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**From the Selected Works of Nancy S. Marder**

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## Cyberjuries: A New Role as Online Mock Juries

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# CYBERJURIES: A NEW ROLE AS ONLINE MOCK JURIES

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## I. INTRODUCTION

CYBERJURIES, in which laypersons' views about a dispute are sought on the Internet, have assumed a new role. They have evolved from online opinion polls to online mock juries. Online mock juries enable lawyers whose clients do not have deep pockets to test a case cheaply and quickly in cyberspace before presenting it to a jury in a courtroom. However, cyberjuries are still a work-in-progress. With advances in technology, they could potentially develop into online juries, which could offer online group decision-making by laypersons in cases that do not require a traditional jury trial.

Cyberjuries began as websites where parties could post disputes and any person with access to the Internet could read a synopsis of the dispute and vote for one party or the other.<sup>1</sup> These nascent cyberjuries had a number of limitations, including the absence of lawyers, judges, and legal claims, the lack of opportunity for deliberation, and no rule of decision-making or mechanism for enforcement. In this early form, cyberjuries operated essentially as online opinion polls.

Cyberjuries have now entered a new, and possibly, more useful phase as online mock juries. In this phase, lawyers who have cases that are going to trial before a traditional jury can present an abbreviated version of their case to online mock jurors. These online mock jurors render an individual verdict at some websites<sup>2</sup> or a group verdict at other websites.<sup>3</sup> The goal of either version is to provide lawyers with insights about how laypersons respond to their cases. Typically, these cases do not involve large sums of money to justify using actual mock jurors. Thus, online mock juries provide lawyers and their clients with access to

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\* Professor of Law, Chicago-Kent College of Law. I want to thank Ben Davis for organizing such a wonderful conference and for bringing together participants with so many different approaches to online dispute resolution. I also want to thank Lucy Moss for her excellent library assistance.

1. For an example of such a website, see iCourthouse, <http://www.i-courthouse.com> (last visited June 18, 2006).

2. For an example of such a website, see eJury, <http://www.ejury.com> (last visited June 18, 2006).

3. For an example of an online mock jury service in which the online mock jurors deliberate in a chatroom, see VirtualJury, <http://www.virtualjury.com/welcome.htm> (last visited on June 18, 2006).

a focus group, a resource that they would otherwise lack. Therefore, these online mock juries can be viewed as a new tool in the litigator's arsenal that will aid in leveling the playing field between rich and poor litigants.

However, online mock juries have potential limitations that have yet to be explored. What is lost when lawyers present their case in cyberspace rather than face-to-face? What is lost when online mock jurors do not have the opportunity to deliberate, or even if they do, when that deliberation is not face-to-face? Lawyers have embraced online mock juries because they believe that online mock juries will offer insights about how actual juries will respond to their case, but what if they do not? Even worse, what if they mislead lawyers because what happens in cyberspace does not replicate what happens when actual jurors sit together in a courtroom, observe a trial, and deliberate?

It is likely that cyberjuries will continue to evolve. Thus far, they have gone from online opinion polls to online mock juries. Perhaps the next development will be online juries. If cyberjuries move in this direction, then they could provide parties with the benefit of group decision-making, as traditional juries currently provide, while offering inexpensive and quick decision-making, as online dispute resolution currently provides. Furthermore, if cyberjuries evolve into online juries, then parties will have a choice whether to submit their case to a traditional jury or an online jury with the trade-offs that each entails.

This article will explore the rapid growth of cyberjuries from online opinion polls to online mock juries and will consider what lies ahead. Part II describes the early phase when cyberjuries functioned as online opinion polls and examines the benefits and limitations of this nascent form. Part III describes the next phase when cyberjuries morphed into online mock juries. Although lawyers believe that online mock juries provide them with tangible benefits, this part also considers the limitations of online mock juries in their current forms. Finally, Part IV describes a new role for cyberjuries as online juries, particularly if advances in technology allow cyberjurors to deliberate as a group and to see and hear each other during their deliberations. Online juries could provide parties with the benefits of group decision-making while still being quick and cheap. Thus, for certain types of cases, online juries could provide a viable alternative to the traditional jury trial, which could lead to a new and significant direction in online dispute resolution.

## II. EARLY PHASE: CYBERJURIES AS ONLINE OPINION POLLS

In their early phase, cyberjuries functioned as online opinion polls. The paradigmatic example of this form, which can still be found today, is the "peer jury" at iCourthouse.<sup>4</sup>

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4. iCourthouse also planned for another type of cyberjury, which it called a "panel jury." The panel jury would consist of twelve jurors selected by lawyers who paid to use this service. The twelve jurors would read about the case and deliberate in a chatroom, to which the lawyers would have access. The panel jury provided the blueprint for the online mock jury. iCourthouse now has a version that it calls JurySmart. See iCourthouse.com, JurySmart, [http://www.i-courthouse.com/main.taf?area1\\_id=jurysmart](http://www.i-courthouse.com/main.taf?area1_id=jurysmart) (last visited on June 18, 2006).

*A. A Brief Description*

At iCourthouse, the parties present their “case” by contributing a few paragraphs to a “trial book” that contains the plaintiff’s and defendant’s opening and closing statements, as well as supporting statements from witnesses.<sup>5</sup> Anyone can participate by registering at iCourthouse, selecting a case, reading the materials, and voting. The parties do not have any background information about the participants, who are only identified by number. A participant can ask questions of the parties; however, the parties can choose whether to answer the questions. As soon as a participant votes, his or her vote is added to the running tally. A participant can offer reasons for his or her vote, and these are added to the tally as well. The first piece of information available to a participant who has selected a case is the tally of how other participants have voted in the case and the reasons for their vote. Thus, individual participants render individual votes, and the votes are totaled so that onlookers and the parties can see who is in the lead. There is no limit on the number of participants who can vote. It is also unclear at what point a vote becomes “final,” how many votes it takes to “win,” and what would happen if one party decides not to be “bound” by the vote.<sup>6</sup>

The disputes, all of which pertain to civil matters, range from legal claims involving small dollar amounts to complaints about relationships. From an early survey in 2000,<sup>7</sup> the cases that appeared at iCourthouse on two random site visits could be categorized as follows: Internet-related disputes, tort disputes, property disputes, contract disputes, and complaints about failed or disappointing relationships.<sup>8</sup> For example, a typical Internet-related claim involved a person who had bought or sold an item on an Internet auction site and had not received either the item or the payment. One plaintiff explained that he had been the highest bidder for a basketball card at an online auction, had paid money for the card, but had never received it.<sup>9</sup> A typical contracts dispute involved two people who knew each other and made an oral agreement for one person to purchase an item from the other, but the buyer did not follow through with payments. Another plaintiff sold a ring to the manager at his job and said that the manager agreed to pay him a total of \$300 over the course of six weeks, but had never paid him.<sup>10</sup> In contrast to the legal claims, there are also laments such as a husband who said that he was entitled to sex three times a week with his estranged wife if he had to pay her alimony or a woman who had been

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5. See iCourthouse.com, iCourthouse Tour, [http://www.i-courthouse.com/tour/f\\_set.html](http://www.i-courthouse.com/tour/f_set.html) (last visited June 18, 2006).

6. *Id.*

7. For a more complete description of the survey results, see Nancy S. Marder, *Cyberjuries: The Next New Thing?*, 14 INFO. & COMM. TECH. L. 165 (2005).

8. The site visits took place on July 7 and July 11, 2000. See *id.* at 167 n.6. On the site visit on July 7, 2000, there were 34 cases listed, and on July 11, 2000, there were 38 cases listed. *Id.* at 191 nn.9 & 10.

9. *Id.* at 167.

10. *Id.* at 168.

abandoned by her boyfriend of eleven years and claimed that his abandonment caused her great stress.<sup>11</sup>

*B. Benefits of Online Opinion Polls*

1. *"Community" Support*

One of the main benefits of an online opinion poll is that a party who feels wronged has a place to give expression to that wrong and to elicit others' support. It may be that the defendant will be swayed by the number of supporters on behalf of the plaintiff and will do what he or she had agreed to do, such as make the payment, provide the item, or repair the relationship. Peer pressure may be all that is needed to persuade the defendant not to renege on his or her agreement.<sup>12</sup> If the opinion poll favors the plaintiff and the defendant fails to respond, the plaintiff can take the next step, such as proceeding to small claims court or state court, after having tried the no-cost, no-risk first step of an online opinion poll. In contrast, if the opinion poll supports the defendant, it may be enough to persuade the plaintiff not to proceed any further with his or her claim or grievance.

For legal claims, as well as for non-legal claims such as the husband who wants sex with his estranged wife or the woman who wants the return of her long-term boyfriend, the online opinion poll serves as a venue for the airing of grievances. The online opinion poll provides an alternative to appearing before television judges or writing to newspaper advice columnists. One difference, however, is that the parties have chosen not to turn to so-called experts, like Judge Judy or Dear Abby, but instead have decided to turn to laypersons.

One reason that the parties turn to laypersons online, whereas they might feel uncomfortable doing so in their own communities, is that online participants remain anonymous. The identities of the parties and the participants in the poll are never disclosed. In an actual community, if one turns to laypersons, they are usually friends, family, or acquaintances. If a person does not wish to divulge the dispute to those whom he or she knows, the alternative is to turn to a professional, such as a psychologist, therapist, or religious leader for a personal problem, or a lawyer for a legal problem. To resolve a legal dispute, one may need to turn to a judge, mediator, or arbitrator. An online opinion poll allows a party to seek guidance from a community of laypersons with whom one has no prior relationship.

Another advantage of an online community is that it consists of laypersons who bring their commonsense judgment to the problem or dispute. Indeed, this

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11. *Id.*

12. For an example of peer pressure among federal trial judges, see 28 U.S.C. § 476 (2006). Congress originally passed this statute as part of the Civil Justice Reform Act. Section 476 requires federal courts to prepare a list including the names of those judges who have failed to decide motions within six months or who have cases on their dockets for more than three years. The idea behind such a statute is that the peer pressure will be sufficient to spur judges to action so that no motion or case lingers too long on their dockets.

is one of the reasons that parties request traditional jury trials. They seek the commonsense judgment of a group of laypersons.<sup>13</sup> Admittedly, the online opinion poll does not allow participants to deliberate and to reach a group decision, but it does allow laypersons to offer their commonsense understanding of a problem or dispute. They do this through the questions they ask, the vote they render, and the reasons they give in support of their vote. Because so many of these disputes do not involve actual legal claims, there is often no law to apply or explain. Thus, an online community's judgment, even if untutored in the law and unmediated by a professional, may be sufficient to resolve the dispute at hand.

## 2. Plain Language

The absence of experts allows the parties to frame the dispute in language that they and the other participants understand. Although the lack of judges and lawyers limits the range of problems that online opinion polls can address,<sup>14</sup> one advantage is that the parties and participants communicate with each other directly in plain language. Without lawyers and judges, there are no intermediaries between the parties and the decision-maker as there are in a traditional courtroom. With online opinion polls, the parties prepare their own trial books in language that the participants understand and the participants ask questions and give reasons in language that the parties understand.

In a forum consisting entirely of laypersons, there is no need for legal language and the obfuscation it creates, at least for laypersons. In a traditional courtroom, legal language becomes particularly difficult to understand when the judge instructs the jurors on their roles and the law they should apply.<sup>15</sup> When the jurors look to the judge to find out what they are supposed to do, they often find themselves bereft of guidance and baffled by the instructions.<sup>16</sup> The instructions are directed more to the appellate court and the legal community than they are to the jurors. The instructions assume a familiarity with legal terms that jurors lack.<sup>17</sup> With online opinion polls, however, there are no lawyers or judges to introduce legal language into the proceedings.

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13. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge."); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge, he was to have it.").

14. See *infra* part II.C.

15. See, e.g., Nancy S. Marder, *Bringing Jury Instructions Into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449 (2006).

16. See, e.g., SCOTT E. SUNDBY, A LIFE OR DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 49 (2005) ("Not only were the instructions extremely long, they sounded like the undecipherable user's manual that comes with a new computer, written by one technician for another.").

17. See Marder, *supra* note 15, at 460-63.

### 3. *Convenience, Speed, and No Cost*

Other advantages of an online opinion poll are the convenience of working from home, the speed with which a running tally becomes available, and the fact that this service is free.

An online opinion poll is available to both parties and participants with an Internet connection. For many, this means that they have access to the online opinion poll from the comfort of their homes. For others, it requires going to a public library or an Internet café. But unlike most other forms of dispute resolution that require a party to go at an appointed time to an appointed meeting place, the online opinion poll makes no such demands. A party can post its section of the trial book at any time from home and simply wait for the results. Participants in an online opinion poll also find it convenient; they, unlike traditional jurors, do not need to be summoned to a courthouse, miss work, wait in a Jury Assembly Room until being assigned to a case, or sit in a courtroom as the trial proceeds. Rather, a participant to an online opinion poll can go online whenever it is convenient, choose a case, and vote.

Once the parties have posted their trial book, any participant may read it and vote. As long as the dispute attracts interest among participants, there will be a running tally, which the parties can follow. Compared to a case that proceeds in court, which can take months or even years, or even a case that proceeds before an arbitrator or mediator, which might be a little quicker, the online opinion poll produces responses almost immediately. In an age of e-mail and instant messaging, the online opinion poll delivers at the same speed as these other forms of communication.

The online opinion poll is not only quick, but free. At a time when trials in traditional courts are prohibitively expensive, and businesses have turned to arbitration<sup>18</sup> or jury waivers<sup>19</sup> as a means of resolving disputes more quickly and cheaply,<sup>20</sup> the online opinion poll offers an option that is both quick and free. Of course, the adage "you get what you pay for" might be particularly apt here because the online opinion poll does not necessarily resolve the dispute. It has the potential to do so, particularly with claims that have nowhere else to be heard, but the online opinion poll is only a poll. It provides easy, fast, and free feedback, but it is just feedback.

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18. See, e.g., Linda J. Demaine & Deborah R. Hensler, *Mandatory Arbitration: "Volunteering" To Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS., Winter/Spr. 2004, at 55.

19. See, e.g., Jane Spencer, *Waiving Your Right to a Jury Trial*, WALL ST. J., Aug. 17, 2004, at D1.

20. But see Deborah Hensler, *A Research Agenda: What We Need To Know About Court-Connected ADR*, 6 DISP. RESOL. MAG. 15, 16 (1999) (suggesting the need for empirical studies to determine whether arbitrations are, in fact, cheaper than trials).

### C. *Limitations of Online Opinion Polls*

An online opinion poll has several limitations as a mechanism for dispute resolution. Among the more significant are that there is no screening of claims, no supervision by professionals, no knowledge of who is participating in the poll, no rules for the poll, and no enforcement mechanism. Even without trying to transform the online opinion poll into another form of cyberjury, the online opinion poll could be more effective as a feedback mechanism with a few changes.

#### 1. *Lack of Serious Claims*

Online opinion polls allow parties to present any claim at all; there are few restrictions. As a result, there is a tendency for claims to be trivial, if not silly. For example, one plaintiff wanted her neighbor to pay for a survey of the boundary between their two properties to determine whether the plaintiff's daughter's guinea pig's remains must be moved.<sup>21</sup> Because there is no screening or supervision, any claim—no matter how fanciful or frivolous—can be addressed by an online opinion poll. Although it might be useful for online opinion polls to handle a wide range of claims, including non-legal claims, the downside of these claims is that they can detract from the entire enterprise. If the claims are not significant, then the participants are unlikely to take their role seriously.

There are several ways to encourage parties to submit meaningful claims even if the dollar amounts at issue are small. First, the website could charge plaintiffs a small fee, such as five or ten dollars, as a way of deterring those who use the online opinion poll mainly for entertainment. If plaintiffs had to pay a modest fee, just as plaintiffs initiating a civil action in federal court have to pay a filing fee,<sup>22</sup> they might be more selective about the disputes they submit. Second, the website could hire a lawyer or judge who screens claims according to the website's posted guidelines and who permits only those claims that meet the guidelines to go forward. The judge could answer participants' questions, explain the law in cases that involve law, and bring gravitas to the proceedings just as a traditional judge does in the courtroom. The downside is that a judge might use legal terms rather than plain language and the parties and participants would no longer communicate directly with each other, but through an intermediary.

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21. See iCourthouse.com, View Cases, [http://www.icourthouse.com/main.taf?area1\\_id=cases&area2\\_id=findcase](http://www.icourthouse.com/main.taf?area1_id=cases&area2_id=findcase) (search for Case 2000-10164) (last visited on June 18, 2006).

22. See 28 U.S.C. § 1914 (2006) (requiring "the parties instituting any civil action . . . to pay a filing fee of \$250").



## 2. *Lack of a Representative Poll*

Another limitation of the online opinion poll is that parties do not have any knowledge about who is participating and do not have any reassurance that the poll is representative. The poll would be more meaningful if it were based on a random sampling of a large number of people. If the website required participants to complete a questionnaire that addressed background information, the parties could be assured that a diverse group had voted. Also, if fewer cases were available at any given time, the number of voters per case might be greater; this would allow the poll to be more representative of the population.

Currently, participants choose the cases in which to participate and a person may vote multiple times in the same case. Thus, the poll is not based on random sampling. The website could randomly assign participants to a case rather than allowing them to select their own case. If assignment to a dispute were random, this would prevent participants from voting multiple times in the same case and would lead to a more representative poll than if participants select their own cases, but it still would not solve the problem that participants are those who volunteer to serve rather than those who are selected randomly by the website to participate.

Another drawback is that participants in an online opinion poll are likely to be very comfortable with computers, and thus, less representative of the general population in this respect. To the extent that there is a "digital divide,"<sup>23</sup> with white,<sup>24</sup> middle- and upper-class,<sup>25</sup> able-bodied<sup>26</sup> men<sup>27</sup> more likely to use

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23. The digital divide refers to those who have access to and feel comfortable using computers and those who do not. The divide operates on a global level as well as a national level. Compare John Markoff, *High-Tech Executives Urge Action on World's Digital Divide*, N.Y. TIMES, July 20, 2000, at A6 (describing the efforts by a group of high-technology executives to encourage nations to take steps to reduce the "digital divide," such as Japan's commitment of \$12 billion in loans and \$3 billion in grants over five years to information-technology initiatives in the developing world), with John Owens, *Helping Close the Digital Divide*, CHI. TRIB., Aug. 7, 2000, at B1 (describing local efforts to provide "computer technology to underprivileged youth in parts of Chicago in an effort to "bridg[e] the gap in the 'digital divide'").

24. See, e.g., Amy Harmon, *Computing in the '90s: The Great Divide*, L.A. TIMES, Oct. 7, 1996, at D1 ("Ethnicity is also a factor in the technological divide. Compared with Latinos, twice the number of non-Latino whites polled said they own personal computers.").

25. See, e.g., Owens, *supra* note 23, at B1 (describing the work of Street-Level Youth Media, a non-profit organization that provides access to video and computer technology to underprivileged youth in parts of Chicago in an effort to "bridg[e] the gap in the 'digital divide,' the technological chasm between the upper- and lower-income communities in America").

26. See, e.g., Matthew Mirapaul, *Making Federal Web Sites Friendly to Disabled Users*, N.Y. TIMES, June 11, 2001, at E2 (raising the question whether web designers, in an effort to meet new guidelines making federal Internet sites more accessible to people with disabilities, will be more limited in their use of multimedia materials because of the time, effort, and money required to adapt them).

27. The gender "digital divide" describes "the fact that fewer women are entering today's . . . technology fields." *Technology's Gender Gap*, N.Y. TIMES, Sept. 5, 2000, at A26. See also Laurie J. Flynn, *Survey on Women's Role in Silicon Valley*, N.Y. TIMES, Apr. 23, 2001, at C3 ("Despite the gains, . . . Silicon Valley is still a man's world."). Although studies show that women are active users of new technology and outnumber men in terms of Internet use, they are not entering the

computers than other demographic groups, the poll is already less likely to represent the population. Unfortunately, the improvements discussed above do not address the digital divide problem; however, as more individuals have access to computers and the Internet, this problem may diminish over time.

### 3. *Lack of Impartiality*

Another limitation of the online opinion poll, at least at iCourthouse, is that each participant is introduced to the case by viewing others' responses. Thus, each participant is prevented from approaching the case impartially. Instead, the participant sees whether there is a groundswell of support for one of the parties before deciding how to vote.

Empirical studies show that people change their own views of correct answers based on what others have said is the correct answer. For example, in the 1950s, Dr. Solomon Asch conducted experiments in which participants were asked to determine which of two lines was the shorter one. The participant heard several confederates' answers before responding; confederates were instructed to provide the incorrect answer.<sup>28</sup> A majority of participants said that the longer line was shorter after hearing confederates give this incorrect answer.<sup>29</sup>

Recently, an updated version of this experiment was conducted using magnetic resonance imaging ("MRI") scanners, which revealed that different parts of the brain are activated based on whether the participant goes along with the incorrect group answer or resists group pressure to conform and stands by his or her independent judgment of the correct answer.<sup>30</sup>

To help participants avoid this tendency to conform to the group answer, the online opinion poll results should be unavailable to participants until after they vote. Once they submit their vote, they would be able to see the tally. In contrast, parties would be able to check the poll at any point so that they would know how they were faring.

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information technology work force in proportion to their numbers in society. See *Technology's Gender Gap*, *supra*. The U.S. Commerce Department estimates that while 51% of the population is female, only 26% of computer scientists and 9% of engineers are female. Marilyn Geewax, *Missing Element: Gender Imbalance Hurts Tech Industry, Women Say*, CHI. TRIB., Sept. 6, 2000, § 8, at 8.

28. See, e.g., Robert Buckhout, *Eyewitness Testimony*, SCI. AM., Dec. 1974, at 23, 28 (describing Dr. Asch's experiment).

29. *Id.*

30. See Gregory S. Berns et al., *Neurobiological Correlates of Social Conformity and Independence During Mental Rotation*, 58 BIOLOGICAL PSYCHIATRY 245, 246 (2005). See also Sandra Blakeslee, *What Other People Say May Change What You See*, N.Y. TIMES, June 28, 2005, at F3 (describing the updated Asch study and noting that "social conformity showed up in the brain as activity in regions that are entirely devoted to perception. But independence of judgment—standing up for one's beliefs—showed up as activity in brain areas involved in emotion.").

#### 4. *Lack of Stated Rules and Enforcement Agreements*

The online opinion poll, at least as presented at iCourthouse, leaves parties and participants uninformed as to when the poll will end and how the parties will use the poll to resolve their dispute. After a participant votes, he or she does not learn anything more about the dispute. The trial book remains on the website for an unspecified time, without any rules indicating when the online opinion poll will end.

How does a party “win” and what happens when he or she does? Do the parties have any prior arrangements? The rules do not indicate which decision-rule governs. It is unclear whether this is left to the parties to decide for themselves before they submit their dispute to the online opinion poll, whether this is a decision that they make after they have seen the poll results, or whether this is a decision that they never make.

Even if the website cannot offer any enforcement to the winning side, it would be useful to provide rules for the parties and participants so that everyone knows what it takes to “win.” Parties could decide for themselves whether they want to wait for a certain amount of time to elapse, a certain number of total votes to be cast, or a certain percentage of votes to be achieved by one side for “victory,” but whichever option they choose, they should decide before the voting begins. If parties worry that voters will “game” the system based on the governing decision-rule, the website could post this information after the voting has closed.<sup>31</sup>

Party agreement to a decision-rule in advance of voting gives the participants reassurance that their vote matters. Although the website rules should explain that the parties may choose to ignore the vote in trying to resolve their dispute in the end, the provision of rules indicates that there is some method to the online opinion poll. Otherwise, participants may wonder when the poll will end and how the parties will use the results.

It would be useful if the website included a page that showed how the disputes were resolved, including the final poll results and how the parties used them to resolve their dispute. If participants could see that their participation helped the parties to resolve their dispute, then they might be inclined to participate in other online opinion polls in the future.

Also, in popular parlance, participants would have closure. Some judges in traditional jury trials strive to give jurors a sense of closure.<sup>32</sup> They not only thank jurors after they have completed their deliberations,<sup>33</sup> but also they send jurors a letter explaining any post-verdict motions in the case.<sup>34</sup> If the website

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31. The website rules could explain that the parties have agreed to a decision-rule and the decision-rule will be posted once the voting has ended.

32. See Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1287 (2001).

33. See, e.g., JURY TRIAL INNOVATIONS 200-02 (G. Thomas Munsterman et al. eds., 1997).

34. See Marder, *supra* note 32, at 1287 (describing the efforts of Judge Donald E. Shelton, a trial judge in Ann Arbor, Michigan, who sends jurors letters to inform them about developments in the case after their jury service has ended).

provided online opinion poll participants with similar updates, albeit online, the participants might experience a similar sense of closure and of having made a difference to the parties.

### III. CURRENT PHASE: CYBERJURIES AS ONLINE MOCK JURIES

Cyberjuries have assumed a new role as online mock juries. In this role, they can serve as sounding-boards for lawyers who have a case that they would like to test on laypersons before presenting it to a traditional jury. There are several websites that offer this service including eJury,<sup>35</sup> Virtual Jury,<sup>36</sup> and JurySmart.<sup>37</sup>

#### A. *A Brief Description*

With the emergence of online mock juries, cyberjuries can play a role that connects traditional jury trials with the Internet. Lawyers who have actual cases can turn to the Internet in search of online mock jurors. Although lawyers with big cases have long turned to mock jurors or focus groups to test their arguments and to hone their presentation before appearing before a traditional jury, the expense usually limited this service to lawyers from large firms or whose clients have deep pockets. With the development of online mock juries, however, lawyers with smaller cases or clients with limited budgets can afford this service.

Online mock juries have taken different forms. At Virtual Jury and eJury, “[t]wo of the better-known Web-based companies,”<sup>38</sup> lawyers submit abbreviated versions of their case to online mock jurors. Typically, the presentation includes a factual summary of the case, with claims and possible defenses, exhibits, and jury instructions. These services then rely on their databases of online mock jurors and look for those who match the demographics of potential jurors in the trial venue. Those who match are invited to serve as online mock jurors. According to the founder of Virtual Jury, online mock jurors are “interviewed and prescreened, just as with live focus groups.”<sup>39</sup> One important difference between eJury and Virtual Jury is that eJury has online mock jurors respond to the case individually whereas Virtual Jury has online mock jurors deliberate in a chatroom in which the deliberations are led by an experienced facilitator.<sup>40</sup> Lawyers can observe the chatroom deliberation and even pose questions to the online mock jurors.<sup>41</sup> Both services provide lawyers with statistical data and online mock jurors’ comments. With Virtual Jury, lawyers also receive a transcript of the deliberations.<sup>42</sup>

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35. See eJury, <http://www.ejury.com>.

36. See VirtualJury, <http://www.virtualjury.com>.

37. See iCourthouse, <http://www.i-courthouse.com>.

38. Karen Dean, *12 Angry Surfers*, DAILY BUS. REV. (Miami, Fla.), Dec. 28, 2005, at A16.

39. *Id.* (quoting Robert Gordon, founder and president of Virtual Jury).

40. VirtualJury, About Focus Groups, <http://virtualjury.com/focusgrp.htm> (last visited Sept. 5, 2006).

41. See Dean, *supra* note 38, at A16.

42. *Id.*

*B. Benefits of Online Mock Juries*

*1. From a Lawyer's Perspective*

*a. Efficient and inexpensive*

Lawyers cite two key advantages to using online mock juries: they are quick and relatively inexpensive. Turnaround time is described as “fairly quick—generally three to five days.”<sup>43</sup> In addition, lawyers do not need to spend time away from the office as they would if they were observing a live mock jury. The cost of an online mock jury is modest compared to an actual mock jury, which typically runs at least \$50,000.<sup>44</sup> In addition, an actual mock jury requires “[g]athering potential jurors, locating a convenient facility, attorney travel expenses, witness fees and other associated expenditures . . . .”<sup>45</sup> At Virtual Jury, the typical cost of an online mock jury is \$8500; at eJury, the cost is about \$1500, but ranges from \$600 to \$4000 depending on the number of pages of data and questions submitted.<sup>46</sup> The speed and modest cost of using online mock jurors make this service available to a broader array of clients, and in particular to those who could not afford the costlier and more time-consuming services of an actual mock jury.

*b. Provides feedback*

Another benefit of online mock jurors, whether they are polled individually or deliberate collectively, is that they provide feedback to the lawyer. In particular, online mock jurors are laypersons who can provide commonsense views of the case that the lawyer, who has been trained in the law and who is immersed in the case, may no longer be able to discern. Online mock jurors, in response to questions or in their comments during deliberations, can make clear to lawyers what a person without any legal training is likely to understand. In addition, if there are particular regional or local perspectives, these can become apparent through the polling of a large number of online mock jurors who come from the place where the trial is to be held.<sup>47</sup> Online mock jurors can provide lawyers with a range of insights, from the words or concepts that cause them confusion to the arguments that fail to persuade them. If actual mock juries are useful insofar as they provide additional feedback to lawyers, then online mock juries can

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43. *Id.* at A19.

44. Conversation with trial lawyer Dennis Cotter, Chicago, Ill. (Apr. 6, 2006).

45. Dean, *supra* note 38, at A19.

46. *Id.* at A20.

47. Of course, this could create a problem for jury pools if lawyers use online mock jurors drawn from the jurisdiction where the trial is to be held. A new question that judges or lawyers might need to ask during voir dire is whether the prospective juror has served as an online mock juror for this case.

provide much, albeit not all,<sup>48</sup> of that feedback for less time and money, thereby making a resource available to lawyers and clients who would otherwise not have access to it.

*c. Serves as a diagnostic tool*

Online mock juries can be used by lawyers in the same way that mock juries are used; they can also be used in new ways, for example as a diagnostic tool. The traditional way to use a mock jury is to present an abbreviated version of the trial to the mock jurors shortly before the case goes to trial. This timing allows lawyers to know which arguments they plan to make, which witnesses they plan to call, and what mix of jurors they should look for if a jury consultant has worked with them. Having an actual mock jury hear the case before the trial allows lawyers to know what their case will look like, and yet, to fine-tune their presentation before the trial begins.

Because online mock juries are cheap and quick, they could be used as an early diagnostic tool. Online mock juries might give lawyers insights about where to file their case, particularly if the online mock jurors' responses indicated that a case met with resistance or acceptance in a certain jurisdiction. As the founder of Virtual Jury suggested, the online mock jury could provide "an early read or a snapshot, of the area's values, or how a case might be viewed in different jurisdictions."<sup>49</sup> Some lawyers have used online mock juries early in the process to reveal directions that they might not have thought to pursue.<sup>50</sup> As one lawyer who uses online mock juries as "a strategy mechanism" explained: "Jurors sometimes come up with obscure points you won't necessarily think of, that lead to other information or even a different direction to go."<sup>51</sup> In addition, if a lawyer uses an online mock jury early in the process, he or she may advise clients to settle or to proceed to trial depending on the feedback. Although settlements are often reached at the eleventh hour, an early settlement would save clients money.<sup>52</sup>

*2. From an Online Mock Juror's Perspective*

*a. Convenient*

For an online mock juror, just as for an online opinion poll participant, participation is easy and requires nothing more than an Internet connection. Online mock jurors are sent an e-mail asking if they want to participate in a

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48. See *infra* part III.C (describing some of the ways in which online mock juries do not provide all of the information that actual mock juries provide).

49. Dean, *supra* note 38, at A19 (quoting Robert Gordon, founder and president of Virtual Jury).

50. *Id.* at A20.

51. *Id.* (quoting Jeffrey Henry, a lawyer with the Law Offices of Tim Dollar in Kansas City, Mo.).

52. Of course this would mean that lawyers would lose fees.

particular case. As one article reports, “unlike many courthouse jurors, most cyberjurors welcome the chance to serve.”<sup>53</sup> As a testament to their enthusiasm, many have encouraged friends and relatives to sign up and serve. The time commitment is minimal and does not entail the inconvenience of traditional jury service such as missing work, traveling to an unknown courthouse, waiting in a Jury Assembly Room, and going to a courtroom to begin the process of jury selection. Online mock jurors with a computer and Internet connection can participate from home at a time that is convenient for them. The online mock juror can experience some of the thrills of a legal case without undergoing any of the rigors or hardships that a traditional juror sometimes endures.

*b. Informal*

The experience of serving as an online mock juror provides a good introduction to the legal system because it is less formal and less intimidating than the traditional courtroom. For example, Robert Gordon, the founder and president of Virtual Jury, describes the online process as “much more relaxed” than “a traditional setting” and he suggests that this leads lawyers to acquire “more information” than they would have in the traditional setting.<sup>54</sup> The informality also allows online mock jurors to feel more comfortable with the process and to ask questions about the process.<sup>55</sup> The courtroom experience for traditional jurors can be mystifying as they wonder what the lawyers are discussing during sidebars or what the objections and judge’s rulings mean. These procedures are not found in the simplified world of the online mock juror, where the procedures that do raise questions can be addressed. In fact, for the reticent online mock juror, there is even, at least at Virtual Jury, a “talented

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53. Dean, *supra* note 38, at A19.

54. *Id.* (quoting Robert Gordon).

55. In contrast, jurors serving on a traditional jury are not permitted to ask questions during the trial, except in a few states, such as Arizona and Ohio, that permit jurors to submit written questions to the judge for witnesses. See, e.g., B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 281 (1996) (describing Arizona’s more leading-edge reforms, including allowing jurors to submit written questions for witnesses during the trial); *State v. Fisher*, 789 N.E.2d 222, 230 (Ohio 2003) (concluding that “the practice of allowing jurors to question witnesses is not error . . . [and holding that it] is a matter committed to the discretion of the trial court”). A few federal courts have experimented with this practice as part of a recent pilot project. See, e.g., Patricia Manson, *Verdict on Jury Project: New Steps Work But More Evidence Sought*, CHI. DAILY L. BULL., May 24, 2006, at 1 (describing the pilot project in the Seventh Circuit in which federal district courts experimented with a number of innovations including jurors’ submission of written question to witnesses); Abdon M. Pallasch, *Experiment Lets Jurors Submit Questions at Trial*, CHI. SUN-TIMES, May 23, 2006, at 42 (“Judges in the Chicago area have been experimenting with letting jurors submit questions during trials, and they say the experiment has been a success.”). The American Bar Association (ABA) has recommended that courts adopt this practice. See ABA PRINCIPLES FOR JURIES AND JURY TRIALS, Principle 13.C at 18-19 (2005) [hereinafter ABA PRINCIPLES], available at <http://www.bna.com/bnabooks/ababna/annual/2005/023.pdf>.

facilitator”<sup>56</sup> who will try to “encourag[e] comments from less forthcoming jurors.”<sup>57</sup> This more supportive experience differs from the experience that some traditional jurors have had, where they have felt “bullied” by fellow jurors.<sup>58</sup>

c. *Anonymous*

Online mock jurors are also cloaked in anonymity; they are unseen and they are identified by first names only during deliberations.<sup>59</sup> Although website services have demographic information about online mock jurors, this information is unavailable to other online mock jurors. One advantage of such anonymity is that online mock jurors can offer their views without worrying about what fellow jurors will think. In this sense, anonymity can be liberating for online mock jurors. Moreover, online mock jurors, like online opinion poll participants, are not subject to stereotypes about their race, ethnicity, class, or sexual orientation that fellow online mock jurors might hold because this information is not available to them. The gender of online mock jurors might be revealed if actual first names are used, but if pseudonyms are used even information about gender would be unavailable. Thus, online mock jurors remain unseen and unknown except for the views that they express online. This comes close to the ideal of the color-blind jury that some justices<sup>60</sup> and academics<sup>61</sup> have espoused.

Anonymity further protects online mock jurors’ privacy in ways unavailable to traditional jurors. Anonymity for traditional jurors is limited to only a few

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56. VirtualJury Welcome, <http://www.virtualjury.com/welcome.htm> (last visited on Apr. 14, 2006).

57. Dean, *supra* note 38, at A19.

58. See, e.g., *Female Jurors Complain of Sexism Tainting Menendez Deliberations*, N.Y. TIMES, Jan. 1, 1994, at A7 (quoting Tracy Miller, one of the female jurors, who described the jury deliberations during the trial of Erik and Lyle Menendez for the murder of their parents as “hostile,” with the male jurors offering “insults, sexual comments” and trying to “outshout” the female jurors); Matt O’Connor, *Juror Wants Questions to Stop*, CHI. TRIB., May 4, 2006, § 2, at 3 (quoting juror Evelyn Ezell who complained that other jurors were calling her “derogatory names” and engaging in “shouting, profanity, and personal attacks”; however, she was removed during deliberations for having lied in her written questionnaire); *Woman Juror: Men Bullied Her To Convict*, L.A. DAILY J., Jan. 1, 1994, at 3 (“A female juror who voted to convict a man of bank robbery now contends she was bullied by nine male jurors into changing her position in a case of alleged gender bias.”).

59. See, e.g., eJury, Terms and Conditions, [http://www.ejury.com/jurors\\_terms.html](http://www.ejury.com/jurors_terms.html) (last visited Sept. 1, 2006).

60. See Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 663-64 (2002) (describing Chief Justice Rehnquist’s view that people are fungible as jurors as long as they can be impartial).

61. One proposal, calling for jurors to be questioned during voir dire so that they are neither seen nor heard by the attorneys as a way of avoiding attorneys’ judgments based on jurors’ race, gender, or ethnicity, would come close to achieving this color-blind ideal. See Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 1011 (1996). Jurors would be evaluated based on whether they revealed explicit or implicit bias, and not on lawyers’ hunches based on stereotypes.



jurisdictions.<sup>62</sup> In those jurisdictions, the names, addresses, and telephone numbers of jurors are made available to the parties, but are unavailable to the public.<sup>63</sup> This limited anonymity is designed to protect the privacy of traditional jurors<sup>64</sup> while still maintaining the openness of jury selection and the trial to members of the public and the press.<sup>65</sup> In contrast, an online mock juror participates in a private process that is available only to the attorney who paid to conduct the process. Thus, online mock jurors can participate knowing that whatever background information they provide will not be made public. Even their fellow jurors do not have access to that information including any other information that is typically revealed through physical appearance or presence.

### C. *Limitations of Online Mock Juries*

#### 1. *From a Lawyer's Perspective*

##### a. *Lack of deliberations*

At online mock jury websites, such as eJury, where online mock jurors respond individually, there is no group deliberation.<sup>66</sup> If an online mock jury is supposed to give a lawyer an opportunity to see how his or her case is perceived by a group of laypersons, then the more closely an online mock jury experience approximates a traditional jury experience, the more likely it is that insights gained from an online mock jury will be applicable to a traditional jury. Thus, the lack of deliberation is a serious omission.

Deliberation is a key feature of the traditional jury. Ideally, jurors approach deliberations with a willingness to be persuaded by their fellow jurors. Although

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62. See, e.g., Molly McDonough, *Private Lives*, A.B.A. J., May 2006, at 14, 16 ("While many states have enacted statutes or court rules to shield jury information from public view, California has the most sweeping statute.").

63. See *id.* ("[In California, s]ince 1996, names, addresses and telephone numbers of jurors for criminal proceedings have been sealed once the jurors' verdict is recorded. Los Angeles takes the statute further with its policy of selecting jurors by number . . .").

64. See *id.*

65. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 11-12 (1986) (concluding that public access to preliminary hearings "plays a particularly significant positive role in the actual functioning of the process"); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) ("[H]istorical evidence . . . reveals that, since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown."); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) ("[P]ublic access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.") (footnotes omitted); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980) ("The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance.").

66. eJury, <http://www.ejury.com> (last visited Sept. 1, 2006).

jurors might have formed tentative views during the trial<sup>67</sup> that does not mean that they will adhere to them throughout the deliberations. Deliberations are intended for the exchange of ideas, with the ultimate goal that the jury will reach a consensus.<sup>68</sup> One reason that a diverse jury is desirable is that jurors can bring their different backgrounds, perspectives, and life experiences to bear in interpreting the evidence and law and in making factual determinations.<sup>69</sup>

Another reason is that jurors will remember different pieces of evidence or understand different parts of the instructions.<sup>70</sup> The collective effort leads to better problem-solving than an individual effort alone would produce.<sup>71</sup> The group deliberation, in which jurors challenge each other's assumptions, offer

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67. One of Arizona's jury reforms was to allow jurors to engage in discussion of the evidence during civil trials if all of the jurors are present in the jury room. *See* Dann & Logan, *supra* note 55, at 281. This change was made in recognition that "the traditional rule swearing the jurors to complete silence about anything having to do with the case until deliberations . . . 'is unrealistic, unnatural, and not necessary for a fair trial.'" *Id.* The reform was implemented through a rule change. *See* ARIZ. R. CIV. P. 39(f). Those researchers who have studied the effects of the rule change have found that it did not lead to premature judgments by jurors and that it did increase their understanding of the evidence, particularly in complex cases. *See, e.g.,* Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003). The ABA recently recommended this practice in its *ABA Principles* because it recognizes "jurors' natural impulses to discuss at least limited aspects of their shared experience with fellow jurors as the trial unfolds." ABA PRINCIPLES, *supra* note 55, Principle 13.F at 20.

68. *See, e.g.,* Nancy S. Marder, *Cyberjuries: A Model of Deliberative Democracy?*, in DEMOCRACY ONLINE: THE PROSPECTS FOR POLITICAL RENEWAL THROUGH THE INTERNET 35, 38 (Peter M. Shane ed., 2004).

69. The Supreme Court has recognized the value of having a venire consisting of jurors from different backgrounds who might have different perspectives and insights to offer during deliberations. *See, e.g.,* *Peters v. Kiff*, 407 U.S. 493, 503 (1972) ("When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."); *Ballard v. United States*, 329 U.S. 187, 194-95 (1946) ("The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.... [A] flavor, a distinct quality is lost if either sex is excluded.").

70. *See, e.g.,* REID HASTIE ET AL., *INSIDE THE JURY* 236 (1983) ("The group memory advantage over the typical or even the exceptional individual is one of the major determinants of the superiority of the jury as a legal decision mechanism."); *id.* at 81 (describing the impressive collective memory of a jury and noting that jurors remember 90% of the evidence and 80% of the judge's instructions); JAMES P. LEVINE, *JURIES AND POLITICS* 182 (1992) ("Remembering what was said is no small part of competent fact finding, and the collective memory of twelve jurors (or even six) is likely to be better than that of one individual."); Harry Kalven Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1067 (1964) ("Different jurors remember, and make available to all, different items of the trial so that the jury as a group remembers far more than most of its members could as individuals.").

71. *See, e.g.,* *Ballew v. Georgia*, 435 U.S. 223, 233 (1978) ("When individual and group decisionmaking were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted."); *id.* at 233 n.14 (citing studies).

different interpretations, correct mistaken views, and point out underlying biases, provides a check that is unavailable to the individual decision-maker.<sup>72</sup>

In many cases, such as in civil and criminal cases in federal court<sup>73</sup> and in criminal cases in some state courts,<sup>74</sup> the jury's verdict must be unanimous. In order to reach unanimity, there must be an exchange of ideas and a genuine give-and-take. If each individual juror simply adhered to his or her view, it would be difficult to reach a consensus. In this sense, a jury verdict is not just the sum of jurors' individual verdict preferences; rather, deliberations are a transformative process and lead jurors to change their views so that a group decision is possible.<sup>75</sup> An online mock jury experience that treats individual verdict preferences as equivalent to a group verdict reached through deliberation misses a crucial step in the decision-making process.

*b. Lack of face-to-face communication during deliberations*

Even websites such as Virtual Jury that include deliberations in a chatroom, do not give lawyers the opportunity to see online mock jurors and to observe their body language. Although chatroom deliberations allow online mock jurors to exchange written comments with each other and to reach a group decision, such deliberations do not permit lawyers to observe online mock jurors as they would observe actual mock jurors during deliberations or traditional jurors during voir dire and trial.

Much information is conveyed through body language. When traditional jurors answer questions during voir dire, they provide not only substantive information, but also subtle cues through the way they sit, the words they use, and their tone of voice or intonation, replete with pauses or hesitation.<sup>76</sup> Jurors,

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72. See, e.g., Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 68 ("Jurors bring a variety of perspectives to their deliberations that enable[s] them to see beyond the single viewpoint of the judge."). Cf. JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 31 (2005) (observing that "if you can assemble a diverse group of people who possess varying degrees of knowledge and insight, you're better off entrusting it with major decisions rather than leaving them in the hands of one or two people, no matter how smart those people are").

73. See FED. R. CIV. P. 48 ("Unless the parties otherwise stipulate, . . . the verdict shall be unanimous . . ."); FED. R. CRIM. P. 31(a) ("The verdict [of the jury] must be unanimous.").

74. See, e.g., Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. MICH. J.L. REFORM 285, 319 n.160 (1999) (providing a sample of states that require a unanimous verdict in criminal jury trials).

75. Kassin and Wrightsman explain jurors' willingness to change their views based on their independence and equality in the jury room, their openness to "informational influence," and less ideally, to "heavy-handed normative pressure." SAUL KASSIN & LAWRENCE WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL* 172-76 (1988); *id.* at 185 ("[T]he ideal deliberation [i]s one in which the informational influences are strong and the normative influences are weak. Some degree of social pressure is inevitable and perhaps even desirable. . . . The question is, how much pressure is too much?").

76. See *id.* at 54 (describing lawyers' interpretations of jurors' body language during voir dire).

like judges,<sup>77</sup> might try to sit impassively throughout the trial and avoid revealing their leanings or inclinations; however, their body language can nevertheless be revealing. For example, a juror with a glazed look might signal to a lawyer that a witness has been on the stand too long. A juror with a quizzical look might indicate that an expert witness has lost his or her intended audience. A sign of boredom is the juror who has fallen asleep during trial.<sup>78</sup>

Although lawyers are not psychologists and cannot always interpret body language correctly, they can at least observe traditional jurors and try to be responsive to the cues they do discern. With actual mock jurors, lawyers have a greater advantage because they can observe these jurors' body language as they deliberate. However, lawyers lack this important source of information with online mock jurors. Online mock jurors are known to the lawyers only through their written responses to written questions, or in the case of chatroom deliberations, through their written comments to fellow online mock jurors. According to some studies, "two-thirds of our communication is nonverbal."<sup>79</sup> If

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77. Although judges might try to sit impassively throughout the trial and not reveal their thoughts, they are not always able to do so; their body language, tone of voice, or facial expressions can signal their inclinations even as they try to mask them. See, e.g., Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 IND. L.J. 1101, 1108 (1993) (describing a judge who, after "hearing the defendant's brother testify that the brother was at home when the alleged burglary occurred, placed his hands to the side of his head, shook his head negatively, leaned back, and swivelled his chair 180 degrees from the jury, without uttering a word. Needless to say, that jury received a not-so-subtle message from that judge") (citation omitted); Peter David Blanck et al., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 100 (1985) (noting that judges may inadvertently convey their expectations for a trial outcome to jurors through subtle, nonverbal cues, such as facial expressions or tone of voice); Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1278 (1975) (noting jurors' tendency to look to the judge for guidance because they are uncertain how to perform their role as jurors); Robert J. Hirsh et al., *Attorney Voir Dire and Arizona's Jury Reform Package*, ARIZ. ATT'Y, Apr. 1996, at 24, 32 ("Jurors very quickly pick up on judges' expectations and mannerisms. . . . While it is seldom the intention of judges to reveal these, expectations of the court for the jurors in the courtrooms are usually quite evident, especially to those anxious jurors.").

78. In the recent state criminal trial of former Illinois Governor George Ryan, one of the jurors, Cynthia McFadden, was removed from the jury prior to deliberations because of her propensity to sleep during the trial. See, e.g., Matt O'Connor, *Ryan Defense Bid To Query Jurors Fought; U.S. Questions Motions to Judge by Ryan Defense*, CHI. TRIB., Apr. 26, 2006, § 2, at 2 ("pointing out [McFadden] was dismissed for sleeping during the trial before trial's end"); Abdon M. Pallasch, *Press Worried Ryan Judge, Lawyers: Sidebar Transcripts Show Concerns Over Juror Reading Paper*, CHI. SUN-TIMES, May 3, 2006, at S18 ("Juror Cynthia McFadden was dismissed after five other jurors signed a note complaining she was sleeping. . . . [U.S. District Court Judge] Pallmeyer said she saw McFadden sleeping . . . . 'I have observed this juror really fully asleep,' Pallmeyer told Ryan's lead attorney, Dan Webb.").

79. Patrick W. Miller, *Body Language in the Classroom*, TECHNIQUES, Nov./Dec. 2005, at 28. According to Marc Salem, a former psychology professor and expert on nonverbal communication, "80 percent of communication is non-verbal." Reyhan Harmanci, *Truth in Silence: 'Mind Games' Ex-Professor Reads Nonverbal Cues to Differentiate Between Audience's Lies, Truths*, S.F. CHRON., Nov. 2, 2006, at G14. See also Michael Tomasello, *For Human Eyes Only*, N.Y. TIMES, Jan. 13, 2007, at A31 ("Knowing what another person is looking at provides valuable information about what she is thinking and feeling, and what she might do next.").

this is correct, then lawyers miss a lot of vital information when they have access to only the written words of online mock jurors.

*c. Lack of trial*

With online mock juries, there is no trial. At best, a lawyer presents his or her case to online mock jurors through the submission of some written materials. Typically, these materials include a factual summary of the case, which includes claims and possible defenses, exhibits, and jury instructions. The materials are all in writing; the presentation is brief; and the lawyer may or may not present the other side's case well.

From a lawyer's perspective, the presentation of his or her case to an online mock jury is very limited. A traditional jury trial allows a lawyer to present his or her case using a wealth of materials, including the testimony of witnesses, the presentation of exhibits, and the oratory of the lawyer. In contrast, a presentation to an online mock jury takes place only in writing and in a highly abbreviated form. Although a trial before an actual mock jury is also abbreviated compared to a traditional trial, there will be lawyers to present both sides, unlike an online mock jury where only one side is fully presented. In addition, the written submission of material, read on a computer screen, is a poor approximation of a trial. It fails to capture the persuasiveness of a compelling witness or the impact of an effective cross-examination. Although advances in technology will continue to improve the ways in which lawyers can present materials to online mock jurors,<sup>80</sup> the full range of modes of presentation available to a lawyer in a traditional trial still remains unavailable in cyberspace at this time.

*d. Questionable reliability and honesty of online responses*

Another difficulty for a lawyer who uses an online mock jury is in deciding whether the responses of online mock jurors provide a reliable indication of how traditional jurors might respond to the case. Online mock jurors, like actual mock jurors, know that nothing is at stake with their individual vote or group verdict. In contrast, traditional jurors know that in a civil case one party will win and one party will lose. Usually, traditional jurors see the parties and know that their verdict will affect them directly. In a criminal case, the consequences of the jury's verdict are even more dire. The defendant can lose his liberty or even his life based on decisions reached by the jury. Online mock jurors know that their decision has little real consequence, except perhaps to encourage settlement. They do not have to take the endeavor seriously, as do traditional jurors. Thus, one problem for a lawyer using this method is deciding whether an online mock jury verdict is reliable when the online mock jurors may not take their role as seriously as traditional jurors. If a lawyer regards the online mock jury verdict as

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80. For example, photos can be scanned allowing online mock jurors to see exhibits and podcasts can be downloaded enabling online mock jurors to hear excerpts of testimony or depositions.

a predictor of a traditional jury verdict, then the seriousness with which traditional jurors confront their task and which online mock jurors lack, is a significant limitation of the online mock jury.

In addition to reliability, there is the question of honesty. The distance provided by a computer and the anonymity it affords to the online mock juror could allow the online mock juror to respond disingenuously, if he or she were so inclined. According to one study, people are more likely to be honest with each other in face-to-face interviews than in telephone interviews.<sup>81</sup> One explanation is that it is harder to be dishonest when you have to look someone in the eye than when you have some distance as with a telephone conversation or a written exchange.

How honest are written conversations conducted online? According to one writer, the distance afforded by e-mail allows people to be more honest with each other and to say things that they would not have said in person.<sup>82</sup> According to Deborah Tannen, a linguistics professor, this is more true for men than women because the “electronic distance” of e-mail allows men to communicate thoughts and feelings that they would have been unwilling to express in person.<sup>83</sup> However, e-mail also allows people to be more unrestrained about what they write.<sup>84</sup> They are willing to make comments that they would never make in a face-to-face conversation when they are concerned about their reputation or how they would be perceived by the other person. Comments made via e-mail and cloaked by anonymity can leave people feeling unfettered by social pressure to behave responsibly.<sup>85</sup>

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81. See William S. Aquilino, *Interview Mode Effects in Surveys of Drug and Alcohol Use*, 58 PUB. OPINION Q. 210, 234 (1994) (concluding that face-to-face interviews were more likely to elicit sensitive information than were interviews conducted over the telephone).

82. See, e.g., Robert E. Litan, *Law and Policy in the Age of the Internet*, 50 DUKE L.J. 1045, 1054 (2001) (“Many individuals somehow feel freer and more able to communicate when writing e-mails and notes to bulletin boards than when speaking directly to other individuals.”).

83. Joyce Cohen, *Where Sender Meets Gender*, N.Y. TIMES, May 17, 2001, at D1 (quoting Deborah Tannen, professor of linguistics at Georgetown University).

84. See, e.g., Tom Kuntz, *Internet Complaint Sites: How Come Pizza Hut Doesn't Deliver To My Trailer Park?*, N.Y. TIMES, July 1, 2001, § 4, at 7 (“Look at all the Web sites that have sprung up to field all manner of kvetch, grouse, grumble and gripe—and in some cases forward them to the offending parties.”).

85. See, e.g., Reed Abelson, *By the Water Cooler in Cyberspace, The Talk Turns Ugly*, N.Y. TIMES, Apr. 29, 2001, at A1 (“On message boards for particular companies on third-party web sites . . . some employees are anonymously expressing thoughts they would not dare say out loud. They are freely showing their prejudices . . .”). See also Mary P. Gallagher, *N.J. Limits Right to ID on the Net*, NAT'L L.J., July 30, 2001, at A4 (describing test formulated by N.J. appeals court to give guidance to trial courts before revealing “the identity of anonymous critics who allegedly smear . . . reputations online”); Jeffrey Ghannam, *Libel Online: Suit Raises Issue of Protection for Anonymous Web Comments*, A.B.A. J., Mar. 2001, at 28 (“Internet message board discussions would not take place unless people were allowed to communicate anonymously or by using a pseudonym. . . .”) (quoting Ronald Barber, a member of the ACLU defending anonymous speech on the Internet); Peter A. Steinmeyer, *Internet Law: Anonymous Speech*, NAT'L L.J., July 2, 2001, at B8 (describing cases in which courts have taken different approaches to anonymous Internet speech, “[r]egardless of whether particular anonymous online speech is merely a juvenile effort at

Although early studies focusing on e-mail communication have produced conflicting results, one consideration is whether the participants are men or women. One study suggested that men felt more emboldened to say whatever they want via e-mail, whereas women took greater care to monitor their words.<sup>86</sup> It may be that the way in which men and women communicate via e-mail mirrors the way in which they communicate face-to-face. Studies of men's and women's deliberations suggest that men speak more than women, are more likely to interrupt other speakers, and are less likely to seek the participation of those who are reticent speakers.<sup>87</sup> However, before lawyers rely on online mock jurors to provide an indication of how traditional jurors might respond to their case, they should consider whether online communications are a reliable predictor of face-to-face communications.

## 2. *From an Online Mock Juror's Perspective*

### a. *Lack of deliberations*

From an online mock juror's perspective, the lack of deliberations at some websites makes the experience seem closer to an online opinion poll than to a traditional jury trial. Without deliberations, the online mock juror merely responds individually to a series of questions posed by the lawyer. There is no opportunity to exchange ideas with fellow online mock jurors. There is no effort to persuade others until the group reaches a consensus. An online mock juror's experience is likely to be lonely.

An online mock juror's experience is also likely to entail less learning than the traditional juror's experience. Alexis de Tocqueville described the American jury as a "free school"<sup>88</sup> that teaches traditional jurors about the responsibilities of self-governance in a democracy. Without deliberations, however, online mock jurors are bereft of any opportunity to learn from each other.<sup>89</sup>

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humor or is truly defamatory or otherwise tortious," and under what conditions the protections afforded to it under the First Amendment can be overcome).

86. See Cohen, *supra* note 83, at D1 (describing research in which "'men tend to make strong assertions,' disagree with others and use profanity, insults and sarcasm. By contrast, women tend to use mitigated assertions along with questions, offers, suggestions and polite expressions. . . . They are supportive and agreeable ....") (quoting Susan C. Herring, Associate Professor of Information Science and Linguistics at Indiana University at Bloomington).

87. See, e.g., Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 596, 603 (1987).

88. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252 (Jacob Peter Mayer & Max Lerner eds., 1966) (13th ed. 1850).

89. Tocqueville thought that jurors in civil matters would learn from the judge, rather than from fellow jurors. The judge would educate jurors by "instill[ing] some of the habits of the judicial mind into every citizen." *Id.* at 252. In Tocqueville's view, civil cases, rather than criminal cases, would be more complicated and jurors would turn to the judge for guidance. *Id.* at 253. Whereas in a criminal case, jurors might be more distrustful of the judge as a governmental actor from whom they must protect the defendant, in a civil case they would not have the same qualms about the judge or feel the same need to protect the defendant. *Id.* Rather, they would be open to learning from the judge, as well as from "the advocate's efforts" and the "passions of the

Even if some websites, like Virtual Jury, provide deliberations, the deliberations are not as autonomous as those of traditional juries. There are at least two ways in which online mock jury deliberations lack complete independence. First, the foreperson is not a juror, but an experienced facilitator.<sup>90</sup> Second, the deliberations can be observed by the lawyer, who can even present questions to the deliberating online mock jury.<sup>91</sup>

With a traditional jury, the foreperson, whether selected randomly by the judge or by the jury, is one of the jurors. The foreperson usually has little idea how to conduct a deliberation and must struggle, along with the rest of the jurors, to discover his or her proper role.<sup>92</sup> An advantage to having a juror serve as foreperson is that there is no outside participant in the deliberations. The idea is that the jurors are free to express their views, no matter how unpopular they might prove to be in the larger community, knowing that they are among fellow jurors who are all engaged in the same task.<sup>93</sup> The secrecy of jury deliberations both encourages juror candor and discourages outside influence over jurors.<sup>94</sup> If jurors have a question, want to see an exhibit, or reach an impasse, the foreperson, on behalf of the jury, is free to communicate with the judge by sending a note via the bailiff. Otherwise, the jury conducts its deliberations free from outside scrutiny or intervention.

With an online mock jury in which a facilitator serves as foreperson, the jury does not conduct its deliberations free from outside observation, as does a traditional jury. The presence of an outsider—one who is not a juror—changes the dynamics of the deliberations. Online mock jurors might become more self-conscious about their comments or more circumspect about what they choose to reveal in the presence of an outsider. Also, the presence of a facilitator who has

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litigants,” and as a result, jury service in a civil case provides “the very best way of preparing people to be free.” *Id.* at 252.

90. VirtualJury, <http://www.virtualjury.com> (last visited Sept. 1, 2006).

91. *Id.*

92. One jury foreperson, Graham Burnett, a professor who eventually wrote a book about his jury experience in a murder trial in New York, expressed frustration with the lack of instruction on how jurors should conduct their deliberations. See D. GRAHAM BURNETT, A TRIAL BY JURY 79-85 (2001). Federal District Judge Kane, who read Burnett’s book, was so struck by the criticism that he drafted a deliberation instruction that he routinely gives to juries, which also provides guidance to the foreperson. See John L. Kane, *Giving Trials a Second Look*, JUDGES’ J., Fall 2004, at 29, 30-31 (providing instruction). The American Judicature Society, like Judge Kane, has tried to fill the gap, and has created a brochure for judges to share with jurors that gives them some guidance on the role of the foreperson and suggestions on how to conduct their deliberations. See generally AM. JUDICATURE SOC’Y, BEHIND CLOSED DOORS: A GUIDE FOR JURY DELIBERATIONS (1999) (providing general information about jury deliberations). Since then, the ABA Principles have recommended such an instruction, as have several of the federal district court judges in the Seventh Circuit, who were asked to implement several of the Principles on an experimental basis. See ABA PRINCIPLES, *supra* note 55, Principle 14, at 21; Panel Discussion: 7th Circuit American Jury Project, 55th Annual Meeting of the 7th Circuit Bar Ass’n & Judicial Conference of the Seventh Circuit (Chicago, Ill. May 22, 2006) [hereinafter 7th Circuit Conference] (notes on file with author).

93. See Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 503 (1997).

94. *Id.* at 539.



experience in that role changes the dynamics of the deliberations where most, though not all,<sup>95</sup> online mock jurors are laypersons who are not experienced as jurors or with the law. As laypersons, online mock jurors are on an equal footing. The presence of a facilitator who has experience in that role alters the dynamic. Although a facilitator might ensure that online mock jurors make their views known and that dominant personalities do not drown out more reticent ones, the facilitator might have more influence than others because he or she is experienced in this forum. In addition, the online mock jurors are more likely to turn to the facilitator for guidance rather than to struggle on their own to make decisions that accord with their sense of what is right.

Similarly, if a lawyer observes the online deliberations and interjects questions, online mock jurors could find it more difficult to engage in candid debate than traditional jurors. If online mock jurors are aware that they might be observed, then they might be more circumspect about the views they express.<sup>96</sup> The presence of a lawyer, like the presence of an outside observer in a classroom, might make online mock jurors feel more self-conscious and restrained about what they say than if an observer had not been present. In addition, the lawyer's questions might lead the online mock jurors in a direction that they otherwise would not have pursued.

*b. Lack of face-to-face communication even with deliberations*

Even at a website that includes deliberations, online mock jurors still face the problem that they cannot see and hear their fellow online mock jurors. As a result, they lose a lot of the information that body language, voice, tone, and touch can convey. Currently, online mock jurors who engage in deliberation do so by entering a chatroom and typing comments to each other. They cannot see the facial expressions of fellow jurors, which could help them to know when others agree or disagree with them, when others are confused about what they have written, or when others would like further clarification. Although they can use punctuation and even emoticons to indicate the strength of their views or the

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95. Presumably there is no rule that precludes lawyers or judges from serving as online mock jurors just as there are no longer exemptions in most states that excuse lawyers or judges from serving as traditional jurors. See, e.g., Margaret Graham Tebo, *Duty Calls*, A.B.A. J., Apr. 2005, at 35 ("At least 40 states allow lawyers to serve on juries, a steady shift from earlier times when many states excluded lawyers from jury pools . . . . Only seven states exclude lawyers, and a few more give judges wide latitude to excuse them . . . ."). New York, which once had the largest number of exemptions, including exemptions for lawyers and judges, has eliminated most of its exemptions. See G. Thomas Munsterman, *A Brief History of State Jury Reform Efforts*, 79 JUDICATURE 216, 218 (1996) (recounting how New York revised its exemption policy so that "the list of exemptions, once the longest in the nation, was eliminated"); Jan Hoffman, *Judges Screen Jurors Faster Than Lawyers, Study Says*, N.Y. TIMES, June 24, 1995, at A23 ("The [New York] State Legislature voted to end exemptions from jury duty for more than 20 professions, including podiatrists and embalmers as well as lawyers and doctors."). Today, in New York, lawyers and judges, like members of most other professions, are summoned routinely for jury service.

96. See Marder, *supra* note 93, at 532 (considering public jury deliberations and how observation by outsiders would inhibit juror candor).

intent of their comments, these symbols do not provide the wealth of information that facial expressions, body language, and intonation provide. As a result, online mock jurors might be more likely to misunderstand each other because they are missing interpretive cues that are available in other group settings. Moreover, they cannot observe other online mock jurors' responses to a comment made by another online mock juror. In a traditional jury room, an exhibit can be passed around and jurors' reactions can be gleaned from their facial expressions. This source of information is lost in an online mock jury deliberation.

Online mock jurors also might have more difficulty cohering as a group because they cannot see each other or strengthen bonds through social banter. Whereas traditional jurors can break down barriers through jokes and small-talk over meals and breaks, online mock jurors have no such opportunity. Online mock jurors meet only in a chatroom, where they are under observation and are focused only on the task at hand. In early studies of small-group behavior, social scientists noted that some jurors tended to be task-oriented whereas others tended to be socially-oriented, and that men tended to fit into the former category whereas women tended to fit into the latter.<sup>97</sup> Even if gender roles are no longer as sharply defined as they were when these studies were conducted, the need for some members of the group to focus on the task while others focus on the social coherence of the group still holds true. For example, in one actual jury deliberation filmed in Wisconsin state court in 1986 and aired on the television program *Frontline*, eleven jurors voted to acquit the criminal defendant, but one juror, a fireman, still held out for conviction.<sup>98</sup> The lone hold-out agreed to change his vote so as not to hold up the others, but he expressed regret because he still believed that a conviction was appropriate.<sup>99</sup> One male juror quickly called for a new vote to take advantage of the fireman's concession, but several female jurors asked the fireman if he truly felt comfortable with his change of vote.<sup>100</sup> The female jurors were attuned to the fireman's feelings, and they did not want him to live with regret for the rest of his life. In contrast, the male juror wanted the jury to complete its task of reaching a unanimous verdict.

c. *Lack of trial*

For online mock jurors, the lack of a trial has two significant drawbacks. First, they receive limited information about the case, and it is only in written form.

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97. See, e.g., Fred L. Strodbeck & Richard D. Mann, *Sex Role Differentiation in Jury Deliberations*, 19 *SOCIOMETRY* 3, 5 (1956) (finding that in mock juries consisting of men and women, women tended to focus on the socio-emotional dynamics of the group, whereas men tended to focus on accomplishing the task set out for them).

98. See *Frontline: Inside the Jury Room* (WGBH television broadcast, Apr. 8, 1986) (transcript of broadcast at 20-23) (on file with author).

99. See *id.* at 24.

100. Compare *id.* at 24 ("Well, we could vote right now.") (quoting Juror Henry Arvin), with *id.* ("He [the hold-out] needs to . . . feel better about this.") (quoting Juror Barbara Bornstein), and *id.* ("Do you [the hold-out] feel better, worse? You know, I think we have to really consider how you feel.") (quoting Juror Margaret Vacula).

Second, with the absence of the courtroom, the parties, and the judge, it is hard for online mock jurors to take their task as seriously as traditional jurors.

Online mock jurors learn about a case through the lawyer's summary of the claims and possible defenses, exhibits, and jury instructions.<sup>101</sup> As discussed earlier,<sup>102</sup> the lawyer presents the case in an abbreviated fashion. This is a disadvantage for the lawyer as well as for the online mock juror. The online mock juror does not have the benefit of an adversarial presentation with all the drama that it is likely to entail, but rather has a fairly one-sided, cursory presentation from which to distill the facts and apply the law.

The difficulty is exacerbated for the online mock juror because all information about the case is presented in written form only. In contrast to a traditional trial, where the presentation of evidence can take many different forms, an online presentation is limited to a written description. Not everyone learns well from the same mode of presentation. For example, some judges have begun to present jury instructions not only by reading them aloud and giving jurors a written copy of the instructions, but also by showing a PowerPoint presentation of the instructions.<sup>103</sup> They have recognized that jurors, like students, have different styles of learning, and the best way to reach as wide a swath of the jury as possible is to present the information in multiple ways.<sup>104</sup> Unfortunately, the online mock juror is presented with the case in written form only.

The online mock juror also must grapple with a setting that fails to convey any seriousness of purpose. The traditional courtroom provides a setting that signals to jurors that they are engaged in a serious task. The courtroom, unlike a chatroom, is used for one purpose only: the presentation of a case. The jurors see before them the judge in his or her robe sitting on a raised platform with the seal and flag of the United States in the background. The jurors sit to one side in the jury box; before them are the lawyers for both sides and their respective clients. In the back, there are seats for the press and the public. In addition to the formality of the setting, there is the formality of the procedures. When the judge enters, all rise. When the jury enters, all rise including the judge, as a sign of respect for the jury. The architecture of the courtroom, with actors in their designated places, the formality of the procedures, and the presence of the parties

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101. See, e.g., Learn About eJury, [http://www.ejury.com/jurors\\_learn\\_about.html](http://www.ejury.com/jurors_learn_about.html) (last visited Sept. 1, 2006).

102. See *supra* part III.C.1.c.

103. See, e.g., Marder, *supra* note 15, at 504 ("At a recent conference of judges, lawyers, and academics, one judge reported that when he reads the instructions to the jury, he also shows them a PowerPoint presentation, in which the key points and terms in the instructions are identified."); 7th Circuit American Jury Project Breakout Session, 7th Circuit Conference, *supra* note 92 (describing one federal district court judge's practice of presenting the instructions using PowerPoint at the same time as the judge reads the instructions to the jury) (notes on file with author).

104. See, e.g., JURY TRIAL INNOVATIONS, *supra* note 33, at 19 ("[M]aterial is better remembered when it is presented in several different forms than in a single form. Having the jurors both listen to and read the instructions should capitalize on this effect."); Mark Hansen, *Learn How They Learn: Knowing Modes of Adult Education Helps Lawyers Create Successful Presentations*, A.B.A. J., Aug. 2003, at 26 ("People learn in different ways. . . . A good teacher will try to incorporate as many different learning preferences into his or her instruction as possible.").

who will be affected by the jury's verdict, remind jurors of the seriousness of their task. An online mock juror lacks such a setting. A chatroom, which is typically used for casual conversations, fails to convey the seriousness of the case.

#### IV. NEXT PHASE: ONLINE JURIES

Thus far, cyberjuries have evolved from online opinion polls to online mock juries. Although it is difficult to predict what form they will take next, one possibility is that they will develop into online juries. If this were the case, there are institutional safeguards that online juries could borrow from traditional juries so that they become a viable form of dispute resolution.

The challenge will be for online juries to incorporate some of the safeguards of traditional juries without becoming as time-consuming and expensive as traditional juries. Ideally, online juries will become a supplement to, rather than a substitute for, traditional juries, and will combine some of the safeguards of traditional juries with the speed and low-cost of the Internet. In doing so, online juries would offer a new form of online dispute resolution.

##### *A. Institutional Safeguards Borrowed From Traditional Juries*

One challenge for the online jury is whether the public will take it seriously as a mechanism for dispute resolution. The early form of cyberjury, the online opinion poll, had difficulty meeting this challenge. Today's online mock jury is taken more seriously because it addresses real cases presented by real lawyers with real clients.

The online jury, like the online mock jury, should hear real cases. One way to ensure this is to have plaintiffs pay a filing fee, just as they would in federal court.<sup>105</sup> With a filing fee, plaintiffs are less likely to use online juries for fictional claims, as often seemed the case with online opinion polls. Another way to ensure that online juries hear real cases is to have lawyers present the cases, albeit in an abbreviated form, as they do for online mock juries.

Another prerequisite for presenting a case to an online jury could be the parties' agreement to the decision-rule. Ideally, the verdict reached by the online jury would be unanimous and binding on the parties. Whereas online opinion polls failed to establish a decision-rule in advance and to require parties to abide by the decision, online juries should require both.

The online jury, like the traditional jury, could consist of a limited number of jurors who engage in deliberation to reach a group verdict. If there were a limited number of jurors, such as twelve, though admittedly there is nothing magical about twelve,<sup>106</sup> then the jurors would be able to engage in deliberation.

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105. See 28 U.S.C. § 1914 (2006).

106. See *Williams v. Florida*, 399 U.S. 78, 102-03 (1970) ("We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'") (citation omitted).

This is in contrast to the online opinion poll, where the number of participants is unlimited, and therefore, deliberation is not an option.

The online jurors could also undergo a limited voir dire by the lawyers, just as today's online mock jurors are interviewed by the website before they are included in its database.<sup>107</sup> Thus, one goal would be to acquire background information about the online jurors to ensure that they meet basic qualifications, such as a minimum age. Another goal would be to ensure that they could be impartial by making sure that they had no connection to the case or parties.

Deliberation should be an essential feature of the online jury, just as it is with the traditional jury. Online jurors could deliberate in a chatroom, but their deliberations should be closed to all outsiders, including lawyers. At the outset, the online jurors should select a foreperson who will lead the deliberations. Because the foreperson is one of the jurors, rather than an outside facilitator, the online jury would have greater autonomy and independence than today's online mock jury and its deliberation would be more akin to a traditional jury's deliberation.

In fact, the online jury could have a pictorial representation of a table around which all of the online jurors are "seated." The online jurors could deliberate as a group using software such as "Unchat," which was developed by academics and programmers to facilitate small-group discussion online.<sup>108</sup> This software allows for one participant to moderate and other participants to contribute their comments to the group discussion.

Online jurors also could have recourse to a judge, just like traditional jurors. The judge, who could be retired or have taken senior status, could instruct the online jurors on the law before they begin their deliberations.<sup>109</sup> The judge also would be available to answer questions that the jury might have during its deliberations. Also, the judge could suggest to the online jurors prior to their deliberations that they should wait before taking a vote and that they should engage in "evidence-driven" deliberations,<sup>110</sup> in which each juror is given an opportunity to express his or her views at the outset about the facts and evidence that merit attention. The idea behind the evidence-driven style of deliberation is

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107. See, e.g., VirtualJury, Jury Questionnaire, <http://virtualjury.com/javintro.htm> (last visited Sept. 1, 2006).

108. See Beth Simone Noveck, *Unchat: Democratic Solution for a Wired World*, in DEMOCRACY ONLINE: THE PROSPECTUS FOR POLITICAL RENEWAL THROUGH THE INTERNET 21, 21 (Peter M. Shane ed., 2004) ("An interdisciplinary team of technologists and democratic theorists (including the author) developed Unchat, Web-based software for deliberative practice in cyberspace.").

109. For an example of a private judge who has taken to the web to resolve disputes, see Abigail Alony, *Tell It to the eJudge*, WIRED, Sept. 2001, at 71, available at <http://www.wired.com/wired/archive/9.09/mustread.html?pg=7> (describing former California Municipal and Superior Court Judge Roderic Duncan, who resolves small claims by e-mail for IntelliCOURT for \$45 to \$150 per party).

110. HASTIE ET AL., *supra* note 70, at 163-65 (describing styles of deliberation).

that it avoids the formation of coalitions that an early vote produces.<sup>111</sup> It also encourages all jurors to participate in the deliberations and to contribute their recollection of the evidence without feeling that they must take one side or the other.<sup>112</sup> Here, such an instruction would be particularly useful because online jurors have the challenge of deliberating without seeing each other, at least until there are advances in technology.

### B. *Advances in Technology*

What kinds of advances in technology would be needed to foster the creation of online juries? One advance that would be useful is if online jurors could see and hear each other while still working from the comfort and convenience of their home computer. Although this change could raise new concerns, such as whether online jurors would participate if they were no longer protected by anonymity,<sup>113</sup> it would allow online jurors to have a more effective deliberation than is currently possible.

Admittedly, there is technology today that would allow online jurors to see and hear each other. For example, web cameras ("webcams") allow users to see and hear each other via their computers. However, the image tends to be poor, the sound is sometimes delayed, and high quality webcams are expensive. There have also been improvements in videoconferencing equipment so that the resolution of images is better and the time-lags in speech are less noticeable, but again, the equipment is quite expensive, and it is found more often in businesses than in residences.<sup>114</sup> For a business, the expense of the equipment is still less than that of repeated trips to other parts of the world that would be required if videoconferencing were unavailable. Although videoconferencing is still not as effective as face-to-face communication,<sup>115</sup> there are some kinds of meetings that can be conducted in this manner.

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111. This style of deliberation has been described as "verdict-driven." *Id.* at 163. For a fictional example of a verdict-driven deliberation, see the movie *12 Angry Men* (Metro-Goldwyn-Mayer/United Artists 1957).

112. See HASTIE ET AL., *supra* note 70, at 163. However, judges are usually wary about instructing traditional jurors about how to structure their deliberations, even if it is only in the form of a suggestion. See, e.g., Kane, *supra* note 92, at 30-31 (providing instruction); AM. JUDICATURE SOC'Y, *supra* note 92 (providing guidance).

113. See, e.g., Lan Q. Hang, Comment, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 858 (2001) ("[A]nonymity is highly valued over the Internet."); Doug Bedell, *Legal Attacks Expose Lack of Net Anonymity*, CHI. TRIB., June 18, 2001, § 4, at 6 ("If you take away anonymity . . . nobody will be able to post anything online.") (quoting Les Frank, whose anonymity was stripped away by civil court subpoenas and who was sued for defamation by his former employer for his online derogatory comments made under the pseudonym "Whadayaknow").

114. See Julie Flaherty, *A Patch for Family Bonds Put Asunder*, N.Y. TIMES, May 10, 2001, at D10 ("Although the videoconferencing technology is becoming cheaper, it is still used primarily as a business tool.").

115. Even those who currently use videoconferencing because "it is the next best thing" to being face-to-face with a person, look forward to a time when "videoconferencing technology will be improved . . . , and more people will have more access to high-speed lines." Snow Anderson,

Online jurors would be able to conduct deliberations more effectively if they could see and hear each other. As discussed earlier,<sup>116</sup> much information is conveyed through body language and voice. Although refined webcams or videoconferencing equipment would still not be as effective as face-to-face communication, they would at least be an improvement over the status quo. Improvements in these technologies would allow online jurors to have access to a wealth of information conveyed by facial expressions and tone of voice. Although this still falls short of information conveyed by actual physical presence, it marks an improvement over what is now possible in cyberspace.

### C. *A Limited Docket*

Another way to help online juries perform effectively is to carve out a limited niche for them. Online juries should certainly be limited to hearing civil matters,<sup>117</sup> and they might begin by hearing disputes that involve Internet purchases and small claims disputes. Once online juries demonstrate that they can handle these cases effectively, parties might be willing to trust them with other kinds of civil cases.

Online juries would be particularly well-suited for hearing Internet disputes. These disputes involve parties who agree to a purchase over the Internet, but for some reason, the transaction goes awry: the seller does not receive his goods; the buyer does not receive his money; or there is some problem with the goods.<sup>118</sup> The parties to such disputes are comfortable using the Internet; after all, they reached their agreement over the Internet. The fact that the parties never met before agreeing to a transaction did not disturb them; thus, they might accept with equanimity an online jury whose members they do not actually meet. In addition, the parties are likely to expect a cheap, quick resolution to their dispute because they have come to depend on the Internet for cheap, quick transactions and communications. Online juries would provide them with a low-cost, speedy method for resolving their dispute. Finally, those using the Internet for purchases are likely to be "early adapters"; thus, they may be more willing to turn to a new form of dispute resolution just as they were willing to turn to a new form for transacting business.

Online juries would also be well-suited for hearing a case that would otherwise end up in small claims court. Given that the dollar amount in dispute is low in order to qualify for small claims court and the inconvenience of going to small claims court is great, an online jury would be preferable to small claims court because one can resolve the dispute from the convenience of one's home. Such a dispute seems like a good candidate for resolution by an online jury, which

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*Online Therapy: Some Psychologists Embrace the Technology, Despite the Handicaps*, CHI. TRIB., June 3, 2001, § 13, at 3 (quoting Lynne Steinman, one of the founders of videoShrink.com, a web site offering video therapy).

116. See *supra* parts III.C.1.b & III.C.2.b (describing the importance of face-to-face communication during deliberations).

117. See Marder, *supra* note 7, at 187-90 (providing reasons for a limited docket).

118. See *supra* note 9 and accompanying text (describing the typical Internet dispute case).

admittedly, would be an experimental form of dispute resolution. If online juries could gain the confidence of parties in these limited areas, then the docket could always be expanded.

#### V. CONCLUSION: A GENUINE CONTRIBUTION TO DISPUTE RESOLUTION

Online juries could provide a new mechanism for resolving small disputes quickly and inexpensively. They would allow parties to turn to a deliberating body of laypersons for their commonsense judgment of the case. Online juries would bring together the speed and convenience of the Internet with several of the key features and safeguards of the traditional jury. In doing so, online juries would provide a new form of dispute resolution in certain limited cases.

Online juries also could assuage a growing concern among some academics, lawyers, and trial judges who have noticed a dwindling number of traditional jury trials,<sup>119</sup> have decried this trend, and have warned about the harms of the “vanishing jury trial.”<sup>120</sup> Online juries would not be a replacement for the traditional jury trial, but rather, they would be an addition to the traditional jury trial. They would represent an offshoot, a new development in this longstanding institution. Online juries, if properly recognized and encouraged, will continue the tradition of the jury trial, albeit in cyberspace.

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119. For example, in the year 2000, only 3% of all civil cases in federal courts went to trial, and the number that went to a trial before a jury was even smaller. Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties, 2001*, BUREAU JUST. STAT. BULL., Apr. 2004, at 7, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf>. In the year 2001, state courts of general jurisdiction in seventy-five of the largest counties held almost 12,000 tort, contract, and real property civil trials, of which three-fourths were decided by juries and one-fourth were decided by judges. *Id.* at 1. The 12,000 civil trials in these state courts represent a 47% decline from the number of civil trials in 1992. *Id.*

120. See generally Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).



