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Internet Frisking Jurors During Voir Dire: The Case for Imposing Judicial Limitations

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ABSTRACT

Our nation has long recognized the need for a fair and impartial jury in civil and criminal cases. At the heart of this pursuit for fairness is the juror, who sits as the factfinder in the process. For centuries, voir dire has served as the backbone for providing parties with a fair and impartial jury. Traditionally, during voir dire, jurors are questioned under oath by the court or counsel to determine their qualifications or disqualifications to sit as a juror in the case. The purpose is to expose potential bias in a juror that would render him or her unable to serve impartially. Since its inception, an essential aspect of voir dire has been that it is conducted under the supervision of the trial judge, in open court, in front of the entire prospective jury panel, the parties, and their counsel. However, in recent years, this centuries-old established practice of conducting voir dire has come under scrutiny with the spotlight focused on whether to integrate or preclude Internet research of jurors by counsel as a part of the voir dire process.

Anyone who has had the privilege of serving on a jury is familiar with the instructions given to a juror that they are not to perform any research about the issues in the case, the parties to the case, or the attorneys on the case. However, jurors are not told that counsel may be conducting research on them—delving into the jurors' social media presence and any digital footprint that could be discovered through Internet research. Twenty years ago, it was nearly impossible to perform Internet research about prospective jurors as part of the voir dire process because no one had a social media presence and there was no easy access to people's information online. By 2021, less than twenty years after the creation of the most primitive social media, 82% of the U.S. population had at least one social media networking

profile. For most individuals, there is also a long tail of public information available on the Internet to anyone who may want to learn about the background of that individual. This new presence of information has compelled courts to confront a question that many are still struggling to answer—should attorneys be able to perform Internet research about prospective jurors as part of the voir dire process?

Courts and commentators across the country are split on how to answer this question. There are many judges who outright ban counsel from conducting any Internet research about prospective jurors. Other judges allow for unfettered research, and some have allowed research with limitations. Legal commentators who have addressed this issue all agree in some form that there needs to be clarity and certainty for lawyers on this issue. The purpose of this Comment is to discuss the issue of Internet research during voir dire; expand upon evolving reasons why Internet research about jurors during voir dire does not promote public participation and trust in the process; and demonstrate that, on balance, a rule prohibiting Internet research of jurors promotes judicial integrity and juror participation. Ultimately, this Comment will propose a court rule that will create uniformity on this issue by precluding any Internet research into the background of prospective jurors in preparation for and during the voir dire process, thereby preserving the time-honored traditional process of in-person, open-court voir dire.

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COMMENT

INTERNET FRISKING JURORS DURING VOIR DIRE: THE CASE FOR IMPOSING JUDICIAL LIMITATIONS

Hannah L. Shotton[†]

ABSTRACT

Our nation has long recognized the need for a fair and impartial jury in civil and criminal cases. At the heart of this pursuit for fairness is the juror, who sits as the factfinder in the process. For centuries, voir dire has served as the backbone for providing parties with a fair and impartial jury. Traditionally, during voir dire, jurors are questioned under oath by the court or counsel to determine their qualifications or disqualifications to sit as a juror in the case. The purpose is to expose potential bias in a juror that would render him or her unable to serve impartially. Since its inception, an essential aspect of voir dire has been that it is conducted under the supervision of the trial judge, in open court, in front of the entire prospective jury panel, the parties, and their counsel. However, in recent years, this centuries-old established practice of conducting voir dire has come under scrutiny with the spotlight focused on whether to integrate or preclude Internet research of jurors by counsel as a part of the voir dire process.

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nearly impossible to perform Internet research about prospective jurors as part of the voir dire process because no one had a social media presence and there was no easy access to people's information online. By 2021, less than twenty years after the creation of the most primitive social media, 82% of the U.S. population had at least one social media networking profile. For most individuals, there is also a long tail of public information available on the Internet to anyone who may want to learn about the background of that individual. This new presence of information has compelled courts to confront a question that many are still struggling to answer—should attorneys be able to perform Internet research about prospective jurors as part of the voir dire process?

Courts and commentators across the country are split on how to answer this question. There are many judges who outright ban counsel from conducting any Internet research about prospective jurors. Other judges allow for unfettered research, and some have allowed research with limitations. Legal commentators who have addressed this issue all agree in some form that there needs to be clarity and certainty for lawyers on this issue. The purpose of this Comment is to discuss the issue of Internet research during voir dire; expand upon evolving reasons why Internet research about jurors during voir dire does not promote public participation and trust in the process; and demonstrate that, on balance, a rule prohibiting Internet research of jurors promotes judicial integrity and juror participation. Ultimately, this Comment will propose a court rule that will create uniformity on this issue by precluding any Internet research into the background of prospective jurors in preparation for and during the voir dire process, thereby preserving the time-honored traditional process of in-person, open-court voir dire.

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I. INTRODUCTION

Unfortunately, most citizens claim that they will go to great lengths to avoid jury duty.[1] One comical bard penned the following lines summarizing the familiar attitude so many prospective jurors claim to have toward this civic duty:

> Dear God, please give me an excuse in a hurry.
> Something good to keep me off this stupid jury.
> My job! My kids! My sick Aunt Bea!
> Who could survive even a day without me?[2]

Not surprising, then, are the statistics that demonstrate that "no-show" jurors are a growing national trend in both federal and state courts across the country.[3] Because of the vital role of the jury in our justice system, trial judges recognize that they must encourage juror participation and limit any misguided efforts that may discourage citizen participation in jury service.[4] This Comment discusses the impact of allowing Internet research into the lives of prospective jurors as part of the voir dire process. "Voir Google" is how one commentator has described this trend of Internet research into the background of a prospective juror during voir dire.[5] And one federal district court, in recognizing the potentially negative impact of this trend, said:

> Trial judges have such respect for juries . . . that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles

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[1] *See* Maxine Bernstein, *Judges Cracking Down on People Who Snub Jury Duty*, AP NEWS (May 21, 2017, 1:39 PM), https://apnews.com/article/62b279c38615469fb9bee505c9c66ff5.

[2] Paul W. Rebein et al., *Jury (Dis)Service: Why People Avoid Jury Duty and What Florida Can Do About It*, 28 NOVA L. REV. 143, 143 (2003).

[3] *See* Bernstein, *supra* note 1.

[4] Letter from Thomas O. Branford, Circuit Judge, Oregon Circuit Court, to Counsel 4–6 (Feb. 22, 2012) (on file with the Oregon Circuit Court).

[5] John G. Browning, *Should Voir Dire Become Voir Google? Ethical Implications of Researching Jurors on Social Media*, 17 SMU SCI. & TECH. L. REV. 603, 604 (2014).

> to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information.[6]

These concerns have led several federal trial courts to outright preclude the practice of Internet research into the backgrounds of jurors during the process of voir dire.[7] The purpose of this Comment is to discuss and expand upon the reasons for and against Internet research into the background of jurors and to demonstrate that, on balance, a rule prohibiting this kind of research promotes the integrity of the process of trial by jury and of juror participation in that process. At its conclusion, this Comment proposes a court rule that, if adopted, will provide uniformity within the federal and state trial courts by precluding Internet research into the background of prospective jurors in preparation for and during the voir dire process. In short: Internet research of prospective jurors should not be allowed.

II. BACKGROUND

A. The Recent Introduction of Social Media to Voir Dire

Just twenty years ago, it was nearly impossible to perform Internet research about prospective jurors as part of the voir dire process because there was very little social media presence or easy access to people's information online. It was only in 2004 that the world became familiar with what is now commonly known as "social media."[8] In 2008, only 10% of the U.S. population participated in its use.[9] But by 2021, less than twenty years after social media's creation, 82% of the U.S. population had at least one

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[6] Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1101 (N.D. Cal. 2016).

[7] *See* MEGHAN DUNN, FED. JUD. CTR., JURORS' AND ATTORNEYS' USE OF SOCIAL MEDIA DURING VOIR DIRE, TRIALS, AND DELIBERATIONS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 13 (2014). One hundred twenty judges who responded to the survey "forbid[] attorneys to research prospective jurors using social media during voir dire." *Id.*

[8] Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), https://ourworldindata.org/rise-of-social-media.

[9] Stacy Jo Dixon, *Share of U.S. Population Who Use Social Media 2008-2021*, STATISTA (July 27, 2022), https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/.

social networking profile.[10] As of 2022, around 223 million people in the United States use social media.[11] That covers a majority of the individuals who will be asked to serve on a jury.[12] It was inevitable that resourceful lawyers would use this growing source of information to research prospective jurors in order to learn information that might benefit them during the voir dire process. With no rules in place and no uniform decision on the issue, courts were quickly compelled to decide whether, and how, online information about jurors could be appropriately used in the voir dire process.[13] It was the grappling with these issues that prompted one commentator to ask in 2014: "Should Voir Dire Become Voir Google?"[14]

Technology is accelerating even faster today than it did at the dawn of the Internet and social media. New resources and ways to access information will be available in five years that may be unimaginable today. Due to the continuing advancement of technology, the question of whether there should be limits on lawyers utilizing online platforms to find information about jurors must be addressed. If limits should be enforced, where should that line be drawn and how will it be enforced? Many have sought to provide insight and answer this question. There are numerous articles on the use of Internet research during the voir dire process that first began to be published shortly after social media became available twenty years ago.[15] And some courts

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[10] *Id.*

[11] *Id.*

[12] In 2022, the resident population of the United States was a little over 333 million. *Growth in U.S. Population Shows Early Indication of Recovery Amid COVID-19 Pandemic*, U.S. CENSUS BUREAU, https://www.census.gov/newsroom/press-releases/2022/2022-population-estimates.html (Apr. 3, 2023).

[13] *See* Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, REUTERS (Feb. 17, 2011, 2:50 PM), https://www.reuters.com/article/us-courts-voirdire-idUSTRE71G4VW20110217/.

[14] *See generally* Browning, *supra* note 5.

[15] *See, e.g.*, Browning, *supra* note 5; J.C. Lundberg, *Googling Jurors to Conduct Voir Dire*, 8 WASH. J.L. TECH. & ARTS 123 (2012) (discussing the use of the Internet to research jurors during voir dire); Michael Thomas Murphy, *The Search for Clarity in an Attorney's Duty to Google*, 18 LEGAL COMMC'N & RHETORIC: JALWD 133 (2021) (same); Whitni Hart, *Researching the Jury's Internet and Social Media Presence: The Ethical and Privacy Implications*, 41 N. ILL. U. L. REV. 230 (2020) (same); Stephen Paterson, *Using Social Media and Other Background Research in Voir Dire: Why Jurors Don't Care, But You Should*, VINSON & CO. (2016) (same).

quickly realized that without a definitive court rule or case governing this issue, there is no clarity or uniformity, which has resulted in the practical reality that lawyers are "skittish about discussing the practice [of Internet research into jurors' lives], in part because court rules on the subject are murky or nonexistent in most jurisdictions."[16] This sentiment is consistent with the concerns raised by trial lawyers, one of which has described the issue of using the Internet to research jurors' backgrounds as the "Wild West."[17]

B. Inconsistent Judicial Positions—Counsel Need Direction

Federal and state judges across the nation disagree on how to answer this question. In 2014, a survey of 466 federal district judges was performed that included the question: "Do You Permit Attorneys to Use Social Media During Voir Dire?"[18] Of the 466 judges surveyed, 323 answered that they did not address the issue with attorneys before voir dire.[19] However, of the judges that did address the issue, 120 outright prohibited the use of social media, while only 23 allowed its use.[20] Consequently, of the federal judges who took the survey and specifically addressed this issue, 84% did not allow Internet research of a juror during voir dire.[21] A follow-up question in the survey provided some additional helpful information on this issue because it asked judges who prohibit the use of social media research about prospective jurors to explain the reasons why they prohibited its use.[22] Some of the reasons included the following: concern that Internet research would invade juror privacy, fear that research would intimidate potential jurors, concern that this kind of research would prolong voir dire, belief that information provided during the traditional ask and answer voir dire was sufficient, fear that Internet research could cause an unfair advantage for one side, and

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[16] Sluss v. Commonwealth, 381 S.W.3d 215, 227 (Ky. 2012) (quoting Grow, *supra* note 13).

[17] Grow, *supra* note 13.

[18] DUNN, *supra* note 7, at 13. The Author was unable to find a more recent survey regarding this issue.

[19] *Id.*

[20] *Id.*

[21] *See id.*

[22] *Id.*

concern that there was no way to evaluate the accuracy of the information gathered.[23]

It would be interesting to know what the results might be if the survey were given again now, ten years later. No matter the outcome, the original concerns raised by the federal judges who answered the question have not dissipated but rather, arguably, have intensified. There are many commentators who advocate that Internet researching jurors is simply the new way of doing things.[24] But accepting something as the "new way of doing things" does not answer or rebut the reasons given by the federal trial judges as to why they prohibit the use of Internet research of jurors during voir dire. The issues that these reasons present must be adequately addressed or there will be no progress in reaching a consensus or uniformity, and the process will continue to be appropriately described as the "Wild West."[25] In order to squarely address the future, a brief look at the voir dire process in the past provides context regarding the impact of allowing or prohibiting Internet research in preparation for and during voir dire.

C. The History and Process of Voir Dire Provides the Framework to Address the Issue of Internet Researching Jurors

Our nation has long recognized the need for a fair and impartial jury in civil and criminal cases.[26] The foundation of this pursuit for fairness is the juror, who serves as the "nerve center of the fact-finding process."[27] But before a juror is allowed the great responsibility of service in performing this civic duty, it is essential that the juror demonstrate and affirm that he will perform his duty with fairness and impartiality.[28] Voir dire was introduced into our system to ensure fairness and impartiality of jurors by allowing either the trial judge or counsel for the litigants to ask questions of individual

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[23] *Id.* at 13–14.

[24] *See generally, e.g.*, Browning, *supra* note 5; Lundberg, *supra* note 15; Murphy, *supra* note 15; Hart, *supra* note 15; Paterson, *supra* note 15.

[25] Grow, *supra* note 13.

[26] *See* Connors v. United States, 158 U.S. 408, 413 (1895) (demonstrating that for over 100 years, the Supreme Court has recognized the need for a fair and impartial jury).

[27] Estes v. Texas, 381 U.S. 532, 545 (1965).

[28] *See Connors*, 158 U.S. at 413.

jurors, the answers of which would demonstrate the jurors' ability to serve.[29] Voir dire, which literally means "to speak the truth,"[30] occurs at the start of a jury trial.[31] During voir dire, jurors are questioned under oath by the court or counsel to determine their qualifications or disqualifications to sit as a juror in the case.[32]

The process and goal of voir dire have largely remained unchanged for centuries.[33] One of the earliest known accounts of the jury selection process dates back to a criminal trial in 1565.[34] The record from this trial demonstrates that jurors were selected publicly "in the presence of the Judges, . . . the prisoner, *and so many as will or can come . . . to hear*[] *it*."[35] In the 1760s, William Blackstone extolled the practice of voir dire as part of the greatness of English law.[36] In his *Commentaries*, he discussed the important right to challenge jurors when there is "suspicion of bias or partiality."[37] It is upon these early, foundational views of voir dire that legal historians credit Chief Justice John Marshall for instituting the "modern right of parties to question individual jurors about their preconceptions of a case."[38] In *United States v. Burr*, Justice Marshall, as the trial judge for Aaron Burr's trial for treason, affirmed that a fair and impartial jury was required by the common law and the U.S. Constitution.[39] In 1895, the Supreme Court in *Connors v.*

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[29] *See* Jill Holmquist, *To Tell the Truth: Voir Dire in the Age of Neuroscience*, CIV. JURY PROJECT AT N.Y.U., https://civiljuryproject.law.nyu.edu/to-tell-the-truth-voir-dire-in-the-age-of-neuroscience/.

[30] *Voir Dire*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[31] JUDICIAL CONFERENCE OF THE UNITED STATES, HANDBOOK FOR TRIAL JURORS SERVING IN THE UNITED STATES DISTRICT COURTS 4 (2012) [hereinafter JUDICIAL CONFERENCE].

[32] *Id.* at 4–5.

[33] Holmquist, *supra* note 29.

[34] Press-Enter. Co. v. Cal. Super. Ct., 464 U.S. 501, 506–07 (1984).

[35] *Id.* at 507 (quoting THOMAS SMITH, DE REPUBLICA ANGLORUM: A DISCOURSE ON THE COMMONWEALTH OF ENGLAND 79, 101 (L. Alston ed., Cambridge University Press, 1906)).

[36] 3 WILLIAM BLACKSTONE, COMMENTARIES *364–66.

[37] *Id.* at *363.

[38] Wes Hill, *A History of Jury Selection*, AM. INNS OF CT. (Oct.), https://inns.innsofcourt.org/media/123985/2015__10-08_final_version_of_hill__voir_dire_history.pdf.

[39] United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807).

United States discussed the purpose of voir dire and explained that an inquiry about prospective jurors is permissible to "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."[40] These cases demonstrate the importance of voir dire and the fact that this process has stood the test of time for over 250 years.[41] Voir dire is foundational to providing litigants with a fair and impartial jury.[42]

The historical backdrop for voir dire demonstrates that two essential elements of voir dire are the "open" nature of voir dire[43] and the supervision that the trial court provides over the process.[44] The U.S. Supreme Court affirmed the necessity of public voir dire in *Press-Enterprise Co. v. Superior Court of California*, when it explained that "[o]penness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[45] The Court underscored the importance of trial court supervision over the voir dire process when it concluded, "To preserve fairness and at the same time protect legitimate privacy [of prospective jurors], a trial judge must at all times maintain control of the process of jury selection."[46]

Voir dire is the one time in the jury trial when lawyers for the litigants may ask questions of the jurors about themselves.[47] Before the existence of the Internet, the basis for those questions would be information learned through written answers to questionnaires or oral answers to questions asked in open court.[48] Because of this open format and the significance of the information

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[40] Connors v. United States, 158 U.S. 408, 413 (1895).

[41] *See* Holmquist, *supra* note 29.

[42] *See id.*

[43] Press-Enter. Co. v. Cal. Super. Ct., 464 U.S. 501, 508 (1984).

[44] *See id.* at 512.

[45] *Id.* at 508.

[46] *Id.* at 512.

[47] *See Communication with Jurors*, LAWSHELF, https://www.lawshelf.com/coursewarecontentview/communication-with-jurors (last visited Feb. 5, 2024).

[48] *See* Browning, *supra* note 5, at 603.

shared during voir dire, it is imperative that the trial judge have direct supervision of this process.[49]

One important aspect of carrying out this required court supervision of voir dire is accomplished by the trial judge maintaining a record of the questions asked of and responses given by the jury.[50] This record is essential for any appellate review.[51] An equally important aspect of supervision is the trial judge's control over the kinds of questions allowed to be asked of prospective jurors. Historically, a trial judge in both civil and criminal trials has broad discretion to determine appropriate questions for the court or counsel to ask prospective jurors during voir dire.[52] The kinds of questions typically allowed during voir dire should illuminate improper biases of a juror, conflicts of interest, or other issues that may impact the impartiality or fairness of a juror to sit as a factfinder in a case.[53] Along these lines, a jury questionnaire may include questions such as age, gender, marital status, occupation, educational background, involvement in lawsuits, hobbies, and general opinions if the trial judge determines that they are relevant.[54] Generally, however, trial judges will not allow questions that involve jurors' personal information or beliefs that are not directly relevant to deciding the case.[55] A routine example of this kind of information includes a juror's political or religious affiliation.[56]

Once questionnaires have been received by counsel and voir dire has begun, the litigants, through their counsel, may act upon the information learned from the prospective jurors by requesting that a juror be removed from the panel,[57] which is generally described as "challenging" the juror.[58]

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[49] *See* Connors v. United States, 158 U.S. 408, 413 (1895); United States v. McDade, 929 F. Supp. 815, 817–18 (E.D. Pa. 1996).

[50] Letter to Counsel, *supra* note 4, at 4.

[51] *Id.*

[52] Hart, *supra* note 15, at 234; *see Connors*, 158 U.S. at 413.

[53] Hart, *supra* note 15, at 234.

[54] *See* Jonathan S. Tam, *Jury Selection (Federal)*, THOMSON REUTERS 9, 11 (2024), https://us.practicallaw.thomsonreuters.com/1-613-5747.

[55] *See, e.g.*, United States v. McDade, 929 F. Supp. 815, 817–20 (E.D. Pa. 1996).

[56] *See* Tam, *supra* note 54, at 6–7, 11.

[57] JUDICIAL CONFERENCE, *supra* note 31, at 5.

[58] *Id.*

The process of how and why a juror is challenged should govern the type of information that is accessible to counsel in making a decision to challenge a particular juror. A challenge made by counsel for a litigant can come in two forms, depending upon the information provided by the juror in response to a question asked. The two forms of challenges are challenges for cause and peremptory challenges.[59]

1. Challenging a Juror "for Cause"

Challenges "for cause" are typically unlimited in number and may be exercised when the voir dire process has revealed a prejudice in a juror that would affect the juror's ability to sit and hear the evidence impartially.[60] An attorney who believes a prospective juror has demonstrated an unfair prejudice may request that the court remove the juror "for cause."[61] Challenges for cause are embedded within the Constitution's Sixth Amendment right to a fair and impartial jury.[62] However, the standard for removing a juror for cause is not easily attained.[63] A prospective juror will only be removed for cause "on a narrowly specified, provable and legally cognizable basis of partiality."[64] Generally, a juror's preconception about the facts of the case will not be enough to remove them for cause if they express that they will set aside their bias or opinion.[65] To be removed for cause, a juror must have such a rooted bias or opinion that they would be unable to listen to and decide the case impartially.[66] Because the standard for removing a juror for cause can be difficult to reach, the second form of challenge, the

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[59] *Id.*

[60] *Id.* The court will determine the number of for cause challenges allowed to each party. 28 U.S.C. § 1870.

[61] JUDICIAL CONFERENCE, *supra* note 31, at 5.

[62] Justin Dolan, *Thou Shall Not Strike: Religion-Based Peremptory Challenges Under the Washington State Constitution*, 25 SEATTLE U. L. REV. 451, 454 (2001); *see* Ross v. Oklahoma, 487 U.S. 81, 85 (1988); State v. Johnson, 437 P.3d 147, 150 (Mont. 2019).

[63] Tam, *supra* note 54.

[64] Swain v. Alabama, 380 U.S. 202, 220 (1965).

[65] Tam, *supra* note 54.

[66] *Id.*

"peremptory challenge," is a coveted tool generally exercised at the conclusion of voir dire.[67]

2. Challenging a Juror with a Peremptory Challenge

In federal trial courts and most state trial courts, each party in a lawsuit is afforded a limited number of peremptory challenges.[68] A peremptory challenge can be exercised without cause, which generally means that no reason has to be articulated for exercising the peremptory challenge.[69] As one author explained, "[A] peremptory challenge is designed to permit a party to strike a member of the [jury panel] on nothing more than a hunch regarding the juror's partiality."[70] Unlike challenges for cause, which are rooted in the Constitution through the Sixth Amendment right to an impartial jury, peremptory challenges are not provided for in the Constitution.[71] Nevertheless, every court in American jurisprudence, at the federal and state level, is authorized to use them.[72] At one time in our nation's history, peremptory challenges could be exercised for any reason whatsoever.[73] In 1965, the U.S. Supreme Court, in *Swain v. Alabama*, explained that a peremptory challenge could be used entirely outside of the trial court's control because "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[74] The Court in *Swain* went on to explain that peremptory challenges could be exercised on grounds "irrelevant to legal proceedings or official action, namely, the race, religion, nationality,

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[67] Dolan, *supra* note 62, at 454.

[68] JUDICIAL CONFERENCE, *supra* note 31, at 5–6.

[69] United States v. Annigoni, 96 F.3d 1132, 1138 (9th Cir. 1996); JUDICIAL CONFERENCE, *supra* note 31, at 5–6.

[70] Dolan, *supra* note 62, at 453; *see Annigoni*, 96 F.3d at 1139.

[71] Dolan, *supra* note 62, at 454; *see* Swain v. Alabama, 380 U.S. 202, 219 (1965).

[72] Dolan, *supra* note 62, at 454; FED. R. CRIM. P. 24(b) (providing procedural rules for federal courts regarding peremptory challenges in criminal cases); 28 U.S.C. § 1870 (codifying the use of the peremptory challenge in federal courts for civil cases).

[73] Dolan, *supra* note 62, at 453.

[74] *Swain*, 380 U.S. at 220 (first citing State v. Thompson, 206 P.2d 1037 (1949); and then citing Lewis v. United States, 146 U.S. 370, 378 (1892)).

occupation or affiliations of people summoned for jury duty."[75] Thus, unsurprisingly, peremptory strikes were being used exactly for what the Supreme Court said they could be used for, and jurors were being dismissed based on race, religion, nationality, occupation, or the like.

With a welcomed national awakening towards civil rights, and moving forward from 1965, the Supreme Court has substantially limited *Swain*. For example, in 1986, the Supreme Court in *Batson v. Kentucky* limited the unrestrained use of peremptory challenges, holding that the Equal Protection Clause was violated when a party used a peremptory challenge on a potential juror based solely on his race or on the assumption that the juror would be biased because of his race.[76] In 1994, the Court went further when in *J.E.B. v. Alabama ex rel. T.B.*, it extended its holding in *Batson* to include gender.[77]

Arguably, Congress has also weighed in and legislatively limited the basis for exercising peremptory challenges.[78] 28 U.S.C. § 1862 governs federal courts and provides that a citizen shall not be excluded from jury service on account of "race, color, religion, sex, national origin, or economic status."[79] Consequently, it would follow based on this language that an attorney may no longer use an available peremptory challenge to strike a juror in federal court based upon one of these prohibited categories without violating the statute.[80] Most states have adopted laws with protections similar to those afforded in 28 U.S.C. § 1862.[81] For example, what appears to be California's counterpart to the federal rule provides that "[a] party shall not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of a characteristic listed or defined in Section 11135 of the Government Code, or

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[75] *Id.* (citations omitted).

[76] Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[77] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994).

[78] *See* 28 U.S.C. § 1862.

[79] *Id.*

[80] Arguments as to how this statute should be interpreted and applied are beyond the scope of this Comment but will ultimately need to be considered to address this issue.

[81] *See, e.g.*, DEL. CODE ANN. tit. 10, § 4502 (2024); W. VA. CODE § 52-1-2 (2023); ALA. CODE § 12-16-56 (2023); OR. REV. STAT. § 10.030(1) (2023); N.H. REV. STAT. ANN. § 500-A:4 (LexisNexis 2023); IDAHO CODE § 2-203 (2023). This list is not exhaustive of state laws on the topic; rather, it is a sample.

similar grounds."[82] The characteristics listed in Section 11135 are: "sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation."[83]

In addition to race and gender, some courts have expressed concerns or directly prohibited the use of a peremptory challenge to strike a prospective juror based solely on their religious beliefs.[84] The Second Circuit in *United States v. Brown* stated, "Exercising peremptory strikes simply because a [prospective juror] affiliates herself with a certain religion is therefore a form of 'state-sponsored group stereotype[] rooted in, and reflective of, historical prejudice.'"[85] The court further explained that religion-based peremptory challenges "like those based on race and gender, 'cause[] harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.'"[86]

The limitations on peremptory challenges continued to expand so that in addition to the express statutes and precedents prohibiting peremptory challenges based upon race, gender, and religion, both federal and state courts routinely limit counsel from asking questions during voir dire that pertain to political affiliation.[87] As one federal judge explained in an article he wrote: "[t]he distinction between cause and peremptory challenges has played an important role in the traditional treatment of politics and religion in voir dire."[88] He further explained that the traditional "view is that courts

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[82] CAL. CIV. PROC. CODE § 231.5 (Deering 2023).

[83] CAL. GOV'T CODE § 11135 (Deering 2023).

[84] *See* Davis v. Minnesota, 511 U.S. 1115, 1116–17 (1994) (Thomas & Scalia, JJ., dissenting) (dissenting from the denial of certiorari); United States v. Stafford, 136 F. 3d 1109, 1114 (7th Cir. 1998) ("It would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc."); State v. Purcell, 18 P.3d 113, 120, (Ariz. Ct. App. 2001); United States v. Brown, 352 F.3d 654, 669 (2d Cir. 2003); Highler v. State, 854 N.E.2d 823, 829 (Ind. 2006); State v. Hodge, 726 A.2d 531, 553 (Conn. 1999).

[85] *Brown*, 352 F.3d at 669 (second alteration in original) (quoting J.E.B. v. Alabama *ex rel.* T.B, 511 U.S. 127, 128 (1994)).

[86] *Id.* (alteration in original) (quoting *J.E.B.*, 511 U.S. at 128).

[87] *See* Thomas Marten, *Politics, Religion, and Voir Dire*, 68 DRAKE L. REV. 723, 727–28 (2020).

[88] *Id.*

should avoid voir dire questions about political or religious beliefs except in the unusual case involving such issues directly."[89] The judge observed that according to the traditional view, "court[s] should avoid such questioning merely to generate background information for use [of] peremptory challenges."[90]

Even before the existence of Internet research into a juror's personal background, courts recognized the danger of questions in voir dire leading to information about a juror that could be used to exercise an improper peremptory challenge. If the goal of voir dire is to establish a panel of men and women "drawn from a fair cross section of the community"[91] who will be able to set aside prejudice and bias and decide the case impartially,[92] then, as the courts and Legislature have acknowledged, to remove a juror based solely on a category such as race, gender, or religion does not aid in this goal but rather harms the integrity of the process.[93]

Because it is unlawful to use a peremptory challenge to strike a juror based solely on one of the prohibited categories, court supervision over the voir dire process is essential. If a party suspects that the opposing counsel is using a peremptory challenge unlawfully, the court is tasked with inquiring further into the strike to determine whether it was made on valid grounds apart from a prohibited category.[94] If the court deems the strike to be motivated by purposeful discrimination, it will prohibit the attorney from using a peremptory challenge to strike that juror.[95] Because courts are tasked with ensuring that the exercise of peremptory challenges are not based upon impermissible reasons, direct, in-person trial court supervision and the ability to monitor what information is being used by counsel to exercise a

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[89] *Id.* at 728.

[90] *Id.* It is important to note that this judge was explaining the traditional view regarding politics and religion in voir dire, but that the judge does not necessarily hold the traditional view himself.

[91] Taylor v. Louisiana, 419 U.S. 522, 534 (1975).

[92] *See* Holmquist, *supra* note 29.

[93] *See* discussion *supra* Section II.C.2.

[94] *See* Tam, *supra* note 54.

[95] *Id.*

peremptory challenge is vital.[96] By creating a record of the questions asked of the jurors and their answers, the court has the ability to better ferret out the use of an unlawful peremptory challenge, and the appellate court has the ability to perform a meaningful review if the issue is raised on appeal.[97] But what if counsel exercises a peremptory challenge based upon information learned through an Internet search that the trial judge and opposing counsel do not know about? What if counsel never asks the juror about information such as religion, economic status, or political affiliation but instead discovers these details through Internet research—and then quietly strikes the juror based on an impermissible category? How can a court create a record; how can it exercise supervision; and how can it preserve the integrity of the process when it does not know that the integrity of the process is being assaulted? Many reasons have been proposed as to why Internet research should be banned in preparation for and during voir dire. Some have argued that the most obvious danger of allowing online investigation is the violation of juror privacy.[98] Others have argued that the inherent hypocrisy of allowing litigants to perform research while prohibiting jurors from doing so should be grounds for a complete ban on Internet research.[99] These are legitimate concerns that will be discussed. However, the most compelling argument in support of a ban on Internet research of a prospective juror is that it paves a way for the impermissible use of a peremptory challenge.

III. THE HISTORICAL ABUSE OF PEREMPTORY CHALLENGES APPLIES TO THIS ISSUE

Even before lawyers were utilizing the Internet to delve into information about a prospective juror and secretly relying upon that information to exercise a peremptory challenge, the use of peremptory challenges was being abused.[100] The judicial prohibitions against exercising a peremptory

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[96] *See* Letter to Counsel, *supra* note 4, at 4.

[97] *Id.*

[98] *See* Browning, *supra* note 5.

[99] Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1102 (N.D. Cal. 2016); Letter to Counsel, *supra* note 4, at 5.

[100] *See* Gilad Edelman, *Why is it so Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors.

challenge based upon race did not prevent all counsel from still doing so.[101] A loophole under *Batson* allows counsel to circumvent race discrimination by articulating a reason other than race for exercising a peremptory challenge.[102] In a 1996 opinion, a judge on the Illinois Court of Appeals, "exasperated by 'the charade that has become the *Batson* process,' catalogued some of the flimsy reasons for striking jurors that judges had accepted as 'race-neutral': too old, too young; living alone, living with a girlfriend; over-educated, lack of maturity; unemployed, employed as a barber; and so on."[103] The judge quipped, "[N]ew prosecutors . . . are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.'"[104]

Even before the existence of the Internet, Justice Thurgood Marshall recognized the potential for substantial abuse in the use of the peremptory challenge and advocated for doing away with the peremptory challenge altogether in his concurrence in *Batson*.[105] But as one commentator has noted, this is a "political nonstarter. Most trial lawyers . . . don't want to give up their ability to use strikes to shape the jury."[106] The temptation and ability to circumvent the rules restricting the use of peremptory challenges has not diminished since Justice Marshall's concurrence. Instead, with advancing technology, the temptation to misuse information has only intensified. The answer should not be to ban the peremptory challenge, but, rather, it should be to ban the use of the Internet or other technology to conduct research into the background of a juror. A ban of this kind would reinforce the role of the trial court to supervise voir dire and limit the potential for counsel to discover information on the Internet that would allow counsel to make an unlawful peremptory strike based on an impermissible reason.

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101 *Id.*

102 *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986) ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.").

103 Edelman, *supra* note 100 (quoting People v. Randall, 671 N.E.2d 60, 65–66 (Ill. App. Ct. 1996)).

104 *Randall*, 671 N.E.2d at 65.

105 *Batson*, 476 U.S. at 102–03, 105 (Marshall, J., concurring).

106 Edelman, *supra* note 100.

IV. JUDICIALLY RECOGNIZED LIMITATIONS ON PEREMPTORY CHALLENGES UNDERSCORE WHY ALLOWING INTERNET RESEARCH OF JURORS IS SO DANGEROUS

When an attorney wishes to strike a juror using a peremptory challenge, the challenge is presented in open court in the presence of the trial judge and other counsel.[107] Under the traditional process, prior to such a challenge, the parties and the trial judge have heard, through voir dire, the answers given by the prospective juror that gave rise to the use of the peremptory challenge.[108] They have had the opportunity to view the juror and assess not only the answers, but also the manner in which the answers were given.[109] This interactive and dynamic process places everyone on equal footing in terms of the information being utilized to exercise the peremptory challenge.[110]

But when someone performs Internet research about a juror, the trial judge and opposing counsel have no way of knowing what was discovered about the juror.[111] When Internet research is allowed, information is obtained without a record for meaningful appellate review and outside of the supervision of the court.[112] It is very likely that questions that could never have been asked of a juror through the traditional means of voir dire do not need to be asked because the information can be found on the Internet and is available even if it is unintentionally discovered. The use of the Internet to research a juror's background places no limitations on what information can be discovered about a juror. A juror's religious or political affiliation, economic status, or even ethnicity may not be readily observable in open

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[107] *See* Sherilyn Streicker, *Jury Selection in Criminal Cases*, NOLO, https://www.nolo.com/legal-encyclopedia/jury-selection-criminal-cases.html (last visited Jan. 25, 2024).

[108] *See* discussion *supra* Section II.C.

[109] *See id.*

[110] *See* Streicker, *supra* note 107.

[111] Letter to Counsel, *supra* note 4, at 4.

[112] *See id.*

court, but it is often easily discovered through Internet research.[113] When counsel acquires online information about a juror and exercises a peremptory strike, there is likely no apparent reason for the trial court or opposing counsel to question the motivation for the strike. One trial judge in Maryland recognized this concern and explained that if the attorneys were allowed to perform such research it would be akin to "allowing either side to [rely] on facts that [are] not part of the record."[114]

This principle attaches to any category a legislature or court chooses to list as a prohibited basis for exercising a peremptory challenge. Most of these evolving categories that may not be used as the basis for a peremptory challenge are not based upon readily observable physical characteristics—one likely has no way of knowing the religion, political affiliation, national origin, ethnic group identification, sex, sexual orientation, genetic information, or disability of a prospective juror unless they perform Internet research.[115]

It would be naive to believe that this kind of Internet research is not occurring in almost every instance where unfettered research into a juror's background is allowed. Even assuming counsel for a party is not intentionally seeking impermissible information, such information may, and usually will, present itself. Access to online information about a juror can serve as a way for attorneys to circumvent court-imposed rules that require an attorney to refrain from asking questions that would reveal improper information about a juror.[116] If the court and opposing counsel are not aware of this information, how could the court create a record or make any sort of finding that the peremptory challenge was exercised on an impermissible basis?[117]

Surprisingly, there are a handful of articles that openly acknowledge that lawyers are using Internet research as a tool to discover information about a

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[113] *See* Sonia Chopra, *Using the Internet and Social Media in Jury Selection*, PLAINTIFF (Feb. 2012), https://www.plaintiffmagazine.com/recent-issues/item/using-the-internet-and-social-media-in-jury-selection.

[114] Soule v. State, 2019 Md. App. LEXIS 59, at *18 (Md. Ct. Spec. App. 2019) (quoting the trial judge's denial of appellant's motion requesting permission to conduct Internet research on jurors during jury selection).

[115] *See, e.g.*, CAL. GOV'T CODE § 11135(a) (Deering 2023).

[116] *See* Grow, *supra* note 13.

[117] Letter to Counsel, *supra* note 4, at 4.

prospective juror—such as political or religious affiliation—that cannot otherwise be discovered in open court because it is impermissible or considered by the trial court to be "taboo."[118] One law firm has openly shared online its Internet vetting process of jurors in preparation for voir dire.[119] This firm shared that it tasks its paralegals to scan Facebook, MySpace, and Twitter, and to perform other Google searches to find information about jurors.[120] The type of information sought includes the names of jurors on government agency websites, school boards, local businesses, and property records.[121] In one example of the type of information these searches produced, counsel unilaterally learned that a prospective juror was the owner of two small businesses, that the juror was affiliated with the Republican party, and that the juror's favorite book to read was the Bible.[122] The attorney who obtained this information about this particular juror acknowledged that this "information is at least enough to guide my questions on what I have to pull out of this cat," and "helps me make the ultimate decision: Can he stay on the jury or does he have to go?"[123] In theory, if this attorney did choose to use a peremptory challenge on this juror based on his religion or political affiliation, the court and opposing counsel would have no way of knowing because this information was not made known in open court.[124]

With online research available to counsel for the litigants, counsel does not have to ask impermissible questions during voir dire.[125] Counsel can obtain the same impermissible information under the cover of the Internet.[126] As a result, what would have arguably violated court rules if asked about in

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[118] *See generally* Tam, *supra* note 54, at 6; Grow, *supra* note 13 (discussing various instances of lawyers admitting to using Internet research as a tool to discover information about a prospective juror).

[119] Grow, *supra* note 13.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] No explanation is required when exercising a peremptory challenge unless a prohibited discriminatory purpose is detected. *See* JUDICIAL CONFERENCE, *supra* note 31, at 5–6.

[125] Grow, *supra* note 13.

[126] *Id.*

court is no longer an issue when the information is obtained through the Internet.[127]

One state trial court in discussing this issue recognized that what some view as a technological advantage of voir dire is actually a step backwards.[128] This trial judge appropriately noted, "[T]he curse of [Internet] research is, in part, that the motivation for [using a] challenge might relate to religion, gender bias, racial or sexual discrimination, or some other factor whose use as a basis for a peremptory challenge would be unlawful."[129] The judge further explained that "[t]he remaining evil would be that the [c]ourt, opposing counsel, and the appellate courts, unaware of the secret knowledge of an attorney about a prospective juror, might not be able to discern the unlawful basis for a challenge and take remedial action."[130] In order for a judge to monitor whether an attorney is properly using a peremptory challenge, the judge must know what information the attorney has obtained about the individual.[131] The absence of any sort of record of the information an attorney considered about a prospective juror in exercising a peremptory challenge is one of the strongest reasons to deny the use of the Internet to research jurors during voir dire.[132]

V. OTHER ARGUMENTS WEIGHING IN FAVOR OF IMPOSING LIMITATIONS ON INTERNET RESEARCHING JURORS

A. "Do As I Say Not As I Do"—Hypocritical Messaging

Another argument in support of prohibiting Internet research about jurors during voir dire is the hypocrisy in allowing attorneys to research jurors though jurors are strictly instructed to refrain from any form of research.[133] Some have noted that this apparent hypocrisy may lead prospective jurors to ignore their own instructions to refrain from any

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127 *Id.*

128 *See* Letter to Counsel, *supra* note 4, at 4.

129 *Id.*

130 *Id.*

131 *See id.*

132 *See id.*

133 *See* Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1102 (N.D. Cal. 2016); Letter to Counsel, *supra* note 4, at 5.

research about the case, thus subjecting the case to a possible mistrial.[134] Lawyers are not fact finders and hold a fundamentally different position during the trial than a juror. However, voir dire is a unique time in the trial when the roles of the juror and the lawyer intersect. Both are participating in the process of obtaining a fair and impartial jury. While legal counsel and the court may see the difference, it is understandable why a layperson carrying out his or her civic duty would not. To a layperson, it is understandably incongruous that a lawyer can thoroughly research a juror, yet a juror may not research the lawyer. Likewise, once jurors are selected, they swear to set aside any prejudice and decide the case based solely on facts of the lawsuit, relevant law, and their best judgement.[135] In order to ensure this process, jurors are strictly instructed that "they are not to rely on any private source of information."[136] Jurors are admonished to refrain from using any Internet service, newspaper material, or even a dictionary to look up information pertaining to the case.[137]

Supreme Court Justice Oliver Wendell Holmes summarized the rationale for requiring jurors to rely solely on evidence presented in court: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[138] This maxim has been adopted both in case law and through practical application by the Federal Judiciary. The Judicial Conference, in its Handbook for Trial Jurors Serving in the United States District Courts, admonishes prospective jurors that "[i]nformation that a juror gets from a private source may be only half true, or biased or inaccurate. . . . [I]t is only fair that the parties have a chance to know and comment on all the facts that matter in the case."[139] If a juror disregards the trial court's order not to obtain online information or use

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134 *See* John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES (Mar. 17, 2009), https://www.nytimes.com/2009/03/18/us/18juries.html.

135 JUDICIAL CONFERENCE, *supra* note 31, at 10.

136 *Id.* at 11.

137 *Id.*

138 *Id.* at 12 (quoting Patterson v. Colorado, 205 U.S. 454, 462 (1907)).

139 *Id.* at 11.

other outside resources to research the case, the juror may be sanctioned and held in contempt of court.[140]

All courts provide some uniform instruction to the jurors that includes a strict admonition to refrain from any research, specifically the use of Internet research.[141] Typically such an instruction provides:

> In this age of instant electronic communication and research, I want to emphasize that in addition to not speaking face-to-face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages . . . or social networking Web sites. . . . In addition to conventional research, you also must not use any Internet search engine—such as Google and all of the others—to look for any information about the case, the law that applies to the case, or the people involved in this case, including the defendant, the witnesses, the lawyers, or the judge.[142]

Is there a direct link between a juror violating a court's order not to conduct Internet research and allowing a lawyer to conduct Internet research of the juror? Some judges have concluded there is.[143] In an opinion granting defense counsel's motion to preclude opposing counsel from performing Internet research on the jurors during voir dire,[144] one trial judge stated:

> Plaintiff's advocacy for [I]nternet spying on jurors seems to imply a belief that there is a limitless supply of intelligent, responsible jurors who are willing to report for jury duty, much less to serve from January 4 to March 17 as the jurors

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[140] Thaddeus Hoffmeister, *Google, Gadgets, and Guild: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 437–38 (2012).

[141] Letter to Counsel, *supra* note 4, at 5.

[142] *Id.*; *see, e.g.*, VA. MODEL JURY INSTRUCTION COMM., VIRGINIA MODEL JURY INSTRUCTIONS–CIVIL (2023); JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO LEARN OR COMMUNICATE ABOUT A CASE (2020).

[143] Letter to Counsel, *supra* note 4, at 5; Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1102 (N.D. Cal. 2016).

[144] Letter to Counsel, *supra* note 4, at 4.

> did in this case, and who would still be willing to do so if they knew that the attorneys in the courtroom had unseen law firm staff back in their offices scurrying and scouring the [I]nternet to find out about the chumps in the courtroom.[145]

This trial judge articulated the argument set forth in this Section of this Comment—an argument that has provided some trial courts with a sufficient reason to unequivocally deny Internet research:

> Imagine the indignation and the outcry from jurors and the public if, after the jurors [were admonished to refrain from performing any Internet research], they discovered that the lawyer in the trial had already used those very electronic sources to delve into the prospective jurors' lives. The hypocrisy of such a policy would be staggering and the public distaste would be profound.[146]

It is the "staggering hypocrisy" and "profound public distaste" that led the same trial court to conclude that the use of Internet research of jurors could contribute to the national decline in juror participation:

> It is this [c]ourt's belief that there would be many people who would otherwise report for jury who would refuse to do so if they thought the attorneys would be exploring Google, Facebook and the like to try to find out more about them. . . . What many trial lawyers don't comprehend is how difficult it is to get jurors already. . . . [O]nly 33% of [jurors] summoned demonstrate a willingness to serve on a given jury term. Then, of those who do return a jury questionnaire which contains the requested information, only about 65% of jurors summoned for a given trial actually report to the courtroom for jury service. With statistics as grim as these, courts would be ill-advised to embrace a new policy which

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145 *Id.* at 4–5.

146 *Id.* at 5.

> would likely reduce the number of willing and capable jurors significantly.[147]

A federal trial judge in California echoed these concerns when he stated that "the apparent unfairness in allowing the lawyers to do to the venire what the venire cannot do to the lawyers will likely have a corrosive effect on fidelity to the no-research admonition."[148]

B. Protecting Juror Privacy Interests—Who Is on Trial?

Juror privacy is another compelling reason for prohibiting the use of Internet research in preparation for and during voir dire.[149] Concerns for juror privacy existed long before the creation of the Internet. In the 1984 Supreme Court decision, *Press Enterprise Co. v. Superior Court of California*, the Court explained that one of its reasons for requiring trial judge supervision over the process of jury selection is to protect the legitimate privacy interests of the jurors.[150] In 1996 a federal judge in Pennsylvania further emphasized the need to protect juror privacy:

> [J]ury service does expose [an individual] to some searching inquiry as to such matters as their ability to be fair, their absence of preconceived, fixed opinions. But there must be some balance, some drawing the line, and when hard-charging counsel are in hot pursuit of every little empirical nugget they get their eyes on, it is the trial judge who must, *sua sponte*, reign them in and give the jurors some protection.[151]

In the pursuit for privacy, this judge prohibited counsel from asking the prospective jurors about what kinds of books, magazines, or newspapers the jurors liked to read.[152] He explained, "Whatever marginal insights trial

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147 *Id.* at 5–6. These percentages are representative of the jurisdiction for this judge, but other jurisdictions may differ.

148 *Oracle Am., Inc.*, 172 F. Supp. 3d at 1102.

149 *See id.* at 1103.

150 Press-Enterprise Co. v. Super. Ct. of Cal., 464 U.S. 501, 512 (1984).

151 United States v. McDade, 929 F. Supp. 815, 817–18 (E.D. Pa. 1996).

152 *Id.* at 819.

lawyers and their jury consultants may gain from this information is markedly outweighed by concerns . . . . [T]o be subjected to such inquiries . . . would be to give up more than is necessary for the proper and fair administration of justice."[153] Although this opinion was written long before lawyers were using the Internet to research jurors,[154] the principle is the same—counsel does not need to know every last "empirical nugget" about an individual to determine whether they will be able to decide a case impartially.

Still, some have attempted to dismiss these concerns that jurors may have about their private information being reviewed by counsel. They suggest that, in this day and age, jurors should expect lawyers to conduct social media research.[155] After all, so the argument goes, jurors should be accustomed to this kind of research because they should know that most employers perform similar research about a potential employee.[156] But, that argument has not mitigated the fear held by many judges that allowing Internet research into jurors' lives will have a chilling effect on their willingness to serve as jurors.[157] Arguments that this kind of research happens routinely in the private sector miss the significant distinction that juror participation is an imposed civic requirement, not a voluntary personal choice.[158] Jurors are "summoned"; they do not volunteer or serve out of their own economic interests.[159] In fact, in the federal courts, the failure of a juror to appear may result in a financial

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153 *Id.*

154 This opinion was issued in 1996 and social media was generally not accessible until 2004. *See* Ortiz-Ospina, *supra* note 8.

155 Paterson, *supra* note 15, at 6.

156 Sandeep Babu, *90% of Employers Consider an Applicant's Social Media Activity During Hiring Process*, SMALL BUS. TRENDS, https://smallbiztrends.com/2020/05/social-media-screening.html (July 22, 2020).

157 *See* Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1107 (N.D. Cal. 2016); DUNN, *supra* note 7, at 13. In this survey, seventeen federal judges "indicated they did not allow attorneys to research prospective jurors during voir dire in order to protect the jurors' privacy, and [four] judges . . . were worried about intimidating potential jurors." *Id.*

158 *See* 28 U.S.C. § 1866.

159 28 U.S.C. § 1866.

penalty of up to $1,000, incarceration of up to three days, and community service.[160]

For similar reasons, a Michigan federal district judge concluded that there is no legal authority for the argument that counsel for a party should be able to "'corroborate' the information provided by the prospective jurors in their detailed juror questionnaires" and reasoned that "[t]he answers prospective jurors provide in their juror questionnaires will provide a wealth of information that can be plumbed during individual voir dire."[161] The judge recognized that "jurors summoned from the community to serve as participants in our democratic system of justice are entitled to safety [and] privacy."[162]

But this begs the question, should there be privacy concerns over information that is generally available to the public? Some have argued that jurors should expect counsel to research their information because it is information that they themselves have placed in a public forum.[163] However, this argument fails to address the reality that information a juror chooses to place on social media about themselves may be vastly different from what they might share during the voir dire process when they have sworn in court to provide truthful information.[164] Online information about a prospective juror can be unreliable for a number of reasons. A person may re-post or "like" a particular post in order to impress a certain peer group. A position expressed online by an individual years or even weeks earlier might have changed by the time of questioning during voir dire. Further, there may be "friends" associated with the prospective juror's social media page who the juror does not even know in reality. The most effective way to learn about jurors' thoughts on a particular subject, thoughts which may have changed over time, is to ask them directly while under the weight of the oath to answer

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160 28 U.S.C. § 1866.

161 United States v. Kilpatrick, 2012 U.S. Dist. LEXIS 110165, at *8 (E.D. Mich. 2012).

162 *Id.* at *9 (quoting United States v. Bonds, 2011 U.S. Dist. LEXIS 155885, at *6 (N.D. Cal. 2011)).

163 *See generally* Paterson, *supra* note 15 (discussing how jurors expect lawyers to conduct social medial research).

164 JUDICIAL CONFERENCE, *supra* note 31, at 4–5 (explaining that the prospective jurors are sworn to answer questions to determine their qualifications to sit as jurors in the case).

the questions truthfully.[165] Jurors are not on trial, and their answers to questions in open court should not be "impeached" or "vetted" by unsworn information that may be available about them online.[166]

An even greater potential issue is that for most prospective jurors there will be content online that they have not put there themselves.[167] This information often reveals personal details that most individuals would only share with those closest to them or with those who have a specific need for the information. The kind of private information that most individuals have not posted about themselves but still exists includes: "websites that list title owners to property," voting records including political party affiliation, "political contributions, membership in charitable or religious organizations, job history via LinkedIn, or even one's 'wish list' on Amazon.com."[168] One commentator has noted:

> Advances in technology facilitate the compilation and exchange of information, making it difficult for individuals to restrict access to personal information, or even to know who has access to that information and for what purposes. It is no surprise that citizens who are summoned for jury service are as concerned about public and litigant access to their personal information as they are about such access in other aspects of their lives.[169]

Most of us likely recognize that information found online about an individual may simply be false information. To demonstrate this point, one attorney decided to test the accuracy of free online services and conducted an

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[165] *See* Hart, *supra* note 15, at 234 ("In order to evaluate whether jurors possess biases that would render them impartial, attorneys or judges ask potential jurors a series of questions while the jurors are sworn under oath . . . .").

[166] Lydia O'Hagen, *Jurors on Trial: Lawyers Using the Internet to Research Prospective Jurors*, 45 VICTORIA U. WELLINGTON L. REV. 161 (2014).

[167] *See* Elizabeth R. Feffer, *Ethical Issues Involving Attorneys and Jurors*, ADVOCATE (July 2016), https://www.advocatemagazine.com/article/2016-july/ethical-issues-involving-attorneys-and-jurors.

[168] *Id.*

[169] Paula L. Hannaford, *Safeguarding Juror Privacy: A New Framework for Court Policies and Procedures*, 85 JUDICATURE 18, 20 (2001).

internet search of himself.[170] The search showed several addresses of places he had lived with misleading home values.[171] He also learned, for the first time, that he was Hindu—but he was in fact not Hindu.[172] If a lawyer were to conduct this same search on a juror, the lawyer would have incorrect information that would remain uncorrected because asking a juror about the juror's religion is, in many instances, prohibited.[173] Additionally, this information could lead an attorney to make an improper peremptory strike based on a juror's religion that, in reality, was not even the juror's religion.

C. Impartial Access to Justice Weighs in Favor of Traditional Voir Dire

Proponents of utilizing online information about jurors argue that a failure to do so demonstrates the attorney is not zealously representing their client and is consequently violating the Rules of Professional Conduct.[174] That position could only be valid if Internet research is allowed by the courts, but it does not answer whether Internet research of jurors should be allowed in the first place. Certainly, if a court allows Internet research, counsel must take every step to zealously represent their client and use whatever means available to assist them in selecting jurors.[175] However, we cannot lose sight of the fact that voir dire is for the benefit of all parties and the court.[176] Selecting impartial jurors occurs at the outset of the trial, and it is foundational to a procedurally fair trial.[177] If one party has greater resources at its disposal for presenting its case, it may be able to afford more experienced and competent counsel. But voir dire and jury selection are not on the same level as being able to afford better, more experienced counsel.

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[170] *Using the Internet and Social Media in Jury Selection*, PLAINTIFF (Feb. 2012), https://www.plaintiffmagazine.com/recent-issues/item/using-the-internet-and-social-media-in-jury-selection.

[171] *Id.*

[172] *Id.*

[173] *See supra* Section II.C.

[174] Murphy, *supra* note 15, at 135; *see* MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2022).

[175] *See* MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2022).

[176] *See supra* Section II.C.

[177] *See supra* Section II.C.

Jurors are to be neutral, impartial, and fair.[178] Money should not be able to buy an advantage in the jury selection process. This is antithetical to the goal of creating a process that advances neutrality, impartiality, and fairness.[179]

Allowing Internet research creates the inevitable problem that each side has a different source or body of information about a prospective juror.[180] One party may have the resources to hire an entire team of jury consultants that could find every "empirical nugget" of information available about a juror, while the other party may not have these same resources.[181] One law professor addressing this issue explained, "only a very limited stratum of the population is able to make use of the full array of services offered by trial consultant firms. In practical terms that means that the wealthy get to bias the system in their favor; the poor don't."[182] In words taken from Justice Hugo Black, "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[183]

Allowing those with a more extensive staff, greater financial resources, or the ability to access more efficient or faster technology to conduct Internet research only serves to defeat equal access to justice for all litigants.[184] Allowing Internet research into prospective jurors places attorneys in a position where they can—and, in order to zealously represent their clients, arguably must—conceal information from the other party that they may have learned about a juror through the Internet.[185] The concealment of information has never been the objective of voir dire.[186] Rather, voir dire should continue to be conducted in full view under the authority of the trial

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178 JUDICIAL CONFERENCE, *supra* note 31, at 5.

179 *See* Adam Benforado, *Do Trial Consultants Spell the End of Justice?*, 27 AM. SOC'Y OF TRIAL CONSULTANTS 20, 21 (2015).

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*; Griffin v. Illinois, 351 U.S. 12, 19 (1956).

184 *See* Benforado, *supra* note 179, at 21.

185 *Id.*

186 *See* Connors v. United States, 158 U.S. 408, 413 (1895) (explaining that an inquiry into the jury is designed to expose a "bias, opinion, or prejudice that would affect" a fair trial).

judge in a manner that gives each party an opportunity to observe jurors' responses to questions in open court.[187]

Finally, what makes the issue of "zealous representation" particularly difficult to work through is the fact that some courts have concluded that a lawyer who fails to conduct some level of Internet research about a prospective juror is not zealously representing his client.[188] But a careful look at what these courts have concluded about this issue demonstrates that the argument of zealous representation should not be the basis for permitting Internet research. The Missouri Supreme Court in particular has held that counsel should research whether a prospective juror has been involved in similar litigation to the case at bar using Case.net.[189] This kind of information, along with information such as a felony conviction, is considered by almost all courts in determining the initial qualifications of a prospective juror to serve.[190] Requiring counsel to research these particular issues about a juror is far different from allowing intelligence reports about a juror's personal background, economic status, and political and religious beliefs to be created outside of the supervision of the court and without equal access by all parties.[191]

D. Traditional Voir Dire Still Works and There Are No Measurable Efficiencies Gained by Allowing Internet Research

The traditional open court process of voir dire works; it has worked efficiently and continues to do so while also facilitating equal voir dire efficiency for both parties. Some argue that having access to online information about a juror makes the voir dire process more efficient,[192] but others have expressed that it has the opposite effect.[193] Simplistic, old-school questioning of jurors in open court has been efficiently implemented by trial

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187 *Id.*

188 *See* Murphy, *supra* note 15, at 147–48.

189 *Id.* at 148; Johnson v. McCullough, 306 S.W.3d 551, 554 (Mo. 2010).

190 28 U.S.C. § 1865.

191 *Johnson*, 306 S.W.3d at 554.

192 *See generally* Browning, *supra* note 5 (discussing the speed at which an attorney can learn about a prospective juror through Internet research).

193 DUNN, *supra* note 7, at 13 (noting that fourteen federal judges were concerned that social media research of jurors would prolong voir dire).

courts for centuries and avoids the almost inevitable time delays that come from the use of technology in the courtroom. The efficiency argument intersects with the argument discussed above regarding equal access to resources.[194] Even if equal time is allotted for both sides to conduct research, the side with the most staff, bandwidth, and ability to pay for information is placed at an advantage. Thus, voir dire could become more efficient for one side and less efficient for the other when Internet research is permitted.

E. COVID-19's Virtual Voir Dire and Now AI Selected Juries—Enabling Bias and Moving Backwards

The last four years have resulted in what some might consider monumental changes to voir dire.[195] These changes have occurred because of COVID-19 and its impact on conducting in-person trials.[196] As a result of COVID-19, many courts experimented with virtual trials.[197] This resulted in some jurisdictions administering voir dire online while jurors and counsel were in their own homes or offices.[198] King County in Washington State regularly conducted voir dire remotely while jurors were in their own homes.[199] A court rule was passed in King County that allowed "jury selection . . . by videoconference in which all participants can simultaneously see, hear, and speak with each other."[200] Instead of having to appear in court, prospective jurors in King County could participate from their homes

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194 *See supra* Section V.C.

195 Dylan E. Jackson & Jeff M. Sbaih, *Is Remote Voir Dire the Way of the Future?*, WILSON SMITH COCHRAN DICKERSON (June 30, 2021), https://wscd.com/news/is-remote-voir-dire-the-way-of-the-future/.

196 *See id.*

197 *See id.*

198 *See id.*

199 *Id.*

200 WASH. CT. R. 41 (proposed 2021).

through "a cell phone, tablet, or . . . computer."[201] This rule is still in effect today.[202]

Because voir dire in this setting is conducted remotely,[203] counsel and prospective jurors are on a device while voir dire is occurring. In this setting, the ability to research a juror without the court or opposing counsel knowing that Internet research is occurring is far less cumbersome than if counsel was present in court.[204] One commentator who discussed this new trend of virtual voir dire acknowledged that "[t]he jury selection process is now more likely to include conducting some social media research of potential jurors before and/or during the jury selection process."[205] This commentator further acknowledged that online voir dire will generally require obtaining the list of juror names in advance, allowing for more optimal time to research the jurors.[206] This practice renders the ability of a court to supervise voir dire almost impossible and should be concerning to the bench and bar. One attorney who participated in multiple trials in King County using virtual voir dire discussed the pitfalls of remote voir dire and urged the return to in-person voir dire: "While videoconferencing seems to increase the overall volume of information that the litigants might otherwise receive about potential jurors, the process of rooting out bias appears much less effective."[207] He explained that during virtual voir dire jurors do not pay as

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[201] *Remote Participation–Video Voir Dire*, KING CNTY., https://kingcounty.gov/courts/superior-court/juror-information/Remote.aspx (last visited Jan. 25, 2024).

[202] *See Jury Selection–Superior Court*, KING CNTY., https://kingcounty.gov/en/court/superior-court/courts-jails-legal-system/jury-duty/jury-selection (last visited Feb. 5, 2024).

[203] WASH. CT. R. 41 (proposed 2021).

[204] Harry Plotkin, *Live vs. Zoom Voir Dire*, ADVOCATE (Mar. 2021), https://www.advocatemagazine.com/article/2021-march/live-vs-zoom-voir-dire.

[205] *Remote Voir Dire: How to Conduct Effective Voir Dire in the New "Courtroom"*, JDSUPRA (Jan. 26, 2021), https://www.jdsupra.com/legalnews/remote-voir-dire-how-to-conduct-1111331/.

[206] *Id.*

[207] E-mail from John Marlow, Staff Att'y, King Cnty. Dep't of Pub. Def., to Office Receptionist, Clerk (Nov. 1, 2021, 9:49 AM) (available at https://www.courts.wa.gov/court_Rules/proposed/2021Jun/GR%2041/John%20Marlow%20-%20GR%2041.pdf).

close attention and are not as willing to open up.[208] Thus, Internet research may deliver more information about a prospective juror, but that does not mean that the ability to root out bias is enhanced. The best way to root out potential bias is to engage in voir dire where the lawyers are asking questions and obtaining answers from prospective jurors in court.

Unfortunately, voir dire conducted online is not the only monumental change that the modern jury trial is facing. In a recent article entitled, "Forget the Future, Attorneys Are Using Generative AI Now," one lawyer explained how new generative artificial intelligence will take jury selection to a whole new level, perhaps not even recognizable as voir dire.[209] There now exists software that can "educate [an attorney] as to how different jury members might be thinking. This includes the economic circumstances, life experiences and subconscious issues affecting jurors."[210] This new technology could create limitless potential in assembling the ideal jury panel. With the assistance of advanced artificial intelligence, attorneys have the potential to obtain not only unfettered information about a juror but also the ability to process and project "what's going through their minds."[211]

Another author familiar with AI explained that new AI-generated legal tools are designed to "search[] all public data related to [a] prospective juror, . . . correlate[] the data with known patters of human behavior, and . . . provide[] a detailed profile with the person's personality type and a summary of their views and biases."[212] This is troubling for both the juror performing one of this nation's highest civic duties and for the integrity of our sacred jury trial, for which a fair and impartial jury is the foundation.[213]

An observation that a law professor made regarding the fairness of the modern use of jury consultants also applies directly to Internet research about a juror and the growing access to generative artificial intelligence:

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[208] *Id.*

[209] Steven Lerner, *Forget the Future. Attorneys Are Using Generative AI Now*, LEXISNEXIS LAW360 PULSE (Jan. 30, 2023, 3:16 PM), https://www.evisort.com/news/forget-the-future-attorneys-are-using-generative-ai-now.

[210] *Id.*

[211] *Id.*

[212] Mike Robinson, *How AI is Helping With Jury Selection and Why Some People are Concerned*, INFOTRACK (Feb. 13, 2023), https://www.infotrack.com/blog/ai-jury-selection/.

[213] *See supra* Section II.C.

> People aren't paying thousands of dollars in fees to achieve balanced proceedings; they are paying to win. And that means that consultants work, not to remove bias, but to manage bias and even to enhance biases that favor their client. Voir dire is a case in point: the consultant's aim is not to impanel a neutral jury, but as favorable a jury as possible. As one of my trial strategist Twitter followers put it recently, "I like my juries like I like my cheeseburgers: Stacked." Go to any of the top trial consultant firm websites and you'll see what's for sale: access to valuable insights about . . . jurors to help attorneys gain a winning edge . . . .[214]

The law professor's response to this reality regarding the modern jury consultant industry captures the core of the argument against Internet research: "for the sake of our system, I don't think anyone should be using scientific [or Internet] insight to imbalance the scales of justice. That's antithetical to our basic principles. The whole reason we have a voir dire process, for example, is to screen out bias, not screen for it."[215]

VI. PROPOSAL

A. Can We Compromise—Is a Complete Ban of Internet Research During Voir Dire Our Only Option?

Although there have been other, perhaps less extreme, solutions than a complete ban on Internet research proposed, those solutions fail based upon individual considerations discussed earlier in this Comment. For example, one commentator has suggested that Internet research should be allowed but that all information discovered about a juror must be documented and copied so that it can be shared with the court and other counsel.[216] Another proposal offered, in order to avoid an outright ban on Internet research, is that courts should allow most Internet research but prohibit searches such as those done through LinkedIn or any other social networking platform that would leave a record with the account holder so as to avoid any potential

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214 Benforado, *supra* note 179, at 21.

215 *Id.*

216 Hart, *supra* note 15, at 254.

chilling effect on the prospective juror.[217] Finally, a third suggestion is that, in order to avoid an outright ban on Internet research, before voir dire begins the prospective jurors should be instructed that the attorneys will soon be conducting Internet research about them and that they, the jurors, will be given a set time (a few minutes perhaps) to adjust any privacy settings on their social media accounts.[218]

While each of these proposals may offer a solution to one or more of the concerns discussed in this Comment, none of them address all of the concerns. The failure to address the cumulative problems of Internet research demonstrates that a "less restrictive" solution is unworkable. Consequently, even if one concern is remedied, inevitably another, equally important, concern remains unresolved.

Any "less restrictive" proposal that allows counsel to conduct their own independent research on a juror that counsel does not share with the court cannot avoid the very real possibility that a peremptory challenge will be used improperly.[219] Alerting the prospective jury panel that they will soon be searched, or, performing a "secret" search outside of the supervision of the court, both still lead to the reality that a peremptory strike could be used based on improper information found through the Internet.[220] The above proposals also fail to address the concern of whether the information is accurate, or the concern that one party may have greater resources that will inevitably put them at an advantage in the jury selection process. There is no way to gauge the accuracy of information gathered if it is not being shared with the court and then corroborated by juror testimony.[221]

Yet, even the "less restrictive" proposal that attempts to remedy the peremptory challenge concerns by requiring counsel to share information gathered on the Internet with the court and opposing counsel still does not resolve the other concerns such as juror privacy and the added time constraint it would put on the court. [222] This type of proposal would require

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217 United States v. Watts, 934 F. Supp. 2d 451, 494–95 (E.D.N.Y. 2013).

218 Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1103–04 (N.D. Cal. 2016).

219 *See supra* Section IV.

220 *See supra* Section IV.

221 *See supra* Section V.B.

222 *See supra* Section V.B.

that a judge, in addition to facilitating traditional jury selection and voir dire, would then be required to wade through hundreds of pages of information pulled from the Internet by each party on each juror.[223]

Finally, none of these "less restrictive" proposals remedy the concern that allowing counsel to conduct Internet research while strictly admonishing the prospective jurors from doing the same would likely be perceived by the prospective jurors as hypocritical, thereby undermining the integrity of the judicial system.[224] Moreover, there remains the risk that a juror might interpret this disparate treatment as a license to do the same and research information about the case. Despite these various proposals aimed at addressing the challenges posed by Internet research in preparation for and during voir dire, none have proven sufficient in mitigating all the associated concerns.

B. Yes. It Is Really Quite Simple

All the concerns surrounding allowing Internet research of prospective jurors point to the bright line solution that a complete ban on Internet research in preparation for and during the voir dire process should be imposed. The language this Comment suggests that both the federal and state trial courts adopt is simple:

> *No attorney, or their agent, shall conduct any Internet research about a prospective juror in preparation for or during the voir dire process.*[225]

VII. CONCLUSION

Trial courts and trial counsel need clear guidance on this issue of Internet research about prospective jurors. Unfortunately, no clear guidance seems to be on the horizon. As it stands, many federal and state trial judges have implemented their own rules on Internet research of prospective jurors, and

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[223] *See supra* Section V.D.

[224] *See supra* Section V.A.

[225] The question of whether counsel should be able to perform Internet research about a juror after the juror has been impaneled is beyond the scope of this Comment. However, the Author acknowledges that some of the issues raised in this Comment would not be implicated if research about a juror was performed after the juror has been impaneled.

those rules are inconsistent.[226] The arguments for allowing Internet research do not adequately address the potential for the improper use of a peremptory challenge with the information discovered, the lack of any record for appellate review, the problem with the accuracy of the information, the loss of efficiency in the voir dire process, the concerns over juror privacy, the perceived inconsistencies in the treatment of counsel and the jurors, the potentially inequitable access to justice, and the impact of artificial intelligence that can only be implemented based upon information obtained through the Internet. When all of these considerations are weighed, the method that best ensures judicial integrity and promotes juror participation is the old-school, traditional approach to voir dire, which will only be preserved by a rule that outright prohibits the use of Internet research in preparation for and during voir dire.

Traditional voir dire has stood the test of time for over 250 years.[227] What faces trial courts today is not an extension of voir dire but arguably an entirely new, parallel process of selecting jurors. The only way to maintain traditional voir dire under the complete supervision of the court is to eliminate Internet research in preparation for and during voir dire entirely. In the wise and concluding remarks of one judge who decided that Internet research would not be allowed in his courtroom: "[J]ust because technology exists to do something does not mean that it is always wise to utilize it."[228]

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[226] *See, e.g.*, DUNN, *supra* note 7, at 13; Oracle Am., Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1103–04 (N.D. Cal. 2016); United States v. Kilpatrick, 2012 U.S. Dist. LEXIS 110165, at *9 (E.D. Mich. 2012); Letter to Counsel, *supra* note 4, at 4.

[227] *See* Holmquist, *supra* note 29.

[228] Letter to Counsel, *supra* note 4, at 6.