51–99 and accompanying text.

⁴⁹ See *infra* notes 100–136 and accompanying text.

A. The Origins of Jury Secrecy

The earliest juries performed an administrative role, mostly comprised of collecting and recording information.⁵⁰ This role required juries to rely on their knowledge and experiences independent of the evidence presented.⁵¹ William the Conqueror likely brought this jury model to England around the eleventh century during the Norman Conquest, though possibly even earlier.⁵² In 1086, William began to compile the Domesday Book, which served as an inventory of the riches of his kingdom, by cataloguing all property and identifying its pre and post-conquest owners for taxing purposes.⁵³ To facilitate this project, William appointed what historians consider to be one of the first juries, though its obligations differed greatly from those of the modern jury.⁵⁴ William's jury consisted of a group of wealthy property owners, who used their personal knowledge to assist with recording information in the Domesday Book.⁵⁵ In this way, the jury operated both as "witnesses" and fact finders, required to arrive at a group consensus.⁵⁶

During the reign of William's great-grandson, King Henry II, the purpose of the jury evolved from reporting property ownership to resolving property disputes.⁵⁷ Disagreements between neighbors over property became a growing problem in Henry II's kingdom, as they often turned violent.⁵⁸ These property

⁵⁰ Landsman & Holderman, *supra* note 41, at 32.

⁵¹ *Id.*

⁵² *Id.* The illegitimate son of the Duke of Normandy, William, asserted himself as a leader by quelling rebellion in Normandy and warding off attempted invasions by France in 1054 and 1057. William I 'The Conqueror' (r. 1066–1087), THE ROYAL HOUSEHOLD, <https://www.royal.uk/william-the-conqueror> [<https://perma.cc/3E4G-7GSD>]. Claiming that his distant cousin Edward the Confessor had promised him the English throne, William invaded England on September 28, 1066, and swiftly defeated the forces of Harold II. *Id.* William donned the crown, becoming the new King of England on Christmas Day in 1066. *Id.*

⁵³ Landsman & Holderman, *supra* note 41, at 32. In 1085, England faced the threat of invasion from Denmark. *Discover Domesday*, THE NAT'L ARCHIVES, <https://webarchive.nationalarchives.gov.uk/ukgwa/https://www.nationalarchives.gov.uk/domesday/discover-domesday/> [<https://perma.cc/BP3K-96CY>]. To pay for the mercenary army he needed to fend off the invasion, William took an inventory of all the financial resources and taxable resources in the kingdom. *Id.* The book is not itself titled "Domesday," but came to be known as such as a metaphor for the day of Judgment. *Id.*

⁵⁴ Landsman & Holderman, *supra* note 41, at 32.

⁵⁵ *Id.* Through a process called "inquest," the king's officers would inquire of these "jurors" to ascertain information to be recorded in the Domesday book. F. C. MONTAGUE, *THE ELEMENTS OF ENGLISH CONSTITUTIONAL HISTORY: FROM THE EARLIEST TIMES TO THE PRESENT DAY* 49 (1894). Prior to the inquest, these individuals were sworn to tell the truth. *Id.*

⁵⁶ Landsman & Holderman, *supra* note 41, at 32.

⁵⁷ *Id.*; see also JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 59 (Little, Brown, & Co. 1898) (discussing the shift in jury responsibilities under the reign of King Henry II).

⁵⁸ See Janet Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 CAMBRIDGE L.J. 144, 144 (1978) (describing the rise in frequency of private disputes between neighbors over property). King Henry II revolutionized the manner in which property disputes were settled. Peter T. Leeson, *Trial by Battle*, 3 J. LEGAL ANALYSIS 341, 341–42 (2011). Prior to his application of

disputes threatened social order and stability.⁵⁹ In an attempt to maintain peace, King Henry II instituted one of the earliest forms of nuisance law, the assize of novel disseisin.⁶⁰ Under this new judicial invention, injured parties could request a royal writ that would order a sheriff to assemble a group of twelve knights with personal knowledge of the neighborhood and the property in dispute.⁶¹ Combining their knowledge and conducting their own examination of the property, the knights ultimately reported back to the king or his justices as to which party was in the right and which was in the wrong, but only after reaching a unanimous decision.⁶² No law or policy required the knights to explain their decision, though they could volunteer an explanation if they wished.⁶³ In 1215, the right to a jury trial was codified in Magna Carta.⁶⁴ By the fourteenth century, the use of these juries had become a common practice.⁶⁵

The role of the jury shifted over time as other elements of the trial system evolved.⁶⁶ Jurors gradually shed their responsibility of providing evidence themselves through personal knowledge, experiences, and perceptions.⁶⁷ This

inquests to resolve questions of land ownership, such disputes were decided through “trial by battle.” *Id.* Disputants appointed representatives who would go before a crowd of spectators and bludgeon one another, sometimes to the death. *Id.* The victorious party won title to the disputed land. *Id.*

⁵⁹ Loengard, *supra* note 58, at 144–45.

⁶⁰ *Id.* at 145; *see also* Landsman & Holderman, *supra* note 41, at 32 (discussing the introduction of this early form of nuisance law as a way of mitigating violence through self-help). An “assize” was a local court in the main town of each county, where judges visiting from London presided. UK Parliament, *The Assizes*, <https://www.parliament.uk/about/living-heritage/transformingsociety/laworder/court/overview/assizes/> [<https://perma.cc/57BC-S765>]. The assizes settled civil disputes and decided criminal matters. *Id.* “Disseisin” refers to dispossession of land. Oxford English Dictionary, *Disseisin*, https://www.oed.com/dictionary/disseisin_n [<https://perma.cc/NKN4-327Q>].

⁶¹ THAYER, *supra* note 57, at 62–64; Loengrad, *supra* note 58, at 146. King Henry II’s new system was a welcome alternative to the traditional method of dispute resolution, which consisted of a duel to the death or until one party surrendered by yelling “craven,” which was perceived as an extreme social embarrassment. Landsman & Holderman, *supra* note 41, at 33.

⁶² THAYER, *supra* note 57, at 62–63; Loengrad, *supra* note 58, at 146. This jury was originally called a “jurata.” THAYER, *supra* note 57, at 59–60. The term comes from the Latin “*iurare*” meaning “to swear” and “*ius*” meaning “law or oath.” ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/jury> [<https://perma.cc/48TJ-GCME>]. The twelve knights selected were screened to determine if they had knowledge of the issue at hand. THAYER, *supra* note 57, at 62. If a knight did not have the requisite knowledge, another knight took his place. *Id.* If the twelve knights were not unanimous, other knights were added to the jury until there were twelve men in agreement for one side or the other. *Id.* at 62–63. In coming to their decision, the knights were permitted to rely on their own knowledge and perceptions, or information that they learned from their fathers. *Id.* at 63.

⁶³ Loengard, *supra* note 58, at 146.

⁶⁴ MAGNA CARTA cl. 21 (1215), *translated in* A.E. DICK HOWARD, MAGNA CARTA: TEXT & COMMENTARY 40 (1964) (“Earls and barons shall be amerced only by their peers, and only in proportion to the measure of the offence.”)

⁶⁵ *See* Landsman & Holderman, *supra* note 41, at 33 (describing the evolution of jury trials after 1215).

⁶⁶ *See id.* (discussing new laws introduced in the 1500s that compelled live testimony in certain situations).

⁶⁷ *Id.*

change occurred in response to a growing preference for the in-court testimony of fact witnesses.⁶⁸ In the seventeenth century, however, the tyrannical reign of King Charles I stunted the evolution of the jury model.⁶⁹ King Charles I used the royal “Star Chamber,” a court King Henry VIII established to prevent judicial corruption, as an oppressive instrument to enforce his royal proclamations.⁷⁰ Juries were no longer a part of the indictment or verdict process.⁷¹

In 1689, the English Bill of Rights reinvigorated the right to a jury trial.⁷² From there, the role of the jury regained its rightful place as a protector against tyranny.⁷³ Though the royal administration fought to keep its foothold over the judicial system, juries began to demand their own independence.⁷⁴ A turning point in the role of the jury came during the trial of William Penn in the year 1670.⁷⁵ On the heels of the English Civil Wars, the rising tide of Catholicism threatened the Church of England.⁷⁶ In response, Parliament renewed the Conventicle Act, which criminalized gatherings of five or more non-related individuals for the purpose of religious worship of any rite other than the Church of England.⁷⁷ On August 14, 1670, authorities charged William Penn and Captain William Mead with leading a Quaker gathering in violation of the Conventicle Act.⁷⁸ Though it was established at trial that Penn had clearly broken the law as written, the jury privately deliberated and returned a verdict of not

⁶⁸ *Id.*

⁶⁹ *Star Chamber*, BRITANNICA (Dec. 11, 2023), <https://www.britannica.com/topic/Star-Chamber> [https://perma.cc/6U5A-H3PG].

⁷⁰ *See id.* (describing King Charles I’s use of the Star Chamber to achieve corrupt political ends). The “Star Chamber” was named for the stars adorning the ceiling of the room where the royal court met in Westminster Palace. Martin Gruberg, *Star Chamber*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Sept. 19, 2023), <https://firstamendment.mtsu.edu/article/star-chamber/> [https://perma.cc/2XSM-YRG7]. Parliament abolished the court in 1641. *Id.*

⁷¹ Gruberg, *supra* note 70.

⁷² Bill of Rights 1689, 1 W. & M. sess. 2 c. 2. (“[J]urors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders[.]”).

⁷³ *See, e.g.,* Weaver, *supra* note 44, at 49–50 (illustrating the role of the jury in combatting oppressive political rule); Alschuler & Deiss, *supra* note 42, at 871 (describing how juries resisted against British rule even before the American Revolution).

⁷⁴ *See* Landsman & Holderman, *supra* note 41, at 33 (describing how juries started to become political entities in the 1600s in protest of royal policies, including at the trial of William Penn in 1670).

⁷⁵ *Id.*; *see also* Barry R. Nager, *The Jury That Tried William Penn*, 50 A.B.A. J. 168, 170 (1964) (identifying the court’s opinion in the case of William Penn as establishing the watershed right to a free and impartial jury). Born in London in 1644, William Penn grew up the only son in a wealthy family and briefly studied law before becoming a religious and social reformer. *William Penn and His Holy Experiment*, LIBR. OF CONG. (<https://www.loc.gov/item/today-in-history/october-14/>) [https://perma.cc/F9CA-D54P]. In 1667, Penn joined the Religious Society of Friends, commonly known as “Quakers.” *Id.* After facing persecution for his religious beliefs in England, Penn established the “Province of Pennsylvania” in America as a “holy experiment” where people could freely worship. *Id.*

⁷⁶ Nager, *supra* note 75, at 168; Weaver, *supra* note 44, at 49–50.

⁷⁷ Nager, *supra* note 75, at 168; Weaver, *supra* note 44, at 50.

⁷⁸ Nager, *supra* note 75, at 168.

guilty in protest of what they viewed to be an oppressive policy.⁷⁹ The royal court refused to accept the jury's decision, ordering the jury to continue deliberations and return with a "correct" verdict—withholding food, water, fire, and a toilet from the jurors until they bent to the will of the court.⁸⁰

Incredibly, after spending two nights in these conditions, the jury held steadfast in their not guilty verdict.⁸¹ Enraged, the court's reporter fined each juror for contempt of court.⁸² All jurors refused to pay the fines, and consequently faced imprisonment, along with Penn and Mead.⁸³ It was not until about a year later that Lord Chief Justice Sir Robert Vaughan issued an opinion prohibiting justices from threatening, harassing, or intimidating juries.⁸⁴ The Penn trial is one of the earliest examples of the principle that jury secrecy and independence—a staple of the democratic deliberation process—is crucial for justice to prevail.⁸⁵

William Blackstone observed that by the 1700s, juries began to exhibit many of the characteristics common to their modern counterparts.⁸⁶ These characteristics included a random selection of jurors, rather than appointment, and the inclusion of members of the middle class rather than solely knights or the wealthiest property owners.⁸⁷ The jury model thus continued to grow increasingly democratic.⁸⁸ The idea that access to a jury trial was essential to a functioning government carried over to the American colonies, where the Massachusetts and Virginia charters explicitly codified this right.⁸⁹ As resentment

⁷⁹ *Id.* at 168, 169. This is an early example of jury nullification, which occurs when jurors acquit a defendant despite believing that he is guilty of the crime charged beyond a reasonable doubt. Nancy J. King, *Jury Nullification in the United States*, OXFORD HANDBOOKS ONLINE (FEB. 2015), <https://academic.oup.com/edited-volume/41333/chapter/352356034> [<https://perma.cc/4P3A-DLBY>].

⁸⁰ Nager, *supra* note 75, at 169–70. The court told the jurors, "Gentlemen, you will not be dismissed until we have a verdict that the court will accept, and you shall be locked up without meat, drink, fire and tobacco We will have a verdict by the help of God or you shall starve for it." *Id.*

⁸¹ *Id.* at 170.

⁸² *Id.*

⁸³ *Id.* Eight jurors ultimately paid their fines, but Penn, Mead, and four jurors remained in prison for two months until the court granted bail. *Id.*

⁸⁴ See generally Weaver, *supra* note 44, at 56–58 (providing Justice Vaughan's opinion regarding treatment of juries).

⁸⁵ See *id.* (quoting Bushel's Case, 124 Eng. Rep. 1006 (C.P. 1670), in which Justice Vaughan argues in favor of an independent jury). Justice Vaughan wrote that "the reasons are, I conceive, most clear, that the judge could not, nor can fine and imprison the jury in such cases." *Id.*

⁸⁶ See 3 WILLIAM BLACKSTONE, COMMENTARIES *380 ("A competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice.").

⁸⁷ *Id.*

⁸⁸ See *id.* (discussing the evolution of the functioning of the jury).

⁸⁹ See Landsman & Holderman, *supra* note 41, at 34 (describing how colonists brought jury trials to the colonies from Britain). One of the first laws of Plymouth Colony, passed on December 17, 1623, provided that "all criminal facts, and also matters of trespass and debts between man and man should be tried by the verdict of twelve honest men to be impanelled by authority in forme of a jury

toward royal rule of the colonies stirred, jury nullification again became an important tool to combat oppressive policies and proclamations, similar to the matter of William Penn.⁹⁰ Juries often exonerated defendants charged with violating colonial rules that colonists generally viewed as unfair.⁹¹

The practice of juries protesting the royal government by issuing verdicts that challenged royal policies became enough of a problem that the crown took steps to reduce jury interference.⁹² The Townshend Acts of 1767 sought to extend the jurisdiction of admiralty courts, which decided cases without the use of a jury.⁹³ Parliament also declared that trials for colonists accused of treason would be held in England, rather than the colonies.⁹⁴ In 1774, delegates met to discuss the issue of this British aggression at the First Continental Congress and voted in favor of a Declaration of Rights which guaranteed the right to a jury trial.⁹⁵ Just a few years later, colonists included the crown's deprivation of the right to trial by jury in some cases in the list of colonial grievances directed toward the King of England in the Declaration of Independence.⁹⁶ Around the time America won its independence from Britain, most states had codified the right to a jury trial in their own constitutions.⁹⁷ Accordingly, delegates at the

upon their oath." *Learn About the History of the Jury System*, MASS.GOV, <https://www.mass.gov/info-details/learn-about-the-history-of-the-jury-system> [<https://perma.cc/3UVQ-XP8M>].

⁹⁰ See Landsman & Holderman, *supra* note 41, at 34 (discussing the ways in which juries protested oppressive royal policies). Black's Law Dictionary defines "jury nullification" as "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue . . . or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Jury Nullification*, BLACK'S LAW DICTIONARY (12th ed. 2024).

⁹¹ *Id.* Another famous instance of jury nullification occurred in 1734, when John Peter Zenger was charged with libel for printing criticisms of the royal governor William Cosby in his publication the *New York Weekly Journal*. *Crown v. John Peter Zenger*, HIST. SOC'Y OF THE N.Y. CTS., <https://history.nycourts.gov/case/crown-v-zenger/> [<https://perma.cc/NF2S-SN27>]. At that time, the definition of libel included any language that opposed the royal government. Alschuler & Deiss, *supra* note 42, at 872. Accordingly, the judge found that as a matter of law, Zenger had committed libel. *Id.* at 873. The jury tackled the only remaining question: whether Zenger himself had printed the articles. *Crown v. John Peter Zenger*, *supra*. Zenger's counsel, Andrew Hamilton, admitted that Zenger printed the articles but argued that the contents of the articles were true. Alschuler & Deiss, *supra* note 42, at 873. In protest of the policy and in the interest of fighting toward the right to free speech, the jury delivered a verdict of not guilty for Zenger. *Id.* When the jury acquitted Zenger, the audience in the courtroom cried out "three huzzas." *Id.*

⁹² Alschuler & Deiss, *supra* note 42, at 875 (discussing the crown's reaction to jury nullification by seeking to expand the jurisdiction of non-jury courts).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *Declaration and Resolves of the First Continental Congress, October 14, 1774*, The Avalon Project, https://avalon.law.yale.edu/18th_century/resolves.asp#:~:text=That%20the%20foundation%20of%20English,are%20entitled%20to%20a%20free [<https://perma.cc/8J6G-FRXQ>] (including a provision that condemned the British government for depriving Americans of trial by jury).

⁹⁶ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁹⁷ See, e.g., PA. CONST. amend. IX, § vi (1790) ("That trial by jury shall be as heretofore, and the right thereof remain inviolate."); see also VA. DEC. OF RIGHTS. § 8 (1776) ("That in all capital or

Constitutional Convention in 1789 took steps to further enshrine this right on the federal level.⁹⁸ One of these steps was including the right to a jury in criminal trials in the main body of the Constitution, highlighting its perceived importance in protecting a republican system of government.⁹⁹

B. The Modern Approach to Keeping the Jury's Secrets

The right to a jury trial is only effective when the jury is able to maintain its independence.¹⁰⁰ An essential tool to achieving this impartiality is the confidentiality of the jury deliberation process.¹⁰¹ Though not constitutionally mandated, the secrecy of jury deliberations is a strongly preferred policy now codified in the Federal Rules of Evidence as well as the evidentiary procedures of all fifty states.¹⁰² Jury secrecy serves many aims above and beyond exorcising oppressive government interference in the guilt phase of a trial.¹⁰³ Secret

criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage . . .”).

⁹⁸ U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”).

⁹⁹ *Id.* (providing the right to a trial by jury as the only right explicitly listed in the body of the text). The right to a criminal trial by jury is one of the only individual rights explicitly listed in the main body of the Constitution, and it was also later enshrined in the Sixth Amendment. *Id.* at amend. VI. Although delegates unanimously agreed that juries comprised of community members provide an essential check and balance on consolidated, tyrannical rule, the specific language of this constitutional provision did spark some debate. *See* THE FEDERALIST NO. 83 (Alexander Hamilton) (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury . . .”); *see also* Landsman & Holderman, *supra* note 41, at 34 (explaining the disagreement between Federalists and Anti-Federalists at the Constitutional Convention over the issue of whether to create a constitutional right to a jury in civil cases). Some Federalists argued in favor of limiting the right to juries only to criminal, rather than civil, trials. Landsman & Holderman, *supra* note 41, at 34. Their hesitation in extending the right to a jury to civil trials stemmed from recent instances of jury nullification in cases related to the payment of debts to the government after the conclusion of the Revolutionary War. *Id.* Though the Federalists ultimately won this battle, the drafters included the Seventh Amendment guarantee of the right to a jury trial in all civil matters where the amount in controversy exceeds twenty dollars as a compromise during the ratification debates. U.S. CONST., amend. VII (1789); *see also* Landsman & Holderman, *supra* note 41, at 34 (referring to the Sixth and Seventh Amendments to the U.S. Constitution as a compromise to induce Anti-Federalists to support ratification).

¹⁰⁰ *See, e.g.,* Nager, *supra* note 75, at 169–70 (describing the attempted oppression of the jury by the court in controlling the outcome of the Penn trial by withholding food and water from the jurors and fining them for delivering a verdict contrary to the court’s political stance).

¹⁰¹ *See* Harawa, *supra* note 44, at 606–07 (describing the historical origins of jury secrecy and its eventual codification into the “no-impeachment” rule). The “no-impeachment” rule prohibits jurors from testifying about what occurred during deliberations in coming to their verdict. FED. R. EVID. 606(a).

¹⁰² Harawa, *supra* note 44, at 613; *see also* FED. R. EVID. 606 (limiting juror testimony to establish grounds for a new trial). On the state level, no-impeachment rules come in the form statutes, state common law, or rules of court. Harawa, *supra* note 44, at 613.

¹⁰³ Harawa, *supra* note 44, at 598–99.

deliberations also help ensure the safety of individual jurors, encourage free and open debate among jurors, preserve the integrity of the jury system, and protect the finality of verdicts.¹⁰⁴

Procedural safeguards of jury secrecy exist on the federal and state level in the form of “no-impeachment” rules.¹⁰⁵ These rules of evidence and criminal procedure prohibit jurors from testifying about jury deliberations after the verdict has been delivered.¹⁰⁶ The prohibition stems from the 1785 case before the King’s Bench, *Vaise v. Delaval*, in which Lord Mansfield held that jurors could not submit an affidavit stating that they used a coin toss to reach their verdict.¹⁰⁷ The “Mansfield Rule”, codified in Federal Rule of Evidence 606(b), refers to the general prohibition against juror statements impeaching their verdict.¹⁰⁸ Many states also enacted their own no-impeachment rules to similarly bar post-verdict juror testimony about the deliberation process.¹⁰⁹

¹⁰⁴ *Id.* Jurors may also be less inclined to deviate from community expectations and reach an outcome unaligned with prevailing public opinion if they are aware that their deliberations will be broadcast in some way. Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 890–91 (1983).

¹⁰⁵ See FED. R. EVID. 606(a) (establishing a blanket prohibition of juror testimony impeaching a verdict).

¹⁰⁶ *Id.*

¹⁰⁷ *Vaise v. Delaval* (1782), 99 Eng. Rep. 944 (KB); Brenda I. Rowe & Wesley S. McCann, *Run-away Jury: An Analysis of State Laws Concerning Juror Impeachment*, 8 CRIMINOLOGY & CRIM. JUST. FAC. PUBL’NS 1, 5 (2018); see also Andrew Hull, *Unearthing Mansfield’s Rule: Analyzing the Appropriateness of Federal Rule of Evidence 606(b) in Light of the Common Law Tradition*, 38 S. ILL. UNIV. L.J. 403, 406–07 (2014) (discussing the Mansfield Rule’s prohibition on jurors impeaching their verdict). The current handbook for jurors serving in federal district courts appears to make passing reference to the *Vaise* case when it instructs that “[i]t would be dishonest for a judge to decide a case by tossing a coin. It would be just as dishonest for a juror to do so.” ADMIN. OFF. OF THE U.S. CTS., HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 14 (<https://www.uscourts.gov/sites/default/files/trial-handbook.pdf>) [<https://perma.cc/F3VC-TBVY>].

¹⁰⁸ See Hull, *supra* note 107 (noting that the Mansfield Rule was part of the common law doctrine long before Federal Rule of Evidence 606(b) came into being). In 1866, an Iowa court proposed a more flexible approach to juror verdict impeachment in contrast to the stricter Mansfield Rule. See *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa 195, 210–211 (1866) (establishing that jurors may testify to misconduct during the deliberation process in a limited number of circumstances). This “Iowa Rule” permitted courts to receive juror affidavits testifying to misconduct in the form of facts independent of the mental processes employed to reach the verdict itself. *Id.* at 212. For example, jurors could make known that the verdict was arrived at by a game of chance, or that they were improperly approached by counsel or another third party. *Id.* at 210. The court in *Wright* reasoned that juror testimony to these facts, unlike testimony to mental impressions, could be corroborated by other jurors and so exhibited increased reliability. See *id.* at 210–11 (noting that if one juror testified to such facts, another juror would be able to disprove that testimony). Though some jurisdictions adopted this more lenient rule, the U.S. Supreme Court later rejected it on the grounds that it opened a door to potential jury tampering and threatened verdict finality. See *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915) (discussing the dangers of allowing jurors to testify to objective facts of the deliberation process).

¹⁰⁹ See, e.g., MASS. R. EVID. 606 (closely mirroring the language of FED. R. EVID. 606(b)); see also KY. R. CRIM. P. 10.04 (“A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot.”).

Federal Rule of Evidence 606(b) prohibits a juror from testifying about statements or events that occurred during the jury deliberations, the mental processes of the jurors, and the effects of any consideration on the jury's decision in coming to a verdict.¹¹⁰ That being said, the federal no-impeachment rule does provide minimal avenues to peer behind the curtain and weed out juror misconduct.¹¹¹

There are three exceptions to the rule.¹¹² First, jurors may be allowed to testify to any prejudicial or extrinsic evidence which they came in contact with during deliberations.¹¹³ Second, jurors may testify to any other improper influence which impacted their decision-making.¹¹⁴ Third, jurors may testify about any mistake that was made in filling out the verdict form.¹¹⁵

Yet preserving jury secrecy comes with certain costs.¹¹⁶ Although the "black box" keeps bad government actors out, it runs the risk of locking problematic deliberations in, leaving the court and litigants unable to address po-

¹¹⁰ FED. R. EVID. 606(b)(1). Some scholars have noted a tension between a general societal belief that government processes should be transparent and the privacy of the jury deliberation process. Note, *supra* note 104, at 894. They reconcile these conflicting ideals by contending that the "impulses of majoritarianism" must be tempered to some degree during deliberations, which are confined to the facts established on the trial record. *Id.*

¹¹¹ FED. R. EVID. 606(b)(2).

¹¹² *Id.* R. 606(b)(2)(A).

¹¹³ *Id.* R. 606(b)(2)(B).

¹¹⁴ *Id.* R. 606(b)(2)(C). In 1987, in *Tanner v. United States*, the U.S. Supreme Court declined to hold that this provision included testimony about whether any jurors were under the influence of drugs or alcohol during the deliberation process. 483 U.S. 107, 127 (1987). The defendants in *Tanner* were convicted on charges of mail fraud and conspiracy to defraud the federal government. *Id.* at 109. On the day before sentencing, the defendants submitted an affidavit stating that a juror from the trial made an unsolicited call to defense counsel, alerting them that several jurors had been drinking alcohol during the trial. *Id.* at 113. Later, another juror by the name of Daniel Hardy came forward to say that he "felt like . . . the jury was on one big party" and that, during each recess, four jurors drank beer (including Hardy, who admitted to having one to three pitchers of beer during recesses), two jurors drank mixed drinks, the foreperson drank a liter of wine, at least four jurors regularly smoked marijuana, and two jurors ingested cocaine between two to five times. *Id.* at 115–16. One juror told Hardy that he was "flying." *Id.* at 116. Defense counsel also testified that he had once seen a juror "in a sort of giggly mood" during the trial but did not mention it to the court. *Id.* at 113. Writing for the majority, Justice O'Connor noted the strong policy interests in verdict finality and open discussion in the deliberation room. *Id.* at 120–21. Any Sixth Amendment concerns were alleviated by the availability of other trial mechanisms such as voir dire, the fact that the jury is observable to the judge and counsel during the trial, and the option for jurors to come forward with concerns about fellow jurors before a verdict is reached. *Id.* at 127. Moreover, the effects of drugs and alcohol "seem[] no more an 'outside influence' [under Rule 606(b)] than a virus, poorly prepared food, or a lack of sleep." *Id.* at 122.

¹¹⁵ *Tanner*, 483 U.S. at 122; see also FED. R. EVID. 606(b)(2) advisory committee's note on proposed rules (noting that the rule as written abrogates the Mansfield Rule by allowing jurors to testify to situations where they received improper extraneous information).

¹¹⁶ See Harawa, *supra* note 44, at 598 (discussing policy reasons in favor of abrogating jury secrecy).

tential misconduct.¹¹⁷ The no-impeachment rule may protect juror bias and misconduct that may improperly influence the outcome of a decision from redress.¹¹⁸ This tradeoff is the result of a policy choice to preserve the social good of jury secrecy at the potential cost of injuring a private party.¹¹⁹

Although courts allow and even encourage jurors to consider the evidence through the lens of their personal life experiences, this practice excludes reliance on prejudicial beliefs.¹²⁰ The jury empanelment process provides the first safeguard to screen jurors for any bias which could rise to the level of misconduct.¹²¹ At the start of the trial and before being sent out to deliberate, the judge will also inform the jury of their duties to consider only the evidence presented to them at trial, and not to perform any investigations of their own, such as site visits.¹²² Yet, whereas jury instructions often dictate what evidence is impermissible in the jury room, the instructions are often silent as to *how* the jury may examine the evidence that it is permitted to have.¹²³ Should a litigant suspect juror misconduct, they are encouraged to raise the issue before the verdict is read or introduce the evidence of non-juror witnesses such as bailiffs whose testimony is not prohibited by the no-impeachment rule after trial.¹²⁴ Even so, proving juror misconduct is a challenging feat given the strong policy preference for jury secrecy and independence of the deliberation process.¹²⁵

In 2017, in *Peña-Rodriguez v. Colorado*, the U.S. Supreme Court created a new exception that would abrogate the no-impeachment rule in situations

¹¹⁷ *Id.* Some have also raised the question of whether restricting the circumstances in which jurors may disclose information about their deliberation infringes on First Amendment speech protections. Note, *supra* note 104, at 897–98.

¹¹⁸ Harawa, *supra* note 44, at 598.

¹¹⁹ *Id.*; see also *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915) (noting the competing interests of avoiding injury to private litigants and injury to the public by way of eliminating juror secrecy).

¹²⁰ See, e.g., MASS. SUP. JUD. CT., MODEL JURY INSTRUCTION—BE FAIR (IMPLICIT BIAS), FINAL CHARGE 1 (2021), <https://www.mass.gov/doc/sjc-model-jury-instructions-on-implicit-bias-final-charge-pdf-sept-29-2021/download> [<https://perma.cc/8ZKH-4M9N>] (explaining the concept of implicit bias, which refers to prejudicial beliefs an individual may have despite being unaware of holding such beliefs). The Massachusetts Supreme Judicial Court provides a number of strategies for recognizing and combatting implicit bias during the deliberation process, including instructing jurors to take their time in coming to a decision, consider the people involved in the case as individuals rather than members of a group, and listen to other jurors. *Id.* at 2–3.

¹²¹ See Lillian B. Hardwick, *Juror Misconduct*, 17 LITIG. 35, 35 (1991) (discussing a case where panel voir dire helped root out potential juror bias).

¹²² See, e.g., MASS. SUPER. CT., JURY INSTRUCTIONS: MODEL CRIMINAL JURY PRECHARGE (2021), <https://www.mass.gov/doc/superior-court-model-criminal-jury-instructions-precharge-script-pdf/download> [<https://perma.cc/S2D7-LHBM>].

¹²³ See generally *id.* (failing to provide explicit instructions for examining physical evidence).

¹²⁴ Jonathan Murphy, *How Do You Prove Juror Misconduct After a Trial?*, ABA (Feb. 23, 2015), <https://www.americanbar.org/groups/litigation/resources/newsletters/corporate-counsel/how-do-you-prove-juror-misconduct-after-trial/> [<https://perma.cc/HW7N-28ZG>].

¹²⁵ *Id.*

where racial prejudice influenced jury deliberations.¹²⁶ The Court noted that racial bias poses unique and dangerous threats to the justice system by undermining the principle of equal treatment under law.¹²⁷ Courts already take steps to prevent racial bias from pervading proceedings, such as permitting questions that probe at potential racial prejudice during voir dire.¹²⁸ Accordingly, the Court found that preserving the Sixth Amendment right to an impartial trial requires jury secrecy to give way where racial animus poisons the deliberation process.¹²⁹ Specifically, the no-impeachment rule does not apply where a juror makes a statement clearly conveying racial animus or stereotypes and indicates reliance on that animus in reaching their decision to convict a defendant.¹³⁰ The racial bias must be overt and a “significant motivating factor” in the juror’s vote on the verdict.¹³¹

The Court’s recent decision in *Peña-Rodriguez* has sparked conversation over and criticism about the secrecy of the jury deliberation process.¹³² Some argue that the rule in *Peña-Rodriguez* should encompass covert as well as overt racial animus, thus creating a larger window into juror deliberations.¹³³ Others have proposed, even prior to the *Peña-Rodriguez* decision, that courts should

¹²⁶ See 580 U.S. 206, 225 (2017) (creating a new exception to the no-impeachment rule that allows jurors to testify to statements of racial animus made during the deliberation process). There, Miguel Angel Peña-Rodriguez was convicted at a jury trial of unlawful sexual contact with two teenage sisters in the bathroom of a horse-racing facility in Colorado. *Id.* at 211. Following the trial, two jurors signed affidavits testifying that one juror had made racially biased statements during deliberations, including, “I think he did it because he’s Mexican and Mexican men take whatever they want.” *Id.* at 212–13. Notwithstanding, the trial court denied petitioner’s motion for a new trial, finding that Colorado’s no-impeachment rule barred the jurors from testifying to the deliberation process. *Id.* at 213. The Colorado Supreme Court affirmed, and the U.S. Supreme Court granted certiorari to consider the question of whether racial bias during deliberations might warrant a new exception to the no-impeachment rule. *Id.* at 214.

¹²⁷ See *id.* at 224–25 (noting that racial bias is a “familiar and recurring evil that . . . implicates unique historical, constitutional, and institutional concerns”).

¹²⁸ See *id.* at 225 (recognizing voir dire as one mechanism to uncover juror bias, as well as observing the conduct of jurors during the trial and any reports from jurors before the verdict is reached).

¹²⁹ *Id.* Just as the no-impeachment rule exists to preserve verdict finality, the Court reasoned that a racial bias exception was necessary to preserve confidence in jury deliberations and verdicts. *Id.*

¹³⁰ *Id.* at 225–26.

¹³¹ *Id.*; see also Nicholas Datlowe, *Jury Room ‘Black Box’ Broken Open at Supreme Court*, BLOOMBERG L. (Oct. 12, 2016), https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/XC26AASG000000?bna_news_filter=business-and-practice#jcite [<https://perma.cc/8YD8-TY2U>] (summarizing the justices’ search for a limiting principle during their questioning of counsel at oral argument in the case of *Peña-Rodriguez v. Colorado*).

¹³² See, e.g., R. Jannell Granger, Comment, *Justice for All: The Sixth Amendment Mandates Purg-ing All Racial Prejudice From the Black Box*, 63 HOWARD L.J. 57, 61 (2019) (arguing that, by limiting permissible testimony to only overt statements of racial bias, the rule in *Peña-Rodriguez* fails to erase racial animus from the jury deliberation process).

¹³³ See *id.* at 79 (proposing a reversible error standard where the jury relies on covert racism, including statements that “hint” at racial animus); see also Harawa, *supra* note 44, at 634 (arguing that the *Peña-Rodriguez* standard is too strict by creating an exception only for explicit, and not more subtle, forms of racism).

take advantage of evolving technology and put cameras in petit jury rooms.¹³⁴ The footage could be sequestered and used for the limited purpose of appellate proceedings and research into jury behavior.¹³⁵ These criticisms and proposals come up against the weight of the centuries-old tradition that juries must deliberate in a black box to preserve the democratic nature of the judicial system.¹³⁶

II. BREAKING THE BOX: EXISTING CASE LAW ON JUROR EXPERIMENTATION

Strong policy considerations that safeguard the practice of jury secrecy do not extend so far as to completely shield juror misconduct behind the veil of the black box.¹³⁷ The U.S. Supreme Court has identified some limitations on jury deliberations that are meant to ensure the integrity of the trial process.¹³⁸ One fundamental rule is that jurors may not consider extrinsic evidence during the trial or deliberations.¹³⁹ Judges often instruct the jury not to conduct independent research, discuss the case, or visit any locations mentioned in the testimony after leaving the courthouse for the day.¹⁴⁰ This prohibition on inde-

¹³⁴ See Alex Kozinski & John Major, *Why Putting Cameras in the Courtroom Is Not As Crazy As You Think*, 99 JUDICATURE 7, 9 (contending that cameras in the jury deliberation room might have the positive effects of encouraging more thoughtful and comprehensive discussions, and would assist judges in determining whether juror misconduct was prejudicial). A “petit jury” is another name for a trial jury, as distinct from a grand jury which issues indictments. *Types of Juries*, ADMIN. OFF. OF THE U.S. CTS. (<https://www.uscourts.gov/services-forms/jury-service/types-juries#:~:text=Learn%20about%20the%20types%20of,plaintiff%20in%20a%20civil%20case>) [<https://perma.cc/8MGV-CYF4>].

¹³⁵ *Types of Juries*, *supra* note 134. The idea of peeking inside the black box was parodied in the 2023 television sitcom “Jury Duty,” a mockumentary that followed fake jurors through hilarious deliberations about a fake trial, with a single catch: unlike his peers, one member of the jury was not an actor and did not know that the trial was fake. Zach Vasquez, *How Jury Duty Became The Surprise Comedy Breakout of the Year*, THE GUARDIAN (Jul. 17, 2023), <https://www.theguardian.com/tv-and-radio/2023/jul/17/show-jury-duty-amazon-freevee-tiktok> [<https://perma.cc/XU3J-ZZVF>].

¹³⁶ See generally *Warger v. Shauers*, 574 U.S. 40, 44–48 (2014) (summarizing the case law on the no-impeachment rule and highlighting state and federal courts’ historic caution in allowing inquiry into the deliberation process).

¹³⁷ See Murphy, *supra* note 124 (summarizing the routes available to parties to address juror misconduct, including pre-verdict investigations and post-conviction motions to introduce non-juror evidence in accordance with FED. R. EVID. 606(b)). The U.S. Supreme Court abrogated Federal Rule of Evidence 606(b), which generally prohibits introduction of juror testimony to impeach a verdict, in limited circumstances to allow jurors to testify to statements made during jury deliberations. See, e.g., *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 225 (2017) (holding that the federal no-impeachment rule does not bar evidence that a juror relied on racial animus in the decision to convict a defendant).

¹³⁸ See, e.g., *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965) (holding that, in reaching a verdict, the jury must only consider the evidence developed during the trial that the defendant had an opportunity to confront and cross-examine).

¹³⁹ *Id.*

¹⁴⁰ See, e.g., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 1.8 (2022 ed.), https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2023_05.pdf (instructing the jury that throughout the course of the trial and deliberations they may not discuss the case with any third parties or on social media, listen to

pendent juror investigation also applies within the walls of the deliberation room.¹⁴¹ It is regular practice for parties to permit, or even request, that jurors be allowed to examine and consider physical evidence admitted during the trial.¹⁴² As the Sixth Circuit's en banc holding in the 2023 case *Fields v. Jordan* ("*Fields IV*") demonstrates, however, it is not uncommon for jurors to formulate questions and desire more information about physical evidence or testimony previously submitted.¹⁴³

Limited by the evidence available to them, some juries conduct their own investigations or experiments.¹⁴⁴ Though jurors are often invited to refer to their common-sense and life experiences, some forms of experimentation may become misconduct if the jury substitutes its own investigation for in-court evidence or testimony.¹⁴⁵ In the absence of any specific direction from the U.S. Supreme Court, federal and state courts adopt varying approaches to determine the point at which examination of evidence becomes improper experimentation.¹⁴⁶

Section A of this Part discusses the constitutional rights that are implicated when juror experimentation becomes juror misconduct, including potential violations of the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's due process protections.¹⁴⁷ Section B explores the range of ap-

or read any news about the case, conduct any independent research or investigations, or visit any of the places discussed during the case).

¹⁴¹ See *id.* at § 1.3 (instructing the jury that the only evidence they may consider during deliberations includes sworn witness testimony, the exhibits received into evidence, and any stipulations by the parties).

¹⁴² See F. Dennis Saylor IV & Daniel I. Small, *Showing Exhibits to the Jury*, MA. LAWS. WKLY. (June 14, 2018), <https://www.hklaw.com/files/Uploads/Documents/Articles/DanSmall/DanSmallShowingExhibitstotheJury.pdf> [<https://perma.cc/Y2TJ-D6WE>] (summarizing the ways trial attorneys can submit evidence to the jury, including publishing exhibits to the jury, blowing up the exhibit or displaying the exhibit electronically, or admitting an exhibit into evidence so that the jury will have it with them during deliberations).

¹⁴³ *Fields IV*, 86 F.4th 218, 230–31 (6th Cir. 2023) (en banc) (discussing the jury's decision to conduct an experiment due to their unanswered questions), *aff'g Fields II*, 2016 WL 3574396, at *1 (E.D. Ky. June 23, 2016), *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024) (mem.).

¹⁴⁴ See, e.g., *Banghart v. Origoverken*, A.B., 49 F.3d 1302, 1306 (8th Cir. 1995) (explaining how jurors experimented with dropping toothpicks into a stove to test the conclusions of the plaintiff's expert witness that this could cause an explosion); *United States v. Abeyta*, 27 F.3d 470, 477 (10th Cir. 1994) (demonstrating how jurors used a personal pocket knife to reenact a stabbing incident); *United States v. Hephner*, 410 F.2d 930, 936 (7th Cir. 1969) (describing how a juror put on sunglasses and covered his head to determine if it would be possible to identify a bank robber in a similar disguise). See generally Carol J. Miller, Annotation, *Propriety of Juror's Tests or Experiments in the Jury Room*, 31 A.L.R. 4th 566 (2024) (summarizing existing case law on juror experimentation nationwide).

¹⁴⁵ See, e.g., *State v. Burke*, 215 P. 31, 33–34 (Wash. 1923) (finding that jurors' use of a magnifying glass during deliberations constituted juror misconduct).

¹⁴⁶ See Miller, *supra* note 144 (discussing the different approaches of federal and state courts to the issue of juror experimentation).

¹⁴⁷ See *infra* notes 149–176 and accompanying text.

proaches implemented by state and federal courts to address the question of when juror experimentation infringes upon these constitutional rights.¹⁴⁸

A. Extrinsic Evidence

At the heart of the juror experimentation question is the centuries-old principle that jurors may not receive new evidence after both parties rest their respective cases.¹⁴⁹ Even during the course of trial, the Federal Rules of Evidence restrict parties from submitting extrinsic evidence—that is, any impeachment evidence beyond the questions being posed to a witness on cross-examination, particularly where that evidence relates to a collateral matter that is not directly relevant to the matter at hand.¹⁵⁰ These limitations reflect policy goals that recognize extrinsic evidence may compromise the integrity of the judicial proceedings by confusing issues for the jury, creating undue surprise to the opposing party, and foreclosing the defendant's ability to impeach or rebut.¹⁵¹

The U.S. Supreme Court discussed these dangers in a series of cases which addressed the constitutional issues raised by the introduction of extrinsic evidence, particularly in the context of criminal jury trials.¹⁵² In 1965, in *Turner v. Louisiana*, the Supreme Court held that juries may not consider extrinsic evidence when reaching a verdict.¹⁵³ In *Turner*, a jury convicted the defendant of murder and sentenced him to death.¹⁵⁴ The prosecution's two main

¹⁴⁸ See *infra* notes 177–227 and accompanying text.

¹⁴⁹ See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 376 (1765–1769) (“Also if [the jurors] speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private . . . any of these circumstances will entirely vitiate the verdict.”); see also *Fields IV*, 86 F.4th 218, 237 (6th Cir. 2023) (en banc) (quoting Blackstone on the dangers of exposing jurors to extrinsic evidence), *aff'g Fields II*, 2016 WL 3574396, at *1 (E.D. Ky. June 23, 2016), *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024) (mem.).

¹⁵⁰ See, e.g., FED. R. EVID. 608(a) (establishing a general rule that parties may not admit extrinsic evidence to prove a witness's specific instance of conduct to support or attack that witness's character for truthfulness); *Id.* R. 613(b) (stating that extrinsic evidence of the prior inconsistent statements made by a witness is only admissible where that witness has an opportunity to respond, and the adverse party may examine the witness about such statements). Black's Law Dictionary defines “extrinsic evidence” as “evidence that is not legitimately before the court” or “evidence that is calculated to impeach a witness's credibility, adduced by means other than cross-examination of the witness.” *Evidence*, BLACK'S LAW DICTIONARY (12th ed. 2024).

¹⁵¹ See *McDonald v. Pless*, 238 U.S. 264, 268–69 (1915) (discussing the negative policy implications of allowing jurors to impeach their verdicts); see also Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 326 (2005) (noting that courts are concerned with, among other issues, the finality of judgments and jury tampering).

¹⁵² See *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (holding that the jury may not consider extrinsic evidence when coming to a verdict because doing so violates a defendant's constitutional rights under the Sixth and Fourteenth Amendments); see also *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (holding that a jury violated a defendant's Sixth Amendment rights when it considered extrinsic evidence in reaching a verdict).

¹⁵³ 379 U.S. at 472.

¹⁵⁴ *Id.* at 466. Wayne Turner was convicted of committing murder during a robbery. *Id.*

witnesses—police officers who investigated the murder scene—took the stand to testify against the defendant.¹⁵⁵ Their role in the trial, however, did not stop there; they also served as bailiffs for the sequestered jury, communicating frequently with jurors and transporting jurors to restaurants and lodgings.¹⁵⁶ The Court found that the proximity and intermingling of the officers with the jury members violated the defendant's due process rights to a fair trial and an impartial jury.¹⁵⁷ The Court discussed the role of the jury as an appendage of the court itself and noted the importance of the jury's ability to consider evidence with calm and independent judgment.¹⁵⁸ Accordingly, evidence against a defendant must come from the statements of testifying witnesses, which affords the defendant the ability to confront the evidence through cross-examination.¹⁵⁹ Subsection 1 of this Section discusses the Sixth Amendment issues created by extrinsic evidence.¹⁶⁰ Subsection 2 examines potential violations of the Fourteenth Amendment.¹⁶¹

1. The Sixth Amendment

The Sixth Amendment to the U.S. Constitution codifies the right of the accused to confront the witnesses testifying against him.¹⁶² In 1965, in *Pointer v. Texas*, the U.S. Supreme Court held that the ability to confront adverse witnesses is a fundamental right that is incorporated to the states by the Due Process Clause of the Fourteenth Amendment.¹⁶³ The protections of the Sixth Amendment's Confrontation Clause are essential to the preservation of the ad-

¹⁵⁵ *Id.* at 467. Officers Vincent Rispono and Hulon Simmons investigated the scene of the murder and testified that the defendant later led them to a hiding place in the woods where the cartridge clip from the gun used in the murder was stashed. *Id.* The officers also testified that the defendant submitted a written confession, which the prosecution introduced into evidence. *Id.*

¹⁵⁶ *Id.* at 467–68. Bailiffs continuously accompanied the sequestered jury for three days when court was not in session. *Id.* The officers testified that, during this time, they did not discuss the case with the jury. *Id.* at 473.

¹⁵⁷ *Id.* at 473. The Court held that the continuous contact between the jury and the officers bolstered the jurors' confidence in two key prosecution witnesses. *Id.* at 474.

¹⁵⁸ *Id.* at 472.

¹⁵⁹ *See id.* at 472–73 (recognizing that the constitution requires evidence against the defendant to be offered “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”).

¹⁶⁰ *See infra* notes 162–167 and accompanying text.

¹⁶¹ *See infra* notes 168–176 and accompanying text.

¹⁶² U.S. CONST. amend. VI.

¹⁶³ 380 U.S. 400, 403 (1965). In *Pointer*, a grand jury indicted the defendant on a charge of robbing Kenneth Phillips of \$375 alongside co-defendant Lloyd Earl Dillard. *Id.* at 401. After Phillips moved out of state without intention to return for the trial, the state instead offered a transcript of testimony that Phillips gave at a preliminary hearing, which the judge allowed into evidence over objections from the defense. *Id.* The Court here found a violation of the defendant's Sixth Amendment rights as the defendant was unable to cross-examine Phillips. *Id.* at 406–08.

versarial trial process.¹⁶⁴ Cross-examination is a key tool for the defense to impeach and rebut the prosecution's evidence and so establish reasonable doubt that would support the jury's finding of a not guilty verdict.¹⁶⁵

In 2004, in *Crawford v. Washington*, the U.S. Supreme Court clarified that the boundaries of the Confrontation Clause only extend so far as to encapsulate *testimonial* evidence offered against a criminal defendant.¹⁶⁶ The Court in *Crawford* described testimonial evidence as extrajudicial statements which the declarant would reasonably believe could be used to prosecute a defendant, including such materials as affidavits and pretrial statements which the defendant was unable to cross-examine at the time it was offered.¹⁶⁷

2. The Fourteenth Amendment

Violations of the Confrontation Clause also create procedural issues that offend constitutionally protected due process rights.¹⁶⁸ Under the Fourteenth Amendment, government actors must abide by certain procedural processes to ensure that criminal defendants are not unfairly deprived of life or liberty.¹⁶⁹ The ability to cross-examine adverse witnesses is one procedure that must always be accessible to defendants.¹⁷⁰ In many cases, depriving the defendant of

¹⁶⁴ See *Turner*, 379 U.S. at 471–72 (discussing the opportunity to confront adverse witnesses as a fundamental right essential to a constitutional trial by jury).

¹⁶⁵ *How Courts Work: Cross Examination*, ABA (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/crossexam/ [<https://perma.cc/M9BE-NW89>].

¹⁶⁶ 541 U.S. 36, 68 (2004).

¹⁶⁷ *Id.* at 51–52. Writing for the majority, Justice Scalia did not, however, offer a comprehensive definition of what might constitute testimonial evidence, stating that thorough clarification would need to come from a future case. *Id.* Extrinsic evidence is excluded because the parties cannot test the reliability of such assertions in court when the declarant himself is absent. *Id.* at 61. As the defendant is not able to question the veracity of the statements in open court, and because the jury is not able to determine the credibility of the witness, the Confrontation Clause bars the submission of such evidence. See *id.* (discussing the importance of cross-examination as a tool of gauging witness reliability). Scholars have criticized *Crawford*'s testimonial evidence rule as being difficult to apply. See David L. Noll, *Constitutional Evasion and the Confrontation Puzzle*, 56 B.C. L. REV. 1899, 1902–03 (2015) (arguing that *Crawford* created a state of “jurisprudential shambles” as courts split over what constitutes testimonial evidence).

¹⁶⁸ See *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (noting that the due process right to a fair trial with an impartial jury is violated when a defendant is not afforded the opportunity to confront adverse witnesses).

¹⁶⁹ *Overview of Procedural Due Process in Criminal Cases*, CONGRESS.GOV, https://constitution.congress.gov/browse/essay/amdt14-S1-5-5-1/ALDE_00013759/ [<https://perma.cc/3BJD-96D8>].

¹⁷⁰ See *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965) (holding that a defendant's right to confront adverse witnesses must be protected in criminal trials); see also U.S. Const. amend. VI (protecting a defendant's confrontation right “in all criminal prosecutions”).

the right to confront adverse witnesses also threatens the impartiality of the jury in a manner that compromises the fairness of the trial.¹⁷¹

In 1966, in *Parker v. Gladden*, the U.S. Supreme Court affirmed its decision in *Turner* and found a Fourteenth Amendment due process violation when it held that a jury was prejudiced by extrinsic evidence.¹⁷² In *Parker*, the bailiff in a murder trial made opinionated comments to at least one juror outside of the courtroom.¹⁷³ One such statement expressed the bailiff's opinion that the defendant was guilty and wicked.¹⁷⁴ The Court held that the bailiff's comments were an outside influence on the jury that the defendant had no procedural recourse to confront, and that the exposure of even one juror to extrinsic evidence could materially impact the defendant's constitutional rights.¹⁷⁵ Justice Harlan's dissent highlighted the tension between addressing improper influence and protecting the sanctity of juror deliberations when he expressed concern that the majority's ruling would expose jurors to intimidation or harassment by convicted defendants.¹⁷⁶

B. Approaches to Jury Experimentation

Although the U.S. Supreme Court has unequivocally prohibited the general submission of extrinsic evidence to the jury, it has not yet considered a scenario where the jury generates such improper evidence themselves.¹⁷⁷ Specifically, as in the case of *Fields IV*, defendants have argued that juror experimentation with evidence infringes upon their constitutional due process rights in the same manner as the testimony the Court barred in *Crawford*.¹⁷⁸ These defendants argue that when the jury conducts their own tests or investigations

¹⁷¹ See *Parker*, 385 U.S. at 364 (finding that denial of the opportunity to cross-examine could lead to an impartial jury). In *Parker*, the Supreme Court held that a bailiff's out-of-court statements to jurors about the defendant's guilt were prejudicial because they compromised the jury's impartiality, and the defendant was not able to address these statements through cross examination. *Id.* at 365.

¹⁷² See *id.* at 365 (finding that a bailiff's making out of court statements to jurors "involves such a probability that prejudice will result that it is deemed inherently lacking in due process").

¹⁷³ *Id.* at 363.

¹⁷⁴ *Id.* at 363–64.

¹⁷⁵ *Id.* at 365–66. The Court found that "petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Id.*

¹⁷⁶ *Id.* at 368–69 (Harlan, J., dissenting). Specifically, Justice Harlan found that defendants may abuse the majority's new rule by harassing a discharged jury to scour for even a minor indication of potential prejudice that could be the basis to argue for a new trial. *Id.* at 369.

¹⁷⁷ See *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (prohibiting the jury from considering extrinsic evidence); see also *Fields II*, No. 15-38, 2016 WL 3574396, at *9 (E.D. Ky. June 23, 2016) (noting that although the Supreme Court clearly ruled that the jury may not consider extrinsic evidence, the Court has not yet ruled on the question of juror experimentation), *aff'd*, *Fields IV*, 86 F.4th 218 (6th Cir. 2023), *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024) (mem.).

¹⁷⁸ See, e.g., *Fields I*, No. 2013-SC-00231-TG, 2014 WL 7688714, at *3 (noting *Fields*' contention that the jury violated his Sixth and Fourteenth Amendment rights by experimenting with the twisty knife); see also *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

while deliberating to explore the veracity of some allegation or piece of testimony, they create new evidence behind closed doors which the defendant does not have the ability to confront.¹⁷⁹

Without clear guidance from the U.S. Supreme Court, lower federal courts and state courts adopt a variety of approaches, most of which are alike in that they are narrow and heavily fact-dependent.¹⁸⁰ Generally, courts strive to apply the Supreme Court's extrinsic evidence case law to novel situations by considering (1) whether the experimentation amounted to the introduction of extrinsic evidence, and (2) whether that extrinsic evidence had a prejudicial effect.¹⁸¹ Thus, even where some courts find that juror misconduct did occur, the verdict will stand so long as that misconduct only resulted in what the judge determines to be harmless error.¹⁸²

In determining whether a jury experiment was improper, courts typically apply one of two broad approaches.¹⁸³ The first applies to circumstances where the jury experiments with the physical evidence that they have with them in the deliberation room.¹⁸⁴ Here, a court will consider whether the jury's experiment was really just a "critical examination" of the previously submitted evidence and, thus, proper.¹⁸⁵

The second approach applies to circumstances where the jury orchestrates a type of reenactment that is not necessarily confined to the physical evidence in front of them.¹⁸⁶ In these circumstances, a court will generally consider whether the results of a jury's experiment did nothing more than corroborate evidence that already came onto the record during trial.¹⁸⁷ If the experiment

¹⁷⁹ *Fields I*, 2014 WL 7688714, at *3.

¹⁸⁰ See *Miller*, *supra* note 144, § 2(a) (noting that the outcome of cases regarding juror experimentation often turn on the facts of the specific case).

¹⁸¹ *Id.*; see also *Turner*, 379 U.S. at 472 (holding that the jury may not consider extrinsic evidence when reaching a verdict); *Parker*, 385 U.S. at 365 (finding that the introduction of extrinsic evidence inherently prejudiced the jury against the defendant and so violated the defendant's constitutional rights).

¹⁸² *Miller*, *supra* note 144, § 2(a); see also *Simon v. Kuhlman*, 549 F. Supp. 1202, 1206, 1207 (S.D.N.Y. 1982) (finding that a jury's experimentation was improper but not so prejudicial as to have violated the defendant's constitutional rights).

¹⁸³ See, e.g., *United States v. Hawkins*, 595 F.2d 751, 753 (D.C. Cir. 1978) (holding that a jury's experimentation with binoculars admitted into evidence was proper); cf. *State v. Burke*, 215 P. 31, 33–34 (Wash. 1923) (finding that a juror's use of magnifying glass was improper).

¹⁸⁴ See, e.g., *Taylor v. Reo Motors, Inc.*, 275 F.2d 699, 705 (10th Cir. 1960) (considering whether a jury committed misconduct by disassembling and rebuilding a heat exchanger properly in evidence during their deliberations).

¹⁸⁵ See, e.g., *State v. Everson*, 7 P.2d 603, 603–04 (Wash. 1932) (finding that the jury merely conducted a "critical examination" of evidence properly before them when they used a magnifying glass).

¹⁸⁶ See, e.g., *Kuhlman*, 549 F. Supp. at 1205 (considering whether a jury committed misconduct when it recreated a disguise allegedly worn by the defendant during a robbery using their own materials).

¹⁸⁷ See *id.* (finding that the jury did not seek to discover facts that were not already in evidence by conducting their experiment).

did not introduce any new, material facts, then a court will likely find that the test was proper.¹⁸⁸ Subsection 1 of this Section explores experimentation with physical evidence.¹⁸⁹ Subsection 2 of this Section discusses reenactments as a form of juror experimentation.¹⁹⁰

1. Experimentation with Physical Evidence

As a general rule, where juror tests are merely a critical examination of the evidence submitted to them, courts do not find any impropriety.¹⁹¹ It is the role of the jury to weigh and consider the testimony and physical evidence presented to them during the course of the trial.¹⁹² As such, juries generally enjoy broad leeway to conduct their analysis to fulfill their duties as fact finders.¹⁹³ Beyond merely observing the physical evidence, jurors may find it helpful to interact with the evidence to fully understand the testimony and explore a certain fact or contention.¹⁹⁴

For example, in 1978, in *United States v. Hawkins*, the U.S. Court of Appeals for the D.C. Circuit considered whether a jury engaged in misconduct when it conducted an experiment with binoculars.¹⁹⁵ During the trial, prosecutors submitted evidence to show that police officers had used this pair of binoculars when surveilling the defendant and so were able to observe him selling narcotics.¹⁹⁶ The prosecution entered the binoculars into evidence, so the jury had access to them during deliberations.¹⁹⁷ The jurors proceeded to use the binoculars to see for themselves whether the officers would have been able to view

¹⁸⁸ *Id.*

¹⁸⁹ See *infra* notes 191–211 and accompanying text.

¹⁹⁰ See *infra* notes 212–227 and accompanying text.

¹⁹¹ See Miller, *supra* note 144, § 2(b) (synthesizing the existing case law on juror experimentation).

¹⁹² *Function of the Jury: What Is Evidence?*, MASS.GOV. (Sept. 2022), <https://www.mass.gov/doc/2120-function-of-the-jury-what-is-evidence-credibility-of-witnesses/download> [<https://perma.cc/6MFV-JAAE>].

¹⁹³ See *Fields II*, No. 15-38, 2016 WL 3574396, at *9 (E.D. Ky. June 23, 2016) (noting that judges encourage jurors to examine the evidence using common sense and their life experiences), *aff'd*, *Fields IV*, 86 F.4th 218 (6th Cir. 2023), *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024) (mem.).

¹⁹⁴ See *Simon v. Kuhlman*, 549 F. Supp. 1202, 1207 (S.D.N.Y. 1982) (noting that the jurors conducted the experiment to corroborate the testimony they heard during trial).

¹⁹⁵ 595 F.2d 751, 753 (D.C. Cir. 1978).

¹⁹⁶ *Id.* at 752. Police allegedly observed the defendant, Albert Lee Hawkins, engaged in narcotics transactions while standing outside of his vehicle on a public street. *Id.* The surveilling officers radioed their supervisor after seeing activity including an individual handing the defendant cash, which he appeared to stash in his trunk. *Id.* The supervisor arrived and arrested the defendant, as well as searched his car to uncover \$393 in cash from an alleged marijuana sale. *Id.* In addition to the defendant's constitutional claims arising from juror experimentation, he also contested the warrantless search as a violation of his Fourth Amendment rights; the judge denied the defendant's motion to suppress the cash found in his car. *Id.* at 753.

¹⁹⁷ *Id.* at 753.

the defendant from a given distance.¹⁹⁸ The court held that the experiment was permissible because the jury was simply evaluating evidence properly before them, and so the experiment did not amount to new and extrinsic evidence.¹⁹⁹

Alternatively, courts have held that critical examination of evidence can amount to impropriety where it leads to the jury's discovery of "new" evidence.²⁰⁰ In 1923, in *State v. Burke*, the Washington Supreme Court found that joint defendants were entitled to a new trial where the jury used a magnifying glass during deliberations.²⁰¹ The prosecution did not submit the magnifying glass into evidence, but the bailiff provided it to the jury without consultation with or permission from defense counsel.²⁰² The jury then used the magnifying glass to determine whether wood dust on the end of a hacksaw found in the defendants' car matched the wood dust found on a sledge used to break into a bank and commit a burglary.²⁰³ The judge determined that the comparison of the wood dust amounted to the discovery of new evidence that was not introduced at trial and so surpassed the boundaries of a mere critical examination of the evidence.²⁰⁴

¹⁹⁸ *Id.* Officers testified that the binoculars were high-powered enough that they could determine not only where the drugs were located, but also make a tentative identification of the type of drug they saw. *Id.* at 755.

¹⁹⁹ *Id.* at 755.

²⁰⁰ See *State v. Burke*, 215 P. 31, 33–34 (Wash. 1923) (finding that jury experimentation was grounds for a new trial). Courts have also found that a jury's overzealous experimentation with evidence may encroach on the province of expert witness testimony. See, e.g., *People v. Rhoden*, 427 N.E.2d 1292, 1294–95 (Ill. App. Ct. 1981) (finding that a jury could not independently conduct a fingerprint analysis during deliberations without the guidance of an expert). In *Rhoden*, police recovered fingerprints from the doorframe of a home that a suspect burglarized. *Id.* at 1293. The jury heard testimony during trial from an evidence technician, who explained the process of fingerprint analysis and ultimately concluded that the fingerprints police recovered belonged to the defendant. *Id.* The prosecution also entered into evidence sets of the fingerprints, as well as an enlarged photograph which displayed the points of similarity on the fingerprints that reflected the expert witness's analysis. *Id.* During deliberations, the jury sent a note requesting a magnifying glass, to which the judge replied, "none available," without consulting the parties. *Id.* at 1294. The defendant contended that the judge's unilateral answer encroached on his constitutional right to be present when the judge communicated his response. *Id.* The appeals court ultimately found that, even if a magnifying glass was available, the jury would not be allowed to use such a tool because "[t]he classification and method of comparison of fingerprints is a science requiring specialized study not common to most." *Id.* The court thus found no prejudice or error with the judge's refusal to give the jury a magnifying glass, despite the judge not consulting with the defendant before communicating this decision. *Id.* at 1294–95.

²⁰¹ 215 P. at 33–34. Prosecutors charged the defendants in *Burke* with burglary of a bank in Benton County, Washington. *Id.* at 32.

²⁰² *Id.*

²⁰³ *Id.* at 33. Prosecutors submitted several hacksaws to the jury; police recovered at least one hacksaw from the defendants' automobile, another from the defendants when they were apprehended at the jail, and one which a witness kept personally in his car. *Id.*

²⁰⁴ *Id.* at 33–34. Though at least one juror submitted an affidavit stating that the magnifying glass experiment did not have a material effect on the jury's decision to convict, the Washington Supreme

The treatment of the court in *Burke* does not reflect a uniform rule, as many other jurisdictions have held that magnifying glasses are simply instruments that may assist jurors with proper examination of evidence and do not themselves facilitate juror misconduct.²⁰⁵ In fact, in 1932, in *State v. Everson*, the Washington Supreme Court distinguished its holding in *Burke* when it found that a jury's use of a magnifying glass was proper.²⁰⁶ In *Everson*, the prosecution alleged that the defendant hit a pedestrian with his car.²⁰⁷ The court provided the jury with the pedestrian's walking stick, which he had with him at the time he was struck.²⁰⁸ The jury used a magnifying glass to examine the end of the walking stick for signs that it had rubbed into the gravel of the road, thus corroborating the prosecution's version of events.²⁰⁹ This time, the Washington Supreme Court found that use of the magnifying glass did not introduce new evidence.²¹⁰ The court reasoned that it would not be improper for jurors to examine evidence with their reading glasses—so use of a magnifying glass, which is the same tool but with greater magnification, should also constitute proper examination.²¹¹

2. Experimentation with Reenactments

Courts are similarly divided on whether juror experimentation by means of reenactment constitutes juror misconduct.²¹² In these circumstances, the jury may not necessarily interact with the physical evidence submitted to them, but rather use external resources to test the veracity of trial evidence.²¹³ In 1982, in

Court held that the mere fact that misconduct had occurred was sufficient to establish prejudice against the defendant and remanded the case for a new trial. *Id.*

²⁰⁵ See, e.g., *People v. Turner*, 99 Cal. Rptr. 186, 192 (Ct. App. 1971) (permitting a jury to use a magnifying glass to examine a photograph that was admitted into evidence).

²⁰⁶ 7 P.2d 603, 603–04 (Wash. 1932).

²⁰⁷ *Id.* at 603

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 603–04.

²¹¹ *Id.* at 604; see also *Falletti v. Brown*, 481 P.2d 744 (Okla. 1971) (finding that it would be unfair to deny jurors the opportunity to use their eyeglasses to examine evidence and so they should also be allowed to use a magnifying glass).

²¹² See, e.g., *Simon v. Kuhlman*, 549 F. Supp. 1202, 1205 (S.D.N.Y. 1982) (finding a juror reenactment improper but not so prejudicial as to constitute misconduct); cf. *Ex parte Thomas*, 666 So. 2d 855, 858 (Ala. 1995) (finding a juror reenactment constituted juror misconduct when the jury defied the judge's express orders not to experiment and the reenactment created new evidence that was prejudicial to the defendant).

²¹³ See, e.g., *Kuhlman*, 549 F. Supp. at 1205 (detailing how the jury provided its own nylon stocking to test the veracity of a witness who claimed she saw the defendant's face through such a stocking); see also *Miller v. Harvey*, 566 F.2d 879, 880–81 (4th Cir. 1977) (considering whether a jury experiment was proper where one juror bit another juror on the arm to determine the veracity of a witness's testimony about teeth marks). In *Miller*, the alleged victim testified that she was attacked and bit her assailant on the arm. *Id.* at 880. The prosecution submitted photographs of Miller's arm taken shortly after the attack and called an expert witness who testified that marks on Miller's arm

Simon v. Kuhlman, the U.S. Court of Appeals for the Second Circuit considered a defendant's post-conviction habeas corpus petition in which he argued that the jury in his trial conducted an improper experiment.²¹⁴ Evidence produced at trial showed that a restaurant was robbed by a man with a nylon stocking over his head.²¹⁵ At trial, the defendant requested to conduct an experiment for the jury to demonstrate that a person's face is not visible through a stocking.²¹⁶ The judge refused on the grounds that there was no way to verify that any stocking used in such a demonstration would be the same texture or thickness as the stocking worn by the robber.²¹⁷ During deliberations, however, the jury conducted their own similar experiment with a nylon stocking to determine if an identification would have been possible.²¹⁸ The Second Circuit held that the jurors' experiment was "unquestionably" improper.²¹⁹ Even so, the court held that the experiment was not so prejudicial as to infringe upon the defendant's due process rights.²²⁰ To preserve the secrecy of the deliberation process, the court proposed that the proper inquiry is whether the alleged misconduct may reasonably have a material effect on an average juror's decision-making.²²¹

In 1995, in *Ex parte Thomas*, the Supreme Court of Alabama found that a jury's reenactment was improper and did infringe upon the constitutional rights of the defendant.²²² There, the police arrested and handcuffed the defendant for

were made by human teeth. *Id.* at 880–81. Miller claimed that he sustained the injuries on his arm from climbing over a chain link fence. *Id.* at 881. To determine what teeth marks would have looked like, one woman on the jury bit the foreman on the arm and the jury observed the marks and bruises throughout the course of deliberation. *Id.* Although the court found that the experiment was improper, the fact that the jury had already heard from an expert witness about the teeth marks meant that the experiment did not introduce any new and prejudicial evidence. *Id.*

²¹⁴ *Kuhlman*, 549 F. Supp. at 1205.

²¹⁵ *Id.* at 1203. The robber entered "Eve's Birdland," a restaurant in Rochester, New York, and demanded money from the cash register. *Id.* A police officer entered the restaurant and was face to face with the robber for fifteen to twenty seconds. *Id.* at 1204. The officer followed the robber out of the restaurant and a ten-minute foot chase ensued before the officer caught the robber. *Id.*

²¹⁶ *Id.* at 1205.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 1208.

²²¹ *Id.*; see also *Miller v. Harvey*, 566 F.2d 879, 880–81 (4th Cir. 1977) (finding that the juror biting experiment was not improper because it did not introduce new material evidence to the jury).

²²² *Ex parte Thomas*, 666 So. 2d 855, 858 (Ala. 1995). Fields relied on this case in his argument to the U.S. Court of Appeals for the Sixth Circuit that his constitutional rights were violated by jury experimentation. *Fields IV*, 86 F.4th 218, 238 (6th Cir. 2023), *aff'g Fields II*, 2016 WL 3574396, at *1 (E.D. Ky. June 23, 2016), *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024) (mem.). The court noted that Fields' citation to this case, as well as other state cases which similarly held that jury experimentation was improper, were unavailing given that AEDPA requires a showing of a "clearly established" rule issued by the U.S. Supreme Court. *Id.* Instead, the court acknowledged that Fields' argument "confirm[ed] the tension in the caselaw on this topic—tension that shows the *absence* of clearly established law." *Id.*

disorderly conduct, before transporting him to the police station in their police vehicle.²²³ Upon arriving at the station, the police discovered two small bags of cocaine under the seat where the defendant had been.²²⁴ Whether the drugs belonged to the defendant turned on the defendant's ability to take the bags out of his front pockets and drop them on the ground.²²⁵ During deliberations, one member of the jury put on the defendant's pants, which the judge admitted into evidence, and another juror bound his hands with string to simulate handcuffs.²²⁶ The Supreme Court of Alabama held that this experiment introduced material evidence and so created reversible error.²²⁷

III. REIMAGINING THE BOX: FINDING BALANCE BETWEEN POLICY GOALS

The debate around juror experimentation demonstrates a tug-of-war between two important principles which are deeply ingrained in the American judicial system—an independent jury and protection of a defendant's constitutional rights.²²⁸ Though courts strive to obtain both goals, tension arises in the context of juror misconduct.²²⁹ Although the jury's independence evolved from historical concerns about government interference, the jury may not engage in its own form of impropriety behind closed doors.²³⁰ This Note argues that striking a balance between these occasionally conflicting tenets of a fair and impartial criminal trial process does not require the creation of a bright line rule, but rather should be dependent upon counsel exercising the full breadth of available in-trial remedies.²³¹

The most streamlined way to achieve the constitutional protections Fields and other defendants argue for would be to abrogate FRE 606(b) by creating an additional exception for jurors to testify to improper experimentation.²³² The fact that the Court has not done so despite years of lower courts attempt-

²²³ *Ex parte Thomas*, 666 So. 2d at 856–57.

²²⁴ *Id.* at 857.

²²⁵ *Id.* The defendant did not have back pockets, so the inquiry focused on whether he would be able to remove the bags from his front pockets while handcuffed. *Id.*

²²⁶ *Id.* at 857–58.

²²⁷ *Id.* at 858.

²²⁸ See *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915) (noting that, when a juror misconduct claim arises, a judge must decide whether to redress the private litigant's potential injury or to “inflict[] the public injury” by having jurors testify to what occurred during their secret deliberations).

²²⁹ *Id.*

²³⁰ See *Weaver*, *supra* note 44, at 54 (illustrating the role of the jury in combatting oppressive political rule).

²³¹ See *infra* notes 232–263 and accompanying text.

²³² See *McDonald*, 238 U.S. at 267–68 (weighing the policy considerations of allowing jurors to impeach their verdicts). In *McDonald*, the Court noted that if the facts in the juror's affidavit were true, then the jury did commit misconduct and the defendant should be entitled to relief. *Id.* Even so, the jurors in this case were not allowed to testify and so impeach their verdict. *Id.* Note that this case demonstrates a preference for jury privacy about sixty years before the no-impeachment rule was codified in the Federal Rules of Evidence in 1975. FED. R. EVID. 606, notes.

ing to navigate the juror experimentation question demonstrates a strong policy commitment to juror privacy that the judicial system is wary of encroaching upon.²³³ Additionally, the fact-dependent nature of each claim of juror misconduct due to experimentation suggests that any rule would likely be incredibly narrow.²³⁴ Even should a very limited rule be proposed, it would still be extremely difficult to determine where the line of improper deliberation sits.²³⁵ As acknowledged by the U.S. District Court for the Eastern District of Kentucky, interference with the jury's reasoning process during deliberations could create a collateral consequence where a juror applying her life experiences—a practice that is generally encouraged—is instead found to have relied upon improper “extrinsic evidence.”²³⁶

Tied to the goal of juror privacy are significant policy aims deemed essential to a properly functioning judiciary, including finality of the decision-making process.²³⁷ If the no-impeachment rule gives way in the context of jury experimentation, the judicial system would operate with much less certainty, as the outcomes of future cases could be entirely upended.²³⁸ Additionally, preserving the privacy of the deliberation process protects jurors from harassment

²³³ See *Fields II*, No. 15-38, 2016 WL 3574396, at *10 (E.D. Ky. June 23, 2016) (acknowledging that the Supreme Court has not established any guidelines for addressing questions of whether jury experimentation constitutes juror misconduct), *aff'd*, *Fields IV*, 86 F.4th 218 (6th Cir. 2023), *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024) (mem.). In *Fields II*, the U.S. District Court for the Eastern District of Kentucky acknowledged that the cases *Fields* relied on, including *Parker* and *Turner*, had narrow, fact-dependent holdings that did not explicitly mention whether juror experimentation would constitute extrinsic evidence. *Id.* at *9. Moreover, the Supreme Court has repeatedly referenced the strong policy interests in verdict finality and protecting the jury from post-verdict harassment in a number of opinions. See, e.g., *Tanner v. United States*, 483 U.S. 107, 120–21 (1987) (noting that although juror misconduct may sometimes lead to invalid verdicts, there is a strong interest in verdict finality, public trust in the jury process, and open and frank jury deliberations); *McDonald*, 238 U.S. at 267–68 (finding that juror deliberations must be kept private to preserve free discussion).

²³⁴ See *Miller*, *supra* note 144, § 2(a) (describing the existing case law on juror experimentation as fact-dependent given the vast variation in types and methods of experiments).

²³⁵ See *Fields II*, 2016 WL 3574396, at *9 (noting that it is difficult to determine when inquiries into the jury's reasoning process go too far).

²³⁶ *Id.* To illustrate the difficulty in drawing the line between improper and permitted considerations, Justice Thapar (now an associate justice for the United States Court of Appeals for the Sixth Circuit) inquired “Were the jurors in *12 Angry Men* really violating the Constitution when they tried to recreate the crime?” *Id.* The 1957 film *12 Angry Men* takes viewers inside the deliberation room of a fictional jury in a murder trial. *12 ANGRY MEN* (Orion-Nova Prod. 1957). As the jurors discuss the trial evidence, they conduct a number of experiments to test whether the defendant was truly guilty of the crime. *Id.* For example, the jurors create a reenactment to examine the possibility that an elderly man with a limp would be able to walk fifty-five feet and open two doors all in just fifteen seconds, as the prosecution contended. *Id.*

²³⁷ See *Gershman*, *supra* note 151, at 326 (noting that abrogating juror privacy may result in a lack of judicial finality, subjecting jurors to tampering or harassment, and deterring jurors from reaching a verdict that may be unpopular).

²³⁸ *Id.*

by the defense after delivering a guilty verdict.²³⁹ Amending no-impeachment rules to allow jurors to provide a larger window into the deliberation process could result in defendants intimidating or harassing jurors post-trial.²⁴⁰

Notwithstanding the challenges associated with amending no-impeachment rules, the constitutional concerns that arise from improper experimentation are far from frivolous.²⁴¹ Although creating or amending evidence rules is likely to be counterproductive, attorneys have other tools at their disposal to alleviate these concerns.²⁴² Counsel should be proactive and use the full breadth of in-trial remedies available to them.²⁴³

The first remedy is to make a record of objections to evidence or arguments made at trial which could facilitate improper juror experimentation.²⁴⁴ This includes objections to the submission of certain evidence to the jury during deliberations and objections to any suggestion that the jury engage in experiments.²⁴⁵ Raising the issue of a potential constitutional violation due to experimentation during the course of trial will preserve the matter for appeal, allowing the court to consider the propriety of juror experiments based on information available in the record rather than proffered juror testimony after the fact.²⁴⁶

The second remedy available to trial attorneys is proposing a jury instruction that would limit the jury to examining certain pieces of evidence in an acceptable manner.²⁴⁷ Doing so would also address the fact-dependent nature of

²³⁹ *Id.*; see also *Parker v. Gladden*, 385 U.S. 363, 369 (1966) (Harlan, J., dissenting) (finding that the majority opinion may invite defendants to intimidate, interrogate, or harass jurors to develop grounds for a post-conviction motion).

²⁴⁰ See Gershman, *supra* note 151 (discussing the policy concern that ameliorating jury privacy may lead to juror harassment).

²⁴¹ See *Fields II*, 2016 WL 3574396, at *9 (noting that there is no clear answer to the question of whether juror experimentation infringes upon the constitutional rights of defendants); see also *Fields IV*, 86 F.4th 218, 250 (6th Cir. 2023) (en banc) (Moore, J., dissenting) (arguing that the dangers of allowing juries to rely on extrinsic evidence by improper experimentation could be a life or death matter for defendants), *aff'g Fields II*, 2016 WL 3574396, at *1, *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024) (mem.).

²⁴² See *United States v. Hawkins*, 595 F.2d 751, 753 (D.C. Cir. 1978) (finding that defense counsel had waived the right to object to the jury experiment as, during closing argument, he suggested that the jury do exactly that).

²⁴³ See *id.* (demonstrating that a court may find waiver where counsel did not object but rather encouraged an experiment to take place).

²⁴⁴ See Miller, *supra* note 144, § 2(b) (noting that counsel's failure to object to juror experiments may be viewed by a court as waiver).

²⁴⁵ See *Hawkins*, 595 F.2d at 753 (noting that the jury conducted the experiment that defense counsel suggested in his closing argument and analyzing the trial record for pre-verdict actions taken by the defendant, including waiving certain objections).

²⁴⁶ See *id.* (analyzing the trial record for pre-verdict actions taken by the defendant, including waiving certain objections).

²⁴⁷ See, e.g., *Criminal Model Jury Instructions for Use in the District Court, Evaluation of Evidence—Final Instructions*, MASS.GOV (Aug. 2023), <https://www.mass.gov/lists/criminal-model-jury-instructions-for-use-in-the-district-court> [<https://perma.cc/9LGV-P3D7>] (listing model jury instruc-

jury experimentation claims by tailoring instructions to specific pieces of evidence.²⁴⁸

In addition to trial attorneys, judges should be cognizant of the potential for juror misconduct to result from improper experimentation.²⁴⁹ As such, judges should treat jury requests for additional tools, such as magnifying glasses, as they would any other question posed by the jury during deliberations—by consulting with counsel for both parties before issuing a response.²⁵⁰

Where a defendant does argue that his constitutional rights were violated by improper juror experimentation, the appeals court should consider a number of factors that weigh primarily on the use of defense counsel's in-court remedies.²⁵¹ The appellate courts should continue to apply the two-part rule that emerged from the case law on the questions of experimentation with physical evidence and reenactments.²⁵²

Initially, a court should consider whether misconduct occurred.²⁵³ As part of this inquiry, a judge may consider proffered juror testimony, but should also rely on more objective factors which could include: whether the evidence that was submitted to the jury during deliberations was properly admitted; whether defense counsel raised any pertinent objections to the admission of evidence or suggestion that the jury engage in an experiment; whether defense counsel proposed a jury instruction to direct juror examination on specific pieces of evidence; and whether the juror experimentation resulted in the introduction of material facts not in evidence.²⁵⁴

After determining that juror misconduct occurred, a judge should then consider whether the misconduct actually resulted in prejudice.²⁵⁵ This prejudice analysis, as opposed to finding *per se* grounds for a new trial based on a finding of juror misconduct alone, affords another layer of protection for the

tions for different types of evidence, including evidence with redacted material, testimony by expert witnesses, lost or destroyed evidence, and more).

²⁴⁸ See Miller, *supra* note 144, § 2(a) (discussing the nuanced approaches of state and federal courts in answering questions relating to improper juror experimentation due to the individual circumstances of each case).

²⁴⁹ See *State v. Burke*, 215 P. 31, 33–34 (Wash. 1923) (finding that improper juror experimentation resulted in juror misconduct severe enough to require nullification of the verdict).

²⁵⁰ See *id.* (noting that the bailiff provided the jury with a magnifying glass without consulting or informing the court).

²⁵¹ See, e.g., Miller, *supra* note 144, § 2(a) (noting that some courts will consider whether defense counsel objected in considering a post-conviction motion for improper jury conduct).

²⁵² See *id.* (discussing how some jurisdictions, after finding juror misconduct occurred, will ask the additional question of whether that misconduct prejudiced the defendant).

²⁵³ *Id.*

²⁵⁴ See, e.g., *United States v. Hawkins*, 595 F.2d 751, 753 (D.C. Cir. 1978) (weighing the defense counsel's actions during trial when considering the post-conviction motion).

²⁵⁵ See *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (considering whether the improper statements made by the bailiff to the jury resulted in any actual prejudice to the proceedings or outcome of the trial and finding "extreme prejudice inherent" in his statements).

secrecy of the deliberation process by requiring counsel to demonstrate that the experiment actually caused harm.²⁵⁶

Critics of this approach point to the difficulty in asking the judge to peer into the mindset of the jury when considering whether the trial would have come out differently irrespective of the alleged misconduct.²⁵⁷ Although the task is not necessarily an easy one, there are existing mechanisms that judges apply in similar situations to objectively evaluate the prejudice question, such as the “reasonable probability” standard in ineffective assistance of counsel claims.²⁵⁸ Judges could rely on a similar approach in the context of improper juror experimentation claims.²⁵⁹ Further, encouraging judges to consider a number of non-dispositive factors rather than adhere to a bright-line rule will allow for the flexibility necessary to address claims of juror impropriety while also respecting the sanctity of the jury’s black box.²⁶⁰

The Sixth Circuit’s holding in *Fields IV*, despite denying the defendant’s habeas corpus petition, raised prudent questions about jury experimentation and framed the related constitutional questions that courts have been grappling with for years.²⁶¹ The Sixth Circuit was likely correct in its analysis that to expand the Supreme Court’s protections of the Confrontation Clause to physical evidence is a deceptively large step from the current state of the case law on testimonial evidence—and one with no clear endpoint.²⁶² Given the fact-

²⁵⁶ See *Simon v. Kuhlman*, 549 F. Supp. 1202, 1208 (S.D.N.Y. 1982) (finding that a jury committed misconduct by conducting an improper experiment, but finding that the experiment resulted in no prejudice to the defendant as it did not likely affect the outcome of the trial); cf. *State v. Burke*, 215 P. 31, 33–34 (Wash. 1923) (finding that a jury committed misconduct by using a magnifying glass to examine evidence, and finding that this misconduct was a per se grounds for new trial).

²⁵⁷ See *Kozinski & Major*, *supra* note 134, at 10 (noting the difficulty judges face in determining whether actual prejudice occurred and arguing that “[w]hat turns out to be the key question in most criminal cases involving trial errors is decided based on a guess, and not a particularly educated one”).

²⁵⁸ See, e.g., *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (requiring defendants to demonstrate, through a totality of the evidence, that there was a “reasonable probability” that but-for the ineffective assistance of counsel, the outcome of the trial or proceeding would have been different).

²⁵⁹ *Id.*

²⁶⁰ See *Miller*, *supra* note 144, § 2(a) (noting that questions of juror impropriety due to experimentation often turn on the specific facts of the case).

²⁶¹ See *Fields IV*, 86 F.4th 218, 239 (6th Cir. 2023) (en banc) (flagging the unanswered constitutional questions raised by the issue of juror experimentation but noting that the lack of a Supreme Court opinion addressing the topic means that the appeals court must deny *Fields*’ habeas petition per the requirements of AEDPA), *aff’g Fields II*, 2016 WL 3574396, at *1 (E.D. Ky. June 23, 2016), *cert. denied*, *Fields v. Plappert*, 144 S. Ct. 2635 (2024) (mem.).

²⁶² See *id.* (acknowledging that the Supreme Court has never suggested that the protections of the Confrontation Clause extend to physical, nontestimonial evidence, and noting the difficulty in determining where to draw the line between what is proper examination of evidence and what is creating “new evidence”).

dependent nature of jury experimentation questions, the Supreme Court would be hard-pressed to carve out a clear rule with a proper limiting principle.²⁶³

CONCLUSION

The American judicial system treats the jury deliberation room as a sacred space. Maintaining the jury's role as a democratic, dispute-resolving body requires a commitment to preserving the privacy of the deliberation process, beyond the view of the government or any intervening party. Can we be confident, though, that the jurors tasked with determining the guilt or innocence, and often the life and liberty, of a criminal defendant are truly performing their service free from error? When Fields pulled back the curtain on the deliberation room in his trial, he found an experiment with a twisty knife and a cabinet. Other defendants found jurors with makeshift disguises, binoculars, magnifying glasses, and even self-inflicted bite marks. Juries have taken creative paths in their pursuit of the truth.

Yet problems occur when "creative" becomes "unconstitutional." Defendants are entitled to due process and the opportunity to confront adverse witnesses. Even so, the strong policy considerations in favor of juror privacy—judgment finality, the rule of law, and free and open discourse among jurors without fear of retaliation or harassment—instruct that weakening existing no-impeachment rules could be counterproductive. Instead, counsel should turn to pre-verdict mechanisms, such as objections and jury instructions, to protect against improper experimentation. Moreover, judges considering post-conviction motions should weigh a number of non-dispositive factors before shining a light into the jury box. Doing so will serve to protect a defendant's due process rights while allowing the deliberation process to proceed without breaking the black box.

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²⁶³ See Datlowe, *supra* note 131 (discussing the difficulties in finding a limiting principle on where to abrogate the no-impeachment rule).