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Textualism and the Fourteenth Amendment

Jonathan F. Mitchell*

Abstract. Modern Fourteenth Amendment doctrine is difficult to square with constitutional text. The text of the Equal Protection Clause, for example, makes no distinction between racial classifications and other discriminatory practices; it requires equal protection of the laws for every "person" within a state's jurisdiction. Nor does the text require equal treatment or equal rights; it requires equality only in the "protection of the laws." Yet the Supreme Court assumes that the Equal Protection Clause is implicated whenever a state treats people differently—without pausing to ask whether the state has withheld the equal "*protection* of the laws." And the Court has created a textually unsupportable distinction between racial discrimination, which it subjects to "strict scrutiny," and other discriminatory practices that receive "rational basis review."

Yet textualism has been enjoying a resurgence in both constitutional and statutory interpretation. This resurgence raises two questions for the Court's equality doctrines. The first is whether those who embrace textualism must reject the Court's equality jurisprudence as textually illegitimate. The second is whether those who embrace the Supreme Court's landmark equality pronouncements must reject textualism as incompatible with those rulings. The answer to both questions is no. Almost all of the Supreme Court's canonical racial-equality decisions have a firm textual foundation in congressional civil rights legislation—a fact that the Supreme Court has all but ignored by insisting on grounding its equality pronouncements exclusively in the Equal Protection Clause. And Congress enacted most of these civil rights statutes *before* the Supreme Court invoked the Equal Protection Clause to declare a discriminatory practice unconstitutional. So these civil rights statutes can and should be used to supply textual support for the

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Experts in the Jury Room
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Introduction

As Justice Holmes once stated, "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence."[1] This prohibition encompasses a juror's introduction of extrajudicial facts and information into the jury room. Expert jurors—that is, jurors with relevant personal expertise—pose a distinct risk of introducing extraneous information given the wealth of knowledge they already possess that other jurors would be prohibited from seeking out. This Note explores the risk expert jurors can pose and how state laws currently treat a juror's use of her personal expertise during deliberations.

While courts have long protected the sanctity of the jury room, they have also long allowed it to be pierced when extraneous information—information beyond that adduced at trial—enters into it.[2] After all, it is also a fundamental principle of the legal system that a jury must determine the outcome of a case based solely upon the arguments and evidence presented at trial. A juror's use of extraneous prejudicial information violates a party's due process rights and, for criminal defendants, Sixth Amendment rights.[3] And extraneous information is less trustworthy as it has not benefited from the safeguards of the judicial process intended to weed out unreliable evidence, such as the rules of evidence and cross-examination.[4] Consequently, courts may grant new trials

1. Patterson v. Colorado *ex rel.* Att'y Gen., 205 U.S. 454, 462 (1907).

2. *See, e.g.*, Mattox v. United States, 146 U.S. 140, 149-51 (1892) (reversing a defendant's criminal conviction in part because the bailiff improperly read a newspaper article to the jury outside the courtroom); *cf.* FED. R. EVID. 606(b)(2)(A) (allowing jurors to testify, in an inquiry into the validity of a verdict or indictment, about whether "extraneous prejudicial information was improperly brought to the jury's attention").

3. *See, e.g.*, Bouret-Echevarría v. Caribbean Aviation Maint. Corp., 784 F.3d 37, 45 (1st Cir. 2015) ("In recognition of the due process implications of a tainted jury, and the need to maintain juror privacy, our law provides for the exploration of the influence of extraneous information on the deliberations of a jury under controlled circumstances."); United States v. Montes, 628 F.3d 1183, 1187 (9th Cir. 2011) ("A juror's communication of extraneous information implicates the Confrontation Clause."); James v. State, 912 So. 2d 940, 953 (Miss. 2005) ("[W]e find that the jury considered extraneous prejudicial information and that [the defendant] did not receive a fair trial."); Zana v. State, 216 P.3d 244, 249 (Nev. 2009) ("We conclude that the juror's independent search of the Internet did amount to the use of extrinsic evidence in violation of the Confrontation Clause.").

4. *See, e.g.*, FED. R. EVID. 403 (allowing relevant evidence to be excluded "if its probative value is substantially outweighed by a danger of," among other things, causing "unfair prejudice, confusing the issues, [or] misleading the jury"); Crawford v. Washington, 541 U.S. 36, 61 (2004) (discussing the role of cross-examination in ensuring the reliability of evidence); Farese v. United States, 428 F.2d 178, 180 (5th Cir. 1970) ("Judicial control of the juror's knowledge of the case pursuant to the laws of evidence is fundamental to the prevention of bias and prejudice.").

when extraneous information enters the jury room, such as when jurors consult dictionaries,[5] real estate appraisal guides,[6] outside attorneys,[7] or medical reference books;[8] take independent trips to accident sites[9] or crime scenes;[10] perform independent experiments;[11] or read newspaper accounts of the trial.[12] Courts have also prohibited people who have personal knowledge of the facts of a case from serving on the jury.[13]

In contrast to the modern jury's limitations on extraneous information, historically "jurors were chosen precisely because they possessed knowledge of a dispute."[14] Courts even selected specialized juries that were intended to use the jurors' expertise. For instance, courts seated juries of merchants to decide commercial disputes[15] and juries of matrons to determine whether a woman was pregnant.[16] Through the early eighteenth century, legal scholars and jurists insisted that "the judge cannot fully know upon what evidence the jury give their verdict; for they may have other evidence than what is shewed in

5. *See, e.g.*, Fulton v. Callahan, 621 So. 2d 1235, 1249 (Ala. 1993); State v. Williamson, 807 P.2d 593, 596-97 (Haw. 1991).

6. Simmons v. State Highway Comm'n *ex rel.* State, 222 A.2d 366, 367-68 (Me. 1966) ("As to that aspect of the problem involving the presence in the jury room of documentary evidence not properly presented and admitted at trial, it is basic that the presence of such is improper.").

7. People v. Honeycutt, 570 P.2d 1050, 1053 (Cal. 1977) ("[J]urors cannot investigate the case outside the courtroom and . . . they must decide the guilt or innocence of a defendant based only on evidence introduced at trial.").

8. Fitzpatrick v. Allen, 575 N.E.2d 750, 753 (Mass. 1991).

9. *See, e.g.*, Markee v. Biasetti, 575 N.E.2d 1083, 1084-85 (Mass. 1991) ("[T]he extraneous influence to which the two jurors were exposed violated the principle that litigants are entitled to a fair trial, based on information presented according to the rules of evidence."); Goff v. Kinzle, 417 P.2d 105, 107-08 (Mont. 1966) ("It is not within the province of a juror to make an independent investigation, carry out certain experiments and then make a map and take it with him to the jury room . . . .").

10. Williams v. State, 570 So. 2d 884, 887 (Ala. Crim. App. 1990).

11. *See, e.g.*, *In re* Beverly Hills Fire Litig., 695 F.2d 207, 215 (6th Cir. 1982); Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co., 286 Cal. Rptr. 435, 448, 450 (Ct. App. 1991).

12. Marshall v. United States, 360 U.S. 310, 312-13 (1959) (per curiam).

13. *See, e.g.*, Dalkovski v. Glad, 774 P.2d 202, 205-06 (Alaska 1989) ("A juror with personal knowledge may base his or her verdict on facts not in evidence and may improperly divulge these facts to other jurors. . . . The juror with personal knowledge therefore presents a greater threat to the litigants' right to a fair trial.").

14. John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 219 (1988).

15. JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 154 (2006).

16. *Id.* at 80-81.

court."[17] Overall, "[t]he twentieth century American jury has moved a long way from its medieval origins."[18]

Yet "it is an impossible standard to require [the jury room] to be a laboratory, completely sterilized and freed from any external factors."[19] It is not realistic to expect jurors to come into the jury room and leave the wealth of their personal experience behind them, to refrain from viewing the evidence—as they view the entire world—through the lens of their knowledge and experiences. After all, "[o]ne function of the jury is to infuse a practical sense into the legal theories offered at trial."[20] Jurors are supposed to bring in the common knowledge of the community to interpret and analyze the evidence adduced at trial,[21] such as a party's theory of the case or a witness's credibility. As the Supreme Court of California has recognized, "[j]urors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system."[22]

The desire to restrict the jury to solely the evidence presented at trial and the constitutional values that such a restriction serves to protect—due process, the right of confrontation, and the right to counsel—exist in tension with the historical roots of the jury and modern jurors' continuing use of everyday experience during deliberation. This tension is particularly acute when a juror enters the jury room with specialized knowledge relevant to the facts at issue—knowledge of the sort possessed by expert witnesses. After all, courts act as gatekeepers when parties seek to introduce expert testimony.[23] Jurors with specialized expertise, such as doctors and lawyers, can bring into the jury room the same sort of evidence an expert witness would testify to at trial, only

17. Mitnick, *supra* note 14, at 219-20 (quoting GILES DUNCOMBE, TRIALS PER PAIS: OR, THE LAW OF ENGLAND CONCERNING JURIES 225 (London, E. Nutt, R. Nutt & R. Gosling 6th ed. 1725)) (discussing scholarly sources).

18. United States *ex rel.* Owen v. McMann, 435 F.2d 813, 817 (2d Cir. 1970).

19. Rideau v. Louisiana, 373 U.S. 723, 733 (1963) (Clark, J., dissenting).

20. *In re* Beverly Hills Fire Litig., 695 F.2d 207, 214 (6th Cir. 1982).

21. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) ("Individuals are not expected to ignore as jurors what they know as men—or women."); Beck v. Alabama, 447 U.S. 625, 642 (1980) ("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." (quoting Jacobs v. State, 361 So. 2d. 640, 652 (Ala. 1978) (Shores, J., dissenting))); State v. Messelt, 518 N.W.2d 232, 236 (Wis. 1994) ("In fact, we expect jurors to bring their experiences, philosophies, and common sense to bear in their deliberations. These human characteristics comprise one of the great strengths of our jury system.").

22. People v. Marshall, 790 P.2d 676, 699-700 (Cal. 1990).

23. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-93 (1993) (discussing guidelines for determining the admissibility of expert testimony); People v. Kelly, 549 P.2d 1240, 1244-45 (Cal. 1976) (discussing expert testimony admission standards).

without having gone through the usual safeguards in place to rule out impermissible or untrustworthy evidence, let alone those governing expert testimony.

If one juror is banned from consulting an encyclopedia, can another juror be allowed to consult the encyclopedic information already in her mind? Is it, for instance, permissible for a juror who is a nurse to independently determine the victim's cause of death[24] or for a juror who is a transportation consultant to describe additional steps a railroad corporation could have taken to prevent an accident?[25] Have these jurors brought in prohibited extraneous information when they use their expertise and then share their opinions and knowledge, or have they simply analyzed the evidence through the lens of personal experience?

This Note considers these questions. First, in Part I, this Note situates the jury in its historical context and summarizes the evolution from juries chosen for their special knowledge to modern impartial juries bound to consider only the evidence admitted at trial. In Part II, this Note then discusses the problem of extraneous information and the threat it poses to constitutional rights, whether the information comes from the lips of a juror or a third party. Next, in Part III, this Note surveys current state case law governing when a juror's use of personal specialized knowledge introduces extraneous information into the jury room, an undertaking no scholar has yet completed.[26] Finally, this Note concludes by suggesting how courts should handle jurors with specialized expertise relevant to the factual issues in dispute. It argues for allowing parties to strike a juror for cause if the juror has expertise related to a material fact at issue while restricting findings of prejudicial misconduct when the parties chose to retain the juror knowing of her relevant expertise.

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24. *See* People v. Maragh, 729 N.E.2d 701, 703, 705 (N.Y. 2000) (finding misconduct).

25. *See* McDonald v. S. Pac. Transp. Co., 83 Cal. Rptr. 2d 734, 737 (Ct. App. 1999) (finding misconduct).

26. Michael Mushlin briefly discusses the two leading cases on the subject without analyzing other states' approaches or the nuances of the two approaches. Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POL'Y REV. 239, 259-65 (2007) (discussing State v. Mann, 39 P.3d 124 (N.M. 2002); and *Maragh*, 729 N.E.2d 701). Two notable student pieces also react to decisions rendered by the highest courts in their respective states. *See* Chance Deaton, Comment, *The Juror Who Knows Too Much: Dealing with Expert Jurors After* Ledbetter v. Howard, 38 OKLA. CITY U. L. REV. 249, 250 (2013) (discussing Ledbetter v. Howard, 276 P.3d 1031 (Okla. 2012)); Sharon Blanchard Hawk, Note, State v. Mann*: Extraneous Prejudicial Information in the Jury Room; Beautiful Minds Allowed*, 34 N.M. L. REV. 149, 149 (2004) (discussing *Mann*, 39 P.3d 124). Finally, Paul Kirgis references cases from Texas, Washington, and New York in his discussion of state law defining an "expert juror." Paul F. Kirgis, *The Problem of the Expert Juror*, 75 TEMP. L. REV. 493, 505-16 (2002).

I. Situating the Modern Jury in Its Historical Roots

The modern understanding of the jury is a departure from the historical conception of the jury. Today's jury is an impartial cross-section of the community that bases its decision solely on the evidence presented at trial. But it was not until the eighteenth century that legal scholars consistently agreed that a juror with personal knowledge of the facts in dispute needed to offer that knowledge in open court.[27] And it was not until the twentieth century that the concept of an impartial, cross-sectional jury took hold in American law.[28]

The historical jury did not face the same limitation on considering extraneous facts as the modern jury does. Between the twelfth and sixteenth centuries, juries were empowered to decide cases on the basis of the jurors' accrued personal knowledge.[29] Juries in the sixteenth and seventeenth centuries were in fact required to contain a minimum number of individuals from the community, who were presumably more likely to have such personal knowledge.[30] Procedures were established, such as requiring jurors to report any personal ignorance about the dispute and intentionally including witnesses as jurors, to help ensure these requirements were met.[31] Drawing juries from the local community, a tradition now embodied in the Sixth Amendment's vicinage requirement, also helped guarantee that jurors had the requisite personal knowledge.[32] While the early juries were "never simply a collection of witnesses," jurors were encouraged to seek out, acquire, and use their own personal knowledge when deciding cases.[33]

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27. Mitnick, *supra* note 14, at 207.

28. OLDHAM, *supra* note 15, at 204.

29. *Id.* at 117-21; Mitnick, *supra* note 14, at 219; *see* Roger W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 WASH. L. REV. 1, 14 (1982) ("The jurors returned a verdict based on what they knew, what they were told before trial, and what they were told at trial. The early juror was both a witness and a judge of facts . . . ."); Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 149 (2003) ("[M]edieval jurors came to court with extensive knowledge about the case and the defendant."); Mitnick, *supra* note 14, at 203 ("It has been amply demonstrated that the early jurors reached a verdict solely on the basis of their personal knowledge.").

30. James C. Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 163-65 (1983); Daniel W. Van Ness, *Preserving a Community Voice: The Case for Half-and-Half Juries in Racially-Charged Criminal Cases*, 28 J. MARSHALL L. REV. 1, 19-20 (1994).

31. Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 584 (1993); Van Ness, *supra* note 30, at 21-22 (discussing how a juror's lack of knowledge was grounds for removal).

32. OLDHAM, *supra* note 15, at 122 ("[S]ecuring a jury from the neighborhood where the facts would most readily be known was thought to be an important protection for an accused party."); Mike Macnair, *Vicinage and the Antecedents of the Jury*, 17 LAW & HIST. REV. 537, 548-49 (1999); *see* Mitnick, *supra* note 14, at 219.

33. Landsman, *supra* note 31, at 585-86.

Through the nineteenth century, courts also selected jurors on the basis of the jurors' specialized expertise. For instance, courts empaneled juries of matrons to determine whether a woman sentenced to death was quick with child or whether a widow was pregnant with her deceased husband's heir: this was, after all, a task for which women were viewed as having particular expertise.[34]

Judges empaneled juries with relevant specialized knowledge in other contexts, as well: juries of clerks and attorneys to try cases of attorney misconduct[35] and even a jury of cooks and fishmongers to try a man accused of selling bad food.[36] One of the most well-known examples is the use of merchant juries, in both England and the colonies, to try cases involving commercial disputes.[37] Judges in England frequently deferred to the verdicts of merchant juries, even occasionally as to questions of law, because of the jurors' perceived expertise.[38] Another well-known example is the use of the jury *de medietate linguae*, the "mixed-language," "mixed-tongue," or "half-and-half" jury.[39] A noncitizen party could request such a jury, which was composed of half noncitizens and half locals.[40] It was assumed that this type of jury could compensate for bias against foreign litigants and would be more able to relate to an alien party's perspective.[41]

This historical vision of a jury empowered to use its own knowledge to decide a case is reflected in scholarly analysis and judicial opinions discussing a party's ability (in a civil case) to seek a new trial due to the verdict's

34. OLDHAM, *supra* note 15, at 98-99; Judy M. Cornett, *Hoodwink'd by Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature*, 4 WM. & MARY J. WOMEN & L. 1, 17-18 (1997).

35. OLDHAM, *supra* note 15, at 141.

36. *Id.*; *see also* Macnair, *supra* note 32, at 549 (referring to special juries of cooks).

37. OLDHAM, *supra* note 15, at 154-63; Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 214-15 (2013).

38. OLDHAM, *supra* note 15, at 158-59 (collecting examples); Shelfer, *supra* note 37, at 217-18.

39. For examples of American cases involving mixed juries, see Respublica v. Mesca, 1 U.S. (1 Dall.) 73, 75 (Pa. 1783), which upheld the grant of a trial by a jury *de medietate linguae*; and Richards v. Commonwealth, 38 Va. (11 Leigh) 723, 731 (1841), which upheld the denial of a request for an order requiring the trial court to convene a jury *de medietate linguae*.

40. Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury de Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645, 654-57 (1997); Oldham, *supra* note 30, at 167-71; Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury* de Medietate Linguae*: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 785 (1994); Van Ness, *supra* note 30, at 35 & n.217.

41. *See, e.g.*, Fukurai & Davies, *supra* note 40, at 655; Oldham, *supra* note 30, at 169-71; Van Ness, *supra* note 30, at 37, 39.

inconsistency with the evidence.[42] Through the seventeenth century, both experts and jurists agreed that judges could not know the entire evidence on which juries based their verdicts (making it difficult to know whether the verdicts were thus contrary to that evidence).[43] As Chief Justice Vaughn famously held in *Bushell's Case*, the judge could not determine what the evidence showed and whether the jury went against the weight of that evidence when the jury might well have had more information than the judge on the matter.[44] It was not until the eighteenth century that British courts began granting new trials when the evidence did not support the jury verdict, illustrating a shift in their conception of the role of juries.[45] Furthermore, by the late eighteenth century, British legal scholars and judges insisted that an empaneled juror with personal knowledge of the facts at issue serve as a witness and be cross-examined in open court rather than act as an unsworn and unexamined witness in the secrecy of the jury room.[46]

Thus, the historical tendency to select jurors for their knowledge, whether personal or expert, gave way to the modern rule requiring juries to decide cases on only the specific facts in evidence. Few scholars have explored the specific reasons underlying this shift. Because the shift predates the rise of modern evidence law, formal rules of evidence likely did not play a decisive role.[47] However, there is some suggestion that the rise of the modern rule was part of an attempt by judges and the legal profession to exert greater control over juries in light of the failure of the historic tool of jury control, the attaint.[48] The attaint was a process analogous to trying a jury for perjury: a second jury was empaneled, and if the second jury reached a different outcome, the entire first jury was convicted and punished criminally.[49] Allowing a judge to order a new trial when the verdict is inconsistent with the evidence—as the modern

42. *Cf.* Mitnick, *supra* note 14, at 219-20 (quoting and listing cases and scholars); *id.* at 222 ("And do you challenge a juryman because he is supposed to know something of the matter? For that reason the juries are called from the neighbourhood, because they should not be wholly strangers to the fact." (quoting Trial of Nathaniel Reading (1679) 7 Howell's State Trials 259, 267)).

43. *Id.* at 219-20.

44. *See id.* at 207 (discussing Bushell's Case (1670) 124 Eng. Rep. 1006, 1012).

45. *Id.* at 223-24.

46. *See id.* at 224-26 (discussing the transition).

47. *See, e.g.*, T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 551 (1999) (concluding that modern evidence law came into being around the end of the eighteenth century).

48. Kirst, *supra* note 29, at 14-15; Mitnick, *supra* note 14, at 209-12.

49. Kirst, *supra* note 29, at 14; *see* Mitnick, *supra* note 14, at 210 (describing the punishment for attaint as "severe").

rule does—is a much less cumbersome means of controlling juries and their verdicts.[50]

Regardless of the cause, in the late nineteenth century, American states began passing statutes requiring jurors to determine cases solely on the basis of the evidence.[51] Yet even then American courts considered it the province of the jury to use some form of personal knowledge. For instance, the Court of Appeals of South Carolina noted in 1834 that "[t]he constitution of the trial by jury pre-supposes that [jurors] will act, in some degree, from their own knowledge of the character of the parties and their witnesses. It is for this reason that the jurors are drawn from the vicinage . . . ."[52] The court further noted that juries "may find on distrust of the witnesses on their own proper knowledge."[53] Thus, even when the legal system of the United States began to statutorily confine juries to the evidence admitted at trial, it still clung to a vestige of the old rule by allowing jurors to use some personal knowledge to analyze this evidence.

It is no longer permissible, though, for jurors to use outside information as evidence to decide a case. For instance, the California civil pattern jury instructions contain a standard instruction informing jurors that they "must decide all questions of fact in this case from the evidence received in this trial and not from any other source."[54] The Maryland criminal pattern jury instructions include statements informing jurors that they "are to completely disregard any newspaper, television, Internet or radio reports that [they] may have read, seen or heard. Because such reports are not evidence, it would be a violation of [their] oath as jurors to consider them in deciding" a case.[55] The instructions further inform jurors that they "must not consider any information obtained from an outside source, including conversations [they] may have had with others."[56] As the next Part discusses, constitutional underpinnings support these limitations on a jury's consideration of facts beyond those in evidence—that is, their consideration of extraneous information.

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50. Mitnick, *supra* note 14, at 209-12.

51. Edward J. Finley II, Comment, *Ignorance as Bliss?: The Historical Development of an American Rule on Juror Knowledge*, 1990 U. CHI. LEGAL F. 457, 474 & n.112 (compiling statutes).

52. *Id.* at 473 (quoting M'Kain v. Love, 20 S.C.L. (2 Hill) 188, 189 (1834)).

53. *Id.* (quoting *M'Kain*, 20 S.C.L. (2 Hill) at 189).

54. CALIFORNIA JURY INSTRUCTIONS: CIVIL § 1.00.5 (2014); *see also* CALIFORNIA JURY INSTRUCTIONS: CRIMINAL § 1.03 (2016) ("You must decide all questions of fact in this case from the evidence received in this trial and not from any other source.").

55. 1 DAVID AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY § 2.01 (2016).

56. *Id.*

II. The Problem of Extraneous Information

Today the jury is instructed to consider only the evidence adduced at trial in reaching a verdict. When a juror is exposed to extraneous information, such as through a news report, a conversation with a third party, or an Internet search, courts are willing to grant new trials.[57] As the United States Supreme Court has recognized, this requirement that a jury's verdict be based solely upon the evidence from trial "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."[58]

That is, this prohibition on extraneous prejudicial information is rooted in the constitutional due process rights of litigants. Extraneous information that comes before the jury has not passed through the processes of trial that serve to protect litigants: rules of evidence intended to weed out misleading or confusing information, procedural rules that protect privileged information, and rules governing expert witnesses that ensure faulty science is not considered.[59] Moreover, a party is not given the chance to respond to any information first presented in the jury room.[60] In light of this lack of procedural safeguards, courts have consistently agreed that extraneous information threatens the due process rights of litigants.[61]

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57. *See, e.g.*, Mattox v. United States, 146 U.S. 140, 150-51 (1892) (holding that a new trial should be granted where the jury considered prejudicial news reports not introduced into evidence).

58. Turner v. Louisiana, 379 U.S. 466, 472 (1965).

59. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) ("Individuals are not expected to ignore as jurors what they know as men—or women."); Beck v. Alabama, 447 U.S. 625, 642 (1980) ("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." (quoting Jacobs v. State, 361 So. 2d. 640, 652 (Ala. 1978) (Shores, J., dissenting))); United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984) ("In addition, since such evidence has not been subject to the rules of evidence, it may confuse the jurors . . . ."); Farese v. United States, 428 F.2d 178, 180 (5th Cir. 1970) ("Judicial control of the juror's knowledge of the case pursuant to the laws of evidence is fundamental to the prevention of bias and prejudice."); State v. Eison, 533 N.W.2d 738, 743 (Wis. 1995) ("The risk stems from the possibility that a defendant's conviction rests on information not part of the evidence offered in the courtroom under the rules of evidence and under the supervision of the court.").

60. *See, e.g.*, *Farese*, 428 F.2d at 180; Titus v. State, 963 P.2d 258, 263 (Alaska 1998) ("Permitting juries to convict defendants when they have considered such extra-record information would undermine interests in both fairness and accuracy by robbing the defendant of the chance to contest such evidence."); Nesmith v. Clinton Fire Ins. Co., 8 Abb. Pr. 141, 147 (N.Y. Sup. Ct. 1858) ("That is not evidence to which the juror listens out of court, when there is no opportunity to meet it, and no chance for cross-examination; and yet it influences the mind, tends to the grossest wrong and injustice, and is a violation of the most sacred obligations of a juror.").

61. *See, e.g.*, Loving v. Baker's Supermarkets, Inc., 472 N.W.2d 695, 703 (Neb. 1991) (holding that jurors' use of extraneous information "prevented a fair trial" for the plaintiff); Barnhart v. Int'l Harvester Co., 441 P.2d 1000, 1005 (Okla. 1968) (stating that juror use of

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In the context of criminal cases, extraneous information poses an additional constitutional problem. Under the Sixth Amendment to the United States Constitution, a criminal defendant has the right "to be confronted with the witnesses against him."[62] The Supreme Court has interpreted the Sixth Amendment as requiring "at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."[63] After all, when a juror introduces new information into the jury room, that juror "in effect becomes an unsworn witness."[64] If the juror is speaking within the secret jury room rather than the open courtroom, the defendant is not present. The defendant therefore has not had the opportunity to confront or cross-examine this new witness against him with the help of counsel. Unsurprisingly, then, the Supreme Court has repeatedly affirmed that a jury's consideration of extraneous prejudicial information can violate the Sixth Amendment rights of a criminal defendant.[65]

The importance of preventing a jury from considering extraneous information is further acknowledged by the rules of evidence governing juror testimony about jury deliberations. Typically, such testimony is prohibited. Under some versions of the common law rule, a juror could not testify about

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extraneous prejudicial information can "obstruct[] due administration of justice" and "imperil[] confidence in the judicial system"); Correll *ex rel.* Castaneda v. Pederson, 518 N.W.2d 246, 251 (Wis. 1994) (observing that juror use of extraneous prejudicial information likely impeded the defendant's "right to trial by an impartial jury").

62. U.S. CONST. amend. VI.

63. *Turner*, 379 U.S. at 472-73. While *Turner* may, strictly speaking, directly interpret notions of due process rather than the Sixth Amendment constellation of rights, the decision has consistently been read to stand for the proposition that the Sixth Amendment precludes the consideration of extraneous information. *See, e.g.*, DeBurgo v. St. Amand, 587 F.3d 61, 70 (1st Cir. 2009) (stating that in *Turner* the Supreme Court held that the Sixth Amendment jury trial right precludes juror consideration of extraneous prejudicial information); Robinson v. Polk, 438 F.3d 350, 359 (4th Cir. 2006) (interpreting *Turner* as standing for the proposition that the Sixth Amendment's Confrontation Clause precludes juror consideration of extraneous information); Salazar v. Dretke, 419 F.3d 384, 403 (5th Cir. 2005) (reading *Turner* as implicating the right to trial by an impartial jury).

64. Sassounian v. Roe, 230 F.3d 1097, 1108 (9th Cir. 2000).

65. *See, e.g.*, Parker v. Gladden, 385 U.S. 363, 364-65 (1966) (per curiam); *Turner*, 379 U.S. at 472-73; Mattox v. United States, 156 U.S. 237, 242-43 (1895); *see also* United States v. Bagnariol, 665 F.2d 877, 884 (9th Cir. 1981) ("The [S]ixth [A]mendment demands that evidence material to the guilt or innocence of an accused be subject to judicial control and the rules of evidence."); Virgin Islands v. Gereau, 523 F.2d 140, 151 (3d Cir. 1975) ("[W]here jurors consider evidence, in the form of either fact or opinion, which has not been introduced in court, the confrontation and counsel rights of an accused are obviated as regards the particular evidence received.").

jury deliberations.[66] Today, this prohibition is encoded in most states' rules of evidence and in the Federal Rules of Evidence.[67] However, many of these rules carve out an exception for juror testimony about extraneous prejudicial information brought before the jury.[68] That the need to prevent a jury from considering extraneous prejudicial information prevails over the importance of jury secrecy speaks to the gravity of the harm that such extraneous information poses.

Extraneous information is a threat to litigants' rights whether it comes to the jury from a third party or from a juror herself. As Judge Friendly once wrote, "[t]here is no rational distinction between the potentially prejudicial effect of extra-record information which a juror enunciates on the basis of the printed word and that which comes from his brain."[69] Thus, courts have refused to distinguish between extraneous information that comes into the jury room from a juror, such as when a juror conducts independent investigations or research or has preexisting knowledge of a criminal defendant's history, and that which comes into the jury room from a third party, such as via a newspaper report or note.[70]

III. Drawing the Line Between Personal Experience and Extraneous Information

As discussed above, jurors are permitted to use their personal knowledge and common sense to analyze the evidence admitted at trial but are prohibited—for constitutional reasons—from bringing in outside facts and information gained through newspaper articles, dictionaries, encyclopedias, and independent investigations and research.

66. *See, e.g.*, Warger v. Shauers, 135 S. Ct. 521, 525-27 (2014) (discussing the common law approaches).

67. *See* FED. R. EVID. 606; Benjamin T. Huebner, Note, *Beyond* Tanner*: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, 1487-89 (2006) (stating that thirty-two states have adopted evidentiary rules analogous to Federal Rule of Evidence 606(b)).

68. *See, e.g.*, FED. R. EVID. 606(b)(2)(A); IND. R. EVID. 606(b)(2)(B); *see also* Huebner, *supra* note 69, at 1487-89, 1487 n.96 (stating that twenty states have "identical or substantially similar" rules to Rule 606(b) and that six states have rules that are "substantially similar" to Rule 606(b) except that they "specify one other area of misconduct to which jurors may testify").

69. United States *ex rel.* Owen v. McMann, 435 F.2d 813, 820 (2d Cir. 1970).

70. *See, e.g.*, Jeffries v. Wood, 114 F.3d 1484, 1490 & n.4 (9th Cir. 1997) (en banc) (refusing to distinguish "unsworn testimony [that] comes from a juror rather than a court official" and noting that this position is in agreement with "almost every other circuit" that had addressed the issue at that point in time); Bowman v. State, 373 P.3d 57, 60-61 (Nev. 2016) (concluding that jurors who had conducted their own experiment committed misconduct).

Expert jurors occupy a space at the boundary between these two distinct categories. After all, an expert juror, by virtue of her expertise and training, has access to a type of information that other jurors would not have unless they conducted (prohibited) independent research to obtain it. A lay juror would need to consult the Physician's Desk Reference to learn the side effects of a drug; a juror who is also a doctor may have already memorized that information. This distinct access to specialized information raises a question: If the lay juror commits misconduct when she researches a drug's side effects in the Physician's Desk Reference, is the doctor committing misconduct when she consults the Physician's Desk Reference that she has already memorized?[71]

States have taken three approaches to answering the question whether and to what extent a juror's use of her personal expertise constitutes misconduct. A minority of states are restrictive, prohibiting most uses of personal expertise; a majority of states are permissive, allowing nearly any use; and California and Washington take a middle ground, allowing some but not all use of juror expertise.

A. New York: Minority Approach

A minority of states, including New York, completely "prohibit jurors from applying their specialized knowledge to deliberations and view a juror's professional or educational expertise as extraneous prejudicial information."[72]

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71. This analysis focuses primarily on questions involving juror use of outside expertise with regard to facts as opposed to law. Given that "the trial court . . . determines the law to be applied to the facts of the case," the way courts handle extraneous law is likely to differ from their approach to extraneous facts. *In re* Stankewitz, 708 P.2d 1260, 1262-63 (Cal. 1985). For instance, the Supreme Court of California has stated that "[w]hen extraneous law enters a jury room . . . [,] the defendant is denied his constitutional right to a fair trial unless the People can prove that no actual prejudice resulted." *Id.* (finding prejudicial misconduct where a juror who was also a police officer brought in erroneous information concerning the legal definition of robbery); *see also* People v. Marshall, 790 P.2d 676, 699 (Cal. 1990) (finding prejudicial misconduct where a juror who was also a police officer brought in erroneous information on juvenile law). These cases illustrate that a more stringent standard applies to juror interjection of extraneous law than to extraneous facts.

72. Kendrick v. Pippin, 252 P.3d 1052, 1064 (Colo. 2011) (describing the minority approach); *accord* Meyer v. State, 80 P.3d 447, 458 (Nev. 2003) (describing New York's approach).

A recent opinion by the Supreme Court of Oklahoma suggests that Oklahoma may also follow the minority approach, though the court's opinion was narrowly drawn to the specific facts at issue in the case. *See* Ledbetter v. Howard, 276 P.3d 1031, 1036-38 (Okla. 2012) (finding that statements made by a juror that relied on her professional expertise constituted extraneous information when the juror had said in voir dire that she would not use her outside expertise in evaluating the case). Another case frequently cited as an example of the minority approach is *State v. Thacker*, which held that a juror who was also a rancher committed misconduct when he calculated an estimate of the size of some calves impounded by the state. 596 P.2d 508, 509 (Nev. 1979) (per curiam).

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These states prohibit a juror from using her personal expertise, including by giving an opinion on the evidence using that expertise.[73]

The leading opinion in this camp is that of the New York Court of Appeals in *People v. Maragh*. In *Maragh*, two jurors in a homicide trial were also nurses, and they performed independent estimations of the victim's blood loss using their own past professional experience.[74] These estimations contradicted the medical expert witness's testimony as to the cause of death.[75] The Court of Appeals affirmed the trial court's order setting aside the verdict on the ground that the nurses had "bec[o]me . . . unsworn witness[es]" for the prosecution, leading the jury "beyond the legally admitted evidence."[76] While recognizing that it is "unrealistic to expect jurors to shed their life experiences," the court nonetheless held that prejudicial misconduct could arise from "(1) jurors conducting personal specialized assessments not within the common ken of juror experience and knowledge (2) concerning a material issue in the case, and (3) communicating that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were evidence."[77] This behavior "injects nonrecord evidence into the jury's deliberative process," which in turn "compromises the integrity of the jury process, as would the introduction of ex parte communications or materials that are not part of tested evidence at trial."[78]

Courts in New York have since applied the three-prong test laid out in *Maragh* to determine when a juror commits misconduct by using her expertise during jury deliberations.[79] First, the juror must use some sort of expertise that is "not within the common ken of juror experience and knowledge."[80] For instance, an appellate court found that two jurors who were teachers committed misconduct when they discussed the training teachers receive about interactions with students because this was "not within the common

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However, in *Meyer v. State*, the Nevada Supreme Court expressly adopted the majority approach and disavowed the approach in *Thacker*. 80 P.3d 447, 458-59 (Nev. 2003).

73. *See, e.g.*, People v. Maragh, 729 N.E.2d 701, 704-05 (N.Y. 2000) (finding misconduct where a juror who was also a nurse told the jury that in her professional experience, the evidence was consistent with a specific cause of death).

74. *Id.* at 703.

75. *Id.* at 702-03.

76. *Id.* at 703, 706.

77. *Id.* at 704-05.

78. *Id.* at 705.

79. *See, e.g.*, People v. Scerbo, 872 N.Y.S.2d 763, 765 (App. Div. 2009) (discussing *Maragh* and its three-part test); Swartz v. Alloway, No. 2969-07, 2012 WL 7186191, at *6 (N.Y. Sup. Ct. Apr. 4, 2012) (discussing *Maragh*).

80. *Maragh*, 729 N.E.2d at 704.

understanding of the average juror."[81] A social worker's comments—informed by his professional experience—about the behavior of sexual assault victims also amounted to juror misconduct because "it is not uncommon for courts to permit expert testimony on precisely th[at] subject."[82]

Second, the expert juror's opinion must concern a material issue in the case.[83] Thus, comments from a juror who was also an attorney about whether the other defendants in a medical malpractice lawsuit had settled did not constitute misconduct because the comments did not concern a material issue of fact the jury had to decide.[84] Similarly, comments made by a juror with law enforcement experience about a homicide defendant's parole status were not misconduct when the parole status was not material to the case.[85]

Finally, the juror must communicate her expert opinion to the other jurors "with the force of private, untested truth as though it were evidence."[86] If a juror merely *uses* her personal expertise to form an opinion but never shares the expertise with the other jurors, she does not commit misconduct. For instance, in *People v. Camacho* the court found that there was no misconduct where a juror who was a nurse used his training while reaching a verdict but did not communicate anything related to his training to the other jurors.[87]

As developed in *Maragh* and subsequent cases, the minority view takes an expansive approach to regulating the behavior of expert jurors.

B. Majority Approach

The majority of states that have considered the question disagree with New York's approach, holding instead that "a juror's intradeliberational statements, when based on personal knowledge and experience, do not constitute extraneous prejudicial information."[88] Thus, these states find it

81. *Scerbo*, 972 N.Y.S.2d at 766.

82. People v. Jerge, 935 N.Y.S.2d 396, 397-98 (App. Div. 2011).

83. *Maragh*, 729 N.E.2d at 704.

84. *Swartz*, 2012 WL 7186191, at *6.

85. People v. Smith, No. 7063/01, 2006 WL 1132409, at *8-9 (N.Y. Sup. Ct. Mar. 14, 2006).

86. *Maragh*, 729 N.E.2d at 704-05.

87. 742 N.Y.S.2d 402, 404 (App. Div. 2002) (finding no misconduct where a juror relied on nursing training but never "communicated [it] to the other jurors").

88. Kendrick v. Pippin, 252 P.3d 1052, 1065 (Colo. 2011), *abrogated on other grounds by* Bedor v. Johnson, 292 P.3d 924 (Colo. 2013); *see also* Marquez v. City of Albuquerque, 399 F.3d 1216, 1223 (10th Cir. 2005) (noting that a juror's personal experience does not constitute extraneous prejudicial information); Hard v. Burlington N.R.R. Co., 870 F.2d 1454, 1462 (9th Cir. 1989) ("Moreover, even if [the juror] did assert some special knowledge regarding x-ray interpretation we do not feel that a new trial would be warranted. It is expected that jurors will bring their life experiences to bear on the facts of a case."); Brooks v. Zahn, 826 P.2d 1171, 1178 (Ariz. Ct. App. 1991) ("We reject the

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permissible for a juror to refer to and rely on any personal expertise during deliberations.

A case that illustrates the majority approach is New Mexico's *State v. Mann*. In *Mann*, a juror who was also an engineer performed a series of calculations to determine the probability that the defendant's theory of the case—that the victim accidentally fell on a screwdriver—was true.[89] These calculations mirrored those an expert witness had performed during trial.[90] While recognizing that extraneous information implicates a defendant's right to a fair trial, the New Mexico Supreme Court held that the juror's calculations were not extraneous information because they stemmed from the juror's own mental processes and the evidence from trial.[91] The court also expressed concern that a contrary outcome would "surely result in a chilling effect on

invitation to categorize specialized knowledge possessed by a juror and discussed during deliberations as extrinsic or extraneous information."); Martin v. State, 779 S.E.2d 342, 369 (Ga. 2015) ("However, there is a distinction between a juror who provides actual evidence specifically about the defendant or his or her crime that was learned outside the courtroom and a juror whose past experiences and learning provide context and insight that allow for the evidence and arguments made at trial to be thoroughly examined. We have held that it is improper for a juror to obtain information relevant to the defendant's case *during* the defendant's trial, but we have also held that jurors properly bring to deliberations knowledge that they obtained *prior* to the trial that facilitates the jury's assessment of the evidence presented at trial . . . ."); Marr v. Shores, 495 A.2d 1202, 1205 (Me. 1985) ("The mere communication of personal knowledge by a juror to his fellow jurors during deliberations, however improper that communication may be, is part of the deliberative process itself, and therefore not 'extraneous.'"); State v. DeMers, 762 P.2d 860, 863 (Mont. 1988) (finding that a juror's possession of expertise in human anatomy "is neither extraneous information" nor "outside influence" and holding that the use of that expertise was not misconduct); Nichols v. Busse, 503 N.W.2d 173, 186 (Neb. 1993) ("[A] juror's intradeliberational statements, when based on personal knowledge not directly related to the litigation at issue, do not constitute 'extraneous' information . . . ."); Meyer v. State, 80 P.3d 447, 459 (Nev. 2003) ("A juror who has specialized knowledge or expertise may convey [her] opinion based upon such knowledge to fellow jurors."); State v. Mann, 39 P.3d 124, 132 (N.M. 2002) ("[J]urors may properly rely on their background, including professional and educational experience, in order to inform their deliberations."); Hill v. Lagrand Indus. Supply Co., 91 P.3d 768, 774 (Or. Ct. App. 2004) (noting that "numerous cases" in Oregon have held that "jurors' introduction of private knowledge outside the evidentiary record" is not misconduct); State v. Anderson, 748 S.W.2d 201, 205 (Tenn. Crim. App. 1985) ("Jurors are generally knowledgeable in many areas, and they are entitled to use their common or acquired sense in arriving at a verdict . . . ."), *overruled on other grounds by* State v. Shelton, 851 S.W.2d 134 (Tenn. 1993); State v. Heitkemper, 538 N.W.2d 561, 564 (Wis. Ct. App. 1995) ("Jurors may rely on their common sense and life's experience during deliberations. This knowledge may include expertise that a juror may have on a certain subject.").

89. 39 P.3d at 127.

90. *Id.* at 127-28.

91. *Id.* at 132-34.

jury deliberations."[92] The court's own narrow view of expert juror misconduct would, by contrast, "protect open, full, and complete deliberations."[93]

A state's decision to adhere to the majority approach may reflect how that state defines "extrinsic" or "extraneous" information. For instance, Nebraska defines "extraneous" as "existing or originating outside or beyond: external in origin: coming from the outside[,] . . . brought in, introduced, or added from an external source or point of origin."[94] Extrinsic information must thus originate *outside* the jury room. By its very definition, any expertise a juror gained before the trial cannot be extrinsic: it is already inside the jury room with the juror. Unsurprisingly, then, courts with a narrower understanding of "extrinsic information" may be less willing to adopt the majority approach—Washington case law, for instance, defines "extrinsic information" as "information that is outside all the *evidence* admitted at trial."[95]

In striking contrast to the much more restrictive minority approach of states like New York, the majority approach allows expert jurors almost unlimited ability to use their expertise during the course of jury deliberations.

C. California and Washington: A Middle Ground

California and Washington occupy a middle ground between the minority and majority approaches. Like the majority approach, both states allow jurors to use personal expertise during deliberations.[96] However, both states draw a distinction between the use of personal expertise to give *opinions* about evidence and the use of personal expertise to introduce *specific facts*.[97] The

92. *Id.* at 135.

93. *Id.* at 134; *accord Kendrick*, 252 P.3d at 1066 (characterizing the majority approach as "allow[ing] jurors to use their life experiences to engage the record evidence and to participate in thoughtful deliberations").

94. Nichols v. Busse, 503 N.W.2d 173, 188 (Neb. 1993) (alteration in original) (quoting Rahmig v. Mosley Mach. Co., 412 N.W.2d 56, 77 (Neb. 1987)); *see also* Marr v. Shores, 495 A.2d 1202, 1205 (Me. 1985) ("[W]e can interpret 'extraneous' only to refer to information introduced to the jury from outside the normal deliberative process."); State v. Heitkemper, 538 N.W.2d 561, 564 (Wis. Ct. App. 1995) ("'[E]xtraneous prejudicial information' is knowledge coming from the outside . . . ." (quoting State v. Shillcutt, 350 N.W.2d 686, 690 (Wis. 1984))).

95. Richards v. Overlake Hosp. Med. Ctr., 796 P.2d 737, 741 (Wash. Ct. App. 1990) (emphasis added).

96. *See, e.g.*, *In re* Malone, 911 P.2d 468, 486 (Cal. 1996) ("It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject . . . ."); *Richards*, 796 P.2d at 743 (finding no misconduct where a juror gave an opinion based on medical expertise).

97. *See, e.g.*, *In re Malone*, 911 P.2d at 486 ("A juror, however, should not discuss an opinion explicitly based on *specialized information obtained from outside sources*." (emphasis added)); Long v. Brusco Tug & Barge, Inc., 368 P.3d 478, 483 (Wash. 2016) (stating that it is permissible for a juror to give an "opinion based on personal experience" but not

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latter is misconduct, while the former is—as under the majority approach—permissible.

The leading case on point in California is *In re Malone*. In *In re Malone*, a juror who was a psychologist critiqued the results of a polygraph study admitted into evidence by discussing specific studies, which had *not* been admitted as evidence, on the reliability of polygraphs and how to properly conduct them.[98] The Supreme Court of California held that it is "not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject."[99] The court distinguished situations where a juror "discuss[es] an opinion explicitly based on specialized information obtained from outside sources" from those where a juror uses her expertise to give an opinion "based on the evidence at trial."[100] The former behavior—which is what the juror in *In re Malone* had done—constituted misconduct.[101]

The Washington Supreme Court similarly found misconduct where a juror told other jurors the specific salary of a Trans World Airlines pilot in a personal injury suit involving a victim who aspired to be an airline pilot.[102] The court held that the juror committed misconduct by "stat[ing] to the other jurors certain matters of fact for which [the juror] vouched and which had not been introduced in the trial" because the new facts were "not subject to objection, cross-examination, explanation or rebuttal."[103] Courts in both Washington and California have thus held that a juror does not commit

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"expressions of law or fact based on outside sources"); Halverson v. Anderson, 513 P.2d 827, 830 (Wash. 1973) (finding misconduct where the juror "stated to the other jurors certain matters of fact for which [the juror] vouched and which had not been introduced in the trial").

Given this fact/opinion dichotomy, it is also possible that Colorado subscribes to something akin to this middle approach because the *Kendrick* court stated that jurors could "rely on their professional and educational expertise to inform their deliberations so long as they do not bring in legal content or *specific factual information learned from outside the record*." 252 P.3d at 1065 (emphasis added). It is unclear whether this means factual information *in general* or factual information specific to the *defendant*, which the majority approach already recognizes as misconduct. *See id.* at 1066 ("[O]ur test . . . does not allow the juror to introduce extra facts or law, not introduced at trial, that are *specific to parties* or an issue in the case." (emphasis added)).

98. *In re Malone*, 911 P.2d at 486-87.

99. *Id.* at 486.

100. *Id.*

101. *Id.*

102. *Halverson*, 513 P.2d at 827-28. The opinion does not explain how the juror knew this particular information.

103. *Id.* at 830.

misconduct when she merely gives an opinion about the evidence[104] but does when she brings in new factual information not replicated by admitted evidence.[105]

At the heart of this middle-of-the-road approach is the fact/opinion dichotomy: use of expertise to give opinions that interpret evidence is acceptable, but use of expertise that draws in new facts is not. One of the first cases to draw this distinction was *Wagner v. Doulton*.[106] In *Wagner*, a juror who was also an engineer drew a scale diagram of the location of the accident at issue in the case and brought it into the jury room.[107] The court acknowledged the "fundamental rule that jurors may not receive evidence out of court."[108] It noted that the diagram in this case, however, served as "a pictorial representation of [the juror's] idea of the testimony he heard during trial" and was therefore based on the evidence received in court.[109] Because the juror's use of

104. *See, e.g.*, People v. San Nicolas, 101 P.3d 509, 533-34 (Cal. 2004) (finding no misconduct where a juror who was also a nurse explained a medical expert witness's testimony to the other jurors); People v. Yeoman, 72 P.3d 1166, 1217-18 (Cal. 2003) (finding no misconduct where a juror who was also a nurse discussed the meaning of the term "sociopath" and how it might apply to the defendant based on expert witness testimony offered at trial); Long v. Brusco Tug & Barge, Inc., 368 P.3d 478, 483 (Wash. 2016) (finding no misconduct where jurors were simply expressing opinions based on personal experience); Breckenridge v. Valley Gen. Hosp., 75 P.3d 944, 949 (Wash. 2003) (finding no misconduct where a juror used his "experience with his wife's migraine headaches to evaluate the evidence presented at trial"); Richards v. Overlake Hosp. Med. Ctr., 796 P.2d 737, 742-43 (Wash. Ct. App. 1990) (finding no misconduct where a juror with medical training gave an opinion about the plaintiff's injuries based on medical records admitted to evidence).

105. *See, e.g.*, McDonald v. S. Pac. Transp. Co., 83 Cal. Rptr. 2d 734, 737-38 (Ct. App. 1999) (finding misconduct where a juror who was also a transportation consultant discussed possible precautions the defendant could have taken that were never discussed during the trial); Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now, 82 P.3d 1199, 1208-09 (Wash. Ct. App. 2004) (finding that the trial court did not abuse its discretion in holding that a juror committed misconduct by sharing specific salary and retirement details with other jurors for calculation of damages); State v. Scott, No. 39251-4-I, 1998 WL 130013, at *2-3 (Wash. Ct. App. Mar. 23, 1998) (finding misconduct where a juror's discussion of the penetrating power of reloaded ammunition did not replicate expert witness testimony but instead "explained the conflict between the experts' theories in the State's favor"); State v. Briggs, 776 P.2d 1347, 1353-54 (Wash. Ct. App. 1989) (finding misconduct where a juror with a stutter "interjected" his experience on the subject into deliberations).

106. 169 Cal. Rptr. 550 (Ct. App. 1980).

107. *Id.* at 551.

108. *Id.* at 552.

109. *Id.* at 552-53; *see also* People v. Collins, 232 P.3d 32, 93 (Cal. 2010) (finding no misconduct where a juror with expertise used a computer to create a diagram of the shooting the defendant allegedly committed because "[t]he computer did not create evidence that was not already before" the juror and "[t]he diagram contained no information beyond the record").

expertise did not create new evidence but simply served to interpret admitted evidence, the juror did not commit misconduct.[110]

The Washington Court of Appeals' decision in *Long v. Brusco Tug & Barge, Inc.*, which was affirmed by the Washington Supreme Court, further clarifies the fact/opinion dichotomy.[111] In *Long*, the court discussed three prior Washington cases in which jurors had committed misconduct by bringing personal expertise into the jury room.[112] In all three cases, jurors had referenced specific facts: what an attorney had told a juror was a reasonable sum for pain and suffering,[113] the average salary of pilots working for a particular airline,[114] and government employees' salary and retirement information.[115] These cases stand in contrast to those finding no misconduct, such as a case where a juror expressed an opinion on whether a mother's illness could cause her infant's medical problems.[116] In that case, because the juror's opinion merely drew on personal experience without introducing new facts, her comments were not misconduct.[117]

As with the minority approach, juror misconduct under the middle-of-the-road approach requires that the juror have some claim to expertise.[118] The Supreme Court of California highlighted this distinction in *In re Lucas*, which involved a criminal defendant who argued that he had committed his crime under the influence of drugs.[119] The court held that a juror's comments about his drug use experience did not constitute misconduct in part because "illicit drugs and their effects have become a matter of common knowledge or experience."[120] The court also emphasized that the juror had not "brought highly technical information before the jury" and "did not hold himself out as an expert in a technical matter on the basis of his education or occupation, but

110. *Wagner*, 169 Cal. Rptr. at 552-53.

111. No. 70529-6-I, 2014 WL 3937336, at *7 (Wash. Ct. App. Aug. 11, 2014), *aff'd*, 368 P.3d 478 (Wash. 2016).

112. *Id.* at *5-6.

113. Fritsch v. J.J. Newberry's, Inc., 720 P.2d 845, 846 (Wash. Ct. App. 1986).

114. Halverson v. Anderson, 513 P.2d 827, 827-28 (Wash. 1973).

115. Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now, 82 P.3d 1199, 1207, 1209 (Wash. Ct. App. 2004).

116. Richards v. Overlake Hosp. Med. Ctr., 796 P.2d 737, 742-43 (Wash. Ct. App. 1990).

117. *Id.* at 743.

118. *See, e.g.*, People v. Cox, 809 P.2d 351, 398 (Cal. 1991) ("We find no misconduct in a single reference to factual matters of which the entire jury undoubtedly has some independent knowledge."); Moore v. Preventative Med. Med. Grp., 223 Cal. Rptr. 859, 866 (Ct. App. 1986) (finding no misconduct where a juror referenced her personal experiences of pain and suffering during damage calculations in a tort suit).

119. 94 P.3d 477, 480, 482 (Cal. 2004).

120. *Id.* at 485.

merely related his own experience."[121] Thus, where a juror does not "rel[y] on specialized knowledge or claim[] to be an expert in the field,"[122] the juror simply acts as a juror should by interpreting the evidence through the lens of personal experience.

Despite the overarching commonalities between California's and Washington's approaches, there is one key difference: California case law focuses on whether the juror's statements "[a]re not contrary to, but c[o]me within the range of, permissible interpretations of th[e] evidence."[123] In *People v. Steele*, the Supreme Court of California expressly stated that a "juror may not express opinions based on asserted personal expertise that is different from or contrary to . . . the evidence."[124] The court's own opinion—analyzing whether multiple jurors committed misconduct by referencing their military training during deliberations in a trial where the defendant used his own military experience as an excuse for killing his wife—emphasized that there were witnesses whose testimony exactly mirrored the information that the jurors referenced.[125] Lower courts in California have also overturned jury verdicts where jurors introduced opinions that were inconsistent with expert testimony, such as where two jurors who were boxers claimed they knew what caused a victim's bruise when the expert witness had been unable to speak definitively on the issue of causation.[126]

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121. *Id.*; *see also* People v. Leonard, 157 P.3d 973, 1006 (Cal. 2007) (finding no misconduct where a juror "relied on his personal experience with firearms to form an opinion about the accuracy of the murder weapon"); Breckenridge v. Valley Gen. Hosp., 75 P.3d 944, 949 (Wash. 2003) (finding no misconduct where a juror referenced his life experience with his wife's migraines).

122. People v. Engstrom, 133 Cal. Rptr. 3d 663, 673 (Ct. App. 2011); *see also* People v. Trujillo Garcia, 107 Cal. Rptr. 2d 889, 902 (Ct. App. 2001) (finding no misconduct where a juror referenced a course he took on body language because he did not "describe himself as an expert, nor was there any reason to consider him as such"); State v. Reid, No. 65934-1, 2012 WL 763016, at *4 (Wash. Ct. App. Mar. 12, 2012) (finding no misconduct where a juror discussed his experience with alcoholism because this was "within the common experience of jurors"); Chiappetta v. Bahr, 46 P.3d 797, 800-01 (Wash. Ct. App. 2002) (finding that there is no misconduct where the juror "does not purport to have special knowledge" on the issue).

123. People v. Steele, 47 P.3d 225, 248 (Cal. 2002).

124. *Id.* at 248-49.

125. *Id.*; *see also* People v. San Nicolas, 101 P.3d 509, 534 (Cal. 2004) (finding no misconduct where a juror offered remarks that were "consistent with the trial testimony" of the expert witness); People v. Yeoman, 72 P.3d 1166, 1218 (Cal. 2003) (noting that there was no indication "the juror made any assertion inconsistent with the properly admitted evidence and testimony").

126. People v. Walker, No. A126317, 2012 WL 3765170, at *6-7 (Cal. Ct. App. Aug. 31, 2012); *see also* McDonald v. S. Pac. Transp. Co., 83 Cal. Rptr. 2d 734, 738 (Ct. App. 1999) (finding misconduct where a juror's opinion "rebutted a significant element of plaintiff's proof, which was otherwise undisputed").

This focus on the consistency of a juror's expert opinion with the evidence[127] is particularly interesting given the rejection of the historical use of expert jurors. Courts could use consistency between a juror's statements and the evidence presented at trial as a proxy for determining whether the juror provided the jury outside facts on which to decide the case. However, this focus can also be interpreted literally: a juror's statements are misconduct if they do not conform to the expert witness testimony and other evidence. This second, literal reading cuts directly against the purpose of allowing jurors to use their everyday experiences in the jury room to analyze and critique the evidence.[128] After all, a juror who is a doctor could easily use his training and education to determine that a party's theory as to cause of death was implausible. If a lay juror can use her common sense to analyze the evidence and theories of the case, why should an expert juror not be allowed to use her professional expertise to analyze the evidence and theories of the case, even when that analysis contradicts expert witness testimony? To hold otherwise is to force expert jurors to play by a second set of rules without any justification for tying expert jurors' hands.

Overall, this middle approach draws a very fine line between facts and opinions.[129] Like the minority approach, it partially silences expert jurors, though not to the same extent. But it may also fail to solve the problem it is meant to address. After all, even if the specific information the expert juror relies on in giving her opinion is not shared with the rest of the jury, it is still implicit in the expert juror's opinion. The expert juror, then, is still an "unsworn witness[], incapable of being confronted by [the] defendant."[130] If the real concern with expert jurors is that they act as unsworn witnesses in violation of constitutional rights of confrontation and due process, it is arbitrary to draw the line such that when otherwise extraneous information walks into the jury room in the mind of a juror it suddenly ceases to be extraneous.[131]

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127. This rule is not followed in every state. *See, e.g.*, State v. Aguilar, 818 P.2d 165, 166-67 (Ariz. Ct. App. 1991) (finding no misconduct where a juror who was also a doctor expressly disagreed with a witness doctor's testimony).

128. *See, e.g.*, *In re* Beverly Hills Fire Litig., 695 F.2d 207, 214 (6th Cir. 1982) ("One function of the jury is to infuse a practical sense into the legal theories offered at trial.").

129. Ledbetter v. Howard, 276 P.3d 1031, 1040 (Okla. 2012) (Gurich, J., specially concurring) ("The line between a juror's application of his or her professional or occupational expertise to evidence in the record and a juror's introduction of legal content or specific factual information learned from outside the record is often a fine one.").

130. People v. Maragh, 729 N.E.2d 701, 705 (N.Y. 2000) (quoting People v. Stanley, 665 N.E.2d 190, 191 (N.Y. 1996)).

131. *Meyer v. State*, a case in which the Supreme Court of Nevada held that a juror—an employee in a dermatologist's office—committed misconduct when he looked up during trial the side effects of a drug used to treat acne, provides a useful illustration. 80

footnote continued on next page

Conclusion

Jurors with personal expertise pose a unique problem as sources of extraneous information. Jurors who are nurses can provide their own medical diagnoses, jurors who are engineers can list additional steps a defendant could have taken to prevent an accident, and jurors who are scientists can bring up specific academic studies to attack a defendant's polygraph test. Such expert jurors can be the encyclopedias and webpages that jurors are expressly prohibited from consulting. They can bring in the sort of extraneous information that other jurors are expressly prohibited from seeking out. As they offer these extrajudicial facts, expert jurors serve as pseudo-expert witnesses, "unsworn" and "incapable of being confronted by [the] defendant."[132] Yet the majority of state courts to have addressed the issue hold that because that expert information walked into the jury room with the juror, it does not constitute extraneous information. Only a minority of courts hold that when a juror uses her expertise to reference specific extrajudicial facts, she has committed juror misconduct by introducing extraneous information.

Understandably, courts want jurors to use their personal experience as a lens through which to view the evidence.[133] However, allowing expert jurors to do the same when their personal experience amounts to material expertise goes too far. Allowing jurors to use their expertise to become hidden expert witnesses undermines a party's due process rights and a criminal defendant's Sixth Amendment rights. And there is particular reason to be concerned given that an expert juror's expertise evades the additional layer of scrutiny courts typically apply to expert witnesses.[134] Under the Federal Rules of Evidence, trial courts bear a special obligation to ensure that all expert testimony is "not

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P.3d 447, 460 (Nev. 2003). Had the juror looked up this information a day *before* the trial, remembered it, and shared it during deliberations, he would not have committed misconduct under the majority approach.

132. *Maragh*, 729 N.E.2d at 705 (quoting *Stanley*, 665 N.E.2d at 191).

133. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) ("Individuals are not expected to ignore as jurors what they know as men—or women."); Beck v. Alabama, 447 U.S. 625, 642 (1980) ("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." (quoting Jacobs v. State, 361 So. 2d. 640, 652 (Ala. 1978) (Shores, J., dissenting))); People v. Marshall, 790 P.2d 676, 699-700 (Cal. 1990) ("Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system."); State v. Messelt, 518 N.W.2d 232, 236 (Wis. 1994) ("In fact, we expect jurors to bring their experiences, philosophies, and common sense to bear in their deliberations. These human characteristics comprise one of the great strengths of our jury system.").

134. For a discussion of the guidelines for determining the admissibility of expert testimony, see Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592-93 (1993); and People v. Kelly, 549 P.2d 1240, 1244-45 (Cal. 1976).

only relevant, but reliable."[135] In at least some states, courts bear similar obligations.[136] These evidentiary rules exist because of the heightened danger that those who claim to be experts will be the source of unreliable evidence.[137] Thus, expert jurors may pose an additional risk to constitutional guarantees given the heightened possibility of unreliability in the context of expert witnesses.

The possibility of experts sitting on juries—and the risk of introducing extraneous information they pose—is not merely hypothetical: in light of the removal of various exemptions from jury service for professionals like doctors and lawyers, millions of expert jurors are serving on juries. New York's abolition of the automatic exemption for professionals in 2003, for instance, added over one million people to the jury pool.[138] Data from the Arizona Jury Project, an initiative that observed jury deliberations in fifty civil cases in the 1990s, indicate that an average of two jurors per eight-member jury had "potentially relevant occupational experience."[139] Expert jurors are serving on juries, and their expertise may be influencing the outcome of trials.[140]

Despite these real risks, the majority approach overlooks the ways that a juror's use of personal expertise can bring in specific extrajudicial facts, such as specific studies on polygraphs or a diagnosis of the victim's cause of death. And these specific extrajudicial facts raise the same concerns as a nonexpert juror's introduction of extraneous information. Consequently, an expert's use of outside facts may be more properly classed as juror misconduct than as the permissible use of personal experience and common sense.

Given that the majority of state courts have decided to limit the ability to use posttrial procedures to determine whether an expert juror has improperly used her expertise during deliberations,[141] it makes sense to look to other means of addressing this problem. Other scholars have suggested two primary solutions: (1) allowing jurors with relevant expertise to be struck for cause and

135. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (quoting *Daubert*, 509 U.S. at 589).

136. *See, e.g.*, *Kelly*, 549 P.2d at 1244-45.

137. *See, e.g.*, *Daubert*, 509 U.S. at 595 ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991))).

138. *See, e.g.*, Steven W. Fisher, *Outside Counsel: The Continuing Problem of Juror Expertise*, N.Y. L.J., May 5, 2003, at 4, 4.

139. Shari Seidman Diamond et al., *Embedded Experts on Real Juries: A Delicate Balance*, 55 WM. & MARY L. REV. 885, 898-99, 902, 906 (2014).

140. *See, e.g.*, Mushlin, *supra* note 26, at 269-70 (recounting stories from jury consultants about the influence of expert jurors).

141. *See supra* note 67 (discussing state law on the prohibition of juror testimony in a challenge to the validity of a verdict or indictment).

(2) giving limiting instructions restricting juror use of personal expertise.[142] Both of these solutions have merits and drawbacks. The best possibility is to combine striking expert jurors for cause with restrictions on review where a party fails to object to such a juror.

Limiting instructions give courts the opportunity to remind jurors not to use any prohibited extraneous information and to avoid peering into the jury room. For instance, New York has a pattern jury instruction telling jurors they "may not communicate any personal professional expertise [they] might have or other facts not in evidence to the other jurors during deliberations" and they "must base [their] discussions and decisions solely on the evidence presented to [them] during the trial and that evidence alone."[143] However, a jury instruction standing alone may not fully prevent expert jurors from introducing extraneous information and thus might not fully protect litigants. It is not clear that jurors will—or even can—follow limiting instructions.[144] Evidence from the Arizona Jury Project's civil cases, for instance, suggests that jurors themselves struggle with the question how much to consider their unique knowledge.[145] In fact, jurors often consider evidence they have been expressly told not to consider.[146] Indeed, "[o]ne of the primary ways jurors deliberate is by comparing their personal experiences with the evidence they hear at trial."[147] It is incredibly difficult for anyone to perform the mental gymnastics required to examine the evidence without ever considering her entire wealth of personal experience and knowledge.[148] Given this human limitation, it would be wise to supplement a limiting instruction with further protections.

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142. *See, e.g.*, Diamond et al., *supra* note 139, at 929-33; Kirgis, *supra* note 26, at 523-37; Mushlin, *supra* note 26, at 277-83.

143. 1A NEW YORK PATTERN JURY INSTRUCTIONS: CIVIL § 1:25A (3d ed. 2015).

144. *See, e.g.*, Bruton v. United States, 391 U.S. 123, 137 (1968) (holding that a limiting instruction for the jury was insufficient to protect a criminal defendant in a joint trial where the jury was instructed to consider the codefendant's confession only against the confessing codefendant); *see also* FED. R. EVID. 403 advisory committee's note (stating that when considering the risk of unfair prejudice a piece of evidence poses, courts should consider the "probable effectiveness or lack of effectiveness of a limiting instruction").

145. Diamond et al., *supra* note 139, at 920-26 (analyzing and quoting trial transcripts from the Arizona Jury Project).

146. Kirgis, *supra* note 26, at 528; *see also* Judith L. Ritter, *Your Lips Are Moving . . . but the Words Aren't Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163, 197-201 (2004) (discussing empirical studies on whether juries follow instructions).

147. Mushlin, *supra* note 26, at 278-79.

148. People v. Maragh, 729 N.E.2d 701, 705 (N.Y. 2000) ("It would be unrealistic to expect jurors to shed their life experiences in performing this important civic duty just because they are professionals.").

Allowing jurors to be struck for cause prior to trial is also a practical and plausible solution that avoids the need for courts to peer into the jury room. Many states that follow the majority approach have suggested that the proper time to remove a juror with potentially relevant personal expertise is during voir dire.[149] However, the current system of challenging jurors for cause would need to be adjusted for this solution to work. Current challenges for cause require a showing that the juror either fails to meet statutory qualifications or is biased.[150] Yet with an expert juror, it is not often apparent at the outset how the juror's expertise might bias the juror. Professional expertise—in contrast to the personal experience of being the victim of a violent crime or being the best friend of the criminal defendant—is not inherently skewed toward one party or the other.[151] It is not surprising, then, that some courts have refused to strike jurors for cause solely on the basis of their expertise.[152]

A more liberal approach—allowing jurors with expertise relevant to a material fact in issue to be stricken for cause without any evidence of bias—would better protect the rights of litigants. It would place the gatekeeping function of the courts at the front end of the trial process rather than the back end. Rather than policing the jury *after* the verdict is entered and any misconduct comes to light, trial courts could prevent jurors who are positioned to bring in prohibited extraneous information from serving on the jury in the first place. By focusing on preventing potentially problematic jurors, courts avoid the danger of allowing extraneous, material evidence into the jury room altogether. They can also conserve judicial resources by minimizing the number of times that alleged misconduct—and the attendant motions and potential mistrials—occurs. This approach would also protect parties' rights without prying into the secrecy of the jury room. In light of the importance of

149. *See, e.g.*, Brooks v. Zahn, 826 P.2d 1171, 1178 (Ariz. Ct. App. 1991) ("The proper time for a party to raise the issue of the potential impact of a juror's specialized knowledge is during voir dire . . . ."); State v. Mills, 748 A.2d 891, 894 (Conn. App. Ct. 2000) (affirming the trial court's dismissal of a juror who had written a doctoral thesis on faulty eyewitness identification in a case that turned on an eyewitness identification where the juror's expertise was not revealed to counsel at voir dire); State v. Saunders, 992 P.2d 951, 964 (Utah 1999) ("In sum, the trial judge abused his discretion in refusing to allow a further probing of the jurors' attitudes toward child sexual abuse [during voir dire], given [the jurors'] prior 'specialized knowledge.'").

150. Kirgis, *supra* note 26, at 525-26.

151. Mushlin, *supra* note 26, at 276-77; *see also* State v. Mann, 39 P.3d 124, 135 (N.M. 2002) ("We do not believe that because an individual has particular professional experience or is well-educated one can assume that he or she is biased in favor of any particular party.").

152. *See, e.g.*, Blank v. Hubbuch, 633 N.E.2d 439, 442 (Mass. App. Ct. 1994); *see also* Mushlin, *supra* note 26, at 256-57 (discussing cases in which courts refused to strike a juror on the basis of expertise alone).

jury secrecy,[153] any solution that minimizes peering into the jury room is preferable to one that requires juror testimony on jury deliberations.

Courts can also adopt an additional means of focusing party attention on the voir dire period: limiting a party's ability to challenge a juror with relevant expertise when parties either fail to question that juror on her expertise or choose to seat the juror despite such expertise. It is well established that parties are capable of waiving their rights if they fail to make a timely assertion of those rights.[154] The way courts address allegations of juror bias serves as a helpful illustration. Courts have held, for example, that a party waives its right to challenge a juror after the verdict on the basis of bias if the party fails to adequately question the juror during voir dire or chooses to retain the juror regardless of potential bias.[155] This is true even though juror bias implicates a criminal defendant's Sixth Amendment right to be tried by an impartial jury.[156] The courts that recognize this rule regarding waiver of challenges for bias state that voir dire is the appropriate time during which to determine a juror's bias and seek to remove that juror.[157] Thus, a court may find that by failing to object to a juror at the time of seating, a party waives its ability to later challenge that juror.[158]

This approach could be applied to address expert jurors. In tandem with expanding challenges for cause, courts could find an objection to an expert juror who may have improperly used her expertise waived if the parties allowed the expert juror to remain on the panel or failed to adequately question her about relevant expertise. After all, it is entirely foreseeable—as the discussion of many cases and anecdotes here has shown—that an expert juror will bring in extraneous information. Thus, parties should be on notice to the

153. *See* Tanner v. United States, 483 U.S. 107, 119-20 (1987) (discussing the importance of secrecy in jury deliberations).

154. *See, e.g.*, United States v. Olano, 507 U.S. 725, 731 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (quoting Yakus v. United States, 321 U.S. 414, 444 (1944))).

155. *See, e.g.*, United States v. Tucker, 137 F.3d 1016, 1029 (8th Cir. 1998) ("Failure to ask the questions necessary to expose bias at voir dire can result in waiver of objections to a juror."); State v. Webster, 865 N.W.2d 223, 237 (Iowa 2015) ("We have held that a party who fails to avail himself or herself of procedures for identifying bias [like voir dire] waives later challenges for juror impartiality."); State v. Bruno, 60 A.3d 610, 620 (Vt. 2012) ("[T]he right to challenge a juror is waived by a failure to object before the jury is impaneled if the basis for the objection is known or might, with reasonable diligence, have been discovered during voir dire." (quoting State v. Koveos, 732 A.2d 722, 725 (Vt. 1999))).

156. Polk v. Commonwealth, 574 S.W.2d 335, 336-37 (Ky. Ct. App. 1978).

157. *See, e.g.*, *id.*

158. *See, e.g.*, United States v. Johnson, 688 F.3d 494, 501 (8th Cir. 2012).

problems such jurors pose. By failing to question jurors on relevant expertise or to object to jurors with such expertise, a party knowingly waives the right to later challenge that juror's actions, just as in the case of juror bias. In fact, Washington courts have already begun applying this doctrine to juror expertise.[159]

These two solutions—expanding strikes for cause and finding waiver when parties fail to use those strikes—would operate in tandem. The waiver doctrine would incentivize parties to challenge jurors *before* the trial begins, thereby removing a potential problem before it occurs. In addition, focusing on the behavior of parties prior to trial—such as whether the party should have won a challenge for cause or chose not to make such a challenge—helps further shield the jury room and protect the secrecy of jury deliberations. Moreover, by applying the waiver doctrine here, courts would also limit their review to decisions made during the voir dire process rather than venturing—as they are often forbidden from doing—into the jury's deliberations. And by allowing parties ample opportunity to strike a juror for cause before that juror enters the jury room, courts would ensure that the constitutional rights of litigants are protected—just as protected, in fact, as in cases involving juror bias.

This dual solution offers a compromise between avoiding extraneous information and protecting litigants' constitutional rights with only minimal drawbacks. Some have voiced concern over the loss of heterogeneity from allowing parties with expertise to be struck for cause, noting that diverse juries enable richer deliberations because jurors can bring in a broader range of experiences and perspectives.[160] However, such a concern is not implicated under this combined approach, which would not categorically prohibit any single profession from serving on all juries but would rather prevent jurors with certain training or skills from serving on a case-by-case basis. A doctor could serve on a tax fraud case but not a case where the cause of death is disputed, while a tax accountant could serve on the latter case but not the former. Thus, allowing parties to strike jurors with relevant personal expertise

159. *See, e.g.*, State v. Brewster, No. 62764-3-I, 2009 Wash. App. LEXIS 2661, at *12 (Wash. Ct. App. Oct. 26, 2009) (declining to grant a new trial where parties "accepted the venire with knowledge of the jurors' backgrounds"); State v. Russell, No. 52948-o-I, 2005 WL 291584, at *3 (Wash. Ct. App. Feb. 7, 2005) (per curiam) (declining to grant a new trial where the "party kn[ew] about [the] juror's specialized knowledge and [chose] to retain the juror on the panel"); State v. Briggs, 776 P.2d 1347, 1353-54 (Wash. Ct. App. 1989) (finding misconduct where a juror concealed relevant personal experiences and knowledge during voir dire and used them during deliberations); *see also* Martin v. State, 779 S.E.2d 342, 369 (Ga. 2015) ("Having accepted Juror Lemmond as a juror, Martin cannot now complain that her knowledge drawn from her past employment assisted the other jurors in considering the evidence and arguments made by the parties at trial.").

160. *See, e.g.*, Diamond et al., *supra* note 139, at 930.

for cause at the start of trial without evidence of bias while also limiting findings of juror misconduct if not struck provides an adequate balance between protecting the due process and fair trial rights of litigants on the one hand and the secrecy and sanctity of the jury room on the other.

The combined solution this Note proposes will require courts to consider which kinds of jurors qualify as experts and when those jurors' personal expertise is relevant to a fact in dispute. Courts are adequately prepared for this task and have many valid approaches to choose from. Courts could, for instance, focus on whether a juror is credentialed or trained, as doctors and lawyers are.[161] Alternatively, courts could ask whether the juror would be primarily drawing on vicarious knowledge gained through professional training (such as medical or law school) or first-hand knowledge gained through personal experience (such as prior drug use).[162] Both of these tests reflect those that courts already use in determining whether a witness is qualified to testify as an expert, which focus on the witness's knowledge (such as formal education), skills (such as formal training), and experience.[163] As with all tests, there will be some arbitrariness in the standard used to exclude jury members. But determining the nuances of this Note's two-fold approach is still well within the ability of courts and will provide a more adequate means of protecting the constitutional rights of litigants.

161. *See* Mushlin, *supra* note 26, at 273.

162. *Cf. id.* at 273-74 (distinguishing between "professional jurors" who gained knowledge through formal training and jurors with specialized information from their personal life experiences).

163. *See, e.g.*, PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE § 7:8, at 583-84 (2015) (discussing expert qualification); *see also* MCCORMICK ON EVIDENCE § 13, at 67-71 (Kenneth S. Broun ed., 6th ed. 2006) (discussing the same).