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Jurors in the Digital Age

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INTRODUCTION.....	2
PART I: AREAS OF IMPACT.....	5
Research.....	5
Communications.....	10
Privacy.....	18
PART II: POSSIBLE SOLUTIONS.....	22
Instructions.....	24
Questions.....	30
Disclosing Juror Information to Opposing Counsel.....	33
PART III: FUTURE CONCERNS.....	36
Penalties.....	36
Limiting Access to Jurors.....	38
CONCLUSION.....	41
APPENDIX A (Jury Survey Questionnaire).....	42

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Introduction

Like other aspects of society, the American legal system has been influenced² by the technological advancements developed in the Digital Age.³ In many respects, this influence is positive bringing increased transparency and time-saving benefits to those who work with or rely on the legal system.⁴ By way of example, attorneys now go online and gather information on cases, witnesses and parties more quickly and in a less labor-intensive fashion.⁵ Filing pleadings and legal briefs occurs, in many instances, without ever physically going to the courthouse as many courts offer online dockets.⁶ Cases are tracked and followed in real-time as some courts permit reporters and the public to provide live updates of legal proceedings via Twitter, text messaging or blog posts.⁷ And, evidence obtained from Smart phones and social media web sites is used to both convict and acquit defendants.⁸

The changes brought by the Digital Age impact almost everyone⁹ who comes in contact with the legal system to include those summoned to jury duty.¹⁰ Today, the Internet provides potential jurors maps and directions to the courthouse, handbooks, questionnaires, and court orientation videos. Jurors may even receive the summons and post-verdict updates by email.¹¹ This ease by which information is accessed and disseminated, however, isn't without drawbacks.

² Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL of COURT INNOVATION pg. 287 (“It [Internet] has permeated every aspect of our society, including the American courtroom.”).

³ The author uses the terms “Digital Age” and “Information Age” interchangeably in this article.

⁴ Mary Flood, *Law, Politics and the Media: Windows Opening and Doors Closing—How the Internet is Changing Courtrooms and Media Coverage of Criminal Trials*, 59 Syracuse L. Rev. 429 (2009).

⁵ *Id.*

⁶ *Id.*

⁷ Jason Cato, *Burgeoning Social Networking System Has Legal Community in a Twitter*, PITTSBURGH TRIBUNE REVIEW, Feb. 8, 2010. (“A Pennsylvania judge last month ruled that reporters covering the public corruption trial of former State Rep. Mieke Veon and three aides could send short dispatches via Twitter a social networking site.”) See also, Debra Cassens Weiss, *Judge Explains Why He Allowed Reporter to Live Blog Federal Criminal Trial*, A.B.A. J. January 16, 2009. For a discussion of the downsides of live blogging from the courtroom see Leila Atassi, *Courts Struggle to Keep Trials Fair in the Age of Instant Information*, THE PLAIN DEALER, Oct. 6, 2009 (“But witnesses discreetly using handheld devices with internet access could easily follow a reporters’ live blog or Twitter feed from courtroom proceedings.”).

⁸ Leila Atassi, *Courts Struggle to Keep Trials Fair in Age of Instant Information*, THE PLAIN DEALER, Oct. 6, 2009 (“And in many criminal cases, defendants who denied that they owned guns or belonged to gangs have been confronted in court by their own Facebook photos featuring them holding weapons and flashing gang signs.”).

⁹ There are even websites to allow employers to confirm whether their employees actually served on jury duty. www.courts.state.co.us/jury/jurorcert.cfm.

¹⁰ Honorable Susan Webber Wright, *High Profile Cases in a Technological Age*, 65 Mo. L. Rev. 785 (2001). (“This ‘Age of the Internet’ has had an impact upon every facet of society including the law and courts.”) Mary Flood, *Law, Politics, and the Media*, 29 Syracuse L. Rev. 429 (2009) (“The Internet and technological advances it has inspired are changing our legal landscape in a number of ways.”)

¹¹ Nancy Marder, *Juries and Technology: Equipping Jurors for the 21st Century*, 66 Brooklyn Law Review 1257, 1269-1274 (2001).

For example, in the Digital Age, attorneys, trial consultants and the media use the Internet to quickly and easily discover background information about jurors. This quest for online juror information goes beyond jury empanelment and voir dire. In fact, it occurs throughout the trial and at times intensifies after the jurors reach a verdict, as attorneys for the losing side look for anything on which to base an appeal.¹² The information uncovered has not only prevented dishonest or biased jurors from serving, but also led to the discovery of juror misconduct. Not surprisingly then, some consider this aspect of the Digital Age as a positive rather than a negative.

Those supporting this viewpoint, however, at times, fail to adequately consider the position of the subject of the prying, the juror. In addition, many proponents of researching jurors assume that all disqualifying juror information discovered by an attorney will be brought to light, which is not always true. A real possibility exists that certain information that would disqualify or cause a juror to be Challenged for Cause will go unreported because the attorney who found the information either wants a particular juror on the jury or does not want to disturb the course or outcome of the trial.

Like attorneys, jurors also conduct online research during the trial. Jurors use the Internet to research definitions of important legal terms, review court documents,¹³ and retrieve photographs of crime or accident scenes.¹⁴ In addition, jurors go online to learn about the attorneys, witnesses, and parties in the case.¹⁵ This is all done without attracting too much attention or exerting too much effort. The misconduct committed by these jurors has on certain occasions led to mistrials, which prove quite costly both financially and in the toll they take on those involved in the legal proceeding. Many instances of juror misconduct, however, go undetected due to evidentiary rules and the secrecy and deference afforded jury deliberations.¹⁶

Unfortunately, the problems brought on by the Digital Age are not relegated to online research or encroachments on juror privacy. New technology also provides jurors numerous ways in which to communicate with each other and outside third parties during trial. For example, jurors, while sitting in the jury box no less, have not only disseminated their thoughts about the trial, but also

¹² Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW 360, Oct. 23, 2009 (“While it can be difficult to overturn a jury verdict, some attorneys in large high-profile cases, are scouring the web to find out whether jurors are opining online about a case or otherwise flouting the court’s instruction.”).

¹³ Bill Braun, *Judge Closes Trial’s Internet Window*, TULSA WORLD, May 3, 2010.

¹⁴ Eric Sinrod, *Jurors: Keep Your E-Fingers to Yourselves*, FINDLAW TECHNOLOGIES, (“It is reasonable to expect that the natural curiosity of some jurors and the ease and habit of Internet research might cause them to let their fingers do their walking into finding out about their cases outside of the courtroom.”).

¹⁵ Jerold S. Solovy and Robert L. Byman, *Confronting the Fact of Juror Research*, NATIONAL LAW JOURNAL, Nov. 30, 2009. See also, Henry Gotlieb, *Should You Design Your Firm’s Web Site With Jurors in Mind?* N.J.L.J. Jan. 2, 2007.

¹⁶ Ralph Artigliere, Jim Barton, Bill Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, FLORIDA BAR JOURNAL, January 2010 (“These examples represent recent transgressions that were discovered, and probably represent just the tip of the iceberg of juror behavior.”).

received the views of others.¹⁷ This information, in certain instances, is either transmitted to other jurors or posted online¹⁸ for the general public to see and comment.¹⁹

Improper use of new technology by jurors inside and outside the courtroom has become so pervasive²⁰ that commentators have coined new phrases to describe it: “Google Mistrials,”²¹ the “Twitter Effect,”²² and “Internet-Tainted Jurors.”²³ Yet, despite the attention garnered, few legal scholars, to date,²⁴ have examined this area in-depth. The articles addressing this topic primarily focus on the benefits of technology and how to harness it to aid in juror comprehension.²⁵ This dearth of legal scholarship may be due in large part to the fact that the Digital Age is fairly new and still evolving and juror misconduct is historically an under-examined area of the law.²⁶ This article attempts to fill the current void by analyzing the detrimental impact of the Digital Age on sitting jurors and how it might be lessened. While many of the issues examined in this article apply equally to civil cases, the primary focus of this article is on jurors deciding criminal cases.

The article begins, in Part I, by discussing the influence of the Digital Age on juror: (1) research; (2) communications; and (3) privacy. In Part II, the article analyzes ways in which to limit the negative impact of new technology on these three areas. While no single solution or panacea exists for these problems,²⁷ this article focuses on several reform measures that could address and possibly reduce the detrimental effects of the Digital Age on jurors. The three proposed

¹⁷ Christopher Danzig, *Mobile Misdeeds: Jurors with Handheld Web Access Cause Trials to Unravel*, INSIDE COUNSEL, June 1, 2009 (“You’ve got jurors who could literally be sitting in the box running an Internet search while testimony is going on.”).

¹⁸ Deborah G. Spanic, *To Tweet or not to Tweet: Social Media in Wisconsin Courts*, INSIDE TRACK, March 5, 2010 (“I just gave away TWELVE MILLION DOLLARS of someone else’s money.”) See also, Dareh Gregoria, *Oh, What a Twit*, N.Y. POST, May 29, 2009 (“The ‘Today show weatherman’ touched off a tempest by taking iPhone pictures from the jury assembly room and posting them to Twitter, in contravention of courthouse rules.”)

¹⁹ Demise Zamore, *Can Social Media Be Banned from Playing a Role in Our Judicial System*, MINORITY TRIAL LAWYER, Spring 2010. In England, a juror conducted a Facebook poll to determine her verdict. Another juror used Facebook to friend a trial witness.

²⁰ Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL of COURT INNOVATION pg. 292 (“Although there are no published studies of how often jurors use the Internet to access information about cases, news stories suggests that it is not uncommon.”).

²¹ John Schwartz, *As Jurors Turn to Web Mistrials Are Popping Up*, NEW YORK TIMES, March 17, 2009

²² Ira Winkler, *An Appeal to a Jury of Your Twittering Peers*, INTERNET REVOLUTION, Feb. 24, 2009

²³ Daniel A. Ross, *Juror Abuse of the Internet*, NEW YORK LAW JOURNAL, Sep. 8, 2009.

²⁴ In the future, this author expects this area of law will receive greater attention.

²⁵ Nancy Marder, *Juries and Technology: Equipping Jurors for the 21st Century*, 66 Brooklyn Law Review 1257, 1269-1274 (2001); Paul Zwier and Thomas C. Galligan, *Communicating with Juries: Technology and Opening Statements: A Bridge to the Virtual Trial of the Twenty-First Century*, 67 Tenn. L. Rev. 523 (2000); and Gregory Morse, *Techno-Jury: Techniques in Verbal and Visual Persuasion*, 54 N.Y.L. Sch. L. Rev. 241 (2009/2010) .

²⁶ Nancy King, *Juror Delinquency in Criminal Trials in America 1796-1996*, 94 Mich. L. Rev. 2673 (1996) (“This article examines two aspects of the jury system that have attracted far less attention from scholars than from the popular press: avoidance of jury duty by some citizens, and misconduct while serving by others.”). See also, Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. Rev. 322, 323 (2005). (“The issue of juror misconduct has not been as closely or systematically studied.”).

²⁷ Jury Survey Response #3, Question #7i: (“There is no one best method combination is most effective.”) Jury Survey Response #7, Question #7(d), (e), and (f): (“Need a combination of the three.”).

remedies are as follows: (1) improving juror instructions; (2) allowing jurors to ask questions; and (3) disclosing juror information to the opposing party. In Part III, the article examines what might occur if the aforementioned remedies are not implemented or prove ineffective. Specifically, the article suggests that the courts may increase juror penalties and limit access to jurors.

As part of the research for this article, this author conducted the first-ever survey (“Jury Survey”) on jury service in the Digital Age. The Jury Survey Questions went to federal judges, prosecutors, and public defenders. The questions focused primarily on juror research but briefly touched upon juror communications and privacy. The questions are available in their entirety in Appendix A.

The purpose of the Jury Survey was twofold: (1) to learn how the reform proposals suggested by this article are viewed by those who work with the legal system on a daily basis; and (2) to learn about other possible reform measures. Of particular note, the Jury Survey Respondents, like this author, believe that improved and updated jury instructions are the best approach to combat online research and improper communications by jurors. In contrast, a significant number of Jury Survey Respondents doubted whether allowing jurors to ask questions would decrease the likelihood of juror research and communications to third parties. This article, however, as discussed *infra*, suggests the opposite and strongly encourages permitting questions by jurors.

Part I: Areas of Impact Research

At present, online research raises the biggest concern with respect to jury service in the Digital Age.²⁸ While the underlying concept is not new, the methods by which jurors conduct research are.²⁹ Since the late 1990s, jurors have been turning increasingly to the Internet to learn information about the cases on which they sit.³⁰ And, unlike traditional research, online research by jurors is much more difficult to detect because it can be accomplished almost anywhere and without attracting the attention of others. The juror only needs Internet access.³¹

²⁸ John Schwartz, *As Jurors Turn to Web Mistrials Are Popping Up*, NEW YORK TIMES, March 17, 2009. (“But juror research is a more trouble-some issue than sending Twitter messages or blogging, Mr. Keene said.”)

²⁹ One of the first reported cases of juror research is *Medler v. State* 26 Ind. 171, 1866 WL 2451 Ind. 1866. See also, Caleb Stevens, *Lure of the Internet has Courts Worried About Its Influence on Jurors*, MINNEAPOLIS ST. PAUL BUSINESS JOURNAL, May 8, 2008 (“Since the inception of a trial by jury, jurors have had the temptation of researching cases outside the courtroom against judges’ orders.”) See also, Jury Survey Response #23, Question #8 discussing Internet research by jurors “[t]his is just another aspect of an old problem.”

³⁰ Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL OF COURT INNOVATION, pg. 288 (“In a sense, though, the very existence of the Internet is antithetical to the idea of the a controlled flow of information.”)

³¹ *Commonwealth v. McCaster* 46 Mass.App.Ct. 752, 710 N.E.2d 605.

Some suggest that online research is easier to discover than traditional research because the court can search the juror's computer or hand held device.³² But this presupposes that the court even knows to check those items or that the juror did not access the Internet through public or non-personal means.³³ More importantly, taking such action without strong evidence of juror misconduct greatly infringes on privacy rights and makes citizens less inclined to serve as jurors. This issue of juror privacy is discussed in greater detail *infra*.

Jurors conduct online research throughout all stages of the trial proceedings: before voir dire,³⁴ during trial;³⁵ and in the midst of deliberations.³⁶ Recent examples include jurors looking up definitions of words such as “aiding and abetting” or downloading medical descriptions of powerful drugs.³⁷ Some jurors even enlist friends and family members.³⁸ In one extreme example, a federal judge, after eight weeks of trial, discovered that 9 of the 12 jurors deciding a case had conducted research on the Internet.³⁹

Besides the United States, other Common Law countries report similar problems.⁴⁰ In New Zealand, a judge was so troubled by the potential of jurors going online that he, at least initially, prevented the media from printing images or names of the two defendants on trial.⁴¹ In 2008, Australia amended its Juries Act and increased the potential fine to \$13,000 for jurors who improperly access the Internet.⁴² In England, a judge received a Google Earth map of the alleged crime scene from a juror.⁴³

The aforementioned examples are problematic because the verdict rendered by jurors must be based on the evidence offered in court.⁴⁴ Although jurors may rely on life experiences to interpret the evidence presented by the parties, they are not to make a decision based on extrinsic

³² Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW360, Oct., 23, 2009.

³³ As noted by Paula Hannaford-Agor, “[i]t is very difficult to frame intelligible questions to jurors if the questioner does not fully understand what he or she is asking about or, for that matter the responses of individual jurors to those questions.” Paula Hannaford-Agor, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, JURY NEWS.

³⁴ *Russo v. Takata*, 774 N.W. 2d 441 (2009).

³⁵ *People v. Carmichael* N.Y.S.2d 2009 WL 5126920 (N.Y.A.D. 4 Dept., Dec. 30, 2009)

³⁶ *State v. Aguillar* 2010 1720613 (Arizona Court of Appeals 2010)

³⁷ *People v. Wadle*, 77 P.3d 764 (Colo. App. 2003), *aff'd*, 97 P.3d 932 (Colo. 2004),

³⁸ *Commonwealth v. Szakal*, 2009 PA. Dist. & Cnty. Dec. Lexis 56 (2009). In this case a juror asked his daughter to go online and find definitions for “first, second and third degree murder.” For a more complete description of other instances of jurors conducting research on the Internet see Douglass L. Keene and Rita R. Handrich, *Wired for Justice* 2010.

³⁹ John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up*, NY TIMES, March 17, 2009

⁴⁰ Afua Hirsch, *Is the Internet Destroying Juries?* GUARDIAN, January 26, 2010.

⁴¹ Edward Gay, *Judge Restricts Online Reporting of Case*, NEW ZEALAND HERALD, Aug. 25, 2008.

⁴² Ellen Whinnett, *DIY Jury Probe*, SUNDAY HERALD SUN, May 9, 2010.

⁴³ Robert Verkaik, *Collapse of Two Trials Blamed on Jurors' Own Online Research*, THE INDEPENDENT, Aug. 20, 2008.

⁴⁴ *Turner v. Louisiana* 379 U.S. 466, 472-473 (1965) (“‘evidence developed’ against a defendant shall come from the witness stand in a public courtroom where there is a full judicial protection of the defendant’s right of confrontation, or cross-examination, and of counsel.”).

information obtained outside of the courtroom.⁴⁵ Allowing jurors to decide a case on such information violates the fundamental concept of due process as neither party to the dispute has had an opportunity to examine or review the extraneous information relied upon by the juror. As the Third Circuit Court of Appeals stated in *U.S. v. Resko*, “extra-record influences pose a substantial threat to the fairness of the proceeding because the extraneous information completely evades the safeguards of the judicial process.”⁴⁶

In addition, permitting jurors to conduct online research impairs the parties’ right to a fair and an impartial jury because the results of the research, which is extrinsic information, lack authentication.⁴⁷ A recent murder trial in Rhode Island illustrates this point. A juror in that case looked up the definitions of “manslaughter,” “murder” and “self-defense” on the Internet.⁴⁸ The definitions discovered by the juror, however, were derived from California statutes and case law, which were dissimilar from those in Rhode Island.⁴⁹

In some respects, the problem of jurors seeking more information is a direct byproduct of the limitations placed on them by the adversarial legal system. For instance, judges act as gatekeepers controlling the flow of information to the jurors limiting what evidence they may or may not hear.⁵⁰ Furthermore, potential jurors who have knowledge of the facts in dispute, the parties or witnesses stand little chance of selection for jury duty. In today’s modern juries, “ignorance is a virtue and knowledge a vice.”⁵¹ Historically, this was not necessarily the case.⁵²

The first ever juries, which were more like grand juries,⁵³ consisted of jurors who actually knew the parties and the facts. Furthermore, these jurors had a duty to investigate the facts.⁵⁴ Over time, as both the judges and the prosecutors became more professional and received better legal

⁴⁵Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL OF COURT INNOVATION, pg. 289 (“Research has demonstrated that jurors’ exposure to media coverage and other extrinsic information about a case can be highly influential to their decision making.”)

⁴⁶ *U.S. v. Resko*, 3 F. 3d 684, 690 (3d Cir. 1993). Research also suggests that extrinsic information can be highly influential to the juror’s decision-making. Neil Vidmar, *Case Studies of Pre-and Midtrial Prejudice in Criminal and Civil Litigation*, 26 Law & Hum. Behav. 73, 86 (2002).

⁴⁷ “Extrinsic influence on a jury’s deliberations violates a defendant’s 6th Amendment rights to an impartial jury, to confront witnesses against him, and to be present at all critical stages of his trial.” *U.S. v. Dyal*, 2010 U.S. Dist. LEXIS 72489, at 38 (D.S.C. July 19, 2009) See also, Ken Strutin, *Jury Deliberations in the Digital Age*, LAW TECHNOLOGY NEWS, May 5, 2009 (“The potential prejudice to the integrity of the process implicates basic fairness embodied in due process, right to a jury trial, confrontation, and cross examination”).

⁴⁸ Taliba Buford, *New Jury Policy Accounts for New Technology*, PROVIDENCE JOURNAL, May 17, 2009.

⁴⁹ *Id.*

⁵⁰ “To the greatest extent possible all factual [material] must pass through the judicial sieve, where the fundamental guarantees of the procedural law protect the rights of those accused of crime.” *United States v. McKinney*, 429 F.2d 1019, 1022-23 (5th Cir. 1970).

⁵¹ Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. Rev. 322 (2005).

⁵² *Id.* at 348. (“In the nineteenth century, jurors who knew about the facts of a case and had not expressed or formed opinions about the facts were considered entirely proper indeed attractive jurors.”).

⁵³ Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. Crim. Law and Crim. 1171, 1188 (2008).

⁵⁴ B. Michael Dann, *Free the Jury*, LITIG., Fall 1996 at 5.

training, the right, but not the desire, of the jurors to investigate was removed. Arguably then, the Internet, in some respect, allows jurors to return to their roots. Professor Caren Morrison recently conveyed this idea by suggesting that while information available in the Digital Age may threaten the modern idea of the isolated and controlled jury, it creates a return of sorts to the original notion of a jury, in which impartiality only referred to the absence of a conflict of interest, not a complete lack of information outside that provided at trial.⁵⁵

Why Jurors Conduct Research

To better understand and address the modern-day problem of online research by jurors, it is first necessary to examine why jurors feel the need to conduct any research at all. Unfortunately, save for the very nature of the adversarial legal system as previously discussed, no clear-cut answer to this question exists. Nonetheless, those who study juries found reoccurring responses among jurors who either admit or are discovered conducting research. One rational or excuse commonly offered is ‘curiosity.’⁵⁶ Like most people, jurors want to know why certain issues went unexamined and specific witnesses went uncalled.⁵⁷ As one Jury Survey Respondent noted, “they [jurors] want to know all things they think we are keeping from them.”⁵⁸

Jurors also conduct research because they are confused about an issue at trial.⁵⁹ This confusion stems from a variety of factors. For example, some of the crimes jurors must consider like RICO and the Felony Murder Rule “go well beyond the general knowledge of the layperson.”⁶⁰ In addition, other jurors are unclear on the legal or scientific terms used at trial.⁶¹ This confusion is compounded by the fact that many jurisdictions prevent jurors from discussing the case until deliberations and even then only with other jurors who for the most part have no legal training or experience with the law.⁶²

In addition to confusion and curiosity, issues also arise with so-called conscientious jurors. These individuals take their role as fact-finder very seriously and aspire to do a good job.⁶³ But, they feel either unprepared or ill-equipped to render a verdict that in certain instances requires

⁵⁵ Mark White, *Does Facebook Threaten Trial by Jury*, PSYCHOLOGY TODAY, May 29, 2010.

⁵⁶ Jeffrey T. Frederick, *You the Jury and the Internet*, THE BRIEF, Volume 39 Number 2 Winter 2010. (“Well, I[juror] was a curious.”).

⁵⁷ John Schwartz, *As Jurors Turn to Web Mistrials Are Popping Up*, NEW YORK TIMES. (“One juror, asked by the judge about the research, said, ‘Well, I was curious...’”) March 17, 2009. See also, Ken Strutin, *Jury Deliberations in the Digital Age*, LAW TECHNOLOGY NEWS, May 20, 2009. (“More powerful than any rule of courtroom conduct are human curiosity and the overwhelming need to share our experiences.”).

⁵⁸ Jury Survey Response #1, Question #1: (“They want to know all things they think we are keeping from them.”).

⁵⁹ Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 Ala. L. Rev. 441, 554 (1997).

⁶⁰ Thaddeus Hoffmeister, *Resurrecting the Grand Jury’s Shield: The Grand Jury Legal Advisor*, 98 Journal of Criminal Law and Criminology 1171, 1189 (2008).

⁶¹ Jerry Casey, *Juries Raise a Digital Ruckus*, THE OREGONIAN, Jan. 13, 2008.

⁶² FNs 80-90 *infra*.

⁶³ The pressure felt by some jurors to get it right should not be underestimated. Many jurors remain bothered long after issuing a verdict about the decision rendered in court and repeatedly second guess themselves.

them to decide between life and death.⁶⁴ According to a former President of the American Society of Trial Consultants, Douglas L. Keene, “[t]here are people who feel they can’t serve justice if they don’t find answers to certain questions.”⁶⁵ To assuage their concerns about getting it wrong or making a mistake, these jurors seek additional information.⁶⁶ Jurors falling in this category often “want to solve the case and they think the Internet might help them do this.”⁶⁷

Besides the traditional reasons for juror research, the Digital Age provides several new rationales. First, in the Digital Age, Internet usage has become increasingly more common and popular. According to one 2009 study, seventy-four percent of Americans use the Internet—a number that is surely to rise in the future. As a result, more people have grown accustomed to and reliant on the Internet. Today, going online is almost reflexive, something people do without giving much thought.⁶⁸ For example, for many, the customary follow-up or preparation to meeting a new person either professionally or socially is to “Google” that individual.⁶⁹ This holds true during trial when jurors for the first-time are introduced to the judge, the parties and their attorneys, and witnesses. Jurors want to “Google” these individuals.

Second and more obvious, the Internet makes research by jurors much easier to accomplish. According to one state bar journal, “[j]urors have the capability to instantaneously...look up facts and information during breaks, at home, or even in the jury room...”⁷⁰ If a juror has a question about an issue that arose in court, she doesn’t have to ask one of the parties or a court official nor does she have to physically go somewhere like the library or the crime scene to find

⁶⁴ Note, *Death By Peers: The Extension of the 6th Amendment to Capital Sentencing in Ring v. Arizona*, 34 Loy. U. Chi. L. J. 845 (2003). Bridget Dicosmo, *Electronic Recording Devices Banned from Courthouse*, THE HERALD MAIL, Jan. 22, 2010. (“Often, the jurors who end up causing problems by conducting their own research are the most conscientious ones, because they want all the facts so they can make an informed decision about the case.”).

⁶⁵ John Schwartz, *As Jurors Turn to Web Mistrials are Popping up*, NEW YORK TIMES, March 17, 2009.

⁶⁶ Michele Lore, *Facing Down Facebook: Social Media Use and Juries*, MINNESOTA LAWYER, June 14, 2010. (“...its understandable that jurors want to do ‘homework’ on a case because they are generally very earnest in their desire to make the best decision they can.”).

⁶⁷ Jury Survey Response #7, Question #1.

⁶⁸ Michele Lore, *Facing Down Facebook: Social Media Use and Juries*, MINNESOTA LAWYER, June 14, 2010. (“I emphasize it because I think it’s almost becoming natural to [go the websites to] satisfy your curiosity and get answers.”).

⁶⁹ Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL OF COURT INNOVATION pg. 294. (“many people automatically search the Internet when confronted with a new name, subject idea or other stimulus. In the face of ignorance—or curiosity—we ‘Google.’”).

⁷⁰ Ralph Artigliere, Jim Barton, and Bill Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, 84 Fla. Bar J. 8 P3 (January, 2010)

the answer.⁷¹ Instead, she merely needs to get online, which, unlike the aforementioned activities, is quicker, less onerous and unlikely to attract much scrutiny.⁷²

The ease by which information is obtained from the Internet has also led jurors like many in society to more readily seek out facts on their own.⁷³ Rather than defer to the person offering the information whether she be the judge, attorney or witness, jurors take it upon themselves to discover the facts. The Internet serves as the great equalizer and can make almost anyone an expert—at least for the moment.⁷⁴

Furthermore, with the Internet, stories and reports about trials are more accessible and have a longer shelf-life. Some jurors know that even the most routine cases are reported on or discussed by someone on the Internet. In the past, courts generally only worried about high-profile trials and then only when those trials continued to capture the attention of the public and the media. With the Internet, reports and stories about the trial or parties involved don't necessarily go away just because they are out of the news cycle. This was noted by several trial consultants who wrote that “[a] year old article in an out-of-state publication will show up in an Internet search just as easily as a current headline from the daily local paper.”⁷⁵

Finally, some jurors unknowingly conduct research. For example, in *Russo v. Takata*, a juror [Flynn] received a summons that stated: “Do not *seek out evidence* regarding this case and do not discuss this case or the Questionnaire with anyone [emphasis added].”⁷⁶ Flynn subsequently went online to look up the defendant, Takata because he “did not recognize Takata by name or product line and wondered ‘what they did.’”⁷⁷ According to the South Dakota Supreme Court, which determined that the juror committed misconduct and upheld the lower court’s decision to order a new trial, “[i]t may well be that Flynn did not realize performing a Google Search on the names of Defendants Takata and Holding constituted ‘seeking out evidence.’”⁷⁸

⁷¹ Erika Patrick, *Protecting the Defendant’s Right to a Fair Trial in the Information Age*, 15 Cap. Def. J. 71, 78 (2002) (“Because the Internet is such a vast resource, the potential exists for jurors to do independent research on matters of law with more ease and stealth than going to the local law library would require.”).

⁷² Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW 360 (“[T]he sheer wealth of data available online makes it easier for them to look up arcane terms or dig up dirt on the parties.”)

⁷³ Susan J. Silvernail, *Internet Surfing Jurors*, ALABAMA ASSOCIATION FOR JUSTICE JOURNAL, Fall 2008 (“Judge Vowell says he observed a change in juror’s attitudes about wanting more information about the cases.”).

⁷⁴ Rebecca Porter, *Texts and ‘Tweets’ by Jurors, Lawyers Pose Courtroom Conundrum*, AMERICAN ASSOCIATION OF JUSTICE, quoting jury consultant Amy Singer, “Some have a compulsion to know and be viewed as an expert. In the privacy of their own homes at 2 a.m., they do whatever they want.” Ken Strutin, *Jury Deliberations in the Digital Age*, LAW TECHNOLOGY NEWS, May 20, 2009. (“Our Internet culture has enlarged the knowledge base of anyone with a smartphone.”).

⁷⁵ Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL OF COURT INNOVATION pg. 292.

⁷⁶ *Russo v. Takata* 774 N.W. 2d. 441 (2009).

⁷⁷ *Id.*

⁷⁸ *Id.*

Communications

While not as troubling as online research--at least not yet--there is a growing concern over the Digital Age's influence on juror communications.⁷⁹ For the purposes of this article, juror communications occur either among jurors themselves or with outside third parties.⁸⁰ Generally speaking, communications by a juror are not an issue if unrelated to the trial on which the juror sits.⁸¹ But, if the communication relates to the trial, problems can arise. This is because most jurisdictions forbid jurors from discussing such matters with other jurors prior to deliberations and with non-jurors before reaching a verdict. Yet, like with the prohibition on juror research, the restrictions on juror communications are not always followed.

Juror to Juror Communications

Traditionally, juror communications with third parties has raised more concerns than juror communications with other jurors.⁸² In fact, some reformers are pushing to allow jurors to discuss the case among themselves prior to the commencement of deliberations.⁸³ Currently, at least two states⁸⁴ allow jurors in civil proceedings to discuss the case before the submission of all evidence. Other jurisdictions are considering or experimenting with the idea for criminal trials.⁸⁵

Advocates of discussions pre-deliberations argue that it improves juror comprehension and focuses the jury once deliberations commence.⁸⁶ In addition, these proponents believe it naïve and unrealistic to think jurors will refrain from discussing the trial with anyone until deliberations.⁸⁷ As noted by jury expert, Hans Zeisel, “the urge to talk about the experience of jury duty is a strong one, in part to release the pent-up emotional pressure inherent in the role of

⁷⁹ Bridget DiCosmo, *Electronic Recording Devices Banned from Courthouse*, THE HERALD MAIL, (“Society’s increasing dependence on cell phones, smart phones and social networking sites such as Facebook and Twitter to stay in contact can pose a problem for court officials when it comes to keeping jurors from communicating during a case.”).

⁸⁰ Inappropriate juror communications to third parties includes: defendants (*State v. Dellinger*, W.Va. Sup. Ct. App.); witnesses (*People v. Rios*, 26 Misc.3d 1225(A) 2010 WL 625221 (N.Y. Sup. Ct. 2010); and members of the court (*Wilgus v. F/V Sirius, Inc.* 2009 WL 3436076).

⁸¹ For a twist on this general rule see, Pablo Lopez, *Judge-Juror Emails Stir Up Fresno Murder Verdict*, FRESNO BEE April 16, 2010. This article discusses a California judge who made it on to a jury and was sending e-mails to his fellow judges. (“Legal observers say it’s not clear that Oppliger did anything wrong. Jurors are allowed to tell others they are assigned to a trial. But the judge should have known better than to do something that could raise a possible objection, they say). See also, generally Jury Survey Response to Question #9.

⁸² Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. Rev. 322, 341 (2005). (“External influences completely evade the safeguards of the judicial process, whereas internal violations do not raise the fear that the jury based its decisions on reasons other than the trial evidence.”).

⁸³ COL (Ret.) David A. Anderson, *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial*, 174 Mil. L. Rev. 92 (2002).

⁸⁴ For example, Arizona allows jurors in civil cases to discuss the evidence prior to deliberations.

⁸⁵ Judge William J. Caprathe, *A Jury Reform Pilot Project*, THE JUDGE’S JOURNAL, Volume 48, Number 1, 2009.

⁸⁶ Council for Court Excellence, District of Columbia Jury Project, *Juries for the Year 2000 and Beyond: Proposals to Improve the Jury Systems in Washington, DC v-vi*, 63 (1998), available at http://www.courtexcellence.org/juryreform/juries2000_final_report.pdf.

⁸⁷ *Id.*

juror.”⁸⁸ Thus to those supporting juror discussions pre-deliberations, it is better that jurors talk with other jurors as opposed to family members and close acquaintances who constitute improper outside third party influences.

With that said, most jurisdictions prohibit jurors from talking about the case with other jurors prior to deliberations.⁸⁹ This rule is in place to: (1) prevent premature judgments; (2) increase flexibility during deliberations; (3) ensure quality and broad deliberations; (4) decrease juror stress; and (5) maintain open mindedness.⁹⁰ A strong belief exists especially among the defense bar in both civil and criminal matters that allowing jurors to discuss the case prior to deliberations puts defendants at a decided disadvantage as they have yet to present their side.⁹¹ Some also fear that discussions prior to deliberations might occur outside the jury room and the presence of all twelve jurors.⁹²

Historically, the issue of jurors communicating with one another received little attention and was viewed by many to include the court as a minor concern.⁹³ While jurors in the past might talk about the case over the phone or discuss the case during breaks in the trial, these were uncommon occurrences and not considered grave breaches of a juror’s duty.⁹⁴ Courts, for the most part, were hesitant to declare a mistrial based solely on jurors discussing the case pre-deliberations, especially if such activity did not occur in the presence of third parties.⁹⁵

The difference today is the impact of technology. One only has to look at three recent high-profile jury trials to see the various ways jurors now interact and communicate with one another. In the corruption trial of former Baltimore Mayor Sheila Dixon, several jurors kept in contact via Facebook despite instructions by the judge not to do so.⁹⁶ In the trial of former Alabama governor Don Siegelman, jurors regularly and improperly exchanged views with one another via email.⁹⁷ In the fraud trial of Brook Astor’s son, Anthony Marshall, jurors utilized an email list

⁸⁸ Mary Strauss, *Juror Journalism*, 12 Yale L. & Pol’y Rev. 389, 408 (1994)

⁸⁹ For a discussion of the constitutional implications of banning juror speech see *Id.*

⁹⁰ David Anderson, *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial*, 174 Mil. L. Rev. 92, 95 (2002)

⁹¹ See generally Jury Survey Question #10.

⁹² David Anderson, *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial*, 174 Mil. L. Rev. 92, 95 (2002).

⁹³ Nancy Marder, *The Jury Process*, Foundation Press, pg. 114 (“Most courts turn a blind eye to the fact that jurors do engage in discussion of the case prior to their official deliberations.”).

⁹⁴ *Id.*

⁹⁵ B. Michael Dann and George Logan III, *Jury Reform: The Arizona Experience*, 79 Judicature 280, 283 (1996). (“...division among the federal courts of appeals on the question whether permitting juror discussions deprives the defendant of the 6th Amendment right to an impartial jury.”).

⁹⁶ *Dixon Jurors Must Testify About Facebook*, December 30, 2009 UPI and *Dixon Juror Ignores Judge, Continue Facebook Posts*, 4 Jan 2010, 11 WBAL-TV.

⁹⁷ *U.S. v. Siegelman*, 2009 U.S. App. Lexis 5369, at 64-72 (11th Cir. 2009). While the court of appeals found the actions of the jurors to be misconduct (assuming that they actually occurred), it found no prejudice after taking into account the totality of the circumstances.

serve to orchestrate and coordinate responses to the media.⁹⁸ Unlike past forms of communication, these new forms of juror to juror communications greatly increase the possibility that the interactions and discussions of jurors will be exposed to third parties.

Today, the court has to worry not only about juror to juror pre-deliberation discussions, but also how those discussions occur. If conducted in an online forum, these communications could provide the general public to include the parties trying the case access to the inner-working of the jury room and privileged information such as informal vote counts or details of closed-door deliberations. This in turn potentially jeopardizes jury deliberations and the integrity of the legal system itself.⁹⁹ Thus, in the Digital Age with its advancements in technology, juror to juror communications easily and quickly becomes inextricably tied to the more problematic issue of communications by jurors to third parties.

Juror to Non-Juror Communications

While strong arguments exist both for and against allowing jurors to discuss the trial prior to deliberations with each other,¹⁰⁰ few if any would suggest that jurors be allowed to communicate with third parties about the trial prior to verdict. Yet, despite this uniform disapproval, it still happens. Of late, the method of juror to third party contact receiving the greatest amount of attention is online communication.¹⁰¹ These communications occur either *directly* like when a juror sends or receives an email to and from a third party or *indirectly* when a juror posts on a blog or social media web site.¹⁰²

Courts, for a variety of reasons, want to limit juror contact with third parties until a verdict is reached. The most obvious is that the juror by communicating with an outside party about the trial increases the likelihood that she will be influenced by that party as most communications generally involve an exchange of words or ideas. In *New York v. Jamison*, the court stated that “the real evil the Court's instruction not to discuss the case was designed to avoid, namely the introduction of an outside influence into the deliberative process, either through information about the case or another person's agreement or disagreement with the juror's own statements.”¹⁰³ Juror online communication, however, to a third party is a bit different in that depending on how it occurs (directly or indirectly) the juror may or may not receive feedback from her initial communication.

⁹⁸ John Eligon, *An Astor Juror Says Her Fear Dictated Vote*, NEW YORK TIMES, February 21, 2010.

⁹⁹ Ira Winkler, *An Appeal to a Jury of Your Twittering Peers*, INTERNET EVOLUTION, February 24, 2009. (“[I]f jurors tweet that a company is losing a big lawsuit. It also facilitates jury manipulation, if lawyers or other interested parties tweet back or learn how individual jurors are leaning.”).

¹⁰⁰ David Anderson, *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial*, 174 Mil. L. Rev. 92, 95 (2002).

¹⁰¹ Douglass L. Keene and Rita R. Handrich, *Wired for Justice* 2010.

¹⁰² See Jason Boulette and Tanya Dement, *Ethical Consideration for Blog-Related Discovery*, 5 Shidler J.L. Com. Tech 1 (Sep. 23, 2008). These authors draw a distinction between “reading” and “posting” on a blog with the latter constituting “communication.”

¹⁰³ 2009 N.Y. Misc. LEXIS 2184, ***; 242 N.Y.L.J. 42.

To date, the Supreme Court has not addressed the issue of jurors making comments online or to the general public. The traditional cases that have come before the courts involve a third party attempting to influence or persuade the juror through direct contact. Thus, the Supreme Court, at least initially, applied a very rigid standard to jurors either contacting or being contacted by third parties. An early example of this is *Mattox v. U.S.* in which a juror *inter alia* claimed that the bailiff discussed the case with the jury.¹⁰⁴ In overturning the defendant's conviction, the Supreme Court in *Mattox* stated that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."¹⁰⁵

Some 60 years later in *Remmer v. United States*, the Supreme Court faced the issue of an unnamed third party who allegedly offered a juror a bribe.¹⁰⁶ In *Remmer*, the trial judge, upon learning of the allegation, directed the FBI to investigate.¹⁰⁷ Ultimately, the trial judge after consulting with the prosecution and without holding a hearing determined that the allegation was harmless and let the defendant's conviction stand.¹⁰⁸ On appeal, the Supreme Court determined that *ex parte* communications with a juror during trial were *per se* prejudicial and remanded the case back to the trial court for a hearing on whether juror misconduct had occurred.¹⁰⁹ The *Remmer* Court held that the "presumption [of prejudice] is not conclusive, but the burden rests heavily on the Government to establish, after notice to and *hearing* of the defendant, that such contact with the juror was harmless to the defendant (emphasis added)."¹¹⁰

Over time, the strict requirement of a 'hearing' established by *Remmer* was gradually watered down as the Supreme Court while not directly overruling *Remmer* issued subsequent opinions that appear to undermine the holding. According to at least one law professor, "[t]he viability of *Remmer*'s 'presumption of prejudice' test" is an open question.¹¹¹ In applying *Remmer*, the federal Courts of Appeal have taken various approaches. For example, the 7th and 4th Circuit apply the *Remmer* presumption of prejudice but allow for an exception in instances of innocuous interventions.¹¹² D.C. and the 5th Circuit grant the district court discretion in deciding whether to presume prejudice,¹¹³ whereas the 1st and 9th Circuit only presume prejudice in egregious

¹⁰⁴ *Mattox v. U.S.* 146 U.S. 140 (1892).

¹⁰⁵ *Id.*

¹⁰⁶ *Remer v. U.S.* 347 U.S. 227 (1954)

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. Rev. 322, 327 (2005).

¹¹² *Wisehart v. Davis* 408 F.3d 321, 326 (7th Cir. 2005) and *U.S. v. Cheek* 94 F. 3d 136, 141 (4th Cir. 1996).

¹¹³ *United States v. Williams-Davis* 90 F.3d 490, 497 (D.C. Cir. 1996) and *United States v. Sylvester* 143 F.3d 923, 934 (5th Cir. 1998).

circumstances.¹¹⁴ These various approaches as to how the Courts of Appeal apply *Remmer* has led at least one commentator to suggest that the Supreme Court should revisit the issue to determine the appropriate standard.¹¹⁵

The weakening of the presumption of prejudice standard or the requirement of a *Remmer* hearing may be due in large part to the evolution of the criminal trial itself. Unlike today, criminal trials were historically shorter in length and jurors who decided them were often sequestered.¹¹⁶ Thus, fewer opportunities existed for jurors to communicate with third parties. Over time, sequestration became increasingly burdensome to implement and fell into disuse while trials grew in length.¹¹⁷ As a result, it appears that courts became more willing to accept certain communications between third parties and jurors as inconsequential.

Goupil v. Cattell, one of the early cases to tackle the issue of jurors going online to communicate with third parties, demonstrates this less stringent standard.¹¹⁸ In *Cattell*, the trial court, shortly after the defendant's conviction, discovered that the foreman of the jury made several posts to his blog during voir dire and trial.¹¹⁹ In one post made during voir dire, the foreman wrote: "Lucky me, I have Jury Duty! Like my life doesn't already have enough civic participation in it, now I get to listen to the local riff-raff try and convince me of their innocence."¹²⁰ In another post after voir dire, but prior to the start of trial the foreman wrote: "After sitting through 2 days of jury questioning, I was surprised to find that I was not booted due to any strong beliefs I had about police, God, etc."¹²¹

The jury foreman's posts ultimately served as grounds for the defendant's appeal in which he argued that: (1) the juror's blog was prejudicial extrinsic communications with a third party; and (2) the juror was personally biased against the defendant.¹²² Unwilling to apply *Remmer*'s presumption of prejudice to the posts, the court in *Cattell* analogized them to "a personal journal or diary, albeit one that the author publishes to the Web and permits others to read."¹²³ The court went on to say that the defendant "surely would not claim that the diary constitutes an 'extraneous communication' with third parties of the sort that gives rise to a presumption of prejudice."¹²⁴ In deciding not to apply the presumption of prejudice, the court also noted that no

¹¹⁴ United States v. Bradshaw, 281 F.3d 278, 288 n.5 (1st Cir. 2002) and United States v. Dutkel, 192 F.3d 893, 894 (9th Cir. 1999).

¹¹⁵ Eva Kerr, Note: *Prejudice, Procedure, and a Proper Presumption: Restoring the Remmer Presumption of Prejudice in Order to Protect Criminal Defendants' Sixth Amendment Rights*, 93 Iowa L. Rev. 1451 (2008).

¹¹⁶ Mary Strauss, *Sequestration*, 24 Am. J. Crim. L. 63 (1996).

¹¹⁷ Nancy King, *Juror Delinquency in America*, 94 Mich. L. Rev. 2673, 2714 (1996).

¹¹⁸ *Goupil v. Cattell*, 2008 U.S. Dist. Lexis 14774 (Feb. 26, 2008).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

other jurors were aware of the blog and the foreman denied receiving any responses to his blog.¹²⁵

To date, the few courts that discuss indirect online juror communications to third parties, for the most part, follow the legal analysis of *Cattell*. The key questions for those courts include: (1) did the juror discuss details of the trial; (2) did the juror demonstrate a pretrial bias; (3) did other jurors see the information; and (4) did the posts reveal that the juror was considering facts not admitted into evidence.¹²⁶

The court, as noted in *Commonwealth v. Guisti*, takes a somewhat different approach when the online juror communication changes from indirect to direct.¹²⁷ In *Guisti*, the defendant was convicted of several serious criminal charges. During the defendant's trial, a member of the jury sent the following email to a 900-person list serve.

"stuck in a 7 day-long Jury Duty rape/assault case . . . missing important time in the gym, working more hours and getting less pay because of it! Just say he's guilty and lets [sic] get on with our lives!"¹²⁸

At least two people (both of whom were attorneys) on the list serve responded to this email message telling the juror that it was improper to make such comments.¹²⁹

In *Guisti*, the juror's email to the list serve ultimately served as the grounds for the defendant's appeal. Upon review by the Massachusetts Supreme Court, the case was remanded back to the trial court.¹³⁰ The Massachusetts Supreme Court instructed the trial court to hold an inquiry or *Remmer*-type hearing and determine the substance of all the emails received by the juror and whether "other jury members prior to or during deliberations" were made aware of the emails.¹³¹

As the previously discussed cases illustrate, juror communications have been negatively impacted by the Digital Age. Although at present, juror research is the most pressing issue facing the jury system, juror communications is not that far behind.¹³² The Digital Age with its new technology has elevated the traditional low-level of concern associated with juror to juror

¹²⁵ *Id.*

¹²⁶ Richard Raysman and Peter Brown, *How Blogging Affects Legal Proceedings*, LAW TECHNOLOGY NEWS, May 13, 2009 ("When jurors blog about ongoing trials, there are several key considerations: Did the jurors discuss details of the trial? Did the jurors display a pretrial bias for or against one party? Did fellow sitting jurors read the blog or electronic communication during the trial and thus become unduly influenced?").

¹²⁷ *Commonwealth v. Guisti*, 434 Mass. 245; 747 N.E.2d 673(2001).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² John Schwartz, *As Jurors Turn to Web Mistrials Are Popping Up*, NEW YORK TIMES, March 17, 2009. ("But juror research is a more trouble-some issue than sending Twitter messages or blogging, Mr. Keene said.").

communications. In addition, the Digital Age has made both direct and indirect communication between jurors and third parties easier to accomplish. As more people (to include jurors) become aware that they can find information about a case by going to a particular juror's blog or social media web site, courts will be forced to reexamine the 'presumption of prejudice' standard.¹³³ Furthermore, it is highly likely that more *Remmer*-type hearings will be held in the future.

Besides illustrating the challenges facing the court with respect to improper juror communications, the aforementioned cases also offer insight into why jurors violate the court's instructions on this topic.¹³⁴ For example, some jurors like those in *Cattell* and *Guisti* feel the need to constantly chronicle their daily activities to the general public. This desire by the so-called "Tell-All Generation" to reveal everyday actions to others is neither shed nor lost just because one is called to serve on a jury.¹³⁵ Rather, this change in daily routine (serving on jury duty) actually increases, for some, the appeal to reveal.¹³⁶

Others, like the jurors in the Dixon trial, flaunt the rules on prohibited communications because they have grown accustomed to and reliant on the various new forms of communication.¹³⁷ For them, going any extended period of time without communicating via a social media web site is a challenge.¹³⁸ Furthermore, it has become socially acceptable to interact with others online in a public forum regardless of how you met the person or how long you have known him or her. This increased use and reliance on new forms of communication in both personal and professional settings raises the risk that a juror will either incidentally or purposely reveal information about the trial to someone else.

Finally, although not discussed in the cases in this section, a number of jurors, like with juror research, disobey the court's instructions against juror communications out of a sheer lack of awareness. Many don't consider or realize that texting, shooting off an email, sending a tweet,

¹³³ *Id.* ("Similarly, if a blogging juror reads and responds to an outside reader's comments, such interaction could potentially give rise to a presumption of prejudice based upon such extrinsic evidence communications.").

¹³⁴ Ralph Artigliere, Jim Barton, Bill Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, FLORIDA BAR JOURNAL, January 2010 ("Some jurors will want to text what they are doing at any given moment and why they are doing it to friends, family, and thousands of strangers.").

¹³⁵ Laura Holson, *Tell-All Generation Learns to Keep Things Offline*, NEW YORK TIMES, May 8, 2010. According to conventional wisdom, "everyone under 30 is comfortable revealing every facet of their lives online, from their favorite pizza to most frequent sexual partners."

¹³⁶ Professor Michael Bromby, *Jurors Use of Twitter, the Temptation to Tweet, Jurors' Outside Activities*, Jury Research Symposium 2010.

¹³⁷ Jerold S. Solovy and Robert L. Bynam, *Confronting the Fact of Juror Research*, LAW.COM ("[W]e cell phone abusers, we internet junkies we believe it is our God-given right to be connected.").

¹³⁸ <http://www.america.gov/st/usg-english/2009/July/20090706162635ebye5389911e-02.html>. See also, Anita Ramasastry, *Why Courts Need to Ban Jurors' Electronic Communication*, FINDLAW, August 11, 2009 ("Citizens have become increasingly reliant on such devices and applications. Indeed, many use them incessantly, as a lifeline to their friends, relatives, and colleagues—especially when they are at meetings conferences, or otherwise away from their normal office or home routines.").

or posting on a blog or web site is a form of communication.¹³⁹ According to Professor Cromer-Young, “[p]eople tend to forget that email, twittering, updating your status on Facebook is also speech. There’s an impersonality about it because it’s one-way communication—but it is a communication.”¹⁴⁰ Noted juror expert, Paula Hannaford-Agor points out that, “[f]or some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication.”¹⁴¹ Not surprisingly then, jurors continue to communicate with other jurors prior to deliberations and outside parties prior to rendering a verdict, despite admonitions from the court.

Privacy

Similar to juror research and communications, the issue of attorneys going beyond traditional voir dire to discover information about jurors is not new. Attorneys have long sought information about jurors outside of the courtroom. Historically, defense attorneys relied on private investigators and prosecutors used police officers or FBI agents. Those seeking information would conduct ‘drive bys’ or canvass neighborhoods in an attempt to discover a potential juror’s: age, religion, employment and marital status, socio-economic background, and political affiliation.¹⁴² Over time, courts increasingly started to release prospective juror names the day before or the day of trial, thus this practice of researching jurors outside of the courtroom became increasingly difficult to accomplish and fell into disuse.¹⁴³

In the Digital Age, this practice has been resurrected as attorneys now research jurors immediately upon receiving their names.¹⁴⁴ At times, it is done right in the courtroom during voir dire. In some jurisdictions, the practice has become so commonplace that one prominent trial consultant stated that “[a]nyone who doesn’t make use of Internet searches is bordering on

¹³⁹ Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW360, Oct. 23, 2009 (“It may seem obvious that you shouldn’t broadcast your juror experience live on Twitter, but even sophisticated people need reminders. Television weatherman Al Roker made headlines earlier this year when he tweeted about his experience being called up for jury duty in Manhattan...”).

¹⁴⁰ Greg Moran, *Revised Jury Instructions: Do Not Use the Internet*, SAN DIEGO UNION, Sep. 13, 2009 citing Professor Julie Cromer Young.

¹⁴¹ Paula Hannaford Agor, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, JURY NEWS.

¹⁴² Joshua Okun, *Investigation of Jurors*, 56 Geo. L. J. 839, 851 (1968).

¹⁴³ Generally speaking, there is no right to the jury list. *Wagner v. U.S.*, 264 F. 2d 524, 528 (9th Cir. 1959); *Hamer v. U.S.* 259 F. 2d 274, 278-279 (9th Cir. 1958). See also, Seth A. Fersko, *U.S. v. Wecht: When Anonymous Juries, The Right of Access, And Judicial Discretion Collide*, 40 Seton Hall L. Rev. 763, FN 45 (2010).

¹⁴⁴ Anita Ramasastry, *Googling Potential Jurors: The Legal and Ethical Issues Arising from the Use of Internet in Voir Dire*, FINDLAW, May 30, 2010 (“Specifically, attorneys are now using the Internet to check up on possible jurors, and to learn about their attitudes, opinions and backgrounds. If permitted to use laptops in the courtrooms, lawyers can check up on possible jurors during voir dire itself.”).

malpractice."¹⁴⁵ While this quote may overstate somewhat the importance of researching jurors online, it nonetheless demonstrates just how routine the practice has become.¹⁴⁶

Contrary to popular belief, research on jurors is not limited to jury selection or to ferret out dishonest jurors.¹⁴⁷ Rather, attorneys gather information on jurors for a variety of purposes and for use at different stages of the trial.¹⁴⁸ Depending on the information discovered, an attorney might format her opening statement to fit the interests of a particular juror or craft specific questions for a witness.¹⁴⁹ Other attorneys, who, at the end of trial, find themselves on the losing side, might go online and try to find some act of juror misconduct to serve as grounds for appeal.¹⁵⁰

This quest to learn more about jurors is not relegated to attorneys. Depending on the level of public interest in a specific trial, the media also researches jurors.¹⁵¹ Although not always driven by the same interests as attorneys, the media is quite adept at uncovering useful information, especially with regards to juror honesty.¹⁵²

Those going online to research jurors rely on the juror's "Digital Trail"¹⁵³ or "Internet Footprint."¹⁵⁴ As more and more information is placed online, most people have at least one online reference whether put there personally or by someone else.¹⁵⁵ Of course, with so much information now available sorting through it and finding something relevant to the case at hand

¹⁴⁵ Carol Williams, *Jury Duty? May Want to Edit Online Profile*, LA TIMES, Sep., 29, 2008.

¹⁴⁶ Some trial consultants have gone so far to offer "personality profiling" of jurors based on internet research. Julia Kay, *Vetting Jurors Via MySpace*, NATIONAL LAW JOURNAL, August 11, 2008.

¹⁴⁷ "...[V]oir dire examinations are theoretically designed to detect and eliminate bias, they are almost universally employed for quite different objectives. Most counsel, seek to employ any bias of their clients and eliminate only such bias as directed against him." Joshua Okun, *Investigation of Jurors by Counsel Its Impact on the Decisional Process*, 56 Georgetown Law Journal 839, 841-842 (1968).

¹⁴⁸ For a critique of attorneys researching jurors during trial see *Sinclair v. U.S.* 279 U.S. 749, 765 (1929).

¹⁴⁹ Julia Kay, *Vetting Jurors Via MySpace*, NATIONAL LAW JOURNAL, August 11, 2008. ("Last year, Fort Lauderdale, Fla., jury consultant Amy Singer was doing Internet research on potential jurors for a products liability case involving a maintenance worker who was severely injured after being forced to get inside a machine to clean it. Singer — who was working for the plaintiff's attorney — hit pay dirt when she found out that one of the jurors divulged on his MySpace page that he belonged to a support group for claustrophobics. Singer instantly knew this juror would be sympathetic to her client and advised her client to keep him on the panel. He wound up becoming the foreman. The plaintiff prevailed.").

¹⁵⁰ *Edwards v. Hyundai*, Civ. Action. No 07cv908-MHT (2010).

¹⁵¹ Recent examples of the media uncovering relevant information about jurors was seen in the corruption trials of the former governor of Illinois, Jim Ryan and the former mayor of Baltimore, Sheila Dixon.

¹⁵² Karen Flax, *Why the Tribune—and Other Networks—are Seeking the Names of Blagojevich Jurors*, Chicago Tribune, July, 09, 2010.

¹⁵³ *Potential Jurors Are An Open Book Online*, LOS ANGELES TIMES, October 26, 2008.

¹⁵⁴ Jack Zemlicka, "Judges Set Electronic Media Limits for Juries," Wisconsin Law Journal, May 7, 2010. ("Since the explosion of social networking, Mastantuono regularly researches jurors and monitors their online activity during lengthy trials. "It's not unusual for someone in my office to run the name of a juror, if we get them ahead of time, through Google, Twitter or Facebook...") .

¹⁵⁵ Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW 360, October 23, 2009. ("Everybody has something on them on the Web, and everybody can look it up.").

is a challenge.¹⁵⁶ Additionally, as noted by some of the Jury Survey Respondents, time is a factor e.g., in most federal courts, the attorneys generally receive the name of the jurors on the day of jury selection or shortly thereafter.¹⁵⁷ But, as demonstrated by the attorneys defending Jose Padilla (“dirty bomber”), it is possible, even with a small window of time, to uncover sufficient information to have a potential juror dismissed.¹⁵⁸

Obviously, the big concern with researching jurors online is the encroachment on juror privacy. The following quote reflects the views held by many on this issue: “[t]he Internet in so many areas creates an extraordinary conflict between the desire for information and the desire for privacy.”¹⁵⁹ This problem of course is neither new nor unique to the Digital Age. Courts have long struggled with where to draw the line between ensuring the rights of the parties trying the case and safeguarding the privacy of jurors.¹⁶⁰ The difference today is the amount of information available about jurors and how accessible it is.

At times, attorneys use online information to learn things about jurors that would rarely, if ever, come up or be discussed during voir dire.¹⁶¹ Thus, in a way, online research provides an alternative route or ‘end-run’ by which attorneys, at least from their perspective, learn important and sometimes personal information about jurors. For example, generally speaking, a judge will not allow an attorney to ask a potential juror about her political ideology or who she voted for in the last presidential election.¹⁶² The attorney, however, by going online may discover a juror’s political leanings by looking at what political candidates she donated to in the most recent election or what organizations she belongs to.¹⁶³

¹⁵⁶ Erika Patrick, *Protecting the Defendant’s Right to a Fair Trial in the Information Age*, 15 Cap. Def. J. 71, 78 (2002).

¹⁵⁷ Julia Kay, *Vetting Jurors Via MySpace*, NATIONAL LAW JOURNAL, August 11, 2008. (“The difficulty of Internet research is time. Lawyers are typically not given lists of jurors until a day or even hours before jury selection begins. With federal trials, lawyers might have several days’ notice.”).

¹⁵⁸ During the trial of Mr. Padilla, several of his attorneys were in the back of the courtroom researching jurors as they were called to sit in the jury box. While conducting this research, one attorney discovered that a prospective juror lied about her criminal record on her juror questionnaire. This prospective juror was subsequently removed from the venire entirely. Julia Kay, *Vetting Jurors Via MySpace*, NATIONAL LAW JOURNAL, August 11, 2008 *U.S. v. Hassoun*, No. 0:04cr60001 (S.D. Fla.).

¹⁵⁹ Julia Kay, *Vetting Jurors Via MySpace*, NATIONAL LAW JOURNAL, Aug., 11, 2008

¹⁶⁰ Nancy A. Novak, Note, *Jury on Trial: Juror’s Constitutional Right to Privacy Falls Under Scrutiny of the Courts*, 3 San Diego Justice J. 215 (1995).

¹⁶¹ Nancy S. Marder, *The Jury Process*, pg. 82-83 (“For example, lawyers have sometimes wanted to ask prospective jurors about their religion or sexual orientation during voir dire, but judges have usually denied such inquiries on the ground that it is an intrusion on the juror’s privacy and not necessary for the parties to know.”).

¹⁶² Bill Poovey, *Palin Set to Take Stand in Tenn. Hacking Trial*, AP, April 23, 2010. (“U.S. District Judge Thomas Phillips has denied a defense motion to have prospective jurors answer a questionnaire asking if they have strong political feelings about Palin. Kernell’s attorney, Wade Davies, cited Palin’s speaking a lot at a tea party movement convention and frequent television appearances. She is hugely popular with conservatives.”).

¹⁶³ See for example the following link on Huffingtonpost: <http://fundrace.huffingtonpost.com>.

Proponents of researching jurors online argue that the information uncovered improves the legal system as a whole because attorneys are better able to exercise peremptory challenges.¹⁶⁴ Rather than strike a juror because of gender¹⁶⁵ or race¹⁶⁶ both of which are unconstitutional, or physical size¹⁶⁷ which is illogical, attorneys with more information might exercise peremptory challenges more intelligently and in a constitutional manner.¹⁶⁸ This assumes of course that the information obtained online is reliable and of sufficient value to warrant the use of a peremptory challenge.¹⁶⁹

Advocates of researching jurors also claim that the practice cuts down the risk of empanelling a rogue juror and makes for a more open and honest voir dire.¹⁷⁰ According to Professor Bennett Gershman, rogue or stealth jurors are those “who seek to inject themselves into the process [trial] for self-serving reasons.”¹⁷¹ Traditionally, attorneys and judges had little outside information to rely on, save for maybe a ‘criminal records check,’ when determining the honesty or suitability of a juror. Today, the Internet offers a virtual treasure trove of information about jurors and makes verification of juror responses much easier.¹⁷²

As jurors realize that their voir dire answers are verifiable online, they will be inclined either to be more truthful or request dismissal from the case.¹⁷³ At least one legal practitioner has noted that, “[b]ecause judges are emphasizing the checks [background checks on jurors] more jurors drop out before the jury is formally seated and thus fewer and fewer people are coming up with a criminal record contradiction of their jury questionnaire.”¹⁷⁴ This truthfulness and willingness to follow the court’s instructions carries over to the actual trial itself. For example, if a juror believes that her online activities will be checked during trial she is more likely to follow the court’s instructions regarding researching the case or communicating with third parties.

¹⁶⁴ “Increased lawyer participation in voir dire should increase the information about jurors’ biases and beliefs and debunk the more fanciful justifications for strikes.” Judge Mark W. Bennett, *Unraveling the Gordian Knot of implicit bias in jury selection: the problems of judge-dominated voir dire, the failed promise of Batson, and proposed solutions*, 4 Harv. L. & Pol’y Rev. 149-171 (2010).

¹⁶⁵ Peremptory challenges based on gender are unconstitutional. *J.E.B. v. Alabama* 511 U.S. 127 (1994).

¹⁶⁶ Peremptory challenges based on race are unconstitutional. *Batson v. Kentucky* 476 U.S. 79 (1986).

¹⁶⁷ A prosecutor actually successfully struck a prospective juror based on the theory that overweight people are defendant-friendly see Statement of prosecutor in *Dolphy v. Mantello* 552 F.3d 236 (2d Cir. 2009). (“I do not select overweight people on the jury panel for reasons that, based on my reading and past experience, that heavy-set people tend to be very sympathetic toward any defendant.”).

¹⁶⁸ See the examples cited by Professor Hans in her article *Avoid Bald Men and People with Green Socks: Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi.-Kent L. Rev. 1190-1191 (2003).

¹⁶⁹ The issue of whether peremptory challenges themselves are good for the legal system is beyond the scope of this article.

¹⁷⁰ Jerry Markon, *Jurors with Hidden Agendas*, Wall St. J., July 31, 2001.

¹⁷¹ Bennett Gershman, *Contaminating the Verdict: the Problem of Juror Misconduct*, 50 S.D. L. Rev. 322, 345 (2005).

¹⁷² The President of the Texas Criminal Defense Lawyers Association recently discovered this fact when he had one prospective juror high on his list until he viewed her web site and discovered that she “discussed her experiences channeling aliens from another planet.”

¹⁷³ Molly McDonough, *Rogue Jurors*, ABA JOURNAL October (2006).

¹⁷⁴ *Id.*

Obviously, most, if not all, want honest jurors and those inclined to follow the rules prescribed by the judge. The issue, however, cuts both ways. As more citizens realize they will be subject to online background checks as jurors, the current jury summons reply rate of forty-eight percent will most likely fall even lower.¹⁷⁵ According to Judge Richard Posner, “[m]ost people dread jury duty—partly because of privacy.”¹⁷⁶ This dread is heightened by the fact that despite assurances to the contrary by the trial judge, information discovered about jurors online may be revealed during voir dire, which generally speaking is open to the public and press.¹⁷⁷

Besides the concerns surrounding a drop in jury participation rates, a potential issue exists regarding an assumption many make about the juror information discovered by attorneys. Most of those who support allowing attorneys to research jurors do so assuming that all disqualifying information is turned over to the court or made public. While probably true in cases where the media discovers the information, the same cannot be said for those situations involving attorneys. As discussed previously, attorneys research jurors for a variety of reasons.

An attorney who discovers a dishonest juror in voir dire¹⁷⁸ or a juror who has committed misconduct might not relay such information to the court, especially if the attorney thinks that particular juror is advantageous to her side or the attorney agrees with the overall outcome of the trial.¹⁷⁹ Also, generally speaking, few legal requirements or rules of Discovery exist mandating that an attorney reveal such information to opposing counsel.¹⁸⁰ A small number of states (California,¹⁸¹ Iowa,¹⁸² Alaska and Massachusetts¹⁸³) require prosecutors to turn over certain

¹⁷⁵ John E. Nowak, *Trying Cases in the Media: Legal Ethics, Fair Trials and Free Press: Article Jury Trials and First Amendment Values in Cyber World*, 34 U. Rich. L. Rev. 1213, 1247 (2001) (“...the thought that one’s entire life will be open to the government and public through jury service certainly may well deter most people from wanting to serve on a jury.”) See also, *Sinclair v. U.S.* 279 U.S. 749, 765 (1929) (“If those fit for juries understand that they may be freely subjected to treatment like that...disclosed [investigation by detectives], they will either shun the burdens of the service or perform it with disquiet and disgust.”).

¹⁷⁶ *U.S. v. Blagojevich*, No. 10-2359 (Dissent by Judge Posner) July 14, 2010.

¹⁷⁷ *Stephens Media v. District Court* 221 P.3d 1240.

¹⁷⁸ Under the ABA’s rule 3.3a Duty of Candor to the Court it does not appear that an attorney would have to reveal such information. A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. However, some states impose a higher duty of candor to the tribunal. See for example, Richard Silverman, *Is New Jersey’s Heightened Duty of Candor Too Much of a Good Thing* 19 Geo. J. Ethics 951 (2006). Also, see *Cowden v. Washington Metropolitan Area Transit Authority*, 423 A.2d 936 (1980). “It is unquestioned that each party has an obligation to report the incompetency of any juror upon discovery.”

¹⁷⁹ John E. Nowak, *Jury Trials and First Amendment Values in “Cyber World”*, 34 U. Rich. L. Rev. 1213, 1225 (2001) (“The attorney with information about cyber activities of potential jurors will be able to use jury challenges for cause and use preemptive challenges, in a strategically wise manner.”).

¹⁸⁰ Jurisdictions not requiring the release of such information by the prosecutor to defense counsel include: *Monahan v. State*, 294 So. 2d 401, 402 (Fla. Dist. Ct. App. 1974); *State v. Jackson* 450 So. 2d 621, 628 (La. 1984); and *Martin v. State* 577 S.W.2d 490, 491 (Tex. Crim. App. 1979).

¹⁸¹ *People v. Murtishaw* 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922, 71 L. Ed. 2d 464, 102 S. Ct. 1280 (1982) and. Also, the Virginia Court of Appeals ruled in *Salmon v. Commonwealth of*

juror information not readily available to the defense; however, the vast majority of states make no such requirement.

Part II. Possible Solutions

As indicated by Part I of this Article, the Digital Age with various degrees has both positively and negatively influenced juror research, communications and privacy. On the one extreme is juror research where the impact has been almost entirely negative. Save for the opportunity to devolve and become more like grand jurors, few positive attributes arise from providing jurors better methods by which to research the case on which they sit. Arguably, even the staunchest advocates of the so-called “Active Jury,”¹⁸⁴ would deem this conduct detrimental to the legal process.

On the other side of the spectrum is juror privacy. Here, the influence of the Digital Age is more mixed. For some, sacrificing the privacy of jurors is a small price to pay to increase the likelihood of empanelling more truthful jurors or those willing to follow the rules provided by the court. These increased intrusions into the personal lives of jurors by both attorneys and the media, however, come at a cost i.e., lower rates of jury service participation.¹⁸⁵ In addition, it should be remembered that when attorneys research jurors they are not doing it necessarily to seat an impartial jury or ensure a fair trial.¹⁸⁶ Rather, attorneys want to remove an unfavorable juror, learn the interests and viewpoints of the sitting jurors, or discover grounds for a new trial or appeal (if necessary).¹⁸⁷

In the middle of the spectrum is juror communications. Little can be said in support of juror communications to third parties in which the trial is discussed prior to reaching a verdict. Similar to juror research, this should not occur and anything that works to facilitate this practice must be viewed as a detriment to the legal system. The same, however, cannot be said for juror

Virginia, 529 S.E.2d 815 (2000), that prosecutors can conduct background checks and withhold that information from the defense.

¹⁸² State v. Bessenecker 404 N.W.2d 134 (Iowa 1987).

¹⁸³ Commonwealth v. Smith 350 Mass. 600, 603, 215 N.E.2d 897, 901 (1966).

¹⁸⁴ Steven Friedland, *Legal Institutions: The Competency and Responsibility of Jurors Deciding Cases*, 85 NW. U. L. Rev. 190 (1990). Active juries are generally described as those which are more engaged in the trial process and allowed to ask questions, take notes and bring the instructions or transcripts back to the jury room.

¹⁸⁵ The Second Circuit (U.S. v. Barnes) people will “be less . . . willing to serve [on a jury] if they know that inquiry into their essentially private concerns will be pressed.”

¹⁸⁶ Just as voir dire is not necessarily conducted to seat an impartial juror the same can be said for online research of jurors. “[V]oir dire examinations are theoretically designed to detect and eliminate bias, they are almost universally employed for quite different objectives. Most counsel, seek to employ any bias of their clients and eliminate only such bias as directed against him.” Joshua Okun, *Investigation of Jurors by Counsel its Impact of the Decisional Process*, 56 Georgetown Law Journal 839, 841-842 (1968).

¹⁸⁷ Julia Kay, *Vetting Jurors Via MySpace*, NATIONAL LAW JOURNAL, August 11, 2008. (“Some jury consultants and lawyers, however, still want to research their juries even after jury selection, for different reasons. For one thing, the information can be used to get a case overturned on appeal if it turns out a juror lied on a questionnaire. Additionally, some consultants and lawyers are beginning to use Internet information they've obtained about jurors to influence them during the trial, particularly during closing arguments.”).

to juror communications that are either inaccessible or beyond the reach of third parties. In fact, there is a growing trend in the United States to allow jurors prior to the close of trial to discuss among themselves evidence introduced in court. For those who support juror to juror communications, the Digital Age with its Smart phones, blogs and social media web sites is a boon because it facilitates this practice.

In light of the analysis conducted in Part I, it appears that of the three areas examined, juror research and third party communications are the most negatively impacted by the Digital Age. Thus, Part II of this Article, which discusses possible solutions, will primarily focus on those two areas. However, some discussion will be reserved for reform proposals addressing juror privacy.

Instructions

The most obvious and popular solution to combating the negative influence of the Digital Age is to provide jurors with improved and updated jury instructions. This was the conclusion of almost every Jury Survey Respondent.¹⁸⁸ As discussed *supra*, some jurors violate the rules against juror research and communications to third parties because the instructions in place are either unclear or don't specifically address the advancements ushered in by the Digital Age.¹⁸⁹ To date, numerous jurisdictions have or are in the process of updating their jury instructions to address the new methods by which jurors communicate and research.¹⁹⁰ Here are two sample jury instructions which will be analyzed later in this section.

Multnomah County, Oregon

Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. "No discussion" also means no emailing, text messaging, tweeting, blogging or any other form of communication. Do not discuss this case with other jurors until you begin your deliberations at the end of the case. Do not attempt to decide the case until you begin your deliberations. I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don't think you are paying attention, but because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common what they just watched together. There are at least two reasons for this rule. The first is to help you keep an open mind. When you talk about things, you start to make decisions about them and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you won't have that until the very end of the trial. The second reason for the rule is that we want all of you working together on this decision when you

¹⁸⁸ Almost every Jury Survey Respondent cited jury instructions as the best way to decrease online research and improper communications by jurors.

¹⁸⁹ As noted by Professor King, this call for more specific jury instructions is not new. ("Calls for more explicit instructions to jurors to keep out of mischief appeared as early as 1893..."). Nancy King, *Juror Delinquency in America*, 94 Mich. L. Rev. 2673, 2728 (1996).

¹⁹⁰ Even the military is getting into the act. Kent Harris, *Jury Instructions to Include Rules on Use of the New Media*, STARS AND STRIPES, June 21, 2009. ("As a result of cases like these, Dixon said he's been working on specific language addressing networking phenomena such as Twitter and Facebook that judges would use when instructing troops who sit on court-martial panels.").

deliberate. If you have conversations in groups of two or three during the trial, you won't remember to repeat all of your thoughts and observations for the rest of your fellow jurors when you deliberate at the end of the trial. Ignore any attempted improper communication. If any person tries to talk to you about this case, tell that person that you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to my staff.

Do not make any independent personal investigations into any facts or locations connected with this case. **Do not** look up any information from any source, including the Internet. **Do not** communicate any private or special knowledge about any of the facts of this case to your fellow jurors. **Do not** read or listen to any news reports about this case or about anyone involved in this case. In our daily lives we may be used to looking for information on-line and to "Google" something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision.

You must resist that temptation for our system of justice to work as it should. I specifically instruct that you must decide the case only on the evidence received here in court. If you communicate with anyone about the case or do outside research during the trial it could cause us to have to start the trial over with new jurors and you could be held in contempt of court.

(Federal Government) Before Trial:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

At the Close of the Case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

The problem of course with jury instructions is that they are just that merely instructions. To be effective, they must be followed. In the corruption of trial of Mayor Dixon, the jurors, despite

written instructions by the judge to desist, continued to communicate via Facebook.¹⁹¹ Absent sequestering and removing all communication devices (discussed *infra*), which is burdensome and expensive, no sure-fire methods exist to ensure compliance.¹⁹² Thus, any jury instruction drafted must be written in such a manner as to create the optimum atmosphere for acceptance.

One way to increase the likelihood of adherence is to use language easily understood by laypersons.¹⁹³ This includes avoiding overly technical terms and offering descriptions of improper conduct. One U.S. Magistrate Judge provides jurors with examples of seemingly innocent online communications that can jeopardize a trial.¹⁹⁴ This is important because some jurors are unclear on what actions violate court rules.¹⁹⁵ For example, some jurors don't consider looking up the name of a party on Google as gathering evidence about a case. To them, gathering evidence means going to the library or the actual crime scene, not performing a name or image search on Google.¹⁹⁶

In addition to being told 'what' they can't do, jurors need to know 'why' they can't do it. Jurors in the Digital Age, unlike those in the past, are more adept and comfortable with discovering facts for themselves. Some are also more receptive to learning information online rather than through oral testimony.¹⁹⁷ Thus, to get them to give up their methods of learning and acquiring information and adhere to the Court's instructions, jurors need be told why such practices as researching a case online or communicating with third parties is incompatible with jury service.¹⁹⁸ Failure to offer an explanation "create[s] mistrust for the judicial system" and decreases the likelihood of compliance.¹⁹⁹

¹⁹¹ *Dixon Juror Ignores Judge, Continue Facebook Posts*, 4 Jan 2010, 11 WBAL-TV. In another example, one federal judge warned jurors in a death-penalty trial forty-one times not to discuss the trial with outside third parties yet the jury foreman still contacted the press about the case prior to the end of the trial (*Basham v. U.S.*, 09-617).

¹⁹² *Infra* FN 286.

¹⁹³ *Russo v. Takata* 774 N.W. 2d. 441 (2009). ("We suggest circuit courts consider using simpler and more direct language in the [jury] summons to indicate that no *information* about the case or the parties should be sought out by any means, including via computer searches. This type of admonishment is warranted given the ease with which anyone can obtain information via the internet...")

¹⁹⁴ Judge Dennis M. Sweeny, *Commentary: Twitter and Tweeting During Jury Service*, DAILY REC. April 20, 2009. Jack Zemlicka, *Judges Set Electronic Media Limits for Juries*, WISCONSIN LAW JOURNAL, May 7, 2010 ("Judges admit there is little they can do to completely keep jurors from avoiding electronic communication, which is why many stress the potential problems that even inane interaction can create.").

¹⁹⁵ Jack Zemlicka, *Judges Set Electronic Media Limits for Juries*, WISCONSIN LAW JOURNAL, May 7, 2010 ("I think people know they can't go home and talk to their wife about a case, but they don't think anything about firing off a bunch of texts," he said. "That is why you have to state it explicitly.").

¹⁹⁶ *Russo v. Takata* 774 N.W. 2d. 441 (2009).

¹⁹⁷ Christopher Hope, *Web Savvy Young Make Bad Jurors Because They Cannot Listen, Says Lord Chief Justice*, TELEGRAPH, Nov. 6, 2008.

¹⁹⁸ According to one Jury Survey Respondent, Jury instructions can be effective if "given forcefully but fairly and the reason for the rule is explained." Jury Survey Response #22, Question #7a

¹⁹⁹ Gareth S. Lacy, *Should Jurors Use the Internet?* 7 Wash. J.L. Tech. and Arts (2010).

While a long discourse on due process and the rights of the defendant may be unnecessary, jurors should be told that information obtained outside of the courtroom cannot be considered when deciding a verdict despite how inconsequential or helpful the information may seem.²⁰⁰ Rather than expect today's jurors to just automatically follow instructions, courts need to explain that cases can only be decided by evidence introduced in court.²⁰¹ Furthermore, courts should acknowledge that the juror's desire and interest in looking for information is neither irrational nor unnatural, but explain that engaging in such activity may result in claims of improper influence.²⁰²

Jurors must also be advised of the negative consequences of violating the court's instructions.²⁰³ Jurors should be told that failure to abide by these rules may cause the court to declare a mistrial, which is costly both in financial terms and the toll it takes on all of those involved in the process.²⁰⁴ In addition, jurors need to be informed of the potential for contempt of court and the subsequent penalties assessed to jurors who fail to follow the court's instructions. As noted by at least one Jury Survey Respondent, "[w]hen a juror can sit in the privacy of their own home and find out info about the case they really need strong discouragement."²⁰⁵

Adding a self-policing section will also encourage compliance with jury instructions.²⁰⁶ While some jurisdictions have shied away from this approach for fear of creating distrust and apprehension among jurors, this article suggests that juror instructions should include language requiring jurors to report fellow jurors for failing to follow the rules of the court.²⁰⁷ This watch-

²⁰⁰ Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL OF COURT INNOVATION pg. 297 ("Judges can acknowledge the temptations of Internet research, but then can explain to jurors *why* their cooperation in refraining from extrinsic research is so vitally important to the fairness of the judicial system.").

²⁰¹ According to Eric Robinson from the Berkman Center for Internet and Society at Harvard University, "Courts have to explain to people why, not just tell people, 'Don't read the newspaper, don't do your own research and don't Twitter... Explain the rationale behind it.'" See also, Diane Jennings, *Dallas Judges Take Pains to Keep Web from Undermining Fair Trials*, DALLAS MORNING NEWS, Jan., 30, 2010.

²⁰² Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL OF COURT INNOVATION pg. 298.

²⁰³ Ralph Artigliere, Jim Barton, Bill Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, FLORIDA BAR JOURNAL, January 2010. ("Some judges tell jurors *why* it is important to follow the instructions. Many jurors respond better to direction if they understand the reason the requirement has been placed on them.").

²⁰⁴ Judge Margaret R. Hinkle, *Voice of the Judiciary: Criminal Practice in Suffolk Superior Court*, 51 B.B.J. 6 (2007). ("With a jury impasse, not only do jurors feel a sense of incompleteness, but any mistrial imposes an enormous emotional and financial cost on the prosecution, the defense, the victim and the Commonwealth.").

²⁰⁵ Jury Survey Response #7, Question #5.

²⁰⁶ Ralph Artigliere, Jim Barton, Bill Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, FLORIDA BAR JOURNAL, January 2010 ("Another tactic is to "empower" all jurors to report transgression by informing them of their duty to report any violation of the court's instructions, including any communication of any juror with the outside about the case or any attempt to bring into court information from outside the trial.").

²⁰⁷ Michigan's new rule on electronic device usage by jurors had originally contained a requirement for jurors to report other jurors who violate the court's instructions. Correy Stephenson, *Michigan Considers Rule on Juror Device Use*, ALLBUSINESS, May 12, 2009.

dog requirement is a necessary evil because juror misconduct is difficult to detect or prevent.²⁰⁸ An added benefit of this rule is that if a juror violates the court's instructions e.g., by researching the case or communicating with a third party she, for fear of being reported to the court by a fellow juror, is less likely to reveal her findings to other jurors and thereby taint the entire jury.²⁰⁹

Besides the actual substance of the instructions, there are procedural issues like how and when to give instructions.²¹⁰ As indicated in Part I, jurors conduct research at all stages of the trial to include immediately upon receiving a jury summons.²¹¹ Thus, the earlier the instructions are given the greater the chance for compliance.²¹² As for frequency, several Jury Survey Respondents stated that the instructions should be repeated as often as possible²¹³ because they are easily forgotten.²¹⁴ This repetition usually comes in the form of brief reminders during the trial.²¹⁵ Other suggestions by the Jury Survey Respondents include "remind[ing] the jurors that this is a violation of their oath"²¹⁶ not just the court's instructions."²¹⁷ One respondent remarked that the court should also allow the jurors to bring the instructions back to the jury room during deliberations.²¹⁸

As for requiring jurors to sign an oath or affidavit acknowledging the instructions, some Jury Survey Respondents were split on the benefits of this recommendation. Some felt that "[i]f jurors commit to signing a declaration, they are more likely to not violate the commitment."²¹⁹ They also stated that "actually sign[ing] a document may verify to them the importance."²²⁰ Others opposed such a policy stating that "[w]e can't turn jury duty into a check list of things

²⁰⁸ Ken Strutin, *Jury Deliberations in the Digital Age*, LAW TECHNOLOGY NEWS, May 20, 2009 ("The hallowed ground of jury deliberations makes it difficult to unearth, preserve and authenticate surreptitious electronic communications and Web postings or to seek redress when they are uncovered.").

²⁰⁹ Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL OF COURT INNOVATION pg. 298.

²¹⁰ Ralph Artigliere, Jim Barton, Bill Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, FLORIDA BAR JOURNAL, January 2010.

²¹¹ *Russo v. Takata* 774 N.W. 2d. 441 (2009).

²¹² Paula Hannaford Agor, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, JURY NEWS, ("Juror education at every stage of jury service should be the first and foremost preventative measure against Google mistrials.").

²¹³ Jury Survey Response #5, Question #7c: ("Because it is repetitive and comes from the judge I believe this is effective.").

²¹⁴ One Jury Survey Respondent stated that "This is o.k. but would be forgotten during the time delay from summons and jury duty. Moreover, it is more effective when the jurors hear it from the judge." Jury Survey Response #14, Question #7(a).

²¹⁵ Ralph Artigliere, Jim Barton, Bill Hahn, *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, FLORIDA BAR JOURNAL, January 2010.

²¹⁶ The importance of the jury oath was recently illustrated in the trial of former Illinois Governor Rod Blagojevich. Eric Zorn, *Jurors: Check Please*, CHICAGO TRIBUNE, Aug. 17, 2010.

²¹⁷ Jury Survey Response #18, Question #7(c).

²¹⁸

²¹⁹ Jury Survey Response #9, Question #7(d).

²²⁰ Jury Survey Response #12, Question #7(d).

sworn to.”²²¹ In addition, some Survey Respondents believe that this step is unnecessary if you address the issue early in voir dire.²²²

Finally, some jurors regardless of how the instructions are written and delivered will nevertheless ignore them e.g., jurors who feel the need to chronicle every aspect of their life online.²²³ To help address this problem, attorneys or preferably the judge should ask potential jurors directly during voir dire if they will follow the court’s instructions and whether or not they use the Internet or have an online presence.²²⁴ On occasion, straight forward and direct questions reveal a lot as some potential jurors make their inability to follow such rules quite clear.²²⁵ In addition to weeding out jurors who refuse to follow the court’s instructions, asking such questions during voir dire serves other purposes. First, it provides early education to jurors that habits viewed by some as normal and inconsequential like looking up unfamiliar people or terms online or blogging about their daily lives is inappropriate during jury duty and can have very profound and harmful consequences. Second, early questioning alerts the court to those jurors who might regularly blog or visit social media websites.

Analysis of Sample Jury Instructions

This section of the article will now examine the sample jury instructions from Multnomah County, Oregon and the federal government to see how well they adhere to the previously discussed recommendations. Both instructions avoid overly complex language and appear to be drafted with the layperson in mind.²²⁶ Each offers specific examples of inappropriate behavior. This is important for those jurors who may not know that their activities violate court rules.²²⁷ In addition, both specifically reference the prohibition against using both old and new forms of communication to discuss the case.²²⁸

As for the negatives, both instructions lack the self-policing section used by some states like New York.²²⁹ This additional safeguard is important in light of the secrecy and deference normally given to jury deliberations. Without this requirement, it is more difficult to ensure that

²²¹ Jury Survey Response #8, Question #7(d).

²²² Jury Survey Response #14, Question #7(d).

²²³ Ken Strutin, *Jury Deliberations in the Digital Age*, LAW TECHNOLOGY NEWS, May 20, 2009 (“Sharing the minutest details of our lives through mobile telecommunications has become second nature in the Information Age.”)

²²⁴ Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW360, Oct. 10, 2009 (“I find that attorneys are asking during voir dire whether jurors have a blog and what the name of the blog is...If you get that commitment upfront, you’re more likely to avoid problems down the line.”).

²²⁵ Daniel A. Ross, *Juror Abuse of the Internet*, NEW YORK LAW JOURNAL, Sep. 8, 2009. (“In Kansas City attorney Peter Carter asked potential jurors during voir dire if they would follow instructions not to do Internet research. In response about six out of ten said that they would not. Carter also discovered, simply by asking that some six or seven of the 80 potential jurors already had researched the case on the internet.”).

²²⁶ Oregon Jury Instruction and Federal Government Jury Instruction.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ New York Pattern Criminal Jury Instructions PJI 1:11.

the instructions will be followed and juror misconduct, if it occurs, will be discovered. Also, it is unclear if either instruction informs jurors that disobeying court rules may lead to a mistrial and violates the juror's oath. This latter point was significant for at least one Jury Survey Respondent.

Of the two instructions, the Oregon instructions appear to be superior to those of the federal government. First, while both tell jurors not to research the case or discuss it until deliberations, the Oregon instructions explain 'why' this rule is necessary. In fact, the Oregon instructions provide several reasons for this rule.²³⁰ As discussed *supra*, telling jurors 'why' even if just using broad terms to do so is important. Jurors in the Information Age want to know why it is necessary to keep certain evidence away from them. Moreover, they need to understand that routine practices such as conducting online research which they have grown accustomed to and reliant on can't be performed during trial.

Also, the Oregon instructions, unlike those of the federal government, define terms like "discussion" and how it is interpreted in the Digital Age. For example, the Oregon instructions explain to jurors that "discussion" includes "emailing, text messaging, tweeting, blogging or any other form of communication."²³¹ As for repetition, the Oregon instructions inform the jury that the "[j]udge will give you some form of this instruction every time we take a break."²³² The Oregon instructions even address the conscientious juror who thinks that by knowing more she will be able to better fulfill her duties.²³³ The Oregon instructions make it clear to this type of juror that while "it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You [the juror] must resist that for our system of justice to work as it should."²³⁴

Questions

In addition to improving jury instructions, allowing juror questions would go a long way in reducing the detrimental impact of the Digital Age.²³⁵ While a few jurisdictions still do not allow jurors to ask questions, most do in either civil or criminal trials.²³⁶ This is not to say, however, that questions by jurors is a common occurrence in the courtroom. Many jurisdictions that permit questions generally do so subject to the discretion of the judge. Thus, in some courts,

²³⁰ Oregon Jury Instructions.

²³¹ *Id.*

²³² Oregon Jury Instruction.

²³³ According to one Juror Survey Respondent, some "[j]urors want to do the right thing—that is a double-edged sword. They think the more info they have the better job they will do" Jury Survey Response #7, Question #7(d), (e) and (f).

²³⁴ Oregon Jury Instructions.

²³⁵ Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL of COURT INNOVATION pg. 296 ("If jurors are turning to the Internet because they are confused by important ideas or terminology in a trial, it is in everyone's best interest to forestall that by maximizing comprehension and minimizing confusion.").

²³⁶ *Sykes v. U.S.* 08-2558 (7th Cir.) July 19, 2010.

jurors are not only kept in the dark about the rule, but also discouraged or prevented from asking questions.²³⁷

Juror questions are important because they directly address the issues of juror: (1) curiosity; (2) confusion; and (3) confidence. As discussed *supra*, curiosity and confusion are primary reasons for jurors conducting research. Arguably, resolving juror curiosity is no easy task. Many of the questions that arise from juror curiosity can't be answered directly pursuant to the Rules of Evidence or other constitutional protections granted to the parties and witnesses. This doesn't mean, however, that they should go unaddressed.

For example, a juror might enquire with the court whether or not the defendant is presently incarcerated. It is unlikely that the judge would ever ask or answer a highly prejudicial question like that. But, the judge can use this situation to her advantage by turning it into a teaching point to reiterate the fact that not all evidence available is admissible. The judge, even without going into the details of the question, can once again instruct the jury as a whole to include the individual juror who raised the question, that certain evidence must not be examined or considered by the jurors in order to protect the rights of the parties involved in the case.²³⁸ This timely re-education of the jury is important because answers to questions like the defendant's incarceration status²³⁹ are easily available and accessible online.²⁴⁰

Allowing questions also aids in the jurors overall comprehension during trial, while simultaneously signaling to the court to include the attorneys trying the case that certain issues and terms are unclear. Questions tell both the court and the attorneys what areas need further clarification. This in turn cuts down on the need for jurors to speculate, conduct research, or contact outside third parties to find answers.²⁴¹ Interestingly, few think twice about a judge--during a bench or jury trial--who attempts to clarify a witnesses' statement or poses a few follow up questions.²⁴²

²³⁷ Nancy Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 Loy. U. Chi. L. J. 727, 747 (2010).

²³⁸ Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. Rev. 601, 630 (stating that questioning by jurors would call attention to areas of improper speculation and would enable the trial judge to neutralize the effects of improper speculation through appropriate admonition).

²³⁹ See for example the website for the Montgomery County Jail in Ohio where inmates may be found by first and last name <http://www.mont.miamivalleyjails.org/>.

²⁴⁰ Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL OF COURT INNOVATION pg. 291 ("With the advent of the Internet and the ease with which it can be accessed anytime, anywhere, concerns about exposure to pre-trial or mid-trial information obtained outside of the courtroom and about juror use of such information take on a whole new dimension.").

²⁴¹ Ellen Brickman, Julie Blackman, Roy Futterman, and Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury*, JOURNAL OF COURT INNOVATION pg. 298 ("The more they understand what they hear in court, the less motivated they may be to do Internet research.").

²⁴² Barry A. Cappello & James G. Strenio, *Juror Questioning: The Verdict Is In*, 36 JUN TRIAL 44, 48-49 (2000). ("Simply put, if a trial judge sitting as a trier of fact without a jury can ask questions, jurors should have the same right in the careful search for the truth.").

Permitting questions also leaves jurors feeling more confident about their verdict and the legal system as a whole.²⁴³ This may be attributable to a variety of factors. First, jurors who ask questions are generally less passive and more attentive during trial.²⁴⁴ Second, questions and their answers decrease speculation and ambiguity in the deliberation room.²⁴⁵ This increased confidence in the verdict bleeds over to the legal system as jurors who are permitted to ask questions “feel more involved in the trial” and report an enhanced satisfaction with their jury service.²⁴⁶

In contrast, very few Jury Survey Respondents thought this specific reform proposal would decrease or prevent online juror research. In fact, some respondents went so far as to question the connection between the two.²⁴⁷ The views of the respondents regarding juror questions may be due to the fact that they dislike the idea of giving up their power in the courtroom, which is what basically occurs when jurors are allowed to ask questions.²⁴⁸ Also, some of the respondents may not truly understand how the process normally works.

For example, one Jury Survey Respondent wrote that she was “[n]ot certain this [allowing juror questions] would help—a judge couldn’t be certain where this would lead.”²⁴⁹ This response indicates a possible lack of familiarity with how jurors ask questions in court. In the courts that allow juror questions, the normal procedure is as follows. At the conclusion of a witnesses’ testimony, jurors write their questions down and then hand them to the bailiff who gives the question to the judge. The judge along with the attorneys reviews the question. The judge then decides whether she will answer or pose the question to a witness. Thus, the concern about “where this would lead” appears unwarranted.

In addition, the Jury Survey Respondents may share some of the concerns raised by the 6th Circuit Court of Appeals when it addressed the issue of jurors asking questions in *U.S. v. Colling*.

There are a number of dangers inherent in allowing juror questions: jurors can find themselves removed from their appropriate role as neutral fact-finders; jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all of the facts; the pace of the trial

²⁴³ John R. Stegner, *Why I Let Jurors Ask Questions in Criminal Trials*, 40 Idaho L. Rev. 541, 543 (2004). See also, Steven Penrod and Larry Heuer, *Tweaking Commonsense: Assessing Aids to Jury Decision Making*,

²⁴⁴ Valerie P. Hans and B. Michael Dann, *Recent Evaluative Research on Jury Trial Innovations*, 41 Court Review 12, 14-16 (2004).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Jury Survey Response #22, Question #7h.

²⁴⁸ Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 Ala. L. Rev. 441, 559 (1997). (“The fact that this practice is not more widely employed may be due to a basic distrust of juries on the part of judges and their fear that they will lose control of the trial process.”).

²⁴⁹ Jury Survey Response #22, Question #7h.

may be delayed; there is a certain awkwardness of lawyers wishing to object to juror-inspired questions; and there is a risk of undermining litigation strategies.²⁵⁰

The potential problems raised by the 6th Circuit and others regarding juror questions must be examined in context of what occurs when jurors don't have their questions addressed by the court. Jurors go elsewhere and seek answers through alternative means. According to Professor Nancy Marder, jurors who are not afforded the opportunity to ask questions during trial are more likely to engage in "self-help."²⁵¹ And, unlike in the past, juror self-help in the Digital Age is far easier to accomplish and more difficult to discover. By denying jurors the opportunity to ask questions, the court is basically encouraging them to rely on alternative sources to find the answers.

Disclosing Juror Information to the Opposing Party

Up to this point, the reform proposals examined target primarily juror research and to some extent juror communications to third parties as these two areas have been more negatively impacted by the Digital Age than juror privacy. The major concern surrounding juror privacy is the enhanced ability to learn information about jurors on the Internet. While some see this as an intrusion into the personal life of jurors,²⁵² others believe that attorneys, like everyone else, should be able to obtain information about jurors, especially when such information is in the public domain.²⁵³

At least for now, it appears that society is willing to accept the online prying of jurors as many believe that such activity serves the greater good of empanelling a "fair and unbiased jury."²⁵⁴ The Jury Survey Respondents almost unanimously held that attorneys should be allowed to research jurors.²⁵⁵ Proponents of researching jurors point to its tremendous upside claiming that with the information uncovered courts increase the likelihood of empanelling unbiased and honest jurors, while decreasing the likelihood of juror misconduct or at least keeping it from going undetected. This point of view, however, assumes that all disqualifying information about jurors will be brought to light, which is not always true.

²⁵⁰ U.S. v. Colling, 226 F. 3d 457, 461 (6th Cir.).

²⁵¹ Nancy S. Marder, *The Jury Process*, pg. 113. ("There are instances in which jurors have, on their own, made site visits or consulted reference books, the Internet, and lawyers who are not involved in the case.")

²⁵² Julia Kay, *Vetting Jurors Via MySpace*, NATIONAL LAW JOURNAL, August 11, 2008.

²⁵³ Carol Williams, *Jury Duty? May Want to Edit Online Profile*, LA TIMES, Sep., 29, 2008. It should be noted that some of the information uncovered about jurors is not publicly available. Peter Vieth, *Internet Juror Research is Revealing, Trained Professional Investigators Can Uncover Even More*, VIRGINIA LAWYERS WEEKLY, November 23, 2009.

²⁵⁴ One telling example of society's acceptance of researching jurors is the state of Missouri which requires attorneys in civil actions to research jurors if they later want to raise a claim of juror misconduct. *Johnson v. McCullough* No. SC 90401 March 9, 2010 Supreme Court of Missouri.

²⁵⁵ See Survey Responses to question #9. ("Do you think it is appropriate for opposing parties to conduct Internet research on jurors?").

As discussed *supra*, attorneys gather information on jurors for a variety of purposes and for use at different stages of the trial. Depending on the specific circumstances, an attorney may not find it advantageous to reveal potentially negative information about a juror and few regulations currently exist requiring her to do so. For example, pursuant to the Rules of Professional Responsibility and the duty of candor to the tribunal, some, but not all states, impose an obligation on attorneys to reveal improper conduct by a juror to the tribunal.²⁵⁶ This requirement, however, imposes an ethical rather than a legal responsibility and ends at the conclusion of trial.

Rather than rely on the Rules of Professional Responsibility and the various ways in which states apply these rules, this article suggests subjecting such information to the rules of Discovery.²⁵⁷ Currently, a few states follow this practice.²⁵⁸ Of the small number of states that permit this type of Discovery, some draw distinctions between information that is publicly and privately available.²⁵⁹ In addition, Discovery is generally limited to the defense.

The rule proposed by this article would require the disclosure to opposing counsel of any information that would result in a juror being either Challenged for Cause or disqualified from serving. Since attorneys research jurors throughout the trial, this rule would be open-ended and not limited to voir dire. This rule would also apply equally to all attorneys involved in the proceeding. Thus under this rule, the attorneys on the list serve in *Guisti* who received the inappropriate email from a juror would not have to report the email or the juror because neither one was an attorney of record in the underlying legal matter.²⁶⁰

The proposed rule might read as follows:

“Any attorney (prosecution or defense) who discovers or learns of information before, during or after a trial that would disqualify a juror from serving or serve as sufficient grounds for challenging the juror for cause shall turn over such information to the opposing party.”

²⁵⁶ See for example Rules of Professional Conduct in the state of Tennessee (“A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by Rule 1.6.”).

²⁵⁷ At least one other legal commentator has made a similar suggestion. John E. Nowak, *Trying Cases in the Media: Legal Ethics, Fair Trials and Free Press: Article Jury Trials and First Amendment Values in Cyber World*, 34 U. Rich. L. Rev. 1213, 1244 (2001). (“Statutes or court rules should be adopted at the state and federal level requiring any party to a litigation to provide the opposing party all information in the party’s possession regarding the cyber activities of potential jurors or witnesses.”).

²⁵⁸ *People v. Martin* (1975) 57 Mich. App. 84, 225 NW 2d 174 and *Commonwealth v. Von Smith* (1974) 457 Pa. 638, 326 A2d 60.

²⁵⁹ *Id.*

²⁶⁰

This rule if enacted would work to maintain society's current approval of researching jurors because it demonstrates that juror research is not done solely for the benefit of the attorney, but also to ensure a fair and unbiased jury. At present, most are unaware of the fact that attorneys research jurors; however, as the procedure becomes more well-known this will most likely change. Arguably, citizens will become less accepting of online investigations of jurors if done solely for the advantage of one attorney over the other and without any requirement to reveal such disqualifying juror information.²⁶¹

In addition, this rule helps level the playing field as some attorneys are still in the dark about researching jurors and others lack the resources to perform such research.²⁶² At least one Jury Survey Respondent acknowledged this by stating that juror research "give[s] [an] additional advantage to large firms and the government."²⁶³ One of the reasons that Jose Padilla's legal team was able to go online and discover the untruthful juror during voir dire is that they had the staff to do it, which is not always the case in criminal trials.²⁶⁴ In addition, this rule will decrease the likelihood that juror misconduct will go ignored as attorneys who become aware of it will have a legal responsibility to disclose it. Of course, one residual effect of the rule may be a decrease in the number of searches done on jurors as some attorneys may not want to be obligated to turn over what they find.

The vast majority of those participating in the Jury Survey opposed making juror information subject to Discovery. The most common argument put forward by the Jury Survey Respondents is attorney work product.²⁶⁵ This article agrees that research done on jurors by attorneys or on their behalf is attorney work product.²⁶⁶ This is one reason why the proposed rule does not require that all juror information be turned over only that which may disqualify a juror or serve as a Challenge for Cause. Attorney work product, however, should not serve as justification for an attorney to withhold information crucial to empanelling and maintaining a fair jury.²⁶⁷ Just as attorney work product would not prevent the release of exculpatory information by the prosecution.²⁶⁸

²⁶¹ Jurors, like most in society, do not relish the idea of attorneys researching their backgrounds. This displeasure would most likely increase if jurors were aware of the fact that the information uncovered was used solely for the benefit of the attorney.

²⁶² Jury expert Hans Zeisel noted this potential problem with researching jurors many decades ago when he stated "I hate things that benefit the richer side...One side obtains an advantage over the other. If this thing gets out of hand, the courts might begin to say that you have to disclose whatever you have learned to the other side." Tamar Lewin, *Business and the Law: Jury Research Ethics Argued*, NEW YORK TIMES, March 9, 1982.

²⁶³ Jury Survey Response #19, Question #9.

²⁶⁴ Ken Armstrong and Justin Mayo, *An Unequal Defense*, SEATTLE TIMES, Apr. 6, 2004.

²⁶⁵ Jury Survey Response #29, Question #9: ("It is not evidence in the case, so is not discovery. It's work product.").

²⁶⁶ *People v. Martin* (1975) 57 Mich. App. 84, 225 NW 2d 174 and *Commonwealth v. Von Smith* (1974) 457 Pa 638, 326 A2d 60.

²⁶⁷ Jeffrey Ghent, *Right of Defense in Criminal Prosecution to Disclosure of Prosecution Information Regarding Prospective Jurors*, 86 A.L.R. 3d 571 (2008).

²⁶⁸ *Brady v. Maryland* 373 U.S. 83 (1963).

Part III: Future Concerns

Penalties

If the previously mentioned reform proposals go unimplemented or prove ineffective at curbing the negative influence of the Digital Age, it is highly likely that the court may resort to more extreme measures. In fact, some have already taken steps in that direction. Thus, this final section of the article will briefly highlight the more drastic remedies available to the court. Specifically, this article will now discuss: (1) juror penalties; and (2) limiting access to jurors.

For some, the immediate answer to a juror violating court rules is to hold the juror in contempt of court. Recently, a California legislator, in response to the increased concern over mistrials attributed to the Digital Age, introduced legislation to amend the civil and criminal contempt statute in California “to allow punishment of jurors who electronically discuss confidential legal proceedings.”²⁶⁹ According to the legislator’s legislative director, “It’s really just the law catching up with technology when it comes to the sanctity of the jury room.”²⁷⁰

In addition to contempt proceedings, jurors can also be: fined, deprived of access to electronic communication devices and sequestered.²⁷¹ One thing common with all penalties is that once imposed, they make citizens less inclined to want to serve as jurors. For many in society, jury duty is a burden in which ‘citizen volunteers’ are pulled away from their job, family or friends to perform a sometimes stressful other times mundane civic duty for which they receive minimal, if any, pay.²⁷² By penalizing jurors, the court gives the average citizen one more reason to avoid jury duty. Therefore, unlike the reform proposals mentioned in Part II, penalties should be a last, not a first resort in preventing juror misconduct.²⁷³

Fines

As discussed throughout this article, jurors violate court rules for a variety of reasons. Some do it intentionally; others do it unintentionally. Some do it for personal gain; others do it so that they can better fulfill their duties as jurors. In light of this, the court, prior to imposing a fine, should examine why the juror failed to follow the court’s rules. In addition, the court should also determine whether a fine will correct or prevent similar behavior in the future. Another factor to consider is the long term consequences on the legal system—one that needs citizen participation to effectively operate. While necessary at times, juror fines for the most part address the symptoms of juror misconduct but ignore the actual disease itself.

²⁶⁹ Cheryl Miller, *California Bill Targets Web-Surfing Jurors*, THE RECORDER, Feb. 23, 2010. Assembly member Fuentes AB 2217

²⁷⁰ *Id.*

²⁷¹ Other penalties which will not be discussed included incarceration and public embarrassment.

²⁷² According to one Jury Survey Respondent, “because jurors are citizen volunteers, the least invasive approach should be used until proven ineffective.” Jury Survey Response #1, Question #8.

²⁷³ *Id.*

*Take Away Their Devices or the Luddite Solution*²⁷⁴

Another type of penalty is to deprive jurors of the tools they need to conduct research or communicate with third parties. At present, this measure appears quite popular with a number of jurisdictions.²⁷⁵ There are a variety of forms by which this measure can take. Some courts do not allow jurors to enter the courthouse with any electronic communication devices.²⁷⁶ Other courts limit this restriction just to deliberations.²⁷⁷ While the latter policy appears to make more sense than the former, both lose their effectiveness in trials that go beyond one day as jurors can simply wait until they get home to violate the court's instructions.²⁷⁸

This rule also imposes a logistics burden on the court as it now becomes responsible for ensuring that jurors can be reached by family members, friends and employers. In addition, this policy seems a bit extreme and somewhat of an over-reaction. By way of comparison, jurors aren't prevented from going to libraries or newsstands or watching television or listening to the radio. Instead they are simply told to avoid reading articles and watching or listening to programs about the trial on which they sit. Similarly, jurors should not be deprived of the Internet or Smart phones but rather instructed that neither is to be used to research the case or discuss it with third parties. Finally, like fines, this measure treats the symptoms not the disease of juror misconduct.

Sequestration

Of all the possible penalties available, this one more than any other will increase the likelihood of juror compliance. This is because the court has direct control of the juror's environment. While popular in the past and still relied upon in some jurisdictions for high profile and capital murder trials, sequestration is not widely used today.²⁷⁹ This is due to the burden it places on the courts and jurors.²⁸⁰

For the courts, it is the high costs associated with lodging jurors throughout the trial. At present, courts are struggling to pay the nominal fee given to jurors for their service.²⁸¹ Adding housing

²⁷⁴ Judge Sweeney previously made this reference in his April 29, 2010 address to the Litigation Section of the Maryland State Bar Association. The topic of his address was *The Internet, Social Media and Jury Trials: Lessons Learned from the Dixon Trial*. ("Banning all cell phones, I-Pads, and laptops for everyone called in for jury duty is unlikely to work and will be viewed as a Luddite solution with little support in the jury pool.").

²⁷⁵ Jury Survey Response #14, Question #1: ("In the CD of Illinois jurors are not allowed to bring cell phones into the courtroom") and Jury Survey Response #23, Question #6: ("We take up their cell phones at the door.").

²⁷⁶ *Id.*

²⁷⁷ Jury Survey Response #20, Question #2: ("I require them to surrender cell phones and other such devices when they retire to deliberate.").

²⁷⁸ Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW360, Oct. 23, 2009 ("Courts can also ban mobile devices from the courtroom—some already do—though there could be some backlash from jurors accustomed to being in constant communication with family and friends. And that still doesn't keep them from doing research on Google or tweeting when they get home.").

²⁷⁹ Mary Strauss, *Sequestration*, 24 Am. J. Crim. L. 63, 105-117 (1996).

²⁸⁰ Jury Survey Response #36, Question #7(h): ("Sequestration—very burdensome on jurors; very expensive for taxpayers.").

²⁸¹ Jean Dubail, *Cuyahoga County Jury Pay Cut to Save Money*, THE PLAIN DEALER, May 14, 2009.

costs might break the budget of many local counties. In addition, sequestration generally results in a longer jury selection process as many potential jurors will attempt to get excused from jury service because they can't or don't want to be away from their family for an extended amount of time. Jurors, for the most part, view sequestration negatively because they live in a controlled environment away from their residence and those whom they normally associate with.²⁸²

One twist to the old idea of sequestration is “virtual sequestration.” Here, jurors remain in their own home but consent to having their access to the Internet and certain electronic devices either monitored or blocked. While arguably less burdensome and probably less expensive than regular sequestration, this idea has yet to go beyond academic circles.²⁸³

Limiting Access to Jurors

In addition to penalties, the courts may use other possible remedies like limiting access to jurors. One definite way to accomplish this is to reduce the number of jury trials. Obviously, the courts, absent a constitutional amendment, can't eliminate criminal juries entirely.²⁸⁴ Courts, however, can work around the edges where room exists to make changes. For example, as of late, some are pushing to expand the use of juries for both criminal charges involving juveniles²⁸⁵ and certain misdemeanor sex offenses that require convicted offenders to register.²⁸⁶ These growing trends may be curtailed or rolled back by the court if the problems raised in this article go unabated.

Anonymous Jury

An even more likely scenario is limiting access to juror personal information. This is accomplished by either prohibiting individuals from researching jurors²⁸⁷ or withholding the jurors' personal identifiers during trial. The former unlike the latter is much more difficult for the court to enforce thus less likely to be used. Courts can prevent the release of juror personal information such as name, address and employer, by empanelling an anonymous jury.²⁸⁸

²⁸² Mary Strauss, *Sequestration*, 24 Am. J. Crim. L. 63, 105-117 (1996).

²⁸³ This idea was raised at the Ohio Legal Scholarship. This author is unaware of any jurisdiction that has implemented virtual sequestration.

²⁸⁴ 6th Amendment of the U.S. Const.

²⁸⁵ The Supreme Court in *McKeiver v. Pennsylvania* 403 U.S. 528 (1971) held that juveniles do not have a constitutional right to a jury in criminal cases. However, some states especially as of late have granted this right to juveniles. See for example, *In re L.M.* 186 P.3d 164 (Kan. 2008).

²⁸⁶ *Fushek v. Arizona*, 215 Ariz. 274, 276, 159 P.3d 584.

²⁸⁷ Anita Ramasastry, *Googling Potential Jurors: The Legal and Ethical Issues Arising from the Use of the Internet in Voir Dire*, FINDLAW, May 30, 2010 (“in 2006, U.S. District Judge David Coar banned Internet search-engine inquiries regarding prospective jurors in the corruption trial of former Chicago mayoral aide Robert Sorich and his codefendant Tim McCarthy due to privacy concerns.”).

²⁸⁸ “An anonymous jury, which can vary in degree of anonymity, is one in which specific identifying information about the jurors—names, addresses, employer information, or other information—[is] not disclosed to or permitted to be revealed by the accused at trial.” Babak A. Rastgoufard, *Pay Attention to that Green Curtain: Anonymity and the Courts*, 53 Case. W. L. Rev. 1009 (2003).

Depending on the concerns of the trial judge, an anonymous jury can have various levels of anonymity. At the most restrictive, only the court has access to the jurors' names. One step below that only the attorneys (excluding the defendant) are given access. At the least restrictive, only the public or press is prevented from obtaining information about jurors.

Anonymous juries, at least in the modern-era, were first used in the late 1970s for trials involving organized crime or criminal gangs in which juror safety was at risk.²⁸⁹ Since then, most jurisdictions, applying various standards, have approved the use of anonymous juries.²⁹⁰ The Supreme Court, however, has yet to directly rule on their constitutionality.²⁹¹ Over the years, anonymous juries have grown increasingly popular and are relied upon today even in situations where juror safety is not an issue.²⁹² In fact, juror privacy more so than safety appears to be the most common concern voiced when empanelling an anonymous jury.²⁹³

By withholding the personal identifiers of jurors, anonymous juries reduce, but do not eliminate the risk of contact between jurors and non-jurors.²⁹⁴ Arguably then, anonymous juries directly address two of the major concerns raised in this article, juror privacy and unauthorized third party communications with jurors.²⁹⁵ This latter fact was noted by the trial judge in the corruption trial of former Illinois Governor Rod Blagojevich. In that case, the trial judge *sua sponte* empanelled an anonymous jury stating he was concerned that publishing names and other personal information creates too much opportunity for jury members to be hounded electronically by people trying to influence their opinion.²⁹⁶ As for the ability of anonymous juries to improve juror privacy, one legal commentator has stated that “anonymity is an antidote to...intrusion.”²⁹⁷

²⁸⁹U.S. v. Barnes 604 F. 2d 121 (2d Cir. 1979) was the first modern day case in which a fully anonymous jury was used. Prior cases which were partially anonymous include: Johnson v. U.S., 270 F. 2d 721, (9th Cir. 1959; Wagner v. U.S. 264 F. 2d 524 (9th Cir. 1959); and Hamer v. U.S. 259 F. 2d 274 (9th Cir. 1958).

²⁹⁰Abraham Abramovsky and Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 St. John's J. Legal Comment, 457, 458 (1999).

²⁹¹*Id.*

²⁹²*Id.*

²⁹³Paul Meincke, *Jurors to Remain Anonymous in Blago Trial*, ABC7, May 17, 2010.

²⁹⁴For example, anonymous juries only address outside parties contacting jurors but does nothing to deal with the inverse. See for example the John Gotti trial. Juror Guilty of Taking Bribe in 1987 Gotti Trial, Chi. Trib., Nov. 7, 1992 at 11.

²⁹⁵Nancy King, *The Case for the Routine Use of Anonymous Juries in Criminal Cases*, 49 Vand. L. Rev. 123 (1996).

²⁹⁶Paul Meincke, *Jurors to Remain Anonymous in Blago Trial*, ABC7, May 17, 2010. See also, Jeff Coen, Bob Sector and Stacy St. Clair, *Judge Rules Against Media on Jury Names*, CHICAGO TRIBUNE, June 3, 2010. (“so many people these days operate on e-mail that you can communicate secretly with a juror.”).

²⁹⁷Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 U.S.F.L. Rev. 531, 549 (2010).

Anonymous juries are not without critics, however. Besides the basic concern over the lack of openness,²⁹⁸ threat to the presumption of innocence,²⁹⁹ and damage to the integrity of the judicial system,³⁰⁰ many view them as a hindrance to meaningful voir dire.³⁰¹ In the instances where even the attorneys aren't provided the names of the jurors, both the prosecution and the defense are put at a handicap in conducting voir dire and exercising peremptory challenges.³⁰² This is because the name of a juror, like the name of a witness testifying under oath, serves as the starting point for uncovering improper bias or interest.³⁰³

Those supporting anonymous juries³⁰⁴ presumably view a prospective juror's name as an "artificial and meaningless convention" like in William Shakespeare's *Romeo and Juliet*.³⁰⁵ While this may be true for a juror named "Joe Smith" it is not necessarily hold for a juror named "Harvey Bartle IV." The name of the latter juror if known to the attorney may provide her insight into the juror's economic status and educational background. This in turn may lead the attorney to ask specific follow up voir dire questions that might have otherwise gone unasked. Similarly, a juror with a Latino surname like "Rodriguez" may open up a whole new line of questioning.³⁰⁶ While some may disagree morally with striking a juror because of her ethnicity³⁰⁷ or enquiring into her economic status or educational background, this does not make it unlawful.

Finally, anonymous juries hinder juror accountability. As discussed *supra*, both attorneys and the media through online research have discovered untruthful jurors during voir dire.³⁰⁸ In the future, this will be more difficult to accomplish if the jurors are anonymous. The concern over accountability does not end with jury selection. Rather, it continues throughout the trial. Anonymity may embolden jurors to violate the court's rules because they know it will be much

²⁹⁸ For a much more in-depth critique of anonymous juries see, Babak A. Rastgoufard, *Pay Attention to that Green Curtain: Anonymity and the Courts*, 53 Case W. Res. L. Rev. 1009 (2003).

²⁹⁹ Abraham Abramovsky and Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 St. John's Legal Comment, 457, 468 (1999).

³⁰⁰ *Id* at 472.

³⁰¹ *Id* at 476.

³⁰² [McDonough Power Equip., Inc. v. Greenwood](#), 464 U.S. 548, 554 (1984).

³⁰³ Abraham Abramovsky and Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 St. John's Legal Comment, 457, 476-479 (1999).

³⁰⁴ Nancy King, *The Case for the Routine Use of Anonymous Juries in Criminal Cases*, 49 Vand. L. Rev. 123, 149-151 (1996).

³⁰⁵ *Romeo and Juliet* (II, ii, 1-2).

³⁰⁶ John Wist, *Levy Murder Suspect Wants Names of Jurors*, NBC Washington, Aug. 17, 2010.

³⁰⁷ Abraham Abramovsky and Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 St. John's J. Legal Comment, 457, FN 131 (1999).

³⁰⁸ Karen Flax, *Why the Tribune—and Other Networks—are Seeking the Names of Blagojevich Jurors*, Chicago Tribune, July, 09, 2010. ("From experience, we know that vetting of jurors by the press has uncovered important omissions by jurors that otherwise could have resulted in mistrial. It happened in the George Ryan trial. To serve those same public interests, we've asked the court to release the names.").

more difficult to monitor or check up on their activities.³⁰⁹ These juror violations may go beyond just researching or blogging about the case. For instance, one anonymous juror actually solicited a bribe from the defendant.³¹⁰

Conclusion

The jury, throughout its approximately 300-year history in America, has witnessed many changes to the legal system. Through each one, the jury has adapted and survived. Thus, it is highly likely that the jury system will once again weather the storm, especially since the problems raised by the Digital Age are for the most part new twists on old concerns. Arguably then, the jury is at a crossroads and society must decide in which direction the jury will evolve.

This article suggests taking an approach that encourages openness³¹¹ and the flow of information. Thus, rather than penalize jurors and suppress information, the court should embrace reform proposals that improve jury instructions, allow juror questions and permit discovery of juror information. It would prove more than ironic if in the Information Age, which has brought greater transparency to the legal system, the courts would deem it necessary to increase the use of anonymous juries.

³⁰⁹ Ephraim Margolin & Gerald F. Uelman, *The Anonymous Jury*, CRIMINAL JUSTICE, Fall 1994, pp. 14, 16, and 61.

³¹⁰ *Juror Guilty of Taking Bribe in 1987 Gotti Trial*, CHICAGO TRIBUNE, Nov. 7, 1992 at 11. See also, U.S. v. Gotti, 784 F. Supp. 1013 (E.D.N.Y. 1992).

³¹¹ Former Chief Justice Burger noted the importance of openness in criminal trials in *Press Enterprise Co. v. Superior Court* 478 U.S. 1 (1986) when he wrote (“Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”).

APPENDIX A

1. Do you believe that jurors accessing the Internet to research the case during trial is a problem? If it is not a problem, please state why you feel this way.
2. Do you or the court in which you sit³¹² have a policy or rule on jurors accessing the Internet while on jury duty?

If you answer “No” go to question #6

3. Can you briefly describe this policy or rule?
4. How long has the rule or policy been in place?
5. Do you think the policy or rule is effective? If not, what changes should be made?
6. To date, have you had instances of jurors improperly accessing the Internet while on jury duty? If yes, what action if any did you take as a result of the juror(s) accessing the Internet?
7. Of the following suggestions which one do you think is most effective at preventing jurors from accessing the Internet? Please state why you believe this one is most effective.
 - (a) Instruct jurors in the initial summons that they must refrain from accessing any trial information from the Internet.
 - (b) Use voir dire questions that actually address juror Internet use.
 - (c) Revise jury instructions with specific language about using the Internet. Repeat these instructions throughout the trial
 - (d) Have jurors sign declarations stating that they will not use the Internet to research case details
 - (e) Educate jurors about the importance of jurors deciding cases on the facts presented.
 - (f) Make it clear that using the Internet to access information about the case is a violation of the law.
 - (g) Allow questions by jurors

³¹² The Survey sent to Prosecutors and Federal Defenders was very similar. Slight changes were made in the language for example “which you sit” was changed to “where you practice.”

(h) Prevent jurors from accessing items like cell phones, laptops etc.

(i) Other (please describe)

8. Do you have any additional views about jurors and the Internet not covered by this survey that you would like to discuss?

9. Do you think it is appropriate for opposing parties to conduct Internet research on jurors? If yes, do you believe that such research should be turned over as part of the Discovery process?

10. Do you think it is appropriate for jurors to communicate with one another online during jury duty?

ABSTRACT:

Improper use of new technology by jurors inside and outside the courtroom has become so pervasive that commentators have coined new phrases to describe it: “Google Mistrials,” the “Twitter Effect,” and “Internet-Tainted Jurors.” Yet, despite the attention garnered, few legal scholars, to date, have examined this area in-depth. The articles addressing this topic primarily focus on the benefits of technology and how to harness it to aid in juror comprehension. This dearth of legal scholarship may be due in large part to the fact that the Digital Age is fairly new and still evolving and juror misconduct is historically an under-examined area of the law. This article attempts to fill the current void by analyzing the detrimental impact of the Digital Age on sitting jurors and how it might be lessened. While many of the issues examined in this article apply equally to civil cases, the primary focus of this article is on jurors deciding criminal cases.

The article begins, in Part I, by discussing the influence of the Digital Age on juror: (1) research; (2) communications; and (3) privacy. In Part II, the article analyzes ways in which to limit the negative impact of new technology on these three areas. While no single solution or panacea exists for these problems, this article focuses on several reform measures that could address and possibly reduce the detrimental effects of the Digital Age on jurors. The three proposed remedies are as follows: (1) improving juror instructions; (2) allowing jurors to ask questions; and (3) disclosing juror information to the opposing party. In Part III, the article examines what might occur if the aforementioned remedies are not implemented or prove ineffective. Specifically, the article suggests that the courts may increase juror penalties and limit access to jurors.

As part of the research for this article, this author conducted the first-ever survey (“Jury Survey”) on jury service in the Digital Age. The Jury Survey Questions went to federal judges, prosecutors, and public defenders. The purpose of the Jury Survey was twofold: (1) to learn how the reform proposals suggested by this article are viewed by those who work with the legal system on a daily basis; and (2) to learn about other possible reform measures. Of particular note, the Jury Survey Respondents, like this author, believe that improved and updated jury instructions are the best approach to combat online research and improper communications by jurors. In contrast, a significant number of Jury Survey Respondents doubted whether allowing jurors to ask questions would decrease the likelihood of juror research and communications to third parties. This article, however, suggests the opposite and strongly encourages permitting questions by jurors.