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# Investigating Jurors on Social Media

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# Investigating Jurors on Social Media

Caren Myers Morrison \*

## I. Introduction

Social media permeates our lives.<sup>1</sup> In a scant decade, Wikipedia,<sup>2</sup> YouTube,<sup>3</sup> Facebook,<sup>4</sup> Twitter,<sup>5</sup> Instagram,<sup>6</sup> and

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\* Associate Professor, Georgia State University College of Law. I am grateful to Leslie Garfield and the staff of the *Pace Law Review* for their invitation to participate in this Symposium.

1. See Susannah Fox & Lee Rainie, *The Web at 25 in the U.S.*, PEW RESEARCH CTR. 5 (Feb. 27, 2014), available at [http://www.pewinternet.org/files/2014/02/PIP\\_25th-anniversary-of-the-Web\\_0227141.pdf](http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf). The Pew Research survey of 1,006 adults conducted in January 2014 found that “87% of American adults now use the internet, with near-saturation usage among those living in households earning \$75,000 or more (99%), young adults ages 18-29 (97%), and those with college degrees (97%). Fully 68% of adults connect to the internet with mobile devices like smartphones or tablet computers.” *Id.* As one writer aptly put it, the Internet has become “a defining characteristic of our society. . . .” Ellen Toronto, *Time Out of Mind: Dissociation in the Virtual World*, 26 PSYCHOANALYTIC PSYCHOL. 117, 118 (2009) (noting that the Internet has “altered dramatically the way we do business, access information, maintain contact, and relate as human beings.”).

2. Wikipedia launched in 2001 and now has more than 4.5 million articles in English alone. See *Wikipedia: About*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Sept. 21, 2014).

3. “Providing a safe home for piano-playing cats, celeb goof-ups, and overzealous lip-synchers since 2005.” Thom Geier et al., *100 Greatest Movies, TV Shows, and More*, ENTERTAINMENT WEEKLY (Dec. 11, 2009), [http://www.ew.com/ew/article/0,,20312226\\_20324138,00.html](http://www.ew.com/ew/article/0,,20312226_20324138,00.html).

4. Facebook was founded in February 2004 and passed the one billion-user mark in 2012. See *Facebook: About*, FACEBOOK, <https://www.facebook.com/facebook/info> (last visited Sept. 24, 2014).

5. Twitter was launched in July 2006. See Aaron Smith & Lee Rainie, *8% of Online Americans Use Twitter*, PEW RESEARCH CTR. (Dec. 9, 2010), <http://www.pewinternet.org/~media/Files/Reports/2010/PIP-Twitter-Update-2010.pdf>. Twitter now has over 255 million active users. See *Twitter: About*, TWITTER, <https://about.twitter.com/company> (last visited Sept. 24, 2014).

6. Instagram was launched in 2010 and as of March 2014, had 200 million active monthly users. See Craig Smith, *By the Numbers: 80*

other social media sites have turned the Internet into “a kind of universal companion, to whom people confide, exhibit themselves, and vent their frustrations in ever-increasing numbers.”<sup>7</sup> Facebook alone now has over 1.32 billion active users, about half of whom log on every day.<sup>8</sup> Not only is most of America living online, but many people also exhibit a marked lack of discretion when doing so.<sup>9</sup> Psychologists have found that people are less inhibited and reveal more about themselves online because they feel invisible, protected by the Internet’s seeming anonymity.<sup>10</sup> According to one psychiatrist, “[d]eficits in insight and judgment may be especially obvious in the context of Internet behavior.”<sup>11</sup> All of this translates into

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*Interesting Instagram Statistics*, DIGITAL MARKET RAMBLINGS, <http://expandedramblings.com/index.php/important-instagram-stats/#.U51sxV4XfFI> (last updated Sept. 4, 2014).

7. Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1613 (2011).

8. See *Newsroom: Company Info*, FACEBOOK, <http://newsroom.fb.com/company-info/> (last visited Oct. 7, 2014) (noting that in June 2014, Facebook had an average of 829 million active users who logged in at least once per day). In 2009, MySpace played catch-up with 122 million active users. Jane McEntegart, *Report: Myspace to Launch Email Service*, TOM’S GUIDE (January 16, 2009), <http://www.tomsguide.com/us/MySpace-Email-Webmail,news-3308.html>. As of October 2013, MySpace had 36 million active users. Molly McHugh, *Myspace Now Boasts 36M Users and a 340 Percent Increase in Artists Using the Network*, DIGITAL TRENDS (Oct. 1, 2013), <http://www.digitaltrends.com/social-media/myspace-releases-new-user-numbers/>.

9. The Internet, by its anonymity and immediacy, encourages the phenomenon of “disinhibition,” which leads to impulsive behavior. Jayne Gackenbach & Heather von Stackelberg, *Self Online: Personality and Demographic Implications*, in PSYCHOLOGY AND THE INTERNET: INTRAPERSONAL, INTERPERSONAL, AND TRANSPERSONAL IMPLICATIONS 55, 58 (Jayne Gackenbach 2d ed. 2007).

10. See John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOL. & BEHAV. 321, 321-26 (2004), available at [http://www.academia.edu/3658367/The\\_online\\_disinhibition\\_effect](http://www.academia.edu/3658367/The_online_disinhibition_effect). 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 322-24; see also John Suler, *The Online Disinhibition Effect*, JOHN SULER’S THE PSYCHOLOGY OF CYBERSPACE (last modified Aug. 2004), <http://truecenterpublishing.com/psyber/disinhibit.html>.

11. 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

an information bonanza for lawyers seeking a window into the psyches of prospective jurors.

So beyond the usual concerns about long waits, missing work, or finding extra childcare that typically accompany a jury summons, jurors now have an additional headache—being the targets of online intrusion. Background checks on jurors are increasingly common,<sup>12</sup> with some lawyers coming to court for jury selection accompanied by paralegals or other assistants to run each juror’s name through a variety of social media searches in real time.<sup>13</sup> Companies offering online sleuthing services are beginning to emerge,<sup>14</sup> offering help to mine the

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behaviors include “anonymity, a reduced sense of responsibility, altered time outlook, sensory input overload . . . and altered consciousness.” *Id.*

12. See Anne Constable, *Background Checks of Jurors Routine*, SANTA FE NEW MEXICAN, Sept. 24, 2009.

13. See, e.g., Stephanie Francis Ward, *Tech Check*, A.B.A. J. (July 1, 2010, 7:30 AM), [http://www.abajournal.com/magazine/article/tech\\_check](http://www.abajournal.com/magazine/article/tech_check). One trial lawyer recommends getting an extra copy of the prospective juror list for the paralegal. “While 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. Christopher B. Hopkins, *Internet Social Networking Sites For Lawyers*, 28 TRIAL ADVOC. Q. 12, 13 (2009). These strategies are not limited to defense lawyers. See Laura B. Martinez, *District Attorney to Use Facebook Profiles in Jury Selection*, BROWNSVILLE HERALD, Jan. 17, 2011, available at [http://www.brownsvilleherald.com/news/article\\_cf424f9b-7543-522f-b860-8b523b5cdfa9.html](http://www.brownsvilleherald.com/news/article_cf424f9b-7543-522f-b860-8b523b5cdfa9.html). Nonetheless, there are still many cases where the attorneys have neither “the resources [n]or even the opportunity to conduct this type of research in any meaningful way.” Ellen Finley, Response, in John G. Browning, *As Voir Dire Becomes Voir Google, Where Are the Ethical Lines Drawn*, 25 THE JURY EXPERT 1, 7 (2013) (arguing that “the last thing most trial attorneys think about when getting ready to start trial is whether or how to investigate potential jurors through social media web sites.”).

14. For those lawyers that do not have time to research jurors online or monitor jurors’ internet activity, the trial consultants at Magna Legal Services can help. For \$295 per profile, their product Jury Scout will:

create detailed profiles for each individual juror based on their online habits, which include but are not limited to: frequency of updates (in terms of photos, status, and comments), the number of social network profiles each juror has, whether their blogs and profiles are protected (i.e., locked down), the number of online aliases, how much personal content is revealed within public forums, opinions on current events and religion, and if said juror is prone to signing online petitions. By creating a personalized matrix

“rich source of unfiltered opinions and intimate details” produced by social media, “that were inaccessible in past times.”<sup>15</sup> Now that the practice has now been officially sanctioned by the ABA,<sup>16</sup> online investigation of jurors appears here to stay.

These searches are usually justified in the name of ferreting out juror dishonesty, and, indeed, there have been some instances where online research has done so.<sup>17</sup> But most of the time, scouring social networking sites is simply a way for lawyers to mine for information that they can use to exercise peremptory challenges or to increase their jury appeal. To this end, the most 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 Streetview to see jurors’ front yards.<sup>18</sup> As one trial lawyer gloated, “imagine 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.”<sup>19</sup>

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of information for each juror, Jury Scout can predict whether they will pose a threat to the case.

JURY SCOUT: JURY MONITORING, <http://www.juryscout.com/about.html> (last visited Sept. 27, 2014, 12:27 AM) [hereinafter JURY SCOUT]. Other, less “scientific” services include VIRTUAL GUMSHOE, <http://www.virtualgumshoe.com/> (last visited Sept. 25, 2014), and SEARCH SYSTEMS, INC., <http://publicrecords.searchsystems.net> (last visited Sept. 25, 2014).

15. Hayes Hunt & Brian Kint, *Trial and Social Media: Researching Potential Jurors*, FROM THE SIDEBAR (Jan. 13, 2014), available at <http://documents.lexology.com/76770073-c290-43e3-be1e-432cca580813.pdf>.

16. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 466 (2014) [hereinafter ABA 466].

17. See Julie Kay, *Vetting Jurors via MySpace; Social Websites Contain a Trove of Data for Attorneys*, NAT’L L.J., Aug. 11, 2008 (citing 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); see also Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (en banc) (lawyer in civil case discovered that one juror had not disclosed fact that he had been a defendant in multiple debt collection and personal injury cases).

18. Hopkins, *supra* note 13, at 13.

19. *Id.* Hopkins also suggests seventeen Internet searches for counsel to

Through a combination of strategy and necessity, online investigations are usually conducted by stealth. Part of this is rule-driven—attorneys are traditionally forbidden from contact with prospective or sitting jurors, and therefore, under several recent ethics opinions, cannot “friend” them on Facebook or follow them on Twitter. But part is strategic, to avoid antagonizing jurors. As one jury consultant put it, “[y]ou don’t want to tip off jurors so that they know you’ve been investigating them.”<sup>20</sup> So there is a disconnect between what lawyers do—and, indeed, are encouraged to do<sup>21</sup>—and what jurors expect. More transparency about the process could show jurors that their privacy concerns have not been entirely forgotten, but also why these concerns must sometimes yield to other interests. At a minimum, more openness might help scrub the faint residue of exploitation that remains when lawyers sneak through jurors’ social media without their knowledge or consent. The best approach, similar to the best practices now common in curbing online misconduct by jurors themselves, is to discuss the issue and explain why it is now part of jury selection. Otherwise, if the courts are not forthright with jurors and only through news articles and gossip do jurors begin to realize that jury duty entails not only considerable inconvenience,<sup>22</sup> but also wholesale intrusion into their online lives, it might do a “great damage to the willingness of most citizens to participate in jury duty.”<sup>23</sup>

We are therefore at an interesting point in juror investigation. It is probably too late to protect juror privacy in

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run on prospective jurors, including Google Streetview, photo-sharing sites, and blog searches. *Id.* at 14. Hopkins 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.* See also Kay, *supra* note 17 (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 argument).

20. Kay, *supra* note 17.

21. See, e.g., Browning, *supra* note 13, at 1 (noting the new standard that “an attorney who doesn’t avail herself of electronic resources like Google, Facebook, and Twitter is simply not living up to her duty of providing competent representation.”).

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

23. Constable, *supra* note 12 (quoting trial consultant).

any meaningful way—as the saying goes, if the ship has not sailed, it is at least scheduled to depart.<sup>24</sup> No disincentive seems likely to stop lawyers from investigating jurors,<sup>25</sup> even though some commentators note that “[i]ndependent investigations of prospective jurors have disturbing ramifications not only for juror privacy, but also for judicial oversight of the jury selection process.”<sup>26</sup>

Jurors’ privacy interests are contested and ambiguous,<sup>27</sup> and attorneys have an obligation to their clients to select the most favorable fact finder possible. We may have to choose between overt invasions of privacy on the one hand, where jurors are asked questions directly in open court, and may feel distressed or put upon both by the questions themselves and being obliged to answer them, and stealth invasions of privacy on the other, where jurors are monitored online but are largely unaware of it. But there remains something unseemly about attorneys “exploiting the ignorance of prospective jurors who are only dimly aware of their digital footprint and who are not expecting to be investigated beyond the questions they are asked in court.”<sup>28</sup>

In an earlier piece, I suggested that courts should consider informing prospective jurors that they might be the subjects of online investigation.<sup>29</sup> Once informed, “[t]he jurors could then assume responsibility for strengthening their privacy settings on social networking sites, temporarily suspending their blogs, and not posting any incendiary letters to the editor during the

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24. Someone much funnier than I coined that phrase, but I have been unable to reconstruct who it was. I would attribute it if I could.

25. The only way to prevent it from happening is not to divulge the jurors’ identities in the first place. While a defendant is entitled to an impartial jury, he is not entitled to the most partial jury his lawyer can engineer. Not having access to the jurors’ favorite books, sandwich-making tweets and family photographs can hardly be said to disadvantage the defendant in any material way.

26. Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework For Court Policies and Procedures*, 85 JUDICATURE 18, 22 (2001).

27. See Melanie D. Wilson, *Juror Privacy in the Sixth Amendment Balance*, 2012 UTAH L. REV. 2023, 2026 & n.19 (2012).

28. Caren Myers Morrison, *Can the Jury Trial Survive Google?*, 25 CRIM. JUST. 4, 15 (2011).

29. See *id.*

duration of their service.”<sup>30</sup> This would allow lawyers to conduct any online searches they wished, but without that uncomfortable feeling of going behind people’s backs. Here, I offer a model instruction to enable courts to let jurors know that online investigations are a likely part of jury selection and why this might be so.

This essay proceeds in three parts. First, it examines the current state of jury investigations, and how they differ from those conducted in the past. Then, it describes the evolving legal and ethical positions that are combining to encourage such investigations. Finally, it offers a note of caution—condoning such investigations while keeping them hidden from jurors may be perceived as unfair and exploitative, risking a possible backlash from outraged jurors. Instead, I propose a modest measure to provide notice and explanation to jurors that their online information is likely to be searched, and why.

## II. Investigations of Jurors Online

This part briefly examines how we got from the grizzled gumshoe in a cheap raincoat driving slowly past prospective jurors’ houses to nattily attired paralegals sitting in the back of courtrooms frantically surfing social media sites—how, in other words, we entered the golden age of jury investigation.<sup>31</sup>

Historically, investigations of prospective jurors were sharply limited by time and money. Only litigants with substantial resources could afford to send private investigators into jurors’ neighborhoods to talk to their neighbors or catalogue the bumper stickers on their cars. Because these investigations happened relatively infrequently and the practical hurdles to investigation kept intrusion to a minimum,<sup>32</sup> courts had little incentive to monitor these activities and therefore never developed a robust body of jurisprudence to deal with extrajudicial investigations of

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30. *Id.*

31. See, e.g., Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 625 (2012) (noting that the digital age has “resurrected the practice of investigating jurors”); Hopkins, *supra* note 13, at 13; see also Hunt, *supra* note 15.

32. See Hoffmeister, *supra* note 31, at 621-24.



jurors.

As in the past, for lawyers who have neither the time nor money to hire investigators or conduct their own sleuthing online, the most obvious way of obtaining information about how a juror feels about a particular topic is simply to ask them about it, either live during voir dire, or by questionnaire. While this method has the benefit of transparency, it can also feel obtrusive, rude, and insensitive.<sup>33</sup> Some scholars note that “trial lawyers have become increasingly aggressive in their questioning of prospective jurors, covering topics from bumper stickers and movie preferences to sexual orientation, incest, and accusations of child molestation.”<sup>34</sup> Understandably, some jurors have rebelled against what they perceived to be unnecessary nosiness. One salient example is a venire member in a capital case in Texas, who objected to being asked questions about her religious views, political affiliations and family income.<sup>35</sup> The juror declined to answer twelve of the questions in a 110-question form, politely noting that she “found some of the questions to be of a very private nature, and in my opinion, having no relevance to my qualifications as a potential fair and impartial juror.”<sup>36</sup> The trial court held her in contempt and sentenced her to three days in jail, but her conviction was set aside by a federal magistrate judge on the basis that her privacy rights were not properly taken into account and the relevance of the questions was not established.<sup>37</sup>

Unfortunately, many jurors simply lie or shade their answers to avoid discussing sensitive topics.<sup>38</sup> According to

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33. See Hannaford, *supra* note 26, at 18 (noting that “[n]umerous studies document that perceived insensitivity to the privacy concerns of prospective jurors is one cause of dissatisfaction with jury service.”); Mary R. Rose, *Expectations of Privacy?*, 85 JUDICATURE 10, 16 (2001) (in empirical study of 207 former jurors, finding that 53% “could identify at least one question that seemed either unnecessary, made them uncomfortable, or seemed too private or personal.”).

34. Wilson, *supra* note 27, at 2026.

35. See *Brandborg v. Lucas*, 891 F. Supp. 352, 353 (E.D. Tex. 1995).

36. *Id.*

37. See *id.* at 360-61.

38. See Hannaford, *supra* note 26, at 23 (noting that “[a] number of empirical studies have found that prospective [sic] jurors often fail to disclose sensitive information when directed to do so in open court as part of

Melanie Wilson, the temptation to do so increases as the questions become more probing, thus “[f]orcing jurors to respond to personal questions intensifies the pressure on jurors to lie and to withhold material facts, making it more likely that biased jurors will survive voir dire.”<sup>39</sup> The crux of the problem is that lawyers and jurors approach this encounter from very different perspectives. “From the lawyers’ vantage,” writes Wilson, “these and other probing questions may appear sensible. From the jurors’ perspective, however, the inquiries often seem irrelevant and harassing.”<sup>40</sup>

From that perspective, online jury investigation might arguably be less offensive to jurors because it avoids putting them on the spot. Many jurors might be reluctant to disclose their political affiliations or the market value of their home in open court. Now, however, many databases aggregate such information, so lawyers can simply look it up without appearing to be rude or nosy. Some, particularly those with a financial stake in boosting Internet investigations, therefore claim that online information may be more reliable than in-court answers. One product, Jury Scout, promises that its service

can be used as a compliment [sic] to the voir dire, as the information we provide from our online research may be more honest than what the potential juror reveals in person. People tend to honest [sic] to a fault online as they don’t a) believe they are being observed and b) their information is visible to the public at large. This information, when compiled, can show political and religious affiliations, biases, and the like.<sup>41</sup>

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the jury selection process.”).

39. Wilson, *supra* note 27, at 2027.

40. *Id.* at 2034. *See also* United States v. Barnes, 604 F.2d 121, 140 (2d Cir. 1979) (noting that jurors might be “less than willing to serve if they know that inquiry into their essentially private concerns will be pressed.”).

41. JURY SCOUT, *supra* note 14. While Jury Scout may put out a crack investigative product, its expertise does not appear to extend to detecting copy-editing errors.

If jurors' concerns about privacy are more related to the discomfiting questions they are asked—and are expected to answer—rather than to the actual disclosure of the information (which sometimes is innocuous), then online investigations would seem to be an improvement on poorly-conducted voir dire. In one recent personal injury case, a lawyer discovered that a prospective juror “divulged on his MySpace page that he belonged to a support group for claustrophobics”—a great plus for a litigant seeking recovery for a victim trapped for hours in a piece of machinery.<sup>42</sup> One cannot help but feel that, at least in such cases, it is preferable for lawyers to find out online that a juror belongs to Claustrophobics Anonymous than to ask them in open court whether small spaces make them nervous. As for the old-school way of doing things, while there was a 1940s film noir appeal to the image of the private eye talking out of the side of his mouth to a juror's neighbors, those investigations were costly, slow, and probably less effective than clicking through a juror's posts on Instagram.

### III. Current Legal and Ethical Guidance

So this is the world we live in. This part, therefore, examines the legal framework that governs online investigations of jurors. In the first few years of what has been termed “voir Google,”<sup>43</sup> there was not much guidance to lawyers wanting to conduct online investigations. The ABA Rules of Professional Conduct simply forbid lawyers from “seek[ing] to influence” a juror or prospective juror “by means prohibited by law” or to “communicate ex parte with such a person during the proceeding . . . .”<sup>44</sup> Since most online research of jurors was done covertly, such conduct did not seem to implicate these ethical rules, so long as lawyers did not attempt to “friend” prospective jurors, or use a third party to do so, in order to gain access to private web pages.<sup>45</sup> But most courts and ethics

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42. Kay, *supra* note 17.

43. Browning, *supra* note 13, at 1 (noting that “in the digital age . . . voir dire is rapidly becoming ‘voir Google.’”).

44. MODEL RULES OF PROF'L CONDUCT R. 3.5 (2002).

45. See Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (2009) (“Deception is deception, regardless of the victim's wariness in her

committees seemed to find searching public information online no more troubling than driving down a juror's street in days of old. "The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b)," wrote the ABA.<sup>46</sup> Numerous state bar associations agreed, as did the handful of court decisions addressing the matter.<sup>47</sup> Accordingly, Google Streetview, compilations of political contributions, public Facebook pages and the like were rapidly considered fair game.<sup>48</sup>

One gray area remained as to whether triggering an automatic notification to the website's user that their page has been viewed, such as those employed by LinkedIn, constituted a "communication." Two ethics opinions, both from New York, concluded that it was.<sup>49</sup> The Association of the Bar of the City of New York Committee on Professional Ethics held that a network-generated notice to the juror that a lawyer has reviewed the juror's social media page constituted a "communication" from the lawyer to the juror, even though it was indirect and not intentionally generated.<sup>50</sup> The notice,

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interactions on the internet and susceptibility to being deceived. The fact that access to the pages may readily be obtained by others . . . does not mean that deception at the direction of the inquirer is ethical." The ABA Committee notes that sending a friend request would be "akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past." ABA 466, *supra* note 16, at 4.

46. ABA 466, *supra* note 16, at 4.

47. See, e.g., Or. State Bar Ass'n, Formal Op. 2013-189 (2013) (stating that lawyers "may access publicly available information on a social networking website"); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012) [hereinafter NY City Bar Opinion] (concluding that lawyers may use social media websites to research jurors); Ky. Bar Ass'n, Op. E-434 (2012) ("If the site is 'public,' and accessible to all, then there does not appear to be any ethical issue."); N.Y. Cnty. Lawyers Ass'n, Formal Op. 743 (2011) [hereinafter NY County Bar Opinion] (lawyer may search juror's "publicly available" social media pages).

48. Times have certainly changed. As recently as 2001, the ABA Standards on Jury Use and Management stated that "[n]o independent investigation by attorneys or any others is contemplated nor should it be countenanced by the court." Hannaford, *supra* note 26, at 23.

49. See NY City Bar Opinion, *supra* note 47; NY County Bar Opinion, *supra* note 47.

50. See NY City Bar Opinion, *supra* note 47, at 4 ("For example, if an attorney views a juror's social media page and the juror receives an automated message from the social media service that a potential contact has

reasoned the Committee, brought “an idea, information or knowledge to another’s perception—including the fact that they have been researched.”<sup>51</sup> This opinion was rapidly seconded by the New York County Lawyers’ Association Committee on Professional Ethics, which noted, “[i]f a juror becomes aware of an attorney’s efforts to see the juror’s profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror’s conduct with respect to the trial.”<sup>52</sup>

But in April of 2014, the ABA issued a formal opinion which took a far more pragmatic approach, contending that an automatic notification generated by a website was not a communication from the lawyer to the juror.<sup>53</sup> “The lawyer is not communicating with the juror[,]” reads the opinion, “the ESM [electronic social media] service is communicating with the juror based on a technical feature of the ESM.”<sup>54</sup> The ABA’s approach is simple:

Unless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.<sup>55</sup>

As before, lawyers are forbidden to “send an access request to a juror’s electronic social media.”<sup>56</sup> But the Committee showed some flexibility in not classifying the automatic notification that some networking services provide as a “communication” by

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viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably ‘communicated’ with the juror.”)

51. *Id.* at 6 (emphasis omitted).

52. NY County Bar Opinion, *supra* note 47, at 3.

53. See ABA 466, *supra* note 16, at 5.

54. *Id.* The Committee could not resist adding: “This is akin to a neighbor’s recognizing a lawyer’s car driving down the juror’s street and telling the juror that the lawyer had been seen driving down the street.” *Id.*

55. *Id.* at 1.

56. *Id.*

a lawyer.<sup>57</sup>

Effectively, the opinion ratifies what it terms “passive lawyer review,” while cautioning against “active lawyer review.”<sup>58</sup> As the opinion puts it, “[l]awyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.”<sup>59</sup> The opinion therefore aligns itself with the small but growing body of law that places a positive responsibility for investigating jurors on the lawyers.<sup>60</sup> If anything, sentiment among the legal community seems to be that anyone who does not conduct a full-on online investigation of jurors could be “bordering on malpractice.”<sup>61</sup>

This attitude is echoed by the courts. In one of the first cases addressing these issues, occurring in New Jersey, defense counsel had objected during voir dire that opposing counsel was conducting Internet searches on the jurors.<sup>62</sup> Not wanting to

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57. *See id.* (“The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).”)

58. *Id.* at 2.

59. *Id.*

60. *See, e.g.,* *Burden v. CSX Transp., Inc.*, No. 08-CV-04, 2011 WL 3793664, at \*9 (S.D. Ill. Aug. 24, 2011) (denying motion for new trial in workplace injury case on ground that defendant had waived its objections after an online search revealed that two jurors had previously litigated workplace injury cases, because “the basis of the objections might have been known or discovered through the exercise of reasonable diligence.”); *Johnson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010) (en banc) (holding that litigants must make “reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial.”). *See also* N.H. Bar Ass’n Ethics Comm., Op. 2012-13/05 (2013) (lawyers have “a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.”); NY City Bar Opinion, *supra* note 47, at 1 (noting that the “standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.”).

61. 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/najury29> (quoting trial consultant).

62. *See Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071, at \*4 (N.J. Super. Ct. App. Div. Aug. 30, 2010).

afford the web-surfing lawyer what the trial judge considered to be an unfair advantage, the judge ordered the attorney to close his laptop.<sup>63</sup> On appeal, however, the New Jersey Appellate Division found that the trial judge had abused his discretion in preventing counsel's use of the Internet.<sup>64</sup> The court wrote that just because plaintiff's counsel "had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of fairness or maintaining a level playing field."<sup>65</sup>

The Missouri Supreme Court went further, imposing an affirmative duty to conduct online research during voir dire, at least in terms of searching the state's online database, Case.net.<sup>66</sup> "[I]n light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members," wrote the court, "it is appropriate to place a greater burden on the parties to bring such matters to the court's attention . . . . Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search . . . ."<sup>67</sup> More recently, in *United States v. Daugerdas*, the Southern District of New York held that a party who did not conduct due diligence after having become aware of possible issues with a juror's truthfulness online had waived his right to a new trial.<sup>68</sup>

#### IV. A Proposed Model Instruction

In terms of souring the public on jury service, stalking jurors on social media might seem like adding insult to injury. This, of course, has been a risk since the first private

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63. *See id.*

64. *See id.* at \*9.

65. *Id.* at \*10 (internal quotation marks omitted).

66. *See Johnson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010) (en banc).

67. *Id.* at 599-600 (codified at Mo. SUP. CT. R. 69.025 (2011)).

68. *United States v. Daugerdas*, 867 F. Supp. 2d 445, 479 (S.D.N.Y. 2012) ("Ultimately, a defendant waives his right to an impartial jury if defense counsel were aware of the evidence giving rise to the motion for a new trial or failed to exercise reasonable diligence in discovering that evidence.").

investigator trotted past the first juror's house in a stagecoach. As the Supreme Court noted in 1925, when it comes to people pressed into service as jurors, even "[t]he most exemplary resent having their footsteps dogged by private detectives."<sup>69</sup> Although the lack of empirical evidence means that the widely-shared belief that being investigated will make people more reluctant to serve as jurors must remain speculative, it certainly seems plausible that "the failure to respect juror privacy rights may diminish the willingness of individuals to serve on juries . . . ."<sup>70</sup>

So the general advice to practitioners seems to be: Whatever you do, do not tip the jurors off that you are investigating them. As one trial lawyer put it, "since [many] Internet searches are fairly invasive, a careful lawyer should avoid overt references to a juror's personal information during jury selection and trial."<sup>71</sup> But this does hint at a troubling lack of respect towards the jurors themselves.<sup>72</sup>

There is something distasteful about lawyers exploiting people's ignorance, both of how extensive investigations into their backgrounds can become, and of how telling their digital footprint might be. Jurors may dislike being scrutinized, but they are even more likely to feel shocked and betrayed if they discover that they had been spied on without their knowledge.<sup>73</sup>

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69. *Sinclair v. United States*, 279 U.S. 749, 765 (1929).

70. David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 *TEMP. L. REV.* 1, 11 (1997). See also *United States v. White*, 78 F. Supp. 2d 1025, 1028 (D.S.D. 1999) (noting that "it is not farfetched to expect jurors to feel intimidated by or prejudiced toward a defendant who, they learn, has conducted an investigation of their personal lives by interviewing their next-door neighbors").

71. See *Hopkins*, *supra* note 13, at 13.

72. As Paula Hannaford noted over a decade ago, there is no justification for hiding the extent of outside investigation from jurors. While parties might certainly find it helpful to know whether jurors have had prior contact with the criminal justice system, "recognition of that fact does not explain why [a criminal background investigation] should be conducted in addition to questioning jurors during voir dire." Hannaford, *supra* note 26, at 23. What is more, she writes, "[i]t also does not explain why the fact that a criminal background check has been conducted should be kept from the jurors themselves." *Id.*

73. Trying to keep online investigations a secret sends a highly condescending message, along the lines of "pay no attention to that paralegal at the back of the courtroom, snooping around on your Facebook page."



Nor is online investigation of jurors a particularly well-kept secret. News outlets are full of articles quipping that people called for jury service “[m]ay want to edit [their] online profile.”<sup>74</sup> The best solution would be for courts to warn citizens called for jury duty that the attorneys, as part of their obligation to represent their clients, may conduct online investigations. Once notice is given, lawyers would be free to conduct whatever public searches they like, but without the jurors feeling the lawyers had taken unfair advantage of them.

Of course, nothing is without cost, and some attorneys and commentators fear that jurors might be rattled to know that their social media presence may be vetted.<sup>75</sup> “I think that [notifying jurors of online investigations] would be unwise,” said one public defender. He continues, “I have a feeling that if a juror finds out that [the attorneys are] checking them out to see if they’re followings [sic] the rule, it could change the dynamic of the trial attorney and the jurors . . . .”<sup>76</sup> An assistant district attorney agreed: “I have a Facebook page, and if I was in the same position, I would understand being a little freaked out.”<sup>77</sup>

Nonetheless, it certainly seems more courteous and respectful to prospective jurors to simply let them know at the outset that they might be subject to online scrutiny.<sup>78</sup> Jurors have little control over the voir dire process as it is. The least we can do is be honest with them.<sup>79</sup> Indeed, this is the

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74. Williams, *supra* note 61.

75. See, e.g., Eric P. Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM. J. TRIAL ADVOC. 597, 608 (2013) (arguing that “[w]hen jurors are aware that they have been investigated their fear or resentment of the investigating party may influence their verdict. . . . When there is public knowledge of the prevalence of pre-trial investigations, citizens may become even more determined to avoid jury service . . .”).

76. Will Houston, *Lawyers Group: Jurors Can Be Judged on Social Media*, EUREKA TIMES STANDARD, June 4, 2014 (quoting Humboldt County Public Defender Kevin Robinson).

77. *Id.* (quoting Assistant District Attorney Kelly Neel).

78. As Mary Rose observed, no matter how difficult the balancing of interests, “one should not ignore the potential benefits of simple attempts to demonstrate to jurors that privacy is a concern and a priority.” Rose, *supra* note 33, at 43.

79. In the context of explaining intrusive voir dire questions, Rose writes positively of efforts to “communicate to jurors that the court and parties are aware of the challenge of providing sensitive information in a setting that

approach now suggested by the ABA, which proposes that “judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites.”<sup>80</sup> An even better approach, which the ABA also views favorably, would be giving the prospective jurors this information when they are still in main waiting room, before being called to a particular courtroom.<sup>81</sup> This would lessen any suspicions that the jurors might have that the lawyers in their specific case are the nosiest in the courthouse, and lessen any possible resentment towards the litigants. The ABA’s view is that “[d]iscussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.”<sup>82</sup>

This advice could be worded in the following way:

Ladies and gentlemen, during jury selection and possibly through the trial, some of the attorneys may look up your public profiles on social media and other public information about you on the Internet. While this may surprise you, it is entirely proper for lawyers to check these sources of information to see if there is anything on social media websites or other databases that is relevant either to your ability to be fair in a particular case, or to views you may hold that might affect your impartiality. Lawyers have a

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otherwise restricts jurors’ control over the proceedings.” *Id.*

80. ABA 466, *supra* note 16, at 3. *See also* Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 *UCLA L. REV. DISCOURSE* 28, 36 (2011) (arguing that “worries over privacy may be lessened somewhat if jurors are told ahead of time that their backgrounds will be researched and why the search is being done”).

81. *See* ABA 466, *supra* note 16, at 3 n.4 (“Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror’s Internet presence.”).

82. *Id.* at 5.

responsibility to their clients to ensure that their side gets a fair trial, and they are allowed to research any information that is in the public domain to help them do that. If any lawyer reads your Tweets or checks your public Facebook page, they are not doing it out of idle curiosity, or because they want to invade your privacy. They are taking these steps only because they want to make sure that there is not any information out there on the Internet that might affect the fairness of your decision.

Even with this proposed instruction, and the ABA's blessing, I would like to add a note of caution. One question lawyers should ask themselves is: "What is all this information really going to get me?" All of this talk of creating a "personalized matrix of information for each juror"<sup>83</sup> can obscure the fact that no amount of online investigation can replace a skillfully conducted and sensitive voir dire. Some of the most experienced trial lawyers in the country have concluded that a minutely investigated jury, vetted by leading trial consultants at tremendous financial cost, is not likely to perform substantially differently from a jury picked at random.<sup>84</sup>

An arms race for information may simply be a waste of time and resources that would be better spent preparing a stronger case. For every "smoking gun" uncovered, there is likely to be hundreds of pages of drivel. "In my experience, most of the stuff [online] is family or business stuff that's not related to the issues in the case," notes one trial consultant, who finds voir dire itself to be a more reliable source of information, particularly for the issues most relevant to the case.<sup>85</sup> "The rest of it is interesting, but . . . it's not interesting enough to waste your time with."<sup>86</sup>

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83. JURY SCOUT, *supra* note 14.

84. Dana Littlefield, *Jurors' Social Media Activity Fair Game*, SAN DIEGO UNION-TRIBUNE (May 5, 2014), <http://www.utsandiego.com/news/2014/may/05/jurors-social-media-trial-lawyers-courts-bar-assoc/> (quoting trial consultant Richard Waites).

85. *Id.*

86. *Id.* See also Hannaford, *supra* note 26, at 20 (arguing that "distinguishing between information that is relevant and information that is

In addition, if lawyers are concerned about juror misconduct on the Internet, they may want to consider what kind of behavior they are modeling. Unauthorized Internet research by jurors is difficult to monitor and detect, and the only way to contain it is to enlist the willing cooperation of jurors who feel invested in the enterprise. If we want to keep jury service a palatable option for the majority of Americans and we want jurors to play by the rules, we should probably think twice about how intrusive lawyers should be in their own online investigations. Otherwise, jurors may feel entitled to do a bit of research of their own.

### V. Conclusion

We have entered a new golden age of juror investigation, one that feeds off of our current culture of oversharing. Since neither ethical opinions nor court cases present any obstacle to lawyers gathering public information about jurors online, one recommendation that would combat the sense that jurors are infantilized and misled would be to give them notice that their public online activity is likely to be monitored by the litigants. If jurors are going to be scrutinized, pretending they will not be is simply self-defeating. Maybe by showing jurors enough respect to tell them how they are likely to be treated, the jurors will in turn feel moved to respect the process themselves.

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not relevant to the fairness or impartiality of prospective jurors should be the primary analytical framework for courts”).