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# VOIR DIRE IN THE #LOL SOCIETY: JURY SELECTION NEEDS DRASTIC UPDATES TO REMAIN RELEVANT IN THE DIGITAL AGE

ZACHARY MESENBURG\*

## I. INTRODUCTION

### A. *Social Boom!: It's a Facebook World . . . and We're Just Living In It*

“Privacy is dead, and social media hold the smoking gun.”<sup>1</sup>

– Pete Cashmore, founder of Mashable<sup>2</sup>

As a pioneer of the digital age, Cashmore’s statement is appropriate given the way society has transformed since the social media explosion.<sup>3</sup>

Facebook surpassed 1.1 billion users in June 2013,<sup>4</sup> Twitter exceeded 554 million accounts around the same time,<sup>5</sup> and YouTube earns more than 1 billion unique users each month.<sup>6</sup> It is safe to say that Cashmore’s statement is well supported by the

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1. Pete Cashmore, *Privacy Is Dead and Social Media Hold the Smoking Gun*, CNN (Oct. 28, 2009, 13:22 GMT), <http://edition.cnn.com/2009/OPINION/10/28/cashmore.online.privacy/>.

2. Mashable is a blog covering social media news, new websites, and social networks. MASHABLE, <http://mashable.com/> (last visited Sept. 13, 2012).

3. Merriam-Webster defines social media as “[F]orms of electronic communication (as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).” MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Sept. 12, 2012).

For the purposes of this comment, social media will be used interchangeably with “social sites,” “social networks,” and “social networking.”

4. STATISTIC BRAIN, *Facebook Statistics* (June 23, 2013), <http://www.statisticbrain.com/facebook-statistics/> (citing Facebook user statistics through mid-2013).

5. STATISTIC BRAIN, *Twitter Statistics* (May 7, 2013), <http://www.statisticbrain.com/twitter-statistics/> (citing Twitter user statistics as of May, 2013).

6. YOUTUBE PRESS STATISTICS, <http://www.youtube.com/yt/press/statistics.html> (last visited Oct. 20, 2013).

data.<sup>7</sup>

Because of social media's pervasive presence and rapid expansion, the impact of these sites has carried over into everything from entertainment to sports to politics.<sup>8</sup> In those industries, social media has changed the communication landscape, introducing wholesale changes to how people interact.<sup>9</sup>

The legal profession is yet another industry that is not immune from the far-reaching impact of social media. And when those two entities collide, it results in a unique set of complications.<sup>10</sup> Most notably, how easy it is for lawyers to leverage social media research for the purposes of voir dire.<sup>11</sup>

*B. A New Tool for the Arsenal?: Lawyers' Experimentations  
with Social Media Research for Voir Dire<sup>12</sup>*

While using social media research during voir dire is gaining more and more favor in jurisdictions across the country, the implications stemming from that practice are far from clear.<sup>13</sup> For

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7. Facebook, Twitter, and YouTube are examples of popular social networks; others including Pinterest, LinkedIn, Foursquare, and Google+. See MERRIAM-WEBSTER, *supra* note 3 (defining social networks).

8. See Ben Bajarin, *How Twitter is Evolving*, [TECH.PINIONS] (Aug. 10, 2012, 3:02 AM), <http://techpinions.com/how-twitter-is-evolving/8575> (showcasing an example from Twitter about how Justin Bieber actively engages with his fans and people hope to communicate with him).

9. *Id.* While Twitter is just one example, the site represents how social media is not just about updating people; it is about building communication platforms. *Id.* This is especially relevant to the legal world considering that many communications are publicly available – giving attorneys a means to track users' whereabouts, activities, opinions, and more. *Id.*

10. Jury selection is a critical step in any case, let alone a high-profile case, leading many attorneys to procure jury consultants. See Jonathan M. Redgrave & Jason J. Stover, *The Information Age, Part II: Juror Investigation on the Internet – Implications for the Trial Lawyer*, 2 SEDONA CONF. J. 211, 211 (Fall 2001) (noting that jury research is commonplace in litigation, which has led to "astonishing growth" for the jury consulting industry).

See also Adam J. Hoskins, *Armchair Jury Consultants: The Legal Implications and Benefits of Online Research of Prospective Jurors in the Facebook Era*, 96 MINN. L. REV. 1100, 1101 (2012) (juxtaposing traditional jury consulting and digital age jury consulting, as a major part of what makes the process unique now is that more lawyers themselves can do it). "The advent of the Internet has made attorneys everywhere into amateur jury consultants." *Id.*

11. See Ann Campoy & Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury*, WALL ST. J. (Feb. 22, 2011), <http://online.wsj.com/article/SB10001424052748703561604576150841297191886.html> (examining the role of social media in selecting a jury, including lawyers' habits of digging for personal details about prospective jurors that could provide insight into which party those jurors might side with during trial).

12. Note: the terms "voir dire" and "jury selection" are used interchangeably in this Comment.

13. See Stephen P. Laitinen & Hilary J. Loynes, *Social Media: A New "Must Use" Tool in Litigation?*, 52 NO. 8 DRI FOR DEF. 16 (Aug. 2010) (arguing

example, take the most critical of all cases—those involving capital punishment—where “jury selection can be a matter of life or death.”<sup>14</sup> For those defendants, what lawyers and jury consultants find out via social research could heavily influence who ends up on the jury. In essence, jurors’ Facebook profiles and Twitter accounts could ultimately be a deciding factor in whether someone lives or dies.<sup>15</sup>

Yes, cases involving capital punishment are rare.<sup>16</sup> But, there are thousands of other cases involving substantial damage awards or prison time that are just as critical.<sup>17</sup> And because jurors are the ultimate triers of fact, lawyers have both practical and ethical obligations to become social media experts.<sup>18</sup> Jurors also need to be cognizant that the details they share about their lives online are

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that lawyers cannot ignore the fact that social media affects every single stage of the litigation process, and urges litigators to expand juror research to social sites in order to get a full and real profile or potential jury members); *but see* Duncan Stark, *Juror Investigation: Is In-Courtroom Internet Research Going Too Far?*, 7 WASH. J. L. TECH & ARTS 93, 101 (2011) (clarifying that lawyers use of social media research could have an adverse effect on jurors’ perceptions of the legal process in general if they feel as though their privacy is invaded – which could also hinder their willingness to be an impartial participant in the process); *see also* U.S. v. Padilla-Valenzuela, 896 F. Supp. 968, 971 (D. Ariz. 1995) (reiterating that even before the digital age, the “scope of inquiry” for jury selection has “relentlessly expanded” to the extent that possible jurors had shown resistance to the process).

14. Steven C. Serio, *A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert*, 53 AM. U. L. REV. 1143, 1147 (June 2004); *accord* John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1210-11 (2001) (emphasizing that jury selection choices could very well decide a defendant’s fate).

15. American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1049 (2003). The American Bar Association (“ABA”) even recommended that defense attorneys use a jury consultant to help wade through the highly sensitive process of a capital punishment case. *Id.*

16. *See Facts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, at 1 (Oct. 11, 2012), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (citing that of all litigated cases since 1976 there have been only 1304 executions).

17. *See* Douglas Burns, *Annual Cost for Iowa Prisoner Stands at \$31,500*, DAILY TIMES HERALD (Mar. 27, 2013), <http://www.carrollspaper.com/main.asp?SectionID=4&SubSectionID=25&ArticleID=11271> (noting the substantial costs for incarceration on a per inmate basis).

18. *See* Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 611-12 (2012) (saying that lawyers should take part in social research because they can find out information about prospective jurors in just a few seconds, and because some courts and state bar associations condone the practice); *see also* Carol J. Williams, *Jury Duty? May Want to Edit Online Profile*, L.A. TIMES (Sept. 29, 2008), <http://articles.latimes.com/2008/sep/29/nation/na-jury29> (quoting trial consultant Robert B. Hirschhorn, saying that lawyers who do not use Internet and social searches “border[] on malpractice”).

fair game for any litigator.<sup>19</sup>

### C. *The Road Forward*

With no end to digital expansion in sight, social media voir dire will continue to evolve, necessitating a better understanding of the impact it has in the courtroom and on society.<sup>20</sup> This Comment aims to provide clarity around the associated critical issues.

Part II of the Comment provides an overview of how the jury selection process has transformed: from traditional to the digital age. It also covers the sparse case law in this area, which has led many courts to give judges discretion on how to proceed with voir dire. Part III dissects the digital approach to jury selection, analyzing both the benefits and consequences of the practice. Finally, Part IV proposes a new mandated voir dire rule with modified jury instructions and penalties that is more stringent and formulaic to ensure compliance.

## II. BACKGROUND

### A. *The Origination of Juries to the Rise of Voir Dire*

#### 1. *Jury Impartiality Was Not Originally a Desired Trait*

Juries were first commonly used in England toward the close of the twelfth century.<sup>21</sup> At that time, typically the king selected jurors out of a pool of prestigious community members, but instead of requiring impartiality, jurors decided disputes using personal knowledge.<sup>22</sup> It was not until approximately the 1600s that jurors faced lines of questioning in an attempt to ferret out any biases or prejudices they might have.<sup>23</sup>

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19. See Hoffmeister, *supra* note 18, at 612-13 (mentioning the related privacy concerns for those jurors being researched, such as political affiliations, and how lawyers are learning things that people would never want mentioned, let alone during voir dire); *but see* Williams, *supra* note 18 (quoting clinical psychologist Marshall Hennington of Hennington & Associate, saying he has no issues with using any and all information publicly available because it is useful to a client – “This is war.”).

20. See Christopher B. Hawkins, *Internet Social Networking Sites for Lawyers*, 28 NO. 2 TRIAL ADVOC. Q. 12, 13 (2009) (illuminating Florida as an example of a forward-looking state where most courtrooms have wireless Internet access, which allows litigators to lean heavily on in-the-moment research, including that of social media).

21. Tracy L. Treger, *One Jury Indivisible: A Group Dynamics Approach to Voir Dire*, 68 CHI.-KENT L. REV. 549, 552 (1992).

22. STEPHEN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 9 (1988).

23. *Id.*

## 2. *Shift Toward Impartiality*

“[T]he very essence of due process would be denied if one or more members of a jury panel were allowed to remain as jurors while harboring a bias or prejudice toward one of the parties.”

– Judge Swanson, Court of Appeals of Washington<sup>24</sup>

While those words post-date the first use of voir dire, they are reflective of even the earliest use of the process, which is now a prominent part of litigation in the United States.<sup>25</sup>

By the 1800s, the process of challenging jurors was entrenched in the judicial process; and despite the Supreme Court’s admission that finding an unbiased juror was incredibly hard, it upheld the practice of barring biased jurors from serving.<sup>26</sup>

Then, toward the beginning of the twentieth century, the Supreme Court once again upheld the voir dire process, saying that it helped “ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried.”<sup>27</sup>

One limitation that lingered, however, was that pools of jurors were typically generated on an arbitrary basis, e.g., using the unemployed, retirees, or anyone in the vicinity of the courthouse.<sup>28</sup> It was not until 1968 when Congress enacted the Jury Selection & Service Act that jury pools had to be representative of the U.S. population at large.<sup>29</sup>

## 3. *Modern-Day Voir Dire*

Voir dire is “a preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and

24. *Rowley v. Grp. Health Co-op of Puget Sound*, 556 P.2d 250, 252 (Wash. Ct. App. Div. 1 1976).

25. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 35 (2001)(1986) (explaining that voir dire resulted from the Massachusetts Jury Selection Law of 1760, a provision that did not allow the sheriff to question potential jurors after being selected for jury duty).

26. *See Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 297 (1813) (describing the questioning and exclusion of potential juror James Reed for his opinions regarding slavery).

27. *Connors v. United States*, 158 U.S. 408, 413 (1895). In that case, the court also made clear that voir dire was applicable to both criminal and civil cases. *Id.*

28. *See SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 22 (Hemisphere Publishing Corp. 1988) (qualifying the nature of voir dire further, saying that in 1961, most federal districts used their own, different methods for choosing juries).

29. 28 U.S.C. § 1861 (1968). Stating, in part: “[A]ll citizens shall have the opportunity to be considered for service on grand and petit juries . . . and shall have an obligation to serve as jurors when summoned for that purpose;” *see also id.* at §§ 1861-62 (quoting: “No citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status.”).

suitable to serve on a jury.”<sup>30</sup> -Black’s Law Dictionary

Prior to the digital age, litigators approached the jury selection process with only their intellect and intuition at their disposal.<sup>31</sup> And while voir dire is not specifically included in the Constitution, it is inherently linked to the Sixth and Seventh Amendments.<sup>32</sup>

Examining jury selection in modern practice reveals that judges in federal jurisdictions can decide to conduct voir dire on their own<sup>33</sup> or to allow attorneys to take part in the process.<sup>34</sup> If a judge does conduct voir dire absent attorney participation, counsel may still strike jurors for cause or exercise a peremptory challenge.<sup>35</sup>

In comparison, at the state level, jury selection procedures mimic those at the federal level, but the process is almost exclusively governed by statute, court rules, or that jurisdiction’s constitution.<sup>36</sup>

### *B. Another Step Forward: Voir Dire Practice in the Digital Age*

If a judge allows counsel to participate in voir dire, common thinking is that attorneys would be foolish not to leverage social media to research potential jurors.<sup>37</sup> This practice has been buoyed

30. BLACK’S LAW DICTIONARY 764 (3d pocket ed. 2006).

31. See Michael J. Ahlen, *Voir Dire: What Can I Ask and What Can I Say?*, 72 N.D.L. REV. 631, 631-34 (1996) (observing that jurors’ first impressions and inclinations are all exposed in the process, which will ultimately affect their vote at trial; and that historically, the best way to grasp whether jurors had any biases before trial was to simply ask them about it during voir dire).

32. See generally Rachel Harris, *Questioning the Questions: How Voir Dire is Currently Abused and Suggestions for Efficient and Ethical Use of the Voir Dire Process*, 32 J. LEGAL PROF. 317, 317-18 (2008) (providing historical context for how the right to a trial by jury came about in the United States); see also U.S. CONST. amend. VI. *Id.*; U.S. CONST. amend. VII.

33. See generally ROBERT A. WENKE, THE ART OF SELECTING A JURY 15 (Parker 1979) (explaining that removing attorneys entirely from the process is constitutional); see also Treger, *supra* note 21, at 555 (citing the examples of *United States v. Hoffa*, 367 F.2d 698, 710 (7th Cir. 1966); and *Hamer v. United States*, 259 F.2d 274, 279-80 (9th Cir. 1958), cert. denied, 359 U.S. 916 (1959), where the constitutionality was upheld).

34. Wenke, *supra* note 33, at 15.

35. See FED. R. CIV. P. 47 (detailing the processes for examining jurors, using peremptory challenges, and excusing jurors).

36. See, e.g., PA. R. CIV. P. 220.1 (providing an example of a state-specific voir dire statute as evidence of variance between states); see also ILL. S. CT. R. 234 (eff. May 1, 1997) (detailing the examination of potential jurors by questioning them to judge if they are qualified to serve as a juror).

37. See Kathryn Kinnison Van Namen, Comment, *Facebook Facts and Twitter Tips—Prosecutors and Social Media: An Analysis of the Implications Associated With the Use of Social Media in the Prosecution Function*, 81 MISS. L.J. 549, 554 (2012) (noting that many attorneys use social media research in trial scenarios because information pulled from those sites is simply using

by the fact that many courtrooms have wireless Internet access.<sup>38</sup> One example comes from Cameron County, Texas, with the district attorney candidly saying he uses Facebook and other networks to evaluate jurors.<sup>39</sup>

With Internet and social media research on the rise,<sup>40</sup> judges still largely have the discretion to decide how they want to handle voir dire proceedings, leading to varying jury selection standards in different jurisdictions.<sup>41</sup>

1. *Lack of Case Law Regarding Social Media Voir Dire Has Translated into Minimal Precedent*

There is neither frequently cited precedent nor iron-clad rules about the use of social media research during voir dire. One of the most prominent cases, however, is *Carino v. Muenzen*.<sup>42</sup> Carino appealed after the dismissal of his medical malpractice claim, and the Superior Court of New Jersey found that the trial court erred by refusing to let Carino's counsel use a computer for jury selection.<sup>43</sup> While the *Carino* court affirmed the lower court's holding, it nonetheless found that Carino's counsel should have been allowed to conduct juror research on his computer.<sup>44</sup>

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"every available tool in the public domain").

Beyond visiting social networks for their own research, some litigators also feel it is their right to question jurors about their Internet usage. Amanda McGee, Comment, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 318 (2010). Some argue that it serves the two-fold purpose of: (1) knowing as much as possible about jurors, and (2) limiting the possibility of a mistrial because attorneys can excuse those people they feel might abuse social channels during the trial. *Id.*

38. Campoy et al., *supra* note 11 (resulting in litigators using tablets, smart phones, laptops, etc. to peruse prospective jurors social profiles).

39. See Laura B. Martinez, *Cameron Co. DA Will Check Facebook Profiles for Jury Picks*, BROWNSVILLE HERALD (Jan. 17, 2011), <http://www.chron.com/business/technology/article/Cameron-Co-DA-will-check-Facebook-profiles-for-1689598.php> (quoting Cameron County district attorney Armando R. Villalobos saying he encourages staff to use social research and "every available tool in their arsenal").

40. See Anita Ramasastry, *Googling Potential Jurors: The Legal and Ethical Issues Arising from the Use of the Internet in Voir Dire*, FINDLAW (May 30, 2010), <http://writ.news.findlaw.com/ramasastry/20100730.html> (detailing voir dire's shift from lawyers simply providing potential jurors with questionnaires to fill out to now checking the Internet in court during voir dire to find out peoples' attitudes and opinions).

41. See *id.* (offering an example from 2006 when U.S. District Judge David Coar barred the use of real-time Internet searches during voir dire when selecting jury members for the corruption trial of former Chicago mayoral aide Robert Sorich).

42. *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

43. *Id.* at \*12 (holding that the judge committed an error in refusing to allow appellant's counsel to use a computer during voir dire).

44. *Id.* at \*4. The exchange is as follows:



Another example comes out of California, where three months into a trial, a lawyer saw that a juror was constantly on his mobile phone.<sup>45</sup> Not only did the activity serve as a signal to counsel that this person was potentially abusing the judicial system, but also that the juror already had a predisposition as to the outcome in the case.<sup>46</sup> After contacting a jury consultant, the legal team quickly uncovered a slew of tweets from the juror, leading to his dismissal.<sup>47</sup>

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THE COURT: Are you Googling these [potential jurors]?

[PLAINTIFF'S COUNSEL]: Your Honor, there's no code law that says I'm not allowed to do that. I-any courtroom-

THE COURT: Is that what you're doing?

[PLAINTIFF'S COUNSEL]: I'm getting information on jurors-we've done it all the time, everyone does it. It's not unusual. It's not. There's no rule, no case or any suggestion in any case that says- . . .

THE COURT: No, no, here is the rule. The rule is it's my courtroom and I control it.

[PLAINTIFF'S COUNSEL]: I understand.

THE COURT: I believe in a fair and even playing field. I believe that everyone should have an equal opportunity. Now, with that said there was no advance indication that you would be using it. The only reason you're doing that is because we happen to have a [Wi-Fi] connection in this courtroom at this point which allows you to have wireless Internet access.

[PLAINTIFF'S COUNSEL]: Correct, Judge.

THE COURT: And that is fine provided there was a notice. There is no notice. Therefore, you have an inherent advantage regarding the jury selection process, which I don't particularly feel is appropriate. So, therefore, my ruling is close the laptop for the jury selection process. You want to-I can't control what goes on outside of this courtroom, but I can control what goes on inside the courtroom.

*Id.*

*See also* Johnson v. McCullough, 306 S.W. 3d 551, 558-59 (Mo. 2010) (en banc) (per curiam) (holding that it is appropriate for litigators to gather information about jurors online given advances in technology).

Also, while not social media specific, the high-profile Jose Padilla "dirty bomber" case exemplifies the possible extreme consequences that could arise if attorneys are not allowed to use Internet research. *See* Williams, *supra* note 18 (highlighting the Padilla case where an extensive survey got mailed to 550 voters in greater Miami before the trial – yet the questionnaire did not unearth the fact that one respondent was being investigated. Trial consultant Linda Moreno ultimately uncovered that integral fact when conducting Internet searches).

45. Alison Frankel, *For \$295, a Window Into Jurors' Posts and Tweets*, THOMSON REUTERS NEWS & INSIGHT (Oct. 24, 2011), [http://newsandinsight.thomsonreuters.com/Legal/News/2011/10\\_-\\_October/For\\_\\$295,\\_a\\_window\\_into\\_jurors\\_posts\\_and\\_tweets/](http://newsandinsight.thomsonreuters.com/Legal/News/2011/10_-_October/For_$295,_a_window_into_jurors_posts_and_tweets/) (detailing a case where Ron Kurzman, director of litigation consulting for Magna Legal Services, used social media research to uncover that a potential juror was constantly posting about the trial; which resulted in the juror being dismissed).

46. *Id.* One of prospective juror Trevor August's tweets read: "Not hard to tell who is here for jury duty and who isn't in the security line. #juryduty"

47. *Id.* The lawyer wisely contacted Kurzman (*supra* note 45), who was working with him on the case. Kurzman quickly investigated the juror's

With the background of the *Carino* case underpinning many of the ripe issues regarding voir dire, experts have noted the usefulness of social research if a judge so permits.<sup>48</sup> Even so, that same case also exemplifies how different court divisions in one jurisdiction can disagree about the specific approach and parameters to use during voir dire.<sup>49</sup>

## 2. Organizations Have Tried to Provide Clarity

While not in direct response to *Carino*, the crux of that case has prompted multiple bar associations to issue formal opinions about social media use during voir dire. One example is the New York City Bar Association's ("N.Y.C. Bar Ass'n") Rule 3.5 regarding social network juror research.<sup>50</sup>

In detailing the delicacy with which lawyers must handle social media research, the N.Y.C. Bar Ass'n noted that nothing precludes attorneys "from viewing public information that a juror might be unaware is publicly available . . . Just as the attorney must monitor technological updates and understand the functionality of social media websites, jurors have a responsibility to take adequate precautions to protect any information they

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activity to inform counsel about the suspicious behavior.

It is also worth noting that Kurzman's experience with that case led to him founding Jury Scout, a service that investigates potential jurors' social media activity to provide lawyers with information about whether a person is more or less likely to agree with the prosecution or the defense. *Id.* In conducting these services, Kurzman will send his employees to trials across the nation to get the names of jury pool members. *Id.* Those names are then cross-referenced against roughly fifty social networks. *Id.*

48. See, e.g., Sara Yin, *Facebook Complicates Jury Duty Screening*, PC MAGAZINE (Feb. 22, 2011, 4:24 PM), <http://www.pcmag.com/article2/0,2817,2380747,00.asp> (quoting Amber Yearwood, a consultant for Trial Behavior Consulting, who said she removed a possible juror in a product-liability case because that juror's Facebook profile was incredibly opinionated); see also Hoskins, *supra* note 10, at 1108 (illuminating the additional benefit that counsel is able to rapidly compile a plethora of information about a jury pool at nearly no cost, whereas the same amount of research pre-digital age could have been too costly to pursue).

49. *Carino v. Muenzen*, No. L-0028-07 at \*12.

50. See N.Y.C. Bar Ass'n, *Jury Research and Social Media: A New York City Bar Formal Ethics Opinion*, 44TH ST. BLOG (June 4, 2012, 4:23 PM), <http://www.nycbar.org/44th-street-blog/2012/06/04/jury-research-and-social-media-a-new-york-city-bar-formal-ethics-opinion/> (quoting the formal opinion:

[I]f a juror were to (i) receive a 'friend' request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that would constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification. We [the Committee] further conclude that the same attempts to research the juror might constitute a prohibited communication even if inadvertent or unintended.

intend to be private.”<sup>51</sup>

Another example comes from the American Bar Association (“ABA”), emphasizing how important it is to act ethically throughout litigation, especially during discovery.<sup>52</sup> But so long as lawyers access only public parts of peoples’ social media properties, the ABA agrees that it is an ethical practice.<sup>53</sup>

Despite increasing support, some others are wary that in conducting exhaustive research for the benefit of clients, lawyers might start to lean too heavily on social networks for research and that practice could actually do them a disservice.<sup>54</sup> If a lawyer does get lazy, the two most fatal consequences would be: (1) failure to authenticate the information they find, and (2) in cases of a juror having a common name, making sure that it is the actual juror in question.<sup>55</sup>

### 3. *Putting Digital Voir Dire into Practice*

Discussion about the historical uses of voir dire laid the necessary framework for understanding how the practice has evolved to where it is today. Within that examination, the crux of new age jury selection became clear: there is currently no standard

51. *Id.*

52. See Seth I. Muse, *Ethics of Using Social Media During Case Investigation and Discovery*, A.B.A. SECTION OF LITIG. PRETRIAL PRACTICE & DISCOVERY (June 13, 2012), <http://apps.americanbar.org/litigation/committees/pretrial/email/spring2012/spring2012-0612-ethics-using-social-media-during-case-investigation-discovery.html> (citing that attorneys can generally access the publicly available parts of someone’s personal social media pages “without facing ethical repercussions”).

The ABA also appears to understand the impact of social media, noting the swift expansion of networking sites. *Id.* It also admits the scarcity of “state ethics rules, model ethics advisory opinions, and emerging case law” does not help lawyers navigate that muddled area of the law. *Id.* Subsequently, the organization knows that ethical dilemmas are bound to arise when leveraging social media. *Id.*

53. See *id.* (citing that the provision about social media usage is generally related to the rule applied in *State ex. rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 164 (1994). There, the Supreme Court of West Virginia held that a party’s actions that take place for viewing by the general public, does not create an ethical violation by a lawyer if that information is used at trial).

54. Van Namen, *supra* note 37, at 557. Stating social research during voir dire is risky because searches may accidentally, or intentionally, access private information that should never have been seen.

One major risk involves people being researched that have established privacy settings that exclude the public from seeing their information. *Id.* In those instances, if a lawyer still somehow gains access to blocked information via other means, they could face severe ethical ramifications. *Id.* at 557-58.

55. Ramasastry, *supra* note 40. Along with mistaken identity and vetting information to determine if it is reflective of a person’s true beliefs, is the worry about a juror posting fake opinions across his social profiles simply to escape jury duty.

set of best practices regarding social media voir dire. Clarity in this area is essential moving forward.

### III. ANALYSIS

#### A. *Content Is King, and People Feel More and More Compelled to Publish*

“We’re living at a time when attention is the new currency . . . those who insert themselves into as many channels as possible look set to capture the most value. They’ll be the richest, the most successful, the most connected, capable and influential among us. We’re all publishers now . . .”

– Pete Cashmore<sup>56</sup>

Cashmore’s statement is essentially a motto for the digital generation as people join social networks to feel connected and share content with large communities.<sup>57</sup> On its face that is a simple activity, but the more someone shares, the more information that person makes available to the public.<sup>58</sup> So knowing there is an influx of discoverable information, lawyers consistently conduct social media research.<sup>59</sup>

Given the rise in these activities, this portion of the Comment seeks to address: (1) how social media voir dire is even possible, (2) benefits of the practice, (3) other consequences of the practice, and (4) and how it affects all parties to a lawsuit.

#### B. *Wired Everywhere*

##### 1. *Wireless Courtroom Access Has Grown*

Most trial lawyers would probably say their jobs are already hard enough, so if they can use a readily available resource to

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56. Cashmore, *supra* note 1. Cashmore’s article brings to light one of the main reasons lawyers have begun to more thoroughly examine social media sites during voir dire. *Id.* Namely, because it is the age where “We’re all publishers now . . .” so content is freely and easily accessible to those who take the time to look. *Id.*

57. *Id.*

58. See Mary Madden, *Privacy Management on Social Media Sites*, PEW INTERNET (Feb. 12, 2012), <http://pewInternet.org/Reports/2012/Privacy-management-on-social-media/Main-findings.aspx> (citing research statistics showing that twenty percent of online adults have set their main social media profiles to be totally public).

Another interesting consideration is that women are far more likely to make their profiles available to just friends (67% compared to 48% of men). *Id.* They are also much less likely to make a totally public profile (14% compared to 26% of men). *Id.* In the context of voir dire, this means that the fruitfulness of lawyers’ research could largely be contingent on gender.

59. See Laitinen et al., *supra* note 13 (discussing that lawyers can uncover not only hard to find information via this method, but that they can also supplement known facts or verify prior statements jurors had given).

assist in any part of a lawsuit, they would welcome it.<sup>60</sup>

Lawyers can now conduct more in-the-moment juror and case research because an increasing number of courtrooms now provide wireless access.<sup>61</sup> This accessibility means lawyers almost feel compelled to take it upon themselves to know if and how a potential juror is active online.<sup>62</sup> This also directly impacts the amount of privacy a juror can expect to maintain throughout a trial, especially if he is incredibly active online.<sup>63</sup>

Another rising trend is businesses that are offering lawyers ways to uncover information more easily, such as LexisNexis' SmartLink.<sup>64</sup> With a tool such as this at their disposal, lawyers can quickly investigate jurors in the courtroom itself; for example, checking to see if a juror used to work for a competitor to a party in the litigation.<sup>65</sup>

## 2. *Frequent Tweeter = Less Privacy*

Generally, courts agree that discovery of Facebook comments, forum threads, blog posts, etc., do not violate a juror's privacy.<sup>66</sup>

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60. See Christopher B. Hopkins, *Internet Social Networking Sites for Lawyers*, 28 NO. 2 TRIAL ADVOC. Q. 12, 13 (2009) (advocating that lawyers should use every resource at their disposal – paralegals, laptops, advanced copies of juror lists – to get ahead of the game by conducting juror research online); but see Marcy Zora, *The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights*, 2012 U. ILL. L. REV. 577, 598-99 (2012) (describing how juror research is not a simple task because jurors could use slang, generic terms, nicknames, and privacy settings to avoid the watchful eye of lawyers).

61. See Michelle Sherman, *The Anatomy of a Trial with Social Media and the Internet*, 14 NO. 11 J. INTERNET L. 1, 10 (2011) (citing *Carino v. Muenzen* where the court issued a press release before the trial saying that wireless access was available to “maximize productivity for attorneys”); see also *Carino v. Muenzen*, No. L-0028-07 at \*10 (discussing the applicable court policy for wireless access).

62. See McGee, *supra* note 37, at 319-20 (saying that lawyers are now hunting to see if jurors are active on social channels; looking specifically for blogs and tweets, etc.); accord John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials are Popping Up*, N.Y. TIMES (Mar. 18, 2009), <http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all> (noting: “Attorneys have begun to check the blogs and Web sites of prospective jurors.”).

63. McGee, *supra* note 37, at 320.

64. See, e.g., SmartLinx, LEXISNEXIS (last visited Oct. 7, 2012), <http://www.lexisnexis.com/government/solutions/research/smartlinx.aspx> (servicing government agencies by searching billions of public records and cross-referencing names, numbers, locations, etc. to uncover links between them).

65. Stark, *supra* note 13, at 98. Because of in-court wireless access, lawyers can find valuable insights quickly in order to strategically use peremptory challenges.

66. See *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (holding that people should not think that published or publicly posted thoughts have any reasonable expectation of privacy).

And unless a juror makes a specific point to restrict public access by making certain content private, courts permit lawyers to proactively search for such content.<sup>67</sup>

This stance was reiterated in *J.S. ex rel. H.S. v. Bethlehem Area School District*, where a student was expelled for threatening comments made on a public website.<sup>68</sup> There, the court held that once information is made available online, the disseminator assumes the risk that anyone can access it, which results in a lessened expectation of privacy for that individual.<sup>69</sup>

Along with concerns that there is a level playing field when it comes to accessibility of juror information, is that there is also equal ground for lawyers.<sup>70</sup> But most experts are in agreement that so long as both parties are made aware that Internet access is available to them, there is a level of “fairness” to the process.<sup>71</sup>

### C. *It’s Free! It’s Easy! Why Not Social Voir Dire?*

“If you’re going to trial and your lawyer doesn’t have an iPad, you may want to seek different legal counsel.”

– Kashmir Hill, *Forbes*<sup>72</sup>

Hill quipped in her article that voir dire is quickly becoming a practice that is more like “voir Google.”<sup>73</sup> She also noted that social media voir dire is an evolving, yet essential, practice.<sup>74</sup> And this evolution means that lawyers can help shape the practice moving forward.

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67. See *United States v. Maxwell*, 45 M.J. 406, 417-18 (C.A.A.F. 1996) (stating that the more open the communication method, the less privacy that should be expected, so if a user allows open access to his sites, he should almost expect people will view them). *But cf.* N.Y.C. Bar Ass’n, *supra* note 50 (noting that even with publicly available information, lawyers must still first think about whether his actions would result in a juror learning about the research being conducted so as not to violate anyone’s privacy).

68. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 425 (Pa. Commw. Ct. 2000).

69. *Id.*

70. See Julie Gottlieb, *Social Media Voir Dire*, SOCIAL MEDIA LAW NEWS (Feb. 22, 2011), <http://socialmedialawnews.com/2011/02/22/social-media-voir-dire/> (discussing the implications arising from *Carino v. Muenzen*).

71. *Id.* The thought being that with open Internet access, it is up to counsel discretion on how to use the privilege. *Id.* So, if one party decides not to utilize it, they have made that decision in full knowledge of how it could affect the case. *Id.*

72. Kashmir Hill, *Make Sure Your Lawyer Knows How to Use Facebook*, FORBES (Feb. 23, 2011, 1:31 PM), <http://www.forbes.com/sites/kashmirhill/2011/02/23/make-sure-your-lawyer-knows-how-to-use-facebook/#more-6615>.

73. *Id.*

74. *Id.* The argument is raised that “voir Google” should be commonplace, and that lawyers basically have a duty to Google or Facebook all prospective jurors, otherwise they could put their clients at a disadvantage.

### 1. *Putting It into Practice*

Voir dire happens in real-time now more than ever before because lawyers carry tablets and laptops with them everywhere, waiting for the chance to uncover clues about jurors online.<sup>75</sup> It has also reached the point where jury consultants are essentially private investigators, sometimes building intricate spreadsheets with notes about jury pool members.<sup>76</sup>

Distinguished jury consultant Jason Bloom said of the process: “Jurors are like icebergs – only 10 percent of them is what you see in court. But you go online and sometimes you can see the rest of the juror iceberg that’s below the water line.”<sup>77</sup>

### 2. *Plunging Below the Water Line*

The fact that social media prompts spontaneous comments means that lawyers can potentially uncover things that people might not typically say.<sup>78</sup> This gives lawyers the opportunity to research before, during, and even after voir dire closes.<sup>79</sup>

Recent examples shed light on how lawyers are wading through the pool of potential jurors.<sup>80</sup> Criminal defense attorney Jennifer Bukowsky said that she had a black client who was facing sexual assault charges in Boone County, Missouri.<sup>81</sup> In that matter, Bukowsky wanted to retain a white female juror because her Facebook profile included pictures of her with a black man, which led Bukowsky to believe that the juror was not racist and would be favorable toward her client.<sup>82</sup>

Social voir dire also plays a role in striking potential jurors,

75. See Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, REUTERS (Feb. 17, 2011, 2:49 PM), <http://www.reuters.com/article/2011/02/17/us-courts-voirdire-idUSTRE71G4VW20110217?feedType=RSS&feedName=domesticNews> (illustrating that lawyers and jury consultants seek out intimate details such as sexual orientation, income, religious affiliation, and political stance).

76. *Id.*

77. *Id.*

78. Nicole D. Galli, Christopher D. Olszyk, Jr. & Jeffrey G. Wilhelm, *Litigation Considerations Involving Social Media*, 81 PA. B.A. Q. 59, 60 (2010). This type of information can be particularly valuable when researching an opponent, but harmful if counsel’s own client is posting.

79. *Id.* at 62. Searching social media at every stage of litigation only helps uncover juror tendencies that could shift how evidence is presented or even if a lawyer might fight for a change in venue. *Id.* This type of comprehensive research should also branch out beyond just individual jurors – taking into consideration the opinions of others similar to those in the jury pool. *Id.* Proponents also argue that social research should include comments left by jurors on traditional sites, i.e., online newspapers. *Id.*

80. See Hill, *supra* note 72 (providing five examples of ways in which lawyers leveraged social research during voir dire).

81. Grow, *supra* note 75.

82. *Id.* The prosecution ultimately struck the juror and trial ended in a hung jury. Regardless, Bukowsky noted that social media directly affected her decision on whether to strike a juror.

as evidenced by a case in which a woman sued ConAgra claiming she got a rare lung disease by consuming a harmful chemical that was in the company's microwave popcorn.<sup>83</sup> During voir dire, ConAgra's lawyers uncovered a potential juror's Facebook page that had links to a BP boycott petition and to other websites with detracting commentary about large companies.<sup>84</sup> The team eventually struck the juror because of his anti-corporate feelings.<sup>85</sup>

Furthermore, while tangentially related to voir dire, continued social media research throughout a trial is critical to ensuring a fair process.<sup>86</sup> In late 2011, the Arkansas Supreme Court reversed the murder conviction of Erickson Dimas-Martinez because counsel discovered that a juror explicitly ignored court instructions and tweeted on numerous occasions during trial and jury deliberations.<sup>87</sup> As a result, the court made a public recommendation that juror access to mobile technology during a trial should be limited because there is too great a risk for misconduct.<sup>88</sup>

### 3. *Miscellaneous Benefits of Social Media Voir Dire*

Another benefit to this practice is more effective time management because lawyers generally have very little time to conduct voir dire and examine potential jurors.<sup>89</sup> This is true even if voir dire lasts only a few hours or several days.<sup>90</sup>

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83. Hill, *supra* note 72.

84. *Id.* ConAgra counsel also conducted a Google search that led the team to the juror's personal blog titled, "The Insane Citizen: Ramblings of a Political Madman." *Id.* On that site, the lawyers found statements such as "F\*\*\* McDonald's. I hate your commercials. I'm not 'lovin' it." *Id.*

*See also, e.g.,* Campoy et al., *supra* note 11 (highlighting a case in which David Cannon, a Los Angeles trial consultant, found that a prospective juror tried to frequently contact extraterrestrials; ultimately recommending counsel not select her because of her "instability").

85. *Id.*

86. *See generally* William Pfeifer, *Social Media Use by Jurors in the Courtroom: How Facebook and Twitter Could Affect Your Jury Trial*, ABOUT.COM (2012), <http://law.about.com/od/trialtechniques/a/Social-Media-Use-By-Jurors-In-The-Courtroom.htm> (discussing a variety of instances where continued juror monitoring has led to overturned verdicts and juror dismissals).

87. *Id.*

88. *Id.* The recommendation rested mainly on the premise that mobile devices provide too much instant access to information that jurors should never be exposed to through a trial.

89. *See* Lindsay M. Gladysz, *Status Update: When Social Media Enters the Courtroom*, 7 I/S: J. L. & POL'Y FOR INFO. SOC'Y 691, 708 (2012) (noting that along with finding relevant tidbits about jurors quickly, there is the additional benefit that the information is more generally more "candid" and forthcoming).

90. Hopkins, *supra* note 60, at 13. Even if voir dire is a relatively fast process, using social media can uncover critical juror interests to help lawyers essentially customize a jury. *Id.* If given more time, rigorous research can uncover exact amounts of political contributions, precise social behaviors, and even employment history. *Id.* All of these items could help counsel drop



And what time might not afford a lawyer during voir dire, social media research can make up for with unearthing details about topics that are not allowed to be mentioned during questioning.<sup>91</sup> Consider that all of the following details can be found online: favorite television shows, music preferences, recommended books, religious background, drinking habits, social events, possible biases, political affiliation, etc.<sup>92</sup> Those types of details are fairly universal, but they could be the difference in whether jurors treat one party more favorably based on perceived common ground they might have with the plaintiff or defendant.<sup>93</sup>

*D. Not So Fast . . . Exploring the Negative Ramifications of Social Voir Dire*

“[D]on’t try to piece together a psychological portrait of everybody . . . what you’re going to get is probably going to be misleading because people don’t put out everything about themselves. They try to put their best foot forward and they create identities on the Internet for various purposes.”

– Galina Davidoff, Magna Legal Services<sup>94</sup>

*1. Wait. It Was the Other John Smith?*

Because the Internet is so vast, the most basic predicament with social media voir dire is lawyers verifying that they are indeed researching the right person.<sup>95</sup> Complicating matters further is that people often use nicknames or pseudonyms online rather than their real names, and judges do not require jurors to provide that information.<sup>96</sup> And seeing as Facebook itself

impactful analogies or sentiments into a closing statement tailored precisely for key jury members. *Id.*

91. Gladysz, *supra* note 89, at 708.

92. *Id.*

93. *See id.* (arguing that those details could be critical in deciding which jurors had the “right’ characteristics,” that could indicate if there is an ability to sway them in your favor).

94. *See* LexisNexis Communities Staff, *The Unique Challenges of Social Media in Court*, LEXISHUB (June 27, 2012, 4:47 PM), <http://www.lexisnexis.com/community/lexishub/blogs/legaltechnologyandsocialmedia/archive/2012/06/27/the-unique-challenges-of-social-media-in-court.aspx> (quoting multiple jury experts discussing the complications that can arise when crossing the overriding urge to look for all possible information about jurors while also respecting their privacy).

95. *See* Leslie Ellis, *Friend or Foe? Social Media, the Jury and You*, THE JURY EXPERT: THE ART AND SCIENCE OF LITIGATION ADVOCACY (Sept. 26, 2011), <http://www.thejuryexpert.com/2011/09/friend-or-foe-social-media-the-jury-and-you/> (stipulating that lawyers must confirm that people found online are actually the prospective jurors themselves – otherwise the “heightened pressures of trial and speed of voir dire” can lead to drastic errors).

96. *See* Ramasastry, *supra* note 40 (discussing this complexity in conjunction with privacy concerns because jurors might feel harassed if they have to divulge too much about their personal lives).

acknowledged that roughly eighty-three million user accounts are fake, who knows what type of information lawyers are actually uncovering.<sup>97</sup>

Even more concerning is that if a lawyer does find the right person, a third-party might post information about a prospective juror that is either misrepresentative or a downright lie, which can lead to a skewed picture of that person.<sup>98</sup> If believed, a lawyer might waste a peremptory challenge on someone that could ultimately be qualified.

## 2. *Privacy Above All Else*

Simply put, lawyers cannot directly contact or communicate with prospective jurors online.<sup>99</sup> That is a simple directive but much harder to execute because lawyers currently can only rely on minimal case law, inadequate state ethics rules, and advisory opinions when working through ethical quandaries.<sup>100</sup>

It is not just about contact with jurors either, as any social media activities that result in a lawyer gaining access to privatized information without a juror's full awareness can be a breach of ethics.<sup>101</sup> Borderline instances are the hardest to evaluate because there is less direction from ethics codes; e.g., friend requesting jurors to get access.<sup>102</sup>

Illuminating this gray area is a formal opinion from the

97. Todd Wasserman, *83 Million Facebook Accounts are Fake*, MASHABLE (Aug. 2, 2012), <http://mashable.com/2012/08/02/fake-facebook-accounts/>. That equates to roughly 8.7% (4.8% duplicate accounts, 2.4% misclassified accounts, and 1.5% undesired accounts) of Facebook's total accounts.

98. See James Gobert, *Laying the Groundwork: Investigation of the Venire*, JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY § 5.2 (2011) (highlighting the possibility that any person with the requisite motivation could post fake information or gossip about a juror to disparage him because it can be done so anonymously).

99. See Timothy Flynn, *Social Media and the Jury Pool*, LAWYERNOMICS (Aug. 1, 2012), <http://lawyernomics.avvo.com/social-media/social-media-and-the-jury-pool/> (predicting that due to technological advances, the conflicts between lawyers' social media research and jurors' privacy will play out more and more frequently); see also Ramasastry, *supra* note 40 (saying the simplest way this duty gets breached, even if not meant to be malicious, is when lawyers send friend requests to jurors via a site such as Facebook, which would allow them to access private information).

100. See Muse, *supra* note 52 (noting that varying state rules and lack of standardized protocols has created a murky playground for lawyers).

101. See Shane Witnov, *Investigating Facebook: The Ethics of Using Social Networking Websites in Legal Investigations*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 31, 38 (2011) (using information from a juror's profile in a way that is contrary to a person's expectations for how it would be used, can also violate a lawyer's ethical obligations).

102. See *id.* (advocating that (1) lawyers can use any and all publicly available information without fear of repercussions, (2) deceptive acts such as making fake profiles or lying to gain access are undoubtedly unethical, and (3) friending a juror via a credible profile is an action that courts need to provide direction on).

N.Y.C. Bar Ass'n about procuring information from social media.<sup>103</sup> In deciding that deceptive acts to get privatized information were clearly barred, the Association seems to have left a door open for lawyers to “friend” people who know, or are familiar with, the litigants in a suit.<sup>104</sup> That is because in issuing the opinion, the Association said that when sending a friend request to someone, a lawyer *does not* also have to disclose the reason for issuing that request.<sup>105</sup> This seems to suggest the possibility that a lawyer could friend request a friend of a prospective juror to see if that friend posted pictures or comments about the juror.

Lack of a metaphorical paper trail is also a pitfall in the social voir dire process because even when lawyers manage to find the right jurors, those people might only consume information rather than comment or post on their own.<sup>106</sup> This means that “stopping jurors from communicating about details of cases on sites like Twitter and Facebook” (via jury instructions and court rules) is just part of the battle.<sup>107</sup> But more important is prohibiting juror research and access to biased information altogether.

*E. After Balancing All Interests, the Fact Remains that  
Impartiality Matters Above All Else*

Despite the necessary changes that have come about with the voir dire process due to digital expansion, at the heart of the matter still lies impartiality.<sup>108</sup> However, impartiality does not

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103. N.Y.C. Bar Ass'n, *supra* note 50.

104. See N.Y.C. Bar Ass'n, *Formal Opinion 2010-2: Obtaining Evidence From Social Networking Websites*, NEW YORK CITY BAR (2012), <http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites> (clarifying that lawyers are not completely barred from “friending” people via social networks, so long as they use their real names and profiles).

105. See *id.* (noting that there are still ethical standards to adhere to, but it is a much less stringent standard than saying “no contact at all”).

106. See Miland F. Simpler, III, *The Unjust “Web” We Weave: The Evolution of Social Media and Its Psychological Impact on Juror Impartiality and Fair Trials*, 36 LAW & PSYCHOL. REV. 275, 287-88 (2012) (highlighting that jury sequestration is no longer a guaranteed way to keep jurors from gaining access to prejudicial information during the digital age because they can communicate with others and absorb the thoughts and commentary from numerous sources without leaving any trail of having done so); see also Frank J. Mastro, *Preventing the “Google Mistrial”: The Challenge by Jurors Who Use the Internet and Social Media*, 37 NO. 2 LITIG. 23, 26 (2011) (examining the purpose and necessity of tailored jury instructions to minimize the potential for untrustworthy behaviors by jurors, but that because of how easy it is to find information on social channels without even trying there is no way to ensure jurors are not reading off-limits material about a case).

107. Emily M. Janoski-Haehlen, *The Courts Are All a “Twitter”: The Implications of Social Media Use in the Courts*, 46 VAL. U. L. REV. 43, 68 (2011).

108. See Michael R. Kon, *iJury: The Emerging Role of Electronic Communication Devices in the Courtroom*, 57 WAYNE L. REV. 291, 292-93

mean ignorance – some suggest it means restricting access to certain information that could prejudice a juror’s decision-making process.<sup>109</sup>

Jurors, litigants, lawyers, and judges continually weigh the pros and cons of social media voir dire.<sup>110</sup> And the process of balancing the best interest of all parties involved has clear overtones of ensuring that impartiality remains at the heart of whatever standards are put in place moving forward.<sup>111</sup>

#### IV. PROPOSAL

##### A. *The Hunt for Best in Class Voir Dire*

To date, there is no unified, bright-line approach to social voir dire.<sup>112</sup> And the utter lack of a unified approach will continue to hamper the effectiveness of voir dire unless a singular set of approved practices are put in place. This standard should include mobile device mandates, improved jury instructions, and greater acceptance of social media research. But also, there will be some instances when jurors must relinquish some privacy rights for the good of the judicial system.

##### B. *Curiosity Killed the . . . Judicial System . . .*

Call it human nature, nosiness, or simply a desire to be informed, but whatever one might call it, juror and lawyer use of social media during trials raises complex issues.<sup>113</sup> Some

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(2011) (agreeing that the practice of jury selection has rightfully changed as society has changed, which is evidenced most notably given technological advances).

109. *Id.* at 293.

110. *See* Janoski-Haehlen, *supra* note 107, at 44 (reinforcing the current thinking about social voir dire – that it is unchartered territory and it is to be determined whether it will impact the process positively or negatively).

111. *Id.* (providing examples of competing interests for the judicial system and the legal industry, such as courts saying digital voir dire “interferes” with the entire process, while lawyers say the practice is “pivotal” for jury selection).

112. *See* Witnov, *supra* note 101, at 32 (noting that New York, Philadelphia, and San Diego have endorsed varying methods for using social media in litigation).

113. *See* Honorable Ron Spears, *Looking for “Facts” In All the Wrong Places*, 98 ILL. B.J. 102, 102 (2010) (denoting that juror research is a concern even before a trial begins because high profile cases are big news and people can find out information about the a pending case long before a person might be called for jury duty); *see also* Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 3 (2012) (stating that the known risks of juror misconduct led the authors to conduct an informal survey of 140 jurors in the U.S. District Court for the Northern District of Illinois, with findings that supported barring jurors’ social media use during a trial).

This becomes an even bigger problem when jurors move beyond basic research to look up case pleadings, locations where events took place, or even

jurisdictions even think jurors are not capable of preventing themselves from acting inappropriately, advocating that lawyers and judges should be more proactive and thorough during voir dire, rather than relying on simple warnings and basic jury instructions.<sup>114</sup> And sometimes jurors do not see it as misconduct; e.g., a complex case where they do not know some of the core concepts, so they feel compelled to research terms or subjects in an attempt to be informed when making a decision.<sup>115</sup>

These mounting concerns are why courts must: (1) ban jurors' mobile device usage throughout the entire course of a trial, (2) enforce stringent jury instructions with penalties for misconduct, and (3) allow lawyers to conduct Internet research, including situational direct access to jurors' social profiles.

### C. Jurors Must Relinquish Their Mobile Devices

Smartphones, tablets, and laptops did not exist decades ago, so why do jurors need them at all during the course of a trial?<sup>116</sup> Confiscation of such devices would be more valuable because it would help ensure impartial litigation as jurors would not be able to intentionally, or inadvertently, affect a trial.<sup>117</sup>

Consider that jurors already enter a trial with their own predispositions and beliefs about the judicial process as a whole, including possible mistrust of lawyers and judges.<sup>118</sup> There is no need to complicate matters further by arming them with a way to publicly display their feelings in ways they might not even realize are affecting a trial.<sup>119</sup>

And experts are far too aware of the ineffectiveness of current

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commentary about preliminary testimony. *Id.*

114. E.g., William E. Wegner, Robert H. Fairbank & Justice Norman L. Epstein, *Jury Selection: Preparation for Attorney Voir Dire*, CAL. PRAC. GUIDE CIV. TRIALS & EV. ch. 5-E, § 252.2a (2010) (detailing that voir dire should be used to identify jurors who may not refrain from using social media during a trial, an especially crucial task if younger jurors are involved).

115. *Id.*  
116. See Benj Edwards, *Evolution of the Cell Phone*, PC WORLD at p. 8 (Oct. 4, 2009, 5:00 PM), [http://www.pcworld.com/article/173033/cell\\_phone\\_evolution.html](http://www.pcworld.com/article/173033/cell_phone_evolution.html) (citing the first mobile phone with Internet access was the Nokia 9000i Communicator in 1997).

117. See Steven Wallace, *The Internet Infects the Courtroom*, 93 JUDICATURE 138, 139 (2010) (mentioning that "confiscation of handheld devices" would prevent juror usage, but the practice would probably be criticized because people rely on them in daily life).

118. See *id.* (intimating that despite how jurors promise to behave, many times how they ultimately act during a trial is far from in line with that promise, and that "technology only adds fuel to the fire").

119. But see Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors From the Internet During Trial*, 59 DRAKE L. REV. 621, 624-25 (2011) (arguing that empirical studies would shed light on jurors' mindsets, including whether they know they are affecting trials via their misconduct).

jury instructions no matter how repetitive and specific they are.<sup>120</sup> Take for example, “Do not do any research about the case.”<sup>121</sup> A simple directive, but often not followed. A manslaughter trial in New Jersey, an aggravated sexual assault case in Maryland, and a drug trial in Florida are all cases involving juror indiscretion.<sup>122</sup>

All of these factors combined prove why jurors’ mobile devices must be taken away. Plus, confiscation is already a practice that is gaining favor among judges.<sup>123</sup> The Research Division of the Federal Judicial Center in Washington, D.C., surveyed 508 federal judges, in which twenty-nine percent said they confiscated juror’s devices during deliberations and twenty-two percent said they confiscated devices at the beginning of each day.<sup>124</sup>

The confiscation (or blackout) approach is also being implemented in various jurisdictions, with Michigan’s bar on device usage being just one example.<sup>125</sup> Michigan’s policy is lax in comparison to other states; e.g. a court in Alaska mandates that jurors give cell phones to the bailiff at the start of deliberations.<sup>126</sup> Even more extreme, courts in Malheur County, Oregon, as well as the United States District Court for the Western District of Louisiana have absolute bans on jurors’ cell phones being allowed in court.<sup>127</sup> And most notably, the court in Ramsey County, Minnesota, does not allow any wireless communication devices in its courtroom.<sup>128</sup>

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120. *See id.* at 621, 623 (saying that judges and lawyers are many times “shocked” at how little control the judicial system appears to have over juror behavior and conduct).

Complicating matters further is that no matter how clear jury instructions are, even very competent jurors have trouble grasping complex legal concepts that some legal experts have taken days, weeks, or years to perfect. *Id.*

121. *Id.* at 623.

122. *See* Mastro, *supra* note 106, at 25 (providing drastic examples of ignored jury instructions).

123. *See, e.g.,* Jerry Crimmins, *New Jury Instructions Look at Social Media*, CHI. DAILY L. BULL. (Aug. 28, 2012), <http://www.chicagolawbulletin.com/News-Extra/2012/08/JURY-jc8282012.aspx> (citing a survey of 508 federal judges by the Research Division of the Federal Judicial Center in Washington, D.C., about limiting electronic device usage in their courtrooms).

124. *See id.* (quoting Michael Paul Cogan of Cogan & Power P.C. in support of the confiscation approach: “I’ve always been a proponent of jurors checking their cell phones at the door every morning and getting them back at the end of the day.”).

125. *See, e.g.,* Sharon Nelson, John Simek & Jason Foltin, *The Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 6 (2009-10) (highlighting Michigan’s Supreme Court rule barring the use of all communication devices throughout the trial).

126. *Id.*

127. *Id.* The United States District Court for the Eastern District of Virginia takes the exact same approach as the Oregon and Louisiana courts in completely barring cell phones. *Id.* at 5.

128. *See id.* at 6 (showing the immediate effect of that new policy, the Ramsey County court has already had two mistrials because jurors violated

Plus, given the fact that it is impractical to completely sequester jurors for every possible case,<sup>129</sup> taking away mobile devices is the most efficient method to ensure juror compliance while also giving lawyers a peace of mind that they do not have to track a juror's every move.<sup>130</sup>

Opponents would most likely call confiscation a nuisance or highly controversial because of possible deprivation of personal property or limiting free speech.<sup>131</sup> That is a compelling argument and one that has already frustrated jurors.<sup>132</sup> Some judges have even made sure to protect jurors' rights and property by denying legal counsels' request to ban electronic device usage.<sup>133</sup> But despite these contentions, more courts are still moving toward electronic device bans (Cook County, Illinois, as one example).<sup>134</sup>

Admittedly, this does not solve the problem of jurors getting their devices back at the end of each day or simply going home and using the internet.<sup>135</sup> Compounding the issue is that many people

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the rule and decided to use cell phones during deliberations).

129. See Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 441 (2012) (opposing sequestration because it is too taxing on courts and jurors).

An additional problem is that it is incredibly expensive to provide hotel rooms for jurors and pay other expenses, especially because some courts already have problems paying jurors for their services. *Id.*

130. See Artigliere, *supra* note 119, at 623 (sequestering jurors is truly only valuable and practical in incredibly high-profile and sensitive cases, not every day civil matters).

131. See Ken Belson, *Jury Duty, Now More Tech-Friendly*, N.Y. TIMES (May 1, 2008, 2:45 PM), <http://cityroom.blogs.nytimes.com/2008/05/01/jury-duty-now-more-tech-friendly/> (tracking one juror's experience in a New York court that had previously banned cell phones, saying that the chief clerk thought it was "ridiculous" that he used to collect up to 400 phones a day).

132. See Kelli Stopczynski, *Cellphone Ban Causes Frustration, Judge Says It's a Matter of Safety*, WSBT.COM (Feb. 21, 2013), [http://articles.wsbt.com/2013-02-21/cellphone-ban\\_37228106](http://articles.wsbt.com/2013-02-21/cellphone-ban_37228106) (referencing the court in St. Joseph County, Indiana, where Circuit Court Judge Michael Gotsch admits that the policy is not truly "feasible" in its current form and jurors have expressed their displeasure about the inconvenience).

133. See Molly DiBianca, *Judge Denies Lawyer's Request to Ban Cell Phones for Jurors*, GOING PAPERLESS (Sept. 23, 2010, 8:15 AM), <http://goingpaperlessblog.com/2010/09/23/judge-denies-lawyers-request-to-ban-cell-phones-for-jurors/> (citing a Colorado case in which the defense attorney requested the cell phone ban, but the judge sided with the deputy district attorney saying that it would be too much of an imposition on jurors).

134. See Kim Bellware, *Cook County Court Cell Phone Ban Delayed: New Rule On Hold To Boost Public Awareness*, HUFFINGTON POST (Jan. 14, 2013, 4:21 PM), [http://www.huffingtonpost.com/2013/01/14/cook-county-court-cell-ph\\_n\\_2473667.html](http://www.huffingtonpost.com/2013/01/14/cook-county-court-cell-ph_n_2473667.html) (citing the Cook County court cell phone ban that will be effective April 15).

135. See Laura Whitney Lee, *Silencing the "Twittering Juror": The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age*, 60 DEPAUL L. REV. 181, 205-06 (2010) (corroborating that technology bans cannot keep jurors from using devices during their free time to access information, times in which the court does not have the ability to

already see jury duty as a hassle, so now if they have to turn over their personal property just to take part in the process, there could be considerable backlash.<sup>136</sup> To help lessen the burden, people should be allowed to use only the call/phone feature of their devices during recess or break at trial if they need to coordinate familial matters (e.g., picking up their children) or in case of an emergency. But, notwithstanding the policy considerations, jurors should otherwise have to relinquish their devices.<sup>137</sup>

#### D. Modified Jury Instructions to Curtail Juror Abuse

Jurors face no substantive repercussions if they do not heed jury instructions, mostly facing dismissal for non-compliance.<sup>138</sup> Because they have little at stake, jurors could drastically affect a trial if they choose to research something such as non-admissible evidence, in essence supplanting a judge's decision about a critical matter of law in the case.<sup>139</sup>

Now, mobile access and social media have only compounded the problem because jurors have the ability to gather restricted information at their fingertips.<sup>140</sup> In response to this growing concern, the Judicial Conference Committee on Court Administration and Case Management released new instructions in August 2012.<sup>141</sup> The most relevant portion of the new instructions is as follows:

You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar

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monitor their activities).

136. See Maggie Clark, *Jurors on the Internet: A Dilemma for Courts*, SENIOR WOMEN WEB (last visited Oct. 20, 2013), <http://www.seniorwomen.com/news/index.php/jurors-on-the-internet> (pointing out the possible public safety ramifications attached to confiscating devices because that practice would deprive people from contacting family members throughout the day, especially in case of an emergency).

137. See Lee, *supra* note 135, at 205-06 (mentioning that some courts have taken part in this full ban on mobile device usage, including taking away "cell phones, PDAs, BlackBerrys, iPhones, laptops, and other mobile technology").

138. See McGee, *supra* note 37, at 306 (noting that jurors sometimes cannot help themselves – feeling compelled to research all relevant issues, especially matters that parties raise objections to).

139. *Id.*

140. See Hoffmeister, *supra* note 129, at 451 (relying on jury instructions to do their part is a mistake because they are meaningless unless followed, which is nearly impossible in the Facebook age); see also Robert Ambrogi, *New Federal Jury Instructions Aim to Deter Juror Use of Social Media*, LAWSITES (Sept. 5, 2012), <http://www.lawsitesblog.com/2012/09/new-federal-jury-instructions-aim-to-deter-juror-use-of-social-media.html> (providing the updated federal jury instructions that were created to keep jurors from using social media for research purposes and communicating during trial).

141. *Id.*



technology of social media, even if I have not specifically mentioned it here.<sup>142</sup>

Similar instructions exist for the close of a trial as well, but they do not mention the consequences jurors could face by not complying.<sup>143</sup>

But these instructions do not go far enough, and a simple modification can correct that problem. An instruction must be added at the end, saying, “Any juror found in breach of these instructions will be held in contempt, have to pay a fine of up to \$2000 (depending on the severity of the infraction), and if the indiscretion leads to a mistrial, have to spend one night in jail.”<sup>144</sup>

Without a doubt, those are drastic measures. But as the accumulated court costs associated with a mistrial can easily reach tens-of-thousands of dollars, jurors need to face more stringent penalties so that they think twice before logging onto one of their favorite social networks during the course of a trial to talk about the case.<sup>145</sup>

These rigorous and modified instructions could be used in combination with the confiscation approach. And the new instructions would be a fallback measure that courts could leverage if jurors failed to turn over all mobile devices or decided to still research the case on their own.<sup>146</sup>

The counter-argument here is readily apparent: people hate jury duty, and now they could be fined and/or imprisoned? However, that proposition is not as outrageous as it might seem. In one case out of England, a juror directly messaged the defendant via Facebook and received an eight-month prison sentence for the violation.<sup>147</sup> In another case, the court forced a

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142. *Id.* The new instructions also made very specific mention of jurors’ known proclivities for using mobile devices, as well as the need for jurors to police each other and report any and all violations of the court’s directives. *Id.*

143. *See id.* (noting only that failure to abide by the instructions could “unfairly and adversely” effect a trial, but do not mention other ramifications jurors might face due to misconduct).

144. This instruction reflects the author’s view on this issue; quotation marks used for effect.

145. *See, e.g.,* Eric Moore, *Ex-Public Defender: Mistrial in Murder Case Could Cost County More Than \$50,000*, DAILY IOWAN (Sept. 28, 2011), <http://www.dailyiowan.com/2011/09/28/Metro/25125.html> (claiming that the state could potentially spend more than \$50,000 to retry a homicide suspect).

146. *See Hoffmeister, supra* note 129, at 433-34 (illuminating that jurors sometimes will continually break the rules because they do not equate texting, blogging, Facebooking as communication—rather thinking that oral communication is what courts mean to prohibit).

147. *E.g.,* Mark Memmott, *Eight Months In Jail for Juror Who Used Web to Contact Defendant*, NPR BLOG (June 16, 2011), <http://www.npr.org/blogs/thetwo-way/2011/06/16/137224640/eight-months-in-jail-for-juror-who-used-web-to-contact-defendant> (describing the sentencing of juror Joanne Frail as the first instance of someone in the United Kingdom being sentenced for using the Internet while on a jury).

Michigan juror to write an essay about violating jury instructions along with paying a \$250 fine for posting, “gonna be fun to tell the defendant they’re GUILTY,” before the defense even presented its case.<sup>148</sup> So not only have courts started to punish jurors more frequently and severely, they are also sending a message: STAY OFF SOCIAL MEDIA DURING A TRIAL!

Yet still, the only way to truly enforce the aforementioned changes is by also allowing judges and lawyers to friend or follow jurors on social channels – and in very rare instances, even allowing them to log into jurors’ private social accounts.

#### *E. Friending Jurors: Inside Access to Social Networks*

As noted, researching jurors via social media during voir dire is becoming a fairly universal and accepted practice.<sup>149</sup> Those proponents suggest that it helps lawyers track juror activity, tailor voir dire questions to uncover potential biases, and find inaccuracies within juror answers when comparing responses to the information found online.<sup>150</sup>

The ABA supports lawyer use of social media research during voir dire, so long as they only access public information and use their findings ethically.<sup>151</sup> But why only public information?

With impartiality always being the main goal of voir dire, the only way to protect that purpose is for the ABA to approve situational lawyer access to jurors’ social media profiles for discovery purposes. Recently, the Superior Court in Sacramento County, California, forced a juror to disclose all Facebook posts made during a trial.<sup>152</sup> While this case hinged on suspected juror

The court said Fraill revealed “highly sensitive details” about jury deliberations to defendant Jamie Sewart, who was acquitted in a high-profile drug case. *Id.* This occurred while the jury was in the process of weighing the charges of the other defendants, and Fraill’s activities “led the case – a second retrial – to collapse.” *Id.*

148. See Michael Santo, *Juror Fined, More, After Posting Early ‘Verdict’ to Facebook*, EXAMINER.COM (Sept. 5, 2010), <http://www.examiner.com/article/juror-fined-more-after-posting-early-verdict-to-facebook> (detailing juror Hadley Jons’ mistakes and the resultant backlash from both the court and the Facebook community).

149. See Background section, part B.2.

150. See Rosalind R. Greene & Jan Mills Spaeth, *Are Tweeters or Googlers in Your Jury Box*, 46-FEB ARIZ. ATTY 38, 45 (2010) (arguing that generally all of these technological advancements are beneficial to the judicial process, especially voir dire, but that attorneys still need to be cautious with the information they find).

151. See Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It*, 41 U. MEM. L. REV. 355, 375 (2010) (proposing the entire legal community must fully grasp all possible implications that come with social media research, and use that knowledge to establish best practices for navigating public and private content).

152. *Juror Number One v. Superior Court*, 206 Cal. App. 4th 854, 874 (Cal. App. 3d 2012); see also Nicole Black, *Court Rules Juror’s Facebook Posts Not Protected*, DAILY RECORD, at 1 (June 18, 2012), available at

misconduct, the same line of thinking should be ported over to the voir dire process.

If a court is willing to infringe on a juror's privacy rights in instances of suspected misconduct, then why should lawyers not be given open access to such content long before trial in order to ensure impartiality from the outset?<sup>153</sup>

This practice would raise First Amendment (for the juror) and Fifth Amendment (for the defendant) considerations.<sup>154</sup> But as the California Superior Court held, on balance, the Fifth Amendment can supersede First Amendment rights during the course of a trial.<sup>155</sup> And that constraint on jurors' privacy is an acceptable compromise given that they have a duty to protect the sanctity of the judicial process.<sup>156</sup>

Plus, in light of the new federally mandated jury instructions, what real purpose would they serve if there is no reasonable means to enforce them?<sup>157</sup> Just because a juror might be clever enough to hide his misconduct, he should be allowed to get away with it? Public posts reveal only so much. So, if a court wants to ensure a juror is following instructions and not compromising a trial, courts must have the authority to force jurors to provide the logins to their social media accounts before trial in limited instances.<sup>158</sup>

One simple test would be to ask each juror to disclose which social networks they belong to. If a juror says "just Facebook" but then an Internet search reveals that the juror also has a Twitter account, that juror should then be forced to provide his login information for all accounts. This puts privacy in the hands of the jurors: disclose and keep your information private; lie and face the consequences. That practice, combined with confiscation of mobile

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<http://nylawblog.typepad.com/files/black-6.18.12.pdf> (citing the Superior Court's decision that the defendant's right to a fair trial "outweighed any privacy interest in the Facebook data").

153. *See id.* (forcing the juror to disclose private information, despite the Stored Communications Act and relevant Fourth Amendment protections).

154. U.S. CONST. amend. I (protecting free speech). *See also id.* amend. V (protecting defendants' rights to due process of the law).

155. *Juror Number One*, 206 Cal. App. 4th at 874.

156. *See id.* at 868 (stating that even if the juror had shown a reasonable expectation that the posts would remain private, that interest could in no way "trump" the requisite due process considerations and the necessity of an impartial trial); *but see* Jeremy Byellin, *Hot Docs: New Ruling Bypasses SCA Protections for Facebook Posts*, WESTLAW INSIDER SOCIAL MEDIA LAW (July 12, 2012), <http://westlawinsider.com/social-media-law/hot-docs-new-ruling-bypasses-sca-protections-for-facebook-posts/> (saying the holding in *Juror Number One*, was a "disturbing development" because the court accessed information supposedly protected by the Stored Communications Act).

157. Ambrogi, *supra* note 140.

158. *Cf. Juror Number One*, 206 Cal. App. 4th at 858 (arguing, for the purposes of this Comment, that even though the holding was directed at minimizing juror misconduct, it would be beneficial for voir dire).

devices and more stringent jury instructions, would go a long way toward ensuring an impartial jury pool.

#### F. Draft Rule for Juror Compliance

A new rule, including updated jury instructions, would direct jurors on how to behave throughout voir dire, and is proposed as follows:

[Following the “Before Trial” instruction<sup>159</sup>, this additional text should be included]:

At this time, the court will collect any and all electronic devices that you have, including but not limited to, cell phones, PDAs, BlackBerrys, iPhones, laptops, and other mobile technology. These devices will be returned to you at the close of each day.

The only exceptions for their use during recess or breaks are as follows:

- Coordinating care for your dependent children
- Handling an emergency for an immediate family member
- Contacting a spouse or your dependent children

In these instances, you are only allowed to make outgoing calls, or receive incoming calls, about these matters. You cannot use them for accessing the Internet or other electronic media.

During any point of the trial, if you access:

- (1)The Internet
- (2)Social media, or
- (3)Other electronic channels

to get information about the case, you will be in breach of these Instructions, and face any, or all, of the following penalties:

- (1)Be held in contempt
- (2)Pay a fine of up to \$2000 (based on the nature of the breach), and
- (3)If the breach leads to a mistrial, spend one night in jail

Please ask the judge about any of these instructions if you are unclear. If you fear that you may accidentally do something improper, please ask the judge first before taking part in that behavior.<sup>160</sup>

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159. See Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case*, U.S. COURTS, 1-2 (June 2012), <http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf> (giving the full text of both the opening and closing jury instructions).

160. See Lee, *supra* note 135, at 216 (inspiring the policy-related language of the proposed jury instructions in this Comment, as Lee correctly notes that most current instructions do not inform jurors as to why their compliance is of

These instructions are set in place to ensure the integrity of the judicial process. And your breach of these instructions could adversely affect the trial in ways that you may not even realize, resulting in an unfair trial. Most importantly, if you choose to ignore these instructions it could lead to an unfair verdict, the court may have to retry the case, and you might also face personal penalties for your misconduct.<sup>161</sup>

## V. CONCLUSION

The advancement of social media is unrelenting and will continue to complicate legal matters moving forward. Social media is the reason that voir dire is no longer a procedure of asking a question and getting a response. Now it is a practice of asking a question, searching social media for information, comparing findings to a juror's answer, and judging the answer's validity and truthfulness.

Much of social media's impact is also unchartered territory. That is why jurisdictions are making up the rules as they go, figuring out the best voir dire standards to apply and what ethical practices attorneys have at their disposal. And while state legislatures and judiciaries have the onus to craft rules and procedures that best suit them, they should adopt the practices of mobile device confiscation, jury instructions that carry consequences, and lawyer access to juror social profiles.

Change is always risky. But considering that voir dire has been drastically altered over the centuries, it should not be shocking to adopt updated standards now. And the law is not static, so carrying on with outdated voir dire principles would be a disservice to the judicial system. As a practical matter then, voir dire needs a twenty-first century overhaul.

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grave importance).

161. *Id.*; see also Edward P. Schwartz, *Remedy for the Googling Juror? Just Ask!*, JURY BOX (Mar. 18, 2009, 11:20 AM), <http://juryboxblog.blogspot.com/2009/03/remedy-for-googling-juror-just-ask.html> (stating the best way to empower jurors is to give them specific instructions that are attached to "logical" explanations of the need for the instructions themselves).

As a best practice consideration, this includes stern warnings from the court, but also that judges should create open environments where questions are encouraged because they lead to an informed jury. *Id.*