

Jury 2.0

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When the Framers drafted the Sixth Amendment and provided that the accused in a criminal case would have the right to a speedy and public trial by an “impartial jury,” it is unlikely that they imagined the members of that impartial jury becoming Facebook friends during deliberations, or running the defendant’s name through Google during trial. But in the past few years, such cases have increasingly been making headlines. The impact of the Internet on the functioning of the jury has generated a lot of press, but has not yet attracted scholarly attention. This Article is the first to focus legal discourse on this underexamined phenomenon.

While the media have characterized this issue as little more than a new variety of juror misconduct, that description may be unnecessarily simplistic. This Article argues that juror attempts to gain information about the defendant and about the law may not reflect misconduct so much as a misplaced sense of responsibility to render the “right” decision. These efforts might also be a signal from jurors that they are chafing under the restrictions of their role.

The modern conception of the jury as passive and uninformed has replaced the more active body envisaged at common law and by the Framers. To earlier legal thinkers, impartiality meant a lack of familial or financial interest in the outcome of the case, not ignorance of the facts. This Article argues that we need to rethink the jury’s role for the twenty-first century and restore some of the jury’s active engagement in the process of fact finding. The jury that ultimately emerges—Jury 2.0—may share some characteristics with its more active forebears.

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INTRODUCTION

Well, I was curious.

-Juror explaining why he had run a Google search of the defendant's name during trial.¹

When the Framers drafted the Sixth Amendment and provided that the accused in a criminal case would have the right to a speedy and public trial by an “impartial jury,” it is unlikely that they imagined the members of that impartial jury becoming Facebook friends during deliberations, or running the defendant's name through Google during trial. But in the past few years, cases of jurors conducting unauthorized online research or using the Internet to contact witnesses have increasingly been making headlines. The impact of the Internet on the functioning of the jury has generated a lot of press, but has not yet attracted scholarly attention. This Article seeks to focus discourse on this underexamined phenomenon.

The media reaction to jurors' online research and networking has primarily been one of gleeful horror, focusing on the shock value of “Jurors Gone Wild” headlines.² But casting the efforts of contemporary jurors to inform themselves as merely an issue of juror misbehavior may be unnecessarily reductive. Jurors are often trying to gain information about the defendant's background, the circumstances of the case, and the effects of the law in an effort to achieve the most accurate result.³ This Article argues that such attempts may not reflect misconduct so much as a misplaced sense of responsibility to render the “right” decision.⁴

From an institution that originally had the power to determine both law and fact, the modern jury has become a singularly passive animal.⁵ A

1. John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1 [hereinafter *Jurors Turn to Web*] (describing a federal drug trial in Florida where nine of the jurors had conducted research on the Internet and the judge declared a mistrial).

2. See, e.g., Deirdra Funcheon, *Jurors Gone Wild: The Feds Slink Away from a Flubbed Internet Pharmacy Case*, MIAMI NEW TIMES, Apr. 23, 2009, <http://www.miaminewtimes.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies>.

3. See *infra* notes 210–12 and accompanying text.

4. One former juror, commenting on the above story, *supra* note 1, on the *New York Times*'s website, wrote,

The legal system is not designed to discover the truth, but rather to reward whichever party presents the most convincing argument and evidence. Jurors, on the other hand, feel the weight of their responsibility and would prefer to know the truth. As someone who has sat on several juries, in each case myself and the other jurors felt frustrated by the lack of key information that would help us feel comfortable that we made the right decision, [w]e also felt deeply frustrated at our inability to fill those gaps in our knowledge.

brad, Comment to *Jurors Turn to Web*, N.Y. TIMES (Mar. 17, 2009, 2:46 PM), <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?sort=oldest&offset=2>.

5. Some scholars correlate the jury's loss of power with the democratization of the institution in allowing people of color and women to participate. See Albert W. Alschuler & Andrew G. Deiss, *A*

battalion of evidence rules shields the jury from inadmissible information on the basis that jurors might be misled,⁶ or might overvalue discrediting information about the defendant.⁷ Tradition prevents most jurors from asking questions⁸ or knowing the sentencing consequences of their decisions.⁹ Viewed in the most negative light, the jury's role has been reduced to that of an adding machine, mechanically crunching the carefully screened evidence that is funneled into it, and producing a verdict.

Some of these constraints reflect the modern conception of impartiality, which is frequently confused with ignorance and passivity. But historically, "impartiality" referred simply to a lack of familial or financial interest in the outcome of the case.¹⁰ The early jury was supposed to be self-informing, and the jurors not only knew the defendant and witnesses, but were also entitled to make their own inquiries.¹¹ Internet access has given juries a means, albeit an unauthorized one, of sending a signal that they are chafing under the restrictions of their role. This Article argues that we should take this signal seriously and begin to rethink the jury's role for the twenty-first century.¹² The jury that ultimately emerges—the body I call Jury 2.0¹³—may share some characteristics with its more active forbears.

The Article proceeds in four parts. Part I examines the ways in which jurors' Internet use interferes with the rules governing both the

Brief History of the Criminal Jury in the United States, 61 U. CHI. L. REV. 867, 868 (1994).

6. See John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1195 (1996) ("[O]ur law of evidence strives to prevent error by excluding from jurors information that might mislead them.").

7. See, e.g., FED. R. EVID. 403 (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); FED. R. EVID. 404(a) (exclusion of character evidence introduced to prove action in conformity with that character); FED. R. EVID. 404(b) (evidence of other crimes or bad acts not admissible to prove character, though admissible for other purposes); FED. R. EVID. 802 (hearsay inadmissible except as otherwise provided).

8. See *infra* note 248 and accompanying text.

9. See *infra* notes 107–08 and accompanying text.

10. See Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1674 (2000).

11. See *infra* notes 251–54 and accompanying text.

12. While most of this discussion is equally relevant to civil cases, this Article will focus on criminal trials. The primary reason is that the stakes are higher, there is more developed doctrinal regulation, and the questions of how Internet use affects juror impartiality are more pressing.

13. This title plays off the common term for the second phase of the World Wide Web, Web 2.0. See PAUL ANDERSON, JOINT INFO. SYS. COMM. TECH. & STANDARDS WATCH, *WHAT IS WEB 2.0? IDEAS, TECHNOLOGIES AND IMPLICATIONS FOR EDUCATION* (2007). Web 2.0 represents the next generation of Internet activity, which focuses on interactive, collaborative communications between individual users and organizations, and of which social networking websites such as Facebook, Wikipedia, and YouTube are prime examples. See Tim O'Reilly, *Web 2.0*, TTI/VANGUARD (Dec. 1, 2005), http://www.ttivanguard.com/ttivanguard_cfmfiles/pdf/dc05/dc05session4003.pdf (exploring whether such a collaborative, information-sharing model could have some parallels with a more active, better informed jury).

functional and symbolic role of the jury. These rules can be classified into four primary categories: (1) rules that prohibit juror information gathering, (2) rules that forbid jurors from making conclusions of law, (3) rules that govern the secrecy and integrity of the deliberation process, and (4) rules that forbid improper contact between jurors and outside parties. Part I also considers the concomitant issue of lawyers using the Web to investigate jurors.

Part II describes and critiques the current legal responses to these issues, including jury instructions, confiscation, and sequestration. This Part examines the ineffectiveness of jury instructions alone as a way of curbing juror behavior and combating the temptations presented by instant access to information. It considers some of the current psychological literature regarding online interactions as possible explanations for the increased incidence of juror misconduct.

Part III draws on the historical development of the jury, and explores the role of the jury at the time of the Founding. In particular, this Part suggests that the emerging issue of Internet use by jurors may reflect an attempt to regain a measure of control over the proceedings that has since been given over to the legal profession.

Part IV assesses the costs of inaction, in particular the unfairness to defendants, and argues that changes need to be made. It proposes a series of measures to enhance jurors' participation in the fact-finding process and to fulfill their normative function as the conscience of the community. Some of these measures will be familiar from "active jury" reforms, such as allowing jurors to take notes, ask questions, and request clarification. But bolder measures may be needed as well, such as informing jurors of the sentencing consequences of their decisions, or allowing jurors a means of describing their experiences, both to alleviate the pressures they find themselves under and to provide a greater understanding of their task. The future ramifications of these issues are still unfolding. Nonetheless, it is not too early to begin to formulate a reasoned and creative response.

I. JURORS BEHAVING BADLY

This Part describes the ways in which jurors' Internet use interacts with the rules that govern the functioning of the jury and the legitimacy of its verdicts. For each rule—regarding factual research, legal research, deliberations, and outside influences—this Part discusses the governing legal framework and the main normative and practical challenges to that framework. In surveying known instances of juror misconduct on the Internet, this Part tries to go beyond a simple list of anecdotal examples to examine the motivations behind jurors flouting the rules and to connect these examples to a more substantive critique of these rules.

A. JURORS CONDUCTING FACTUAL RESEARCH

At first glance, the issue of jurors seeking information online seems analogous to the age-old problem of jurors obtaining information from outside sources, particularly the press. But online research amounts to more than jurors perusing electronic newspapers. First, online activity has become fully embedded in most people's everyday lives. While a juror might refrain from reading the paper, it might be impossible to refrain from checking her RSS feed. Second, there is an almost limitless amount of information on the Internet, even about facts or individuals that would otherwise not be deemed "newsworthy." Third, because there is no system of fact-checking on the Web, this information might be incomplete, erroneous, or deliberately false. Fourth, a juror conducting her own research is likely to be invested in the results because she is actively engaged in seeking out the information.

1. *The Governing Framework*

"The theory of our system," wrote Justice Holmes at the turn of the nineteenth century, "is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."¹⁴ Only in open court can a defendant's constitutional rights to confrontation, cross-examination, and counsel be protected;¹⁵ a defendant has no means of defense against influences, insinuations, and information that reach the jury behind his back. This remains a cardinal principle of our system. As the Court has held, "[t]he requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."¹⁶

Nonetheless, the "evidence developed at trial" is strictly circumscribed. The Federal Rules of Evidence and their state counterparts operate to exclude even relevant, probative evidence, if that evidence poses a substantial risk of unfair prejudice.¹⁷ This reflects a

14. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). The Court later characterized this language as an "undeviating rule of this Court." *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966).

15. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) ("In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.").

16. *Id.* at 472.

17. *See, e.g.*, FED. R. EVID. 403. As Albert Alschuler has observed, most of the law of evidence "rests on the proposition that the prejudicial impact of relevant information may outweigh its probative value—in other words, that although judges and rulemakers can understand the limited worth of this evidence, jurors who evaluate similarly fallible evidence in their everyday lives cannot." Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 162 (1989).

concern that the “wrong” kind of evidence will distract jurors or cause them to decide on emotional or irrational bases.¹⁸ The result is that jurors operate in a highly restrictive, formalistic environment that ensures that only some relevant information will be admitted.

The mistrust inherent in rules that bar certain evidence from reaching the jury in the first place has long provoked criticism.¹⁹ Jeremy Bentham, an acerbic critic of the then-developing rules of evidence, urged that the jury should be allowed to hear all the evidence and decide for themselves whether it was credible or not.²⁰ “If there be one business that belongs to a jury more particularly than another,” he wrote, “it is, one should think, the judging of the probability of evidence: if they are not fit to be trusted with this, not even with the benefit of the judge’s assistance and advice, what is it they are fit to be trusted with?”²¹

The exclusionary nature of the rules of evidence is also the object of fairly widespread loathing from jurors themselves.²² As one irate former juror put it, “courts will just have to accept the fact that most of us want to know more than we are supposed to know. This is NOT a corruption of the jury process. The arrogance of the judicial system doling out just

18. See, e.g., FED. R. EVID. 403 advisory committee’s note (explaining that judges may exclude relevant information if it has “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one”).

19. Alschuler has called the rules of evidence “patronizing,” “bespeak[ing] limited faith in juries.” Alschuler, *supra* note 17, at 154; see also Bruce A. Green, “*The Whole Truth?*”: How Rules of Evidence Make Lawyers Deceitful, 25 LOY. L.A. L. REV. 699, 703 (1992) (“[Evidentiary rules] are predicated in large measure on the law’s distrust of juries.”). Some commentators have gone so far as to say that the rules of evidence are morally objectionable. See, e.g., Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463, 512 (“Forcing jurors to make decisions on the basis of a limited, government-screened body of evidence violates jurors’ deliberative autonomy and instrumentalizes them in service to the government’s and the litigants’ objectives.”).

20. 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 9–33 (1827).

21. *Id.* at 17. Bentham added, “Better trust them with nothing at all, and do without them altogether.” *Id.*

22. The story in the *New York Times* about web-surfing jurors garnered nearly 300 comments in the first hour. See *Jurors Turn to Web*, *supra* note 1. Many of those comments reflected frustration and anger with the current system. See, e.g., brad, *supra* note 4. Another juror recalled his service as “terribly frustrating” and said he “felt like a potted plant.” Matt, Comment to *Jurors Turn to Web*, N.Y. TIMES (Mar. 17, 2009, 4:04 PM), <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?sort=oldest&offset=6>. Many members of the public echoed these sentiments. See, e.g., John Lister, Comment to *Jurors Turn to Web*, N.Y. TIMES (Mar. 17, 2009, 2:48 PM), <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?sort=oldest&offset=3> (“Good! Let jurors research as much as they want. . . . I’m tired of jurors being treated as idiots by the legal profession.”); Kyle, Comment to *Jurors Turn to Web*, N.Y. TIMES (Mar. 17, 2009, 3:40 PM), <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?sort=oldest&offset=5> (“[J]ustice is not served when the jury is left (sometimes purposefully) in the dark about cold, hard fact. These technologies allow jurors to make more appropriate decisions and serve justice more accurately and fairly.”); mnowhere, Comment to *Jurors Turn to Web*, N.Y. TIMES (Mar. 17, 2009, 3:08 PM), <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?sort=oldest&offset=3> (“Why are we treating jurors like computers, who are fed predigested information and churn out an ‘impartial’ result? Treat jurors like adults. Give them all the information. They’ll get it anyways.”).

enough information to keep us ‘pure’ is intolerable.”²³ Some jurors, at least, are frustrated by a sense of not getting the whole picture; they may feel that the lawyers and the judge form some sort of elite club from which they are excluded, as if the adversarial system is “based on the judge and the attorneys being in the know about everything and the jury being in the dark.”²⁴ This may not be new. What has changed, however, is jurors’ ability to do something about it.

2. *The Wealth of Online Information*

Until recently, there was little jurors could do to indulge their feelings of frustration and outright curiosity. There were occasional incidents of a juror visiting a crime scene,²⁵ conducting experiments,²⁶ or seeking outside information,²⁷ but they were relatively uncommon.²⁸ Today, most jurors have access to news stories, television segments, blogs and opinion, criminal records databases, social networking pages, and general research tools such as Wikipedia and Google at their fingertips.²⁹ And they have not been shy about availing themselves of these resources. While empirical studies of the phenomenon in this country

23. Ladislav Nemeč, Comment to *Jurors Turn to Web*, N.Y. TIMES (Mar. 17, 2009, 3:40 PM), <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?sort=oldest&offset=5>. When he sat on a jury, their “decision was certainly influenced by hiding important facts from us. I chose not the challenge the decision of the majority (it was a civil case) but to this day I resent the treatment we got.” *Id.*

24. James, Comment to *Jurors Turn to Web*, N.Y. TIMES (Mar. 17, 2009, 2:46 PM), <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?sort=oldest&offset=2>.

25. See, e.g., *Gafford v. Warden*, 434 F.2d 318, 320 (10th Cir. 1970) (juror went to gas station mentioned at trial to determine whether station had been open at the time described in the testimony); *Saperito v. State*, 490 N.E.2d 274, 278 (Ind. 1986) (juror visited duplex apartment where assault occurred and measured width of the doors); *Dyer v. State*, 342 N.E.2d 671, 672 (Ind. Ct. App. 1976) (juror visited car dealership to see whether alibi witness could have seen what he described).

26. See, e.g., *People v. Phillips*, 175 Cal. Rptr. 703, 709 (Ct. App. 1981) (juror in murder by poisoning case conducted experiment to see whether baking soda dissolved in water overnight); *People v. Smith*, 453 N.E.2d 1079, 1080 (N.Y. 1983) (juror looked into rear windows of cars while walking to dinner to see whether arresting officers could have seen defendant in back seat of cab); *People v. Brown*, 399 N.E.2d 51, 52 (N.Y. 1979) (juror conducted experiment to see whether police witness could have seen face of driver in adjacent car).

27. See, e.g., *Paz v. United States*, 462 F.2d 740, 745 (5th Cir. 1972) (books about drugs and drug trafficking found in jury room in narcotics case); *United States v. Staples*, 445 F.2d 863, 863 (5th Cir. 1971) (law books found in jury room during deliberations); *People v. Holmes*, 372 N.E.2d 656, 657 (Ill. 1978) (in case where identification of defendant turned on footprint left in the snow, several jurors went to Florsheim shoe store to see whether heels of shoes contained brand name logo).

28. See Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2675 (1996) (“[F]ew cases today are plagued by misconduct.”).

29. As of June 30, 2010, over 239 million people in the United States were using the Internet—approximately seventy-seven percent of the population. *Internet Usage and Population in North America*, INTERNET WORLD STATS (June 30, 2010), <http://internetworldstats.com/stats14.htm>. While there have been numerous instances of jurors using iPhones and Blackberries to access the Internet even from the courthouse, because most felony trials last longer than a day, jurors also have ample time to consult their home computers in the evenings.

have not yet been fully undertaken,³⁰ a recent survey of jurors conducted in England found that more than twenty-five percent of jurors had seen information about their cases on the Internet during trial.³¹

In the United States, a growing number of cases reflect instances in which jurors have attempted to supplement the information at trial through online research, particularly Google. The most notorious recent example was a federal case in Florida, in which the defendants were charged with illegally running an Internet pharmacy.³² After seven weeks of trial, during the course of deliberations, the judge discovered that not one, but eight of the twelve jurors had conducted Internet research about the case during trial.³³ As one of the defense lawyers described it, the jurors “Googled defendants’ names. They Googled definitions of medical terms. There was a lot of Googling going on.”³⁴ One juror discovered that “one of the defendants had once been implicated for prescribing medicine that was used in a double suicide.”³⁵ In addition, an alternate juror was found to have been surfing the Web on his cell phone during breaks in testimony.³⁶ The judge declared a mistrial.³⁷

Not every case is as spectacular. But a quick survey of recent cases shows instances where jurors have run Google searches on the defendant,³⁸ the names of co-conspirators,³⁹ and the defense lawyer.⁴⁰ In

30. The New Media Project of the Conference of Court Public Information Officers recently conducted a survey of nearly 1600 judges and court personnel—though not of jurors—about issues of social media use by and in the courts. Fewer than ten percent of judges reported seeing jurors use social networking sites in the courtroom. *See* CONFERENCE OF COURT PUB. INFO. OFFICERS, NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE 67 (2010) [hereinafter CCPIO REPORT]. This statistic obviously does not shed any light on how much online research and commentary is being conducted by jurors outside of the courtroom.

31. *See* CHERYL THOMAS, MINISTRY OF JUSTICE, ARE JURIES FAIR? 43 (2010), available at <http://www.justice.gov.uk/publications/docs/are-juries-fair-research.pdf>. Thomas conducted surveys of 668 jurors post-trial and obtained a ninety-eight percent response rate. *See id.* at 12–13. Five percent of jurors in non-high-profile cases, and twelve percent of jurors in high-profile cases admitted to conducting Internet research about their cases during trial. *See id.* at 43. In contrast, twenty-six percent of jurors only said they “saw” media reports concerning their cases on the Internet. *Id.* As Thomas noted, these figures might be on the low side because, although the jurors were guaranteed anonymity, “it should be borne in mind that they were being asked to admit to doing something they may have remembered being told not to do by the judge.” *Id.* This might explain why “a much higher proportion of jurors said they saw media reports of their case on the internet during the trial compared to those who admitted looking for information about the case on the internet.” *Id.* If we assume that British jurors are no more lawless than American ones, this is a worrying statistic.

32. *See* Funcheon, *Jurors Gone Wild*, *supra* note 2.

33. *See id.*

34. *Id.*

35. *Id.* The defendant’s lawyer had specifically moved in limine to make sure that information would be excluded. *See id.*

36. *Id.*

37. *Id.*

38. *See, e.g.,* Rucker v. Patrick, No. 07cv0364-IEG (RBB), 2008 WL 4104230, at *2 (S.D. Cal. Sept. 3, 2008).

39. *See, e.g.,* United States v. Sabir, 628 F. Supp. 2d 414, 421 (S.D.N.Y. 2007). In *Sabir*, the jury

other cases, jurors have discovered that a prosecution witness was in protective custody because of the defendant;⁴¹ looked up the Myspace profile of one of the teenage victims in a felony sexual abuse case;⁴² accessed the Facebook page of a defendant accused of aggravated burglary with a weapon, where he showed a picture of himself holding a gun;⁴³ tried to look up the defendant's prior criminal record on a police department website;⁴⁴ looked up the driving record of a truck driver in a negligence action;⁴⁵ looked up defendants' ages and dates of birth;⁴⁶ researched oppositional defiant disorder;⁴⁷ researched alternative causes of death in a manslaughter case;⁴⁸ researched the effect on blood alcohol of the drug Narcan in a vehicular homicide case;⁴⁹ looked up a definition of "lividity" and the role it might have had in fixing the time of a beating victim's death;⁵⁰ researched the injury of retinal detachment in a child-murder case;⁵¹ and determined whether a particular type of firearm could have damaged a bullet-proof vest.⁵²

Not only is there a wealth of information online, but that information also takes a lot less effort to find than it used to in the analog world. Rather than having to get in their cars to calculate how long it

sent a note to the judge stating that it knew that the defendant's co-conspirator, Tarik Shah, had pled guilty, a fact which had not been admitted into evidence. *Id.* Upon being questioned, Juror Number Eight "stated that it was '[n]ot research, but I was curious as to why Mr. Shah was not here, and what happened to him . . . So I Googled Tarik Shah.'" *Id.*

40. *See, e.g.,* *People v. Owen*, No. Do48090, 2007 WL 4260487, at *3-4 (Cal. Ct. App. Dec. 6, 2007).

41. *See* Andrea F. Siegel, *Jury Acquits Man Accused of Shooting Crofton Woman*, *BALT. SUN* Nov. 7, 2009, at A5.

42. *See* John G. Browning, *When All That Twitters Is Not Told*, 73 *TEX. B.J.* 217, 217 (2010) (describing a West Virginia case).

43. *See* Amelia Hill, *Judges "Giving Up" Trying to Stop Juries' Online Research*, *GUARDIAN* (U.K.), Oct. 5, 2010, at 10. The defendant had also christened his Facebook page a "gangster zone." *Id.*

44. *People v. Garcia*, No. Co49205, 2007 WL 29949, at *5 (Cal. Ct. App. Jan. 5, 2007); *see also* Nick Madigan, *Juror's Misconduct Leads to New Trial in Gang Killing*, *BALT. SUN*, Sept. 12, 2010, at A3 (vacating a Baltimore gang member's conviction, after juror performed an Internet search on the defendant's prior criminal record).

45. *Sharpless v. Sim*, 209 S.W.3d 825, 828 (Tex. App. 2006).

46. *State v. Howard*, 680 N.W.2d 832, 832 (Wis. Ct. App. 2004).

47. *Wardlaw v. Maryland*, 971 A.2d 331, 334 (Md. Ct. Spec. App. 2009).

48. *State v. Boling*, 127 P.3d 740, 741 (Wash. Ct. App. 2006). In *Boling*, the juror, a former biology professor, was "not impressed" with the medical examiner's testimony as to cause of death. *Id.* He then conducted his own research over the Internet to determine an alternate cause of death, which he then shared with the other jurors. *Id.*

49. *State v. Armstrong*, 691 S.E.2d 433, 444 (N.C. Ct. App. 2010).

50. Brief of Appellant at 8, *Clark v. State* (Md. Ct. Spec. App. 2009) (No. 953), 2009 WL 4276755. The defendant's conviction was vacated on appeal on the basis that the juror's inquiry violated the trial court's order prohibiting jurors from researching the case. *See* Del Quentin Wilber, *With Social Networking, Justice Not So Blind*, *WASH. POST*, Jan. 9, 2010, at C1.

51. Brian Grow, *Juror Could Face Charges for Online Research*, *REUTERS*, Jan. 19, 2011, available at <http://www.reuters.com/article/2011/01/19/us-internet-juror-idUSTRE70I5KI20110119> (describing partial mistrial in a Pennsylvania case).

52. *People v. Dale*, No. E033290, 2004 WL 1260241, at *1 (Cal. Ct. App. June 9, 2004).

would take to drive from one location to another,⁵³ which is time consuming and expensive, jurors can now simply map online the distance between two towns⁵⁴ or between the crime scene and the site of the defendant's arrest,⁵⁵ or use a cell phone equipped with MapQuest to measure the distance between a store where an alleged child molestation took place and the defendant's house⁵⁶ without having to inconvenience themselves a bit.

These examples alone probably understate the breadth of the phenomenon.⁵⁷ For one thing, the examples given represent only those cases where the misconduct has come to the court's attention, either through a juror directly approaching the court, or through postverdict interviews with jurors by the parties or the press.⁵⁸ What is not captured are those situations in which a juror conducts online research but does not share that fact with her fellow jurors. Nor do these examples account for situations in which jurors mention to their colleagues that they have done forbidden research, but those colleagues do not tell the court for fear of causing delay and extending their service.⁵⁹ As one former juror, who chose to keep mum about a fellow juror's online searches about the defendant, explained: "If everybody did the right thing, the trial, which took two days, would have gone on for another bazillion years."⁶⁰

53. See, e.g., *Russell v. State*, 661 P.2d 1293, 1293 (Nev. 1983) (juror went to defendant's place of employment and timed drive from there to scene of the crime); *State v. Arney*, 544 P.2d 334, 338 (Kan. 1975) ("[A juror] timed the drive from the scene of the homicide on 77th Street to defendant's home on 13th Street, and from there to defendant's place of work a few blocks away.").

54. See, e.g., *United States v. Wheaton*, 517 F.3d 350, 359 (6th Cir. 2008).

55. See John Murray, *UNPLUG!*, INDIANAPOLIS STAR, Mar. 14, 2010, at B1 (describing how a Marion Superior Court judge dismissed a juror from murder trial for mapping the distance between key locations).

56. See, e.g., *Brown v. State*, 620 S.E.2d 394, 397-98 (Ga. Ct. App. 2005).

57. One journalist has compiled a tally of reported decisions in which litigants have moved for a new trial in whole or in part because of juror misuse of the Internet. Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS, Dec. 8, 2010, available at <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>. Grow found that since 1999, at least ninety verdicts have been challenged because of Internet misuse, with more than half of the cases occurring in the past two years. Of the ninety challenges, twenty-eight were successful, including twenty-one since January 2009. See *id.* In Grow's estimation, "[t]hese figures do not include the many incidents that escape judicial notice." *Id.*

58. In that sense, nothing has changed and most jury misconduct only comes to light if the jurors themselves alert the court. See Dennis Edwards, Jr., *A Judge's Review of Juror Misconduct*, 27 How. L.J. 1519, 1520 (1984) ("If the jurors remain silent, most instances of jury misconduct will go undetected.").

59. See, e.g., *Talk of the Nation: Social Media Crashes the Courtroom* (National Public Radio broadcast Sept. 17, 2009) [hereinafter *Talk of the Nation*], transcript available at <http://www.npr.org/templates/story/story.php?storyId=112926570>. One of the show's callers was a former jury foreman in a civil case where a juror admitted that she had Googled the defendant and found discrediting information. The caller stated that he "didn't feel really necessary to tell the judge, [but] probably should have." *Id.*

60. *Jurors Turn to Web*, *supra* note 1.

The available evidence may also underestimate the seriousness of the transgressions. Even in cases where juror research does come to the attention of the court, some jurors may minimize the extent of their online peregrinations, and trial courts appear inclined to believe them.⁶¹ Certainly those who actually work with juries—judges, practitioners, and jury consultants—seem to think the problem is on the rise.⁶² “You just have to figure it’s happening,” said one public defender. “[Jurors] go home at night and look up whatever they can. That’s what people do.”⁶³ As one state supreme court justice put it, “I think this is one of the biggest concerns that we have about fair trials in the future.”⁶⁴

3. *A Specific Example: The Defendant’s Criminal Record*

Some of the instances of juror research—calculating the distance between two locations, for example, or reading about the physiological effects of a drug—may reflect a juror’s dissatisfaction with the way the evidence was presented, or its perceived lack of clarity or completeness.⁶⁵ Some of the other instances, however, represent attempts by jurors to obtain entirely new information that otherwise would have been excluded from the case.⁶⁶ These are the occasions where the consequences of lack of confrontation are at their most serious.

To explore the possible ramifications of juror research in this context, I will focus on a simple—and common—example: a criminal case in which the defendant has a prior criminal record. The rules of evidence in both federal and state systems forbid the prosecutor from introducing evidence of the defendant’s criminal past to show his

61. See, e.g., *Buford v. Grp. Health Coop.*, No. 42915-9-I, 2000 WL 44123, at *11 (Wash. Ct. App. Jan. 18, 2000) (juror who had run an Internet search on twin-to-twin transfusion syndrome testified that once she found that there was information available, she did not open or read any of the retrieved documents); Ellen Brickman et al., *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 288–89 (2008). Brickman and her colleagues describe a New York murder case in which three prospective jurors admitted to conducting research on the case on their cell phone web browsers during a break in voir dire. After the first juror was rebuked by the court, the other two prospective jurors, “perhaps upon seeing the judge’s reaction to the first juror’s search, said they had not actually read any of the search results.” *Id.*

62. See, e.g., Brickman et al., *supra* note 61, at 301 (noting the authors’ experience as trial consultants that jurors were increasingly using the Internet to research their cases). “Jurors are generally very astute, and if they sense missing pieces of the puzzle or are left with unanswered questions, the temptation to ‘cheat’ by running a quick Internet search from their couch may be hard to resist.” Rosalind R. Greene & Jan Mills Spaeth, *Are Tweeters or Googlers in Your Jury Box?* ARIZ. ATT’Y, Feb. 2010, at 38, 40.

63. Wilber, *supra* note 50 (quoting A.J. Kramer, Washington’s Public Defender). Kramer added, “I’m not sure what you can do about it nowadays, to tell you the truth, especially for younger people. That’s what they grow up doing.” *Id.*

64. Laura A. Bischoff, *Courthouse Tweets Not So Sweet, Say Judges*, DAYTON DAILY NEWS, Feb. 12, 2010, available at <http://www.allbusiness.com/legal/trial-procedure-judges/13916591-1.html> (quoting Ohio State Supreme Court Justice Judith Lanzinger).

65. See *supra* notes 46–56 and accompanying text.

66. See *supra* notes 41–45 and accompanying text.

propensity for criminal activity,⁶⁷ though the rules permit such evidence for certain limited purposes⁶⁸ and for impeachment should the defendant testify.⁶⁹ The reason, as discussed above, is the fear that the jury will overvalue evidence of the defendant's past bad acts and will be more likely to convict.⁷⁰

This fear is not ill-founded. Empirical evidence from mock juror studies⁷¹ has borne out Richard Lempert's hypothesis that "the mistaken conviction of those with criminal records is likely to be perceived as less regrettable than the mistaken conviction of individuals thought never to have been in trouble with the law."⁷² Studies of real cases have shown both that defendants with criminal records testify less frequently than defendants without criminal records,⁷³ and that, in borderline cases, if evidence of a prior record is brought to the jury's attention, the jury is more likely to convict.⁷⁴ The result is that, frequently, defendants are

67. See, e.g., FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving an action in conformity therewith on a particular occasion."); FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith").

68. See, e.g., FED. R. EVID. 404(b) (evidence of prior crimes or bad acts admissible for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

69. See, e.g., FED. R. EVID. 609(a)(1) (evidence of a felony conviction may be admitted for purposes of impeaching the defendant "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused"); FED. R. EVID. 609(a)(2) (evidence of crime of dishonesty admissible to impeach the defendant).

70. See *Michelson v. United States*, 335 U.S. 469, 476 (1948) (observing that character evidence is excluded not because it is irrelevant; "on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge").

71. See, e.g., Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 LAW & HUM. BEHAV. 67, 76 (1995) (finding that mock jurors who read evidence of a prior conviction were more likely to convict on new charges); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 47 (1985) (concluding, based on 160-person study, that presentation of a defendant's criminal record "does increase the likelihood of conviction, and that the judge's limiting instructions do not appear to correct that error").

72. Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1039 (1977).

73. See Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1371 (2009) (showing that, in empirical study of 330 criminal trials, sixty-two percent of defendants without criminal records testified, compared to forty-five percent of defendants with prior records).

74. See *id.* at 1385. Eisenberg and Hans found that "the jury's learning of a defendant's prior record is significantly associated with whether that defendant testified." *Id.* at 1379. They further found that, while evidentiary strength (as reported by the jurors themselves) is the most important factor leading to conviction, in borderline cases, learning of the defendant's prior record could compensate for a weaker prosecution case and lead juries to convict. See *id.* at 1386. While in weak cases, the authors found that the dominant tendency was not to convict, "in the strongest of weak cases, the existence of a prior criminal record can prompt a jury to convict... [t]he prior record effectively leverages the existing evidence over the threshold needed to support conviction." *Id.* at 1385.

deterred from taking the stand in their own defense for fear that their prior convictions will come into evidence.⁷⁵

In the past, a person's criminal history, or "rap sheet," was easily accessible only to the prosecutor, the court, and law enforcement personnel.⁷⁶ Today, when it is commonplace for people to conduct an online background check of each other before a first date, running someone's name in a database has become second nature.⁷⁷ And as the boundaries that separate criminal records information from the public become increasingly porous, anyone can simply look up any person's criminal history across all the states over the Internet.⁷⁸ Some sites, such as criminalsearches.com, are free and do not even require registration.⁷⁹ A juror who runs a defendant's name through Google, therefore, could easily come across prior convictions. In these situations, the rules of evidence are losing their ability to preserve the legal fiction that the defendant stands before the jury unencumbered by his past misdeeds.

So what is a criminal defendant with a prior record supposed to do? If the cost of testifying is linked to the risk of impeachment by prior convictions, a higher probability that the jury will discover the information anyway would lower the cost of testifying. Over time, this could conceivably lead to more defendants testifying and telling their side of the story.⁸⁰ On the other hand, it is at least as likely that this risk

75. See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 479 (2008). In an empirical study of later-exonerated defendants, Blume found that most of the defendants failed to testify because they had a prior record and "believed, or their lawyers believed, that if the jury knew the defendant had previously committed another criminal offense, it would be more likely—despite the judge's instructions to the contrary—to conclude that the defendant is the type of person who would have [committed the instant offense]." This is not to say that fear of impeachment by prior convictions is the only reason a defendant might not testify; other factors such as communication abilities, perceived jury appeal, and the threat of perjury charges or obstruction of justice enhancements can also deter defendants from taking the stand in their own defense.

76. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L. REV. 387, 401 (2006).

77. See, e.g., D. Ordes, Comment to *Jurors Turn to Web*, N.Y. TIMES (Mar. 17, 2009, 3:12 PM), <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?sort=oldest&offset=4> ("I wouldn't have lunch with a stranger without checking first with Google. Why should I pass judgment on a person in trial without a similar screening?").

78. There is no shortage of paid services that provide instant criminal record information. See, e.g., CRIMINAL-INFO.COM, <http://criminal-info.com> (last visited July 4, 2011) ("Over 250 million Criminal Records at your fingertips!"); *Get an Instant Credit Check*, INTELIUS, <http://www.intelius.com/criminal-check.html> (last visited July 4, 2011) ("[I]nstant access to records of criminal convictions, felonies, misdemeanors, sex offenses and other criminal offenses associated with a name."); CRIMINALRECORDS.COM, <http://www.criminalrecords.com/> (last visited July 4, 2011) ("Sometimes you just wish there's a way for you to determine the good guys and the bad guys. Well now, you can.").

79. See, e.g., CRIMINALSEARCHES.COM, <http://www.criminalsearches.com> (last visited July 4, 2011) ("Do you really know who people are? Start a FREE Criminal Search on anyone today!"); see Brad Stone, *If You Run a Red Light, Will Everyone Know?*, N.Y. TIMES, Aug. 3, 2008, at 4 (Business).

80. For a provocative discussion of the dignitary and expressive values of defendant speech, see Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1479–

might simply lead to fewer trials, concentrating them among the famous, the wealthy, or those savvy enough to wage an effective propaganda war on the Web.⁸¹ If a defendant has a particularly lengthy or egregious rap sheet, or has a conviction for a similar crime to the one charged, the fear that this information could come to the jury's attention surreptitiously could deter the defendant from going to trial at all.

These concerns are not limited to defendants with criminal records, as defendants with no prior records could easily be mistaken for someone else online. A curious juror, unlike a member of law enforcement, is unlikely to have access to the defendant's date of birth or Social Security number. If all she has to go on is a common name, like "John Smith," she might lack the tools to accurately match the information with the defendant. Even if the record found correctly identifies the defendant, its information might be inaccurate.⁸² Dismissed charges, quashed warrants, and expunged convictions may all survive online, and criminal records databases are not known for their up-to-the-minute updates or attention to fact-checking.⁸³ So not only the defendant with a criminal record, but all other defendants, might be tarred with discrediting information sought out by jurors who know how to conduct online research but not necessarily how to test the accuracy of what they find.

B. RULES CURTAILING THE JURY'S POWER TO DECIDE THE LAW

Jurors are not only indulging their curiosity about facts relating to their cases, but are also engaging in unauthorized legal research. Flouting the strong presumption that their task as jurors is to follow the law as stated to them by the judge, they are double-checking legal terms, seeking out competing definitions, and poring over sentencing information—all of which are now much easier to do with the online tools at their disposal.

80 (2005).

81. During her prosecution for false statements, Martha Stewart maintained a defense website, *Marthataalks.com*. See Bernard Hibbitts, *Martha Stewart Statement on Appeal*, JURIST (Mar. 5, 2004, 3:32 PM), http://jurist.law.pitt.edu/paperchase/2004_03_05_indexarch.htm. When the guilty verdict was returned, she wrote, "I continue to take comfort in knowing that I have done nothing wrong." *Id.*

82. See Jacobs, *supra* note 76, at 416–18.

83. See *Herring v. United States*, 129 S. Ct. 695, 709 (2009) (Ginsburg, J., dissenting). While "law enforcement has an increasing supply of information within its easy electronic reach," wrote Justice Ginsburg, "[t]he risk of error stemming from these databases is not slim. Herring's *amici* warn that law enforcement databases are insufficiently monitored and often out of date. Government reports describe, for example, flaws in NCIC databases, terrorist watchlist databases, and databases associated with the Federal Government's employment eligibility verification system." *Id.* (citations omitted).

I. *The Governing Framework*

The orthodox view, succinctly stated by Justice Story in 1835, is that it is “the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.”⁸⁴ There nonetheless remained some question about the jury’s power to mitigate the law by finding verdicts of lesser included offenses until the Supreme Court decided *Sparf v. United States*⁸⁵ sixty years later.

In *Sparf*, two seamen were charged with murder on the high seas, a capital offense.⁸⁶ The defendants were denied an instruction to the jury that it could find the defendants guilty of manslaughter.⁸⁷ The jury itself, during deliberations, returned to the courtroom to ask the judge whether it could return a verdict of manslaughter, which was not punishable by death.⁸⁸ The court repeatedly told the jury that if it found there had been a homicide, “the facts of the case do not reduce it below murder” and therefore its verdict “cannot properly be manslaughter.”⁸⁹ The jury thereupon returned a verdict of murder.⁹⁰

The Supreme Court held that the district court had correctly instructed the jury that, “on account of the absence of all evidence tending to show that the defendants were guilty of manslaughter, they could not, consistently with law, return a verdict of guilty of that crime.”⁹¹ Although the Court’s ruling did not expressly prohibit judges from instructing juries that they could determine the law, Justice Harlan’s opinion for a five-Justice majority left little doubt of his position on the matter. If “juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves,” he wrote, “[p]ublic and private safety alike would be in peril.”⁹²

While the principles espoused in *Sparf* were all but unanimously adopted by the courts, the *Sparf* opinion itself was hotly contested. Justices Gray and Shiras dissented; in their view, the judge’s instructions denied the jury “their right to decide the law.”⁹³ In an opinion notable for its thoughtful and detailed historical analysis, they wrote:

84. *United States v. Battiste*, 24 F. Cas. 1042, 1043 (D. Mass. 1835) (No. 14,545).

85. 156 U.S. 51 (1895).

86. *Id.* at 52.

87. *Id.* at 53.

88. *Id.* at 62 n.1 (transcribing colloquy between juror and the trial court, where the juror asked, “[a] crime committed on the high seas must have been murder, or can it be manslaughter?”).

89. *Id.*

90. *Id.* at 52.

91. *Id.* at 101. Any other rule, wrote the Court, “would bring confusion and uncertainty in the administration of the criminal law.” *Id.*

92. *Id.*

93. *Id.* at 113 (Gray, J., dissenting).

It is our deep and settled conviction . . . that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact.⁹⁴

One hundred years later, there is barely a trace of this debate in the courts.⁹⁵ Whether this is due to the rise of an entirely more complex body of criminal law, the professionalization of lawyers, or the democratization of jury composition, the norm today is for judges to instruct juries that they must accept the law as stated by the court.⁹⁶ Critics charge that such limitations on the jury's power "appear to reflect a pervasive fear that our heterogeneous jurors, unbound by common principles of morality, education and dedication to the law, may deviate too far from judicial views of the rule of law unless tightly controlled."⁹⁷

Some jurors find this restriction frustrating and experience their lack of access to the law as belittling. "Being on a jury is a humiliating and degrading experience," griped one former juror: "The lawyers and judges assume that you are too stupid to understand anything but the most rudimentary legal concepts. Maybe if jurors were not treated like the annoying children that someone brought uninvited to the adult party, they would not go out on their own to get information."⁹⁸

Accordingly, many of the situations in which jurors have sought legal information over the Internet have reflected either confusion with the legal instructions they received, or dissatisfaction with a legal explanation. The reported cases thus feature jurors looking up legal

94. *Id.* at 114.

95. The literature, too, is primarily concerned with the jury's power to nullify the law and return a verdict of acquittal regardless of the evidence, rather than its power to mitigate the law. *See generally* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 253 (1996); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 881-82 (1999); Arie M. Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 960 (2006). As this Part focuses on the jury's power to determine the law, rather than reject the law outright, the issue of nullification is beyond the scope of this Article. *Cf.* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at xiii (1985) (contrasting instances of nullification which reflected the jury's view that the act charged was not unlawful with those instances where "the jury does not quarrel with the law but believes that the prescribed sanction is too severe").

96. *See, e.g.*, PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 3.01 (rev. ed. 2008) ("It is your duty to find the facts from all the evidence admitted in this case. To those facts you must apply the law as I give it to you. . . . It is your duty to apply the law exactly as I give it to you, whether you agree with it or not."); PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, § 1.01 Function of the Court and Jury (1998) ("You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone. Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them.")

97. *United States v. Polouizzi*, 687 F. Supp. 2d 133, 191 (E.D.N.Y. 2010).

98. CAC, Comment to *Jurors Turn to Web*, N.Y. TIMES (Mar. 17, 2009, 7:01 PM), <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html?sort=oldest&offset=10>.

definitions of such words as “attempt,” “distribution,” and “possess” in a narcotics case;⁹⁹ “great bodily injury” in a domestic violence case;¹⁰⁰ “deliberating” in a racketeering case;¹⁰¹ and “prudent” in a manslaughter case.¹⁰²

These cases are functionally similar to past cases where jurors referred to law books or dictionaries.¹⁰³ Unlike attempts to uncover extraneous factual information, which the courts consider presumptively prejudicial,¹⁰⁴ “[i]f a juror is exposed to extraneous information that involves merely supplementing the Court’s legal instructions it remains within the province of the judge to determine whether this conduct distorted the jury’s understanding of the law to the prejudice of the defendant.”¹⁰⁵ Few courts have thus declared mistrials in cases where jurors have researched the meaning of legal terms online.¹⁰⁶

2. *A Specific Example: Information Regarding Punishment*

One area, however, in which the legal information does introduce new facts, as opposed to merely offering a competing definition, is sentencing. Because of the generally acknowledged rule that “when a jury has no sentencing function, it should be admonished to ‘reach its verdict without regard to what sentence might be imposed,’”¹⁰⁷ most courts warn juries not to concern themselves with the consequences of their verdicts.¹⁰⁸

In *Shannon v. United States*, the Court characterized the “[i]nformation regarding the consequences of a verdict” as “irrelevant to the jury’s task,” reasoning that the division of labor in the criminal justice

99. *United States v. Bristol-Martir*, 570 F.3d 29, 36 (1st Cir. 2009).

100. *People v. Hamlin*, 89 Cal. Rptr. 3d 402, 445–46 (Ct. App. 2009) (finding error harmless because juror was unable to find any information online).

101. *United States v. Warner*, 498 F.3d 666, 667 (7th Cir. 2007).

102. *Tapanes v. State*, 43 So. 3d 159, 162 (Fla. Dist. Ct. App. 2010).

103. *See, e.g., United States v. Cheyenne*, 855 F.2d 566, 567 (8th Cir. 1988) (affirming conviction in case where juror made unauthorized use of a dictionary to look up the words “callous” and “wanton”); *United States v. Griffith*, 756 F.2d 1244, 1244–45 (6th Cir. 1985) (affirming conviction where juror looked up word “organize”).

104. *See Cheyenne*, 855 F.2d at 568.

105. *United States v. Estrada*, 45 F.3d 1215, 1226 (8th Cir. 1995).

106. *See, e.g., United States v. Warner*, 498 F.3d 666, 683–84 (7th Cir. 2007) (affirming district court’s denial of motion for new trial); *People v. Hamlin*, 89 Cal. Rptr. 3d 402, 445–46 (Ct. App. 2009) (affirming trial court’s denial of motion for new trial). *But see Tapanes*, 43 So. 3d at 162 (reversing trial court’s denial of motion for new trial as abuse of discretion).

107. *Shannon v. United States*, 512 U.S. 573, 579 (1994) (footnote omitted) (quoting *Rogers v. United States*, 422 U.S. 35, 40 (1975)).

108. *See, e.g., PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS* § 2.08 (2010) (“Do not concern yourself with what the penalty might be if you should find the defendant guilty.”); *ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL* § 27.07 inst. 1.01 (2000) (“You are not to concern yourself with possible punishment or sentence for the offense charged during your deliberations. It is the function of the trial judge to determine the sentence should there be a verdict of guilty.”).

system left the determination of guilt to the jury and the determination of punishment to the judge.¹⁰⁹ “Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion.”¹¹⁰

But the Court’s reasoning is unpersuasive. To say that jurors should not be concerned with the consequences of their verdict because it is not their place to be concerned with the consequences of their verdict is no more than circular. If the role of the jury involves not only “reliable fact-finding and republican self-government” but also “normative judgment,”¹¹¹ then the jury’s determination of whether a legislatively mandated sentence is appropriate is a critical part of that judgment.

Daniel Richman has observed that evidentiary doctrines that keep factual information away from juries tend to “rob verdicts of the power to communicate the community’s prosecutorial preferences.”¹¹² It can equally be said that keeping sentencing information away from juries robs verdicts of the power to communicate the community’s judgment of what constitutes just punishment. This deprives society and the legislature of valuable information about the community’s conception of just desserts, muddying the message of moral condemnation.¹¹³

But now sentencing ranges, including mandatory minimums and maximum penalties, are freely available online.¹¹⁴ This has given jurors the opportunity to obtain the information easily and share it with their fellow jurors. For the most part, the courts have been relatively quick to grant mistrials in these situations.¹¹⁵ In a DUI-death case in Mississippi, one of the jurors looked up the maximum and minimum penalties online

109. *Shannon*, 512 U.S. at 579.

110. *Id.*

111. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 122 (1997).

112. See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 979 (1997). “Every evidentiary rule that—for fear of jury misvaluation, ‘inflammation,’ or nullification—prevents the jury from learning something about a criminal defendant, his victim, or his crime tends to rob verdicts of the power to communicate the community’s actual prosecutorial priorities.” *Id.* at 976.

113. “No man who claims innocence can be condemned as guilty unless the community, via the jury, pronounces him worthy of moral condemnation.” AMAR, *supra* note 111, at 123. See Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 143 (2009) (arguing that the current system of inarticulate verdicts obscures the ability of jury verdicts to reflect the judgment of the community on a defendant’s blameworthiness).

114. Putting “drug sentences Illinois,” for example, into Google summoned up a handy chart of all sentencing ranges for every type of drug. See *Illinois Drug Laws*, ILLINOIS WESLEYAN UNIVERSITY, http://www.iwu.edu/ccs/Illinois_Drug_Laws.htm (last visited July 4, 2011).

115. There are exceptions. See *People v. Lister*, No. D047684, 2006 WL 3826658, at *4–5 (Cal. Ct. App. Dec. 29, 2006) (excusing a juror who had looked up penalty for drug crime and shared information with other jurors, and permitting deliberations to continue).

and the judge felt he had “no choice” but to grant a mistrial.¹¹⁶ In a North Carolina cocaine case, the jury foreman searched the state General Assembly’s website for the statute setting forth drug violations and penalties.¹¹⁷ He then brought a printout of the statute to court and sent the judge a note asking whether he was permitted to share it with his fellow jurors, explaining that “he felt the judge had not answered their questions clearly and he simply wanted to tell the others what the law was.”¹¹⁸ The judge reluctantly declared a mistrial.¹¹⁹

While the mistrials seem to be granted on the theory that the jury’s awareness of sentencing consequences will prejudice the defense, that is not necessarily the case.¹²⁰ Indeed, in a recent child pornography case before Judge Jack Weinstein of the Eastern District of New York, several jurors, when polled, explicitly told the judge that they would not have found the defendant guilty of receiving child pornography if they had known that he would be incarcerated for a mandatory minimum of five years.¹²¹ In a typically bold move, Judge Weinstein decided to grant a new trial on those charges on the basis that he should have informed the jury of the mandatory minimum sentence.¹²² Given the proliferation of mandatory minimum sentences and high advisory guidelines, providing jurors with sentencing information would, he wrote, “enable the jury to more effectively fulfill its historical Sixth Amendment role as the conscience of the community and guardian against government oppression.”¹²³

This is not to say that jurors finding this information out for themselves in a haphazard, unauthorized manner will lead to better results. On the contrary, it raises serious questions of arbitrariness, in that some juries will be informed and others will not.¹²⁴ But given the ease with which jurors can now access sentencing information,

116. Karen Nelson, *Judges Say Technology in Jurors’ Hands Threatens Court Cases*, BILOXI SUN HERALD, Apr. 25, 2010, available at 2010 WLNR 8530803 (quoting Circuit Court Judge Robert Krebs of Jackson County, MS).

117. See Keren Rivas, *Jury’s Conduct Leads to Mistrial: Foreman Brought in Copy of Law, Discussed it with Jurors*, TIMES-NEWS (Burlington, N.C.), Apr. 23, 2010, available at 2010 WLNR 8452132.

118. *Id.*

119. *Id.* (“[Judge] Allen said he regretted to have to do that but he felt he didn’t have any other choice.”).

120. See Milton Heumann & Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343, 344 (1983).

121. *United States v. Polouizzi*, 549 F. Supp. 2d 308, 320 (E.D.N.Y. 2008).

122. *Id.* at 449–50.

123. *United States v. Polouizzi*, 687 F. Supp. 2d 133, 197 (E.D.N.Y. 2010). In the interim, the Second Circuit vacated Judge Weinstein’s initial order and remanded the case. *United States v. Polouizzi*, 564 F.3d 142, 146 (2d Cir. 2009).

124. See Heumann & Cassak, *supra* note 120, at 371–86 (arguing that the random nature of juror awareness of mandatory minimum sentences raises issues of due process and equal protection).

reevaluating whether this information should not be provided to them in all cases becomes more pressing.

C. THE SECRECY OF JURY DELIBERATIONS

Jury verdicts are one of the most mysterious artifacts of the adversarial system. While the system has plenty to say about what the jury can and cannot know, a jury's verdicts, once rendered, are "largely immune from challenge or review."¹²⁵ Federal Rule of Evidence 606(b), and most of its state counterparts, forbid jurors from testifying about their deliberations or mental processes.¹²⁶ This rule was given an expansive reading by the Supreme Court in *Tanner v. United States*, which held that Rule 606(b) foreclosed a hearing into juror allegations that their fellow jurors had used marijuana, cocaine, and copious amounts of alcohol during the trial.¹²⁷ Congress has even made it a federal crime to record jury deliberations in a federal court.¹²⁸

Traditionally, the purpose of these rules is to encourage full and free discussion inside the jury room. As Justice Cardozo warned, "[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world."¹²⁹ In addition, some consider the inscrutability of jury verdicts to be a critical factor supporting the system's legitimacy.¹³⁰ By hiding the jury's reasons for its verdict and the methods by which it arrived at its decision, reducing all that has gone before to a series of "crisp and impregnable verdicts," the system promotes the public acceptability of its fact finding.¹³¹

125. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 579 (1997). In criminal cases, jury verdicts of acquittal are insulated from review by the Double Jeopardy Clause. See *United States v. Scott*, 437 U.S. 82, 91 (1978); *United States v. Ball*, 163 U.S. 662, 671 (1896). Verdicts of conviction can only be invalidated if a reviewing court, taking the facts established in the light most favorable to the government, determines that no reasonable jury could have convicted. *United States v. Howard*, 235 F.3d 366, 373 (8th Cir. 2000).

126. See FED. R. EVID. 606(b) (barring, with limited exceptions, testimony of jurors to impeach that jury's verdict).

127. 483 U.S. 107, 122–25 (1987).

128. 18 U.S.C. § 1508 (2006).

129. *Clark v. United States*, 289 U.S. 1, 13 (1933).

130. See Fisher, *supra* note 125, at 705 ("The jury's secrecy is an aid to legitimacy, for the privacy of the jury box shrouds the shortcomings of its methods."); Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1195 (1979) ("The trial system presents the jurors with an array of facts, assertions, contradictions, and ambiguities, and then obtains a verdict difficult to disagree with because the secrecy of the jurors' deliberations and the general nature of the verdict make it hard to know precisely on what it was based."). But see Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1187 (1995) (arguing that "inscrutability and muteness are not the essence of juries" and that juries should be invited to give reasons for their verdicts if they wish).

131. Fisher, *supra* note 125, at 581.

But the blogging jurors who post tidbits complaining about how they are going to have to “listen to the local riff-raff try and convince me of their innocence”¹³² do little to maintain the “crisp and impregnable” qualities of jury verdicts.¹³³ When even a superior court judge, empaneled as a juror in a murder case, thinks it appropriate to email his fellow judges to inform them, “[h]ere I am livin’ the dream, jury duty with [defense counsel] Mugridge and [prosecutor] Jenkins,”¹³⁴ the public confidence in the secret workings of the jury can reasonably be undermined. We know that jurors are human: they are picked because they are supposed to reflect the conscience of the community. But when the nameless, faceless jurors suddenly burst into the public consciousness with inane tweets, their mystique is jeopardized.

For the most part, the dispatches from the jury box seem fairly harmless and do not appear to implicate any substantial rights of the defendant.¹³⁵ In the federal corruption trial of former Pennsylvania state senator Vincent Fumo, one juror posted to his Facebook page at the conclusion of deliberations on a Friday, “Stay tuned for the big announcement on Monday everyone!”¹³⁶ The judge denied Fumo’s motion for a new trial.¹³⁷ In the mayor of Baltimore’s recent embezzlement trial, five of the jurors became Facebook friends during the trial and chatted about the case online.¹³⁸ In two separate cases in which defense counsel are currently attempting to subpoena errant jurors’ Facebook records, the only comments made public so far have been that the jurors found portions of the testimony boring.¹³⁹ Overall,

132. See Vesna Jaksic, *A New Headache for Courts: Blogging Jurors*, NAT’L L.J. (Mar. 12, 2007), <http://www.law.com/jsp/PubArticle.jsp?id=900005476512> (quoting what one prospective juror, who became jury foreman, wrote on his blog four days before jury selection).

133. Fisher, *supra* note 125, at 581.

134. E-mail from James Oppliger to Hilary Chittick et al. (Mar. 16, 2010, 3:51 PM), available at <http://fresnocriminaldefense.com/wp-content/uploads/2010/04/oppliger-emails-042010.pdf>. The defendant was quick to move for a new trial based on juror misconduct. See Pablo Lopez, *Judge/Juror Emails Stir Up Fresno Murder Verdict*, FRESNO BEE (Apr. 15, 2010), available at 2010 WLNR 7799009.

135. See Michael Bromby, *The Temptation to Tweet—Jurors’ Activities Outside the Trial* (Mar. 2010) (unpublished manuscript) (on file with Institute for Advanced Studies, Glasgow), available at <http://ssrn.com/abstract=1590047>. The author conducted a weeklong study of Twitter users who mentioned “jury duty” or “jury service.” *Id.* at 1. Although some of the users tweeted during their jury duty, most of the tweets were innocuous comments about boredom and lack of refreshments. *Id.* at 2–4. Only two of the users arguably touched on the merits. One tweeted, “Yay! Jury duty! . . . That guy looks so guilty!” *Id.* at 4. The other tweeted, “Week 8 of jury service. Now am in the not-so-fun part of returning a verdict. Are they guilty? [sic] I don’t knooooooow :(” *Id.* at 5.

136. United States v. Fumo, No. 06-319, 2009 WL 1688482, at *61–62 (E.D. Pa. June 17, 2009).

137. *Id.* at *67.

138. See Julie Bykowicz, *5 Dixon Jurors Recalled as Witnesses*, BALT. SUN, Dec. 30, 2009, at 2A. Ultimately, the mayor, Sheila Dixon, abandoned her motion for a new trial and pled guilty to a perjury charge. See Julie Bykowicz, *Dixon Resigns*, BALT. SUN, Jan. 7, 2010, at 1A.

139. See Andy Furillo, *Defense in Sacramento Assault Case Subpoenas Juror’s Facebook Postings*, SACRAMENTO BEE, Nov. 18, 2010, <http://www.sacbee.com/2010/11/18/v-mobile/3194312/defense-in-sacramento-assault.html> (discussing a motion for new trial that quoted a juror’s postings stating “can it

these incidents just appear to serve as new, if flimsy, arguments on appeal.¹⁴⁰

On the other hand, at least one social media posting has made clear that the juror had made up her mind before the case was over. When a juror from Detroit posted that it was “gonna be fun to tell the defendant they’re GUILTY” on her Facebook page before the defense case had even started, the judge removed her from the jury, fined her \$250, and ordered her to write a five-page essay on the Sixth Amendment.¹⁴¹

In a murder trial in Ventura County, California, the jury foreman was held in contempt for blogging about the trial during the taking of evidence and deliberations, posting a photograph of the murder weapon, and hosting a chat room in which people could ask him questions about the case.¹⁴² In a burglary case in San Diego, the defendant’s conviction was vacated and remanded for a hearing on juror misconduct after it was discovered that the jury foreman had blogged about his fellow jurors and their deliberations.¹⁴³ The foreman, who had also failed to mention that he was a lawyer,¹⁴⁴ wrote about the proceedings in detail, complete with descriptions of the physical appearance and mannerisms of his fellow jurors,¹⁴⁵ and a blow-by-blow account of the deliberations.¹⁴⁶ On remand, however, the judgment was reinstated on the grounds that the state had rebutted the presumption of prejudice.¹⁴⁷

There appear to be several issues at stake here. The first is that juror blog postings, status updates, and tweets might chill robust discussion inside the jury room. Jurors could potentially feel inhibited from participating too actively, out of concern that they might become the

get any more BORING (than) going over piles and piles of (cell) phone records . . . uggggghhhhh”); Alexandra Zayas, *No Friends of Justice*, ST. PETERSBURG TIMES, Oct. 29, 2010, at 1B (describing how the jury foreman in Florida rape case, whose Facebook records are now under subpoena, “updated her Facebook page calling testimony ‘boring, boring, boring’” while trial was ongoing).

140. Compared to the subsequent revelation that another of the jurors in Vincent Fumo’s trial learned that he had previously been charged and convicted of corruption in 1980, the “Stay tuned for the big announcement on Monday everyone!” concern seems relatively trivial. See Robert Moran, *Fumo Lawyers File Brief Seeking New Trial*, PHILA. INQUIRER, Feb. 11, 2011, at B11.

141. See Ed White, *Juror Hadley Jons Punished for Posting Verdict on Facebook*, HUFFINGTON POST (Sept. 2, 2010), http://www.huffingtonpost.com/2010/09/02/hadley-jons-juror-punished_n_703877.html.

142. Raul Hernandez, *Juror Held in Contempt for Blog of Murder Trial*, VENTURA CNTY. STAR, Jan. 23, 2008, <http://www.vcstar.com/news/2008/jan/23/juror-held-in-contempt-for-blog-of-murder-trial/>.

143. *People v. McNeely*, No. D048692, 2007 WL 1723711, at *2 (Cal. Ct. App. June 14, 2007).

144. *Id.* at *3 n.3 (quoting the juror’s blog, in which he wrote, “I quickly iterated my occupation (project manager for technology company, which is more neutral than lawyer, don’t ya think?)”).

145. The cast of characters included “Emily, the pretty teacher to my left,” who spoke “softly but passionately,” Amanda, “the shy, young girl across the table,” and the foreman’s antagonist Brad, a “confident, muscular skinhead character with a carefully shaven goatee,” who the foreman “had unease about since seeing him lope down the hallway on day one.” *Id.* at *3.

146. *Id.*

147. See *People v. McNeely*, No. D052606, 2009 WL 428561, at *1 (Cal. Ct. App. Feb. 23, 2009).

subject of a fellow juror's blog post.¹⁴⁸ There is, as of yet, no evidence that this has occurred.

The second issue is that jurors could use the Internet to solicit outside opinions. While a serious violation of the jurors' oath, this seems to have occurred only a handful of times. In one case that enchanted the British tabloids, a juror on a sex abuse case couldn't decide whether the defendants were guilty.¹⁴⁹ During deliberations, she posted the salient facts of the case on her Facebook page and wrote, "I don't know which way to go, so I'm holding a poll."¹⁵⁰ Some of her Facebook friends replied with guilty verdicts.¹⁵¹ In a murder trial in Indiana, a juror posted the following status update on his Facebook page: "jury duty; day one complete."¹⁵² One of his friends commented, "Guilty, next."¹⁵³ The juror was admonished by the court, but not dismissed, and the trial continued to a guilty verdict.¹⁵⁴

The third is that dispatches from the "black box" of the jury room¹⁵⁵ subvert the gravity of the process.¹⁵⁶ This appears to mirror the concerns some commentators have raised about postverdict interviews with jurors, that "if the media continue to reveal the contents of jury deliberations, there is a genuine risk that the authority of jury verdicts will decline."¹⁵⁷

148. See, e.g., *McNeely*, 2007 WL 1723711, at *4 (jury foreman complained on his blog that by threatening to vote not guilty on one of the counts, "skinhead Brad threatened to torpedo" two of the other counts "in his quest for tyrannical jurisprudence").

149. See Guy Patrick, *Juror Axed for Verdict Poll on Net*, SUN (U.K.), Nov. 24, 2008, <http://www.thesun.co.uk/sol/homepage/news/article1963544.ece>.

150. *Id.*

151. See *id.* The juror was dismissed from the case, and the trial continued with eleven jurors. See *id.*

152. Lydia X. McCoy, *Starks Juror Admonished*, EVANSVILLE COURIER & PRESS, Oct. 10, 2009, at A1.

153. *Id.*

154. *Id.*

155. Although so commonplace as to be almost a cliché, the origins of the phrase are obscure. The earliest use of the expression I was able to find was by Thomas Cowan in 1963. "If we were to adopt the lingo of the system theorists for a moment we could put the matter this way," he wrote. "There is an immense and complicated Input into the judicial Decision-Maker which we can observe. We also can observe the Output in the form of the Decision and all the effects of it that we care to observe. The judicial Decision-Maker is the Black Box between Input and Output." Thomas A. Cowan, *Decision Theory in Law, Science, and Technology*, 17 RUTGERS L. REV. 499, 508 (1963). The earliest court decision using the term appears to be *Freshwater v. Booth*, 233 S.E.2d 312, 318 (W. Va. 1977).

156. This concern was aptly lampooned by the comedian Steve Martin when he was called for jury duty. On December 20, 2010, his Twitter followers were treated to the following updates:

REPORT FROM JURY DUTY: defendant looks like a murderer. GUILTY. Waiting for opening remarks.

... REPORT FROM JURY DUTY: guy I thought was up for murder turns out to be defense attorney. I bet he murdered someone anyway.

... REPORT FROM JURY DUTY: Prosecuting attorney. Don't like his accent. Serbian? Going with INNOCENT. We're five minutes in.

Brian Grow, *Live from the Jury Box, It's Steve Martin!*, REUTERS, Dec. 22, 2010, available at <http://www.reuters.com/article/2010/12/22/us-stevemartin-twitter-idUSTRE6BL34O20101222>.

157. Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Post-Verdict Interviews*, 1993 U. ILL. L. REV. 295, 297.

If the linchpin of the jury's legitimacy is that their verdicts are opaque, so all mistakes are hidden from sight, the fact that increasing numbers of jurors are blogging may change the calculus that keeps jury decisionmaking secret.¹⁵⁸ Whether we are really ready to see what is behind the curtain—the petty rivalries, potential misapprehension of evidence, and irrelevant matter the jurors actually considered—is open to question. But if jurors themselves begin to expose their deliberative process, possibly even in real time, there could be a genuine challenge to the traditional view that jury verdicts should never be explained.

D. IMPROPER CONTACT WITH JURORS

Unlike the foregoing set of rules, norms barring improper contact are uncontroversial—indeed, it is hard to imagine any set of circumstances in which *ex parte* communications between jurors and parties would be a positive thing. The reason “[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden,”¹⁵⁹ is simply because such encounters are not subject to “confrontation, cross-examination, or other safeguards” fundamental to a fair trial.¹⁶⁰ Any such communications will “invalidate the verdict, unless their harmlessness is” demonstrated.¹⁶¹

Accordingly, in several early cases, the Court reversed convictions where an officer of the court made comments to the jury regarding the defendant's guilt. In *Mattox v. United States*, a bailiff said in the presence and hearing of the jury, “This is the third fellow [the defendant] has killed.”¹⁶² The Court held that the bailiff's misconduct, given the fact that he was in charge of the jury and that the defendant was on trial for murder, could not “have been otherwise than prejudicial,” and directed that a new trial be granted.¹⁶³ In *Parker v. Gladden*, a bailiff stated to one of the jurors, referring to the defendant, “Oh that wicked fellow[], he is guilty.”¹⁶⁴ Regardless of whether the bailiff's comments actually had a prejudicial effect, the Court wrote, “we believe that the unauthorized conduct of the bailiff ‘involves such a probability that prejudice will result that it is deemed inherently lacking in due process.’”¹⁶⁵

158. “Maybe the law needs to be amended to accommodate blogs,” wrote a blogging juror. “No doubt this sort of thing happened and happens a lot on a smaller scale (juror to friend, relative over dinner), and no one learns of it.” John Eligan & Rebecca White, *A Juror's Blog Chronicle Stirs an Age-Old Question*, N.Y. TIMES, Oct. 17, 2010, at A32.

159. *Mattox v. United States*, 146 U.S. 140, 150 (1892).

160. *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (per curiam).

161. *Mattox*, 385 U.S. at 150.

162. *Id.* at 142.

163. *Id.* at 151.

164. 385 U.S. at 363.

165. *Id.* at 365 (quoting *Estes v. Texas*, 381 U.S. 532, 542–43 (1965)). Justice Harlan, unconvinced that the statements of the “apparently Elizabethan-tongued bailiff” had any prejudicial effect, dissented. *Id.* at 367 (Harlan, J., dissenting).

Apart from their prejudicial character, statements such as these contravene the rule discussed above,¹⁶⁶ that “the ‘evidence developed’ against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.”¹⁶⁷ In addition, overly cozy relationships between jurors and parties can undermine impartiality. In the notorious example of *Turner v. Louisiana*, a jury was sequestered during a three-day capital murder trial and in the charge of several sheriff’s deputies.¹⁶⁸ The deputies drove the jurors to and from their hotel, ran errands for them, had meals with them, and made phone calls for them.¹⁶⁹ Two of these deputies were also the State’s principal witnesses against Turner.¹⁷⁰ As the Court observed, this was not a brief encounter, but “a continuous and intimate association throughout a three-day trial.”¹⁷¹ Given the “extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution,” the Court found that Turner had been deprived of a fair trial.¹⁷²

Compared to these cases, reported instances of online contact have been fairly mild.¹⁷³ Where once a juror might have sent a love letter to the prosecutor, enclosing a photo and a poem,¹⁷⁴ she now employs the more expedient process of sending a friend request. Some courts have nonetheless taken these contacts seriously. In West Virginia, the fraud conviction of a sheriff’s deputy was reversed on appeal after it was discovered that one of the jurors had “friended” the defendant on Myspace shortly before the trial, a fact she failed to mention during voir dire.¹⁷⁵

166. See *supra* Part I.A.1.

167. *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965).

168. *Id.* at 467–68.

169. *Id.* at 468.

170. *Id.* at 467–68.

171. *Id.* at 473.

172. *Id.*

173. As Nancy King points out, some forms of improper contact were probably more prevalent in earlier times, when jurors sometimes had to share accommodations with the parties. See King, *supra* note 28, at 2709 n.131 (citing *Louisville & Nashville Railway Co. v. Turney*, 62 So. 885, 888–89 (Ala. 1913), in which the jurors shared a bed, then a room at a boardinghouse, with the plaintiff during trial).

174. See *United States v. Beltempo*, 675 F.2d 472, 481 (2d Cir. 1982) (discussing a juror who wrote a love letter during trial to an Assistant U.S. Attorney, inviting her to lunch or dinner).

175. See Ry Rivard, *Web Stirs Problems in Jury Selection*, CHARLESTON DAILY MAIL, June 18, 2010, at 1A. Presumably the defendant had not mentioned this fact to his counsel either, in the hope that the juror would vote in his favor. This is not unprecedented. In a case that occurred years before the advent of the Internet, a juror met the defendant outside the courthouse during a trial recess, accompanied him to his home, met the defendant’s wife and children, and had a beer. *State v. Adams*, 555 P.2d 358, 359–60 (Ariz. Ct. App. 1976). The court found that the defendant had suffered no prejudice from the incident, since he deliberately did not mention it to the judge or his lawyer until after his conviction, apparently in the belief that the friendly juror would vote to acquit. *Id.* at 361.

In contrast, a Bronx court refused to grant a new trial in a criminal negligence case where a juror sent a Facebook friend request to a firefighter witness after deliberations began.¹⁷⁶ The firefighter, not recognizing the juror by name, failed to respond.¹⁷⁷ The day after the verdict, the juror renewed her request and sent the firefighter a message explaining who she was; the two then became Facebook friends.¹⁷⁸ The court refused to grant a new trial on grounds of jury misconduct, on the basis that the improper conduct of the juror did not prejudice a substantial right of the defendants.¹⁷⁹ Although the court noted that the juror's conduct was a serious breach of her obligations as a juror, it rejected the defense's argument that the juror's possibly romantic "feelings" towards the firefighter tainted the verdict.¹⁸⁰

Finally, there are now more ways to "bump into" parties inadvertently. For example, a juror on a medical malpractice case was sent a "match" by an online dating site to which she subscribed; when she checked the profile, the proposed suitor turned out to be the medical expert whose testimony she had recently heard.¹⁸¹ The more people are linked through a complex of contacts, listservs, dating databases, and friend pages, the more likely these chance encounters become, causing not only the embarrassment of seeing trial participants in unexpected contexts but also possible prejudice to the parties. Who could take an expert seriously after learning that he is looking for "that special someone?"

It is true that so far, such friend requests and dating matches have not presented a serious threat to the fairness of the proceedings. Nonetheless, technology has facilitated these types of impermissible contacts, lowering the embarrassment factor, making it easier to get in touch, and encouraging secrecy, at least so long as both parties keep the encounter quiet. Studies suggest that computer-mediated communications increase the phenomenon of disinhibition and encourage poor judgment.¹⁸² If this is so, then improper communications between jurors and parties could be a growing problem.

176. *People v. Rios*, No. 1200/06, 2010 WL 625221, at *2 (N.Y. Feb. 23, 2010). The case arose out of the deaths of two New York firefighters. *Id.*

177. *Id.*

178. *Id.* at *3.

179. *Id.* at *3-4. The court did, however, set aside the jury's verdict on the basis of insufficiency of the evidence. *Id.* at *14.

180. *Id.* at *4 ("Defendants failed to elicit any testimony to establish what exactly Ms. Krell's 'feelings' were or how any 'feelings' implicit in her friend request affected the jury's deliberations in any way.").

181. See *Talk of the Nation*, *supra* note 59. Emily, a caller into the show, had recently been a juror in a medical malpractice case when the medical expert from the trial "showed up in my online dating site inbox as somebody I should date." *Id.* She noted that the trial was over at that point, but that "it could have very well happened during the trial." *Id.*

182. See *infra* notes 239-42 and accompanying text.

E. THE OTHER SIDE OF THE COIN: LAWYERS INVESTIGATING JURORS

Jurors themselves are subject to a shocking amount of online intrusion. The value of the Internet, particularly social networking sites, in providing a much more intimate view of the jurors has not escaped the attention of trial lawyers.¹⁸³ Background checks on jurors are becoming commonplace, particularly in high-profile or violent crime cases.¹⁸⁴ In some cases, this uncovers juror dishonesty,¹⁸⁵ but most of the time it is simply a way for lawyers to mine for information that they can use to exercise peremptory challenges or to increase their jury appeal.¹⁸⁶ Some lawyers are coming to court for jury selection armed with a phalanx of paralegals to run each juror's name through a variety of social media searches in real time.¹⁸⁷

Ever more intrusive searches are recommended as an enhancement to jury selection, including searching the county sheriff's online arrest records, "obtaining the exact dollar amounts and dates of a juror's recent contributions to political campaigns," and using Google Street View to see jurors' front yards.¹⁸⁸ As one trial lawyer gloated, "[I]magine the potential impact of a well-placed metaphor in your closing argument tailored to a juror's interests or social views as described on Facebook or Twitter."¹⁸⁹

183. See Christopher B. Hopkins, *Internet Social Networking Sites for Lawyers*, 28 TRIAL ADVOC. Q. 12, 13 (2009).

184. See Anne Constable, *Background Checks of Jurors Routine*, NEW MEXICAN, Sept. 24, 2009, at A4. One trial consultant was quoted in the article as saying that "if this became standard practice, you would do great damage to the willingness of most citizens to participate in jury duty." *Id.*

185. See, e.g., Julie Kay, *Vetting Jurors via MySpace: Social Websites Contain a Trove of Data for Attorneys*, in LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES: LITIGATION 87, 89 (2009) (citing an incident in Jose Padilla case in which lawyers discovered that a juror had lied on her questionnaire by saying she had no experience with the criminal justice system, whereas in fact she was being investigated for malfeasance).

186. See, e.g., Hopkins, *supra* note 183, at 13 ("Even if a jury is selected in a matter of hours, continued Internet research during the trial may reveal interests, backgrounds, and social/political opinions which should help a lawyer target themes of the case and closing argument to resonate with that particular jury."); Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, REUTERS, Feb. 17, 2011, available at <http://us.mobile.reuters.com/article/technologyNews/idUSTRE71G4VW20110217> (noting that online vetting can enable lawyers to "bypass court-imposed restrictions on voir dire").

187. See, e.g., Stephanie Francis Ward, *Lawyer Uses Web to Sort Through Jury Pool*, ABA J. MAG., July 2010, available at http://www.abajournal.com/magazine/article/tech_check/. One trial lawyer recommends getting an extra copy of the prospective juror list for the paralegal, and that "[w]hile the judge and the plaintiff's lawyer begin questioning the potential jurors, the paralegal should sit unnoticed in the corner or in the hallway with the laptop and run the names on the juror list" through a series of Internet searches. Hopkins, *supra* note 183, at 13.

188. Hopkins, *supra* note 183, at 13.

189. *Id.* Hopkins also suggests seventeen Internet searches for counsel to run on prospective jurors, including Google Street View, photosharing sites, and blog searches, and then notes, "since the foregoing seventeen Internet searches are fairly invasive, a careful lawyer should avoid overt references to a juror's personal information during jury selection and trial." *Id.* at 14; see also Kay, *supra* note 185, at 92 (describing lawyer who discovered from a juror's Myspace page that one of his favorite books was *The Seven Habits of Highly Effective People* and wove the reference into his closing

What is particularly objectionable is the fact that this process is conducted by stealth. As one jury consultant put it, “You don’t want to tip off jurors so that they know you’ve been investigating them.”¹⁹⁰ As these tactics become standard,¹⁹¹ one wonders how long prospective jurors will remain unaware of them. If jurors begin to realize that jury duty entails not only the inconvenience of taking time off of work and other obligations¹⁹² but also involves wholesale intrusion into their online lives, it might do “great damage to the willingness of most citizens to participate in jury duty.”¹⁹³ Conversely, jurors may feel entitled to do a bit of research of their own just to balance the scales.

II. CURRENT LEGAL RESPONSES—AND THEIR SHORTCOMINGS

As this issue is still emergent, legal responses are in their early stages and rely primarily on jury instructions. Requiring jurors to turn in their cell phones in the courtroom does not address what happens when jurors go home at night. Sequestration is impractical, expensive, and would make jury duty even more unpopular than it is now. Ultimately, this Part argues, given the compelling nature of the Internet, none of these responses may be sufficient to turn the tide. Given the outlook for the future, it may take more to convince jurors to put down their iPhones than simply telling them to stop.

A. JURY INSTRUCTIONS

The first response that comes to mind when addressing any problematic jury behavior is simply to tell jurors not to do it. As one state court observed, “[G]iven the simplicity, speed, and scope of Internet searches, allowing a juror to access with ease extraneous information about the law and the facts, trial judges are well advised to reference Internet searches specifically when they instruct jurors not to conduct their own research or investigations.”¹⁹⁴

Most jurisdictions have done exactly that.¹⁹⁵ In December 2009, the Federal Judicial Conference issued proposed model jury instructions that admonished jurors not to research the case online and to refrain from engaging in any social networking:

argument).

190. Kay, *supra* note 185, at 92.

191. This strategy is not limited to defense lawyers. See Laura B. Martinez, *District Attorney to Use Facebook Profiles in Jury Selection*, BROWNSVILLE HERALD, Jan. 17, 2011, <http://www.brownsvilleherald.com/articles/district-121729-attorney-use.html>.

192. See Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 61–62 (2001).

193. See Constable, *supra* note 184 (quoting trial consultant).

194. *Commonwealth v. Rodriguez*, 828 N.E.2d 556, 568 n.11 (Mass. App. Ct. 2005).

195. A recent survey of state court judges revealed that fifty-six percent of judges “report routine juror instructions that include some component about new media use during trial.” CCPIO REPORT, *supra* note 30, at 66.

You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case.¹⁹⁶

Many states have done the same,¹⁹⁷ and a number of other jurisdictions are considering similar instructions.¹⁹⁸ There have also been calls for sterner, more frequently repeated instructions,¹⁹⁹ or a requirement that jurors sign declarations, under penalty of perjury, that they will not conduct any online research.²⁰⁰ Nonetheless, this is unlikely to be the end of the matter.

One argument against instructions is that they do not work: in a sizeable minority of cases in which a juror's Internet research was revealed, the juror had conducted the research in flagrant disregard of the judge's instructions.²⁰¹ "I don't know how much clearer I can say it,"

196. JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (2009).

197. *See, e.g.*, HAW. PATTERN JURY INSTRUCTIONS—CRIMINAL § 2.01 (2010) ("You are not permitted to search the Internet, for example, using Google, or any other search engine or web site to look for information about this case or about the participants in the trial . . . Do not share information, opinions, or anything else about this case with others, personally or in writing, or through computers, cell phone messaging, personal electronic and media devices or other forms of wireless communications. This includes, for example, communicating about this case through e-mail, instant messaging, tweeting, text messaging, or using the Internet in any way."); MONT. CRIMINAL JURY INSTRUCTIONS § 1-101 (2009) ("You must not consult any books, dictionaries, encyclopedias, research online, using Google, Yahoo, Bing, or any other Internet search engine."); N.J. CIVIL JURY CHARGE § 1.11C (2010) ("You . . . should not attempt to communicate with others about the case, either personally or through computers, cell phones, text messaging, instant messaging, blogs, Twitter, Facebook, Myspace, personal electronic and media devices or other forms of wireless communication."). The National Center for State Courts lists an additional twelve states—Arizona, California, Connecticut, Florida, Indiana, Michigan, New York, Ohio, South Carolina, Utah, Washington, and Wisconsin—that specifically reference social media in their jury instructions. *Social Media and the Courts*, NAT'L CTR. FOR STATE CTS., <http://www.ncsc.org/topics/media-relations/social-media-and-the-courts/state-links.aspx?cat=Jury%20Instructions%20on%20Social%20Media> (last visited July 4, 2011).

198. *See, e.g.*, *A Jury of Your TWITS: Social Media Wreaks Havoc in the Courtroom*, WINNIPEG FREE PRESS, Jan. 9, 2011, at A20 (noting arguments for judges in Canada to devise guidelines to address juror use of social media); Lorraine Davidson, *Googling Jurors Who Research Cases at Home Put Fair Trials in Jeopardy*, TIMES (U.K.), Oct. 21, 2009, at 3 (describing calls for jury instructions in Scotland); *Twitter "Threatens" Trial by Jury*, DAILY TELEGRAPH (London), Nov. 20, 2010, available at 2010 WLNR 23153821 (describing demand from Lord Chief Justice that judges inform jurors "in unequivocal terms from the very outset of trial" of the consequences of misusing the Internet).

199. *See* Douglas L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet*, 21 JURY EXPERT 14, 20 (2009).

200. *See id.*; *see also* Cheryl Miller, *New Bill Targets Web-Surfing Jurors*, S.F. RECORDER, Feb. 22, 2010, at 1 (describing recent California legislation penalizing jurors who access external information).

201. *See, e.g.*, Carmen Juri, *Mistrial Declared in Killing of Boy, 13 Jurors Saw Story on Star-Ledger Website*, STAR-LEDGER (Newark, N.J.), May 25, 2010, at 30 (describing case in which jurors had viewed

fumed one state court judge after declaring a mistrial in response to a juror researching the penalty online. “We just lost 3 1/2 days of court time because somebody couldn’t follow my instructions.”²⁰²

Courts generally operate on the assumption that jurors will abide by legal instructions.²⁰³ However, as Justice Scalia has recognized, that rule “is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”²⁰⁴

The psychological literature and empirical studies show that jurors frequently misunderstand instructions.²⁰⁵ As Jerome Frank memorably wrote, “[T]welve men can easily misunderstand more law in a minute than the judge can explain in an hour.”²⁰⁶ The Internet, with its virtual connections that seem almost—but not quite—real, confuses jurors further. The juror in West Virginia who had “friended” the defendant on Myspace shortly before trial²⁰⁷ did not appear to understand that the judge’s admonition to disclose any relationship with the parties applied to her. “I just didn’t feel like I really knew him,” she explained.²⁰⁸

news article on a cell phone in the jury room and the judge ruled that they were not reliable and could not follow the instructions of the court); John Monk, *Juror Misconduct Alleged in Federal Cockfighting Case*, HERALD (Rock Hill, S.C.), May 27, 2010, available at 2010 WLNR 10891869 (“[O]ne juror had defied the judge’s numerous orders not to surf the Internet to do independent research about the case.”); Siegel, *supra* note 41 (“[O]ne juror had been doing online research into the case despite the judge’s order not to read news accounts or otherwise investigate the crime.”); see also Usman Azad, *Internet Map Subject of Appeal*, KALGOORLIE MINER (W. Austl.), Nov. 23, 2010, at 3 (describing how juror in murder case had downloaded aerial maps of murder location—and made fourteen copies to hand out to fellow jurors—despite fact that judge had “specifically warned the jury not to go ‘on the internet and try to find out something . . . about the case’”).

202. Rivas, *supra* note 117 (quoting Superior Court Judge J.B. Allen, Jr.).

203. See *United States v. Olano*, 507 U.S. 725, 740 (1993) (noting that courts presume that jurors follow instructions from the court); *Rodriguez v. Colorado*, 498 U.S. 1055, 1058 (1991) (Marshall, J., dissenting) (“As a matter of convention, we presume that jurors follow jury instructions.”).

204. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

205. See, e.g., Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469, 475 (2006) (reviewing prior studies with a combined 8,474 participants).

206. *Skidmore v. Balt. & Ohio R.R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948). This continues to be a problem today. The jurors in the corruption trial of former Illinois governor Rod Blagojevich were overwhelmed by the complexity of the instructions they received. “It was like, ‘Here’s a manual, go fly the space shuttle,’” complained one of the jurors of the over 100-page tome they were given. Monica Davey & Susan Saulny, *Jurors Fault Complexity of the Blagojevich Trial*, N.Y. TIMES, Aug. 19, 2010, at A1.

207. See *supra* note 175 and accompanying text.

208. Rivard, *supra* note 175; see also Keene & Handrich, *supra* note 199, at 16 (“[I]n virtually every case [of juror misconduct on the Internet], the violator is usually very sincere that their intent was innocent [and that] they did not perceive what they were doing as being a material violation of the rules.”).

Worse, these studies suggest that jurors do not always follow instructions, even when they do understand them.²⁰⁹ One problem is that jurors may resist instructions when those instructions clash with their innate sense of justice.²¹⁰ Jurors want to do the right thing, and seeking out extrajudicial information is sometimes their way of making sure that they reach the right result.²¹¹ While the law defines a fair trial within a due process model that seeks to protect the individual from illegitimate conviction through procedural safeguards,²¹² “due process is not the jury’s main concern. Ask any juror what his or her objective is, and the answer will be to come up with the *right* decision.”²¹³

Another problem is that jurors may react negatively to what they perceive to be a restriction on their decisionmaking freedom.²¹⁴ This can make them value the forbidden evidence or practice all the more, a process referred to as psychological reactance.²¹⁵ In combination with some jurors’ distrust of lawyers,²¹⁶ this can goad potential jurors into wanting to verify facts for themselves, regardless of instructions.

B. CONFISCATION, SEQUESTRATION, FINES AND CONTEMPT

While a comprehensive solution would appear to be simply to separate jurors from their electronic devices, this is unlikely to be effective. Because so few trials proceed from jury selection to verdict in a

209. See, e.g., Greene & Dodge, *supra* note 71, at 76 (finding that judge’s limiting instructions were ineffective in guiding the jurors’ use of prior criminal record evidence); Steblay, *supra* note 205, at 487 (“[I]t is clear that judicial instructions do not effectively eliminate jurors’ use of inadmissible evidence.”); Wissler & Saks, *supra* note 71, at 47 (finding that presentation of a defendant’s prior criminal record affects the likelihood of conviction, which a judge’s limiting instruction would not fix).

210. See Steblay, *supra* note 205, at 473. The author explains that most jurors are motivated to reach a just verdict, therefore “jurors can be expected to rely on inadmissible evidence, despite instruction to the contrary, if it is seen as reliable and probative from the juror’s perspective.” *Id.*

211. See SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 111 (1988). They add, “Precisely because juries want to make correct decisions, they find it difficult to resist the temptation to use information that is not in the trial record.” *Id.* The juror who caused a mistrial because she researched retinal detachment, see *supra* note 51, was not motivated by an improper purpose, said her lawyer: “Her sole intent was being the most conscientious juror that she could be. It just happened to get sidetracked a little.” Michael R. Sisak, *Support for Juror No. 11*, *THE CITIZEN’S VOICE* (Wilkes-Barre, Pa.), Jan. 16, 2011, <http://citizensvoice.com/news/support-for-juror-no-11-1.1090981#axzz1QLqdbSmu>.

212. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 163–68 (1968).

213. KASSIN & WRIGHTSMAN, *supra* note 211, at 110. The authors add that, “as a general rule, the jury defines justice in terms of the accuracy of an outcome.” *Id.*

214. See *id.* at 109. “Telling the jury that it must disregard evidence is, to them, a form of censorship,” the authors write; “[w]hen information is banned, people assume it is important and are persuaded by it.” *Id.*

215. See SHARON S. BREHM & JACK W. BREHM, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* 2–4 (1981).

216. Green, *supra* note 19, at 703 (“[Exclusionary evidentiary rules] have the unintended, and perhaps ironic, result of encouraging the jury’s distrust of lawyers. The rules do so by fostering the perception that lawyers are deliberately withholding evidence.”).

single day,²¹⁷ even jurors who must turn in their cell phones when they enter the courthouse can always check their computers when they go home at night.

The same problem applies to sequestration. While there have been a few calls for sequestration of the jury, particularly from editorial writers in need of a punchy headline,²¹⁸ such drastic measures are prohibitively expensive and impractical.²¹⁹ Even setting aside the expense, it seems unwise to make jury service more unpalatable than it is now.²²⁰ Jury service is a funny thing: we sing its praises as an opportunity for democratic participation, as a bulwark of individual liberty, as the crown jewel in our criminal justice system,²²¹ but then the summons arrives and our enthusiasm evaporates. There is little doubt that if jurors were forced to sit idly in courtrooms, unable to contact work except by payphone, and then were separated from friends and family for the duration of every trial, large numbers of people would refuse to participate.

A few courts, particularly in England, have held jurors in contempt, or subjected them to fines.²²² While this could serve as an effective

217. See King, *supra* note 28, at 2709 (noting that most felony trials take three days or longer to complete).

218. For some reason, this seems to be a particularly popular option in Australia. See, e.g., Chris Nyst, *www.Verdict Inadmissible*, GOLD COAST BULL. (Austl.), June 5, 2010, at 32 (“Perhaps the only answer left will be to . . . cloister[] our juries safely behind closed doors, with mobile phones and other access to the internet strictly denied.”); Op-Ed., *Protect Our Jury System*, SUNDAY HERALD SUN (Austl.), May 9, 2010, at 90 (“[I]f jurors cannot be trusted to distance themselves from technology while judging their peers, perhaps consideration should be given to isolating, or sequestering, jury members until the trial is completed.”).

219. See Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 105–09 (1996) (noting that sequestration poses a “significant” financial burden on the state and adverse psychological effects on jurors); see also King, *supra* note 28, at 2713–14 (tracing the demise of sequestration as a method of juror control).

220. This fact has been acknowledged for over 150 years. See, e.g., *Stephens v. People*, 19 N.Y. 549, 554 (1859) (“[I]f the ancient rule forbidding the separation of jurors, during a trial, should be enforced at the present day, the public would lose the services of the most reliable jurors.”).

221. See, e.g., *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part) (referring to the right to jury trial as “the spinal column of American democracy”); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (“A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.”); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218 (1995) (observing that jury service has been considered since the time of the Founders “one of the fundamental prerequisites to majoritarian self-government”).

222. See, e.g., Nigel Freedman, *Sussex Juror Fined for Researching Court Case on Internet*, ARGUS (U.K.), Sept. 17, 2009, http://www.theargus.co.uk/news/4632812.Sussex_juror_fined_for_researching_court_case_on_internet/. In the United Kingdom, the Contempt of Court Act of 1981 provides that “obtain[ing], disclos[ing] or solicit[ing] any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings” is an offense punishable by up to two years imprisonment. Contempt of Court Act, 1981, c. 49 §§ 8, 14 (Eng.). This did not stop a juror in the perjury trial of a Scottish politician from ranting on her Facebook page that her fellow jurors were a bunch of “scumbags” for finding the politician guilty. See Jonathan Brocklebank, *Sheridan Case Juror “Could Face Jail” over Online Rant*, DAILY MAIL (U.K.), Jan. 10, 2011, available at 2011 WLNR 537489.

deterrent, it might also lead to less reporting. There is reason to suspect widespread underreporting of juror misconduct, as it does not come to the attention of the court in the first place unless a juror comes forward and admits her own wrongdoing or informs on one of her colleagues.²²³ Most people try to avoid overt conflict,²²⁴ and if jurors knew they were potentially inflicting financial consequences on each other by alerting the court, they might be more hesitant to come forward. On balance, it seems that any marginal deterrent value would be outweighed by the potential for deliberations to be adversely affected by increased mistrust and resentment among jurors.

C. THE SIREN SONG OF THE WEB

The main problem with any of the suggested solutions is that they do not take sufficient account of the compelling nature of the Web. The Internet has a hold on people that traditional media never had. As one psychologist put it, “Being highly interactive, computers are much more captivating than passive media such as television.”²²⁵ In addition, because it facilitates interaction across time and obliterates distance, “the virtual world presents an unreal universe comprised of instant connection and gratification.”²²⁶

It is no exaggeration to say that, in the past decade, the Internet has become “a defining characteristic of our society.”²²⁷ The Internet itself underwent a profound change even more recently when it transitioned from its first iteration as an informational and commercial platform to the interactive and participatory world that is Web 2.0. The launch of Wikipedia,²²⁸ YouTube,²²⁹ Facebook,²³⁰ Myspace²³¹ and Twitter²³² has

223. See *supra* note 58 and accompanying text.

224. See, e.g., Stacy G. Ulbig & Carolyn L. Funk, *Conflict Avoidance and Political Participation*, 21 POL. BEHAV. 265, 267–68 (1999) (describing social science research and concluding that people tend to avoid disagreement).

225. MICHAEL G. WESSELLS, *COMPUTER, SELF, AND SOCIETY* 214 (1990).

226. Ellen Toronto, *Time Out of Mind: Dissociation in the Virtual World*, 26 PSYCHOANALYTIC PSYCHOL. 117, 117 (2009).

227. *Id.* at 118 (“[The Internet has] altered dramatically the way we do business, access information, maintain contact, and relate as human beings.”).

228. Wikipedia launched in 2001 and now has 18 million articles. WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia> (last visited July 4, 2011).

229. YouTube was launched in February 2005. See *The 100 Greatest Movies, TV Shows, Albums, Books, Characters, Scenes, Episodes, Songs, Dresses, Music Videos, and Trends That Entertained Us Over the Past Ten Years*, ENT. WKLY., Dec. 11, 2009, at 74, 76 (listing YouTube as the third most entertaining trend from the 2000s: “Providing a safe home for piano-playing cats, celeb goof-ups, and overzealous lip-synchers since 2005.”)

230. Facebook was founded in February 2004. *Facebook Factsheet*, FACEBOOK, <http://www.facebook.com/press/info.php?factsheet> (last visited July 4, 2011).

231. Myspace was launched in January 2004. *Fact Sheet*, MYSPACE, <http://www.myspace.com/pressroom/fact-sheet/> (last visited July 4, 2011).

232. Twitter was launched in July 2006. See Aaron Smith & Lee Rainie, *8% of Online Americans*

turned the Internet into a kind of universal companion, to whom people confide, exhibit themselves, and vent their frustrations in ever-increasing numbers. Facebook now has over 500 million active users, half of whom log on every day.²³³

Internet activity has become so enmeshed in people's everyday lives that the compulsion to check one's Facebook page can strike even a burglar—mid-burglary.²³⁴ Psychological research has shown that some people prefer interacting online over face-to-face, on the basis that it seems easier, less risky, and more exciting.²³⁵ For some jurors, it might simply be impossible to refrain from checking their phones or updating their Facebook status, and prohibitions on doing so may seem tantamount to isolating them from the world as they know it.²³⁶ This issue is only more pronounced for the generation of people who are growing up along with the Internet. Social networking among people under twenty-five is so ubiquitous that those who make headlines are the social networking refuseniks, who now “qualify as exotic life forms” out of step with their generation.²³⁷ As one teenager explained to her mother, “If you're not on MySpace, you don't exist.”²³⁸ Like it or not, the tweeting teens of today will be the jaded jurors of tomorrow.

In addition, the Internet, by its anonymity and immediacy, encourages transgressions through the phenomenon of disinhibition, which leads to impulsive behavior.²³⁹ Psychologists have found that

Use Twitter, PEW INTERNET & AM. LIFE PROJECT, 1, 2 (Dec. 9, 2010), <http://www.pewinternet.org/~media/Files/Reports/2010/PIP-Twitter-Update-2010.pdf>.

233. *Facebook Statistics*, FACEBOOK, <http://www.facebook.com/home.php?#!/press/info.php?statistics> (last visited July 4, 2011). These statistics indicate that 500 million people logged on to Facebook at least once in the preceding 30 days. *Id.* Myspace plays catch-up with more than 100 million users. *Fact Sheet*, MYSPACE, <http://www.myspace.com/pressroom/fact-sheet/> (last visited July 4, 2011).

234. Edward Marshall, *Burglar Leaves His Facebook Page on Victim's Computer*, JOURNAL (Martinsburg, W. Va.), Sept. 16, 2009, <http://www.journal-news.net/page/content.detail/id/525232.html>.

235. Scott E. Caplan, *Preference for Online Social Interaction: A Theory of Problematic Internet Use and Psychosocial Well-Being*, 30 COMM. RES. 625, 631 (2003).

236. I am not making the claim that most people are “addicted” to the Internet in any clinical sense. Whether Internet addiction even exists is a matter of controversy within the clinical community, and it is likely that “if Internet addiction does indeed exist, it affects only a relatively small percentage of the online population.” Laura Widyanto & Mark Griffiths, *Internet Addiction: Does It Really Exist? (Revisited)*, in PSYCHOLOGY AND THE INTERNET: INTRAPERSONAL, INTERPERSONAL, AND TRANSPERSONAL IMPLICATIONS 141, 160–61 (Jayne Gackenbach ed., 2d ed. 2007) [hereinafter PSYCHOLOGY AND THE INTERNET]. Nonetheless, many people appear to have some kind of dependency on their favorite websites. See, John D. Sutter, *Twitter Blackout Left Users Feeling “Jittery,” “Naked,”* CNN.COM (Aug. 7, 2009), <http://www.cnn.com/2009/TECH/08/07/twitter.attack.reaction/index.html> (describing panicked reactions of Twitter users when the site went briefly offline).

237. Ian Shapira, *In a Generation That Friends and Tweets, They Don't*, WASH. POST, Oct. 15, 2009, at A1. Shapira notes that eighty-five percent of all Internet users aged eighteen to thirty-four visited Facebook, Myspace or Twitter in August 2009, and Facebook's monthly traffic was 92 million. *Id.*

238. danah boyd, *Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life*, in MACARTHUR FOUNDATION SERIES ON DIGITAL LEARNING: YOUTH, IDENTITY, AND DIGITAL MEDIA VOLUME 119 (David Buckingham ed., 2007).

239. Jayne Gackenbach & Heather von Stackelberg, *Self Online: Personality and Demographic*

people are less inhibited and reveal more about themselves online because they feel invisible, protected by the Internet's seeming anonymity.²⁴⁰ It also leads to people exhibiting poor judgment, like the juror sending a friend request to the firefighter witness.²⁴¹ According to one psychiatrist, "Deficits in insight and judgment may be especially obvious in the context of Internet behavior."²⁴²

Finally, blogging, posting status updates, and tweeting present their own compulsive appeal. "Once one has a taste of externalizing one's thoughts and imagining that others care to ponder them," wrote one commentator, "thinking that is not externalized seems kind of pointless."²⁴³ On jury duty, boredom and access to Wi-Fi can combine to make blogging or tweeting almost irresistible.²⁴⁴ "I am sitting in a big, drab room with about 100 other people, waiting around to see if our number is called to go up stairs and serve on a trial," posted one prospective juror: "it is obvious that this must be blogged about."²⁴⁵ Given these forces, it seems unlikely that jury instructions—even coupled with the threat of sanctions—will be enough to make jurors resist the lure of the Internet.

III. THE HISTORICAL ROLE OF THE JURY

The foregoing responses to jurors' "bad behavior" are part of a larger trend. The twentieth-century view of juries celebrated their passivity as an aid to impartiality. Most of the rules governing juries were designed to prevent any behavior that might interfere with jurors keeping an open mind, and are still operational today. Rules of

Implications, in PSYCHOLOGY AND THE INTERNET, *supra* note 236, at 55, 58; *see also* Adam N. Joinson, *Disinhibition and the Internet, in* PSYCHOLOGY AND THE INTERNET, *supra* note 236, at 75, 89 ("Disinhibition is one of the few widely reported and noted media effects of online interaction.").

240. *See* John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 321–26 (2004). Suler notes several reasons why people are less inhibited and reveal more about themselves online, including dissociative anonymity ("you don't know me"), invisibility ("you can't see me"), dissociative imagination ("it's just a game"), and minimizing authority ("we're equals"). *Id.* at 321–23.

241. *See supra* notes 176–80 and accompanying text.

242. Patricia R. Recupero, *The Mental Status Examination in the Age of the Internet*, 38 J. AM. ACAD. PSYCHIATRY L. 15, 19 (2010). The author notes that qualities of computer-mediated communications that facilitate impulsive behaviors include "anonymity, a reduced sense of responsibility, altered time outlook, sensory input overload, . . . and altered consciousness." *Id.*

243. David Gibson, *The Social Psychology of Facebook, Etc.*, COMPLEXITY & SOC. NETWORKS BLOG, HARV. U. (Mar. 23, 2009, 12:13 PM), http://www.iq.harvard.edu/blog/netgov/2009/03/the_social_psychology_of_faceb.html. "Consistent with [the above observation]," he noted, "one acquires the cognitive habit of thinking and experiencing on behalf of an audience, and perhaps of formulating a blog entry as the experience unfolds." *Id.*

244. *See, e.g.*, Matt McCormick, *Live Blogging Jury Duty*, URB. HONKING (July 20, 2006), http://urbanhonking.com/actionitems/2006/07/20/live_blogging_jury_duty/ ("I am stuck in jury duty today, but . . . the jury waiting room has Wi-Fi! So of course that means one thing: I'm live blogging jury duty.").

245. *Id.*

procedure or individual instructions of judges forbid juries to discuss the case among themselves until the end of the trial.²⁴⁶ Many jurors are forbidden or discouraged from taking notes.²⁴⁷ The overwhelming majority are not allowed to ask any questions of the witnesses, judge, or lawyers.²⁴⁸ They usually receive instructions as to how to evaluate the evidence and on the elements of the crimes at the very end of trial.²⁴⁹

However, it was not always this way. The earliest juries, when they emerged in the thirteenth century,²⁵⁰ were to some extent “self-informing,”²⁵¹ although the precise extent is open to question. While prominent legal historians of the eighteenth and nineteenth centuries maintained that medieval juries were expected to interview witnesses and conduct their own factual investigations in advance of their appearance in court,²⁵² modern scholars have found that early trial

246. See Jessica L. Bregant, Note, *Let's Give Them Something to Talk About: An Empirical Evaluation of Predeliberation Discussions*, 2009 U. ILL. L. REV. 1213, 1215 (“The overwhelming majority of state and federal courts specifically prohibit ‘predeliberation discussions’ among jurors, even in long and complex cases.”).

247. See JEFFREY ABRAMSON, WE, THE JURY 5 (1994) (“[Judges often treat jurors] as children, refusing to let them take notes during trial or to have written copies of the legal instructions they are supposed to follow.”). As Akhil Amar has observed, “This is idiocy.” Amar, *supra* note 130, at 1185.

248. See Alschuler, *supra* note 17, at 161–62 (“We usually do not permit jurors to ask questions, and we do not permit them to explain their rulings. Like good children, good jurors are to be seen and not heard.”).

249. See Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 684 (2000) (“Although some judges do provide a brief introduction to the applicable law at the beginning of the trial, most of the detailed instructions on the law are given after closing arguments . . . One author compared jurors in this system to a ‘scorekeeper of an athletic contest’ who does not know ‘what acts receive points or penalties until after the conclusion of the game.’” (quoting Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 160–61 (1996))).

250. See Roger D. Groot, *The Early Thirteenth Century Criminal Jury*, in *TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200–1800*, at 3, 17–18 (J.S. Cockburn & Thomas A. Green eds., 1988) [hereinafter *TWELVE GOOD MEN*] (observing that the first true criminal trial by jury, in which the jury had the power to acquit or condemn, took place at Westminster in 1220). It is not my aim to go over the origins of the common law jury at length, as this ground has been covered in depth by numerous eminent legal historians. See, e.g., GREEN, *supra* note 95, at 3–27; JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 47–84 (1898); Fisher, *supra* note 125, at 585–95; Langbein, *supra* note 6, at 1170–71.

251. See Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 133–45 (2003) (arguing, based on thirteenth-century treatises and contemporaneous court reports, that the jury was self-informing and rarely needed to rely on in-court testimony); Langbein, *supra* note 6, at 1170 (“The early jury was self-informing. No instructional trial was held to inform its verdict. If the jurors thought they needed more information, they obtained it ‘by consulting informed persons not called into court.’” (quoting 5 JOHN H. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* II (3d ed. 1940))).

252. Pollock and Maitland wrote that it was “the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony; they must weigh it and state the net result in a verdict.” 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 622 (1895); see 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 374 (3d ed. 1894), reprinted in *COMMENTARIES ON THE LAWS OF ENGLAND* (William Draper Lewis ed., 1902) (“As to such evidence as the jury may have in their own consciences by their private knowledge of the

records support a more nuanced view of a jury that, while likely familiar with the parties and the facts of the incident, also received a portion of its information in court.²⁵³ Nonetheless, there is little doubt that early juries were not entirely ignorant of the cause to be judged.²⁵⁴

A. THE JURY AT THE TIME OF THE FRAMERS

At the time of the Founding, there remained an expectation that the jury would have some personal knowledge of the facts at issue.²⁵⁵ Many of the legal thinkers who had the most influence on the Framers took it as a given that jurors would be familiar with the character of the accused and the witnesses.²⁵⁶ Sir Edward Coke explained that trial “shall be [had in the] towne, parish, or hamlet . . . within which the matter of fact issuable is alledged, which is most certaine and neerest thereunto, the inhabitants whereof may have the better and more certaine knowledge of the fact.”²⁵⁷

In the ratification debates, many of the supporters of a vicinage requirement in the Sixth Amendment framed the question in terms of the personal knowledge a local jury would bring to a trial.²⁵⁸ Abraham

facts, it was an ancient doctrine that this had as much right to sway their judgment as the written or parol evidence which is delivered in court.”); *see also* THAYER, *supra* note 250, at 90 (observing that medieval jurors “were men chosen as being likely to be already informed”).

253. *See* Klerman, *supra* note 251, at 147–49 (concluding, based on a variety of trial accounts from the thirteenth century, that “medieval jurors came to court with extensive knowledge about the case and the defendant. They heard testimony, but they heard much less, and what they heard was less important.”).

254. While George Fisher has observed that the scant trial records from medieval times make it difficult to confirm the theory of the fully “self-informing” jury, particularly in criminal cases, *see* Fisher, *supra* note 125, at 591–93, he concludes that

it would be rash to suggest that early trial jurors came to court entirely ignorant of the facts in the manner of modern jurors. The mechanics of pretrial and trial procedure made it likely that at least some jurors had at least some knowledge of the event or the defendant before trial.

Id. at 593–94. This, at least, accords with the traditional historical view that “[w]e must not think of [the jurors] as coming into court ignorant, like their modern successors, of the cases about which they will have to speak.” 2 POLLOCK & MAITLAND, *supra* note 252, at 619.

255. *See* Engel, *supra* note 10, at 1673. Engel argues that the common law

presumed that a jury would be drawn from the community that suffered the crime, and the Framers of the Bill of Rights drafted the Sixth Amendment against this historical presumption. The Framers knew about the dangers of local prejudice, yet they recognized that only local juries could fulfill the adjudicative and representational purposes that underlie the jury system.

Id.

256. *See id.* at 1679 (noting that the legal commentators “with whom the American Founders were most familiar” were Coke, Hale, and Blackstone).

257. 1 SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* § 193, at 125a (1812).

258. *See* 2 DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109–11 (Jonathan Elliot ed., 1891) (1787) [hereinafter ELLIOT’S DEBATES] (remarks of Abraham Holmes of Massachusetts); 3 ELLIOT’S DEBATES 547 (remarks

Holmes, arguing for a requirement that trials should be held “in the vicinity where the fact was committed,” relied on the fact that there “a jury of the peers would, from their local situation, have an opportunity to form a judgment of the *character* of the person charged with the crime, and also to judge of the *credibility* of the witnesses.”²⁵⁹ In contrast, holding a trial elsewhere would force a person to be tried by “a jury of strangers; a jury who *may* be interested in his conviction.”²⁶⁰

For the Anti-Federalists, it was not enough that the Constitution prevented the worst excesses of the British in carrying off colonists to be tried overseas; it was the local character of the jury that helped protect liberty and ensure justice.²⁶¹ Patrick Henry lambasted the framers of Article III for specifying only that the trial of all crimes should be held in the state where the crime had been committed.²⁶² With such a loose guarantee, he argued, trials could

proceed in a manner extremely dangerous to liberty: a person accused may be carried from one extremity of the state to another, and be tried, not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the fact, but by a jury unacquainted with both, and who may be biased against him.²⁶³

This argument was open to rebuttal: Christopher Gore of Massachusetts, in reply to Holmes, noted that

the idea that the jury coming from the neighborhood, and knowing the character and circumstances of the party in trial, is promotive of justice, on reflection, will appear not founded in truth. If the jury judge from any other circumstances, but what are part of the cause in question, they are not impartial.²⁶⁴

Indeed, Gore added, if the jury could be “perfectly ignorant of the person in trial, a just decision would be more probable.”²⁶⁵ Samuel Johnston, Governor of North Carolina, echoed this reasoning, saying, “We may expect less partiality when the trial is by strangers; and were I to be tried for my property or life, I would rather be tried by disinterested men, who were not biased, than by men who were perhaps intimate friends of my opponent.”²⁶⁶

of Edmund Pendleton of Virginia) (“[The jury] should have some personal knowledge of the fact, and acquaintance with the witnesses, who will come from the neighborhood.”).

259. 2 ELLIOT’S DEBATES, *supra* note 258, at 109–10 (remarks of Abraham Holmes).

260. *Id.*

261. See Paul Finkelman, *The Ten Amendments as a Declaration of Rights*, 16 S. ILL. U. L.J. 351, 388–89 (1992) (describing how the Anti-Federalists wanted local juries to protect them from potential oppression by the federal government).

262. 3 ELLIOT’S DEBATES, *supra* note 258, at 447 (statement of Patrick Henry of Virginia). Article III states only that “the Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.” U.S. CONST. art. III, § 2, cl. 3.

263. 3 ELLIOT’S DEBATES, *supra* note 258, at 447.

264. 2 ELLIOT’S DEBATES, *supra* note 258, at 112 (remarks of Christopher Gore of Massachusetts).

265. *Id.* at 112–13.

266. 4 ELLIOT’S DEBATES, *supra* note 258, at 150 (remarks of governor Johnston).

In the end, Gore's view gained ascendancy, but the arguments of Patrick Henry that "an impartial jury of the vicinage" would be specifically "one acquainted with [the defendant's] character and the circumstances of the fact" still resonated.²⁶⁷ As late as 1834, at least one state court held that a jury may act "in some degree, from their own knowledge of the character of the parties and their witnesses. It is for this reason that the jurors are drawn from the vicinage."²⁶⁸

B. THE MEANING OF IMPARTIALITY

The right to trial by jury is the only right guaranteed both in the Constitution itself and in the Bill of Rights.²⁶⁹ Of the two constitutional provisions however, only the Sixth Amendment provides that the jury shall be "impartial"; the word does not appear in Article III.²⁷⁰ It is notable that the debates surrounding the adoption of the Constitution and the ratification of the Sixth Amendment focused on the vicinage requirement, and not on the definition of impartiality. One can only surmise that the Framers were either not concerned with the definition of impartiality, as it appeared to them self-evident, or were unable to come to an agreement on what it meant. In any event, there is little reference to its meaning in the writings of the Framers.²⁷¹

At common law, jurors were "impartial," not because they knew nothing about the case, but simply because they had no family ties to any

267. 3 ELLIOT'S DEBATES, *supra* note 258, at 447 (statement of Patrick Henry of Virginia). This he contrasted with "a jury unacquainted with both, and who may be biased against him." *Id.* To some extent, this supports the argument that one of the aims of the Sixth Amendment was to protect innocence. See AMAR, *supra* note 111, at 90 ("The deep principles underlying the Sixth Amendment[] . . . are the protection of innocence and the pursuit of truth.").

268. *M'Kain v. Love*, 13 S.C.L. (2 Hill) 188, 189 (1834).

269. The right to trial by jury appears, respectively, in Article III of the Constitution and in the Sixth Amendment. Article III provides:

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.

U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment states, "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." U.S. CONST. amend VI.

270. "Impartial" also does not appear in the Seventh Amendment, which guarantees a right to trial by jury in civil cases. U.S. CONST. amend VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."); see also Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 428 (1995) ("Indeed, impartiality is the only defining feature of the jury that is mentioned anywhere in the Constitution.").

271. JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 46 (1977) ("Little attention was given to the specific meaning of the words 'impartial jury' during the ratification debates, so we cannot say for certain what they meant then."); Cammack, *supra* note 270, at 429 ("Despite the attention given to the right to a jury at the time the Constitution was drafted, there is little direct evidence of the original understanding of the requirement that the jury must be impartial.").

of the parties and no financial interest in the outcome.²⁷² What was required was that they be “free and lawful, impartial and disinterested, neither the enemies nor the too close friends of either litigant.”²⁷³ This remained the understanding into the eighteenth century: Sir Edward Coke’s oft-quoted pronouncement that a juror ought “to be indifferent as he stands unsworne”²⁷⁴ meant indifferent in the sense of not having a personal interest in the case, rather than lacking knowledge.

While jurors could be removed for cause even as far back as the thirteenth century, just cause required either personal interest or hostility, “as where there are deadly enmities between some of [the jurors] and the indicted man, or there is a greedy desire to get his land.”²⁷⁵ Echoes of this understanding of partiality were to be found in the debates surrounding ratification of the Constitution in the New World: Patrick Henry explicitly equated impartiality and acquaintance.²⁷⁶ While not dispositive, these sources cast some light on how the Framers viewed the impartiality requirement.

Today, the popular conception is that jurors must know nothing about the case to be tried—witness two trial attorneys who recently remarked, in response to the flurry of jurors looking for information online, that “[t]he information age makes finding those 12 ignorant persons—and keeping them ignorant—a daunting and maybe impossible task.”²⁷⁷

But the Supreme Court has never held that an impartial jury must be ignorant. When Aaron Burr was tried for treason in 1807, the trial was the subject of many inflammatory articles in the press and the impartiality of the jurors selected was hotly disputed.²⁷⁸ Rejecting the idea that a jury had to be completely ignorant, Chief Justice Marshall,

272. See Engel, *supra* note 10, at 1674.

273. 2 POLLOCK & MAITLAND, *supra* note 252, at 619.

274. 1 COKE, *supra* note 257, § 234, at 155b.

275. Klerman, *supra* note 251, at 133 (quoting a treatise attributed to Bracton, probably written in the late 1220s or early 1230s); see also 3 BLACKSTONE, *supra* note 252, at 363 (noting that early jurors could be challenged as being “kin to either party within the ninth degree” or having a financial interest in the cause).

276. 3 ELLIOT’S DEBATES, *supra* note 258, at 447 (statement of Patrick Henry).

277. Jerold S. Solovy & Robert L. Byman, *Confronting the Fact That Jurors Do Research: Trial Attorneys Should Assume That, Despite Judges’ Instructions, Jurors Will Engage in Illicit “E-Discovery,”* 32 NAT’L L.J., Nov. 30, 2009, at 23. The authors cautioned readers that “[j]urors have the tools—and they are using them—to discover all sorts of things about us, about our cases, about our witnesses.” The article advised litigators to “clean up” their own Internet presence, and to “[r]ethink everything. You are being watched.” *Id.*

278. See *United States v. Burr*, 25 F. Cas. 49, 49 (D. Va. 1807) (No. 14,692g). Burr’s counsel argued that the public’s mind had been so filled with prejudice against Burr that finding an impartial jury would be impossible. *Id.* The negative articles in the press and the repeated declarations of Burr’s guilt by the prosecutor created “such a ferment in the public mind that the prisoner could not have a fair trial.” *Id.*; see also ABRAMSON, *supra* note 247, at 38–39 (discussing the notoriety of the Burr trial).

sitting by designation, wrote instead that the ablest jurors might well be the best informed:

[T]o say that any man who had formed an opinion on any fact conducive to the final decision of the case would therefore be considered as disqualified from serving on the jury, would exclude intelligent and observing men, whose minds were really in a situation to decide upon the whole case according to the testimony.²⁷⁹

Marshall noted that jurors with no knowledge of the case were not required, but he contrasted the “light impressions which may fairly be supposed to yield to the testimony that may be offered” with “those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force.”²⁸⁰ While prescient in many ways, Marshall was far from the first to make these observations, since borne out by social psychologists.²⁸¹ “The human understanding when it has once adopted an opinion,” observed the English philosopher Francis Bacon, “draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects.”²⁸²

In evaluating whether a particular juror can be impartial, the question is not whether a juror is “as white paper”²⁸³ but rather whether she can lay aside her initial impressions to judge the case with an open mind. “The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors,” wrote the Court in 1975. “Qualified jurors need not, however, be totally ignorant of the facts and issues involved.”²⁸⁴

The Court reiterated this standard last year in the trial of Jeffrey Skilling, the former CEO of Enron. “Juror *impartiality*,” wrote Justice Ginsburg, “does not require *ignorance*.”²⁸⁵ Rejecting Skilling’s claim that he could not receive a fair trial in Houston because of the amount of press coverage and commentary the Enron scandal had generated, the

279. *Burr*, 25 F. Cas. at 51.

280. *Id.*

281. See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 177 (1998) (noting the extensive empirical evidence that once someone has taken a position, “one’s primary purpose becomes that of defending or justifying that position”).

282. 1 FRANCIS BACON, NOVUM ORGANUM aphorism 46 (1620).

283. *Mylock v. Saladine*, (1764) 96 Eng. Rep. 278 (K.B.). In that case, Lord Mansfield observed: “A juror should be as white paper, and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him.” *Id.*

284. *Murphy v. Florida*, 421 U.S. 794, 799–800 (1975) (internal quotation marks omitted) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)).

285. *Skilling v. United States*, 130 S. Ct. 2896, 2902 (2010).

Court emphasized that jurors “need not enter the box with empty heads in order to determine the facts impartially.”²⁸⁶

C. JURIES JUDGING THE LAW

In colonial times, it was widely accepted that the jury would be judge of the law as well as of the facts. In prerevolutionary Massachusetts, for example, juries “could ignore judges’ instructions on the law and decide the law by themselves in both civil and criminal cases.”²⁸⁷

In 1735, the jury’s power to determine the law was famously celebrated by Andrew Hamilton, who defended New York publisher John Peter Zenger by appealing explicitly to the jury’s power, which he called “beyond all dispute to determine both the law and the fact.”²⁸⁸ John Adams, shortly before the adoption of the Constitution, wrote that it would be “an Absurdity to suppose that the Law would oblige [jurors] to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience.”²⁸⁹

The Supreme Court, sitting as a trial court in 1794, echoed this view, if more soberly, in the instructions Chief Justice Jay delivered to the jury. While he acknowledged the presumption that juries were “the best judges of facts” and that judges were “the best judges of law,” he told the jurors, “you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.”²⁹⁰

But this position had eroded sufficiently that by the time Justice Story stated his view of the division of labor between judge and jury,²⁹¹ one hundred years after Hamilton’s famous pronouncements in the Zenger trial, Story’s stance was becoming preminent. Although the constitutions of three states still provide that jurors shall determine both law and fact,²⁹² over time the state courts “essentially nullified the[se] constitutional provisions.”²⁹³

286. *Id.* at 2925.

287. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE IN MASSACHUSETTS SOCIETY, 1760–1830*, at 3 (1975).

288. John Peter Zenger was charged with seditious libel for publishing criticisms of the Governor of New York. *See* Alschuler & Deiss, *supra* note 5, at 871–73. Hamilton conceded the publication of the comments, but claimed that truth was a defense and that the matter was for the jury: “I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so.” Hamilton told the court, “[L]eaving it to the judgment of the Court whether the words are libelous or not in effect renders juries useless.” *Id.* at 873 (quoting JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL* 78 (1963)). The jury acquitted Zenger, and the account of the trial, in pamphlet form, was widely circulated in the colonies. *See* Alschuler & Deiss, *supra* note 5, at 871–73.

289. 1 *LEGAL PAPERS OF JOHN ADAMS* 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

290. *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794).

291. *United States v. Battiste*, 24 F. Cas. 1042 (D. Mass. 1835) (No. 14,545).

292. *See* GA. CONST. art. 1, § 1, para. XI (“In criminal cases . . . the jury shall be the judges of the law and the facts.”); IND. CONST. art. I, § 19 (“In all criminal cases whatever, the jury shall have the right to determine the law and the facts.”); MD. CONST., DECL. OF RTS art. 23 (“In the trial of all

D. CAN WE DRAW ANY LESSONS FROM THE PAST?

There seems to be solid historical precedent for a better informed, more active jury.²⁹⁴ Under the common law and colonial jury model, the jury was more on a par with the judge and was an active participant in the process.²⁹⁵ The jury also had flexibility to exercise mercy and determine penalties in a way that could subordinate the law to its members' sense of justice.²⁹⁶ Arguably, such a jury more accurately reflects the conscience of the community than one which does not have access to all the facts and has no say over the law. How a more active jury could be achieved without violating the defendant's protections under the Sixth Amendment is the subject of the next Part.

IV. FACING THE FUTURE

Assuming that jurors' growing propensity to research their cases and communicate in new ways is not just a passing fad—and there is little indication that it is—the deeper effects on the justice system have yet to be fully understood. One obstacle to that understanding is that we are unlikely ever to know the full extent of the problem. Most online transgressions happen by stealth, so there may never be a full account of how widespread they are. Empirical research, through juror surveys and interviews, might give us a better picture, but it would still rely on juror self-reporting and be subject to jurors minimizing their misdeeds.²⁹⁷

In addition, any reconsideration of the jury's abilities and function has to be evaluated against the background of the “largely vestigial” role the jury trial actually plays in the system as a whole.²⁹⁸ While the jury trial may retain symbolic importance, serving as a reminder of our aspirations to fairness and equity,²⁹⁹ one thing it does not do is adjudicate the vast majority of cases.³⁰⁰ The Sixth Amendment's promise that “[i]n all

criminal cases, the Jury shall be the Judges of Law, as well as of fact.”).

293. Alschuler & Deiss, *supra* note 5, at 911 & n.237 (citations omitted).

294. *See supra* notes 251–57 and accompanying text.

295. *See supra* notes 287–90 and accompanying text.

296. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1062–63 (1994) (describing practice by eighteenth century jurors of manipulating their verdicts to mitigate the death penalty).

297. A British researcher suspected that such minimization occurred in her survey of 668 jurors. Thomas, *supra* note 31, at 43.

298. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124 (1998).

299. *See id.* at 2144.

300. The current rate of jury trials is a little more than three percent in federal court for all dispositions, whether conviction or acquittal. *See Sourcebook of Criminal Justice Statistics*, ST. U. N.Y. AT ALBANY (2009), <http://www.albany.edu/sourcebook/pdf/t5242009.pdf> (showing that out of 86,798 case dispositions in district court, there were 2660 jury trials and 431 bench trials). Available state court statistics do not track rates of acquittal at trial, but reflect a jury trial rate of four percent when only convictions are counted. *See Felony Sentences in State Courts, 2006*, BUREAU OF JUSTICE STATISTICS

criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”³⁰¹ is already honored more in the breach than in the observance. For the overwhelming majority of criminal defendants, we have an adversarial system in name alone, with jury trials as rare as a hippopotamus in New York City.³⁰²

And so the jury trial is arguably in decline, both in function and in reputation.³⁰³ At the Founding, the importance of protecting the right to trial by jury was one issue that brought both Federalists and Anti-Federalists together. Alexander Hamilton famously wrote that both sides, if they agreed upon nothing else, “concur at least in the value they set upon the trial by jury. Or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.”³⁰⁴

Today, the jury system has been subject to bitter criticism for the better part of two centuries. Commentators charge the adversarial system with privileging combat at the expense of truth seeking.³⁰⁵ The system of jury selection and peremptory challenges is believed to result in juries that are not representative of the abilities and educational level of the community.³⁰⁶ Our dissatisfaction with the jury reflects a deep-seated ambivalence, “sometimes romanticizing jurors as zealous yeomen alert to abuses of governmental power and sometimes treating them as helpless, weak-minded, irrational, vindictive, and easily swayed

Tbl. 4.1 (2006); see also Brian J. Ostrom et al., *Examining Trial Trends in State Courts, 1976–2002*, 1 J. EMPIRICAL LEGAL STUDIES 755, 764 (2004) (“[By 2002] felony trials comprised only 3 percent of all felony dispositions, and the felony jury trial rate had fallen to 22 per 1000 dispositions (just over 2 percent of all felony dispositions).”).

301. U.S. CONST. amend. VI (emphasis added).

302. John H. Langbein, *On the Myth of the Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL’Y 119, 121 (1992) (“Can you find a hippopotamus in the Bronx? Yes, there’s one in the Bronx Zoo, but it has nothing to do with life in the Bronx. It’s a goner. And so, too, stunningly, is criminal jury trial, which has ceased to typify American criminal justice.”).

303. See, e.g., Randall T. Shepard, *State Court Reform of the American Jury*, 117 YALE L.J. POCKET PART 166 (2008), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/state-court-reform-of-the-american-jury/> (“[By the 1990s] many citizens viewed the jury as archaic, emotional, irrational, and unintelligent.”).

304. THE FEDERALIST NO. 83, at 456 (Alexander Hamilton) (E.H. Scott ed., 1898).

305. See JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL I* (2005) (critiquing the “truth-impairing incentives of the adversary system”).

306. See Douglas W. Ell, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 782 (1978) (“[Voir dire and peremptory challenges] can strongly contribute to the selection of a jury which is not representative of the highly skilled and educated members of the community”). This view, while widespread, so far has not been supported empirically. See, e.g., Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?*, 38 CONN. L. REV. 325, 328 (2006). Levin and Emerson conducted an empirical study of jury venires in the District of Connecticut over the course of a year. They found “no evidence that juries are undereducated relative to the venires from which they are selected. Indeed, juries seem to be *better* educated than the Connecticut population demographics reported by U.S. census data.” *Id.* (footnote omitted).

children.”³⁰⁷ We praise their salt-of-the-earth “common sense” but excoriate them for being “illiterate plebeians, easily misled.”³⁰⁸

Some scholars trace our ambivalence to the increasing diversity of the jury, as the conscience of the community was far more predictable when expressed by twelve propertied white men of the colonies.³⁰⁹ On some level, we must reevaluate what it means for the jury to represent the conscience of the community when the community itself speaks with so many different voices. Juror misuse of the Internet presents a challenge to the old norms, but also may provide an opportunity for us to reconsider what we want from our juries.

A. THE COSTS OF INACTION

One clear cost of inaction is the risk of unfairness to individual defendants, who may be defending not only against criminal charges brought by the prosecutor, but also against the unseen enemy of Internet gossip and innuendo. An overarching concern with jurors relying so heavily on information they can unearth online is that there is no quality control on the Internet. Unlike a newspaper, which employs paid fact checkers, the Internet is based on the paradigm that anyone can say whatever they want, and the truth will rise to the top of the Google search results page.³¹⁰ Much of the information on the Web may be erroneous, misattributed, or malicious. When a defendant’s liberty or life is at stake, the potential for prejudice is considerable.

Not addressing the problem now will lead to the rampant inequity of some jurors seeking out extrajudicial information; some jurors abiding by the rules; and, in the absence of admissions or informants, the defendant not knowing what, exactly, the jury knows. This impairment of the jury function could, in turn, contribute to a greater decline in the jury’s reputation.³¹¹

307. Alschuler, *supra* note 17, at 232.

308. See P.J.R. King, “*Illiterate Plebeians, Easily Misled*”: *Jury Composition, Experience, and Behavior in Essex, 1735–1815*, in *TWELVE GOOD MEN*, *supra* note 250, at 256–58 (quoting eighteenth-century commentators describing jurors as “low and ignorant country people,” “the meaner sort,” and “ignorant and illiterate persons”).

309. Cf. Alschuler & Deiss, *supra* note 5, at 916 (“Over the course of the nineteenth century, as American society grew more diverse and jury membership more inclusive . . . the belief that jurors’ consciences would yield sound, shared, consistent answers to legal questions undoubtedly faded.”).

310. See Virginia Heffernan, *What “Fact-Checking” Means Online*, N.Y. TIMES, Aug. 20, 2010, at 14 (Magazine) (noting that people have become so reliant on Google search results that the “Internet wasn’t the accurate or the inaccurate thing; it was the only thing”); see also Bing Pan et al., *In Google We Trust: Users’ Decisions on Rank, Position, and Relevance*, 12 J. COMPUTER MEDIATED COMM. 801, 817 (2007) (reporting clinical results of eye movement tests that suggest “an increased probability of misinformation, particularly in circumstances of topic naivete” linked to the ranking of Google search results).

311. See, e.g., B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1229 (1993) (“[C]oncerns and complaints about jury trials, and how such trials impact and empower jurors in deciding cases, continue to abound.”) (emphasis

If a tipping point is reached where defendants believe it is sufficiently likely that their jurors will be digging around into parties' backgrounds, scouring the Web for evidence of their criminal past, sending friend requests to attractive witnesses, and blogging about the experience, defendants might decide to forsake trials altogether. Those with vast resources and Internet savvy could wage propaganda wars on the Internet, strategically planting favorable information where jurors might be likely to stumble across it,³¹² but the indigent defendants who are in the vast majority might simply abstain. From an already negligible fraction of cases, trials could then dwindle down to a handful of "trials of the century" or simply disappear.³¹³

In the circumstances, it is not entirely surprising that one experienced district court judge wondered, if juror misuse of the Internet could not be prevented, "can the jury system survive or will we become a civil law country that abandons jury trials altogether?"³¹⁴ If nothing is done, the outlook is bleak.

B. JURY 2.0

In the face of this unauthorized jury activity, it is not enough to reflexively insist on the old norms of the passive, uninformed jury. The old norms may be unenforceable as a practical matter. Rather than fruitlessly attempting to make the new jurors conform to the old model, taking action only in those rare cases where we find out about violations, it might make better sense to work towards some kind of accommodation between the defendant's right to a fair trial and the contemporary jury's thirst for information.

A set of responses must be developed to address the various manifestations of jurors' Internet use. One good place to start is with the efforts, particularly in state courts over the past twenty years, to reform the jury system so that jurors can be more engaged in the proceedings.³¹⁵

omitted); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 382 (1996) ("[I]n recent years, dissatisfaction with the functioning of the jury in both civil and criminal trials has been of increasing public and scholarly concern.").

312. See, e.g., Hibbitts, *supra* note 81 (describing Martha Stewart's defense website).

313. It should be acknowledged, however, that scholars have been lamenting the death of the jury trial and writing articles with titles like "The Vanishing Jury" since at least 1928. See Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 107-09 (1928) (charting incidence of guilty pleas in New York from 1839 to 1926, and concluding that the rate of guilty pleas increased from twenty-five percent to ninety percent over that period). The fact that the institution staggers on is a testament to at least some resilience.

314. Shira A. Scheindlin, *The Future of Litigation*, N.Y. L.J. (Feb. 5, 2010), http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202442011010&font_colorredFreefont_The_Future_of_Litigation&slretur n=1&hbxlogin=1#.

315. See, e.g., Larry Heuer & Steven D. Penrod, *Some Suggestions for the Critical Appraisal of a More-Active Jury*, 85 NW. U. L. REV. 226, 231 (1990) (reporting an ambiguous response in a survey of judges' attitudes regarding juror note taking and submitting questions for witnesses).

While not developed in direct response to issues of juror misconduct on the Internet, these “active jury” proposals are promising: they encourage jurors to take a more active role by allowing them to ask questions of the witnesses, take notes, and request clarification.³¹⁶ The judges and jurisdictions that have employed these methods report much higher juror satisfaction.³¹⁷ Presumably, these techniques would go some way towards defusing the frustration and enforced passivity that may goad jurors to seek help online.

I. *Confronting Extraneous Facts*

The most pressing issue is how we should cope with the flow of unauthorized information reaching the jury room. It is tempting to suggest that we should simply open the floodgates and embrace it. One can make a plausible argument that the rules of evidence have become obsolete and should be abandoned and that jurors should simply be trusted to evaluate all available information.³¹⁸ Allowing character evidence, hearsay, and other relevant but traditionally inadmissible information to come before the jury would demonstrate confidence in the jury’s abilities to assess correctly the information and alleviate the suspicion of some jurors that the lawyers are deliberately concealing the truth.³¹⁹ It would be consonant with the jury’s historical role. In an ideal world, this could promote the accuracy of verdicts and make trials less of a gladiatorial contest of lawyerly skill and more of a quest for truth.

But this is not an ideal world, and while the idea of returning to a full-information model along the lines that Jeremy Bentham once

316. See Keene & Handrich, *supra* note 199, at 21 (“To the extent that [jurors] have reasonable and proper questions for witnesses, they are less likely to conduct research on their own if the witnesses addresses [sic] them more completely.”). The American Bar Association endorsed these reforms, with the exception of juror questioning in criminal cases, in 2005. See Patricia Lee Refo, *Principles for Juries and Jury Trials*, 2005 AM. BAR ASS’N AMERICAN JURY PROJECT 17–20 [hereinafter ABA PRINCIPLES].

317. See, e.g., Mark A. Frankel, *A Trial Judge’s Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 NW. U. L. REV. 221, 225 (1990) (“There is no question in my mind that providing jurors with additional tools such as preliminary instruction, notetaking, and jury questioning enhances the rational aspects of the jury’s fact-finding role.”); Judith S. Kaye, *My Life as Chief Judge: The Chapter on Juries*, 78 N.Y. ST. B. J. 10, 13 (2006) (reporting findings of survey of jurors in New York state after experimenting with jurors taking notes, submitting written questions, and providing them with a copy of the judge’s final instructions as “overwhelmingly positive”); Shepard, *supra* note 303, at 169 (noting with approval reformers abolishing “roadblocks to sensible decision making”); Jeanine Turgeon & Elizabeth A. Francis, *Improving Pennsylvania’s Justice System Through Jury System Innovations*, 18 WIDENER L.J. 419, 436–48 (2009) (discussing Pennsylvania’s adoption of rules allowing for juror note taking, written instructions, substantive preliminary instructions, and juror questioning to be promising improvement in the state’s jury system).

318. Alschuler has made powerful arguments for “abandoning our cumbersome, patronizing rules of evidence and trusting jurors with the facts,” and “viewing jurors neither as child savants nor as child simpletons but as responsible adults.” Alschuler, *supra* note 17, at 232.

319. See Green, *supra* note 19, at 700–01 (“[J]urors are sometimes led to conclude that trial lawyers are being deceitful when in fact the lawyers are simply abiding by the rules of evidence.”).

suggested seems attractive on its face, it is ultimately unworkable.³²⁰ Even setting aside the longstanding debates about jurors' abilities to process (truthful) unfavorable information about a defendant without compromising their impartiality, there is no way to process all of the information on the Internet about every defendant in a fair manner. Much of the information on the Internet is presented as fact, but is often driven by personal or political agendas that are more or less transparent.³²¹ If jurors are equally likely to find not only true information about a defendant's criminal record, but also false allegations that the defendant abused his children, for example, every criminal case could devolve into a series of mini-trials in which defendants would have to defend not only against the instant criminal charges, but against every allegation against them on the Web, no matter how biased or fabricated. If ever there were a time when juries could be entrusted with all extant information, that moment has now passed.

Solutions must therefore be found that maintain the exclusionary nature of trials, while acknowledging the Pandora's Box of information online.³²² Courts need to work on ways of explaining to jurors *why* they should not surf, blog, or tweet during trial. If these instructions come across as no more than another admonition, jurors may well shrug them off. But if the instructions enlist the jurors' help as equal participants in a common enterprise with the court and the litigants, the goal of which is to ensure the defendant a fair trial, they might reduce the kinds of online misconduct that arise out of boredom and disaffection.

A good example of an instruction that explains the prohibition in terms of fairness to the parties and the integrity of the trial is the one given by a state court judge, who, after telling the jurors that they may not discuss the case, says:

Here's why: We go to some great lengths to make sure that all of the information or input you get about this case comes from people who walk into this courtroom, swear to tell the truth, sit in this chair, and say what they have to say in front of the prosecutor, in front of the defendant, and in front of all of you. And we do that because that's the fair way to do it. If you get information, even comments, input from

320. See 5 BENTHAM, *supra* note 20.

321. See, e.g., Michel Marriott, *Rising Tide: Sites Born of Hate*, N.Y. TIMES, Mar. 18, 1999, at G1 ("[Hate websites] are presented as ordinary home pages or educational sites."); David Mehegan, *Bias, Sabotage Haunt Wikipedia's Free World*, BOSTON GLOBE, Feb. 12, 2006, at A1 ("The revelations that political bias has crept into articles raises new questions about an Internet phenomenon that some are acclaiming as the future of information.").

322. As a threshold matter, lawyers should conduct their own defensive research as a matter of course, so that they know what might be found online about their client if anyone were to look. This could include a check of court records, popular criminal databases, Google, social networking sites, and so forth. Lawyers would be well advised to ask their clients whether they maintain any blogs or have posted comments on other websites. At a minimum, this would give attorneys an idea of the universe in which they might be operating.

somebody else where the defendant can't hear, or the prosecutor can't hear what you're hearing, or your fellow jurors, that's not fair. That is not a fair way to decide a criminal charge in this country. What's fair is for you to decide this case only on what happens inside this courtroom.³²³

The judge then instructs the jurors not to conduct any investigations on their own, whether on the street or on the Internet. Finally, he extracts a promise from them that they will abide by the rules:

So I have two ways I can do this. I can lock you up—it's called sequestering, it's a fancy word for locking you up—during the course of the trial, or I can have you promise me that you will strictly abide by my instructions during the trial, and not do any investigations, not have any communications about the case Will each of you promise me that you will follow those instructions?³²⁴

If such instructions were combined with rules that allowed jurors to take a more active part in the proceedings, their effectiveness might increase. For example, a number of jurisdictions have begun allowing jurors to submit questions for the witnesses.³²⁵ Typically, jurors will submit written questions to the judge; after review and consent of both parties, the question can then be put to the witness.³²⁶ Usually, the question will be asked by the judge, so that no particular juror is identified by either the parties or the witness.³²⁷ This would provide an

323. Video: Hon. Donald E. Shelton, "No Googling, No Texting" Jury Instruction Video, NAT'L CTR. FOR STATE CTS. (Sept. 13, 2010, 11:42:45), <http://www.ncsc.org/topics/jury/jury-selection-trial-and-deliberations/resource-guide.aspx> (scroll down to "Jury Instructions" subheading) (last visited July 4, 2011).

324. *Id.* at 11:45:15. Obviously, it helps that Judge Shelton has an avuncular, folksy manner that establishes a rapport with the jurors. But, regardless of delivery, these instructions succinctly cover a number of bases that should be addressed in any instruction dealing with Internet use: (1) they acknowledge the fact that most jurors frequently use the Internet in their daily lives; (2) they make clear that a trial is not ordinary life and that jurors have a particular responsibility to be fair to the parties whose rights they are adjudicating; (3) they remind the jurors that a criminal defendant can only confront evidence that is presented in open court; and (4) they extract a promise from the jurors to refrain from misuse of the Internet during trial. *See id.*

325. This practice is cautiously endorsed by the American Bar Association, which approves of juror questions in civil trials, but which in criminal trials leaves the decision whether to ask questions in the trial judge's discretion, taking into consideration "the historic reasons why courts in a number of jurisdictions have discouraged juror questions and the experience in those jurisdictions that have allowed it." ABA PRINCIPLES, *supra* note 316, at 18; *see also* Akhil Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1185 (1995) ("[S]hould not juries at least be allowed to forward questions to the judge to be asked, if not substantively inappropriate?"); Dann, *supra* note 311, at 1253 ("[Q]uestioning by jurors is an important device for permitting more (and much needed) juror participation in the fact-finding process.").

326. *See, e.g.*, Neil P. Cohen, *Better, Happier Juries*, 39 TENN. B.J. 16, 23 (2003) (noting advantages of permitting jurors to ask questions); Dann, *supra* note 311, at 1253 (same).

327. While this sounds potentially time consuming, judges who have used the technique report that it does not take more than a few minutes. *See* Frankel, *supra* note 317, at 225 (noting that, in his experience, this process takes "approximately three minutes per question"). In addition, in jurisdictions that have experimented with the practice, it seems that jurors in fact rarely exercise their option to ask questions; instead, the primary benefit appears to be that the jurors feel that they are an active part of the process. *See* Turgeon & Francis, *supra* note 317, at 446-48 (2009).

outlet for jurors' frustration by increasing their participation and decreasing any confusion. It would also give the parties an indication of what the jurors' concerns are, helping the parties focus their presentations.³²⁸ A jury that received answers to its questions, or that at least was given some reasonable explanation as to why certain questions should not be answered, would be much less likely to search for supplementary information on the Internet.

2. *Allowing Jurors to Determine the Law*

Another issue is whether instructions could be made sufficiently understandable and plain that jurors would not have to resort to seeking legal definitions online. Over the past twenty years, there have been frequent calls, many of them by judges, for developing accurate and understandable instructions that jurors can actually follow.³²⁹ Now that jurors can look up legal terms,³³⁰ the incomprehensibility and unwieldiness of jury instructions must be addressed promptly. Once again, allowing jurors to request clarification if they do not understand a definition would be an important step towards eliminating these "dictionary" offenses.

On the more complex question of jurors seeking to understand the potential sentencing consequences of their decisions, the legal and normative arguments are strong that, at least in some cases, they should be given that information by the judge. The body of authority holding that jurors should not be told of any possible sentence rests primarily on tradition, as well as on the unsupported assumption that merely speaking of punishment implies that the defendant is guilty, or, conversely, that informing jurors of the possibility of a harsh sentence is tantamount to endorsing nullification.³³¹

But a murky sense of "tradition," established a century after the ratification of the Sixth Amendment, and unsubstantiated concerns about how a jury would use this information, fail to establish that the jury should always be uninformed. Historically, the jury had the power to mitigate the harsh consequences of a primarily capital sentencing scheme by routinely finding defendants guilty of lesser offenses.³³² If an

328. See Cohen, *supra* note 326, at 23.

329. See, e.g., Turgeon & Francis, *supra* note 317, at 426–27.

330. See *supra* notes 99–102 and accompanying text.

331. 75A AM. JUR. 2d *Trial* § 1210 (2010) ("The reasons prohibiting an instruction on the sentence that could be imposed are to minimize the possibility of jury sympathy based on the potential sentence, and to ensure that the jury decides a case according to the law and evidence presented, rather than speculating on the consequences of the verdict." (footnote omitted)); see also Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. Rev. 2223, 2225 (2010) ("Indeed, a largely unexamined doctrine prohibiting informing the jury of potential punishment has become firmly entrenched in American law.").

332. See Langbein, *supra* note 296, at 1062–63 (describing the practice of having a jury

important function of the jury is to reflect the judgment of the community, that judgment falls not only upon the accused and his conduct, but upon the penalties for that conduct assessed in society's name.

Nonetheless, giving this information would not always be without cost to the defendant, particularly where a sentence would turn, as it so often does, on the defendant's prior record. Informing the jury of the sentencing consequences of a guilty verdict might make the most sense in situations where there is a mandatory minimum sentence or where a conviction would trigger a mandatory life sentence under a state's "three strikes" law. In cases where punishment is fixed rather than discretionary, a jury that was aware of the consequences of its decisions would at least exercise its power knowingly.³³³

3. *Is There a Place for Juror Self-Expression?*

Juror blogging, tweeting, and status updating raise interesting questions about the relationship between the opacity of jury verdicts and their legitimacy. To the extent that such missives do diminish the gravitas of the institution, then other means of letting jurors process their experiences, such as allowing jurors to discuss the case with each other during the course of the trial, so long as they refrain from making any ultimate determinations,³³⁴ could diminish the urge to blog.

A bolder approach would be to try to locate a new source of legitimacy for jury verdicts, one that grows not out of inscrutability but understanding. One of the values lost in the dismissive popular attitude towards jurors as ignorant and uneducated is an appreciation of the difficulty of their task. Trying to recreate past events is fraught with perils, and because of concerns about unfairness to defendants, we deny jurors many of the tools that we ourselves use in daily life. The jurors who take their role seriously—and we can assume that they are in the majority—face a lonely and difficult task, which can cause them great

"downcharge" or "downvalue" charged crimes in order to mitigate the death penalty). Langbein found that in nearly a quarter of the cases at the Old Bailey during the 1750s, juries returned a partial verdict, finding the defendant guilty of a lesser offense. *See id.* at 1063. "For a few offenses, like picking pockets, the juries all but invariably downvalued, expressing a social consensus that the capital sanction was virtually never appropriate." *Id.*

333. It is by no means a certainty that juries would mitigate their verdicts in response to sentencing information. Nonetheless, in cases where the punishment, by any rational measure, seems disproportionate to the crime, one wonders whether the jury would have changed its verdict if it understood the consequences. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 358–59 (1978) (upholding life sentence of a defendant convicted of forging a check for \$88.30 under Kentucky Habitual Offender Statute).

334. *See* Dann, *supra* note 311, at 1262 (advocating further research on the question of whether jurors would benefit from structured discussions throughout the trial); Shepard, *supra* note 303, at 169 (characterizing the banning of presubmission discussions as a "roadblock[] to sensible decision making").

anxiety.³³⁵ Describing their experiences might be a justifiable attempt to relieve that pressure.

If we do not want jurors to discuss the case among themselves, for fear of solidifying opinions before all the evidence is in, perhaps we should consider allowing jurors to externalize their thoughts, maybe even to post comments in some centralized, anonymous forum. So long as the jurors did not specifically identify the case they were involved with, they could describe their impressions and express their feelings in a controlled environment. Whether such a measure is desirable would depend on whether jurors end up straying so far from a “black box” model in the future that the paradigm must be abandoned. If that were to happen, and such a compendium of juror voices were made public, it could conceivably lead to renewed appreciation of the importance and difficulty of the jury’s task.³³⁶

4. *Curbing Investigations of Jurors*

Finally, as the situation develops, there might be a need for some kind of curb on the investigation of jurors by attorneys. It is not at all clear that lawyers should be able to obtain more information about jurors than is provided on the record in voir dire, particularly when this information is used to peremptorily strike jurors.³³⁷ Short of relying on anonymous juries,³³⁸ the only way to diminish the incentives for these kinds of investigations would be to reduce or eliminate peremptory challenges.³³⁹ There are strong democratic reasons for abandoning the

335. There is evidence, particularly in violent crime and capital cases, that some jurors can suffer from a form of post-traumatic stress disorder. See, e.g., James E. Kelley, *Addressing Juror Stress: A Trial Judge’s Perspective*, 43 *DRAKE L. REV.* 97, 124 (1994) (noting that jurors in serious criminal cases often suffer from severe stress, and recommending postverdict debriefing by the judge as an appropriate response); Daniel W. Shuman et al., *The Health Effects of Jury Service*, 18 *LAW & PSYCHOL. REV.* 267, 268 (1994) (“[J]urors may experience stress from being removed from their families and jobs, from being shown especially graphic evidence, or from the trial process itself.”).

336. A full exploration of the costs and benefits of a more open model of jury deliberations is beyond the scope of this Article.

337. The arguments for balancing the defendant’s right to an impartial jury and the juror’s right to privacy will be the subject of a future article.

338. There is nonetheless a strong case to make in favor of anonymous juries, particularly given the potential privacy invasions of attorneys’ online sleuthing. See Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 *VAND. L. REV.* 123, 125 (1996) (“[A]nonymity can enhance the participation of citizens in jury service, the reliability of the voir dire process, the quality of jury deliberations, and the fairness of criminal verdicts.”).

339. Even if the peremptory challenge were retained, one could fairly question whether the number of peremptories allowed by statute needs to be so high. See, e.g. MD. CODE ANN., CTS. & JUD. PROC. § 8-301(c) (2011) (allowing, for cases with the potential of twenty years or greater imprisonment, ten peremptory challenges for defendant and five for state); MINN. R. CRIM. PROC. 26.02 subd. 6 (allowing, for offenses with the potential for life imprisonment, fifteen peremptories for defendant and nine for state; for all other offenses, five peremptories for defendant and three for state); N.J. STAT. ANN. § 2B:23-13(b) (West Supp. 2011) (allowing, for serious felonies, twenty peremptory challenges for defendant and twelve for the state).

peremptory challenge so that juries could be selected in a way that reflects “the breadth of our communities rather than the group left over when lawyers had expended their peremptory challenges on pet hates.”³⁴⁰ With a shorter voir dire and fewer strikes to make, the value of the information to the lawyers would be reduced to its usefulness as a persuasive tactic.

This Part raises more questions than it answers. But if we begin to ask the right questions, then we have a chance of creating a more functional, more active, possibly even a more transparent type of jury that might actually survive into the twenty-first century.

CONCLUSION

New technologies that could never have been contemplated by the Framers are challenging long-established rules that have shaped the modern norm of the passive, uninformed jury. Now that jurors have the ability to circumvent these rules on their own, the time seems ripe to reevaluate both the functioning of the jury and the symbolic role it plays in our justice system. The history of the jury supports a vision of a stronger, more active jury that can participate more fully in the fact-finding process and is aware of the consequences of its decisions. What the future holds has yet to be written.

340. Alschuler, *supra* note 17, at 232. A jury selection system without peremptory challenges might also entail “respecting the jurors’ privacy, abandoning our probing of their psyches, beliefs, and practices in extended voir dire examinations.” *Id.*