INEXORABLE INTERTWINEMENT: THE INTERNET AND THE AMERICAN JURY SYSTEM

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This article, as most legal scholarship, is dedicated to those important in its construction. However this piece, at this point in my life and career, gives thanks those who gave me the perspective to write such a thing. Accordingly, it is dedicated to the Hon. Carlynn Grupp (Ret.), John O. Reich., Robert E. Frush, the Hon. Gregory Hulse, James E. Van Werden, the Hon. Randy Hefner, Jon Kimple, Bryan Jennings, John Powell, the Hon. Richard Strickler (Ret.), Chad Boehlje, and to all those who showed me and told me things along the way, to help me understand the "real practice of law." Thanks.

"Static" - pertaining to or characterized by a fixed or stationary condition.[1]

The theory of our jury system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by outside influence, whether of private talk or public print. [2]

Digital communication and online research are ubiquitous, immediately responsive, and much easier and more effective than analog research and communication— all characteristics that present unprecedented temptation to jurors… to many people, such resources are a way of life rather than a tool or toy.[3]

I. INTRODUCTION

Some might dismiss these incongruous perspectives as a result of changing times, but that ignores the real issue. The Internet is a development the American jury system never contemplated and does not know how to respond to. While aspects of our jury process evolved over time,[4] the role of the individual juror was static; he or she decided questions of fact based on evidence and testimony admitted at trial.[5] That time is done. The Internet has changed, and will increasingly change, how jurors execute their duties, and it will significantly reshape the American jury system itself. This article begins that comprehensive discussion.

This article has four sections. Section I examines the roles of the American criminal and civil jury systems, including how each is predicated on, and subject to, the actions of individual jurors. Section II discusses Internet use and explains how the Internet is increasingly inseparable from the lives of current and prospective jurors. In Section III, we turn to the Internet's impact on the jury system before, during, and after juror service. Finally, Section IV brings us to potential judicial responses to the Internet's role in the American jury system: prohibit juror Internet

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1. *See* Definition of Static, DICTIONARY.COM, http://dictionary.reference.com/browse/static (last visited Apr. 8, 2015).

2. Patterson v. Colo. ex rel. Att'y Gen. of Colo., 205 U.S. 454, 462 (1907).

3. *See* Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors From the Internet During Trial*, 59 DRAKE L. REV. 621, 626–27 (2011).

4. *See Jury: Legal Aspects – Selecting Jurors*, LAW LIBRARY – AM. LAW AND LEGAL INFO., http://law.jrank.org/pages/1434/Jury-Legal-Aspects-Selecting-jurors.html (last visited Apr. 8, 2015) (discussing juror eligibility evolution in the United States).

5. *See, e.g.*, Nicole L. Waters & Paula Hannaford-Agor, *Jurors 24/7: The Impact of New Media on Jurors, Public Perceptions of the Jury System, and the American Criminal Justice System*, NAT'L CENTER FOR ST. CTS, http://www.ncsc-jurystudies.org/What-We-Do/~/media/Microsites/Files/CJS/What%20We%20Do/Jurors_%2024-7_REV011512.ashx (last visited Apr. 8, 2015) ("The traditional strength of the jury system rests on the assumption that the jury considers only evidence properly admitted at trial."); *see also* John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up*, N.Y. TIMES (Mar. 17, 2009), http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all&_r=0 ("Jurors are not supposed to seek information outside of the courtroom. They are required to reach a verdict based on only the facts the judge has decided are admissible . . . .").

use, limit Internet use biasing jurors, or embrace juror Internet use within our current system.

II. JURIES IN THE UNITED STATES[6]

A. Criminal Juries

There may be no feature more distinctive of American legal culture than the criminal trial jury. Americans have a deep and stubborn devotion to the belief that the guilt or innocence of a person accused of crime can only be judged fairly by a "jury of his peers." [7]

The American criminal jury system is a frequent topic of legal scholarship, not only because it is a defense to potential attacks in the criminal trial process,[8] but also because of its significant, some would opine even singular, importance in our criminal justice system itself.[9] The United States Constitution implements the criminal jury safeguard through a combination of provisions. First, Article 3, Section 3 guarantees that:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.[10]

Second, the Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."[11] Finally, the right to trial by jury is provided, in state proceedings, by the Due Process Clause of the Fourteenth Amendment.[12] While the Constitution provides parameters for the criminal jury system, it does not mandate uniformity,[13] thus

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6. The need for independent juries is one of the primary reasons the American colonies declared independence. *See* THE DECLARATION OF INDEPENDENCE para. 20 (1776) ("For depriving us in many cases, of the benefits of Trial by Jury . . . .").

7. CLAYTON S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 1, 1 (1998), *available at* http://famguardian.org/Subjects/Activism/JuryNullification/JuryNullEvolOfADoctrine.pdf.

8. *See, e.g.*, Nancy Jean King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 43(1999) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

9. *See, e.g.*, N. Pieter M. O'Leary, *Across the 49th Parallel: A Historical and Comparative Overview and Analysis of Some Similarities and Differences Between the United States and Canada Relative to Juries in Criminal Trials*, 27 T.M. COOLEY L. REV. 539, 548 (2010) ("[j]uries are viewed as the ultimate protection for criminal defendants.").

10. U.S. CONST. art. III, § 3, cl. 3.

11. U.S. CONST. amend. VI.

12. *See* Duncan v. Louisiana, 391 U.S. 145, 160 (1968).

13. King, *supra* note 8, at 44:

> Individual state courts and legislatures have considerable room to experiment with different jury procedures consistent with the minimum protections of the Sixth Amendment, and have sometimes expanded upon its guarantees, providing more protection than the United States Constitution requires. The thousands of juries convened each day (over ninety percent of them in state courts) are governed by hundreds of state constitutional provisions, statutes, and court rules of varying complexity and content. Congress, too, has supplied a multitude of

states have great latitude in process, including the number of deciding jurors and whether a convicting vote must be unanimous.[14]

While the importance of the criminal jury is lauded, criminal jurors are not perfect and may engage in behaviors compromising the integrity of that system, such as violating court orders. Such action is "juror misconduct,"[15] and it can cause, at least, three very different outcomes. First, if juror misconduct occurs within a proceeding resulting in conviction, a defendant may appeal that conviction and receive a new trial.[16] Second, if a juror engages in the same misconduct, but the jury acquits, the Double Jeopardy Clause of the Fifth Amendment protects the defendant from being retried for that crime.[17] Third, jurors may disregard the law to acquit a defendant accused of a crime, though the proof at trial demonstrates guilt beyond a reasonable doubt.[18] These disparate results demonstrate that criminal juror misconduct can cause systemic problems. As we will see, the likelihood of juror misconduct is increased, potentially beyond calculation, by the Internet.

B. Civil Juries

While societally vital,[19] there is little actually written about adoption and implementation of the American civil jury system.[20] It seems likely the system gar-

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> statutes and rules governing jury trials in the federal courts, also supplementing the constitutional commands of the Bill of Rights. The federal constitutional declarations of the U.S. Supreme Court, in other words, are only the common core of a much larger body of jury law in the United States which varies significantly from jurisdiction to jurisdiction.

See also Kimberly A. Mottley et al., *The Jury's Role in Administering Justice in the United States: An Overview of the American Criminal Jury*, 21 ST. LOUIS U. PUB. L. REV. 99, 101–02 (2002).

14. *See* King, *supra* note 8, at 46.

15. Juror Misconduct is defined as, "violation of a court's charge or law by a person who serves on the jury." Juror Misconduct Law & Legal Definition, USLEGAL.COM, http://definitions.uslegal.com/j/juror-misconduct/ (last visited Apr. 8, 2015).

16. *See* King, *supra* note 8, at 50.

17. *Id.*

18. This is "jury nullification." *See Jury Nullification*, CORNELL U. L. SCH. LEGAL INFO. INST., http://www.law.cornell.edu/wex/jury_nullification (last visited Apr. 8, 2015):

> Jury Nullification
>
> A jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself, or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.
>
> Jury nullification is a discretionary act, and is not a legally sanctioned function of the jury. It is considered to be inconsistent with the jury's duty to return a verdict based solely on the law and the facts of the case. The jury does not have a right to nullification, and counsel is not permitted to present the concept of jury nullification to the jury. However, jury verdicts of acquittal are unassailable even where the verdict is inconsistent with the weight of the evidence and instruction of the law.

19. Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 285 (1999) ("Americans have relied on juries of ordinary citizens to resolve their civil disputes since the beginning of the colonial period.").

20. *See* Lawrence M. Friedman, *Some Notes on the Civil Jury System in Historical Perspective*, 48 DEPAUL L. REV. 201, 201 (1998) ("It is an interesting fact that there is no full scale history of the American [civil] jury. What there is—and the literature is not large—deals mostly with criminal cases. . . . Thus, the criminal jury gets the lion's share of the attention and the civil jury sits home among the ashes."). When the American civil jury system is the subject of scholarly discourse, it is usually in the context of its rela-

nered significant support because it appeared to provide protection from bureaucratic tyranny.[21] In this capacity, as so eloquently explained by Alexis de Tocqueville, it may be even more important than American criminal jury system.[22] The civil jury was universally adopted by the first American state constitutions[23] and by the Seventh Amendment to the United States Constitution.[24] While civil jury composition,[25] and final decision-making "numbers"[26] have changed over time, its purpose remains the same—to decide civil disputes using evidence and testimony admitted at trial.[27] However, our civil jury system, like its criminal system sibling, is predicated on its jurors and vulnerable to their misconduct. Juror activities, in both systems, cause increasing concerns.[28]

Since 1999, at least ninety verdicts have been challenged based on Internet-related juror misconduct.[29] This is a small number, but the pace is alarming. More than half of those occurred between 2008 and 2010,[30] and, of those, judges granted new trials or overturned verdicts in twenty-one trials between 2009 and 2010

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tionship to the English jury system. *See generally* Justin C. Barnes, *Lessons from England's "Great Guardian of Liberty": A Comparative Study of English and American Civil Juries*, 3 U. ST. THOMAS L.J. 345, 362 (2005) ("The jury system was still being developed in England when it was imported to the United States as part of the "cargo" brought over by the first colonists.").

21. *See* Landsman, *supra* note 19, at 288; *see also* Barnes, *supra* note 20, at 362–63 ("[I]n the United States . . . juries became a bulwark against royal overreach and genuinely protected individuals' rights.").

22. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284–85 (Phillips Bradley ed., 1946):

> I am so entirely convinced that the jury is pre-eminently a political institution that I still consider it in this light when it is applied in civil causes. Laws are always unstable unless they are founded upon the manners of a nation; manners are the only durable and resisting power in a people. When the jury is reserved for criminal offences, the people only witnesses its occasional action in certain particular cases; the ordinary course of life goes on without its interference, and it is considered as an instrument, but not as the only instrument, of obtaining justice. This is true a fortiori when the jury is only applied to certain criminal causes.
>
> When, on the contrary, the influence of the jury is extended to civil causes, its application is constantly palpable; it affects all the interests of the community; everyone co-operates in its work: it thus penetrates into all the usages of life, it fashions the human mind to its peculiar forms, and is gradually associated with the idea of justice itself.

23. *See* Landsman, *supra* note 19, at 288.

24. U.S. CONST. amend. XII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

25. *See* Waters & Hannaford-Agor, *supra* note 5.

26. *See, e.g.*, Colgrove v. Battlin, 413 U.S. 149, 160 (1973) (holding that the Seventh Amendment does not require a twelve person jury); Williams v. Florida, 399 U.S. 78, 89 (1970)(referring to limitation to a twelve person jury as a "historical accident").

27. For a much more comprehensive discussion, *see* George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1616&context=fss_papers (last visited Apr. 8, 2015).

28. A 2010 Westlaw search for "juror misconduct" provided some recent historical data. It revealed 2,701 results for the years 1980-1990, 3,990 results for 1990-2000, and 8,755 results for 2000-2010. *See* Daniel William Bell, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 93 (2010).

29. *See* Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010, 3:23 PM), http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208.

30. *Id.*

alone.[31] In three-quarters of the cases where judges declined to declare mistrials, they nevertheless found Internet-related misconduct on the part of jurors.[32] This should come as no surprise in light of online use trends.[33] In fact, it should provide a clear warning of what to expect in the future. As one young, prospective juror so succinctly put it, ironically on her online blog, "EVERYBODY UNDER THIRTY IS ON THE INTERNET" (emphasis not added).[34]

III. THE BIRTH AND GROWTH OF THE INTERNET

The Internet is technically, even boringly, "an electronic communications network that connects computer networks and organizational computer facilities around the world."[35] In reality, it is far more compelling, perhaps even fascinating. It is, to borrow a slogan, "Every one of us. Everywhere. Connected."[36] While empirically inaccurate, this latter definition is insightful because, while over-stating the Internet's current availability, it may be prescient.

Many of us accept the Internet as a fixture in our lives without much thought. We do not realize how recent Internet use, much less widespread Internet use, really is. In 1999, only 40% of Americans age 16-years and older accessed the Internet.[37] Twenty years later, 74% did.[38] Moreover, 85% of Americans over age 18 have Internet access[39] and the United States currently has more than 267,000,000 Internet users.[40] Global Internet use increased 1000% from 1999 to 2013.[41] As of April 2014, there were approximately 2,955,625,560 Internet users worldwide and individual pieces of the great Internet matrix provide use perspective that is simply staggering.[42]

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31. *Id.*

32. The article also noted, "These figures do not include the many incidents that escape judicial notice." *Id.*

33. *See infra* text accompanying notes 37–43

34. *See* Eric P. Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM. J. TRIAL ADVOC. 597, 597 (2013).

35. *See Internet*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/internet (last visited Apr. 8, 2015).

36. *See* INTERNET.ORG, http://www.internet.org/ (last visited Apr. 8, 2015).

37. *See* INTERNET LIVE STATS, http://www.internetlivestats.com/internet-users/ (last visited April 8, 2015).

38. *See* Sydney Jones& Susannah Fox, *Generations Online in 2009*, PEW RES. INTERNET PROJECT (Jan. 29, 2009),http://pewresearch.org/pubs/1093/generations-online. This dramatic usage increase is not limited to America. Recent data for the U.K. shows that 35% of U.K. adults used the Internet daily in 2006. As of 2013 that number was 73%; *see* Lyndon Harris, *Has the Internet Destroyed Trial by Jury?*, CRIM. L. & JUST. WKLY (Aug. 17, 2013), http://www.criminallawandjustice.co.uk/features/Has-Internet-Destroyed-Trial-Jury.

39. *See* Michael Springer, *57 Cities Now Have Free Wi-Fi, but They're Not Thinking Big Enough*, ARTS. MIC (Oct. 9, 2013), http://www.policymic.com/articles/66891/57-cities-now-have-free-wi-fi-but-they-re-not-thinking-big-enough.

40. *See* INTERNET LIVE STATS, *supra* note 37.

41. *Id.*

42. In late 2004 Facebook had 1,000,000 users, by 2009 that had grown to 250,000,000, and, as of 2013, there were more than 1.1 billion Facebook users per month. *See* ASSOCIATED PRESS, *Number of Active Users at Facebook over the Years*, YAHOO! NEWS (May 1, 2013, 7:27 PM), http://news.yahoo.com/number-active-users-facebook-over-230449748.html. The world's population is currently estimated at 7.7 billion people. *See Current World Population*, WORLDOMETERS, http://www.worldometers.info/world-population/ (last visited Apr. 9, 2014). That means, in less than ten

While the Internet exponentially increases the availability of information, the development with the greatest direct impact on current and prospective jurors is the proliferation of devices granting almost immediate access to that information. As of 2013, over half of all Americans owned a smartphone,[43] tablets seemed ubiquitous,[44] and free Internet access was available in many population centers[45] and judicial buildings.[46] A study of prospective jurors found that 89% had Internet access through a desktop or laptop computer, 86% had such through their phones, and 75% used the Internet via PDA (some form of "personal data assistant device").[47] These developments not only increase the availability of Internet information, they foster reliance on almost instant access to such materials.[48] The end result is that jurors are increasingly tied to the Internet and, as a result, the Internet is a significant consideration for the jury system.

IV. JURORS AND THE INTERNET

The courtroom sits squarely atop the Internet highway.[49]

While it is unsaid, jurors are expected to live their juror lives within four walls. They are summoned to the courthouse. If chosen to serve as jurors, they sit in a courtroom. When the time comes to deliberate, they adjourn to the jury room. They eventually return to the courtroom to deliver their verdict. Enter the Internet, a world without walls. It will change how jurors are chosen to serve, the information they seek, use, and disseminate during service, and how they conduct themselves post-service.

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years, a non-necessity (Facebook) has gone from statistical insignificance, to use by 1 in every 7 people on the planet, every month. *Id.*

43. Dara Kerr, *Smartphone Ownership Reaches Critical Mass in the U.S.*, CNET MAGAZINE (June 5, 2013, 5:35 PM), http://www.cnet.com/news/smartphone-ownership-reaches-critical-mass-in-the-u-s/.

44. *See* Angela Moscaritolo, *Survey: 35 Percent of Americans Own a Tablet*, PC MAG (Oct. 18, 2013, 4:24 PM), http://www.pcmag.com/article2/0,2817,2425979,00.asp. This is a truly sobering statistic. If we accept the Apple iPad as the first commercially available "tablet," by June of 2013 thirty-five percent of Americans owned a device they could only buy since April of 2010.*See iPad*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/IPad (last visited Apr. 9, 2015).

45. *See* INTERNET LIVE STATS, *supra* note 37.

46. There is no central tally, but Google searches for "courthouses with internet access" and "judicial buildings with Internet access" show many so equipped facilities, at the federal, state, and municipal levels.

47. PAULA HANNAFORD-AGOR ET AL., JUROR AND JURY USE OF NEW MEDIA: A BASELINE EXPLORATION 5, *available at* http://www.sji.gov/PDF/NCSC_Harvard_005_Juror_and_Jury_Use_of_New_Media_Final.pdf. The researchers also noted, "These statistics are comparable to those of Internet access and usage in other studies of contemporary American culture." *Id.*

48. *See* Rebecca Myhr Szajna, *Surrendering Your Smartphone at the Courthouse Door: Addressing the Rise of Technology-Related Juror Misconduct*, TIMELY TECH @ THE U. OF ILL. (Dec. 2, 2013), http://illinoisjltp.com/timelytech/surrendering-your-smartphone-at-the-courthouse-door-addressing-the-rise-of-technology-related-juror-misconduct/.

49. *See* Julie Blackman & Ellen Brickman, *Let's Talk: Addressing the Challenges of Internet-Era Jurors*, THE JURY EXPERT: THE ART & SCIENCE OF LITIGATION ADVOCACY (Mar. 30, 2011), http://www.thejuryexpert.com/2011/03/lets-talk-addressing-the-challenges-of-internet-era-jurors/.

A. Attorneys Will Use the Internet to Select and Sway Jurors

American jurors are vetted through the voir dire process.[50] Voir dire is the "preliminary examination of prospective jurors to determine their qualifications and suitability to serve on a jury, in order to ensure the selection of fair and impartial jury."[51] The procedural purpose of voir dire is to secure an impartial jury, meaning a jury free from bias.[52] However, trial attorneys know that the real purpose of voir dire is to try to empanel jurors sympathetic to their respective positions, and eliminate those who are not.[53] To those ends, attorneys want as much information as possible regarding prospective jurors.[54]

Voir dire varies as trial courts have wide discretion regarding form and content.[55] Commonly, judges address topics such as prior jury service and prospective juror opinions about the legal system, and may explore issues such as religious beliefs and practices when pertinent.[56] However, there are limits. These may range from concerns for juror privacy[57] to the fact that judges may not know what topics to explore.[58] Traditional voir dire can only go so far. Information may exist shedding further light on possible juror biases, but additional research is necessary to locate it. That research is now available to attorneys via the Internet,[59] and commentators[60] and courts[61] support such investigation.

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50. *See* THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/voir+dire (last visited Apr. 9, 2015).

51. *Id.*

52. Douglas M. Bates, Jr., *Voir Dire Examination in Criminal Jury Trials: What is the Proper Scope of Inquiry?*, 70 FLA. B.J. 64, 64 (1996).

53. *See, e.g.*, Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. TIMES (Sept. 28, 2008), http://articles.latimes.com/2008/sep/29/nation/na-jury29.

54. *See Juries and Social Media*, LTT (August 15, 2013), http://www.lawtechnologytoday.org/2013/08/juries-and-social-media-free-book-excerpt-from-social-media-as-evidence/:

> In addition to researching individual jurors, parties should also consider social media research to discover trends of thought, attitudes, opinions, and the like among the jury pool in the area, particularly in a high profile case. Indeed, information obtained from social media sites may be different from that found in traditional media outlets and, most importantly, closer to the actual opinion of the potential jurors than the views expressed in traditional media. In-depth social media research includes not only user-generated content on traditional social media sites (including blogs), but also user comments on other sites such as traditional media sites.

55. Bates, *supra* note 52, at 65.

56. *Id.* at 65–66.

57. *See, e.g.*, Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. REV. DISCOURSE 28, 31 (2011) ("As concerns about juror privacy started to capture the attention of judges, academics, and the public as a whole, it became increasingly difficult to investigate jurors in certain jurisdictions.").

58. This is particularly true in the Internet age. While a Judge may now inquire as to potential Facebook use, it would never have occurred to a Judge to ask such a question even 10 years ago. *See* Hannaford-Agor, *supra* note 47, at 2.

59. Hoffmeister, *supra* note 57, at 30 ("As more and more personal information is placed online, attorneys are increasingly turning to the internet to investigate and research jurors. In certain jurisdictions, the practice has become fairly commonplace.").

60. One prominent trial consultant contends that, "Anyone who doesn't make use of [internet searches] is bordering on malpractice." *See id.* In reality, no court has yet found the failure to conduct online research on prospective jurors as attorney malpractice, but one author believes at least one high court is

While judges may be leery of, or time constrained from, querying jurors about certain information, the Internet has no such reservations. Many potential jurors have an online presence.[62] Attorneys can access public records of prospective jurors, including marital, arrest, and property ownership information, and individuals often provide information regarding organization membership, including religious and political party affiliations, via social media sites like Facebook.[63] One can readily understand why attorneys in dissolution of marriage, criminal, tort, and civil rights cases might want to know such things when reviewing potential jurors. One can also understand why courts increasingly support practitioners seeking such information[64] as it, at least theoretically, decreases the risk of biased jurors becoming or remaining part of the jury panel. The upside is that Internet research may reveal information traditional voir dire does not.[65] The downside is that this increased security will not come without potential cost. Such online research could logically be feared as invasion of privacy, and privacy is important to prospective jurors.[66] Knowledge that jury service might—or would—involve online checks, could drive an already low rate of reply to jury summons even lower.[67]

Attorneys will use the Internet to attempt to identify jurors receptive to their messages. Some will go further and use the Internet to influence sitting and prospective jurors. A recent trend in litigation is for parties to use online sources for

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hinting at such an obligation. *See* Robinson, *supra* note 34, at 636 (referencing the Missouri Supreme Court).

61. *See* Hoffmeister, *supra* note 57, at 30 n. 5 (citing Johnson v. McCullough, 306 S.W.3d 551, 558–59 (Mo. 2010) (en banc)); Carino v. Muenzen, No. L-0028-07, 2010 WL 3448071, at *7–8 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

62. Williams, *supra* note 53 (stating that about 10% of jurors had an online presence, but that number was increasing "exponentially"). The article was published in 2008. The observation was correct. By 2014, 87% of potential jurors had emails accounts and 64% had social media accounts. Hannaford-Agor, *supra* note 47, at 5.

63. For an explanation of Facebook, see *Facebook*, WHATIS.COM, http://whatis.techtarget.com/definition/Facebook (last visited April 24, 2014) [hereinafter Facebook Definition].

64. *See* Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 417 (2012) [hereinafter Google, Gadgets, and Guilt] ("Recently, online investigation of jurors has gained increased acceptance among practitioners. Moreover, courts and state bar associations have both approved of and encouraged the practice."). For discussion of rules and guidelines regarding online research of sitting and prospective jurors, see Erika L. Oliver, *Researching Jurors on the Internet: The Ills of Putting Jurors on Trial and the Need to Shift the Focus Back to the Defendant*, 34 U. LA VERNE L. REV. 251, 273–78 (2013).

65. *See* Hoffmeister, *supra* note 57, at 32:

> In certain instances, attorneys investigating jurors learn things that would rarely, if ever, come up or be discussed during voir dire. This is because the attorney or judge never thought to pose the question, the topic was too personal in nature, or the information arose after jury selection. For example, judges generally prohibit attorneys from questioning a potential juror during voir dire about her political ideology or who she voted for in the last presidential election. By going online, however, the attorney may discover which political candidates the juror donated to in the most recent election and whether the juror belongs to any particular political organizations. Thus, in a way, online research provides an alternative route or "end run" by which attorneys learn additional information about jurors.

66. "Most people dread jury duty – partly because of privacy concerns." *See* United States v. Blagojevich, 614 F.3d 287, 293 (7th Cir. 2010).

67. *See* Hoffmeister, *supra* note 57, at 36. Conversely, such inquiry could also reduce the risk of a "rogue juror" (one who seeks to serve as a juror for self-serving reasons) and reduce attorney reliance on hunches or stereotypes when exercise juror strikes. *Id.* at 35.

advocacy. While the development is recent enough to lack empirical analysis, one author identifies six instances where parties developed websites, or website content, to support their trial positions.[68] These included high profile defendants Michael Jackson and Martha Stewart.[69] Content included text and video clips designed to influence viewers and readers.[70] There are no limitations on such content, including trial admissibility, and it is available to anyone. Parties can display largely whatever they desire online, hoping prospective and sitting jurors find it.[71]And, as discussed next, many of them will.

B. Jurors Will Conduct Pre-Trial Internet Research and Form Pre-Trial Opinions

While the risk of pre-trial publicity always exists, the Internet makes it easier for prospective and selected jurors to seek out pre-trial information,[72] or accidentally encounter such materials,[73] and form pre-trial opinions.[74] That is significant be-

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68. *See* Jeffrey T. Frederick, *Did I Say That? Another Reason to do Online Checks on Potential (and Trial) Jurors*, JURY RES. SERVICES (Oct. 13, 2011, 4:10 PM), http://www.nlrg.com/blogs/jury-research/bid/69503/Did-I-Say-That-Another-Reason-to-Do-Online-Checks-on-Potential-and-Trial-Jurors.

69. *See id.*

70. *Id.*

71. This strategy will not be limited to hope; it will be highly strategic. Facial recognition software already exists. It maps points on a person's face and then compares those points with other faces, seeking a single match or a very small pool. *See, e.g.*, Kevin Bonsor & Ryan Johnson, *How Facial Recognition Systems Work*, HOWSTUFFWORKS, http://electronics.howstuffworks.com/gadgets/high-tech-gadgets/facial-recognition4.htm (last visited Apr. 9, 2015). While young, the technology is already very accurate. *See* Will Oremus, *Facebook's New Face-Recognition Software is Scary Good*, FUTURE TENSE (Mar. 18, 2014, 5:45 PM), http://www.slate.com/blogs/future_tense/2014/03/18/deepface_facebook_face_recognition_software_is_97_percent_accurate.html (discussing a 97% accuracy rate). One can only imagine how effective this could be when paired with development such as Google Glass. *See* Paul Saffo, *Google Glass Signals a Wearables Revolution*, CNN (Apr. 16, 2014, 11:39 AM), http://www.cnn.com/2014/04/16/opinion/saffo-google-glass/index.html?hpt=hp_c2. In the not-too-far-distant future attorneys will be able to look at jurors, find and identify them online, and direct them to targeted content or deliver such content to them.

72. *See, e.g.*, *Russo v. Takata Corp.*, 774 N.W.2d 441, 444 (S.D. 2009) (juror researching defendant while part of jury pool); John G. Browning, *Legally Speaking: When all that Twitters is not Told—the Dangers of the Online Juror (Part One)*, SE. TEX. REC. (May 13, 2009, 9:45 PM), http://setexasrecord.com/arguments/218993-legally-speaking-when-all-that-twitters-is-not-told-the-dangers-of-the-online-juror-part-1 (discussing uncited cases where jurors conducted online research on lawyers, judges, defendants, and victims).

73. Waters & Hannaford-Agor, *supra* note 5:

> [C]ontemporary jurors are also accustomed to receiving constant updates in the form of email and text messages, tweets, and notices from social networking sites that do not require active intent to acquire new information. They just arrive, unsolicited, on one's computer screen or smart phone with information formatted in the highly abbreviated style of headlines, sound bites, and bullet points.

74. Frederick, *supra* note 68:

> A potential juror was recently held in contempt in an Oklahoma murder trial where Jerome Ersland, a pharmacist, had shot a robber five times after the robber lay wounded and motionless on the floor. While the potential juror had said that she had not expressed an opinion on the case, the defense discovered that she had made comments critical of the pharmacist on the local television's Facebook site six months before the trial.
>
> "First hell yeah he need to do sometime!!! The young fella was already died from the gun shot wound to the head, then he came back with a different gun and shot him 5 more times. Come let's be 4real it didn't make no sense!"

cause exposure to pre-trial publicity causes, or potentially contributes to, at least two serious problems. First, pre-trial publicity can bias individual jurors, perhaps even outweighing what they learn at trial. According to one author's synopsis of available research, "pretrial publicity exerts a disproportionate imprint on juror memory compared to the evidence actually presented at trial,"[75] and "studies collectively confirm that the impact of pretrial publicity on individual juror judgments about defendant culpability carries through to the collective verdicts rendered by juries."[76] The second problem is that pre-trial publicity may significantly impact not just individual jurors, but the entire jury. This may occur when one or more jurors with pre-trial based perspectives taint the whole group,[77] or because all or part of the jury knowingly allows pre-trial information to be considered.[78]

The Internet is a primary source of information for prospective jurors and it will shape their pre-trial opinions, and resulting actions, in ways past information sources could not. This is a significant challenge to a jury system based on independent jurors rendering their decisions based only on evidence and testimony elicited in the courtroom.[79] This threat will not end when trial begins, as jurors will use the Internet during trial as well.

C. Jurors Will Conduct Internet Research During Trial and Deliberations

One would find it very difficult to not use the Internet, or perform a task or service that does not rely on the Internet each day. Against that background and with a huge amount of information just a Google search away,

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75. Waters & Hannaford-Agor, *supra* note 5, at 7.

76. *Id.*

77. There is no study that quantifies this, but the risk mirrors the traditional concern about note takers on a jury. "Probably the gravest concern is that the best note takers (or the only note taker) may dominate jury deliberations." Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 570 (1997) (citing United States v. Maclean, 578 F.2d 64, 66 (3d Cir. 1978)). The analogous concern is that the juror with the "best" information may also dominate. Courts strongly fear this risk. In 2009, a San Francisco judge dismissed 600 potential jurors after several acknowledged performing online research on the pending case. *See* ABA JUDICIAL DIVISION, A FAIR TRIAL: JURORS USE OF ELECTRONIC DEVICES AND THE INTERNET1 (2010),*available at* http://www.ncsc.org/~/media/Files/PDF/Jury/fairtrialhandbookauthcheckdam.ashx [hereinafter A FAIR TRIAL].

78. According to one study of 30 mock juries designed to test the effect of pre-trial publicity:

> Not only did pre-trial publicity ["PTP"] have powerful effect—that effect was consistent across all thirty juries. Every single one of the juries exposed to PTP discussed what they had read/heard about the trial. Rarely did a juror in any of the thirty groups halt the PTP discussion despite pre-deliberation admonitions to not discuss PTP and to halt any discussion that should arise during deliberations. Rather, they acknowledged the information came from PTP and then agreed to discuss it anyway!

Douglas Keene, *Pretrial Publicity & Jury Deliberations*, KEENE TRIAL CONSULTING (June 17, 2011), http://keenetrial.com/blog/2011/06/17/pretrial-publicity-jury-deliberations/ (citing CL Ruva & MA LeVasseur, *Behind Closed Doors: The Effect of Pretrial Publicity on Jury Deliberations*, 18 PSYCHOL., CRIME & L., 431, 431–52 (2011).

For a real example, see A FAIR TRIAL, *supra* note 77, at 3, discussing a 2007 South Dakota trial where a prospective juror performed Internet research on the defendant when learning the caption of the case. He became part of the jury and shared the search, and its results, with at least five other jurors. There were no objections by fellow jurors.

79. *See* Artigliere, *supra* note 3, at 639.

is it realistic to expect jurors not to use the Internet in relation to their cases?[80]

Jurors must execute their duties separate from outside influence or external factual information.[81] However, there is little doubt that some jurors will perform online research during trial.[82] This research has two primary purposes, terminology clarification and information acquisition. A new development will also appear: jurors will look to the purpose or intent of the law to decide how or if it should apply.

i. Legal Terminology and Instruction

> For many jurors, legal terminology is probably another language.[83] It is characterized as "wordy" and "turgid," relying on deviation from French and Latin text, and generally archaic.[84] Jurors have varied experiences, abilities, language skills, and attention spans.[85] The combination of this strange language, and a constantly diverse juror audience, can result in jury instructions that are unclear, or even incomprehensible to jurors.[86] As a result, they may feel confused by judicial instructions and terminology used at trial.[87] Jurors will then turn to the Internet, a familiar, perhaps even default, source of definitional guidance.[88] When that happens, it will not be the definitions provided by judicial instruction, or in-

80. *See* Springer, *supra* note 39.

81. *See* Friedman, *supra* note 20, at 207. Juries are expected to decide the case presented to them on the strength of the evidence adduced by the contending parties. *Id.* at 204–05. The introduction of evidence is regulated by a series of rules circumscribing the use of certain sorts of proof. *Id.* The most important evidence restrictions require that only relevant materials be presented in court and that prejudicial materials be excluded. *Id.*

82. *See, e.g.*, Jeffrey T. Frederick, *You, the Jury, and the Internet*, NAT'L LEGAL RES. GROUP, http://cdn2.hubspot.net/hub/79400/file-15647173-pdf/Jury_Reseach_Documents/you(last visited Apr. 9, 2015) [hereinafter You, the Jury, and the Internet]. In March of 2009 federal judge William Zloch received a note that a juror had conducted Internet research during trial. *Id.* His questioning revealed that eight other jurors had conducted such research, including Google searches on the parties, accessing news reports (including excluded evidence), and searching online for legal and technical definitions. *Id.* When asked about these searches, one juror responded, "Well, I was curious." *Id.*

83. *See* Cheryl Stephens, *What is Really Wrong with Legal Language?*, PLAIN LANGUAGE ASS'N INT'L, (Nov. 27, 1990), http://www.plainlanguagenetwork.org/legal/wills.html ("Linguists identify legalese as a distinctive dialect.").

84. *Id.*

85. *See* Artigliere, *supra* note 3, at 625.

86. *See* William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 732 (1981) ("Prevailing practices of instructing juries are so archaic and unrealistic that even in relatively simple cases what the jurors hear is little more than legal mumbo jumbo to them.").

87. As an example, a recent study revealed that almost one-quarter of jurors do not understand aspects of rules governing Internet use during trial. *Almost a Quarter of Jurors Confused about Rule on Internet Use During a Trial, According to New Research Published in Criminal Law Review*, REUTERS (May 14, 2013, 7:01 PM), http://www.reuters.com/article/2013/05/14/idUSnHUGd5lJ+71+ONE20130514.

88. *See, e.g.*, Mark Pearson, *When Jurors Go 'Rogue' on the Internet and Social Media*, JOURNLAW (May 30, 2013, 2:12 PM), http://journlaw.com/2013/05/30/when-jurors-go-rogue-on-the-internet-and-social-media/ (discussing trials where jurors went online to perform term definitional research in an Australian terrorism trial and a Maryland state murder trial); Robert Quigley, *Juror Uses iPhone to Look Up a Dictionary Definition in Court, Sparks Mistrial*, THE MARY SUE (Sept. 16, 2010, 10:49 AM), http://www.geekosystem.com/iphone-mistrial-definition/ (juror looking up "prudence" in a Florida Manslaughter trial); Tapanes v. State, 43 So. 3d 159, 163 (Fla. Dist. Ct. App. 2010) (new trial granted because juror used online research to define "prudent").

> terpretations discerned from evidence and testimony, that guide verdicts. It will be the "answers" provided by the Internet, and such answers will not be limited to term definition.

ii. Jurors "Doing Their Job"

[J]urors want to do the right thing, but recent experience shows that many jurors feel that doing the right thing includes doing their own research and communicating with others about the case. Some jurors even consider the limits placed by judges and lawyers on information presented in trial to be abhorrent to finding the truth.[89]

"[E]very single person who is now sitting in a courtroom has access to just about every piece of information ever published anywhere in the world."[90] We all need to stop and really think about that statement. Jurors can find almost anything online. Combine that reality with pervasive Internet use,[91] almost constant Internet access,[92] and the fact that Internet information may be a way of life,[93] and it is not surprising that jurors perform online research during trial.[94] It is also no surprise that they perform such research, even in direct violation of a court order,[95] precisely because they are trying to "do the right thing" and instructions limiting access may cause them to feel the truth is hidden,[96] adding to their frustration with the entire jury process. As one author succinctly understands:

> Information at trial is presented methodically and often slowly and even more often, feels incomplete to jurors. Generations of past jurors simply

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89. Artigliere, *supra* note 3, at 640.*See also* Grow, *supra* note 29, at 93 (reporting the following comment, posted in response to a New York Times articles asserting that "there are people who feel they can't serve justice if they don't have answers to certain questions.")

> If evidence and testimony provided to jurors in the courtroom is incomplete, I feel that any rational and responsible juror would seek additional information on their own. The object of any court proceeding is to ascertain the facts and arrive at a fair judgment using ALL facts obtainable by any means available. If I am ever called and sit on a jury, you had better believe that everything said will be recorded and photographed so I can take it home and do whatever research is required to unravel the case using due diligence. *Id.*

90. Hannaford-Agor, et al., *supra* note 47, at 1.

91. *Supra* notes 38–44.

92. *Supra* notes 44–48.

93. Artigliere, *supra* note 3, at 627, "Taking away juror's ability to communicate on social websites or research on the Internet can evoke unexpected reactions and concerns; to many people, such resources are a way of life rather than a tool or toy."

94. "Most jurors who conduct factual or legal research do so because they feel they need better or more information than was provided to them at trial." Szajna, *supra* note 48.

95. *See* Gareth Lacy, *Should Jurors Use the Internet?*, THE NAT'L L. REV. (Dec. 6, 2010), http://www.natlawreview.com/article/should-jurors-use-internet. For an instruction example from Oregon:

> 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.

96. *Id.*

> had to live with that frustration, but today's jurors do not. They can remedy the situation in mere seconds by opening a search engine and typing in a question, a few words, a name or even just the first three letters of a search term.[97]

However, even if that author's synopsis is accurate, it still does not excuse the end result; jurors using the Internet to "do" their perceived jobs obviate their responsibilities in our current system. American jurors are triers of fact.[98] They do not elicit testimony, determine admissible evidence, or decide substantive legal issues, and they are instructed accordingly.[99] However, some jurors cannot be confined to these roles.[100] Jurors have tried contacting witnesses, online, during trial.[101] They used the Internet to investigate sentencing guidelines, where such information could impact the final verdict.[102] Jurors even researched evidence that would likely be inadmissible, such as a Defendant's prior criminal convictions.[103]These actions are certainly problematic for courts, but they are relatively small threats compared to the next likely development.

Jurors will go beyond current actions to a development yet largely unseen. They will perform online research to determine intent, purpose, or even moral acceptability of applicable law. In other words, jurors will perform Internet research to determine if the law in a particular case is "right,"[104] and then proceed as they see "just."[105] This is already occurring. In a 2010 death penalty sentencing case, a

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97. Blackman & Brickman, *supra* note 49. Information at trial is presented methodically and often slowly and even more often, feels incomplete to jurors. *Id.* Generations of past jurors simply had to live with that frustration, but today's jurors do not. *Id.* They can remedy the situation in mere seconds by opening a search engine and typing in a question, a few words, a name or even just the first three letters of a search term. *Id.*

98. *Legal Terms and Definitions*, LAW.COM, http://dictionary.law.com/Default.aspx?selected=2165 (last visited Apr. 9, 2015).

99. *How Courts Work*, AM. B. ASS'N, http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct.html (last visited Apr. 9, 2015) ("The judge will advise the jury that it is the sole judge of the facts and of the credibility (believability) of witnesses. He or she will note that the jurors are to base their conclusions on the evidence as presented in the trial.").

100. *See* Google, Gadgets, and Guilt, *supra* note 64 at 419 ("There are people who feel they can't serve justice if they don't find answers to certain questions.").

101. Friedman, *supra* note 20, at 201–02.

102. Blackman & Brickman, *supra* note 49.

103. *The Effects of Pre-trial Publicity on Juror Verdicts*, ADLSI (Sep. 26, 2014), http://www.adls.org.nz/for-the-profession/news-and-opinion/2014/9/26/the-effects-of-pre-trial-publicity-on-juror-verdicts/ (discussing Attorney General v. Dallas, where a juror used the Internet to discover the Defendant had a prior rape conviction).

104. American history is clear that jurors sometimes do not apply laws they do not view as "right." Conrad, *supra* note 7, at 2 ("Early American jurors had frequently refused to enforce the acts of Parliament in order to protect the autonomy of the Colonies."). This "rebellion" is not limited to colonists. Negligence jury instructions, even in the 1970s, were reformed so that jurors could not render verdicts based on what they desired in the final outcome. *See, e.g.*, Robert Kinney & Jordana Thomadsen, *Examining Wisconsin Jury Instructions*, St. B. of Wis. (Aug. 2003), http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=76&Issue=8&ArticleID=459 (last visited April 15, 2014).

105. Perhaps that is what some really seek from our jury system. "The public, as Jerome Frank put it, 'turns to the jury for relief from . . . dehumanized justice.'" *See* Friedman, *supra* note 20, at 210. The problem with such an admirable result is that it requires jurors to do what is "right," not what is legal. And, as so aptly explained by Justice Oliver Wendell Holmes, "This is a court of law, young man, not a court of

single juror held out, resulting in a hung jury.[106] That juror later revealed he performed his own online "proportionality review," looking at the background of each prisoner currently on that state's death row.[107] The juror concluded that the defendant at issue was "not as bad as those prisoners," so he held out.[108] When such research and analysis occurs, the entire jury system is challenged, as jurors become lawmakers deciding when a law applies, or even exists.[109] This case also illustrates a related concern—the potential power of a single juror using the Internet, particularly when others do not. When not all jurors have or utilize such access, those with it can disproportionately influence proceedings.[110]

D. Jurors will Seek Internet Communication During Trial

Social media technology allows people to communicate, via the Internet, and to share information.[111] One of the primary reasons the Internet will change the American jury system is the sheer number of people using social media. It is not an exaggeration to say that social media is everywhere. Facebook[112] is just one brand of social media, but its impact is, depending on perspective, informative or alarming. In 2004, Facebook had 1 million members[113] and the world's population was approximately 6.4 billion people.[114] By mid-2013, the global population had grown to an estimated 7.7 billion,[115] while Facebook had 1.1 billion monthly users.[116] That means currently one in every seven people on the planet use Facebook—an item not essential for human life—at least monthly.

Based on such usage it makes sense that many, likely even most, jurors are social media participants.[117] They carry social media behaviors into juror activities because they are accustomed to Internet peer interaction[118] and may even require

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justice." *Quotations about Justice, Laws, & Crime*, QUOTEGARDEN.COM, http://www.quotegarden.com/justice.html (last visited Apr. 9, 2015).

106. A FAIR TRIAL, supra note 77.

107. *Id.*

108. *Id.*

109. Friedman, *supra* note 20, at 209. "Juries are not supposed to question the law itself; that is out of bounds." *Id.* However that ignores the reality of juror power: "Civil juries, then, make law, or a sort of law. But they do it quietly; and their work does not leave many visible traces." *Id.* at 211.

110. *See* Smith, *supra* note 77.

111. *Social Media Definition*, ABOUT.COM, http://jobsearch.about.com/od/networking/g/socialmedia.htm (last visited Apr. 9, 2015) [hereinafter Social Media Definition].

112. Facebook Definition, *supra* note 63.

113. *Number of Active Users at Facebook Over the Years*, YAHOO! NEWS (May 1, 2013, 7:27 PM), http://news.yahoo.com/number-active-users-facebook-over-230449748.html.

114 *2004 World Population Reference Sheet*, POPULATION REFERENCE BUREAU, http://www.prb.org/pdf04/04worlddatasheet_eng.pdf (last visited Apr. 9, 2015).

115. *Current World Population*, WORLDOMETERS, http://www.worldometers.info/world-population/ (last visited Apr. 9, 2014).

116. *Number of Active Users at Facebook Over the Years*, *supra* note 113.

117. *See* Hannaford-Agor, *supra* note 47("Eighty-seven percent . . . of prospective jurors had personal email accounts and sixty-four percent . . . had some type of social network account . . . .").

118. *See* Pearson, *supra* note 88 ("As social media becomes a part of everyday life, the courts are encountering the fact that ordinary citizens have adopted a routine use of social media which they carry into the court room.").

it.[119] Such behaviors include jurors "friending" each other on Facebook during trial[120] and posting comments about jury service.[121] Courts usually allow such activities, so long as juror commentary does not go to the trial at issue.[122]

However, some jurors publicize information not just for peer interaction, but also for peer approval or direction. This distinction is potentially significant. Jurors have repeatedly blogged and tweeted about their trial experiences during trial.[123] This may demonstrate a relatively innocuous intent to share; it may also reflect something deeply troubling about some jurors in the Internet age. At least two authors contend that contemporary jurors may lack confidence in "their collective common sense and community values and thus find it necessary to verify initial impressions about the evidence or to supplement it with external sources found online."[124] Jurors are drawn from their geographic communities, at least in part, so that they may apply that community's values.[125] It makes sense that other communities, including Internet communities such as social media groups, could influence them as well.[126] Jurors using the Internet for approval or input is highly problematic in multiple ways,[127] and at least one juror has already taken it a step further, going

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119. *See Why Smartphone-Obsessed Generation Y Can't Put Down Their Phones*, MASHABLE (Dec. 12, 2012), http://mashable.com/2012/12/12/martphone-obsessed-generation-y/. Discussing smartphone reliance:

> Two out of five said they "would feel anxious, like part of me is missing," if they couldn't use their smartphones to stay connected [to the Internet]. One in four people in Gen Y say they check their smartphones so much throughout the day they lose count.

120. *See generally* Commonwealth v. Werner, 967 N.E.2d 159 (Mass. App. Ct. 2012). In a separate matter, a Judge found out that a juror was undertaking such action and admonished him. *See* Pearson, *supra* note 88. The juror then posted, on Facebook, "F[uck] the Judge." *Id.* When the Judge asked the juror about the post, his reply was, "Hey Judge, that's just Facebook stuff." *Id.*

121. *See, e.g.*, Pamela MacLean, *Jurors Gone Wild*, CAL. LAW. (April 2011), http://www.callawyer.com/Clstory.cfm?eid=914907&wteid=914907_Jurors_Gone_Wild.

122. *See* Porsha Robinson, *Yes Jurors Have a Right to Freedom of Speech Too! . . . Well, Maybe. Juror Misconduct and Social Networks*, 11 FIRST AMEND. L. REV. 593, 609 (2013) ("Communication between jurors about subjects that do not relate to the trail is generally considered acceptable conduct; the problem arises when the juror communicates about what is happening in the trial on which the juror is currently sitting.").

123. *See* Frederick, *supra* note 68.

124. Waters & Hannaford-Agor, *supra* note 5, at 2.

125. *See id.* "Jurors are drawn from the community at large, so it is only to be expected that jurors will reflect the general social outlook and values of their communities. Indeed, one of the primary roles of the jury is to inject community values into judicial decision-making." *Id.* at 5.

126. *See* Scott Ritter, *Beyond the Verdict: Why Courts Must Protect Jurors from Public Exposure Before, During, and After High-Profile Cases*, 89 IND. L.J. 911, 934 (2014) ("In a close case, a juror might factor this expected public response into his or her decision, even subconsciously, seeking to avoid such a backlash.").

127. *See* Google, Gadgets, and Guilt, *supra* note 64, at 428–29:

> [F]ew, if any, would suggest that jurors be allowed to communicate with third parties about the trial prior to verdict. Yet, despite this uniform disapproval, this communication still happens. Of late, the method of juror-to-third-party contact receiving the greatest amount of attention is online communication.
>
> For a variety of reasons, courts want to limit juror communications to third parties until a verdict is reached. First, there is concern about maintaining the confidentiality of jury deliberations. Having jurors post information online about ongoing deliberations or other jurors would hinder the traditional method of juror decision-making.
>
> Second, juror communications to third parties undermine the notions of due process and a fair trial by providing attorneys with "inside information" into juror decision-making.

online to ask Internet "friends" how she should actually decide issues.[128] Based on the extent of Internet use, and the breadth of social media use by potential jurors, there is no reason to think that such actions will be anything but frequent in the future.

E. Juries and Jurors Post-Trial

The virtue of the jury system lies in the random summoning from the community of 12 indifferent persons . . . and in their subsequent, unencumbered return to their normal pursuits . . . the system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed . . . .[129]

While there is no research or treatise on the topic, we have seen juror quotes following verdicts.[130] While these same quotes may be repeated when the media focuses on appeal, we have not yet seen significant, ongoing input from those jurors. That will change. Jurors will go online to explain what they did and why they did it, in terms of their official responsibilities, because they are accustomed to sharing details of their lives online[131] and because court rules do not prohibit such action.[132] The more individual jurors do this, the unhappier they will be with the

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> The final concern with juror-to-non-juror communication is that the juror, by communicating with an outside party about the trial, increases the likelihood that the third party will influence the juror's views.

128. *See, e.g.*, Hon. Dennis M. Sweeney, Address to the Litig. Section of the Md. State Bar Ass'n: The Internet, Social Media, and Jury Trials: Lessons Learned from the Dixon Trial, (Apr. 29, 2010), *available at* juries.typepad.com/files/judge-sweeney.doc.

129. *See* Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 99 (1996).

130. *See, e.g.*, Alyssa Newcomb, *George Zimmerman Juror Says 'In Our Hearts, We Felt He Was Guilty'*, ABCNEWS (July 25, 2013), http://abcnews.go.com/US/george-zimmerman-juror-murder/story?id=19770659 ("You can't put the man in jail even though in our hearts we felt he was guilty," said the woman who was identified only as Juror B29 during the trial. "But we had to grab our hearts and put it aside and look at the evidence."); *Anthony Juror: 'Sick to Our Stomach' Over Verdict*, NBCNEWS.COM (July 6, 2011, 7:34 PM), http://www.nbcnews.com/id/43651613/ns/us_news-crime_and_courts/t/anthony-juror-sick-our-stomach-over-verdict/#.VL7Sd8Z3H8E("Jennifer Ford, or juror No. 3, said the jurors were 'sick to their stomach' after coming to the decision. 'I did not say she was innocent,' Ford, a 32-year-old nursing student told ABC. 'I just said there was not enough evidence. If you cannot prove what the crime was, you cannot determine what the punishment should be.'"); Andrew Branca, *Black Juror in Dunn Case: Trial About Justice, not Race*, LEGAL INSURRECTION (Feb. 20, 2014, 9:15 PM), http://legalinsurrection.com/2014/02/black-juror-in-dunn-case-trial-about-justice-not-race/.

131. While there is no breakdown of actual content shared, as of September 2013, 73 percent of American adults online used some form of social media. *See Social Networking Fact Sheet*, PEW RES. CENTER, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/ (last visited Apr. 9, 2015).

132. *See, e.g.*, *Jury Duty: A Handbook for Trial Jurors*, TRIAL COURTS OF THE STATE OF WEST VIRGINIA, http://www.courtswv.gov/public-resources/jury/juryhdbk.htm (last visited Apr. 9, 2015) (applicable to all West Virginia state courts):

> Often when a jury trial is completed, reporters and other members of the media or the attorneys and parties involved in the case wish to ask jurors about their deliberations and what factors influenced the final verdict. Jurors are under no obligation to answer any questions about a case or comment upon it in any way. A simple refusal or response of "no comment" should suffice.
>
> On the other hand, if jurors wish to speak with the media or attorneys about the trial, they are free to do so.

results.[133] America has seen verdicts resulting in direct threats to jurors, and that was when remote communication was largely limited to letters and telephone calls.[134] Jurors using the Internet to explain deliberations and verdicts will face scrutiny and attacks that are historically unprecedented and currently unimaginable.[135] Though it may be due, at least in some cases, to their own actions, many future jurors will not be able to return to the anonymity the pre-Internet jury era provided. This "juror exposure" will trigger court response. That action will be a new development as well.

In the past courts had little concern for post-trial jurors.[136] In the future courts will use the Internet to support them.[137] Courts will do so attempting to provide "openness,"[138] and to maintain trust in the jury system as verdicts are publicly (likely online) challenged.[139] Courts must proceed with caution for at least two reasons. First, a judge is in no position to explain how a jury reached its conclusion as he or she was not present for deliberations. Second, any attempt to explain what a jury did will likely focus attention on the jury itself. Discussing a verdict may lead to identification of individual jurors.[140] Even without specific identification, the entirety of the jury may be subject to threats and harassment when rendering an "unpopular" verdict.[141] It is only logical that, when a court explains or defends a ver-

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133. Jurors will probably seek to create an audience that "gets it"; one that accepts what they did and why. They will not achieve this. Many years ago a person, understanding the futility of "answering" the masses, put it in a commonsensical manner. "Former Congressman Charles Brownson, Indianapolis Republican, used to say, 'I never quarrel with a man who buys ink by the barrel.'" *See* Fred Shapiro, *Ink by the Barrel*, FREAKONOMICS, (May 12, 2011, 11:00 AM), http://freakonomics.com/2011/05/12/ink-by-the-barrel/. Imagine the challenge when the Internet renders the cost of ink moot. Even a small, dissatisfied minority, can wage an attack without many limits. If public acceptance is the goal, the juror will never win.

134. *See* Ritter, *supra* note 126, at 936 ("When police officers were acquitted in the Rodney King case, some jurors received 'taunts, threats, and disturbing phone calls.'").

135. This cannot be understated. Even now we can forecast that some jurors' true identities will be discovered. Then those identities will be investigated, identifying and exposing their real and online friends and family. Those people then become targets and the Internet makes it much easier to reach them.

136. *See* A FAIR TRIAL, *supra* note 77("For these jurors, their subsequent activities regarding jury service are not ordinarily within the scope of the trial court's concern.").

137. *See* Waters & Hannaford-Agor, *supra* note 5, at 6:

> The courts depend on the jurors as representatives of their respective communities to provide legitimacy to the justice system. As such, central to the mission of the courts is away to maintain the public's trust and confidence in trial by jury as an effective way to resolve disputes. When there is public outrage over a perceived injustice, especially in a notorious trial, the courts must work quickly and effectively to counter the public's doubt.

138. *See, e.g.*, Ritter, *supra* note 126, at 919:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

139. *See* Waters & Hannaford-Agor, *supra* note 5, at 6:

> [C]entral to the mission of the courts is a way to maintain the public's trust and confidence in trial by jury as an effective way to resolve disputes. When there is public outrage over a perceived injustice, especially in a notorious trial, the courts must work quickly and effectively to counter the public's doubt.

140. *See generally* Ritter, *supra* note 126.

141. *See id.* at 934.

dict, it draws more public attention to that verdict and those jurors. That attention generates even more public responses. Those responses constitute a warning for potential future jurors.[142] Courts will use the Internet to explain and support jury actions. While that may seem laudable, it does not mean such action will actually benefit jurors, or the jury system itself.

V. POTENTIAL JUDICIAL RESPONSES TO INTERNET USE AND JURIES

> *The crux of the dilemma for the justice system is the impending collision between the traditional view of juror impartiality and contemporary jurors' increasing reliance on new media to inform their decision making.*[143]

At least in terms of current challenges, considerations, and possibilities, there are three broad options for courts addressing juror Internet use. Courts may attempt to completely eliminate juror Internet use, limit use that prejudices jurors, or embrace use within the current jury system.

A. Attempt to Eliminate Juror Internet Use

> *"If you said to me 'What is the biggest threat to trial by jury in this country?', I would say to you: 'No question: improper use of the Internet by jurors. No question.'"*[144]

The Sixth Amendment to the United States Constitution guarantees the right to a trial by an impartial jury.[145] An impartial jury is one "capable and willing to decide the case solely on the evidence before it."[146] This will be a difficult, perhaps impossible, standard to meet in the future as it is highly unlikely jurors will limit themselves to evidence and testimony admitted at trial.[147] If courts truly want to

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142. I cannot, now, empirically substantiate this, but I suspect that (a) potential Internet identification and attacks will dissuade many people from being "available" as jurors in the future but, ironically (b) many of those selected to serve as future jurors will voluntarily engage in Internet activities that expose them to the responses many were concerned about.

143. Waters & Hannaford-Agor, *supra* note 5, at 4.

144. Harris, *supra* note 38.

145. U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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

147. *See* Google, Gadgets, and Guilt, *supra* note 64, at 417 ("Since the late 1990s, jurors, rather than relying solely on the evidence presented at trial, have increasingly turned to the Internet to obtain information about the case on which they sit."). *See also* Waters & Hannaford, *supra* note 5 (discussing the impact of Internet media).

> Second is the possibility that contemporary jurors are cognitively either less reliant on or less confident in their collective common sense and community values and thus find it necessary to verify initial impressions about the evidence or to supplement it with external sources found online.

prevent jurors from such straying, they will have to take strong action. Perhaps the strongest is sequestration.[148]

Sequestration is the physical isolation of a trial jury from the public.[149] Quite surprisingly, and not a little disturbingly, minimal scholarship exists examining the actual power to sequester.[150] There is no Constitutional right to sequestration, but either the court (*sua sponte*) or a party may move to sequester.[151] The trial court makes the actual sequestration decision,[152] and no author seriously questions whether that court has such authority, where it comes from, or what its limits might be.[153] Historically, sequestration was common and it encouraged the jury to reach agreement sometimes by locking jurors up without food, water, heat, or light.[154] Modern sequestration is viewed as an extraordinary measure[155] and attempts to shield jurors from improper influence or information.[156]

American courts combine two mechanisms to keep sequestered jurors from external information, judicial order and physical restriction. I discuss each in the context of sequestration but, even absent formal sequestration, these are mechanisms courts are likely to use to "ensure" jurors cannot use the Internet. The first, judicial order, relies on the combination of a judge's directive and the good faith of the jurors. Simply put, this assumes that if a judge orders jurors to avoid external information, jurors will do so. The second, physical access restriction, assumes that a court can enact effective physical barriers to external sources.[157] Both of these are flawed assumptions in the Internet age.

Waters & Hannaford, *supra* note 5, at 3.

148. *See* Lacy, *supra* note 95 ("The best way to keep jurors away from [Internet sources] would be to sequester them.").

149. *See* THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/sequestration (last visited Apr. 9, 2015).

150. The few authors who touch upon the subject do so with general comments on their perceptions of the current authority to sequester, not a historical examination of such power. *See, e.g.*, Strauss *supra* note 129, at 70 ("Currently, sequestration is essentially a statutory creation; each state and the federal government has set out in code provisions the rules governing the separation or sequestration of juries."). There is little recent, significant scholarship regarding sequestration, period. *See id.* at 558.

151. O'Leary, *supra* note 9, at 560.

152. This decision may have certain parameters. *See* Strauss, *supra* note 129, at 72:

> The varying approaches to sequestration taken by the states and the federal government can be divided into three basic categories: (1) sequestration during the trial and deliberation stages is solely a matter of judicial discretion in all cases; (2) sequestration, while generally a matter of judicial discretion, is mandatory in a certain limited category of cases like felonies or capital cases, or during deliberations; and (3) sequestration is a matter of judicial discretion except when there is a party motion for sequestration.

153. There are some subjective, advisory guidelines. *See, e.g.*, Kansas Judicial Branch Standards Relating to Jury Use and Management, Standard 19: Sequestration of Jurors, http://www.kscourts.org/rules/District_Rules/STANDARDS%20RELATING.pdf (last visited Apr. 9, 2015)("A jury should be sequestered only when absolutely necessary to protect the jury or ensure justice."). *See also* State v. Young, 311 S.E. 2d 118, 130 (W. Va. 1983) (The West Virginia Code lists 11 factors a court "should look at" when considering sequestration).

154. *See* People v. Webb, 581 N.E.2d 509, 511 (N.Y. 1991).

155. *See* Strauss, *supra* note 129, at 71.

156. *See* WIS. SCR 73.01–73.03, *available at* https://docs.legis.wisconsin.gov/misc/scr/73.

157. *See* Strauss, *supra* note 129, at 93 ("Sequestered jurors' television habits are carefully monitored, and they can be provided redacted newspapers and precluded from access to radio").

i. Judicial Instruction and Juror Good Faith

Courts use jury instructions to govern juror behavior[158] and can punish violators with statutory and contempt powers,[159] but there is no definitive evidence of the actual impact of judicial instruction on jurors. While at least one author argues that judicial admonition regarding external publicity may be greater than commonly thought,[160] other research concludes that such instructions are not effective in directing jurors to ignore information learned outside the courtroom.[161] As to Internet-specific admonishment, many jurors contend that they could follow judicial orders prohibiting Internet use,[162] but a growing percentage of jurors report they would not,[163] while still others, for many reasons, reveal that they may be tempted to perform online research during trial.[164] Thus, we cannot conclude that judicial instructions alone are effective. There are even greater efficacy questions when juror good faith is examined.

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158. "The first line of defense is obviously to address the issue in jury instructions." Caren Myers Morrison, *Can the Jury Trial Survive Google?*, 25 CRIM. JUST. (Winter 2011) 1, at 4, 12 *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjw11jurytrial_google.authcheckdam.pdf.

159. *See* Lacy, *supra* note 95. *See also* Blackman & Brickman, *supra* note 49:

> As of September 2010, the U.S. Judicial Conference had sent suggested jury instructions to the entire federal judiciary (absent the U.S. Supreme Court) which included admonitions against conducting any independent research using the Internet (or traditional media). Similarly, twenty states reference juror Internet use in at least some of their standard jury instructions. Thus, jurors who nonetheless conduct Internet research often do so in direct violation of judicial instructions. Jurors have been fined as a result and in some cases, judges have even contemplated charging them with contempt for their trial-related Internet activity.

160. *See* Strauss, *supra* note 129, at 85 ("Although certainly not foolproof, the effectiveness of the judge's admonition to avoid publicity may very well be underestimated.").

161. *See, e.g.*, Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U.L. REV. 631, 648 (1991):

> Judge Learned Hand called such instructions a "placebo," requiring of the jury "a mental gymnastic which is beyond, not only their powers, but anybody's else. [sic]" Similarly, psychologist Norbert Kerr stated that there has not been a single study which indicates that judicial instructions limit the effects of jury bias.

162. *See* Hannaford-Agor., *supra* note 47, at 6 ("Eighty-six percent (86%) claimed that they could refrain from all Internet usage for the duration of the trial if instructed to do so by the trial judge . . . .").

163. *See id.* (stating that fourteen percent of prospective jurors responded that they would not be able to refrain from all Internet use for the duration of trial, if so instructed by a judge.).

164. *Id.*

> Despite their common understanding about restrictions on their Internet use, a sizeable proportion of prospective jurors reported they would have liked to use the Internet to obtain information about legal terms (44%), the case (26%), the parties involved (23%), the lawyers (20%), the judge (19%), the witnesses (18%), and their fellow jurors (7%). Slightly fewer prospective jurors also admitted that they would have liked to use the Internet to email family and friends about the trial (8%), connect with another juror (5%), connect with one of the trial participants (3%), tweet about the trial (3%), blog about the trial (3%), or post information about the trial on a social networking site (2%). Similarly, sizeable numbers of the trial jurors and alternates admitted that they would have liked to use the Internet for case-related research (28%) and for ex parte communications (29%). The level of interest was approximately equal for jurors serving in civil versus criminal trials.

Id.

While it may sound coarse or abrupt, the American jury system is based on juror obedience. More specifically, "[t]he constitutional guarantee of trial by jury is premised on the fundamental belief that juries will follow the law."[165] Jurors are supposed to do exactly as they are instructed,[166] but some jurors believe the good faith execution of their duties requires activities outside the confines of the law.[167] This attitude seems particularly likely among jurors growing up with regular, even constant, Internet access. If these people use the Internet to provide information in their "regular" lives, they are likely to use it while serving as jurors. This probability makes actual Internet use critical to understanding current and future "good faith" juror behavior.

There are multiple definitions of "generations" but, for purposes of this article, three are most important as (a) they encompass most people currently eligible, at least based on age, to serve as jurors and (b) information is available regarding their Internet habits. The first generation is the Baby Boomers ("Boomers"), those born from the mid-1940s to the mid-1960s.[168] The second is Generation X, those born from the later mid-1960s to the mid-1980s.[169] Finally, there is Generation Y, also known as the Millennials, born between the mid-to-late 1980s and the 2000s.[170] The data is clear—as we proceed through these generations from oldest to youngest—that both frequency and importance of Internet use increase significantly. Some examples are highly informative: 79% of Boomers use the Internet, while 90% of Millennials do; 2% of Boomers have posted a video of themselves online, while 20% of Millennials have;[171] and 30% of Boomers use a social media networking site, while a staggering 75% of Millennials do.[172] Internet importance is not only reflected in use but also in role; almost twice as many Millennials identify the Internet as their primary news source (59%) as Boomers (30%).[173] Additionally, we cannot ignore the interrelated fact that many cellular telephones are also Internet access devices (or "smartphones"), and smartphone use increases dramatically as we move forward through these generations: 28-39% of Boomers own a smartphone; that number increases to 61% of Generation X'ers, and climbs to 72% of Millennials.[174]

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165. United States v. Scarfo, 850 F.2d 1015, 1025 (3d Cir. 1988).

166. *See* Strauss, *supra* note 129, at 87 ("The point is that the entire jury system is predicated on juror good faith.").

167. *See supra* text accompanying notes 90–104.

168. *See, e.g.*, *Meet the Generations*, CULTURE COACH INT'L http://www.culturecoach.biz/Generations/meetthegenerations.html (last visited Apr. 9, 2015).

169. *See, e.g.*, Jennifer Jochim, *Generation X Defies Definition*, OUTPOST (June 1, 1997) http://www.jour.unr.edu/outpost/specials/genx.overvw1.html.

170. *See Millenials*, MASHABLE, http://mashable.com/category/millennials/ (last visited Apr. 9, 2015).

171. *See How Digital Behavior Differs Among Millennials, Gen Xers and Boomers*, EMARKETER (Mar. 21, 2013), http://www.emarketer.com/Article/How-Digital-Behavior-Differs-Among-Millennials-Gen-Xers-Boomers/1009748 [hereinafter EMARKETER].

172. *Id.*

173. *Id.*

174. *See* EMARKETER, *supra* note 171. Those numbers probably understate the current reality as the article was published in 2012. Some may point to the data regarding "Generation Z," the generation following the Millennials, as supporting a decrease in future smartphone use because "only" 64% of that group own a smartphone." *Id.* While this is a decrease from the prior generation, it is likely somewhat deceptive as it may reflect current use, but not future use. The article explains that, "Younger consumers are

It is obvious and inevitable that jurors will be tied to, and likely even dependent on, information provided by the Internet.[175] Such reliance on the Internet to acquire information, understand concepts, define terms, and make decisions will make the Internet inseparable from many juror actions, regardless of judicial instruction. But maybe the courts do not have to rely on judicial orders and juror good faith to overcome the Internet use temptation. Perhaps there is another way.

ii. Physical Limitations on Outside Information

In past years, courts physically restricted juror exposure to the outside world while sequestered.[176] This was probably effective because there were few information sources and what existed was largely controllable. As an example, if jurors were confined to a hotel and radio, television, and newspapers were removed, jurors could only gain information from in-person contact and that was limited or monitored. Such barriers are now largely ineffectual. Jurors can gain outside information through their smartphones, tablets, and personal computers. While the simple response may be "Take those away, too,"[177] we will soon reach a point where we cannot eliminate access to all sources for at least one or both of two reasons. First, as recently noted in an opinion by United States Supreme Court Justice Kennedy, Americans are increasingly highly dependent on Internet communications, perhaps to the point where use restriction may constitute a violation of a Constitutional right.[178] Second, and much more pragmatically, true physical limitation of juror Internet access will be almost impossible. Jurors are already wearing "Google Glass," eyeglasses combining Internet access with optical necessity,[179] and industry

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more likely to have too little money to afford a smart device, compared to their slightly older peers." *Id.* In other words, Generation Z will buy smartphones just as soon as they can afford them.

175. The smartphone is an Internet access tool. It is also a device that is increasingly serving other roles and replacing other mechanisms and machines. 24% of Generation Xers, and 41% of Millennials, have a cellular telephone and no landline, and 83% of Millennials have slept with their cellular telephones next to their beds. *See* EMARKERTER, supra note 171. The result is that literally, for many, their smartphone is always very close at hand (and therefore so is the Internet). *Id.* For additional perspective regarding the utility and predominance of smartphones, look around a room full of people. Compare how many have smart phones versus the number with "antiquated" time-pieces, such as wrist watches, or how many record appointments in those devices, rather than in a paper organizer.

176. This practice decreased over time. *See* Strauss, *supra* note 129, at 71.

177. *See* Szajna, supra note 48 ("Taking away the use of smartphones, iPads, and laptops while jurors are in the courthouse makes sense and can eliminate the temptation to use technology inappropriately during proceedings.").

178. *See* City of Ontario v. Quon, 560 U.S. 746, 760 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification."). While the topic goes well beyond the scope of this article, I have no doubt that there will soon be extensive scholarly and judicial discussion about free speech and juror online communications. This will range from what jurors can post online while serving, to information they may review, to what information may be posted that might bias sitting or potential jurors. For a brief starting point, *see* Eric P. Robinson, *Web Restrictions not the Answer to Juror Online Research*, DIGITAL MEDIA L.AW PROJECT (Nov. 15, 2013), http://www.dmlp.org/blog/2013/web-restrictions-not-answer-juror-online-research.

179. *See* Paul Saffo, *Google Glass Signals a Wearables Revolution*, CNN (last updated Apr. 16, 2014, 11:39 AM) http://www.cnn.com/2014/04/16/opinion/saffo-google-glass/ (although these may be (a) fashion or technological accouterment, as opposed to actual necessities, and (b) already fashionably and technologically outdated).

leaders are exploring clothing that accesses the Internet.[180] While such "wearables" could be removed, jurors will have Internet access actually imbedded in their bodies in the very near future. In fact, similar procedures already occur.[181] Courts will soon reach the point where even physically isolated, naked jurors can access the Internet. It is unrealistic to believe that those serving as jurors will be able, or willing, to simply ignore an information source that is otherwise omnipresent. There will be no effective physical, judicial barriers to Internet access.

B. Limit Juror Internet Use that Prejudices Jurors

i. Direct Court Action

> *[I]t is the jurors, together with the judge, who carry the burden of keeping the trial process free from information untested in the crucible of trial procedure.*[182]

Unlimited Internet access threatens the jury system,[183] but, as discussed above, use elimination is impossible. So, perhaps, limiting Internet access is a potential alternative. For purposes of this discussion "limiting" means allowing some juror Internet access, but not access likely biasing jurors.

Limitation attempts will begin with jury instructions.[184] Jurors likely understand these directives,[185] but effectiveness is a different matter. While many jurors

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180. *See* Kevin Fitchard, *How You and I Could Become Nodes in the Internet of Things*, GIGAOM (June 3, 2013, 12:51 PM), http://gigaom.com/2013/06/03/how-you-and-i-could-become-nodes-in-the-internet-of-things/.

181. *See, e.g.*, Leslie Katz, *Implanted Bluetooth Biochip Gets Under Hacker's Skin*, CNET (Nov. 1, 2013, 2:20 PM), http://www.cnet.com/news/implanted-bluetooth-biochip-gets-under-hackers-skin/.

182. *See* King, *supra* note 8, at 63.

183. *See* Robbie Manhas, *Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms*, 112 MICH. L. REV. 809, 815 (2014) ("unfettered access to information would invariably expose jurors to impermissibly prejudicial or otherwise inappropriate sources.").

184. Limiting instructions may identify when jurors may use the Internet, and for what purpose(s).

> Some judges have begun to prevent jurors from accessing electronic communication devices while court is in session. The Michigan Supreme Court, for example, recently amended its rules to require that jurors "shall not . . . use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation."
>
> But open lines to the outside world also connect, inter alia, parents with their children, and employees to employers. Thus, the Michigan Supreme Court's rule permits electronic devices to "be used during breaks or recesses but . . . not . . . to obtain or disclose information."

Bell, *supra* note 28, at 86–87.

Such instructions may also explain why Internet use is limited, rather than simply implementing restriction.

> Rather than discourage jurors' sense of moral duty, the courts might strive to redirect it by educating jurors as to the powerful reasons why their duty is to avoid outside information rather than to seek it out . . . [t]hese questions would be used not to eliminate jurors, but to reinforce the seriousness of the judge's later, more complete admonition against conducting outside research.
>
> Preliminary instructions, therefore, should be used not only to admonish jurors as to what behavior is prohibited, but also to educate them as to why their access to information is limited.

claim they would follow judicial directives,[186] not all would;[187] many would still be highly tempted to go online,[188] and some may lie about actual or potential Internet use to avoid court sanctions.[189] The issue is then whether (or how) courts can buttress admonishments to actually limit Internet use creating bias. Current possibilities include limiting juror access to Internet access devices,[190] showing jurors examples of permissible and impermissible activities,[191] using voir dire to identify Internet use patterns,[192] and requiring jurors to sign a written pledge not to "improperly" use the Internet.[193] These will not be effective, for several reasons.

First, limiting juror Internet access devices will be an incomplete effort. Regardless of restriction, jurors will still have opportunities to go online,[194] and there will be too many access avenues to remove them all.[195] Second, courts cannot effectively provide jurors current examples of what to do, or not to do, when addressing constantly and rapidly evolving technology.[196] Third, voir dire queries have a fundamental problem; jurors may not answer honestly.[197] It is obvious that one of the purposes of asking jurors about Internet use is to provide information for poten-

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Id. at 94.

185. *See* Hannaford-Agor, *supra* note 47, at 6 ("[Jury] instructions appear to have had the desired effect on jurors insofar that most of them correctly understood these basic restrictions. Two-thirds of the prospective jurors, for example, reported that using the Internet to research any aspect of the case or the trial participants would violate the judge's instructions . . . .").

186. "Eighty-six percent (86%) claimed that they could refrain from all Internet usage for the duration of the trial if instructed to do so by the trial judge . . . ." *Id.*

187. 14% of prospective jurors responded that they would not be able to refrain from all Internet use for the duration of trial, even if so instructed by a judge. *Id.* This percentage may be low. At least one study shows that the Internet may be the most "needed" information source for American adults, with 46% of study respondents stating it would be "very hard or impossible to give up" the Internet. *See 5 Fascinating Graphs that Show How We Use the Internet*, TIME (Feb. 27, 2014), http://newsfeed.time.com/2014/02/27/5-fascinating-graphs-that-show-how-we-use-the-internet/photo/internetgraph6/.

188. *See* Hannaford-Agor, *supra* note 47, at 6.

189. "There is lingering concern that some jurors may be reluctant to disclose misconduct involving new media while they are under the control of the trial judge." *Id.* at 8.

190. *See* Manhas, *supra* note 183, at 815–16.

191. *See, e.g.*, David Aaronson & Sydney Patterson, *Modernizing Jury Instructions in the Age of Social Media*, 27 ABA Criminal Justice 4 (2013), *available at*http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1233&context=facsch_lawrev.

192. *See, e.g.*, Sonia Chopra, *Using the Internet and Social Media in Jury Selection*, PLAINTIFF MAGAZINE 1, 1 (2012), *available at* http://www.plaintiffmagazine.com/Feb12/Chopra_Using-the-Internet-and-social-media-in-jury-selection_Plaintiff-magazine.pdf.

193. *See* Aaronson & Patterson, *supra* note 191.

194. *See* Manhas, *supra* note 183, at 816 ("[J]urors can always use electronic devices before they arrive and can also use them after they depart, which is problematic when trials last longer than a day.") For trials lasting less than a day, limitation may still be ineffective. "Although such a [restriction] may prevent jurors from using electronic devices in the courthouse, in some jurisdictions, jurors can use them during breaks." *Id.*

195. *See supra* text accompanying notes 179–83.

196. Instagram is an excellent example. It is a social media tool allowing people to take, edit, and post photographs online. *See* Kelly Lux, *What is Instagram and Why is it So Popular?*, SYRACUSE UNIV. (Dec. 15, 2011), http://infospace.ischool.syr.edu/2011/12/15/what-is-instagram-and-why-is-it-so-popular/.It launched, meaning became publicly available, on October 6, 2010. *Id.* It was the number one application downloaded in the App Store within 24 hours of launch. *Id.* It had more than 1,000,000 downloads by December 21, 2010. *Id.* There is no doubt that some jurors were using Instagram before some judges even knew it existed.

197. *See, e.g.*, *Jury Selection: Myths and Realities About Jurors*, DECISIONQUEST, http://www.decisionquest.com/utility/showArticle/?objectID=475 (last visited Apr. 9, 2015) ("[R]esearch supports that, for a variety of reasons, jurors lie while answering questions during *voir dire*.").

tial monitoring. Effective monitoring requires that jurors answer Internet use questions truthfully and that courts have the time and knowledge to utilize necessary follow up questions, such as ascertaining online user names.[198] Neither of these requirements are close to certainties, making limitation via the combination of voir dire responses and juror Internet usage monitoring suspect at best. Finally, there is the Internet Pledge.[199]

The Internet Pledge is a judicial device making each juror promise he or she will not access the Internet in manners biasing that juror when carrying out his or her responsibilities.[200]Judge Shira A. Scheindin of New York probably implemented the first incarnation:

> I agree that during the duration of this trial, I will not use the Internet to conduct any research into any of the issues or parties involved in this trial. I will not communicate with anyone about the issues or parties in this trial, and I will not permit anyone to communicate with me. I further agree that I will report any violations of the Court's instructions immediately.[201]

The Internet Pledge is a written agreement, not part of standard jury instructions.[202] It focuses juror attention, specifically, on Internet use.[203] The Judge delivers it separate from other directives, requiring written acceptance, likely further increasing its importance in jurors' minds.[204] At first blush, the Internet Pledge seems like it should limit juror-biasing Internet use. However, closer inspection reveals two potentially crippling shortcomings. First, the Internet Pledge appears enforceable but, in many cases, it is designed to intimidate, not actually mandate behavior.[205] Second, even when presented to jurors in a "special" way, it is still just

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198. *See* You, the Jury, and the Internet, *supra* note 82 (Noting that, in a recent federal case, 11 percent of potential jurors had used social media websites and none of them had user names matching their actual full names).

199. *See, e.g.*, Anita Ramasastry, *Should Jurors Take a "No Internet" Pledge? The Merits of One Judge's Simple Proposal*, VERDICT (Sept. 27, 2011),http://verdict.justia.com/2011/09/27/should-jurors-take-a-no-internet-pledge.

200. *See, e.g.*, Bell, *supra* note 28, at 88:

> The San Diego Superior Court has recently adopted a novel policy requiring jurors to sign declarations saying that they will not use the Internet or other media to conduct research. Juror conduct in violation of the declaration is punishable by fine, probation, and possible jail time.

201. *See* Shira A. Scheindlin, *The Impact of the Digital Age on Courts, Lawyers, and the Public: Revisiting Fundamental Assumptions About Traditional Litigation*, http://moderncourts.ca/documentation/Scheindlin%20-%20Forum%202012%20Closing.pdf (last visited Apr. 9, 2015).

202. *See id.*

203. Waters & Hannaford-Agor, *supra* note 5, at 1 ("For some jurors, reliance on [Internet] technologies for everyday tasks has become so ingrained that it would require conscious effort to refrain from doing so for the duration of a trial.").

204. Ramasastry, *supra* note 199 ("Moreover, the Internet issue may get lost in the reading of long, complex jury instructions. Having a separate pledge, in contrast, would ensure that jurors focus specifically on the Internet issue, and would put them in the position not of passive listeners, but of active readers, signers, and promissors [sic].").

205. *See, e.g.*, Colin Moynihan, *Judge Considers Pledge for Jurors on Internet Use*, N.Y. TIMES (Sept. 18, 2011), http://www.nytimes.com/2011/09/19/nyregion/us-judge-considers-making-jurors-vow-not-to-use-web.html ("I can't seize their computers and their BlackBerrys," she said. "I can't lock them up. I can try to intimidate them."). There is a related concern. If compliance was the true purpose, violation would likely require punishment. That could be problematic in the larger picture:

a judicial order limiting Internet use and research is clear that many jurors will not, or may not, follow such directives.[206]

ii. Court "Outsourcing"

There is also an unexplored, but intertwined resource issue. If courts admonish jurors not to access certain Internet content or engage in specified online activities, someone must monitor to ensure judicial directives are actually followed. Who will this be? It seems unlikely, in this era of judicial budget constraints, the courts will have the people, time, technology, or money required for monitoring.[207] They could "outsource" this obligation, but would have to do so in a way that does not increase costs. Who could provide such "free" labor?[208] The surprising answer is the attorneys involved in the respective cases.[209]

Lawyers are not employees of the courts, so the courts cannot require them to "go forth and monitor," but courts can "encourage" aspects of attorney monitoring via ethical mandates. ABA Model Rule of Professional Conduct Model Rule 3.5, "Impartiality and Decorum of the Tribunal" provides, in pertinent part, that:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.[210]

Some states may also have similar ethical rules regarding jurors. As an example, New York Rule of Professional Conduct 3.5 requires, in pertinent part:

> [I]t is generally inadvisable to punish jurors who conduct outside research. Unless widely publicized, punishment is unlikely to deter future misconduct. If it were publicized, the prospect of punishment is likely to discourage people from jury service altogether. Threats may also have a negative effect on a jury's relationship with the court. Intimidated jurors might refrain from making legitimate inquiries or reporting other jurors' misbehavior.

Bell, *supra* note 28, at 94.

206. *See* Hannaford-Agor, *supra* note 47.

207. *See, e.g.*, Bill Raftery, *Iowa State of the Judiciary: Budget Cut "Undermines the Public's Confidence in the Reliability of our Justice System and Hinders the State in Achieving its Goal of a Vibrant Economy*," GAVEL TO GAVEL (Jan. 17, 2012) http://gaveltogavel.us/2012/01/17/iowa-state-of-the-judiciary-undermines-the-publics-confidence-in-the-reliability-of-our-justice-system-and-hinders-the-state-in-achieving-its-goal-of-a-vibrant-economy/.

> Yet, while we have faced budget cuts year after year, resulting in a workforce smaller than we had 24 years ago, our workload has increased dramatically. During this 24-year period, the number of cases filed with our courts, excluding simple misdemeanors and traffic violations, has increased 50%. During this same time, the Code of Iowa has increased in size by 79%. A recent report of the Legislative Service Agency of this state revealed that we have cut our full-time workforce 16.5% since 2003, while the workforce in state government as a whole has grown 1.6%.

Id.

208. "Free" here means "of no financial costs to the courts."

209. These attorneys may not provide truly free labor. They may bill their clients for such time and service.

210. MODEL RULES OF PROF'L CONDUCT R. 3.5 (2013).

> (b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.
>
> (c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.
>
> (d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.[211]

Such mandates, though historically not applied to Internet activities, could be used to monitor both attorney and juror Internet conduct. A court could issue an order prohibiting a) attorneys from having any online contact with jurors or prospective jurors and b) placing whatever restrictions on juror Internet access or communications it viewed necessary. It could then "remind" attorneys of their ethical obligations. Any attorney who then personally participated in prohibited conduct could be ethically sanctioned, and they would have the ethical duty to report both attorneys and jurors engaging in prohibited activities (who, in turn, could also be sanctioned).This is an obvious "stick" and many attorneys will initially resent it. However, they will realize (some quite quickly) the pragmatic "carrot"; lawyers need to monitor Internet use by jurors and opposing counsel to protect their client's interests. While the courts cannot specifically order attorneys to monitor Internet use, they can create a procedure with the same final result. The courts will likely find the American Bar Association an ally here as well.[212] Even if the courts did not encourage attorney monitoring, juror lists are likely available to the public and,[213]

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211. NEW YORK RULES OF PROF'L CONDUCT R. 3.5 (2013), *available at*http://nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf.

212. On April 24, 2014, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 466. The background is as follows: "There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents," the opinion says. "Lawyers need to know where the line should be draw between properly investigating jurors and improperly communicating with them. In today's Internet-saturated world, the line is increasingly blurred." *See* Dan Berexa, *ABA Formal Ethics Opinion Addresses Internet Research on Jurors and Potential Jurors*, DAN BEREXA'S TENNESSEE LAW BLOG, http://www.tennlawblog.com/dan_berexas_tennessee_law/2014/04/aba-.html (last visited Apr. 9, 2015).

The text of Formal Opinion 466 states, in pertinent part:

> Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.
>
> In the course of reviewing a juror or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

213. While this result will be state—if not jurisdiction—specific, the results are likely to be similar to the following example :In Florida, the Attorney General's opinion is that, " . . . consistent with the decision in *Kever v. Gilliam*, it is my opinion that section 322.20(9), Florida Statutes, does not operate to exempt from public disclosure jurors' names and addresses appearing on a jury list compiled by the clerk of

where statutes restrict general public access,[214] to parties and their attorneys. The end result is that monitoring will occur anyway.

C. Embrace Internet Use Within the Current Jury System

Can even the best and most explicit of instructions, coupled with the harshest of consequences and penalties for violation, stop jurors from taking advantage of the vast resources that the Internet has to offer as they try to make sense of what they are hearing in court each day? And equally important, is this an effort worth making? Or, is it time to acknowledge that the world has irrevocably changed, and that it is no longer feasible to expect jurors to quell their impulses to seek information outside the courtroom? [215]

Clichés are sometimes accurate. In this case, times have changed and courts must embrace juror Internet use out of necessity and reality.[216] Traditionally, jurors received information in "bits and pieces," evidence coming to them through the direct and cross examination of separate witnesses, sometimes over extended and interrupted periods of time.[217] There are few, if any, forums in American society where the only permissible information is so presented.[218] Current sitting and prospective jurors reflect that reality. Many are accustomed to constant, fast-paced, information access and retrieval.[219] They may "skim" for information not focusing on, much less actually digesting, entire content.[220] In short, modern American jurors may be unwilling, unable, or improperly conditioned to identify, retain, process, or analyze disparate information, much less do all of those things to generate a "traditional" verdict. That disconnect will frustrate jurors,[221] who will turn to the Internet for guidance, and feel justified doing so.[222]

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court." *See* Records, Disclosure of Juror Names, Advisory Legal Opinion - AGO 2005-61 (Fla. Att'y Gen. 2005), *available at* http://www.myfloridalegal.com/ago.nsf/Opinions/4A410DA4389543CC852570C000750D51.

214. *See, e.g.*, Steven D. Zansberg, *The Public's Right of Access to Juror Information Loses More Ground*,17 COMM. LAW. 11, 11–22 (2000).

215. *See* Blackman & Brickman, *supra* note 49.

216. *See* Google, Gadgets, and Guilt, *supra* note 64, at 422:

> [I]n the Digital Age, Internet usage has become increasingly common and popular. As a result, more people have grown accustomed to and reliant on it. In fact, "going online" to find information has become almost instinctive, something people do without giving it much thought.

217. *See* Waters & Hannaford-Agor, *supra* note 5, at 2 ("The jurors' task involves taking the individual bits of trial evidence and piecing it together into a coherent picture that can be tremendously complicated.").

218. *See id.* at 2 ("The format is exceedingly archaic and is almost never employed in other settings in which information is communicated to a lay audience.").

219. *See id.*

220. *See id.*

221. *Id.* at 3 ("The traditional style of trial procedure is more and more likely to perplex and antagonize jurors who will have greater difficulty making sense of how its organizational framework presents disparate and detailed pieces of trial evidence.").

222. *Id.*

Jurors need the Internet and their Internet use cannot be stopped. Courts will, likely grudgingly and reluctantly,[223] but inevitably, accept that reality. They must then find a compromise allowing jurors the Internet access they require, while also limiting those same jurors to their role as triers of fact. Any such conciliation requires radical change because it allows jurors to function beyond their traditional, physical, "four walls" environment. Whatever this "final" structure,[224] the courts will walk a very difficult line. They cannot allow Internet use making jurors triers of law, but they will have to permit Internet activity potentially biasing jurors. Likely, the first development will be courts allowing juror-to-juror communication, via the Internet, regarding a pending case. Currently, most jurisdictions prohibit any form of juror-to-juror communication prior to deliberations.[225]The rationale is that such communication may cause or allow jurors to prematurely make up their minds.[226] Soon practical reality will trump potential risk. Traditional restriction will prove impossible as people use the Internet as a primary information source. [227] Jurors need perspective from fellow jurors to understand and execute their responsibilities,[228] and such access is readily and increasingly available.[229]

Courts will allow Internet use; they will also "direct" it. The most immediate example will probably be juror monitoring, during both voir dire and jury service. This process will likely have four steps. First, courts will publicly announce that monitoring will occur. Second, courts will use traditional voir dire to try to ascertain juror Internet habits and online identities, then go online to verify responses.[230] Third, once jurors are selected, courts will monitor juror Internet activities,[231] attempting to ensure jurors are without (at least publicized) bias,[232] and that they do

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> As individuals increasingly rely on the Internet to access information to help navigate their environment and interpret the world, it will likely become ever more difficult to prevent them from doing so when serving as trial jurors. After all, jurors understand that jury service is a serious task that requires the greatest degree of attention and competence. It will become increasingly counterintuitive to jurors that they would violate a solemn oath by using the very tools on which they normally rely to inform their judgments in serious matters.

Waters & Hannaford-Agor, *supra* note 5, at 4.

223. This is probably a gross understatement.

224. I use the term, but it will not be "final." This article begins a discussion; nobody can truly know where the Internet will take the American judicial system.

225. *See* Google, Gadgets, and Guilt, *supra* note 64, at 426.

226. *See* Szajna, *supra* note 48, at 564–65.

227. As an analogy, in 2011, 41% of Americans got most of their national and international news from the Internet. That was up 17 percentage points from 2007. *See* THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *Internet Gains on Television as Public's Main News Source* 2 (2011), *available at* http://www.people-press.org/files/legacy-pdf/689.pdf.

228. *See* Szaina, *supra* note 48, at 565 ("Jurors are confronted with a wholly unfamiliar situation when they are called for jury duty. Not allowing them to communicate with each other can only add to their feelings of anxiety and uncertainty.").

229. *See, e.g.*, *supra* text accompanying notes 179–83.

230. As previously discussed, courts will likely rely on attorneys to perform this function and attorneys will eventually realize they need to do so to protect their clients' interests. *See supra* Part IV.B.ii.

231. *See id.*

232. Even rudimentary monitoring would likely reveal conduct like the following:

> Last month, a person using the Twitter name @JohnnyCho wrote that he was in a pool of potential jurors in Los Angeles Superior Court, and tweeted, "Guilty! He's guilty! I can tell!" In later tweets, @JohnnyCho said he was picked for the jury and that the defendant was convicted.

not engage in actions making them triers of fact. Fourth, when jurors or prospective jurors are caught, they will be publicly recognized. "Recognition" may not involve revealing specific identities, but results will be publicized to promote deterrence.[233] The reality is that the cheaters are usually ahead of the testers. That means that juror monitoring is not going to catch all inappropriate activity. But the publicized threat and use of monitoring should make jurors less likely to engage in prohibited activities as they believe they could be caught;[234] and even imperfect monitoring will catch some and likely deter others.

VI. CONCLUSION

For those waiting for a neat summary of how the American jury system can "deal with" the Internet, this section will be disappointing. The Internet is technology and technology constantly evolves. Any attempt to align the jury system and the Internet is a point-in-time endeavor. As a result, when any such undertaking is "finished," things will have already changed—perhaps significantly. We must accept that the Internet genie is out of the bottle. There is no going back. Courts can only decide how they will attempt to move forward, using a system based on confining jurors within four walls, in an informational world where those walls are rapidly falling. This article provided a comprehensive analysis of how the Internet is impacting, and will impact, the present American jury system, based on what we know and see now. It also sets the stage for the future American judicial system, one coming much quicker than most expect, where the Internet moves from its current supporting role, to a lead player.[235]

Grow, *supra* note 29. These posts were discovered by a search monitoring Twitter and reading all tweets containing the term "jury duty." *Id.*

233. Revealing identities would create a dilemma. On one hand, it might be quite effective. As one judge noted in an analogous matter, "Most of us care what people think of us…[i]f we're held up to public embarrassment, we don't like it. It does serve as a deterrent." *See* La, *Public Humiliation as a Crime Deterrent*, CIRCLE OF MOMS (July 3, 2010), http://www.circleofmoms.com/debating-mums/public-humiliation-as-a-crime-deterrent-559413. On the other, such public unmasking could quell interest in being a juror. *See* Facebook Definition, *supra* note 63, at 636 ("Some believe that this dread will become more acute and cause the national jury summons reply rate to fall even lower as jurors realize that, in addition to answering very personal questions during voir dire, they must submit to online investigations.").

234. *See* The Free Dictionary, *supra* note 50, at 35 ("Once jurors learn that their public online activities are subject to monitoring, they will be less inclined to violate court rules for fear of being caught.").

235. While this article focused on the jury system, the most immediate change will be at the appellate level. Notices and briefs will be, where they are not already, electronically submitted and disseminated for review. Judges addressing appeals without oral arguments will not need to meet in-person, and will deliberate via online video. It will occur to some that it is not necessary to even have judges and attorneys in the same room for oral arguments and that these can also occur online. These developments will be supported by argument and studies of efficiency and cost-savings, and not subject to the same Constitutional challenges that may exist at trial (such as the right to confront accusers under the Sixth Amendment) as the procedure is very different. This article begins the conversation of where the Internet will take the American judicial system, like it or not.