

Prejudice, Procedure, and a Proper Presumption: Restoring the *Remmer* Presumption of Prejudice in Order to Protect Criminal Defendants' Sixth Amendment Rights

*Eva Kerr**

ABSTRACT: The Sixth Amendment guarantees a criminal defendant the right to a trial by an impartial jury. A defendant's Sixth Amendment rights are threatened when a jury is exposed to extrajudicial information or engages in improper contacts with third parties. In Remmer v. United States, the Supreme Court held that when extrajudicial information or improper contacts threaten the Sixth Amendment guarantee, courts should presume the defendant suffered prejudice. Without explicitly overruling Remmer, two subsequent Supreme Court decisions suggested that the Remmer presumption of prejudice is not absolute. As a result of the Supreme Court's conflicting decisions, the federal courts of appeals have applied Remmer in significantly different ways. This Note asserts that courts should retain the Remmer presumption of prejudice because it strikes the proper balance between protecting the criminal defendant's Sixth Amendment rights and shielding against impeachment of verdicts due to insignificant or trivial claims of prejudice.

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*I'm no idealist to believe firmly in the integrity of our courts and in the jury system—that is no ideal to me, it is a living, working reality. Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up.*¹

—Harper Lee, *To Kill a Mockingbird*

*[A jury is] the most ingenious and infallible agency for defeating justice that human wisdom could contrive*²

—Mark Twain, *Roughing It*

I. INTRODUCTION

The fairness and impartiality of the jury system in this country has been equally revered and questioned. Nevertheless, the jury system remains a fundamental component of American jurisprudence,³ and maintaining the criminal defendant's Sixth Amendment right to a trial by an impartial jury remains crucial to the administration of justice. Jury exposure to extraneous, and possibly prejudicial, information deprives a criminal defendant of his or her Sixth Amendment right to a trial by an impartial jury.⁴ Extraneous information that may affect the verdict includes jury exposure to non-evidentiary information, external contacts between jurors and third parties (such as third-party attempts to bribe jurors), and information from the jurors' own personal knowledge.⁵ This Note examines the Supreme Court's inconsistent decisions regarding whether prejudice should be presumed when jury exposure to extraneous information threatens a criminal defendant's Sixth Amendment right to a trial by an impartial jury. This Note then examines the resulting confusion among the federal courts of appeals.

Part II of this Note discusses the history behind the criminal defendant's Sixth Amendment right to a trial by an impartial jury,⁶ including the presumption-of-prejudice standard articulated in *Remmer v. United States*.⁷

1. HARPER LEE, *TO KILL A MOCKINGBIRD* 233 (Harper & Row 2002) (1960).

2. MARK TWAIN, *ROUGHING IT* 347 (Penguin Classics 1981) (1872).

3. One scholar has commented, "The jury has been hailed as one of the greatest attributes of democracy. . . . [T]he jury system affords ordinary citizens the opportunity to participate in the administration of justice. These citizens act as the conscience of the community and provide a bulwark against governmental oppression." Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 322 (2005).

4. *Parker v. Gladden*, 385 U.S. 363, 364 (1966).

5. See *infra* Part III (discussing several cases involving extraneous communications with the jury).

6. See *infra* Part II.A (explaining a criminal defendant's rights under the Sixth Amendment).

7. See *infra* notes 32–37 and accompanying text (discussing the Supreme Court's decision in *Remmer v. United States*).

Part II also discusses Federal Rule of Evidence 606(b) and two post-*Remmer* Supreme Court decisions that are seemingly inconsistent with *Remmer*, and then examines how both Rule 606 and the Supreme Court decisions have played a role in prompting several circuit courts to narrow the breadth of *Remmer*'s presumption of prejudice.⁸ Part III provides a general overview of the different standards the circuit courts currently apply after a jury is exposed to extraneous information.⁹

Part IV argues that the issue presented in *Wisehart v. Davis*—whether the *Remmer* presumption of prejudice survived the inconsistent, subsequent Supreme Court decisions—is ripe for resolution. More specifically, this Note argues that the Supreme Court needs to address this issue because the circuit courts currently apply widely varying standards that produce inconsistent results for criminal defendants and because maintaining the criminal defendant's Sixth Amendment rights is crucial to the administration of justice.¹⁰ In *Wisehart*, the defendant presented a juror affidavit on appeal stating that the juror learned that the court cancelled a session so the defendant could take a polygraph test.¹¹ The juror did not learn the results of the polygraph test.¹² In concluding that the affidavit raised a reasonable suspicion of jury contamination, the Seventh Circuit applied the *Remmer* presumption of prejudice but emphasized the importance of maintaining a harmless-error exception.¹³

Part IV analyzes the two competing policy concerns implicated by the impeachment of verdicts: (1) ensuring each verdict is rendered by a fair and impartial jury and (2) maintaining the integrity of the jury system on the whole.¹⁴ Part IV concludes that courts should maintain the *Remmer* presumption of prejudice in all cases other than those involving innocuous interventions because the presumption protects the criminal defendant's Sixth Amendment rights while simultaneously avoiding impeachment of jury verdicts based on trivial or insignificant prejudice claims.¹⁵

8. See *infra* Part II.B–C (discussing Federal Rule of Evidence 606(b) and two post-*Remmer* Supreme Court decisions).

9. See *infra* Part III (discussing the various tests employed by the circuit courts of appeals).

10. See *infra* Part IV (arguing that the Supreme Court should decide the issue).

11. *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005).

12. *Id.*

13. *Id.* at 326–27; see also *infra* notes 95–111 and accompanying text (discussing *Wisehart* and the harmless-error exception).

14. See *infra* Part IV.A (contrasting the policy concerns implicated by the impeachment of jury verdicts).

15. See *infra* Part IV.B (stating why courts should maintain the presumption of prejudice).

II. JURY EXPOSURE TO EXTRANEOUS INFORMATION: THE HISTORICAL BACKGROUND AND THE DEVELOPMENT OF THE PRESUMPTION OF PREJUDICE

A. SIXTH AMENDMENT RIGHT TO A JURY TRIAL

Juror exposure to extraneous information is a major source of prejudice. Such exposure deprives a criminal defendant of the Sixth Amendment right to a trial by an impartial jury.¹⁶ The Sixth Amendment also guarantees a criminal defendant “the right to be present at all critical stages of the . . . proceedings.”¹⁷ For example, a defendant possesses the right to be present during communications between the judge and the jury whenever the defendant’s presence has a “reasonably substantial” relation to the defendant’s “opportunity to defend against the charge.”¹⁸ The Due Process Clause protects the criminal defendant’s Sixth Amendment rights in state courts.¹⁹ The Supreme Court has noted:

[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.²⁰

Thus, the denial of a trial by an impartial jury also violates the defendant’s due-process rights.²¹

Extraneous information that may affect a verdict includes external contacts between jurors and third parties, and jury exposure to non-evidentiary information.²² Examples of external contacts include third-party

16. U.S. CONST. amend. VI; see *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (stating that communications between jurors and outside parties raise Sixth Amendment concerns); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (holding that under the Sixth Amendment, the jury must base its verdict upon evidence developed at trial); Bradley Tennyson Smith, *Remmer’s Presumption of Prejudice: The Tenth Circuit’s Position*, 81 DENV. U. L. REV. 687, 687 (2004) (discussing the prejudice that ex parte communications produce). The partiality of one juror due to an extraneous influence is sufficient to deny a defendant the constitutional guarantee of an impartial trial. *Parker*, 385 U.S. at 365.

17. *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004).

18. *Id.* (quoting *United States v. Gagnon*, 470 U.S. 522, 526 (1985)).

19. *In re Oliver*, 333 U.S. 257, 273–74 (1948).

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

21. *Irvin*, 366 U.S. at 722.

22. Gershman, *supra* note 3, at 323. Other forms of jury misconduct include (1) improper reenactments in the jury room, (2) dishonest statements during jury selection, (3) physical and mental impairments, (4) pre-deliberation discussion of the evidence, and (5) willful violations

attempts to bribe jurors, and communications between jurors and the deputy sheriffs or between jurors and the court bailiff during the trial.²³ Other extraneous, non-evidentiary information that may prejudice the jury includes the juror's personal knowledge of relevant information or "official documents and records made available to the jury."²⁴ The information may reveal the defendant's prior criminal record, the defendant's other prior misconduct, or a co-defendant's pleading.²⁵ Evidence used by the jury to convict a defendant should "come from the witness stand . . . where there is full judicial protection of the defendant's right to confrontation, of cross-examination, and of counsel."²⁶ A jury's use of extraneous material prejudices a defendant in two ways. First, the extraneous material may comprise information that would be inadmissible at trial, when judged by valid evidentiary-rule limits. Second, the extraneous material's use denies the defendant the opportunity to introduce the evidence himself.²⁷ When jurors engage in ex parte communications or access extraneous information outside court, the defendant cannot impeach the evidence, provide an explanation for the extraneous material, or engage in cross-examination.²⁸

In *Mattox v. United States*, the Supreme Court articulated the type of prejudice that juror exposure to extraneous information produces.²⁹ In *Mattox*, a juror who served on the jury that convicted the defendant submitted an affidavit to the court alleging that (1) the bailiff discussed the case with the jury and (2) a newspaper article addressing the case entered the jury room and was read to the jury.³⁰ The Supreme Court held that the affidavit was material evidence of prejudice, stating: "Private communications, possibly prejudicial, between jurors and third persons, or

of the jury instructions. *Id.* at 323–24. "Although the quest for the perfect trial may be illusory, the ability of some jurors to contaminate the proceedings may deprive a criminal defendant of a fair trial by an impartial jury." *Id.* at 324.

23. *Id.* at 325.

24. *Id.* at 329.

25. *Id.* at 328.

26. *Id.* at 324–25 (quoting *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965)).

27. *Wisehart v. Davis*, 408 F.3d 321, 327 (7th Cir. 2005).

28. *See id.* (explaining how the defendant is denied an opportunity to impeach the evidence against him when extraneous material is left in the jury room). In *Wisehart*, one of the jurors learned that the defendant took a polygraph test. *Id.* at 326. The court noted:

The concern with extraneous material in the jury room is not limited to material that would be inadmissible at trial; if news about a defendant's having taken a polygraph test reaches the jurors under the table as it were, the defendant is denied an ability to put the results in—to explain for example that he had passed the test, or at least not failed it; to describe the weaknesses of lie detectors . . .

Id. at 327.

29. *Mattox v. United States*, 146 U.S. 140, 150 (1892).

30. *Id.* at 142–43.

witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.”³¹ *Mattox*, therefore, stands for the proposition that, absent a showing of harmlessness, improper extraneous influences on the jury constitute prejudice sufficient to invalidate a verdict.

The Supreme Court expounded on *Mattox* in *Remmer v. United States*.³² In *Remmer*, a third party attempted to bribe a juror in exchange for a verdict favorable to the defendant.³³ The trial judge, without informing the defense, asked the FBI to investigate the matter and found that the attempted bribe was harmless and that the verdict should stand.³⁴ On appeal, the Supreme Court held that the attempted bribe presumptively prejudiced the jury, and the Court remanded the case for a hearing to investigate the matter.³⁵ In its opinion, the Court stated:

In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial. . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant.³⁶

When describing the hearing, the Court noted that the trial judge should “determine the circumstances, the impact [of the attempted bribe] upon the juror, and whether or not it was prejudicial.”³⁷

In sum, *Mattox* stands for the proposition that improper influences on jurors are sufficiently prejudicial to invalidate an otherwise-valid verdict, and *Remmer* advanced this notion by creating a presumption that improper influences on jurors are prejudicial and invalidate the verdict.

B. FEDERAL RULE OF EVIDENCE 606(b)

After issuing its decision in *Remmer*, the Supreme Court promulgated Federal Rule of Evidence 606(b), which codified the “common-law rule against admission of jury testimony to impeach a verdict.”³⁸ Rule 606(b)

31. *Id.* at 150.

32. *Remmer v. United States*, 347 U.S. 227, 229 (1954).

33. *Id.*

34. *Id.* at 228.

35. *Id.* at 230.

36. *Id.* at 229 (citation omitted).

37. *Remmer*, 347 U.S. at 229–30.

38. *Tanner v. United States*, 483 U.S. 107, 121 (1987). *Tanner* is one of the leading cases interpreting Rule 606(b). *Id.* at 120–26. In *Tanner*, the Court held that jurors may not later testify about their drug use or alcohol consumption during a trial in order to impeach a verdict. *Id.* at 127. The Court noted that the policy rationales behind Rule 606(b) were the desire to

prohibits a juror from testifying about his mental processes during deliberations but allows the juror to testify about “any outside influence [that] was improperly brought to bear upon any juror.”³⁹ Rule 606(b)’s restrictions “cut off the principal means by which one might directly dispel the presumption of prejudice—the interrogation of jurors as to the impact of an improper contact.”⁴⁰ In particular, Rule 606(b) makes it difficult for the government to overcome a presumption of prejudice if, after the jury has reached its verdict, the defendant provides evidence of improper contact or extraneous influence.⁴¹ In order to mitigate this effect, at least one court has argued that Rule 606(b) necessitates judicial narrowing of *Remmer*’s presumption of prejudice.⁴²

C. POST-REMMER AND 606(b) SUPREME COURT DECISIONS

After the codification of Rule 606(b), two subsequent Supreme Court cases suggested, without explicitly overruling *Remmer*, that the *Remmer* presumption is not absolute.⁴³ In a 1982 case, *Smith v. Phillips*, the Court declared that the defendant had the burden of proving prejudice at the *Remmer* hearing.⁴⁴ Later, in *United States v. Olano*, the Court opined that a trial court, before presuming prejudice, should consider the actual effect of the improper contacts or extraneous information on the jury’s deliberations.⁴⁵

1. *Smith v. Phillips*

In *Smith v. Phillips*, the alleged prejudice arose when a juror applied for a job with the district attorney’s office during the trial.⁴⁶ The juror’s application created concern that the juror might be more apt to favor the prosecution or to persuade other jurors to favor the prosecution in an effort

preserve privacy for the jurors so that they may engage in “full and free debate,” to maintain the finality of the jury process, and to protect the integrity of the jury system. *Id.* at 120–26.

39. FED. R. EVID. 606. See generally James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN’S L. REV. 389, 419 (1991) (discussing the history surrounding and litigation involving Rule 606(b) and noting that “Rule 606(b) does not apply to preverdict inquiries” of jurors or “postverdict polling of the jury”).

40. *United States v. Williams-Davis*, 90 F.3d 490, 496 (D.C. Cir. 1996).

41. *Id.*

42. See *id.* (noting that the Tenth Circuit has suggested that Rule 606(b) may require the courts to narrow the *Remmer* presumption of prejudice).

43. See *United States v. Olano*, 507 U.S. 725, 739–40 (1993) (declining to presume prejudice when alternate jurors were allowed to sit in the jury room during deliberations); *Smith v. Phillips*, 455 U.S. 209, 215 (1982) (suggesting that the defendant must prove bias at the *Remmer* hearing).

44. *Smith*, 455 U.S. at 215.

45. *Olano*, 507 U.S. at 739.

46. *Smith*, 455 U.S. at 212.

to bolster his job application, or the juror might feel a subconscious “affinity with his potential employer.”⁴⁷ The Court had to decide whether the law imputes bias to the job-seeking juror.⁴⁸ The defendant argued that bias should be imputed to the juror because a court “cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question.”⁴⁹ The Supreme Court disagreed, concluding that a *Remmer*-type hearing was the proper remedy for determining prejudice.⁵⁰ The concurring opinion expressed concern that a hearing might not always reveal biases and argued that, in some circumstances, it is appropriate to imply bias.⁵¹ The dissent believed the facts of the case warranted implied bias.⁵²

47. *Id.* at 229–30 (Marshall, J., dissenting). “Only individuals of extraordinary character would not be affected in some way by their interest in future employment.” *Id.*

48. *Id.* at 215 (majority opinion). Under the implied bias doctrine, a court that imputes bias to a juror must disqualify the juror or, if the jury has rendered a conviction, reverse the verdict. Mary B. Bader, Note, *Posttrial Hearing to Determine Actual Juror Bias Held Sufficient to Satisfy Due Process Rights*, 66 MARQ. L. REV. 400, 404 (1982). The Supreme Court has implied bias in cases where the jury announced its guilty verdict in open court in the presence of the jurors who would hear the second case against the same defendant. *Id.* The Supreme Court also has implied bias in cases pervaded by extensive publicity and where the jury was not composed of a representative cross-section of the community. *Id.* at 405.

49. *Smith*, 455 U.S. at 215.

50. *Id.* at 217. “The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.” *Remmer v. United States*, 347 U.S. 227, 229–30 (1954) (describing a *Remmer* hearing). When deciding whether the government has rebutted the presumption of prejudice successfully, a court may consider several factors: (1) “the nature and seriousness of the communication”; (2) “whether the extrinsic communication was shared with other members of the jury”; (3) “the manner in which it was discussed”; (4) “the length of time it was available to the jury”; (5) “whether the communication related to factual evidence not developed at the trial”; (6) “whether it was disseminated before the verdict or during deliberations”; and (7) “whether the communication was reasonably likely to influence the verdict, especially in light of the strength of the government’s case.” Gershman, *supra* note 3, at 328 (citation omitted).

51. *Smith*, 455 U.S. at 222 (O’Connor, J., concurring).

52. *Id.* at 231 (Marshall, J., dissenting); *see also* Bader, *supra* note 48, at 410 (arguing that the implied-bias test should have been applied in *Smith*). As Bader explains:

[A] posttrial hearing to determine the effect of the third party’s misconduct on the juror is appropriate under *Remmer*. However, extending the *Remmer* holding to allow a posttrial hearing to satisfy the defendant’s due process rights in the event of juror misconduct seriously imperiled the defendant’s right to a trial by an impartial jury. Although the majority stressed that the defendant had the opportunity to prove actual bias at the hearing after trial, this was almost impossible to do. In this case, unlike the situation with a third party nonjuror, by the time the posttrial hearing was held the juror had a stake in the outcome of the hearing.

Id.

The Court purported to apply the *Remmer* standard, but the Court's description of the *Remmer* hearing departed from *Remmer*'s automatic presumption of prejudice. Instead, the Court held "that the remedy for allegations of juror partiality is a hearing in which *the defendant* has the opportunity to prove actual bias."⁵³ As a result, *Smith* has generated confusion among the federal courts of appeals as to whether the *Remmer* presumption of prejudice remains valid. Courts have struggled with the Supreme Court's language ("the defendant has the opportunity to prove actual bias"), which suggests that *the defendant*, rather than the government, has the burden of showing prejudice at the *Remmer* hearing.⁵⁴

2. *United States v. Olano*

The Supreme Court's opinion in *United States v. Olano* also contradicts *Remmer*'s presumption of prejudice.⁵⁵ In *Olano*, the alleged prejudice arose when the alternate jurors for the trial remained in the jury room during deliberations and listened to the actual jurors' discussions.⁵⁶

The Supreme Court did not presume prejudice per se because of extraneous influences, nor did it find prejudice based on the particularized facts of the case.⁵⁷ In determining that there was no prejudice, either specifically or presumptively, the Court said that while "[t]here may be cases where an intrusion should be presumed prejudicial, a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?"⁵⁸ The Court stated that the defendant failed to show the alternate jurors participated in deliberations or "chilled" deliberation by the other jurors, and it noted that there was no direct evidence of prejudice on the

53. *Smith*, 455 U.S. at 215 (emphasis added).

54. See *infra* Part III (discussing the various tests that the circuit courts apply).

55. *United States v. Olano*, 507 U.S. 725, 739 (1993).

56. *Id.* Under Federal Rule of Civil Procedure 52(b), the appellate court has discretion to correct plain errors or errors affecting substantial rights that were not raised in the district court. *Id.* at 731–32. The appellate court should exercise this discretion only if the errors "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732 (quoting *United States v. Young*, 470 U.S. 1, 15 (1985) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936))). The Ninth Circuit had reversed the *Olano* defendants' convictions and found the error inherently prejudicial. *United States v. Olano*, 934 F.2d 1425, 1438 (9th Cir. 1991).

In deciding whether the error affected substantial rights within the meaning of Rule 52(b), the Supreme Court evaluated the error for prejudice using the *Remmer* "intrusion" jurisprudence. *Olano*, 507 U.S. at 739–41 ("Of course, the issue here is whether the alternates' presence sufficed to establish remedial authority under Rule 52(b), not whether it violated the Sixth Amendment or Due Process Clause, but we see no reason to depart from the normal interpretation of the phrase 'affecting substantial rights.'").

57. *Olano*, 507 U.S. at 739–41.

58. *Id.* at 739 (internal citations omitted).

record.⁵⁹ The Court further stated, “Nor will we presume prejudice for purposes of the Rule 52(b) analysis here. . . . Nor do we think that the mere presence of alternate jurors entailed a sufficient risk of ‘chill’ to justify a presumption of prejudice on that score.”⁶⁰

The Supreme Court’s decision in *Olano*, much like its decision in *Smith*, suggests that extraneous influences on the jury do not automatically trigger a presumption of prejudice. The circuit courts have struggled to reconcile *Smith* and *Olano* with *Remmer* and other Supreme Court cases that suggest prejudice is presumed when jurors are subjected to extraneous influences.⁶¹

D. PRE-VERDICT INQUIRIES V. POST-VERDICT INQUIRIES

The improper contact’s timing is also a significant factor. Many allegations of improper contacts with jurors or juror exposure to prejudicial information are made after the jury renders a verdict.⁶² Presuming prejudice in pre-verdict allegations of improper contacts raises fewer policy concerns than presuming prejudice in post-verdict allegations because it is easier to remedy the situation and because such a presumption carries a lower risk of negatively impacting the integrity of the jury process. When someone raises an allegation of improper contact before the verdict, a pre-verdict inquiry is preferred.⁶³ A pre-verdict inquiry raises at least one concern, however: Questioning jurors about the improper contact before the verdict may so focus the jurors’ attention on the improper contact that they no longer will be able to deliver an impartial verdict.⁶⁴

In contrast, after a jury renders a verdict and the convicted party alleges that jurors were exposed to extraneous information, courts are reluctant to haul jurors back into court “‘to probe for potential instances of bias, misconduct, or extraneous influences.’ Courts . . . are justifiably concerned that post-verdict inquiries may inhibit jury-room discussions, deter jurors from returning an unpopular verdict, subject jurors to harassment, or burden courts with frivolous and time-consuming applications.”⁶⁵ Post-

59. *Id.* at 739–40.

60. *Id.* at 740–41.

61. *See infra* Part III (discussing the circuit courts’ various approaches).

62. *See infra* Part IV.A (discussing the policy concerns that the impeachment of verdicts implicates).

63. Gershman, *supra* note 3, at 326.

64. *Id.*

65. *Id.* (quoting *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989)). Federal Rule of Evidence 606(b) attempts to deal with some of these issues by prohibiting a juror from testifying about the effect an outside influence had on her mental processes during deliberation. *See* FED. R. EVID. 606(b) (“[A] juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any juror’s mind or emotions . . . or concerning the juror’s mental processes in connection therewith.”).

verdict inquiries also threaten verdicts' finality and "render[] a factual determination of jury taint much more difficult."⁶⁶ Furthermore, it may be difficult for a court to hold a *Remmer*-type hearing several years after the original trial and accurately determine the prejudicial effect of the ex parte communication.⁶⁷ However, "[w]hen evaluating the effect of this communication in terms of 'fundamental fairness' to the defendant," the defendant should not be punished "for the ambiguities created by the lack of a record."⁶⁸

In his dissenting opinion in *Smith v. Phillips*, Justice Marshall emphasized the considerable problems created by post-verdict inquiries.⁶⁹ He noted that it would be difficult, and thus unlikely, for jurors to admit any bias or prejudice in their deliberations when consulted post-verdict.⁷⁰ On the other hand, during a pre-verdict inquiry, a juror only would have to admit that the extraneous influence "might affect his ability to weigh the evidence fairly"—something a juror would be much more willing to admit.⁷¹ Justice Marshall also noted that a judge faces more pressure from a post-verdict hearing.⁷² If a hearing during trial finds juror bias or prejudice, a judge can remedy the situation by replacing the juror with an alternate.⁷³ If a post-trial inquiry finds prejudice or bias, however, the remedy is to set aside the verdict and grant a new trial.⁷⁴

66. Gershman, *supra* note 3, at 326.

67. See *Moore v. Knight*, 368 F.3d 936, 941–42 (7th Cir. 2004) (noting that the court conducted a *Remmer*-type hearing to investigate ex parte communications more than eight years after the trial and stating that "it is ridiculous to base such a determination [of whether or not there was prejudice] on the predictable lack of evidence so many years after the fact").

68. *Id.* at 944.

69. *Smith v. Phillips*, 455 U.S. 209, 242 (1982) (Marshall, J., dissenting) ("[A] hearing during trial is far more likely to reveal evidence of bias than a post-trial hearing."). Justice Marshall opined that the remedy of a *Remmer* hearing should not apply to instances of serious misconduct. *Id.* at 235–36. In cases such as *Smith*, bias should be implied. *Id.* at 234–35. In *Smith*, one of the jurors submitted an employment application to the district attorney's office during the course of the trial. *Id.* at 212 (majority opinion). Justice Marshall distinguished *Remmer* (in which someone attempted to bribe a juror) from *Smith* by noting that a juror would be more likely to reveal the impact of an attempted bribery and that "he was disturbed or upset by the misconduct of a third party, than to admit that he himself acted improperly." *Id.* at 236 (Marshall, J., dissenting).

70. *Id.* at 242 (Marshall, J., dissenting).

71. *Id.*

72. *Id.* at 242–43.

73. *Id.* at 242.

74. *Smith*, 455 U.S. at 242–43 ("Any judge would hesitate before [granting a new trial]."). In *Smith*, the court declared a mistrial after the jury was unable to reach a verdict. *Id.* at 243. The second trial began two years later. *Id.* The second trial lasted nine weeks and included forty-four witnesses. *Id.* Under these circumstances, a judge would be hesitant to grant a new trial. *Id.*

III. THE RESULTING CONFUSION: A SURVEY OF THE CIRCUITS

As a result of the Supreme Court's inconsistent decisions, the circuit courts have split in their interpretations of the law.⁷⁵ This Part presents a spectrum analysis of the circuits' varying positions.

A. THE CIRCUIT WITH NO ARTICULATED STANDARD

The Eleventh Circuit has not yet resolved the conflict between *Remmer*, which mandated a presumption of prejudice, and two subsequent Eleventh Circuit cases, which stated that prejudice is not presumed.⁷⁶ In *United States v. Martinez*, the Eleventh Circuit noted that the *Remmer* presumption-of-prejudice standard conflicted with a previous Eleventh Circuit case, *United States v. Rowe*, which stated that the defendant bears a "higher initial burden of proving prejudice through a preponderance of the credible evidence."⁷⁷ In *Martinez*, the jury knew of and may have used several pieces of extrinsic evidence, including (1) evidence that the defendant faced 160 years of imprisonment if convicted, (2) a dictionary defining technical terms, (3) evidence of publicity surrounding the trial, (4) television news accounts of the trial, and (5) newspaper accounts of the trial.⁷⁸ The court did not resolve the conflict between *Remmer* and *Rowe* since the court concluded that the defendant had shown prejudice even under the more demanding *Rowe* standard.⁷⁹ The court then found that the government did not rebut the defendant's showing of prejudice and remanded the case for a new trial.⁸⁰

75. See Peter A. Kuperstein, *Extraneous Information Prejudicial If It Influences Average Reasonable Juror's Decision*—State v. Hartley, 30 SUFFOLK U. L. REV. 557, 560 (1997) (noting that some courts use the presumption-of-prejudice test in an attempt "to balance the Sixth Amendment right to a fair trial with the common-law rule favoring verdict finality"). Other courts use the "reasonable possibility of prejudice" test, and "[s]till other[s] . . . consider the probable effect of the extrajudicial information on an average reasonable juror." *Id.* at 560–61.

76. See *United States v. Cruz*, 225 F. App'x 807, 810 n.1 (11th Cir. 2007) (describing the court's approach in *United States v. Martinez*). The *Cruz* court stated:

Although prior precedent recognized the presumption of prejudice from *Remmer*, this Court, on at least two other occasions, has stated that prejudice is not presumed even when jurors considered extrinsic evidence. . . . We declined to resolve the conflict [in *Martinez*] because it had no bearing on the outcome As in *Martinez*, the presumption of prejudice does not drive the outcome of this appeal. . . . Accordingly, we again decline to consider the issue further.

Id.

77. *United States v. Martinez*, 14 F.3d 543, 549–50, 550 n.3 (11th Cir. 1994) (citing *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir. 1990)).

78. *Id.*

79. *Id.* at 550 n.3.

80. *Id.* at 552 (noting that "a reasonable probability exists that extrinsic matters influenced the jury's deliberations"). "Because [the defendant] demonstrated that extrinsic evidence entered the jury's deliberations, we assume prejudice . . ." *Id.* at 550–51.

In a more recent Eleventh Circuit case, *United States v. Cruz*, the Eleventh Circuit reaffirmed its position on this issue, noting that in *Martinez* the presumption of prejudice did not drive the outcome of the appeal.⁸¹ In *Cruz*, a security guard made a comment to the jurors that other jurors had been attacked outside the courthouse.⁸² The court concluded that the security guard's comments did not prejudice the jury because nothing in his statement connected the attack to the defendant and because none of the jurors expressed concern after the district court assured them that their names would be sealed.⁸³ Because the presumption of prejudice did not "drive the outcome of [the] appeal," the court did not consider the issue of whether the *Remmer* presumption of prejudice survived the subsequent inconsistent Supreme Court opinions.⁸⁴ The Eleventh Circuit's position is representative of the overall lack of clarity in the case law on this issue.

B. CIRCUITS APPLYING THE REMMER PRESUMPTION OF PREJUDICE WITH AN
EXCEPTION FOR INNOCUOUS INTERVENTIONS

The Seventh and Fourth Circuits apply the *Remmer* presumption of prejudice but recognize an exception for innocuous interventions—meaning that the court will not presume prejudice if it determines that an extraneous communication was innocuous.

In *Moore v. Knight*, the Seventh Circuit applied *Remmer*'s presumption of prejudice to an ex parte communication between a judge and juror made via the bailiff.⁸⁵ The jury in *Moore* sent a note to the judge containing factual questions regarding the defendant's alibi: "where [the defendant] lived, the distance between [the defendant's] home and the location of the crime, and [what] time [the defendant] arrived home on the night in question."⁸⁶ The judge, without discussing the matter with either attorney, responded by having her bailiff communicate the answers to the jury.⁸⁷ Prior to sentencing, the judge informed the defendant's attorney of the communication.⁸⁸ After the defendant objected, the judge proceeded with sentencing.⁸⁹ The defendant filed a habeas corpus appeal,⁹⁰ asserting that

81. *Cruz*, 225 F. App'x at 810.

82. *Id.* at 808.

83. *Id.* at 810–11.

84. *Id.* at 810 n.1. The court noted that even if prejudice were presumed, the government had rebutted that presumption. *Id.* at 811.

85. *Moore v. Knight*, 368 F.3d 936, 943–44 (7th Cir. 2004). *Remmer* does not apply to cases of contact between the judge and a juror; however, instances where the judge communicates with the juror via the bailiff remain "under the purview of *Remmer*." *Id.*

86. *Id.* at 938.

87. *Id.*

88. *Id.*

89. *Id.*

the judge's actions constituted *ex parte* communications with the jury.⁹¹ The Seventh Circuit applied the *Remmer* presumption of prejudice to the communication that had taken place between the judge and jurors through the bailiff.⁹² The court concluded that the government's evidence was "not reliable enough to support a finding of harmless error on its face" and that it was "not strong enough to meet the government's heavy burden necessary to overcome the presumption of prejudice."⁹³ The Seventh Circuit continues to apply the *Remmer* presumption of prejudice but also acknowledges *Remmer's* exception for errors that are "harmless" on their face.⁹⁴

In 2005, the Seventh Circuit revisited *Remmer's* presumption of prejudice in *Wishart v. Davis*.⁹⁵ In 1983, a jury convicted the defendant, Wishart, of murder, robbery, burglary, and theft.⁹⁶ The judge subsequently sentenced Wishart to death.⁹⁷ Wishart filed for federal habeas corpus, but the court denied his petition.⁹⁸ He then appealed to the Seventh Circuit Court of Appeals.⁹⁹ On appeal, Wishart presented a juror affidavit—given at a post-conviction hearing more than a decade after his trial—which stated the following:

I learned that Mark Wishart had taken a polygraph test. The jury had been brought to the courthouse, and was preparing to begin court when we were told court would not be held that day. I learned the court session had been canceled because Mark Wishart was to take a polygraph test. I do not recall who gave me the information about the polygraph. After the polygraph, the trial continued, and I never learned the results of [the] polygraph

90. In federal habeas proceedings, a federal court will entertain a writ of habeas corpus on behalf of a criminal defendant, who is in custody pursuant to a state judgment, on the grounds that the defendant's imprisonment violates the U.S. Constitution or federal law. 28 U.S.C. § 2254(a) (2000).

91. *Moore*, 368 F.3d at 938.

92. *Id.* at 943–44. The Seventh Circuit does not apply *Remmer* to cases where the *ex parte* communication occurred between the judge and the jury or juror. *Id.* The court likewise has refused to apply the *Remmer* presumption of prejudice in cases where the judge makes a "brief procedural remark," off the record, to the jury. *Id.* at 941 (quoting *Ellsworth v. Levenhagen*, 248 F.3d 634, 642 (7th Cir. 2001)).

93. *Id.* at 943.

94. See *Whitehead v. Cowan*, 263 F.3d 708, 722–24 (7th Cir. 2001) (holding that *Remmer* does not apply to the publication of juror addresses or to a situation in which the jury overhears a defendant's mother's outburst in the courtroom while court is not in session); *United States v. Thibodeaux*, 758 F.2d 199, 202–03 (7th Cir. 1985) (noting that no inquiry into an improper communication was necessary because the comment in question was innocuous).

95. *Wishart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005).

96. *Id.* at 323.

97. *Id.*

98. *Id.*

99. *Id.*

test.¹⁰⁰

The district court had not inquired any further into the incident, making the affidavit the only factual information concerning the incident.¹⁰¹

Judge Posner, writing for the majority, noted that judges should read *Remmer*'s presumption language in its context (a situation in which the court sent an F.B.I. agent to investigate a juror—an event that was “bound to impress the juror and [was] very apt to do so unduly”).¹⁰² Judge Posner emphasized that the language in *Remmer* suggesting courts should presume prejudice from all extraneous influences on a juror “is difficult to take seriously” when applied to other factual situations because many situations exist in which private communications between jurors and third parties would not give rise to a presumption of prejudice.¹⁰³ To illustrate his point, Judge Posner gave the example of a juror’s spouse saying, “I saw you on television in the jury box, and you looked great.”¹⁰⁴ Although this statement would be “a private communication . . . with a juror during a trial about a matter pending before the jury,” the statement, just like many others, would not suggest jury tampering because it would not be apt to impress unduly the juror or prejudice the defendant.¹⁰⁵

The Seventh Circuit set forth a standard that the extraneous communication must “create[] a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury.”¹⁰⁶ The court declared the likelihood the “extraneous communication[s] . . . contaminate[d] the jury’s deliberations” should dictate the level of inquiry.¹⁰⁷ The court concluded that the juror’s affidavit raised a reasonable suspicion that the extraneous information contaminated the jury’s deliberations.¹⁰⁸ Therefore, the court found it necessary to further inquire about the juror’s reaction to the extraneous information concerning the polygraph test.¹⁰⁹ The court acknowledged the difficulty associated with having the former juror explain her reaction to an incident that occurred over twenty years earlier, but it still held that the state carried the burden to present evidence to rebut the presumption of prejudice.¹¹⁰ The Seventh Circuit thus reaffirmed its decision in *Moore* by continuing to apply the

100. *Wishart*, 408 F.3d at 326.

101. *Id.*

102. *Id.* (quoting *Remmer v. United States*, 347 U.S. 227, 229 (1954)).

103. *Id.* (“General language does not decide particular cases, as Holmes liked to say.”).

104. *Id.*

105. *Wishart*, 408 F.3d at 326.

106. *Id.*

107. *Id.*

108. *Id.* at 327.

109. *Id.*

110. *Wishart*, 408 F.3d at 327–28.

Remmer presumption of prejudice, but it noted the importance of the “harmless” error exception to the rule.¹¹¹

The Fourth Circuit also continues to apply *Remmer*’s presumption of prejudice to cases involving extrajudicial juror contact.¹¹² In *United States v. Cheek*, a co-defendant contacted a juror during the defendant’s trial and attempted to bribe the juror for a favorable verdict.¹¹³ The district court refused to apply the *Remmer* presumption of prejudice under these circumstances.¹¹⁴ The Fourth Circuit reversed and explained that the district court had “construed *Remmer* . . . too narrowly.”¹¹⁵ The Fourth Circuit opined that a district court should analyze whether the contacts were “innocuous interventions.”¹¹⁶ If the court finds that the contacts were not innocuous, the court *must* apply a presumption of prejudice.¹¹⁷ According to the court, the following contacts are not innocuous: private communication, private contact, and indirect or direct tampering with a juror during trial about the matter before the jury.¹¹⁸ Once the contact triggers the presumption of prejudice, the burden shifts to the government to show that there is no reasonable possibility that the improper communication influenced the jury’s verdict.¹¹⁹ Applying the test to the facts in *Cheek*, the court found that the defendant proved every factor required to trigger a presumption of prejudice and the government had failed to rebut this presumption.¹²⁰ Like the Seventh Circuit, the Fourth Circuit continues to apply the *Remmer* presumption of prejudice but maintains an exception for “innocuous interventions.”¹²¹

111. See *id.* at 326; see also *Whitehead v. Cowan*, 263 F.3d 708, 724 (7th Cir. 2001) (concluding that the media’s publication of the jurors’ names and addresses was innocuous); *Schaff v. Snyder*, 190 F.3d 513, 534 (7th Cir. 1999) (concluding that a statement whispered by a child in the courtroom and overheard by a juror was innocuous).

112. See *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996) (holding that the defendant was entitled to a presumption of prejudice).

113. *Id.* at 138.

114. *Id.* at 141.

115. *Id.*

116. *Id.* (quoting *Haley v. Blue Ridge Transfer Co., Inc.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986)).

117. *Cheek*, 94 F.3d at 141.

118. *Id.*

119. *Id.*

120. *Id.* at 141–43.

121. See *id.* at 141 (quoting *Haley*, 802 F.2d at 1537 n.9); see also *Dennis v. Gen. Elec. Corp.*, 762 F.2d 365, 367 (4th Cir. 1985) (“Unless the jury’s impartiality is sacrificed, mere technical and unintentional contacts between counsel and the jury should be deemed harmless.”). In *Dennis*, the jury sent a cartoon to defense counsel, satirizing lawyers. *Id.* at 366. Defense counsel then showed the cartoon to the prosecutors and later referenced the cartoon in his closing argument. *Id.* The court held that the cartoon was harmless and stated that “[i]t would require speculation upon the improbable to presume” prejudice. *Id.*

C. *CIRCUITS APPLYING THE REMMER PRESUMPTION OF PREJUDICE WITH AN EXCEPTION FOR FEDERAL HABEAS CASES*

The Tenth and Eighth Circuits continue to apply the *Remmer* presumption of prejudice but note an exception for federal habeas cases. Additionally, the Eighth Circuit does not presume prejudice in cases where the extraneous communication concerns only an issue of law.

The Tenth Circuit applies the *Remmer* presumption of prejudice in all cases except federal habeas proceedings.¹²² For example, in a federal habeas case, *Crease v. McKune*, an ex parte communication occurred between one of the jurors and the judge.¹²³ The district court had applied a plain-error analysis and had denied the writ because no “miscarriage of justice had occurred.”¹²⁴ The Tenth Circuit affirmed the district court’s judgment but applied a different test.¹²⁵ The appellate court held that there was “no convincing evidence that [the defendant] was prejudiced by the ex parte conversation.”¹²⁶ The court noted:

We disagree that *Remmer* established the rule that any ex parte communication with a juror presumptively deprives a criminal defendant of due process under the Fourteenth Amendment. To the contrary, it is established that “the mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right.” . . . We view the *Remmer* presumption as a rule of federal criminal procedure, rather than a rule of federal constitutional law. Unlike *Remmer* . . . [the defendant’s] claim is before us in the context of a collateral attack on a state conviction and sentence. Interests of comity and federalism, as well as “the State’s interest in the finality of convictions that have survived direct review within the state court system,” mandate a more deferential standard of review in evaluating [the defendant’s] claim.¹²⁷

122. *Cannon v. Mullin*, 383 F.3d 1152, 1170 (10th Cir. 2004); *see also* *Mayhue v. Saint Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 923 (10th Cir. 1992) (applying the *Remmer* presumption of prejudice); *United States v. Hornung*, 848 F.2d 1040, 1044–45 (10th Cir. 1988) (same); *United States v. Greer*, 620 F.2d 1383, 1385 (10th Cir. 1980) (same).

123. *Crease v. McKune*, 189 F.3d 1188, 1190 (10th Cir. 1999). During the ex parte communication, one of the jurors expressed her desire that the judge release her from the jury due to her disagreement with the felony-murder rule. *Id.* at 1190.

124. *Id.*

125. *Id.* at 1194.

126. *Id.*

127. *Id.* at 1193 (quoting *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (internal quotation omitted) and *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

Therefore, the Tenth Circuit does not apply the *Remmer* presumption in federal habeas proceedings because it views the presumption as a rule of federal criminal procedure, not federal constitutional law.

However, in cases other than federal habeas proceedings, the Tenth Circuit continues to apply a presumption of prejudice when extraneous communication with a juror occurs. In *United States v. Scull*, an alternate juror reported witnessing an ex parte contact between the defense counsel and another juror outside the courthouse.¹²⁸ In response, the trial court held a hearing in the presence of counsel for both sides and found that the alternate juror had been mistaken about the identity of the juror.¹²⁹ On appeal to the Tenth Circuit, the defendant argued that the district court should have held a hearing to determine whether the district court tainted the jury by (1) informing them that there was a report of attorney–juror contact and (2) subsequently failing to inform them of the report’s inaccuracy.¹³⁰ The Tenth Circuit applied *Remmer*’s presumption of prejudice but noted that the government could prove harmlessness beyond a reasonable doubt by demonstrating “‘overwhelming evidence of [the] defendant’s guilt.’”¹³¹ In the case at hand, the court concluded that the lack of evidence of jury taint and the overwhelming evidence of the defendant’s guilt supported the conclusion that the district court’s findings and its decision to not hold a hearing were not clearly erroneous.¹³² The Tenth Circuit continues to apply a presumption of prejudice in all cases involving improper extraneous influences on the jury, with the exception of federal habeas cases.¹³³

The Eighth Circuit recently followed the Tenth Circuit’s path by refusing to presume prejudice in a federal habeas case. In *Helmig v. Kemna*, the defendant filed a petition for federal habeas relief because jurors had “obtained and consulted” a highway map that neither party introduced or

128. *United States v. Scull*, 321 F.3d 1270, 1279 (10th Cir. 2003).

129. *See id.* (“When the district court learned of [the] allegation, it separately questioned [the two jurors] and allowed the lawyers for all parties to do the same. . . . [T]he court concluded [the] allegation was a case of mistaken identity.”).

130. *Id.* at 1279–80.

131. *Id.* at 1280 (quoting *United States v. Davis*, 60 F.3d 1479, 1485 (10th Cir. 1995)).

132. *Id.* at 1281. The court applied the plain-error standard (rather than the abuse-of-discretion standard) because the defendant raised this objection for the first time on appeal. *Id.* at 1280.

133. *See United States v. Hornung*, 848 F.2d 1040, 1043–44 (10th Cir. 1988) (applying the *Remmer* presumption of prejudice). *But see United States v. Robertson*, 473 F.3d 1289, 1294 (10th Cir. 2007) (qualifying the *Remmer* presumption of prejudice and stating, “The defendant must also demonstrate ‘that an unauthorized contact created actual juror bias; courts should not presume that a contact was prejudicial.’” (quoting *United States v. Frost*, 125 F.3d 346, 377 (6th Cir. 1997))).

admitted as evidence at trial.¹³⁴ The court held that because this was a habeas case, the district court had erred in presuming prejudice; the defendant had to prove that the map “was both extraneous and prejudicial.”¹³⁵ The court concluded, based on the trial record and the hearing testimony, that the map was neither extraneous nor prejudicial because “there is no ‘reasonable probability’ that a reasonable juror would have reached a different verdict without the map.”¹³⁶

Additionally, the Eighth Circuit has refused to presume prejudice when the extrinsic contact concerns only a point of law. In *United States v. Blumeyer*, the jury foreperson posed a hypothetical question to an attorney friend (not involved in the *Blumeyer* case) regarding the case.¹³⁷ The court held that the contact did not warrant a presumption of prejudice because the “extrinsic contact relate[d] to legal issues,” which are not decided by the jury.¹³⁸ Therefore, the defendant carried the burden to prove actual prejudice.¹³⁹ The court concluded that the defendant failed to prove that the improper contact resulted in prejudice.¹⁴⁰ The Eighth Circuit does, however, continue to apply the presumption of prejudice to cases in which the extrinsic contact relates to “factual evidence not developed at trial” because the jury is responsible for deciding questions of fact.¹⁴¹ Therefore, the Eighth Circuit’s presumption-of-prejudice determination depends on whether the extraneous information relates to a point of law or a factual issue in the case.

D. CIRCUITS APPLYING A VARIATION OF THE HYPOTHETICAL-AVERAGE-JURY TEST

The Second and Third Circuits apply a variation of the hypothetical-average-jury test. The Second Circuit presumes prejudice but employs the hypothetical-average-jury test when determining harmlessness, whereas the Third Circuit only presumes prejudice when the intrusion is likely to prejudice a hypothetical average jury.

134. *Helmig v. Kemna*, 461 F.3d 960, 962 (8th Cir. 2006).

135. *Id.* at 963 (quoting *Fullwood v. Lee*, 290 F.3d 663, 682 (4th Cir. 2002)).

136. *Id.* at 965–66 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

137. *United States v. Blumeyer*, 62 F.3d 1013, 1014 (8th Cir. 1995).

138. *Id.* at 1017.

139. *Id.*

140. *Id.*

141. *Id.* at 1016 (quoting *United States v. Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988)). The court stated, “Extrinsic contacts that relate to the facts of a case are presumptively prejudicial ‘because the jury is the final arbiter of factual disputes.’” *Id.* (quoting *Cheyenne*, 855 F.2d at 568); *see also* *United States v. Wallingford*, 82 F.3d 278, 281 (8th Cir. 1996) (stating that “the presumption of prejudice does not apply unless the extrinsic contact relates to factual evidence not developed at trial” (quoting *Blumeyer*, 62 F.3d at 1016)).

The Second Circuit claims to presume prejudice when a juror is exposed to extraneous information,¹⁴² but the court's presumption lacks teeth because the Second Circuit allows the government to rebut this presumption with relative ease by proving harmlessness.¹⁴³ While the Eighth Circuit requires the government to prove beyond a reasonable doubt that the contact was harmless,¹⁴⁴ the Second Circuit permits the district court to determine the probable effect of the information on a hypothetical average juror.¹⁴⁵ Thus, the district court applies a "hypothetical average juror" test, in which it "assess[es] for itself the likelihood that the influence would affect a typical juror," in order to determine whether the jury's exposure to extraneous information was harmless.¹⁴⁶

Using this test, the court determines "whether the exposure prejudiced the defendant's right to a fair trial . . . [by examining] the extrinsic information 'on the basis of the nature of the matter and its probable effect on a hypothetical average jury.'"¹⁴⁷ The court applied this test in *United States v. Schwarz* and found that the jury's exposure to extrinsic information¹⁴⁸ prejudiced the defendant's right to receive a fair trial.¹⁴⁹ The court declined to decide the proper remedy for the district court's error in failing to hold an evidentiary hearing and ordered a new trial on other grounds.¹⁵⁰

The Second Circuit also applied this test in *United States v. Greer*.¹⁵¹ In *Greer*, a friend of the defendant contacted one of the jurors before trial; the juror interpreted this contact as a bribe.¹⁵² That same juror was also the

142. See *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2002) ("It is well-settled that any extra-record information of which a juror becomes aware is presumed prejudicial.").

143. See *id.* (noting that the court can determine that the exposure was harmless by concluding that the exposure was not likely to prejudice the hypothetical average juror).

144. *United States v. Hall*, 85 F.3d 367, 371–72 (8th Cir. 1996).

145. See *Greer*, 285 F.3d at 173 (applying the hypothetical-average-jury test); *United States v. Schwarz*, 283 F.3d 76, 99 (2d Cir. 2002) (same).

146. *Greer*, 285 F.3d at 173 (quoting *Bibbins v. Dalsheim*, 21 F.3d 13, 17 (2d Cir. 1994) (per curiam)).

147. *Schwarz*, 283 F.3d at 99 (quoting *United States v. Crosby*, 294 F.2d 928, 950 (2d Cir. 1961)).

148. In *Schwarz*, a police officer was prosecuted for violating the civil rights of a detainee. *Id.* at 80. After trial, three jurors submitted affidavits alleging that, during deliberations, the jury learned from one of their fellow jurors that the officer's co-defendant had pled guilty. *Id.* at 88–89. The affidavits also stated that after the verdict, the jurors learned that the co-defendant's attorney told prosecutors that there was a second officer at the scene of the incident but that the second officer was not the defendant. *Id.* The affidavits also stated that each of them had contacted the defendant's attorney after the verdict to discuss the jury's deliberations with him. *Id.* at 88.

149. *Id.* at 99–100.

150. *Id.* at 100.

151. *Greer*, 285 F.3d at 173.

152. *Id.* at 166.

brother of a man whose name the parties mentioned repeatedly during trial due to his alleged involvement in drug transactions with the defendant.¹⁵³ Five other jurors knew of the alleged bribe and the reference to the brother's name.¹⁵⁴ The court ultimately held that a "hypothetical average juror" would not have been influenced by the extrinsic information in this case.¹⁵⁵ Thus, the Second Circuit focuses on the probable effect of the improper extraneous influence on a hypothetical average jury when deciding whether the exposure was harmless.

The Third Circuit uses a different variation of the Second Circuit's hypothetical-average-juror test.¹⁵⁶ The Third Circuit's approach differs from the Second Circuit's approach because the Third Circuit does not automatically presume prejudice; rather, the Third Circuit only presumes prejudice when the intrusion is likely to prejudice a hypothetical average jury.¹⁵⁷

In *United States v. Gilsenan*, the jury obtained information from one of the jurors regarding plea negotiations.¹⁵⁸ On appeal, the Third Circuit placed the burden on the defendant to establish prejudice and held that "[the court] must determine if on the record already made the [defendants] have demonstrated they suffered substantial prejudice from the information."¹⁵⁹ The court determined whether substantial prejudice existed "by considering the probable effect of the allegedly prejudicial information on a hypothetical average juror."¹⁶⁰ The court then held that the circumstances of this case did not give rise to a presumption of prejudice, but that, even if there were a presumption, the facts established that the extraneous information was harmless.¹⁶¹ The court could not "conceive in these circumstances that the allegedly prejudicial information could have had an impact on the verdict."¹⁶² Thus, the Third Circuit focuses on the

153. *Id.* at 166–67. That juror allegedly told the jury that his brother was involved with drugs, was in and out of jail most of his life, and had dealt with the defendant. *Id.* at 167.

154. *Id.*

155. *Id.* at 174.

156. *See* *United States v. Gilsenan*, 949 F.2d 90, 95 (3d Cir. 1991) (concluding that the court should consider the effect the information will have on the hypothetical average juror when deciding whether to presume prejudice).

157. *See id.* (placing the burden of proof on the defendant to show prejudice).

158. *Id.* at 93.

159. *Id.* at 95.

160. *Id.* When determining prejudice, factors that the court considers include: (1) the length of the jury's deliberations, (2) the structure of the jury's verdict, (3) the degree of the jury's exposure to the extraneous information, (4) the point in time during the trial when the jury was exposed to the information, and (5) whether the jury received instructions to consider only evidence in the case. *United States v. Urban*, 404 F.3d 754, 778 (3d Cir. 2005).

161. *Gilsenan*, 949 F.2d at 95 n.7.

162. *Id.* at 96.

probable effect of the improper extraneous influence on a hypothetical average jury before deciding whether to presume prejudice.¹⁶³

E. *CIRCUITS PRESUMING PREJUDICE IN EGREGIOUS CIRCUMSTANCES
OR AT THE DISCRETION OF THE COURT*

The D.C. Circuit and the Fifth Circuit grant the district court discretion in deciding whether to presume prejudice, whereas the First Circuit and the Ninth Circuit only presume prejudice in egregious circumstances.

The D.C. Circuit rejects *Remmer's* presumption of prejudice and instead looks at the facts and circumstances surrounding the intrusion before deciding whether to presume prejudice; if the intrusion shows a strong enough likelihood of producing prejudice, the government must prove harmlessness.¹⁶⁴ In *United States v. Williams-Davis*, the jury foreperson's husband, who regularly attended court, told her to "nail" the defendants.¹⁶⁵ In concluding that the remark did not give rise to a presumption of prejudice, the court noted: (1) the remark was isolated; (2) the nature of the remark was "subordinate in a way that could not possibly be said of the third-party comments that intruded in cases relied on by appellants"; (3) strong deference should be given to the district court; and (4) the prosecution presented overwhelming evidence against the defendants.¹⁶⁶ The D.C. Circuit grants the district court discretion to consider the circumstances surrounding an improper extraneous influence when deciding whether it is likely that the intrusion prejudiced the jury.¹⁶⁷

The Fifth Circuit also grants the district court discretion to determine when to apply the *Remmer* presumption of prejudice, rather than mandating a presumption of prejudice.¹⁶⁸ In *United States v. Sylvester*, two jurors received phone calls from an unknown man wishing to discuss the case, one juror

163. See *Urban*, 404 F.3d at 777 n.9 (noting that the court does "not mechanically apply a presumption of prejudice every time a jury is exposed to extraneous information" and that the court is more likely to presume prejudice when jurors are contacted by third parties than when jurors are exposed to a television story or a newspaper article); see also *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001) (stating that the defendant bears the burden of proving prejudice and that, when evaluating prejudice, the court examines the probable effect on a hypothetical average jury).

164. *United States v. Williams-Davis*, 90 F.3d 490, 497 (D.C. Cir. 1996).

165. *Id.* at 495.

166. *Id.* at 497–98.

167. See *United States v. Morrow*, 412 F. Supp. 2d 146, 166 (D.D.C. 2006) (applying the standard announced in *Williams-Davis*); *United States v. Edlin*, 283 F. Supp. 2d 8, 15 (D.D.C. 2003) (same).

168. See *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) ("[T]he *Remmer* presumption of prejudice cannot survive *Phillips* and *Olano*.").

received a mysterious package at his home,¹⁶⁹ and a concession-stand vendor at the courthouse asked another juror to “take it easy on the [defendants].”¹⁷⁰ The trial judge met *ex parte* with each juror outside of the presence of defense counsel and determined that the contacts had not prejudiced the defendant.¹⁷¹ The Fifth Circuit concluded that, even in jury-tampering cases, the court should not apply an automatic presumption of prejudice.¹⁷² Rather, the district court should exercise discretion in assigning the burden of proof;¹⁷³ the government must prove the absence of prejudice only when the court determines that an extraneous contact likely caused prejudice.¹⁷⁴ The Fifth Circuit remanded the case, ordering a hearing where counsel for both sides would have the opportunity to examine the jurors.¹⁷⁵ Thus, the Fifth Circuit does not require the court to presume prejudice unless the court determines that prejudice is likely.¹⁷⁶

The First Circuit refuses to apply the *Remmer* presumption of prejudice in cases that lack egregious circumstances.¹⁷⁷ In *United States v. Bradshaw*, court personnel accidentally left an unredacted indictment in the jury room, and jurors read the indictment.¹⁷⁸ The indictment contained three counts that were not before the jury, charging the defendant with serious crimes of which the jury had no other knowledge.¹⁷⁹ In response to this error, the court interviewed the jurors individually and subsequently re-instructed the jury to consider only the evidence the parties presented.¹⁸⁰ The court then conducted a second round of interviews.¹⁸¹ At the conclusion of the

169. The juror believed that the person who delivered the mysterious package worked for one of the co-defendants at the co-defendant's automotive shop. *Id.* at 934.

170. *Id.* at 932 (quoting the concession-stand vendor).

171. *Id.*

172. *Id.* at 933.

173. *Sylvester*, 143 F.3d at 933.

174. *See id.* at 934 (“[R]egardless of whether the presumption arises, the court’s ‘ultimate inquiry’ must be whether the intrusion will affect the jury’s deliberations and verdict.”).

175. *Id.* at 935.

176. *See United States v. Smith*, 354 F.3d 390, 396 (5th Cir. 2003) (applying the same standard as *Sylvester*).

177. *See United States v. Bradshaw*, 281 F.3d 278, 288 n.5 (1st Cir. 2002). The court stated:

We leave for another day the question of whether a jury’s exposure to substantively damaging information may sometimes occur under circumstances so aggravated as to warrant the application of the *Remmer* presumption even without deliberate misconduct (and if so, what those circumstances might comprise). That question simply is not presented here.

Id.

178. *See id.* at 282, 288 (refusing to extend *Remmer* to the facts of that case).

179. *Id.* at 290.

180. *Id.* at 291.

181. *Id.*

interviews, the court dismissed one juror and allowed the remaining jurors to resume deliberating.¹⁸² The trial court denied the defendant's motion for a mistrial, and the court of appeals affirmed the district court.¹⁸³

The First Circuit distinguished *Bradshaw* from *Remmer* on the following basis: in *Bradshaw*, the trial judge investigated the incident and found that no one deliberately attempted to influence the outcome of the case; *Remmer* involved a deliberate attempt to influence the outcome of the case.¹⁸⁴ The First Circuit reasoned that the Supreme Court's decisions in *Smith v. Phillips* and *United States v. Olano* confined the *Remmer* presumption to cases of egregious circumstances in which the tampering or improper communication "directly injects itself into the jury process."¹⁸⁵ *Bradshaw* affirmed that the First Circuit refuses to apply a presumption of prejudice unless the case involves egregious circumstances.¹⁸⁶

Like the First Circuit, the Ninth Circuit applies the *Remmer* presumption only in particularly egregious circumstances, such as jury tampering.¹⁸⁷ In *United States v. Madrid*, a law clerk consoled a juror against whom another juror had used obscenities.¹⁸⁸ The Ninth Circuit abandoned *Remmer*'s presumption of prejudice in cases of ex parte contacts and, relying on the Supreme Court's decision in *Smith*, placed the burden on the defendant to establish "actual prejudice" from an ex parte contact.¹⁸⁹ In *Madrid*, however,

182. *Bradshaw*, 281 F.3d at 291.

183. *Id.* at 287.

184. *Id.* at 288 (distinguishing *Remmer* because, in *Bradshaw*, "the document was [not] insinuated into the jury room for some nefarious purpose" and "the trial judge kept all counsel apprised and engaged throughout his in-depth investigation into the matter, and diligently fleshed out the circumstances of the taint-producing incident").

185. *Id.* at 287–88 (quoting *United States v. Boylan*, 898 F.2d 230, 261 (1st Cir. 1990)).

186. *See Boylan*, 898 F.2d at 261 (concluding that the *Remmer* presumption should only apply to cases "where there is an egregious tampering or third party communication which directly injects itself into the jury process").

187. *See United States v. Dutkel*, 192 F.3d 893, 894 (9th Cir. 1999) (explaining that *Remmer* applies only to cases of jury tampering). *But see United States v. Brande*, 329 F.3d 1173, 1176–77 (9th Cir. 2003). In *Brande*, the court stated:

[N]ot every improper contact is either tampering, on the one hand, or innocuous, on the other. For example . . . the Supreme Court held that the impartiality of the jury was tainted when a court bailiff expressed to two jurors his personal opinion that the defendant was guilty. . . . To determine whether an evidentiary hearing must be held, the court must consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source. If these factors warrant holding a hearing, a hearing should be held unless the court already knows the exact scope and nature of the improper contact.

Id. (citations and quotations omitted).

188. *United States v. Madrid*, 842 F.2d 1090, 1091 (9th Cir. 1988).

189. *Id.* at 1093–94 (noting that like *Smith*, this case did not involve extraneous information that the jury received, but rather involved an ex parte communication); *see also United States v.*

the Ninth Circuit noted that when the jury has access to extrinsic material, a different, “reasonable possibility” of prejudice standard applies, which asks whether there was a reasonable possibility that the extrinsic material could have affected the verdict.¹⁹⁰

Although the Ninth Circuit mostly abandoned the *Remmer* presumption, it continues to presume prejudice in cases involving jury tampering.¹⁹¹ In *United States v. Dutkel*, a defendant’s co-defendant “bribed a juror and secured himself a hung jury,” while the same jury convicted the other defendant.¹⁹² The Ninth Circuit distinguished jury-tampering cases—cases involving “an effort to influence the jury’s verdict by threatening or offering inducements to one or more of the jurors”—from cases of ex parte communications and stated that “[courts] treat jury tampering cases very differently from other cases of jury misconduct.”¹⁹³ The court explained that jury tampering poses a substantial risk to a verdict’s integrity because a court may presume that jurors can ignore the advice of friends or other ex parte contacts, but a court cannot make the same presumption about jury tampering.¹⁹⁴

The court also noted that because *Remmer* was a jury-tampering case, anything said in *Remmer* about other forms of juror contact was “dicta overtaken by cases such as *Olano* and *Phillips*.”¹⁹⁵ Therefore, in a run-of-the-mill ex parte case, the Ninth Circuit places the burden on the defendant to establish prejudice.¹⁹⁶

F. THE LONE CIRCUIT DISCARDING THE REMMER PRESUMPTION OF PREJUDICE

The Sixth Circuit is the only circuit that continues to follow *Smith* and *Olano*, instead of applying *Remmer*’s presumption of prejudice. In *United States v. Zelinka*, the Sixth Circuit interpreted the Supreme Court’s decision in *Smith* as “shift[ing] the burden of showing prejudice to the defendant.”¹⁹⁷ In *Zelinka*, a trial spectator who was associated with the defendant boarded

Henley, 238 F.3d 1111, 1116 (9th Cir. 2001) (noting that “*Dutkel* expressly distinguishes the ‘prosaic kinds of jury misconduct’ cases . . . from the ‘much more serious intrusion’ of a bribe or threat” (quoting *Dutkel*, 192 F.3d at 895)).

190. *Madrid*, 842 F.2d at 1094 (citing *United States v. Bagley*, 641 F.2d 1235, 1240–41 (9th Cir. 1981)).

191. See *Dutkel*, 192 F.3d at 894–95 (applying the *Remmer* presumption of prejudice in a jury-tampering case).

192. *Id.* at 894.

193. *Id.* at 894–95 (noting that jury tampering poses a “greater risk to the integrity of the verdict”).

194. *Id.* at 895.

195. *Id.* at 895 n.1.

196. *Dutkel*, 192 F.3d at 895 n.1.

197. *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988) (noting the circuit split as to *Remmer*’s application).

an elevator with several members of the jury and commented, “[I]t would be too bad if the elevator should crash.”¹⁹⁸ The court noted that *Remmer* only controlled how the district court should proceed after a defendant makes an allegation of prejudice (i.e., conduct a *Remmer*-type hearing), and, therefore, *Remmer* no longer controlled the burden-of-proof issue.¹⁹⁹ The court found that the district court had followed the proper procedure by conducting a hearing and that the defendant had not met his burden (as set forth in *Smith*) of proving prejudice.²⁰⁰ The Sixth Circuit remains the lone circuit that refuses to presume prejudice in all cases involving extraneous communications with the jury.²⁰¹

IV. A CRITICAL ANALYSIS OF THE PRESUMPTION OF PREJUDICE: POLICY CONCERNS AND IMPLICATIONS FOR CRIMINAL DEFENDANTS

The issue of whether a presumption of prejudice should attach to extraneous jury influences is ripe for resolution. Despite this ripeness and the fact that most federal circuit courts no longer strictly adhere to the *Mattox* and *Remmer* decisions, the Supreme Court has declined to address the issue, recently denying certiorari in *Wishart v. Davis*.²⁰² The Supreme Court may be reluctant to reaffirm the *Remmer* decision because to require a presumption of prejudice would likely increase the number of impeached jury verdicts. In several cases, circuit courts that apply *Remmer*'s presumption of prejudice only in egregious circumstances have not conducted a *Remmer* hearing to determine prejudice, but rather have found prejudice lacking

198. *Id.* at 93.

199. *Id.* at 95–96. The court concluded:

(1) [W]hen a defendant alleges that an unauthorized contact with a juror has tainted a trial, a hearing must be held; (2) no presumption of prejudice arises from such a contact; (3) the defendant bears the burden of proving actual juror bias; and (4) juror testimony at the “*Remmer* hearing” is not inherently suspect.

Id.

200. *Id.* at 96.

201. *See* *United States v. Herndon*, 156 F.3d 629, 635 (6th Cir. 1998) (holding that the defendant has the burden of proving that the unauthorized communications resulted in juror partiality); *United States v. Pennell*, 737 F.2d 521, 532 (6th Cir. 1984) (same).

202. *See* *Wishart v. Davis*, 408 F.3d 321 (7th Cir. 2005), *cert. denied sub nom. Buss v. Wishart*, 547 U.S. 1050 (2006); *see also* *Smith*, *supra* note 16, at 702 (arguing that the “Supreme Court should exercise its certiorari jurisdiction and decide this matter once and for all”). *See generally* E. Barrett Prettyman, Jr., *Opposing Certiorari in the United States Supreme Court*, 61 VA. L. REV. 197, 200–07 (1975) (discussing reasons why the Supreme Court denies certiorari). Prettyman notes that the Supreme Court may deny certiorari if the result below was “fair” (even if the result was not “correct”), if the conflicts among the circuits can be somehow reconciled, if well-respected judges reached the result below, or if the issue would be better decided under different facts. *Id.* at 200–05.

based on the circumstances alone.²⁰³ If the court held a *Remmer* hearing, however, the government would have the burden of proving that extraneous contacts or information did not prejudice the defendant, rather than the court making its own determination. Applying a presumption of prejudice likely would lead to an increase in *Remmer* hearings, which, in turn, most likely would lead to an increased number of impeached jury verdicts.

An increase in the number of impeached jury verdicts raises serious policy concerns, such as (1) protection of the jurors' liberty, (2) possible harassment of jurors, (3) stifled discussion in the jury room, and (4) loss of public confidence in the judicial system.²⁰⁴ Despite these policy concerns, courts should apply an automatic presumption of prejudice in all cases involving extraneous contacts with jurors—except those cases involving innocuous contacts—in order to safeguard a criminal defendant's Sixth Amendment rights while simultaneously protecting the jury's verdict against trivial or insignificant claims of prejudice.²⁰⁵

A. IMPEACHING JURY VERDICTS: TWO CONFLICTING VIEWS

Impeaching jury verdicts implicates numerous policy considerations and has been debated actively for the past two-hundred years.²⁰⁶ Two conflicting views have emerged.²⁰⁷ The first view maintains that, in the interests of fairness and accuracy, courts should inquire liberally into jury verdicts and impeach jury verdicts when necessary.²⁰⁸ Proponents of this view frame the relevant inquiry as “whether the verdict in a particular case was

203. See *United States v. Scull*, 321 F.3d 1270, 1281 (10th Cir. 2003) (holding that the district court did not err by not holding a hearing to determine prejudice); *United States v. Gilsenan*, 949 F.2d 90, 97–98 (3d Cir. 1991) (concluding that the district court did not abuse its discretion in not holding a hearing, since a hearing was not necessary to develop the facts, and stating that jurors who complete their service should rarely be called back into court). *But see United States v. Sylvester*, 143 F.3d 923, 935 (5th Cir. 1998) (remanding for a hearing in order to determine prejudice).

204. See *infra* Part IV.A (discussing the policy implications accompanying the impeachment of jury verdicts).

205. See, e.g., *Whitehead v. Cowan*, 263 F.3d 708, 723 (7th Cir. 2001) (concluding that the media's publication of the jurors' names and addresses was innocuous); *Schaff v. Snyder*, 190 F.3d 513, 534 (7th Cir. 1999) (concluding that a statement whispered by a child in the courtroom and overheard by a juror was innocuous); *Dennis v. Gen. Elec. Corp.*, 762 F.2d 365, 366–67 (4th Cir. 1985) (concluding that a cartoon satirizing lawyers given by the jury to defense counsel was innocuous); *United States v. Thibodeaux*, 758 F.2d 199, 202–03 (7th Cir. 1985) (concluding that a comment—“Are you having fun up there?”—made by an Assistant U.S. Attorney to a government witness in the presence of a juror was innocuous).

206. Diehm, *supra* note 39, at 437.

207. *Id.*

208. *Id.* at 437–38. Most scholars have adopted this first approach. *Id.* at 437.

rendered by a fair and impartial jury, based solely on the evidence, a position that finds its roots in the Constitution.”²⁰⁹

The second view proposes that courts should restrict post-trial inquiries into jury verdicts. This approach emphasizes “protecting individual jurors and the jury system as a whole.”²¹⁰ The Constitution and several policy considerations support this view.²¹¹ One policy consideration supporting this view is the need to protect jurors’ liberty.²¹² This argument suggests that jurors will be unwilling to render unpopular verdicts if they know that the court may question them about their deliberations and decisions.²¹³ As one writer explained, “Posttrial scrutiny sabotages [S]ixth and [S]eventh [A]mendment values to the extent that, when jurors are chosen from the community and must one day return to it, the public’s very possession of information about their deliberations may become tantamount to control over them.”²¹⁴ Proponents’ other concerns include possible harassment of jurors, a stifling of discussion in the jury room, and loss of public confidence in the judicial system.²¹⁵ Although the two viewpoints advocate diametrically different approaches to the impeachment of jury verdicts, both viewpoints seek to maintain the integrity and impartiality of the jury system.

209. *Id.* at 438. The Eighth Circuit has noted that a post-verdict evidentiary hearing is sometimes necessary for a court to make an informed decision whether to grant a new trial. *United States v. Hall*, 85 F.3d 367, 369 (8th Cir. 1996). When discussing the competing policy concerns, the court noted:

Affirmance [of the district court’s grant of a new trial] would nullify a jury trial that lasted more than a week, consumed significant judicial resources, and involved an investment of substantial time by the lawyers on all sides. At the same time, few rights of an accused person are more fundamental or more sacred than the Sixth Amendment right to an impartial jury. . . . [E]ach of the competing interests is strong

Id. at 369.

210. Diehm, *supra* note 39, at 438. Most courts and Congress have adopted this approach. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* (quoting Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 894 (1983)).

215. Diehm, *supra* note 39, at 438. Diehm contends that the law governing impeachment of jury verdicts steadily has become more restrictive. *Id.* As evidence of this trend, Diehm points to the promulgation of Rule 606(b) and the courts’ expansion of the Rule and limitation of its exceptions, the development of “procedural rules making it more difficult to attack jury verdicts,” limitations on post-verdict contact with juries, and the utilization of anonymous juries. *Id.* According to Diehm, these factors reflect the courts’ greater concern with the preservation of the jury system, as opposed to a concern about the fairness and impartiality of the jury system. *Id.* Diehm predicts that the law of jury-verdict impeachment will become more restrictive. *Id.* at 439.

Rule 606(b) provides an additional safeguard to protect jurors' liberty, as well as maintain the integrity and impartiality of the jury system. By prohibiting a juror from testifying about the effect of an outside influence on her mental processes during deliberations, Rule 606(b) "shield[s] the jury's deliberation from public scrutiny so that what was intended to be a private deliberation [does] not become the subject of public investigation—to the destruction of all frankness and freedom of discussion and conference, and the integrity of the judicial system."²¹⁶

Despite the gravity of these policy concerns, the desire to avoid the impeachment of jury verdicts does not justify denying a criminal defendant his or her constitutional right to an impartial jury trial. Rather, courts need to balance these competing concerns against each defendant's right to an impartial jury trial. Applying the *Remmer* presumption of prejudice in all cases except those involving innocuous²¹⁷ extraneous communications protects the integrity of the jury system by striking an appropriate balance between shielding against the impeachment of jury verdicts due to insignificant claims of prejudice and protecting the criminal defendant's constitutional right to an impartial jury trial.

B. WHY COURTS SHOULD MAINTAIN THE REMMER PRESUMPTION OF PREJUDICE

The *Remmer* presumption of prejudice strikes an appropriate balance between protecting a criminal defendant's Sixth Amendment rights and preserving the integrity of the jury. Consistent application of the *Remmer* presumption will eliminate or, at the very least, reduce the inconsistencies among the federal courts of appeals.²¹⁸ Strong policy reasons support applying the *Remmer* presumption in particularly egregious cases because the conduct damages the integrity of the jury process.²¹⁹ In contrast, applying the *Remmer* presumption in cases where actual prejudice is unlikely or where

216. Smith, *supra* note 18, at 690 (internal quotations omitted).

217. A contact is not innocuous if it is a private communication, a private contact, or indirect or direct tampering with a juror during trial about the matter before the jury. *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996).

218. Currently, the degree to which a criminal defendant's Sixth Amendment rights are protected is determined by the geographical part of the country in which the defendant happens to live. Furthermore, inconsistency in the law "can create public perception that laws are irrational and unfair." Don E. Tomlinson, *Federal Versus State Jurisdiction and Limitations Versus Laches in Songwriter Disputes: The Split Among the Federal Circuits in Let the Good Times Roll, Why Do Fools Fall in Love?, and Joy to the World*, 23 LOY. L.A. ENT. L. REV. 55, 77 n.182 (2002) (citing Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 431, 489 (1988)).

219. Gershman, *supra* note 3, at 327 ("Such conduct is pernicious, likely to poison the integrity of the process, and damaging to the appearance that juries behave fairly and impartially.").

the prejudice probably did not affect the verdict may appear to be an “excessive” or “unjustifiable response.”²²⁰

However, as the Fourth Circuit noted in *Cheek*, the *Remmer* presumption of prejudice does not require courts to presume prejudice for “innocuous interventions.”²²¹ The innocuous-intervention exception is similar to the de minimis exception that courts apply without difficulty in several areas of the law, “including contract, tort, civil and criminal matters.”²²² The legal maxim “de minimis non curat lex,” or “the law does not concern itself with trifles,”²²³ “signifies that mere trifles and technicalities must yield to practical common sense and substantial justice.”²²⁴ Thus, the law should avoid expensive and unnecessary litigation that is likely to cause delay and injury and unlikely to produce any real benefit.²²⁵ Therefore, courts would not risk applying an “inflexible” presumption in cases involving insignificant or trivial improper contacts.²²⁶ Furthermore, even if the court were to “mistakenly” conclude that an insignificant intervention was not “innocuous” and incorrectly presumed prejudice, the *Remmer* presumption of prejudice would allow the government to rebut the presumption.²²⁷

The *Wisehart* case provides a useful and realistic framework for analyzing cases of juror exposure to extraneous information. Applying an automatic presumption of prejudice in all cases of juror exposure to extraneous information, except those cases involving harmless errors or innocuous interventions, obviates the need for courts to engage in difficult balancing tests to determine whether the contact is sufficiently egregious to warrant a presumption of prejudice.²²⁸ Although some balancing is inherent in determining whether or not an intervention is innocuous, innocuous

220. *Id.* at 327–28 (citation omitted).

221. *See Cheek*, 94 F.3d at 141 (holding that the court must presume prejudice only if the extraneous communication was not innocuous); *supra* notes 95–111 and accompanying text (discussing *Wisehart v. Davis*, in which the court noted that many instances of jury contacts with third parties are so insignificant that they will not trigger a presumption of prejudice).

222. Michael L. De Shazo, Note, *Freethought Society of Greater Philadelphia v. Chester County: The Desirability of a De Minimis Exception to the Supreme Court’s Establishment Clause Jurisprudence*, 65 LA. L. REV. 507, 525 (2004).

223. *Id.* at 524 (quoting Jeff Nemerofsky, *What is a “Trifle” Anyway?*, 37 GONZ. L. REV. 315, 316, 325 (2002)).

224. *Id.* at 525 (internal quotation omitted).

225. *Id.*

226. *See Gershman, supra* note 3, at 327–28 (“By the same token, applying an inflexible presumption in cases of technical, trivial, and arguably insignificant although improper transgressions, may be an excessive and unjustifiable response.”).

227. *See id.* (explaining that the prosecution may disprove prejudice if the court invokes a presumption of prejudice).

228. *See id.* at 328 (“If a court chooses not to apply a presumption of prejudice, then the court would evaluate the severity of the suspected intrusion, and only if the court determines that prejudice is likely would the government be required to prove its absence.”).

interventions should be readily apparent and should not require any extensive effort to balance. Judge Posner's example in *Wisheart* of the spouse telling a juror that he or she looked good on television (in the jury box) aptly demonstrates the type of extraneous communication with jurors that courts would label as innocuous.²²⁹ No significant balancing would be required to reach the conclusion that the spouse's comment was an innocuous intervention. In contrast, any intervention that is arguably prejudicial would not be labeled innocuous.²³⁰

If courts do not apply a presumption of prejudice, the government will have to prove the absence of prejudice only in situations where the court first determines that prejudice is likely.²³¹ This approach presents two key problems. The first problem is the inherent difficulty in distinguishing between cases where prejudice is likely and cases where prejudice is not likely. Granting courts complete discretion to decide when to apply a presumption of prejudice has led and will continue to lead to inconsistent results.²³² For example, the Ninth Circuit applies an automatic presumption of prejudice in cases involving jury tampering, whereas the Fifth Circuit has decided that jury tampering is not sufficiently egregious to warrant automatically a presumption of prejudice.²³³

Justice Marshall described the second problem in his dissent in *Smith*.²³⁴ When the defendant makes post-verdict allegations of improper contacts or exposure to extraneous information, jurors will be less likely to admit that they were prejudiced in their deliberations than jurors will be if the defendant makes the allegations before the verdict.²³⁵ Placing the burden on the defendant to prove prejudice makes it difficult for a criminal defendant

229. See *supra* notes 95–111 and accompanying text (discussing the Seventh Circuit's decision in *Wisheart v. Davis*).

230. One alternative to noting an exception for innocuous extraneous communications would be to apply the *Remmer* presumption with no exception for innocuous extraneous communications. The circuit courts have largely rejected this approach, and it would be unnecessarily burdensome on the courts, given the courts' ease in identifying innocuous extraneous communications.

231. Gershman, *supra* note 3, at 328 (internal citation omitted).

232. *Id.* at 327 (“[E]ven courts that continue to apply the presumption do so inconsistently.”).

233. Compare *United States v. Dutkel*, 192 F.3d 893, 894 (9th Cir. 1999) (“Once tampering is established, we presume prejudice and put a heavy burden on the government to rebut the presumption.”), with *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) (“[O]nly when the court determines that prejudice is likely should the government be required to prove its absence.”).

234. See *supra* notes 69–74 and accompanying text (discussing Justice Marshall's dissent in *Smith v. Phillips*).

235. See *supra* notes 69–74 and accompanying text (discussing Justice Marshall's dissent in *Smith v. Phillips*).

to prove prejudice successfully during a post-verdict inquiry.²³⁶ Of course, since the juror is unlikely to admit prejudice at a hearing, the government's burden to disprove prejudice will be less demanding. Nevertheless, since a criminal defendant's Sixth Amendment rights are at stake, requiring the government to "bear[] the ultimate burden of disproving prejudice" is neither excessive nor unreasonable.²³⁷

V. CONCLUSION

Although "there are no perfect trials,"²³⁸ a guilty verdict should not be "immune from judicial review" when a criminal defendant has not received an impartial jury trial as guaranteed by the Sixth Amendment.²³⁹ The Supreme Court's decision in *Remmer* sought to protect this constitutional right by applying a presumption of prejudice whenever the jury is exposed to extraneous information.²⁴⁰ Subsequent developments in the law, however, including Rule 606(b)'s codification and the Supreme Court's decisions in *Smith* and *Olano*, have led several federal courts of appeals to either abandon the presumption altogether or only apply the presumption in limited circumstances.²⁴¹ Although questioning jurors after they have rendered verdicts and permitting courts to impeach jury verdicts raise serious policy concerns, a criminal defendant's Sixth Amendment right to a fair trial by an impartial jury should outweigh these underlying policy concerns.²⁴² Furthermore, the *Remmer* presumption of prejudice provides a feasible framework that protects a criminal defendant's constitutional rights while simultaneously shielding against impeachment of verdicts due to insignificant or trivial claims of prejudice.²⁴³

236. See *supra* notes 69–74 and accompanying text (discussing Justice Marshall's dissent in *Smith*, in which he argued that jurors are unlikely to admit prejudice during post-verdict inquiries).

237. Gershman, *supra* note 3, at 328.

238. *Id.* at 351 (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984)).

239. *Id.*

240. See *supra* Part II.A (discussing a criminal defendant's constitutional right to a fair trial and the presumption of prejudice articulated in *Remmer*).

241. See *supra* Part III (examining the various circuit-court applications of *Remmer*'s presumption of prejudice).

242. See *supra* Part IV (noting the policy concerns implicated by impeachment of verdicts and the policy concerns implicated when a presumption of prejudice is not applied).

243. See *supra* Part IV.B (discussing *Remmer*'s application).