
2021

Iceberg Ahead: Why Courts Should Presume Bias in Cases of Extraneous Juror Contacts

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Recommended Citation

Andrew S. Rumschlag, *Iceberg Ahead: Why Courts Should Presume Bias in Cases of Extraneous Juror Contacts*, 72 Case W. Res. L. Rsrv. 463 (2021)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol72/iss2/20>

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— Note —

ICEBERG AHEAD: WHY COURTS
SHOULD PRESUME BIAS IN CASES OF
EXTRANEOUS JUROR CONTACTS

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INTRODUCTION

In its 1954 decision, *Remmer v. United States*, the Supreme Court declared that outside influences on jurors are “presumptively prejudicial.”¹ Although *Remmer* involved paradigmatic jury tampering, extraneous contacts involving jurors—and juror misconduct more broadly—comes in many forms.² Since *Remmer*, the internet and electronic secondary sources have required courts to address extraneous contact involving internet legal research and social media.³ And, although the Supreme Court incorporated the Sixth Amendment right to an impartial jury against the states, remedies for extraneous contacts involving jurors vary widely between jurisdictions.⁴

In the half-century following *Remmer*, although stopping short of explicitly overruling *Remmer*, the Court cast doubt on the presumption’s vitality, sowing widespread confusion among the lower courts.⁵ Further, states have adopted myriad procedures aimed at remedying extraneous juror contacts.⁶ This variation likely stems from confusion about where extraneous contact with a juror ends and juror misconduct begins.⁷

A presumption that extraneous contacts are prejudicial is not a minor, idiosyncratic difference between jurisdictions. As Justice Brennan once noted, “[T]he assignment of the burden of proof on an

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1. *Remmer v. United States (Remmer I)*, 347 U.S. 227, 229 (1954).
 2. See Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 323–24 (2005), which explains:

“Defendants have claimed that jurors were [1] influenced by external contacts with third parties, [2] exposed to extraneous, non-evidentiary information, [3] engaged in contrived experiments and improper reenactments in the jury room, [4] made dishonest and misleading statements during jury selection, [5] engaged in conduct demonstrating bias and prejudice, [6] suffered from physical and mental impairments, [7] engaged in pre-deliberation discussions of the evidence, and [8] willfully violated the trial court’s legal instructions.”

(footnotes omitted). *But see infra* text accompanying notes 176–77; *infra* Part III(A) (explaining why extraneous contacts should not be treated as juror misconduct). In this Note, “extraneous contact” means any contact between a juror and extrajudicial influence pertaining to the matter for which a juror is empaneled—the first two of Gershman’s above examples.
 3. See generally Amanda McGee, Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 307–14 (2010).
 4. See *infra* Part I(D)(1); *infra* Part II.
 5. See *infra* Part II.
 6. See *infra* Part III.
 7. See *infra* Part II.

issue where evidence does not exist and cannot be obtained is outcome determinative. [The] assignment of the burden is merely a way of announcing a predetermined conclusion.”⁸ Extraneous contacts present that precise problem. Evidence that a contact biased a juror is generally unavailable due to the no-impeachment rule. Although the rule permits testimony about whether an extraneous contact happened, it generally excludes relevant information that might otherwise prove whether that contact impacted deliberations.⁹ When the only fact either party can prove is whether or not extraneous contact happened, rather than what its effects were (i.e., whether a juror manifested bias during deliberation), the burdened party fails.

Put another way, the no-impeachment rule restricts evidence of whether extraneous contacts influenced a jury’s verdict, exposing only the proverbial tip of the iceberg. The question is whether to presume until proven otherwise that what lies unseen below the water threatens to sink the defendant’s impartial jury guarantee—or whether to sail ahead under the assumption that no danger lurks beneath the waves, in the interest of making good time.¹⁰

This Note examines the Supreme Court’s, federal circuits’, and state courts’ approaches to remedying extraneous contacts. From those disparate approaches, it attempts to formulate a uniform solution that strikes a constitutionally sound balance between the impartial jury guarantee and judicial efficiency. Part I examines the Supreme Court’s extraneous-contact jurisprudence, the Sixth Amendment impartial-jury guarantee’s incorporation, and the Federal Rules of Evidence. Part II surveys a three-way split between federal circuits, as well as the patchwork of state approaches to extraneous contacts. Part III proposes a procedure that courts should adopt when analyzing claims of extrinsic juror bias. The proposed procedure strikes an appropriate balance between the constitutional guarantee of an impartial jury and concerns of judicial efficiency.

I. THE LAW GOVERNING EXTRANEOUS JUROR CONTACTS

American colonists decried the Crown’s decision to deprive colonists of their jury-trial right in the Declaration of Independence.¹¹ While it is unclear how frequently colonists were in fact denied a jury trial, the

8. United States v. Leon, 468 U.S. 897, 943 (1984) (Brennan, J., dissenting) (alteration in original) (quoting Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332–33 (1973)).

9. See *infra* Part I(D)(2).

10. See generally *TITANIC* (Paramount Pictures 1997).

11. Sydney George Fisher, *The Twenty-Eight Charges Against the King in the Declaration of Independence*, 31 PA. MAG. HIST. & BIOGRAPHY 257, 288 (1907).

Crown's actions nevertheless inspired the Sixth and Seventh Amendments.¹² The Supreme Court later held that the right to trial by impartial jury was so fundamental to our concept of ordered liberty that it incorporated the right against the states through the Fourteenth Amendment.¹³ Yet the Court's approach to rooting out bias caused by extraneous contacts has trended away from stalwartly protecting the impartial-jury guarantee towards favoring finality.¹⁴ Simultaneously, the range of potential extraneous contacts has broadened, encompassing everything from quintessential jury tampering¹⁵ to jurors researching legal terms of art on Wikipedia.¹⁶ Regardless of how extraneous contact happens, courts are concerned that extraneous contacts will affect a juror's ability to deliberate impartially.¹⁷

A. *Constitutional Impartial-Jury Requirements*

The impartial-jury requirement appears in the Sixth Amendment's text, which ensures that criminal defendants "enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."¹⁸

Even one biased juror may deprive a defendant of her Sixth Amendment right.¹⁹ But an impartial juror need not be "totally ignorant of the facts and issues" of the case for which she is empaneled.²⁰ Rather, the Supreme Court has described impartiality as a state of

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12. *See id.* (noting some confusion regarding which acts of Parliament the Declaration of Independence referred to).
 13. *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968); *see infra* Part I(D)(1).
 14. *Compare* *Mattox v. United States*, 146 U.S. 140, 150 (1892) ("Private communications . . . between jurors and third persons . . . invalidate the verdict, . . . unless their harmlessness is made to appear."), *with* *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("[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.").
 15. *E.g.*, *Remmer I*, 347 U.S. 227, 228.
 16. *E.g.*, *United States v. Lawson*, 677 F.3d 629, 639 (4th Cir. 2012) (applying *Remmer* to a juror who "research[ed] on Wikipedia the term 'sponsor,' an element of the crimes charged").
 17. *See generally* SARAH N. WELLING, 3 FEDERAL PRACTICE AND PROCEDURE § 587 (4th ed.), Westlaw (database updated Apr. 2021 & Supp. Jan. 2022) for background.
 18. U.S. CONST. amend. VI.
 19. *Williams v. Bagley*, 380 F.3d 932, 944 (6th Cir. 2004) (citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992)).
 20. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

indifference that must be assessed on a case-by-case basis.²¹ The Court recognized as early as 1963 that “widespread and diverse methods of communication” ensure that well-informed prospective jurors inevitably have some sort of opinion or impression about the case for which they are called.²² To avoid an impossible standard, it is enough that a juror can set aside any preconceived notions and “render a verdict based on the evidence presented in court.”²³

Unlike criminal defendants, whose impartial-jury right is rooted in the Sixth Amendment, civil litigants’ right to a jury trial is found in the Seventh Amendment.²⁴ Although the Seventh Amendment does not explicitly guarantee an “impartial” jury, courts have consistently found that the Seventh and Fifth Amendments require impartial juries in civil trials.²⁵ Although courts have occasionally applied *Remmer’s* holding to civil proceedings,²⁶ this Note will focus on *Remmer’s* primary application: protecting criminal defendants’ Sixth Amendment right to an impartial jury.

B. Early Caselaw: Burr and Mattox

While riding circuit in 1807, Chief Justice Marshall had an early opportunity to define the impartial jury guarantee in *United States v. Burr*.²⁷ Aaron Burr’s attorneys sought to prevent potential jurors from being empaneled. They argued that “inflammatory articles” about

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21. *United States v. Wood*, 299 U.S. 123, 145–46 (1936) (“Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.”).
 22. *Irvin*, 366 U.S. at 722.
 23. *Id.* at 723. This has been the impartial-jury standard since the early 19th century. *Id.* at 722. And every state constitution preserved the jury-trial right for criminal defendants accused of serious crimes even before the Supreme Court incorporated the Sixth Amendment impartial-jury right against the states. *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968).
 24. U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).
 25. James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 269 n.1 (1988).
 26. *E.g.*, *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977) (requiring a *Remmer* hearing after allegations of jury tampering in a § 1983 proceeding).
 27. 25 F. Cas. 49, 52 (C.C.D. Va. 1807) (No. 14,692g). This was a companion case to *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694), in which Aaron Burr stood trial for treason. See generally Morrison Shafroth, *The Aaron Burr Conspiracy*, 18 A.B.A. J. 669 (1932) (explaining the surrounding circumstances).

Burr's conduct had biased the jurors against him.²⁸ Marshall explained the practical difficulties of empaneling a truly impartial jury in particularly high-profile cases.²⁹ "[L]ight impressions," therefore, were permissible—but "strong and deep impressions" that could not yield to evidence at trial were not.³⁰ Further, whether a party could challenge a potential juror's impartiality depended on whether the impression pertained to a case's dispositive element.³¹ Burr's attorneys could therefore challenge only those jurors who "ha[d] made up and delivered the opinion that [Burr] entertained the treasonable designs with which he [was] charged, and that he retained those designs and was prosecuting them when the act charged in the indictment is alleged to have been committed"³² Chief Justice Marshall's *Burr* decision exemplifies the tension between guaranteeing a perfectly impartial jury and empaneling imperfect human jurors.³³ But while *Burr* instructed courts how to root out bias before empaneling jurors, it did not deal with bias as a result of extraneous contacts with already-empaneled jurors.

Nearly a century after *Burr*, the Court foreshadowed its *Remmer* rule in *Mattox v. United States*.³⁴ Clyde Mattox stood trial for murder.³⁵ During deliberations, the bailiff provided extrajudicial information to the jury. The bailiff told jurors that Mattox would stand trial again on different charges after it returned its verdict—and that his alleged victim was the third person Mattox had killed.³⁶ Further, the jury was read an excerpt from an article in a local newspaper, which opined that "[i]f [Mattox was] not found guilty of murder he [would] be a lucky man" because of the "very strong" evidence against him.³⁷

Chief Justice Fuller articulated a rule that foreshadowed *Remmer's* "presumptively prejudicial" doctrine: "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the

28. *Burr*, 25 F. Cas. at 49.

29. *Id.* at 50–51.

30. *Id.* at 51.

31. *Id.* ("[T]o say that any man who had formed an opinion on any fact conducive to the final decision of the case would therefore be considered as disqualified from serving on the jury, would exclude intelligent and observing men").

32. *Id.* at 52.

33. *See id.* at 50–51. ("Were it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required.").

34. 146 U.S. 140 (1892).

35. *Id.* at 141.

36. *Id.* at 142.

37. *Id.* at 143.

officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.”³⁸ Because the *Mattox* Court specified that the default response to extraneous contacts is a mistrial, it implicitly burdened the government to prove the “harmlessness” of “possibly prejudicial” contact with jurors.

Burr and *Mattox* laid the doctrinal groundwork for *Remmer*’s procedural solution. *Burr* defined the Sixth Amendment impartial-jury right. And *Mattox* burdened the government to prove that any improper extrinsic influence on jurors is *not* prejudicial.

C. *Presuming Prejudice: Remmer*

Another half-century later, the Court prescribed the procedural remedy for extraneous contacts. Namely, an evidentiary hearing, at which the government bears a heavy burden to rebut a presumption that extraneous contacts prejudiced the defendant.

1. The Trial of Bones Remmer

Elmer “Bones” Remmer, a money launderer for organized crime in the western United States,³⁹ stood trial in San Francisco from late 1951 through early 1952 for tax evasion.⁴⁰ Sometime during the trial, James Satterly, a Las Vegas craps dealer, approached I.J. Smith—one of the jurors—and remarked that Smith “could profit by bringing in a favorable verdict” for Remmer.⁴¹ After learning of Satterly’s comments, the judge conferred with the prosecuting attorneys and contacted the FBI.⁴² The FBI’s investigation—which included interviewing Smith while the trial was ongoing—concluded that Satterly had made the statement in jest.⁴³ But defense counsel did not learn about the extraneous contact, let alone that the FBI had investigated it, until they read newspapers’ coverage of the trial—*after* the jury had already convicted Remmer.⁴⁴

Remmer moved for a new trial and requested that the district court hold a hearing to determine whether the bribe offer and subsequent FBI investigation had affected the jury’s impartiality.⁴⁵ The district court

38. *Id.* at 150.

39. Paul Drexler, *Elmer ‘Bones’ Remmer: San Francisco’s Gambling Czar*, S.F. EXAM’R (Nov. 20, 2016 12:00 AM), <https://www.sfexaminer.com/news/elmer-bones-remmer-san-franciscos-gambling-czar> [<https://perma.cc/V3MM-BQVQ>].

40. *Remmer I*, 347 U.S. 227, 228 (1954).

41. Transcript of Record at 3–4, *Remmer v. United States*, 347 U.S. 227 (1954) (No. 12,177).

42. *Remmer I*, 347 U.S. at 228.

43. *Id.*

44. Transcript of Record, *supra* note 41, at 4.

45. *Remmer I*, 347 U.S. at 228.

denied the motion and refused the hearing request.⁴⁶ The Ninth Circuit affirmed the district court's ruling because Remmer had not shown that the contact between Satterly and Smith had produced prejudice.⁴⁷

The Supreme Court vacated Remmer's conviction and remanded to the district court, instructing the trial judge to hold a hearing to determine whether Satterly's comments had biased the jury.⁴⁸ The *Remmer* Court explicitly rejected burdening the defendant to show prejudice, explaining:

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, for obvious reasons, deemed *presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.⁴⁹

The district court was instructed "to hold a hearing to determine whether the incident complained of was harmful to the petitioner" and, if so, "to grant a new trial."⁵⁰

On remand, the district court limited its inquiry to whether the FBI investigation had prejudiced the jury deliberations.⁵¹ But when the case returned to the Supreme Court two years later, the Court explained that the district court should have examined "the entire picture," including Satterly's communications with Smith.⁵²

The entire picture, as it turned out, was troubling. Satterly's comments had "disturbed" Smith.⁵³ Further, Smith had discussed Satterly's offer and the "terrific pressure" he felt to two other jurors.⁵⁴ Smith also did not know the FBI investigation's findings when casting

46. *Id.* at 229.

47. *Id.*

48. *Id.* at 230.

49. *Id.* at 229 (emphasis added).

50. *Id.* at 230.

51. *Remmer v. United States (Remmer II)*, 350 U.S. 377, 378 (1956).

52. *Id.* at 379; *see also Remmer I*, 347 U.S. at 230 ("We therefore vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial.").

53. *Remmer II*, 350 U.S. at 380.

54. *Id.* at 381.

his vote to convict Remmer.⁵⁵ And, as Remmer’s attorneys pointed out, the conversation with Satterly may have given Smith pause about voting to acquit.⁵⁶ Taken together, the Court determined that the extraneous contact had biased Smith.⁵⁷ Remmer was entitled to a new trial.⁵⁸

2. *Remmer’s* Presumption

The *Remmer* Court deemed extraneous contact involving a juror “presumptively prejudicial.”⁵⁹ But *Remmer* did little to clarify that presumption’s precise nature—and courts have contributed to the confusion by incautiously interpreting *Remmer’s* holding.⁶⁰

As a preliminary matter, the *Remmer* Court omitted a key intermediate premise from the rule it articulated. The extraneous *contact* does not presumptively prejudice the defendant. Instead, the contact presumptively *biases the juror*—by altering the juror’s opinion of the defendant, knowledge of the case’s facts, or understanding of the applicable legal standard. The presumption is that the juror, once exposed to extraneous contacts, will not be able to “render a verdict based on evidence presented in court” as required by the impartial jury guarantee.⁶¹ That biased juror, then, prejudices the proceedings because he can no longer deliberate impartially using only the record generated at trial.⁶²

Generally speaking, a presumption’s character and constitutionality depend on the presumption’s context.⁶³ In the criminal context, a presumption burdening the defendant raises constitutional concerns if it allows the jury to presume a crime’s element is satisfied, rather than require the prosecution to prove each element beyond a reasonable

55. *Id.* at 381–82.

56. Transcript of Record, *supra* note 41, at 4 (“Smith, having had such conversation, quite naturally would be apprehensive of being suspected and criticized were he to vote and attempt to have the other jurors vote for a verdict in favor of the defendant . . .”).

57. *Remmer II*, 350 U.S. at 381 (“We think this evidence, covering the total picture, reveals such a state of facts that neither Mr. Smith nor anyone else could say that he was not affected in his freedom of action as a juror.”).

58. *Id.* at 382.

59. *Remmer I*, 347 U.S. 227, 229 (1954).

60. *See, e.g.*, *Smith v. Phillips*, 455 U.S. 209, 215 (1982) (stating—contrary to *Remmer’s* text—that *Remmer* placed the burden on the *defendant* to prove bias).

61. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

62. *See supra* notes 19–23 and accompanying text.

63. *Compare* FED. R. EVID. 301, *with* *Ulster Cnty. Ct. v. Allen*, 442 U.S. 140 (1979).

doubt.⁶⁴ But because an evidentiary hearing investigating an extraneous contact does not determine a defendant's guilt or innocence—and the presumption is against the government, rather than the defendant—no such concern exists in the *Remmer*-hearing context.

Yet the usual civil-context presumption (a “bursting bubble” presumption)—which would allow the government to rebut the presumption simply by producing *any* evidence that the defendant was *not* prejudiced—is inappropriate in this context.⁶⁵ *Remmer* was explicit that “the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant.”⁶⁶

Instead, the Court probably contemplated a presumption that assigns not only a burden of production, but also a burden of persuasion.⁶⁷ Presumptions that assign a burden of persuasion typically arise when strong policy underpinnings—including evidence's unavailability and social policy—render a “bursting bubble” presumption inadequate.⁶⁸ In the *Remmer*-hearing context, the no-impeachment rule renders evidence that deliberations were biased unavailable.⁶⁹ Further, *Remmer*'s presumption serves an unquestionably important policy concern: a criminal defendant's Sixth Amendment impartial-jury guarantee. It is not clear what evidentiary standard the *Remmer* Court intended to require of the government to rebut a presumption of prejudice. But that the Court characterized the burden as “rest[ing] heavily”⁷⁰ certainly rules out anything less than a preponderance of the evidence⁷¹—and likely implies an even more demanding standard.⁷²

64. *Allen*, 442 U.S. at 157.

65. See 2 KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 344, at 741–51 (Robert P. Mosteller ed., 8th ed. 2020) (discussing the “bursting bubble” theory of presumption and critiques thereof); see also FED. R. EVID. 301.

66. *Remmer I*, 347 U.S. 227, 229 (1954).

67. BROUN ET AL., *supra* note 65, at 751.

68. See *id.* at 743–44 (“The strong policies behind [certain] presumption[s] are so apparent that the courts have universally agreed that the party . . . [rebutting the presumption] not only has the burden of producing evidence in support of the contention, but also has a heavy burden of persuasion on the issue as well.”).

69. See *infra* Part I(D)(2).

70. *Remmer I*, 347 U.S. at 229.

71. Cf. *Colorado v. Connelly*, 479 U.S. 157, 167–68 (1986) (determining that the “heavy” burden imposed on the government to show that a defendant has waived her *Miranda* rights may be satisfied by a preponderance of the evidence).

72. See *Commonwealth v. Guisti*, 747 N.E.2d 673, 680 (Mass. 2001) (requiring the government to prove beyond a reasonable doubt that extraneous contact did not prejudice the defendant).

D. Incorporation, Impeachment, and Efficiency

Remmer was decided on the cusp of a watershed period in American law. That shifting legal landscape may explain why the Court apparently departed from *Remmer*'s presumption. Three developments are especially relevant: the Supreme Court incorporated the impartial-jury guarantee to the states; Congress enacted the Federal Rules of Evidence, which codified the no-impeachment rule; and the Burger and Rehnquist Courts emphasized judicial efficiency and finality, calling into question the *Remmer* presumption's continuing vitality.

1. Incorporation

Just over a decade after deciding *Remmer II*, the Court incorporated the impartial-jury guarantee against the states in *Duncan v. Louisiana*.⁷³ The Court traced the long history of the jury trial back to the Magna Carta, and determined that the right to an impartial jury was so fundamental and firmly rooted in American jurisprudence that substantive due process incorporated it against the states.⁷⁴ But although the Court recognized that the right to an impartial jury is fundamental, the procedures ensuring that right vary widely between jurisdictions.⁷⁵ That variation merits skepticism—the Court has time and again rejected a “watered-down, subjective” application of fundamental rights incorporated through substantive due process.⁷⁶ Further, in the collateral-appeal context some circuits even consider a state court's failure to apply *Remmer*'s presumption an unreasonable application of federal law.⁷⁷ A uniform *Remmer* procedure is therefore necessary to ensure that the Sixth Amendment's guarantee is truly incorporated against the states.

73. 391 U.S. 145 (1968).

74. *Id.* at 151–54.

75. *See infra* Part II.

76. *See* McDonald v. City of Chicago, 561 U.S. 742, 765 (2010) (quoting Malloy v. Hogan, 378 U.S. 1, 10 (1964)).

77. *E.g.*, Barnes v. Joyner, 751 F.3d 229, 243, 246 (4th Cir. 2014). But on collateral appeal, the petitioner must prove that failing to apply the presumption resulted in actual prejudice. *Id.* at 252–53 (citing Hall v. Zenk, 692 F.3d 793 (7th Cir. 2012)). *But see* B. Samantha Helgason, Note, *Opening Pandora's Jury Box*, 89 *FORDHAM L. REV.* 231, 259–60 (2020) (cataloging disparate collateral-appeal approaches between circuits).

2. The No-Impeachment Rule, Federal Rule of Evidence 606(b), and
Tanner

The *Remmer* presumption is inextricably linked with the no-impeachment rule,⁷⁸ which prohibits jurors from testifying about their deliberations.⁷⁹ The rule dates to 1785, when Lord Mansfield ruled that a juror could not submit an affidavit alleging juror misconduct.⁸⁰ “Mansfield’s Rule” was widely adopted and settled by 1975, when Congress enacted the Federal Rules of Evidence.⁸¹ Federal Rule of Evidence 606(b) codified this common-law rule.⁸² The Senate Judiciary Committee report explained that Rule 606(b) provides “finality” and the “absolute privacy” of jurors.⁸³ Although Rule 606(b) preserved the common-law exception that permits jurors to testify about improper extraneous contacts,⁸⁴ it still excludes testimony about whether those contacts actually affected a jury’s deliberations.⁸⁵

The Supreme Court echoed the judiciary committee’s rationales in *Tanner v. United States*.⁸⁶ In *Tanner*, two jurors separately alleged that

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78. See, e.g., Peña-Rodriguez v. Colorado, 137 S. Ct. 855, *passim* (2017) (referring to the exclusion of juror testimony regarding deliberations as the “no-impeachment rule”).
79. See generally 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:16 (4th ed.), Westlaw (database updated May 2021) (describing the scope, origins, and policy considerations for the no-impeachment rule).
80. Andrew J. Hull, *Unearthing Mansfield’s Rule: Analyzing the Appropriateness of Federal Rule of Evidence 606(b) in Light of the Common Law Tradition*, 38 S. ILL. U. L.J. 403, 406 (2014).
81. *Id.* at 406–07.
82. *Id.* at 406; see also *Tanner v. United States*, 483 U.S. 107, 121 (1987).
83. Hull, *supra* note 80, at 407 (quoting S. REP. NO. 93-1277, at 13–14 (1974)); see also FED. R. EVID. 606 note (Subdivision (b)) (“The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. . . . On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.”).
84. Federal Rule of Evidence 606(b) includes the *Mattox* exception, which allows jurors to testify about extraneous contacts. *Tanner*, 483 U.S. at 121.
85. See, e.g., Defendants’ Joint Post-*Remmer* Hearing Brief in Support of Ordering a New Trial, Exhibit 1 - Redacted Transcript at 43, *United States v. Lanier*, No. 2:14-cr-00083, 2016 WL 6819998 (E.D. Tenn. Oct. 24, 2016). The trial court admonished the defense attorney that 606(b) precluded asking a juror “about what happened in deliberations or what [the juror at issue] said in deliberations or what other people said [in deliberations].” *Id.*
86. *Tanner*, 483 U.S. at 120.

jurors were consuming alcohol, marijuana, and cocaine during recesses.⁸⁷ But the Court refused to carve out an exception to Rule 606(b). Permitting juror testimony about deliberations, it reasoned, would result in jurors being “harassed and beset” by criminal defendants, thereby “destr[oying] all frankness and freedom” during deliberations.⁸⁸ So the possibility of subsequent investigations into deliberations, according to the Court, was not unlike the “unauthorized invasion” *Remmer* sought to remedy.⁸⁹ Further, the Court noted that juror-misconduct allegations raised “days, weeks, or months after the verdict” threatened to “seriously disrupt the [verdict’s] finality.”⁹⁰

The *Tanner* Court emphasized an “external/internal distinction,” differentiating internal juror misconduct—like the drug and alcohol abuse at issue—from extraneous contacts.⁹¹ Courts may admit evidence that extraneous contacts took place, but not evidence of contacts’ impact on deliberations.⁹² Any juror testimony evidencing how the jurors deliberated is inadmissible.⁹³ Still, Rule 606(b), like the common-law no-impeachment rule, does not prohibit juror testimony “concerning any mental bias in matters unrelated to the specific issues that the juror was called to decide.”⁹⁴

A juror can therefore testify, for example, that her extrajudicial discovery of a defendant’s prior convictions compromised her impartiality.⁹⁵ But she could not testify that she shared that knowledge with other jurors during deliberations or how that knowledge affected the ultimate verdict. And if the extraneous contact involved information directly related to the issues before the jury, she could not testify whether it biased her.⁹⁶ Defendants tasked with proving actual

87. *Id.* at 113–16.

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

89. *Id.* at 120 (quoting *Remmer I*, 347 U.S. 227, 335 (1954)).

90. *Id.*

91. *Id.* at 117.

92. *Id.*

93. *Id.*

94. *Rushen v. Spain*, 464 U.S. 114, 120–21 & 121 n.5 (1983).

95. *See id.*

96. In practice, courts do not always carefully adhere to this rule. *See, e.g.*, *United States v. Wheaton*, 517 F.3d 350 (6th Cir. 2008). In *Wheaton*, a juror used his laptop to determine the relative distance between two locations relevant to the case. *Id.* at 359. In open court, the judge “asked the jury whether the use of the juror’s computer had in any way affected anyone’s decisionmaking, and the jurors responded by shaking their heads negatively.” *Id.* After admonishing the jury not to conduct independent research, the judge “instructed the jury to continue with its

bias therefore face a nearly impossible task.⁹⁷ Even if a defendant is able to inquire about mental bias unrelated to the issues before the jury, he must rely only on the juror's ability to self-diagnose—and willingness to admit—whether she is biased or not. But recent scholarship indicates that jurors are especially bad at this sort of self-diagnosis.⁹⁸

The purpose of *Remmer's* presumption is therefore to ensure that, in a criminal proceeding, the government bears this nearly impossible burden. Put another way, without the no-impeachment rule, there would be little need for a presumption. Rather than stopping its *Remmer* inquiry at whether the extraneous contact took place, the trial court could admit evidence about how the jury reacted to the outside influence. Courts could then evaluate problematic deliberations as they would any other grounds for a new trial.⁹⁹ But while eliminating the no-impeachment rule would result in a more uniform impartial-jury right, it would reintroduce the problems that Lord Mansfield sought to remedy nearly 250 years ago: infringing jurors' privacy, threatening their freedom to deliberate frankly, and undermining concerns of finality. This Note therefore proposes a procedure consistent with these policy considerations while protecting defendants' right to an impartial jury.

3. Judicial Efficiency

Chief Justice Burger, appointed fifteen years after *Remmer*, spearheaded a jurisprudential shift towards judicial efficiency and finality.¹⁰⁰ His administrative philosophy—which was largely inspired by foreign court systems and hospital administration—abhorred

deliberations.” *Id.* The Sixth Circuit determined this was not an abuse of the district court's discretion and affirmed the defendant's conviction. *Id.* at 361–62. True enough, the *Wheaton* jurors did not offer testimony governed by the Rules of Evidence—they were not sworn witnesses. But the no-impeachment rule's underlying policy concerns still apply. *See also infra* Part II(B) (explaining that the Sixth Circuit is a jurisdiction that treats extraneous contacts as juror misconduct).

97. Several jurisdictions require an actual-bias showing. *E.g.*, *State v. Jenner*, 780 S.E.2d 762, 773–74 (W. Va. 2015) (“[T]he person seeking a new trial must prove, by clear and convincing evidence, that improper influence on a juror occurred and affected the verdict.”). Some jurisdictions have therefore rejected a subjective actual-bias requirement in favor of an objective hypothetical-reasonable-juror test. *See infra* notes 244–49.
98. *See* David Yokum, Christopher T. Robertson & Matt Palmer, *The Inability to Self-Diagnose Bias*, 96 DENV. L. REV. 869, 913 (2018) (noting that “jurors [in the study] completely failed to self-diagnose bias”).
99. *See infra* Part II(C) (explaining that courts generally have significant discretion when hearing motions for a new trial in contexts outside of extraneous contacts involving jurors).
100. James A. Gazell, *Chief Justice Burger's Quest for Judicial Administrative Efficiency*, 1977 DET. COLL. L. REV. 455, 455.

congestion and promoted judicial efficiency.¹⁰¹ This shift helps explain why *Remmer's* presumption—which made a new (expensive) trial the default remedy for extraneous contacts—fell out of favor.

Justice Rehnquist, who would succeed Burger, wholeheartedly embraced this pivot towards judicial efficiency. In *McDonough Power Equipment, Inc. v. Greenwood*,¹⁰² the Court grappled with another manifestation of juror bias—failing to truthfully answer questions during *voir dire*.¹⁰³ Writing for the majority, then-Justice Rehnquist reiterated that “there are no perfect trials.”¹⁰⁴ He further emphasized the cost to litigants, jurors, and taxpayers inherent in trying cases.¹⁰⁵ Even if perfect trials were possible, he reasoned, limited resources and increased caseloads would prevent courts from holding them.¹⁰⁶ Moreover, Justice Rehnquist explicitly disapproved of presuming prejudice—a practice that he viewed as a relic of a bygone era when “reviewing courts were considered ‘citadels of technicality.’”¹⁰⁷

E. Post-Incorporation Caselaw

Chief Justice Rehnquist presided over two cases that dealt with extraneous juror contacts. This section examines these cases to better understand why some lower courts have departed from *Remmer*, and to formulate a more effective *Remmer* procedure.

1. *Smith v. Phillips*

Although not the sole cause, some have blamed *Smith v. Phillips* for courts’ departure from *Remmer's* presumption.¹⁰⁸ William Phillips was convicted of murder.¹⁰⁹ During Phillips’s trial, one of the jurors applied to be a “major felony investigator in the District Attorney’s Office.”¹¹⁰ Despite initially concealing the juror’s application from the

101. *Id.* at 456–61.

102. 464 U.S. 548 (1984).

103. *Id.* at 549–50.

104. *Id.* at 553 (quoting *Brown v. United States*, 411 U.S. 223, 232 (1973)).

105. *Id.* at 553, 555.

106. *Id.* at 553.

107. *Id.* (quoting *Kotteakos v. United States*, 328 U.S. 750, 759 (1946)).

108. Eva Kerr, Note, *Prejudice, Procedure, and a Proper Presumption: Restoring the Remmer Presumption of Prejudice in Order to Protect Criminal Defendants’ Sixth Amendment Rights*, 93 IOWA L. REV. 1451, 1460 (2008) (“*Smith* has generated confusion among the federal courts of appeals as to whether the *Remmer* presumption of prejudice remains valid.”).

109. *Phillips*, 455 U.S. at 210.

110. *Id.* at 212.

trial court, prosecutors eventually disclosed it.¹¹¹ The trial judge determined that the application did not warrant a mistrial, and the jury convicted Phillips.¹¹² On federal collateral appeal, the district court “ordered [him] released unless the State granted him a new trial within 90 days,” and the Second Circuit affirmed.¹¹³

The Supreme Court reversed.¹¹⁴ Writing for the majority, Chief Justice Rehnquist explained that trial courts do not need to grant a mistrial “every time a juror has been placed in a potentially compromising situation.”¹¹⁵ Although he did not cite *Burr* directly, Rehnquist’s discussion of the inherently impossible nature of a perfectly impartial jury tracked much of Marshall’s reasoning.¹¹⁶ Somewhat perplexingly, Rehnquist wrote that “[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the *defendant* has the opportunity to prove actual bias,” citing *Remmer* as support.¹¹⁷ But the *Remmer* Court did not burden the defendant with “prov[ing] actual bias”—it placed “the burden . . . heavily upon the *Government* to establish . . . that [extraneous] contact with the juror was harmless to the defendant.”¹¹⁸ The resulting disparity between the *Remmer* Court’s presumption of prejudice and the *Phillips* Court’s implied burden on the defendant to prove prejudice led to confusion

111. *Id.* at 213.

112. *Id.* at 213–14.

113. *Id.* at 214.

114. *Id.* at 221.

115. *Id.* at 217.

116. *Id.*; see *supra* notes 27–31 and accompanying text. Justice Rehnquist explained:

Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case.

Phillips, 455 U.S. at 217.

117. *Phillips*, 455 U.S. at 215 (emphasis added) (citing *Remmer I*, 347 U.S. 227 (1954)).

118. *Remmer I*, 347 U.S. at 229 (emphasis added). The *Phillips* opinion quoted heavily from *Remmer I* but failed to include this language. See *Phillips*, 455 U.S. at 215–16.

about *Remmer*'s continuing vitality—with two circuits abandoning the presumption entirely.¹¹⁹

Phillips also raised questions about when *Remmer* applies. *Remmer* and *Mattox* both dealt with third-party-initiated extraneous contacts that pertained to the case for which the juror was empaneled.¹²⁰ But *Phillips* dealt with an extraneous contact that the juror initiated.¹²¹ Moreover, *Phillips* did not turn on whether the juror-initiated contact exposed the juror to information that likely biased him. Instead, the Court considered whether the juror's law-enforcement job application demonstrated that the juror was *impliedly* biased, despite the juror's claim that he remained unbiased.¹²² It was the juror's intrinsic quality—his interest in law enforcement—that the defendant argued manifested bias.¹²³ That the *Phillips* Court invoked *Remmer* in this context is especially perplexing given that *Remmer* constrained its prescription to contacts “about the matter pending before the jury.”¹²⁴ Nothing in *Phillips* indicates that the juror's job application fit this description. Rather, the defendant's theory was that the job application manifested the juror's implied bias favoring law enforcement.¹²⁵ It therefore made little sense to invoke *Remmer*—which dealt with contacts that *caused* jurors' biases.

The *Phillips* Court's decision caused widespread confusion, leading two circuits to reject *Remmer*'s presumption of prejudice outright, and leading other circuits to question *Remmer*'s continued vitality.¹²⁶

2. *United States v. Olano*

Recent scholarship,¹²⁷ and some court decisions¹²⁸ characterize *United States v. Olano*¹²⁹ as the Court's most recent decision regarding the proper response to extraneous contacts. But *Olano*'s treatment of

119. Helgason, *supra* note 77, at 249; *see also infra* Part II(B) (discussing the Sixth and Tenth Circuits' rejections of *Remmer*).

120. *See supra* Parts I(A)–(C).

121. *Phillips*, 455 U.S. at 212–13.

122. *Id.* at 215.

123. *Id.* at 222 (O'Connor, J., concurring) (noting that certain qualities or affiliations may lead courts to find that a juror is impliedly biased).

124. *Remmer I*, 347 U.S. 227, 229; *see also Phillips*, 455 U.S. at 223 (O'Connor, J., concurring) (noting this disparity).

125. *See Phillips*, 455 U.S. at 214.

126. *See, e.g., United States v. Gartmon*, 146 F.3d 1015, 1028 (D.C. Cir. 1998) (noting inconsistency within the D.C. Circuit and among circuit courts generally).

127. Helgason, *supra* note 77, at 262–63.

128. *See, e.g., United States v. Sylvester*, 143 F.3d 923, 935 (5th Cir. 1998).

129. 507 U.S. 725 (1993).

the respondents' claim of juror bias may not reliably indicate how trial courts ought to remedy alleged juror bias. In *Olano*, the Court noted that the "mere presence of alternate jurors" during a jury's deliberations was not presumptively prejudicial.¹³⁰ But the *Olano* Court "granted certiorari to clarify the standard for 'plain error' review by the courts of appeals under [Federal] Rule [of Criminal Procedure] 52(b)."¹³¹ The presence of alternate jurors during deliberations violated a procedural rule requiring that deliberations not include alternate jurors.¹³² But whether that violation in turn violated the defendant's impartial jury guarantee was not a question presented to the Court, except as it pertained to finding plain error.¹³³ The Court's decision not to "presume prejudice for purposes of the Rule 52(b) analysis" is a far cry from a blanket rejection of *Remmer's* presumption.¹³⁴ Rather than instruct trial courts not to presume prejudice, *Olano* simply did not presume prejudice when reviewing a procedural violation for plain error.

At least one commentator has suggested that *Phillips* and *Olano* are reconcilable with *Remmer*.¹³⁵ She presents two theories purportedly reconciling *Phillips* and *Olano* with *Remmer*.

First, she argues that *Phillips* merely explained that *Remmer's* presumption is available only on remand and only if the trial court does not initially grant an evidentiary hearing.¹³⁶ But this theory does not give full effect to *Remmer's* evidentiary presumption, which arises any time extraneous contacts happen "[i]n a criminal case."¹³⁷ Nor does it account for *Remmer's* express burden on the government to prove the contact's harmlessness.¹³⁸

Second, she argues that *Olano* alluded to a categorical approach—that only certain types of extraneous contacts warrant a presumption

130. *Id.* at 739 (emphasis omitted) ("[T]he 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 . . .").

131. *Id.* at 731.

132. *Id.* at 739; *see also* FED. R. CRIM. P. 24(c)(3) ("The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.").

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

134. *Id.* at 740.

135. Helgason, *supra* note 77, at 259–60.

136. *Id.* at 255–57.

137. *Compare Remmer I*, 347 U.S. at 229, with Helgason, *supra* note 77, at 256 ("[T]he Supreme Court could at most presume that such contact with the jury prejudiced the defendant's trial."); *see also generally supra*, Part I(C)(2).

138. *Remmer I*, 347 U.S. at 229.

of prejudice.¹³⁹ So because the presence of alternate jurors would not likely prejudice the proceedings, *Olano* did not presume prejudice.¹⁴⁰ But that theory still does not reconcile *Olano* with *Remmer*. *Remmer* cast a wide net, presuming that “any private communication, contact, or tampering directly or indirectly” was prejudicial.¹⁴¹ To the extent that *Olano* prescribed a categorical approach, it significantly narrowed *Remmer*.¹⁴²

Neither *Phillips* nor *Olano*, then, is reconcilable with *Remmer*. But the Supreme Court also has not explicitly overruled *Remmer*’s presumption. Rather than accepting this current, unsettled state of affairs, courts should adopt a uniform procedure when investigating extraneous contacts involving jurors.

II. SPLINTERED CASELAW

Others have examined how federal circuits split when applying *Remmer*.¹⁴³ This section will update those examinations with recent caselaw and add an exploration of state courts’ analyses of extraneous contacts involving jurors. Courts have essentially adopted three approaches: (1) presuming prejudice, as *Remmer* instructed; (2) requiring the defendant to prove juror bias; and (3) relying solely on judicial discretion, rather than burdening either party to prove prejudice or harmlessness.

A. *Extraneous Contact as Unique: Maintaining Remmer’s Presumption*

Eight federal circuits¹⁴⁴ and twenty-eight states¹⁴⁵ expressly maintain some form of *Remmer*’s presumption. These jurisdictions use the presumption to compensate for the no-impeachment rule, which otherwise makes juror-bias evidence inadmissible.¹⁴⁶

Many of these jurisdictions require threshold showings, which filter out meritless claims of prejudicial extraneous contacts.¹⁴⁷ These showings may pertain to the likelihood that the contact took place¹⁴⁸ or the

139. Helgason, *supra* note 77, at 257–59.

140. *Id.*

141. *Remmer I*, 347 U.S. at 229 (emphasis added).

142. *Id.*

143. *See generally* Helgason, *supra* note 77; Kerr, *supra* note 108.

144. *See infra* Appendix A.

145. *See infra* Appendix B.

146. *See In re Hamilton*, 975 P.2d 600, 612–13 (Cal. 1999).

147. *See, e.g.*, *Ward v. Hall*, 592 F.3d 1144, 1180 (11th Cir. 2010) (requiring a “colorable showing” that extraneous contact took place).

148. *E.g., id.*

likelihood that the contact would have prejudiced a juror.¹⁴⁹ Some jurisdictions establish clear evidentiary standards that apply to threshold showings—for example, requiring the defendant to prove by preponderance of the evidence that a juror was exposed to potentially prejudicial evidence.¹⁵⁰ Others have much vaguer requirements, such as requiring the defendant to “demonstrate”¹⁵¹ or “show”¹⁵² such an exposure without articulating any evidentiary standards. These unclear requirements leave trial courts with little guidance about when they should presume prejudice—and in turn leave defendants without the uniform impartial-jury guarantee that the Sixth Amendment and its incorporation demand.

Other jurisdictions condition the availability on the circumstance’s perceived severity. That is, the likelihood that the alleged extraneous contact would bias a juror rather than the likelihood that the contact occurred.¹⁵³ Among jurisdictions that require defendants to show that the extraneous contact had a tendency to bias, some reserve the presumption only for particularly egregious circumstances.¹⁵⁴ But these jurisdictions rarely concretely define which circumstances merit the presumption, effectively granting trial courts broad discretion over when to presume prejudice.¹⁵⁵ To counteract courts’ concern for judicial resources¹⁵⁶—which may incentivize them to exercise their discretion to avoid retrying cases—something more than this vague guidance is necessary.

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149. *E.g.*, *Godoy v. Spearman*, 861 F.3d 956, 968 (9th Cir. 2017) (requiring defendant to “demonstrate a *credible* risk” that the extraneous contact biased the juror).
150. *E.g.*, *Wahl v. State*, 51 N.E.3d 113, 115 (Ind. 2016); *State v. Scott*, 2004-1312921, p. 71–72 (La. 1/19/06); 921 So. 2d 904, 952.
151. *State v. Adams*, 405 S.W.3d 641, 651 (Tenn. 2013).
152. *State v. Abdi*, 2012 VT 4, ¶ 13, 191 Vt. 162, 45 A.3d 29.
153. *Compare, e.g., Wahl*, 51 N.E.3d at 115 (requiring that the defendant prove that extrajudicial contact pertaining to the case occurred), *with Conyers v. Commonwealth*, 530 S.W.3d 413, 428 (Ky. 2017) (presuming prejudice only in extreme circumstances).
154. *E.g.*, *United States v. Pagán-Romero*, 894 F.3d 441, 447 (1st Cir. 2018) (“It is now well established that less serious instances of potential taint should be addressed using the abuse-of-discretion standard, with the presumption of prejudice being reserved for more serious instances.”); *Barnes v. Joyner*, 751 F.3d 229, 245 (4th Cir. 2014) (noting that the *Remmer* presumption is only available when the contact is “more than innocuous”).
155. *See, e.g., Pagán-Romero*, 894 F.3d at 447–48 (giving examples, but no test, for what extraneous information merited the presumption of prejudice).
156. *See supra* notes 100–07 and accompanying text.

Unlike the eight circuits that expressly maintain *Remmer's* presumption, the Fifth Circuit nominally rejects it.¹⁵⁷ In practice, however, the Fifth Circuit effectively preserved the presumption but imposed a particularly vague threshold requirement. Most recently, in *United States v. Jordan*,¹⁵⁸ the court noted that “[t]o be entitled to a new trial based on an extrinsic influence on the jury, a defendant must first show that the extrinsic influence *likely* caused prejudice.”¹⁵⁹ The burden then shifts to the government to show that “there is ‘no reasonable possibility’” of jury bias.¹⁶⁰

This approach effectively aligns the Fifth Circuit with jurisdictions that maintain *Remmer's* presumption but impose a threshold-showing requirement. *Jordan's* approach closely resembles the Ninth Circuit's approach in *Godoy v. Spearman*.¹⁶¹ The *Godoy* court explained that, after showing that an extraneous contact created a “credible risk of influencing the verdict,” *Remmer's* presumption places the burdens of production and persuasion on the government to show that the contact did not cause bias.¹⁶² So while the Fifth Circuit claims to have “rejected” *Remmer's* presumption in response to *Phillips* and *Olano*,¹⁶³ its post-*Olano* procedure functions indistinguishably from circuits that have added a threshold requirement to *Remmer's* presumption.¹⁶⁴

Both the Fifth and Ninth Circuits' tests exemplify how vague these threshold requirements often are. It is unclear, for example, what “likely” means to the Fifth Circuit—reasonable interpretations might include “more likely than not” or “plausibly.” Nor does the Ninth Circuit explain clearly what amounts to a “credible risk.” These vague standards give trial courts broad discretion to decide when the

157. *See* *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) (“[T]he *Remmer* presumption of prejudice cannot survive *Phillips* and *Olano* . . . [instead,] the trial court must first assess the severity of the suspected intrusion; only when the court determines that prejudice is likely should the government be required to prove its absence.”).

158. 958 F.3d 331 (5th Cir. 2020).

159. *Id.* at 335 (emphasis added) (quoting *United States v. Mix*, 791 F.3d 603, 608 (5th Cir. 2015)).

160. *Id.* (quoting *Mix*, 791 F.3d at 608).

161. 861 F.3d 956, 959 (9th Cir. 2017).

162. *Id.* at 967–68 (quoting *Tarango v. McDaniel*, 837 F.3d 936, 947, 949 (9th Cir. 2016)); *see also supra* Part I(C)(2).

163. *United States v. Sylvester*, 143 F.3d 923, 935 (5th Cir. 1998).

164. *Compare Sylvester*, 143 F.3d at 934 (“[T]he trial court must first assess the severity of the suspected intrusion; only when the court determines that prejudice is likely should the government be required to prove its absence.”), *with Godoy*, 861 F.3d at 967 (“The [defendant must show that the extraneous] contact . . . ‘raise[s] a credible risk of influencing the verdict’ before [that contact] triggers the presumption of prejudice.” (quoting *Tarango*, 837 F.3d at 947, 949)).

threshold requirements are met. Given the strong incentives to preserve judicial resources and efficiency, it seems unlikely that trial courts will err towards finding prejudice.

* * *

Because the no-impeachment rule makes testimony pertaining to jury deliberations inadmissible, many jurisdictions have preserved *Remmer's* presumption. But following the Supreme Court's shift towards judicial efficiency, many have struck a balance between the impartial-jury guarantee and efficiency by requiring defendants to make a threshold showing. While a prudent *Remmer* procedure should include a threshold requirement to filter out clearly innocuous extraneous contacts, the procedure should clearly state (1) what sort of extraneous contacts require an evidentiary hearing and (2) the evidentiary standard required to prove that the contact was of that nature. Clarifying which standards are necessary would ensure uniform application of *Remmer* by limiting judicial discretion.

B. Extraneous Contacts as Juror Misconduct: No Presumption Available

Some have characterized the Sixth Circuit as standing alone in rejecting *Remmer's* presumption entirely.¹⁶⁵ In *United States v. Pennell*,¹⁶⁶ the Sixth Circuit held that *Phillips* abrogated *Remmer*, leaving only its requirement that a district court hold an evidentiary hearing when a defendant alleges jury partiality.¹⁶⁷ "In light of *Phillips*," the court reasoned, "the burden of proof rests upon [the] defendant Prejudice is not to be presumed."¹⁶⁸ *Pennell* therefore interpreted *Phillips* as an unqualified rejection of *Remmer's* presumption.

But the Sixth Circuit may not stand alone after all. The Tenth Circuit appears to have rejected *Remmer's* presumption in *United States v. Barrett*.¹⁶⁹ The *Barrett* court quoted *Remmer's* presumption but went on to note that the Tenth Circuit had "qualified" that presumption.¹⁷⁰ "The *defendant* must . . . demonstrate 'that an unauthorized contact created actual juror bias; *courts should not presume* that a contact was prejudicial."¹⁷¹ The Tenth Circuit therefore does more

165. *E.g.*, Kerr, *supra* note 108.

166. 737 F.2d 521 (1984).

167. *Id.* at 532.

168. *Id.* The *Pennell* court stated in a footnote that "*Phillips* worked a substantive change in the law." *Id.* at 532 n.10.

169. 496 F.3d 1079 (10th Cir. 2007).

170. *Id.* at 1102.

171. *Id.* (emphasis added) (quoting *United States v. Robertson*, 473 F.3d 1289, 1294 (10th Cir. 2007)). Notably, the *Robertson* court in turn quoted *United States v. Frost*, 125 F.3d 346, 377 (6th Cir. 1997). So it seems that the Tenth Circuit has adopted the Sixth Circuit's post-*Phillips* approach.

than “qualify” *Remmer*’s presumption—it joins the Sixth Circuit in entirely rejecting it.

Fifteen states also either reject or question the continued vitality of *Remmer*’s presumption of prejudice when extraneous contact is alleged.¹⁷²

Frequently, jurisdictions that reject *Remmer*’s presumption do not distinguish between extraneous contact involving jurors and juror misconduct.¹⁷³ The commingling of juror-misconduct and extraneous-contact jurisprudence likely explains why some jurisdictions do not presume prejudice.¹⁷⁴ That is, even jurisdictions that preserve *Remmer*’s presumption generally do not presume that *internal* juror misconduct—misconduct that clearly did not involve third parties—is prejudicial.¹⁷⁵ It follows that jurisdictions categorizing and evaluating extraneous contact as a form of juror misconduct would reject *Remmer*’s presumption.

There is admittedly some logic to treating extraneous contacts as juror misconduct. Extraneous contacts may themselves constitute juror misconduct when jurors initiate the extraneous contact.¹⁷⁶ A prudent *Remmer* procedure must fit both juror-initiated extraneous contact and third-party-initiated extraneous contact. But as will be discussed in Part III, it does not follow that a juror who engages in misconduct by *initiating* extraneous contact is *not* presumptively biased, while a juror contacted by a third party or unwillingly exposed to extraneous information *is* presumptively biased. If any distinction is appropriate, the

172. See *infra* Appendix B.

173. *E.g.*, *United States v. Wheaton*, 517 F.3d 350 (6th Cir. 2008) (characterizing a juror conducting internet research as “juror misconduct” rather than exposure to extraneous information); *Finch v. State*, 2018 Ark. 111, at 7–8 & n.4, 542 S.W.3d 143, 147 & n.4 (same); *State v. Christensen*, 929 N.W.2d 646, 661 (Iowa 2019) (“Juror misconduct often involves communication by a juror with others about the case outside the jury room, independently investigating the crime, or engaging in independent research on questions of law or fact.”), *reh’g denied* (July 15, 2019). *Contra* *Smith v. Phillips*, 455 U.S. 209, 223 (1982) (O’Connor, J., concurring) (“[*Remmer* I], on which the Court heavily relies, involved not juror misconduct, but the misconduct of a third party who attempted to bribe a juror.”).

174. *E.g.*, *State v. Anderson*, 134 A.3d 741, 746–47 (Conn. App. Ct. 2016) (noting that both extraneous contact and internal misconduct are forms of juror misconduct).

175. *E.g.*, *id.* at 747 (noting that extraneous contact is presumptively prejudicial, while internal misconduct is not); *cf.* *Tanner v. United States*, 483 U.S. 107, 125 (1987) (refusing to require an evidentiary hearing to investigate alleged internal juror misconduct).

176. See, *e.g.*, *United States v. Lawson*, 677 F.3d 629, 639 (4th Cir. 2012) (examining juror research as an extraneous contact); see also Gershman, *supra* note 2, at 323 (describing exposure to extraneous information as juror misconduct).

presumption of bias ought to be even stronger when the juror initiates extraneous contact.¹⁷⁷

* * *

Jurisdictions that do not employ *Remmer's* presumption have either interpreted *Phillips* and *Olano* as abrogating that presumption or analyzed extraneous contacts as juror misconduct. But because these jurisdictions burden defendants to show bias—and prohibit testimony that would prove that the deliberations were tainted—they do not adequately protect the impartial-jury guarantee.

*C. Extraneous Contacts as Indistinct from Other Causes for Mistrials:
Judicial Discretion*

The Eighth Circuit¹⁷⁸ and seven states¹⁷⁹ do not place the burden of proof on either the defendant or the government. Instead, these jurisdictions bestow the trial court with discretion to find facts, determine prejudice, and grant or deny a new trial. These jurisdictions generally do not differentiate extraneous contact involving a juror from any other reason to declare a mistrial.¹⁸⁰ They instead rely on the trial court's ability to root out juror bias and determine whether a mistrial is warranted.¹⁸¹

By adopting a judicial-discretion approach, the Eighth Circuit has, over the last decade, implicitly rejected *Remmer's* presumption.¹⁸² But unlike the Sixth Circuit, it does not place the burden on the defendant to prove prejudice.¹⁸³ Instead, district courts in the Eighth Circuit have broad discretion to determine what the extraneous contact was, how it

177. *See infra* Part III(A).

178. *See infra* Appendix A.

179. *See infra* Appendix B.

180. *See, e.g.*, *State v Taylor*, 669 S.E.2d 239, 260 (N.C. 2008).

181. *Id.*; *People v. Maragh*, 729 N.E.2d 701, 704 (N.Y. 2000).

182. *Compare* *United States v. Hall*, 877 F.3d 800, 805–06 (8th Cir. 2017) (requiring trial courts to determine whether *any* “incident that may have improperly influenced the jury . . . ‘affect[ed] the jury’s deliberations and thereby its verdict’” (quoting *United States v. Honken*, 541 F.3d 1146, 1167 (8th Cir. 2008))), *with* *United States v. Wallingford*, 82 F.3d 278, 281 (8th Cir. 1996) (preserving the presumption in cases where the extraneous information related to “factual evidence not developed at trial” (quoting *United States v. Blumeyer*, 62 F.3d 1013, 1016 (8th Cir. 1995))), *and* *Blumeyer*, 62 F.3d at 1017 (8th Cir. 1995) (“When an extrinsic contact relates to legal issues, the presumption of prejudice does not apply, and it is the defendant’s burden to produce evidence not barred by Rule 606(b) that is sufficient to prove the actual prejudice necessary to justify a new trial.” (citation omitted)). *See also* *United States v. Lawson*, 677 F.3d 629, 643 (4th Cir. 2012) (including the Eighth Circuit as one that does not apply *Remmer's* presumption).

183. *Hall*, 877 F.3d at 805–06.

affected the jury's deliberations, and whether or not a new trial is warranted.¹⁸⁴

The Eighth Circuit's approach is exemplified in *United States v. Harris-Thompson*.¹⁸⁵ There, the defendant moved for a mistrial after jurors reported that they had spoken with people who may have been the defendant's family.¹⁸⁶ The Eighth Circuit upheld the district court's decision to deny the defendant's motion.¹⁸⁷ The *Harris-Thompson* panel deferred to the district court's inquiry into the extraneous contact's likelihood and severity in light of the trial judge's "advantages of close observation of the jurors and intimate familiarity with the issues at trial."¹⁸⁸

The primary advantage of leaving mistrials up to the discretion of the trial court is that it is a highly flexible approach—and can therefore address a wide range of circumstances involving extraneous contact involving jurors.¹⁸⁹ But what this approach offers in flexibility, it lacks in concrete protections for criminal defendants. Without any consistently applicable principles, allowing individual judges to make ad hoc decisions may create disparate outcomes between similarly situated defendants. Moreover, courts are loath to declare a mistrial, often emphasizing concern for judicial resources.¹⁹⁰ Leaving the decision of whether a mistrial is warranted to the trial court's sole discretion therefore does not provide adequate safeguards for defendants' impartial-jury guarantee.

* * *

In sum, the patchwork solutions adopted by circuit and state courts provide inconsistent—and therefore constitutionally unacceptable—protections for defendants' Sixth Amendment right to an impartial jury.¹⁹¹ A uniform, administrable *Remmer* procedure is needed to guarantee an impartial jury, while giving due consideration to the policy concerns of judicial efficiency and juror privacy.

184. *Id.*

185. 751 F.3d 590 (8th Cir. 2014).

186. *Id.* at 594–95.

187. *Id.* at 594, 598.

188. *Id.* at 598 (quoting *United States v. Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988)).

189. *People v. Maragh*, 729 N.E.2d 701, 704 (N.Y. 2000) (“[B]ecause juror misconduct can take many forms, no ironclad rule of decision is possible.” (quoting *People v. Brown*, 399 N.E.2d 51, 53 (N.Y. 1979))).

190. *See supra* notes 100–07 and accompanying text.

191. *See supra* notes 73–77 and accompanying text.

III. A PROPOSED PRACTICAL SOLUTION

Because extraneous contacts may take myriad forms, adopting a one-size-fits-all *Remmer* procedure may be difficult. Indeed, several jurisdictions have declined to provide any guidance at all to the trial court—leaving whether to grant a new trial entirely up to its discretion. But that approach fails to account for—and counterbalance—trial courts’ interest in judicial efficiency.¹⁹² The considerable public-resource outlay, which prolonged criminal trials require, means that courts may tend towards preserving a verdict rather than perfecting a trial.¹⁹³ So while a bright-line rule may be inapposite, clear guidance is necessary to preserve a defendant’s Sixth Amendment impartial-jury guarantee, while accounting for judicial efficiency and the no-impeachment rule.

A. *Resolving the Overlap of Extraneous Contact and Misconduct*

Part II demonstrated that whether a jurisdiction characterizes extraneous contact as juror misconduct corresponds with whether it maintains *Remmer*’s presumption. Preserving *Remmer*’s presumption requires parsing the difference between extraneous contact and purely internal juror misconduct, which may be easier said than done. A Venn diagram helps illustrate the difficulty. Circle A encompasses all extraneous contacts involving jurors and Circle B encompasses all juror misconduct. Juror tampering as contemplated by federal juror-tampering statutes is exclusively in A.¹⁹⁴ Because the juror did not initiate the contact, no juror misconduct has occurred. Internal juror misconduct—such drug and alcohol consumption¹⁹⁵—is solely within Circle B.¹⁹⁶ The remaining question, then, is what to do where these categories overlap. A procedure that presumes juror bias when extraneous contact occurs must determine whether juror-initiated extraneous contact—which is both a form of juror misconduct and an extraneous contact—also triggers that presumption.

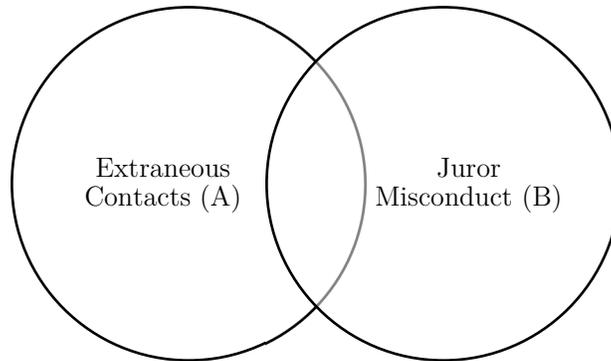
192. *See supra* Part I(D)(3).

193. *See supra* notes 104–06 and accompanying text.

194. 18 U.S.C. § 1503 (criminalizing “corruptly, or by threats or force, or by any threatening letter or communication, endeavor[ing] to influence, intimidate, or impede any . . . juror”); 18 U.S.C. § 1504 (criminalizing “attempt[ing] to influence the action or decision of any . . . juror . . . upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter”).

195. *See United States v. Tanner* 483 U.S. 107, 118–19 (1987).

196. *See supra* note 91 and accompanying text.



On one hand, it seems incongruous to presume bias when a juror is approached by a third party,¹⁹⁷ but *not* presume bias when a juror *initiates* the extraneous contact.¹⁹⁸ After all, both may expose a juror to biasing influences. And the no-impeachment rule prohibits jurors from testifying about the effects either has on jury deliberations. Yet it seems similarly incongruous to presume bias when, for example, a juror initiates an extraneous contact through internet research,¹⁹⁹ but *not* presume bias when jurors engage in other misconduct that may seem on its face more egregious—such as drug or alcohol abuse,²⁰⁰ falling asleep during trial,²⁰¹ or conducting improper experiments during deliberations.²⁰² Both call into question the jury’s ability and willingness to base its verdict solely on the trial record.²⁰³

Of the two, this latter incongruity is more acceptable. Courts have consistently distinguished between internal and external influences—permitting jurors to testify only about external influences on their deliberations.²⁰⁴ Precedent therefore supports remedying juror-initiated extraneous contacts in the same way as third-party-initiated extraneous contacts—that is, by presuming bias.

197. *E.g.*, *Remmer I*, 347 U.S. 227, 229 (1954).

198. *E.g.*, *Smith v. Phillips*, 455 U.S. 209, 215 (1982).

199. *See United States v. Lawson*, 677 F.3d 629, 639, 646 (4th Cir. 2012) (applying the *Remmer* presumption to a juror who “research[ed] on Wikipedia the term ‘sponsor,’ an element of the crimes charged”).

200. *E.g.*, *Tanner*, 483 U.S. at 122.

201. *E.g.*, *United States v. Hui*, 64 F. App’x 264, 265 (2d Cir. 2003).

202. *E.g.*, *Simon v. Kuhlman*, 549 F. Supp. 1202, 1208 (S.D.N.Y. 1982) (holding that no new trial was required when jurors tested how difficult it is to identify a person wearing a nylon stocking over her face).

203. *Phillips*, 455 U.S. at 217; *see also Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (requiring jurors to “render a verdict based on the evidence presented in court”).

204. *See supra* notes 91–94 (discussing this distinction).

Moreover, juror-initiated extraneous contacts have just as much potential to bias the juror as third-party-initiated extraneous contacts. For a rather extreme example, compare I.J. Smith—the contacted juror in *Remmer*—with George Pape—a juror for a racketeering trial of the infamous mobster John Gotti.²⁰⁵ Unlike Smith—who received a bribe offer—Pape *sought out* Gotti’s associates, and offered to sell Gotti his vote.²⁰⁶ Pape was later prosecuted and convicted of obstructing justice.²⁰⁷ Pape’s offer to sell his vote was both juror misconduct and extraneous contact.

The jury acquitted Gotti,²⁰⁸ so he had no need to appeal the verdict. But had the jury convicted him, the no-impeachment rule would have made it impossible to determine whether Pape had based his vote on Gotti’s associates’ agreeing or refusing to pay a bribe rather than on the facts in front of him. Nor could the court have considered evidence of whether Pape’s bias had affected other jurors’ deliberations.²⁰⁹ A *Remmer* presumption would therefore have protected Gotti’s impartial-jury guarantee by requiring a new trial.

A less obvious mix of juror misconduct and extraneous contacts arises in cases when jurors independently research facts or law pertaining to the case for which they are empaneled.²¹⁰ But courts should still apply *Remmer*’s presumption, since those contacts still have the potential to expose jurors to extrajudicial information.²¹¹ Because both may bias a juror, courts should not distinguish between juror-initiated extraneous contact and third-party-initiated extraneous contact.

Additionally, distinguishing between jurors who consult secondary sources and those who contact third parties is increasingly difficult in the Internet Age. As an example, Reddit.com allows users to “post, vote, and comment in communities organized around their interests.”²¹² At least one of these communities, aptly named *Legal Advice*, allows users to ask questions about the law.²¹³ Questions that users pose and

205. Arnold H. Lubasch, *Juror Is Convicted of Selling Vote to Gotti*, N.Y. TIMES (Nov. 7, 1992), <https://www.nytimes.com/1992/11/07/nyregion/juror-is-convicted-of-selling-vote-to-gotti.html> [<https://perma.cc/E2RN-4AKJ>].

206. *Id.*

207. *Id.*

208. *Id.*

209. *See supra* Part I(D)(2) (discussing the no-impeachment rule).

210. *See, e.g.*, United States v. Lawson, 677 F.3d 629, 639, 646 (4th Cir. 2012).

211. *E.g., id.* at 645.

212. *About*, REDDIT, <https://www.redditinc.com> [<https://perma.cc/U4W6-M5FT>] (last visited Mar. 27, 2021).

213. *See LegalAdvice*, REDDIT, <https://www.reddit.com/r/legaladvice/> [<https://perma.cc/LFB8-2ZGZ>] (last visited Mar. 27, 2021).

responses to those questions are publicly viewable—and the community’s rules require that users not delete those questions after they receive a satisfactory answer.²¹⁴ As those rules put it: “This is a resource for everyone, and your post may help others in the future.”²¹⁵ The *Legal Advice* Reddit community is therefore one example of both a third-party-authored secondary source of legal information and a platform that could facilitate direct communication between jurors and third parties. An attempt to distinguish between juror-initiated research and juror-initiated communication would therefore be fruitless. And the policy concern that extraneous contacts will affect a juror’s ability to deliberate impartially is equally salient whether that contact comes from viewing a pre-existing resource or communicating with a third party.²¹⁶

Moreover, when a juror seeks extraneous information about the case, he manifests his unwillingness or inability to follow the trial court’s instructions—instructions that are crucial to ensure an impartial jury.²¹⁷ For example, courts routinely instruct juries not to conduct their own internet research on the facts and law of the case for which they are empaneled.²¹⁸ The Supreme Court interprets the impartial jury guarantee as requiring “a jury [to be] capable and *willing* to decide the case solely on the evidence before it.”²¹⁹ Jurors who cannot be trusted to abstain from internet legal research are therefore not the impartial, unbiased jurors the Sixth Amendment demands. These same concerns arise when jurors seek a third party’s opinion about the case.²²⁰

A workable *Remmer* analytical framework should therefore reconcile the disparate approaches of juror misconduct and extraneous contact by drawing the line at exposure to *extraneous* contacts—regardless of who initiates the contact. While courts may someday find

214. *Id.*

215. *Id.*

216. *See supra* notes 13–17 and accompanying text.

217. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017) (noting that “fair and impartial verdicts can be reached if the jury follows the court’s instructions”).

218. Ahunanya Anga, *Jury Misconduct: Can Courts Enforce a Social Media and Internet Free Process? We “Tweet,” Not*, 18 J. TECH. L. & POL’Y 265, 277–78 (2013).

219. *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (emphasis added).

220. *See Godoy v. Spearman*, 861 F.3d 956, 966 (9th Cir. 2017) (evaluating a claim of juror bias when a juror communicated with her friend—a judge—about the trial throughout the proceedings); *United States v. Lanier*, 870 F.3d 546, 548 (6th Cir. 2017) (evaluating a claim of juror bias when a juror called her friend—an assistant district attorney—regarding a “problem” with jury deliberations).

it prudent to presume bias for allegations of internal juror misconduct as well,²²¹ that discussion is beyond the scope of this Note.

B. A Uniform Procedure

Courts need a workable procedure to determine whether to presume an extraneous contact is prejudicial. This section draws on the most prudent and constitutional approaches adopted by state and federal courts to propose a procedure that acknowledges that a perfect trial is impossible, while protecting defendants' fundamental right to an impartial jury.

1. Court-Initiated Hearings

Although some jurisdictions require a defendant to move for a new trial in order to qualify for an evidentiary hearing,²²² the better practice is for the court to investigate *sua sponte* when it becomes aware of potential extraneous contacts with jurors.²²³ Information about extraneous contacts is frequently revealed directly to the trial judge.²²⁴ Indeed, in *Remmer*, the defendant was not even informed of the extraneous contact and subsequent FBI investigation until after the trial when newspapers reported the events.²²⁵ The burden to initiate the hearing should therefore not fall on the defendant—but the defendant should still be permitted to initiate the hearing by informing the judge of extraneous contact with jurors of which the defendant is aware.

2. Triggering the Presumption

Remmer's presumption should not completely yield to judicial efficiency. But a threshold requirement to prevent defendants from abusing *Remmer* hearings is prudent. Under the proposed procedure, a defendant would be required to present evidence amounting to probable cause that (1) an extraneous contact with a juror took place, (2) the juror initiated the contact, or a third party initiated the sort of contact that might bias a reasonable juror,²²⁶ and (3) the contact was not clearly irrelevant to the matter for which the juror is empaneled.

221. This is not a completely outlandish possibility. Consider *Peña-Rodriguez*, 137 S. Ct. at 869, in which the Court carved out an exception to the no-impeachment rule when a juror manifests racial bias. It may be prudent to *presume* bias once those manifestations come to light.

222. *E.g.*, *Wahl v. State*, 51 N.E.3d 113, 115 (Ind. 2016).

223. *E.g.*, *State v. Berrios*, 129 A.3d 696, 704 (Conn. 2016).

224. *E.g.*, *Lanier*, 870 F.3d at 548 (noting that the third party with whom the juror had extraneous contact was the party who revealed that contact to the district judge).

225. Transcript of Record, *supra* note 41, at 4.

226. *Cf. Godoy v. Spearman*, 861 F.3d 956, 966–67 (9th Cir. 2017).

A defendant's burden to trigger the presumption should not be an onerous one.²²⁷ Probable cause is a low bar—and one with which courts are already familiar. But requiring a threshold showing preserves judicial resources by screening out entirely meritless and unscrupulous claims of juror bias.²²⁸ And the threshold may be overcome as a matter of course by the information that prompted the trial judge to initiate proceedings. Once the defendant has satisfied this initial requirement, the burdens of proof and persuasion shift to the government.

Although the first and third elements are relatively self-explanatory, the second element warrants some elaboration to provide the clear guidance that current procedures lack. If the defendant can show probable cause that a juror sought out the extraneous contact, the court should presume prejudice.²²⁹ But jurors' relevant internet histories, phone records, and text messages may suffice to rebut the presumption if they prove that the contact was harmless.²³⁰

Further, courts must determine what sort of contact might bias a reasonable juror. As an obvious example, if the extraneous contact with a third party fulfills the elements of juror-tampering statutes,²³¹ the contact is presumptively prejudicial. *Remmer's* presumption was originally intended to remedy a juror-tampering attempt.²³² Even if a juror is unreceptive or resistant to a tampering attempt, that is no guarantee that he will not be “disturbed” or “troubled” by the attempt—and therefore unable to freely deliberate as though nothing had happened.²³³ Requiring a presumption in instances of jury tampering is therefore a plain application of *Remmer*.

Courts should also presume prejudice when the extraneous contact is between “witnesses, attorneys[,] or court personnel and jurors.”²³⁴ One of the earliest cases regarding extraneous contacts involving jurors arose in part out of a bailiff's comments to jurors.²³⁵ When extraneous contacts take place between jurors and parties involved in the proceed-

227. *Id.* at 968.

228. One such claim arose in *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997). A juror left deliberations to lie down in a deputy court clerk's office after experiencing chest pains. *Id.* at 376. Without more, the defendant speculated that the juror had been exposed to extraneous influence and requested a *Remmer* hearing. *Id.*

229. *See supra* Part III(A).

230. *See* *United States v. Lanier*, 988 F.3d 284, 290 (6th Cir. 2021).

231. *See supra* note 194 and accompanying text.

232. *Remmer I*, 347 U.S. 227, 229 (1954).

233. *Remmer II*, 350 U.S. 377, 381–82 (1956).

234. *State v. Allen*, 2005 UT 11, ¶ 51, 108 P.3d 730 (emphasis omitted).

235. *Mattox v. United States*, 146 U.S. 140, 142 (1892).

ings, presuming bias serves two purposes. Not only does the presumption protect the defendant against the difficulty of proving bias, but it also protects the integrity of the judicial system.²³⁶ As the Utah Supreme Court said, when the extraneous contact is between jurors and others involved in the proceedings, “it is probable that a doubt must and will continue to exist in the mind of the losing party and that of his friends as to whether or not he had a fair trial.”²³⁷ To ensure defendants’ and the public’s trust in the judicial system, therefore, these contacts should trigger the *Remmer* presumption.

Under the proposed procedure, courts need not apply *Remmer*’s presumption if a third party makes a cursory inquiry into the juror’s experience unrelated to the matter for which the juror is empaneled. A third party would not trigger the presumption by asking a juror, for example, whether being empaneled on a jury is an interesting experience—because that sort of question is not the sort of contact that might bias a reasonable juror.

Nor does that sort of conversation touch on the matter for which the juror is empaneled—it is clearly irrelevant. This is a lower bar than the one employed by jurisdictions requiring that the contact “pertain[]” to the proceedings.²³⁸ Extraneous contacts may sometimes be ambiguous. Because the government is in a better position to fully investigate the extraneous contact,²³⁹ an ambiguous contact that is not obviously unrelated to the case should trigger the presumption of prejudice.

Finally, while trial courts should not have discretion to *deny* defendants *Remmer*’s presumption in the circumstances outlined above,²⁴⁰ they should have discretion to *impose* a presumption in the interest of justice in circumstances that do not otherwise meet the above requirements.

3. Rebutting the Presumption

To rebut the presumption of juror bias, the proposed procedure would require the government to prove beyond a reasonable doubt that the extraneous contact would not have prejudiced a hypothetical

236. *State v. Pike*, 712 P.2d 277, 280 (Utah 1985) (noting that these contacts have a “deleterious effect upon the judicial process”).

237. *Id.* (quoting *Glazier v. Cram*, 267 P. 188, 190 (Utah 1928)).

238. *E.g.*, *Wahl v. State*, 51 N.E.3d 113, 115 (Ind. 2016); *accord State v. Coburn*, 1999 ME 28, ¶ 7, 724 A.2d 1239, 1241–42 (Me. 1999).

239. *Cf. Remmer II*, 350 U.S. 377, 378–79 (1956) (describing the FBI’s investigation into Slattery’s comments to Smith).

240. *See supra* Part II(C) (explaining that additional safeguards are necessary to counterbalance the judicial preference for efficiency).

reasonable juror.²⁴¹ Beyond a reasonable doubt is an evidentiary standard with which trial courts are already familiar. And adopting a specific evidentiary standard provides the clear guidance that existing jurisdictions often lack.²⁴² Because at stake is the validity of a trial that may revoke a defendant's liberty, beyond a reasonable doubt is the appropriate standard.²⁴³

Concerns about juror self-assessment have led many jurisdictions—regardless of whether they presume bias or not—to adopt a hypothetical-reasonable-juror standard when determining whether an extraneous contact likely biased a juror.²⁴⁴ This Note proposes that every jurisdiction adopt this objective standard.

An objective, hypothetical-reasonable-juror standard is more administrable than a subjective, actual-bias one. Although some jurisdictions inquire into actual bias,²⁴⁵ the no-impeachment rule leaves the court to take the juror at her word that she was not biased.²⁴⁶ But one recent study found that “jurors completely fail[] to self-diagnose bias.”²⁴⁷ Juror testimony is therefore at best weakly probative for the purpose of *disproving* actual bias.²⁴⁸ But while the trial court need not inquire into actual bias, a juror's subjective belief that she *was* biased is still very probative—if not dispositive—of the extraneous contact's

241. Massachusetts follows this approach. Once the defendant makes a threshold showing, “the burden shifts to the Commonwealth to demonstrate ‘beyond a reasonable doubt’ that the defendant was not prejudiced by the extraneous matters. ‘The judge . . . must focus on the probable effect of the extraneous facts on a hypothetical average jury.’” *Commonwealth v. Guisti*, 747 N.E.2d 673, 680 (Mass. 2001) (citation omitted) (quoting *Commonwealth v. Fidler*, 385 N.E.2d 513, 519 (Mass. 1979)).

242. *E.g.*, *State v. Needelman*, 276 So. 3d 444, 447 (Fla. Dist. Ct. App. 2019) (noting that the government “must demonstrate that the error was harmless” without providing an applicable evidentiary standard (quoting *Williamson v. State*, 894 So. 2d 996, 998 (Fla. Dist. Ct. App. 2005))).

243. *See generally* Note, *Reasonable Doubt: An Argument Against Definition*, 108 HARV. L. REV. 1955 (1995).

244. *E.g.*, *State v. Broomfield*, 589 N.W.2d 225, 231 (Wis. 1999) (requiring defendants to show that the contact would have biased a hypothetical reasonable juror); *Guisti*, 747 N.E.2d at 680 (requiring the government to show that the contact would *not* have biased a hypothetical reasonable juror to rebut a presumption of prejudice).

245. *E.g.*, *State v. Jenner*, 780 S.E.2d 762, 774 (W.Va. 2015) (requiring the defendant to “prove, by clear and convincing evidence, that improper influence on a juror occurred and affected the verdict”).

246. *See supra* Part I(D)(2) (discussing Rule 606(b) and the no-impeachment rule).

247. Yokum, *supra* note 98, at 913.

248. *Id.*

effect on a hypothetical reasonable juror.²⁴⁹ The objective standard therefore still takes into account the juror's subjective state of mind.

Concededly, requiring the government to rebut the presumption beyond a reasonable doubt is a heavy burden. But a heavy burden on the government is precisely what *Remmer* prescribed.²⁵⁰ Moreover, while testimony regarding the contact's impact on the jury's deliberations and verdict is inadmissible because of the no-impeachment rule, information about the contact itself is exempt from that rule. Trial courts may compel jurors to produce text messages and web browsing histories²⁵¹ and interview third parties with whom jurors communicated,²⁵² thereby making that information available to the government. If necessary, the government may work with law enforcement to investigate the extraneous contact.²⁵³ If the extraneous contact would not have biased a hypothetical reasonable juror, these evidentiary sources should be sufficient to prove that fact beyond a reasonable doubt.

A full discussion of the proper remedy when juror bias is found is beyond the scope of this Note. However, courts have noted that a biased juror may warrant a mistrial.²⁵⁴ Other jurisdictions look to factors such as the timing of the contact²⁵⁵ or the efficacy of curative measures²⁵⁶ when considering mistrial motions that allege extraneous juror contacts. While the proper remedy is likely a mistrial, this Note leaves open

249. If a juror was biased by contact that would not have biased a reasonable juror, she is therefore *not* a reasonable juror—which violates the impartial-jury guarantee. *Cf.* *People v. Kurth*, 216 N.E.2d 154, 156 (Ill. 1966) (noting that a claustrophobic juror's deliberation may be “influenced by her fear of confinement” and that therefore “the possibility of prejudice is high”); *Pace v. State*, 524 S.E.2d 490, 500 (Ga. 1999) (holding that the trial court properly excused a juror prone to anxiety attacks).

250. *Remmer I*, 347 U.S. 227, 229 (1954) (“[T]he burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant.”).

251. *See United States v. Lanier*, 988 F.3d 284, 290 (6th Cir. 2021) (describing the trial judge requiring a juror suspected of internet research and third-party contacts to preserve and produce her web browsing history and text messages).

252. *See Reporter's Transcript of Evidentiary Hearing Day 3 at 35, Godoy v. Uribe*, 2013 WL 2121440 (C.D. Cal. May 13, 2013) (No. CV 10-7927-R) (interviewing a third-party judge with whom the juror communicated regarding the trial).

253. *See, e.g., Remmer II*, 350 U.S. 377, 381 (1956) (describing the FBI investigation into allegations of jury tampering).

254. *E.g., Hatten v. Quarterman*, 570 F.3d 595, 600 (5th Cir. 2009); *see also Williams v. Bagley*, 380 F.3d 932, 944 (6th Cir. 2004) (noting that “even a single biased juror” violates a defendant's Sixth Amendment right to an impartial jury (citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992))).

255. *E.g., Bowman v. State*, 387 P.3d 202, 205–06 (Nev. 2016).

256. *E.g., State v. Erickson*, 610 N.W.2d 335, 338–39 (Minn. 2000).

whether excusing a biased juror before or during deliberation is a sufficient safeguard to a defendant's impartial-jury guarantee, and what prophylactic measures a trial court might take—such as admonishing or sequestering jurors—to prevent extraneous contacts in the first place.

CONCLUSION

To ensure that the Sixth Amendment's impartial-jury guarantee is equally available to all defendants, courts must respond to extraneous contacts uniformly. A careful analysis of *Remmer* and its underlying policies demonstrates that courts should presume that a juror is biased when she is involved in extraneous contacts that might bias an objective, reasonable juror. This presumption is necessitated by the no-impeachment rule, which restricts the available evidence to whether extraneous contact took place—the tip of the iceberg. The proposed procedure would keep defendants' impartial-jury guarantee afloat without wholly sacrificing judicial efficiency. While there may still be close calls and opportunities for judges to exercise individual discretion within this procedure, the proposed measures would ensure that the fundamental right to an impartial jury is equally guaranteed to every defendant.

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APPENDIX A

Circuit Survey

Jurisdiction	Presumes Prejudice	Burdens Defendant	Judicial Discretion
First Circuit	X ²⁵⁷		
Second Circuit	X ²⁵⁸		
Third Circuit	X ²⁵⁹		
Fourth Circuit	X ²⁶⁰		
Fifth Circuit	X ²⁶¹		
Sixth Circuit		X ²⁶²	
Seventh Circuit	X ²⁶³		
Eighth Circuit			X ²⁶⁴
Ninth Circuit	X ²⁶⁵		
Tenth Circuit		X ²⁶⁶	
Eleventh Circuit	X ²⁶⁷		
D.C. Circuit	X ²⁶⁸		

257. *United States v. Pagán-Romero*, 894 F.3d 441, 447 (1st Cir. 2018) (“It is now well established that less serious instances of potential taint should be addressed using the abuse-of-discretion standard, with the presumption of prejudice being reserved for more serious instances.”).
258. *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.”).
259. *United States v. Claxton*, 766 F.3d 280, 299 (3d Cir. 2014) (“[A]ny 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.” (quoting *United States v. Vega*, 285 F.3d 256, 266 (3d Cir. 2002))).
260. *Barnes v. Joyner*, 751 F.3d 229, 245 (4th Cir. 2014) (noting that “the *Remmer* presumption” is only available when the contact is “more than innocuous” (quoting *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996))).
261. *See supra* notes 157–64 and accompanying text.
262. *United States v. Lanier*, 988 F.3d 284, 295 & n.13 (6th Cir. 2021) (noting that the Sixth Circuit “places on the defendant the burden of proving bias at the *Remmer* hearing”).
263. *United States v. Turner*, 836 F.3d 849, 867 (7th Cir. 2016) (“[I]n a criminal case, any private communication . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial.” (emphasis omitted) (quoting *United States v. Bishawi*, 272 F.3d 458, 462 (7th Cir. 2001))).
264. *United States v. Hall*, 877 F.3d 800, 806 (8th Cir. 2017) (granting the district court “broad discretion” to detect and cure prejudice).

265. *Godoy v. Spearman*, 861 F.3d 956, 968 (9th Cir. 2017) (“Once a defendant shows a possibly prejudicial contact, the presumption of prejudice attaches, and the burden shifts to the state to prove the contact was harmless.”).
266. *United States v. Barrett*, 496 F.3d 1079, 1102 (10th Cir. 2007) (“[T]he defendant must . . . demonstrate ‘that an unauthorized contact created actual juror bias; courts should not presume that a contact was prejudicial.’” (quoting *United States v. Robertson*, 473 F.3d 1289, 1294 (10th Cir. 2007))).
267. *Ward v. Hall*, 592 F.3d 1144, 1180 (11th Cir. 2010) (“[E]xposure [to extraneous information] is presumptively prejudicial.”).
268. *United States v. Gartmon*, 146 F.3d 1015, 1028 (D.C. Cir. 1998) (noting that its cases maintain the presumption but declining to determine the continuing strength of the presumption after *Phillips* and *Olan*).

APPENDIX B

State Survey

Jurisdiction	Presumes Prejudice	Burdens Defendant	Judicial Discretion
Alabama	X ²⁶⁹		
Alaska		X ²⁷⁰	
Arizona		X ²⁷¹	
Arkansas		X ²⁷²	
California	X ²⁷³		
Colorado			X ²⁷⁴
Connecticut	X ²⁷⁵		
Delaware	X ²⁷⁶		
Florida	X ²⁷⁷		
Georgia	X ²⁷⁸		
Hawaii	X ²⁷⁹		
Idaho		X ²⁸⁰	
Illinois	X ²⁸¹		
Indiana	X ²⁸²		
Iowa	X ²⁸³		
Kansas	X ²⁸⁴		
Kentucky	X ²⁸⁵		
Louisiana	X ²⁸⁶		
Maine	X ²⁸⁷		
Maryland			X ²⁸⁸
Massachusetts	X ²⁸⁹		
Michigan	X ²⁹⁰		
Minnesota	X ²⁹¹		
Mississippi		X ²⁹²	
Missouri	X ²⁹³		
Montana	X ²⁹⁴		
Nebraska	X ²⁹⁵		
Nevada		X ²⁹⁶	
New Hampshire	X ²⁹⁷		
New Jersey			X ²⁹⁸
New Mexico		X ²⁹⁹	
New York			X ³⁰⁰
North Carolina			X ³⁰¹
North Dakota	X ³⁰²		
Ohio		X ³⁰³	
Oklahoma	X ³⁰⁴		
Oregon			X ³⁰⁵
Pennsylvania			X ³⁰⁶
Rhode Island		X ³⁰⁷	
South Carolina		X ³⁰⁸	

Jurisdiction	Presumes Prejudice	Burdens Defendant	Judicial Discretion
South Dakota	X ³⁰⁹		
Tennessee	X ³¹⁰		
Texas		X ³¹¹	
Utah	X ³¹²		
Vermont	X ³¹³		
Virginia		X ³¹⁴	
Washington	X ³¹⁵		
West Virginia		X ³¹⁶	
Wisconsin		X ³¹⁷	
Wyoming		X ³¹⁸	

269. *Resurrection of Life, Inc. v. Dailey*, 311 So. 3d 748, 757 (Ala. 2020) (presuming prejudice when a juror is exposed to information “crucial in resolving a key material issue in the case” (quoting *Dawson v. State*, 710 So.2d 472, 475 (Ala. 1997))).
270. *Swain v. State*, 817 P.2d 927, 931 (Alaska Ct. App. 1991) (requiring “substantial likelihood” that the jury was prejudiced by extraneous information to grant a new trial), *cited with approval in Titus v. State*, 963 P.2d 258, 264 n.6 (Alaska 1998).
271. *Am. Power Prods., Inc. v. CSK Auto, Inc.*, 367 P.3d 55, 59–60 (Ariz. 2016) (“That the nature of an error may render it impossible to prove the extent of any prejudice does not warrant a presumption of prejudice [T]he moving party is not required to prove actual prejudice, but is required to demonstrate the objective likelihood of prejudice.”).
272. *Finch v. State*, 2018 Ark. 111, at 7, 542 S.W.3d 143, 147 (“[T]he moving party bears the burden of proving both the misconduct and that a reasonable possibility of prejudice resulted from it.”).
273. *In re Hamilton*, 975 P.2d 600, 613–14 (Cal. 1999) (“[A] nonjuror’s tampering contact or communication with a sitting juror, usually raises a rebuttable ‘presumption’ of prejudice.”), *modified on reh’g denial* (June 30, 1999), *cited with approval in In re Cowan*, 419 P.3d 535, 544 (Cal. 2018).
274. *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005) (“[F]irst, a court makes a determination that extraneous information was improperly before the jury; and second, . . . makes a determination whether use of that extraneous information posed the reasonable possibility of prejudice”).
275. *State v. Berrios*, 129 A.3d 696, 704 (Conn. 2016) (“We . . . agree . . . that the *Remmer* presumption remains good law”).
276. *Baird v. Owczarek*, 93 A.3d 1222, 1228 (Del. 2014) (requiring the movant to prove either identifiable prejudice or “egregious circumstances” meriting the presumption of prejudice (quoting *Sykes v. State*, 953 A.2d 261 (Del. 2008))).
277. *State v. Needelman*, 276 So. 3d 444, 447 (Fla. Dist. Ct. App. 2019) (“Once it is determined that extrinsic information was made available to the jury, ‘the State has the burden of proving that there is no reasonable possibility

- of prejudice to the defendant.” (quoting *Williamson v. State*, 894 So. 2d 996, 998 (Fla. Dist. Ct. App. 2005))).
278. *Burney v. State*, 845 S.E.2d 625, 642 (Ga. 2020) (“[W]hen irregular juror conduct is shown, there is a presumption of prejudice to the defendant” (quoting *Dixon v. State*, 808 S.E.2d 696, 702 (Ga. 2017))).
279. *State v. Pitts*, 456 P.3d 484, 496–97 (Haw. 2020) (“[A] rebuttable presumption of prejudice is raised when the nature of an outside influence is such that it ‘could’ substantially prejudice the defendant’s right to a fair trial.”).
280. *McCandless v. Pease*, 465 P.3d 1104, 1112 (Idaho 2020) (“[T]he party seeking a new trial must demonstrate that juror misconduct occurred” then “the district court must determine whether there has been ‘a showing that prejudice reasonably could have occurred.’” (quoting *Levinger v. Mercy Med. Ctr., Nampa*, 75 P.3d 1202, 1206 (Idaho 2003))).
281. *People v. Hogley*, 696 N.E.2d 313, 341 (Ill. 1998) (“[T]he law is well established that communications about the case between jurors and third parties are presumptively prejudicial.”).
282. *Wahl v. State*, 51 N.E.3d 113, 115 (Ind. 2016) (“Defendants seeking a mistrial for suspected jury taint are entitled to the presumption of prejudice” (quoting *Ramirez v. State*, 7 N.E.3d 933, 939 (Ind. 2014))).
283. *State v. Christensen*, 929 N.W.2d 646, 678 (Iowa 2019) (“[T]he *Remmer*-type presumption is for ‘more than innocuous interventions.’” (quoting *Stephens v. S. Atl. Cannery, Inc. (Coca Cola Co.)*, 848 F.2d 484, 486 (4th Cir. 1988))), *reh’g denied* (July 15, 2019).
284. *State v. Pruitt*, 453 P.3d 313, 327 (Kan. 2019) (requiring nonmoving party to prove beyond a reasonable doubt that extrinsic contact did not affect the trial’s outcome).
285. *Conyers v. Commonwealth*, 530 S.W.3d 413, 427–28 (Ky. 2017) (prescribing a three-tiered approach that may presume prejudice only in extreme circumstances).
286. *State v. Scott*, 2004-1312921, p. 71–72 (La. 1/19/06); 921 So. 2d 904, 952 (“Once the defendant has established that an extraneous influence was present in the jury room, the burden shifts to the state, which may present evidence to rebut the presumption of prejudice.”), *overruled on other grounds by* *State v. Dunn*, 2007-0878, p. 7 (La. 1/25/08); 974 So. 2d 658, 662–63.
287. *State v. Coburn*, 1999 ME 28, ¶ 7, 724 A.2d 1239, 1241 (“When a defendant demonstrates that a juror was subjected to extraneous information and that the information is sufficiently related to the issues presented at trial, a presumption of prejudice is established”).
288. *Johnson v. State*, 31 A.3d 239, 246 (Md. 2011) (acknowledging that, while prejudice may be presumed in certain, unspecified situations, the trial court can ordinarily fashion a remedy other than mistrial).
289. *Commonwealth v. Guisti*, 747 N.E.2d 673, 680 (Mass. 2001) (requiring “the Commonwealth to demonstrate ‘beyond a reasonable doubt’ that the defendant was not prejudiced by the extraneous [contact]” (quoting *Commonwealth v. Fidler*, 385 N.E.2d 513, 520 (Mass. 1979), *superseded*

- by rule on other grounds*, Commonwealth v. Moore, 52 N.E.3d 126, 132 (Mass. 2016))).
290. People v. Rademacher, No. 258149, 2006 WL 707718, at *3 (Mich. Ct. App. Mar. 21, 2006) (“If the defendant establishes [that extrinsic contact occurred and that contact could have affected the verdict], the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt.” (quoting People v. Budzyn 566 N.W.2d 229, 235 (Mich. 1997))).
291. State v. Erickson, 610 N.W.2d 335, 338 (Minn. 2000) (“[P]rivate communication with a juror is presumptively prejudicial.”).
292. Rutland v. State, 2008-CT01544-SCT (¶ 24), 60 So.3d 137 (Miss. 2011) (“The party contending the misconduct must make an adequate showing to overcome the presumption of jury impartiality.”).
293. Smotherman v. Cass Reg’l Med. Ctr., 499 S.W.3d 709, 712 (Mo. 2016) (en banc) (“[P]roving that a juror obtained extraneous evidence against the court’s instructions . . . raises a presumption of prejudice . . .”).
294. Stebner v. Associated Materials, Inc. (AMI), 2010 MT 138, ¶ 17, 356 Mont. 520, 234 P.3d 94 (“A rebuttable presumption of prejudice exists when jury misconduct stems from extraneous influence . . .”).
295. State v. Thorpe, 783 N.W.2d 749, 759 (Neb. 2010) (applying a nominal “presumption” after requiring a defendant to “prov[e], by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial”).
296. Bowman v. State, 387 P.3d 202, 205–06 (Nev. 2016) (“[A juror’s] exposure to extraneous information via independent research or improper experiment is . . . unlikely to raise a presumption of prejudice.” (quoting Meyer v. State, 80 P.3d 447, 456 (Nev. 2003))).
297. State v. Stanin, 183 A.3d 890, 895 (N.H. 2018) (“[P]rejudice is presumed when there are communications between jurors and individuals associated with the case or when the juror’s unauthorized communications with others are about the case.” (quoting State v. Brown, 910 A.2d 1203, 1207 (N.H. 2006))).
298. Brandimarte v. Green, 182 A.2d 562, 565 (N.J. 1962) (“Where there are sufficient allegations that the jury’s verdict was discolored by improper influences, the trial judge should investigate the truth of the charges so that he may determine whether a new trial is warranted.” (quoting State v. Levitt, 176 A.2d 465, 467 (N.J. 1961))), *cited with approval in* Davis v. Husain, 106 A.3d 438, 448 (N.J. 2014) (“An indication that jurors have used improper information in deliberations may require an inquiry into the information’s effect on the jury’s decision making.”).
299. Kilgore v. Fuji Heavy Indus. Ltd., 2010-NMSC-040, ¶ 22, 148 N.M. 561, 240 P.3d 648 (“[W]e hereby disavow any further reference to a ‘presumption of prejudice’ in our case law because, in practice, the burden does not shift to the opposing party to disprove prejudice.”).
300. People v. Maragh, 729 N.E.2d 701, 704 (N.Y. 2000) (“[B]ecause juror misconduct can take many forms, no ironclad rule of decision is possible. In

- each case, the facts must be examined to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered.” (quoting *People v. Brown*, 399 N.E.2d 51, 53 (N.Y. 1979))).
301. *State v. Hurst*, 624 S.E.2d 309, 317 (N.C. 2006) (“[W]hen there is a substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial.” (quoting *State v. Campbell*, 460 S.E.2d 144, 156 (N.C. 1995))).
302. *State v. Hidanovic*, 2008 ND 66, ¶ 16, 747 N.W.2d 463, 469–70 (requiring the nonmoving party to prove that extrinsic juror contact was not prejudicial).
303. *State v. Herring*, 762 N.E.2d 940, 955 (Ohio 2002) (“The complaining party must show actual prejudice, *i.e.*, he must show that the communication biased one or more jurors.” (citation omitted)).
304. *Lay v. State*, 2008 Ok CR 7, ¶ 16, 179 P.3d 615, 621 (presuming prejudice when extraneous contacts take place during deliberations).
305. *State v. Moore*, 927 P.2d 1073, 1091 (Or. 1996) (“The decision to grant or deny a motion for a mistrial ‘is addressed to the sound discretion of the trial judge, who is in the best position to assess and to rectify the potential prejudice to the defendant.’” (quoting *State v. Pratt*, 852 P.2d 827, 835 (Or. 1993))).
306. *Pratt v. St. Christopher’s Hosp.*, 866 A.2d 313, 317 (Pa. 2005) (establishing a three-factor test to guide a court’s inquiry).
307. *State v. Quinlan*, 921 A.2d 96, 111 (R.I. 2007) (“[A] rebuttable presumption of prejudice does not arise merely because extraneous information is placed before the jury.”).
308. *State v. Harris*, 530 S.E.2d 626, 628 (S.C. 2000) (“In order to receive a mistrial, the defendant must show error and resulting prejudice.”).
309. *State v. Dillon*, 2010 S.D. 72, ¶ 51, 788 N.W.2d 360, 373–74 (maintaining the presumption of prejudice, but providing a three-pronged framework allowing the government to rebut that presumption).
310. *State v. Adams*, 405 S.W.3d 641, 651 (Tenn. 2013) (“[When] the jury was exposed to extraneous prejudicial information or an improper outside influence, a rebuttable presumption of prejudice arises . . .”).
311. *Howard v. State*, 941 S.W.2d 102, 117 (Tex. Crim. App. 1996) (en banc) (“A defendant, to prevail on an appeal claiming reversible prejudice resulting from external juror influence, must show either actual or inherent prejudice.”), *reh’g denied*, (Mar. 19, 1997), *overruled on other grounds by Easley v. State*, 424 S.W.3d 535, 538 (Tex. Crim. App. 2014).
312. *State v. Allen*, 2005 UT 11, ¶ 51, 108 P.3d 730 (maintaining the presumption of prejudice when the extraneous contact is between another participant in the trial and a juror).
313. *State v. Abdi*, 2012 VT 4, ¶ 14, 191 Vt. 162, 45 A.3d 29 (noting the state’s “heavy burden” when proving that extrinsic contact was not prejudicial).

314. *Riner v. Commonwealth*, 601 S.E.2d 555, 567 (Va. 2004) (“[T]he party moving for a mistrial . . . ha[s] the burden to establish that juror misconduct ‘probably resulted in prejudice.’” (quoting *Robertson v. Metro. Wash. Airport Auth.*, 452 S.E.2d 845, 847 (Va. 1995))).
315. *In re Woods*, 114 P.3d 607, 615 (Wash. 2005) (“[W]hen an unauthorized jury communication is found to have taken place, it is the State’s burden to prove harmlessness beyond a reasonable doubt.”), *abrogated on other grounds by Carey v. Musladin*, 549 U.S. 70, 76 (2006).
316. *State v. Jenner*, 780 S.E.2d 762, 774 (W.Va. 2015) (“During a *Remmer* hearing, the person seeking a new trial must prove, by clear and convincing evidence, that improper influence on a juror occurred and affected the verdict.”).
317. *State v. Broomfield*, 589 N.W.2d 225, 230 (Wis. 1999) (holding that a new trial is not warranted when a “defendant fail[s] to prove that the jury was biased by any improper information, or that a new trial was warranted”).
318. *Teniente v. State*, 2007 WY 165, ¶ 8, 169 P.3d 512, 520 (Wyo. 2007) (noting *Remmer*’s presumption of prejudice before noting that “many courts have abandoned the ‘presumption’ mechanism in favor of common sense inquiries into the likely effect of the information or influences on the average juror” (quoting *Gunnnett v. State* 104 P.3d 775, 781 (Wyo. 2005))).