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Social Media, the Internet, and Trial by Jury

Thaddeus Hoffmeister and Ann Charles Watts

School of Law, University of Dayton, Dayton, Ohio 45469, USA;
email: thoffmeister1@udayton.edu, wattsa3@udayton.edu

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Abstract

This review starts with a historical overview of trial by jury and then moves to a discussion of media and communication. This is followed by an examination of the advantages and disadvantages associated with jurors and digital technology. The heart of the article is a review of six scholarly studies that attempt to explain why jurors use the Internet, as well as methods for combating such use. The article concludes with recommendations for future areas of research.

INTRODUCTION

The concept of trial by jury is neither new nor stagnant. Since its inception in ancient times, it has evolved into a bedrock of the American legal system. As an institution, the jury has survived revolutionary shifts and expansions in the way members of society obtain information and communicate with one another, from the advent of the printing press to that of broadcast radio and television (Kalven & Zeisel 1966, St. Eve et al. 2014). Today, however, that bedrock is being disrupted by a sea change unlike any it has ever seen before: the emergence of digital technology.

This review delves into the consequences of this disruption by examining the past and present legal scholarship related to jurors and the Internet. It begins with a discussion of the history and import of trial by jury, followed by a brief look at the evolution of media and communication. It moves on to examine both the positive and negative effects of digital technology on the jury system, focusing on how attorneys and jurors use these new tools, specifically the Internet and devices such as smartphones that enable contact with the outside world for the purposes of communicating via text (Powers 2017); posting, friending, and liking on social media (Hoffmeister 2012a); and conducting trial-related research (Morrison 2011). After identifying specific problem areas, such as online research by jurors, it addresses possible solutions and provides some concluding thoughts.

There is a fair amount of scholarship examining the impact of digital technology on jurors, despite the fact that the subject is little more than a decade old and rather narrow in scope. Most of the scholarly research has focused on the growing instances of juror misconduct resulting from jurors using the Internet to conduct outside research and communicate with others. Although the concept of juror misconduct has been around for centuries and has been examined previously by other legal scholars (King 1996), online misconduct is a fairly recent phenomenon. Despite that fact, related scholarship has already begun to evolve as society becomes increasingly comfortable with and reliant on the Internet. This evolution is most noticeable in the reform measures proposed by both academics and practitioners to curb Internet use by jurors.

Interestingly, unlike most legal scholarship that remains strictly under the purview of academics, the subject of trial by jury in the digital age has been tackled by a broad swath of people outside academia, including prominent attorney John Browning (2010, 2017), journalist John Schwartz (2009), and Federal District Court Judge Amy St. Eve (St. Eve et al. 2014), among others. The mix of authors from both inside and outside academia makes for a rich discussion and raises a variety of viewpoints not regularly seen in other subject areas.

THE HISTORY AND IMPORT OF TRIAL BY JURY

The common law practice of trial by jury, whereby citizens decide cases arising from the communities in which they reside, began millennia ago, but the requirement that juries be impartial did not come about until the late Middle Ages. As anathema to justice as it may sound, early courts considered a juror's familiarity with the facts of a case to be an asset at trial and even preferred to impanel those with first-hand knowledge of the events at issue (Hans & Vidmar 1986).

Several centuries after ignorance of the facts replaced awareness as the single most desirable attribute of a juror, trial by impartial jury became a fundamental part of American democracy with ratification of the US Constitution in 1787. Article III, Section 2 of the Constitution and its Sixth and Seventh Amendments all make reference to the right to trial by jury. The Sixth Amendment affords criminal defendants "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime [was] committed." Although many early American legal scholars believed that only relatives of a defendant and those with a vested interest in a case were barred from jury service (*United States v. Burr*), in 1807, Chief Justice John Marshall, presiding over

the trial of Aaron Burr for treason, broadened that category to include anyone whose bias would threaten the jury's "fairness and impartiality."

The Constitution's Seventh Amendment governs the right to trial by jury in civil cases, and although impartiality is not mentioned explicitly therein, courts have treated it as an implicit guarantee. As recently as 2016, the US Supreme Court addressed the issue in *Dietz v. Bouldin*, ruling that a civil jury may be recalled after dismissal as long as its impartiality has not been compromised. On behalf of the court, Justice Sonia Sotomayor wrote, "Immediately after discharge, a juror could text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter. Prejudice can come through a whisper or a byte" (*Dietz v. Bouldin*).

At least one commentator has noted that, in some ways, use of the Internet by juries to discover information about a case is simply a return to the historic role of jurors as active, self-informing participants in the process, rather than passive fact finders (Morrison 2011). Perhaps the concept of trial by jury finally has come full circle.

Evolution of Media and Communication

In less than three decades, the Internet's ubiquity has turned public concepts of community, media, and communication on their heads. Although historically people's lives once revolved around the individuals and institutions in relative geographic proximity to them, emergence of the World Wide Web has meant that members of a community need not even live in the same global hemisphere.

Furthermore, the growth of virtual networks has made it difficult for mainstream local and national media outlets (once trusted purveyors of news and information) to maintain credibility with the public at large. As the definition of community has shifted from being locality based to being more affinity based, community members have begun to gravitate toward media reflecting their own worldviews. No longer does the public at large have to depend on common sources of information designed for a moderate audience; instead, "social media and its invisible algorithms" have allowed individuals to consume "only what [they] want to hear" (Bricker 2017, p. 19). Today, some like-minded people purportedly trust one another more than professional outsiders (journalists) to deliver news and information of import to them. "Gone are the days of a fact-driven, source-verified news story" (Brown 2013, pp. 817–18). Peer-to-peer networks dominate the media landscape and wield responsibility for screening and disseminating content for public consumption.

To complicate matters further, although traditional media outlets have been, by and large, passive in nature, in the sense that they facilitate unidirectional reporting, social media and the Internet have allowed content consumers to actively engage authors and commentators in real time, blurring the line between media and communication. As more and more American adults turn to social media for their news—liking, retweeting, and sharing the content they find interesting—it becomes more and more difficult to determine where media consumption ends and communication begins.

The outcome of the 2016 presidential election and the role social media played in shaping the national political debate have been seen as emblematic of this shift from real, place-based communities to virtual, identity-based ones (Bricker 2017). Segments of society, having effectively insulated themselves from values and viewpoints different from their own, may have become so entrenched in their own worldviews that relating to the lives of others has become next to impossible. When it comes to juries, this means, in short, that prospective jurors from the very same city may no longer be assumed to possess a common sense of belonging and may, as a result,

bring to court with them deep-seated intolerances for ideas outside their individually tailored frames of reference.

Both legal scholars and practitioners agree that the social order has evolved considerably since the advent of trial by jury and have pointed to the fact that, although the institution has survived such innovations as the printing press, the telephone, and the emergence of broadcast media, "[t]he Internet is a development [that] the American jury system never contemplated" and to which it "does not know how to respond" (Reich 2015, p. 390; Cato 2010).

BENEFITS OF TRIAL BY JURY IN THE DIGITAL AGE

Most legal scholarship surrounding jurors and digital technology focuses on the negative results of such, i.e., juror misconduct. Although not as frequently discussed, there has been some scholarship on the positive effects of digital technology on jurors. For example, a few commentators have noted that the Internet has improved the way courts communicate and interact with members of the public, especially with respect to summoning them to jury duty (Burnett 2005) and educating them on the justice system, in general, and the roles and responsibilities of jurors, in particular (Marder 2014).

Furthermore, digital technology has revolutionized the way juror research is conducted, during voir dire and beyond. Attorneys conducting research online can find a great deal more information about jurors and prospective jurors than they ever could in the predigital age (Dubin 2017). Pre-Internet, information on juror biases was derived primarily from questioning the prospective jurors themselves, but a few attorneys also undertook independent investigations by whatever means they had at their disposal, including private investigators and, on the prosecution side, data from government agencies, such as the Federal Bureau of Investigation and Internal Revenue Service (Robinson 2013).

Today, however, information that once would have required great effort and expense to acquire is available online at next to no cost with a quick and easy search. A few minutes online can offer insights into everything from a juror's political persuasion, religion, and hobbies to her criminal background and the value of her home. These online investigations provide a threefold benefit to the legal system (Hoffmeister 2011). First, they decrease the likelihood that attorneys will exercise peremptory challenges based on a hunch or, worse yet, a physical characteristic trait of the juror (Hoffmeister 2011). Rather than exercising peremptories based on the race or gender of the juror, attorneys are more likely to act on information they discover online.

Second, online investigations allow attorneys to verify juror responses during voir dire (Hoffmeister 2011). Historically, attorneys simply had to accept the responses provided by jurors. Today, however, attorneys can go online and verify those answers, which goes a long way in preventing rogue jurors from being impaneled. Third, investigations decrease the likelihood of juror misconduct. As jurors realize that their activities are subject to monitoring, they are less likely to violate the court's rules (Hoffmeister 2011).

CHALLENGES OF TRIAL BY JURY IN THE DIGITAL AGE

For every pro, there is a con, and although the evolution of digital technology has contributed certain efficiencies to the practice of trial by jury, it has also spawned several unique challenges, including how far attorneys may go to investigate jurors online, what information may be disseminated online by attorneys and court personnel, what constitutes impartiality on the part of a juror, and how courts should go about identifying and remedying juror misconduct.

Legal Ethics: Collecting and Disseminating Sensitive Information

There is no denying that competent client representation in the digital age includes attorneys making full use of the Internet to investigate jurors, but what right, if any, do jurors have to privacy (Titus 2015)? Although social media profiles and other highly personal information may be publicly available, some question whether the information found by attorneys should be subject to discovery by the other side or shared with the court, and if so, how much? Other questions arise about whether jurors should have any say over what is and is not shared.

Courts have not reached a consensus on these issues. Although they draw the line at using information about jurors for the purpose of intimidating them, they have yet to agree on what does and does not amount to jury intimidation. A few judges prohibit online searches altogether; however, the majority view them as routine (Robinson 2013). Judges outlawing the practice typically cite juror privacy (Hoffmeister 2012b). Judges permitting the practice generally view it as a natural evolution of litigation (Hoffmeister 2012b).

As for the dissemination of trial-related information online by attorneys and judges, ethical concerns abound owing to the interactive nature of the Internet and social media. Attorneys have faced criticism, and even sanctions, for creating websites to support their clients' positions, posting social media updates on platforms such as Facebook and Twitter regarding the status of their cases, and advising clients to alter their social media accounts (Jacobowitz & Singer 2014, Vance 2015). Although the American Bar Association has yet to develop bright-line standards for what is and is not allowed, local bar associations have (Jacobowitz & Singer 2014); e.g., third-party contact between a juror and attorney that occurs because Twitter or LinkedIn notifies the juror that an attorney has viewed the juror's site constitutes an ethical violation based on ex parte contact (N.Y.C. Bar Assoc. 2012).

Since as early as 2011, a vast majority of attorneys have reported using smartphones and other Internet-enabled devices in the courtroom, and although some courts have sought to limit such use, most have embraced the change, seeing it as a natural evolution of litigation in the digital age (Am. Bar Assoc. 2011). It is safe to say that the Internet has become a vital part of trial by jury, though the ethical implications of wielding its power inside and outside the courtroom have yet to be fully fleshed out and addressed.

Juror Impartiality

Courts have long agreed that finding truly impartial jurors is no easy task, but neither is determining where on the partiality continuum a juror may fall and still be impaneled. Speaking to the importance of juror impartiality during the trial of Aaron Burr in the early nineteenth century, Chief Justice Marshall wrote, "a tribunal. . .may be expected to be uninfluenced by an undue bias of the mind" (*United States v. Burr*). This assertion—made decades before the invention of the lightbulb, telegraphs, telephones, and automobiles—was more than reasonable at the time, but the digital age is upon us. Instant access to information and ceaseless connectivity to the outside world make Marshall's vision harder than ever to achieve.

A jury's role is to consider only the facts presented at trial, but modern citizens are accustomed to seeking information online throughout the day and satisfying their curiosities instantaneously (Hoffmeister 2012a). A juror is not allowed to discuss the trial with anyone until after the verdict, but modern citizens share everything on social media—from their breakfast menus to their medical diagnoses—and exchange texts with friends and family at all hours, describing the minutiae of life (Hoffmeister 2012b). Jurors must refrain from communicating with one another about the trial until all arguments have been made and they have been sent to deliberate, but modern citizens make sense of the world by publishing their thoughts and feelings in real time and receiving immediate

feedback from others (Hoffmeister 2012b). Owing to these blatant incongruities between modern life and the classic role of jurors, it should come as no surprise that misconduct, both voluntary and involuntary, has been on the rise (Hoffmeister 2012a).

Juror Misconduct

Jurors accessing the Internet to discuss or research the case before them is misconduct and problematic for several reasons. First, by blogging, posting, tweeting, or otherwise communicating online about the case, jurors increase the possibility that someone will reach out to them. It is this response from a third party, in whatever form, that most worries the court because it may influence the juror's decision making. Furthermore, if the juror discusses the case online, she increases the likelihood that someone affiliated with the case, such as an attorney, will learn her views prior to the verdict. As for conducting research, jurors use the Internet to find information about the judge, parties, witnesses, attorneys, and evidence (Hoffmeister 2012a). The jurors then rely upon this information, which has not been vetted by the court, during deliberations and in reaching a verdict (Hoffmeister 2012a).

Surveys (and the Limits of Their Insights)

One challenge with examining Internet use by jurors is determining the depth of the problem. Although anecdotal reports highlighting jurors using the Internet have been popping up around the country for years, no one can say with any degree of certainty whether jurors rarely or routinely access the Internet in the course of their service (Grow 2010).

This lack of concrete data is attributable to several factors. First, jurors deliberate in secrecy, which makes it difficult to determine what actually occurs in the jury room. If jurors do access the Internet to discuss or research the case, that fact is much more likely to surface in the jury room than any other place. Second, juror misconduct, regardless of whether it involves the Internet, can be a criminal offense. Thus, many jurors are hesitant to report such conduct by themselves or others for fear of the consequences.

Finally, there have not been any in-depth empirical studies on the subject, like those conducted in the 1960s by Kalven & Zeisel (1966), who reviewed 3,576 trial questionnaires by 55 judges throughout the United States. Of the six prominent studies conducted in the past decade, most, if not all, lack the type of rigor necessary to gauge the level of Internet-related juror misconduct. Yet, they are nonetheless valuable and worthy of review.

Conference of Court Public Information Officers. The first study of the effects of new media on trial by jury was conducted in 2010 by the Conference of Court Public Information Officers (CCPIO), in partnership with The National Center for State Courts and the E.W. Scripps School of Journalism at Ohio University (CCPIO 2011). It polled respondents on their uses of new media, which it divided into seven categories: social media (e.g., Facebook); microblogging (e.g., Twitter); smartphones, tablets, and notebooks (e.g., iPhone); monitoring and metrics (e.g., Addictomatic); news categorizing, sharing, and syndication (e.g., Reddit); visual media sharing (e.g., YouTube); and wikis (e.g., Wikipedia).

After distributing approximately 16,000 electronic questionnaires nationwide to individuals involved in courtroom communities, CCPIO received 810 complete and 789 incomplete surveys. The surveys focused on various forms of new media technology and their impact on (*a*) court proceedings, (*b*) ethics and conduct for judges and court employees, and (*c*) the courts' ability to promote understanding and public trust and confidence in the judicial branch.

The CCPIO report recognized the growing temptation for jurors to use these technologies as "an especially troubling dilemma for courts." In fact, general respondents (7.2%) and judicial officers (9.8%) reported observing jurors using social media profile sites, microblogging sites, smartphones, tablets, or notebooks in the courtroom. The CCPIO report also emphasized a need for judges to be extremely cautious with social media and indicated that, if properly managed, courts could experiment with social media sites of their own to communicate directly with the public. Unfortunately, this study focused exclusively on judges and court employees and did not survey jurors directly.

New Hampshire Superior Court. In 2012, a survey was conducted in the New Hampshire Superior Court that, like the CCPIO survey, queried only judges about Internet use by jurors (Shilo 2014). The survey collected information in the following areas: (*a*) judges' experience with juror Internet misconduct, (*b*) tools currently in place to prevent misconduct, and (*c*) views on a proposed sample instruction related to use of the Internet by jurors. Of the judges surveyed, 10 responded; thus, the sample poll was too small to be conclusive. The results are nonetheless helpful, especially in comparison to similar studies.

In the New Hampshire study, the juror misconduct was discovered by the judges only after other jurors brought it forward, and it was limited to one or two trials. The breakdown of misconduct was as follows: research (100%), communication (60%), and accessing media reports (40%). Additionally, of the judges who reported the misconduct, all believed that the conduct was willful, not accidental, e.g., misunderstanding the jury instructions. As for the sample jury instruction included in the survey, 80% of the judges surveyed believe that it would be helpful in preventing jurors from properly accessing the Internet.

Hoffmeister. One early survey to address the online activity of jurors was conducted in 2012 by Professor Thaddeus Hoffmeister, coauthor of this review. Hoffmeister (2012a) sent questionnaires to federal judges, federal prosecutors, and defense attorneys across the country (*a*) to determine the negative effects of the Internet on jury service and (*b*) to gather feedback from legal professionals about potential reforms.

Although the survey focused primarily on the issue of research by jurors, it also touched on juror communications with parties inside and outside the courtroom. Hoffmeister distributed the survey to several different federal district courts and received 41 responses from judges, federal prosecutors, and public defenders. Approximately 10% of respondents reported personal knowledge of online research by one or more jurors, a potentially significant number considering the inherent challenges of detecting such misconduct. Respondents also acknowledged the need for reforms in light of the new digital landscape, but not all agreed on what those should be.

Although this survey, in some respects, was an improvement on other surveys because it focused primarily on the Internet activities of jurors, it too was lacking: No jurors took part in the survey. Also, in comparison to the CCPIO study, which did not look at federal courts, this study focused exclusively on the federal court system. Finally, whereas the CCPIO study was expansive and had 810 completed online surveys, the Hoffmeister study was paper driven and had a very low response rate of 41 questionnaires returned, which is probably too small of a sample size to be representative.

St. Eve/Burns/Zuckerman. Another survey, launched in 2011 as an informal jury poll, was originally published in 2012 by Judge Amy St. Eve and attorney Michael Zuckerman (St. Eve & Zuckerman 2012). It was then updated in 2014 by St. Eve, Zuckerman, and Judge Charles Burns (St. Eve et al. 2014). Judge St. Eve, who sits in the US District Court for the Northern District

of Illinois, surveyed jurors who sat on both civil and criminal trials, whereas Judge Burns, who sits in the Circuit Court of Cook County, surveyed only jurors in criminal cases. The anonymous questionnaires, given to jurors at the conclusion of their service, asked whether they had been "tempted" to communicate about the case through any social media networks, rather than whether they had, in fact, done so. If they answered "yes," they were asked what prevented them from doing so.

As demonstrated by the questions posed, the focus of this survey was to learn what techniques best prevented jurors from using the Internet rather than who actually used the Internet. In total, the judges received responses from 583 jurors, 140 in the first round and 443 in the second. Of the 583 jurors, 520, or 89.19%, were not "tempted" to use the Internet; 47 jurors, or 8.06%, said they were tempted. When the 47 jurors were asked what prevented them from using the Internet, a large number—41 jurors—referenced the court's social media instruction.

Although the authors acknowledge that the results of their survey "are not scientific, nor are they intended to be," their work still has value, e.g., showing the importance of jury instructions to curb juror misconduct (St. Eve et al. 2014, p. 66). It should be noted that online juror communications, the focus of this study, are not viewed as the biggest threat to the jury system. Rather, most are more concerned with jurors using the Internet to conduct research, which this survey unfortunately left unaddressed.

Federal Judicial Center. In 2011, the Federal Judicial Center conducted a survey of all federal judges to ascertain the social media use of jurors during trial (Dunn 2011). It updated that survey in 2013, expanding the field of inquiry to include the social media use of both jurors and attorneys during voir dire, trial, and deliberations (Dunn 2014).

A total of 508 of the 952 judges polled responded. Of those 508, only 6% (30 judges) uncovered Internet use by jurors. Many of the judges, however, readily acknowledged the difficulty in detecting jurors' inappropriate social media use (Dunn 2011).

Flash forward two years, and the second survey showed that approximately 7% (33 judges) of the 492 judges who responded had detected Internet use by jurors. Although the number of survey respondents decreased between 2011 and 2013, the number of judges reporting use of the Internet by jurors increased. Furthermore, in 2013, 6 judges reported that jurors had divulged confidential information via social media, up from zero in 2011. The Federal Judicial Center suggests that plain-language instructions that explain the rationale for the social media ban are the main reason for the overall low rates of misconduct.

Of the 33 instances, 27 occurred during trial, whereas the other 7 occurred during deliberations. Furthermore, juror transgressions were more likely to occur during criminal rather than civil trials. The preferred methods used by jurors were Facebook (17 responses by judges), instant messaging (4 responses by judges), Twitter (3 responses by judges), and personal blogs (3 responses by judges). Of the judges who reported how they discovered the misconduct, 12 said another juror, 8 said an attorney, 7 said courtroom staff, and 1 said one of the parties.

Although beneficial, this study acknowledges, like those before it, the challenges of obtaining an accurate reading of online juror misconduct. This is especially true when actual jurors are not surveyed. It remains to be seen how many jurors actually access the Internet during trial, to what end, and at what cost to the institution of trial by jury.

National Center for Jury Studies (Pilot Study). To date, the National Center for Jury Studies (NCJS) has conducted the most thorough and comprehensive study on jurors and online misconduct (Hannaford-Agor et al. 2011). The NCJS pilot study provided survey questionnaires to judges, attorneys, and jurors from 6 states covering 13 separate trials. With respect to the jury

questionnaires, the NCJS received 506 responses. The survey asked the jurors several different questions to include whether they wanted to use the Internet, to which a large number said "yes." Despite this fact, not a single juror admitted to conducting online research, which contradicts other studies. Some jurors in this survey, however, did acknowledge committing traditional forms of misconduct, such as discussing the case before all of the evidence is admitted and with family and friends.

Despite the lack of candor by some jurors, this study is nonetheless quite valuable. For example, this survey demonstrated that jurors had a strong interest in using the Internet during trial. In addition, the study provides insight into how jurors, if allowed, would use the Internet to conduct additional research: to look up legal terms (44%), the case (26%), the parties involved (23%), the lawyers (20%), the judge (19%), the witnesses (18%), and fellow jurors (7%) (Hannaford-Agor et al. 2011). The survey also noted that future jurors will become increasingly "wired-in, having both the technological access and the practical experience to use the communication devices effortlessly" (p. 7). Finally, the survey made note of the addictive qualities of the Internet.

The NCJS plans to alter their study in the future by creating dual tracks. The first track will replicate the pilot study. The second track will contact jurors after they leave the courtroom. The NCJS believes that by waiting and asking jurors to complete questionnaires outside of the courtroom, they will find jurors to be more forthcoming.

SOLUTIONS

Despite the inability to determine with any precision the percentage of jurors who improperly access the Internet, commentators have offered several suggestions for limiting the phenomenon as much as possible (Hoffmeister 2012a). These solutions may be separated into two broad categories. The first category focuses on oversight and punishment and includes fining, sequestering, investigating, and monitoring jurors and confiscating their digital devices (Hoffmeister 2012a). The second focuses on education and empowerment and includes allowing jurors to ask questions and improving jury instructions (Hoffmeister 2012a). Of the solutions discussed, a few commentators focus on one or two, whereas most suggest employing a wide variety, arguing that no single panacea exists for preventing juror misconduct online (Manhas 2014).

When the issue of Internet-related juror misconduct first arose in the mid-2000s, a few commentators suggested the "Luddite Solution" of taking jurors' phones (Robinson 2011). Although this recommendation quickly fell out of favor with most reformers, it is worth mentioning to highlight how the legal scholarship in this area has evolved, and continues to do so, as individuals become increasingly comfortable with and dependent on technology. At present, few, if any, commentators advocate taking a juror's phone, save perhaps for during deliberations (Brayer 2016). If jurors really want to discuss the case or research it online, they will simply wait until they leave the courthouse. Other reasons offered for not taking jurors' phones include the idea that "separating a juror from his or her device could promote extreme anxiety" (Brayer 2016, p. 26).

Another early solution involved penalizing jurors. The suggested penalties took various forms, ranging from fines to public embarrassment to sequestration. Although some commentators have suggested increasing penalties for jurors who violate court rules, few have gone so far as to advocate for incarceration (Miller 2010).

The most commonly recommended reform measure was improved jury instructions, which falls into the second category of reform measures, focusing on juror education and empowerment. In fact, nearly every commentator on the topic mentions improved jury instructions as a way to prevent jurors from accessing the Internet (Robinson 2011). Most experts believe that the court's instructions to jurors have not kept pace with how jurors use technology.

In 2011, after conducting a 50-state examination of jury instructions, Eric P. Robinson published the most in-depth discussion of the topic, concluding that not only must jury instructions be updated but these modernized instructions must be given at the outset of jury service, repeated various times throughout the trial process, and coupled with other tactics to deter juror misconduct (Robinson 2011). Though juror instructions are a powerful tool, they cannot be a court's only line of defense.

Another recommendation from the second category could be described as the "active juror" approach (Marder 2001), which includes allowing jurors to take notes, have lists of witnesses and exhibits, ask questions during trial, and engage in preverdict deliberations. Marder and others argue that these measures will help jurors better understand and analyze the information they receive. Some experts argue that by fielding questions from the jury in the courtroom, judges make it less likely that jurors will seek answers online (Marder 2010). However, even Marder (2014) draws a line between the "active juror" and the "anarchic juror," contending that online conduct by jurors must never be allowed to interfere with a party's right to a fair trial.

Finally, commentators in this area have not limited their recommendations solely to innovations in American courtrooms (Hoffmeister 2015). At least one commentator has examined efforts in other common law countries to prevent Internet-related juror misconduct, many of which involve similar strategies to those mentioned above. Hoffmeister (2015) suggests that American courts should examine and consider implementing reform measures proposed in Australia and Great Britain, including certain forms of punishment, oversight, and education. Of particular note was one suggestion offered by an Australian law professor that involved creating a telephone or email hotline. This recommendation called for the establishment of "a hotline for jurors to call to anonymously report other jurors . . . that used social media inappropriately during trial or during deliberations" (Hoffmeister 2015, p. 993).

CONCLUSION

The Internet, including social media, has had several positive effects on trial by jury, including improving the court's ability to educate and communicate quickly and easily with those called to jury duty and attorneys' ability to investigate jurors during voir dire. However, scholars and practitioners on the whole believe these technological innovations pose more threats than opportunities for the long-term sustainability of the institution.

Although jury trials have traditionally entailed the presentation and cross-examination of evidence in court before a body of impartial decision makers, Internet and social media prominence has made it more likely than ever that (*a*) unbiased jurors will be hard to come by; (*b*) impaneled jurors will be tempted to seek and consider outside information; and (*c*) unsanctioned juror communications with other jurors and nonjurors, both inside and outside the courtroom, will threaten the sanctity of the institution.

Studies conducted to date have offered valuable insights into jurors' online behavior. For example, they show why jurors go online and their preferred methods for doing so. The studies also show how juror misconduct is discovered and what tools are available to keep jurors offline. The final piece of the puzzle is to determine how often jurors commit misconduct. These statistical data points are crucial to fully diagnose and resolve the problem.

Potential areas ripe for research include delving more deeply into why and how jurors access the Internet. This research can be conducted by sending electronically or via mail questionnaires to courtroom personnel, judges, attorneys, and jurors. The questionnaires should enquire into the evolving ways jurors use the Internet to include specific questions about juror misconduct. The questionnaire should also examine whether ongoing reforms are effective. All efforts should

be made to create an environment conducive to juror truth telling. Thus, rather than survey the jurors in the courthouse, future studies could contact them post trial, as suggested by the NCJS.

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