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## Preventing Juror Misconduct in a Digital World

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## PREVENTING JUROR MISCONDUCT IN A DIGITAL WORLD

THADDEUS HOFFMEISTER\*

*Woooow I wasn't expecting to be in a jury deciding a paedophile's fate. I've always wanted to F@ck up a paedophile & now I'm within the law.*<sup>1</sup> —Facebook post by a British juror

*I just didn't feel like I really knew him. I didn't know him personally. I've never, never talked to him. And I just felt like, you know, when [the trial judge] asked if you knew him personally or if he ever came to your house or have you been to his house, we never did. . . . I knew in my heart that I didn't know him. . . . [M]aybe I should have at least said that, you know, that he was on MySpace, which really isn't that important, I didn't think.*<sup>2</sup> —American juror in a post-trial hearing

*everyone's guilty*<sup>3</sup> —Facebook post by an Australian juror

*Tell your solicitor that because you spoke to the jury as a result of access to Facebook despite a warning the judge gave you, the judge is taking a serious view of this and has to take a view on whether or not you are in contempt of court.*<sup>4</sup> —Irish judge speaking with a juror

### INTRODUCTION

Currently, many countries with layperson juries are struggling to prevent internet-related juror misconduct, which generally arises when jurors use technology to improperly research or discuss a case. This article focuses on the efforts made by Australia, England and Wales, New Zealand, and the United States to reduce internet-related

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1. *Jurors Jailed for Contempt of Court over Internet Use*, BBC NEWS (July 29, 2013), <http://www.bbc.com/news/uk-23495785>.

2. *State v. Dellinger*, 696 S.E.2d 38, 40 (W. Va. 2010).

3. Lorana Bartels, *Jurors and Social Media: Is there a Solution?*, CONVERSATION (July 30, 2013), <http://theconversation.com/jurors-and-social-media-is-there-a-solution-15921>.

4. *Juror Faces Contempt after Seeing Details on Facebook*, IRISH EXAMINER, Feb. 8, 2013, <http://www.irishexaminer.com/ireland/juror-faces-contempt-after-seeing-details-on-facebook-222026.html>.

juror misconduct. Specifically, this article examines three areas of reform: (1) punishment, (2) oversight, and (3) education.

## I. PUNISHMENT

### A. Codified Criminal Penalties

As of late, there has been an increased interest by various countries around the world in codifying criminal laws that specifically target internet-related juror misconduct.<sup>5</sup> One of the first countries to pass such laws was Australia.<sup>6</sup> Today, three Australian states—Queensland, New South Wales, and Victoria—have criminalized juror misconduct.<sup>7</sup> The law in New South Wales prohibits jurors from making an inquiry about their case, including:

- a) Asking a question of any person;
- b) Conducting any research, for example, by searching an electronic database for information (such as by using the Internet);
- c) Viewing or inspecting any place or object;
- d) Conducting an experiment;
- e) Causing someone else to make an inquiry.<sup>8</sup>

However, it does not appear that these laws are widely used in New South Wales. In fact, according to a recent report, there have been hardly any prosecutions to date.<sup>9</sup>

Britain<sup>10</sup> is also in the process of strengthening its criminal laws in this area.<sup>11</sup> Specifically, a proposal is before the Parliament to make

5. See, e.g., LAW COMM'N, CONTEMPT OF COURT, APPENDIX C: CONTEMPT IN OVERSEAS JURISDICTIONS (2012) (U.K.), available at

[http://lawcommission.justice.gov.uk/docs/cp209\\_contempt\\_of\\_court\\_appendix-c.pdf](http://lawcommission.justice.gov.uk/docs/cp209_contempt_of_court_appendix-c.pdf); Ian Cram, *Penalising the Googling Juror?—Reflections on the Futility of Part 3 of the Criminal Justice and Courts Bill (2013-14)*, U.K. CONST. L. ASS'N (Oct. 2, 2014),

<http://ukconstitutionallaw.org/2014/10/02/ian-cram-penalising-the-googling-juror-reflections-on-the-futility-of-part-3-of-the-criminal-justice-and-courts-bill-2013-14/>.

6. *Jury Act 1977* (NSW) s 68C(1) (Austl.) (A juror for the trial of any criminal proceedings must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror). *Id.* s 68(c)(5)(b) (“making an inquiry includes . . . conducting any research, for example, by searching an electronic database for information (such as by using the Internet)”).

7. See *id.* s 68C (Austl.) (prohibiting inquiries by jurors about trial matters); *Jury Act 1995* (Qld) s 69A; *Juries Act 2000* (Vic) s 78A (Austl.).

8. *Jury Act 1977* (NSW) s 68C(5)(a)-(e).

9. JANE JOHNSTON, ET AL., JURIES AND SOCIAL MEDIA: A REPORT PREPARED FOR THE VICTORIAN DEPARTMENT OF JUSTICE 18 (2013), available at

[http://www.nsccl.org/~/medi/Files/PDF/Information%20and%20Resources/juries%20and%20social%20media\\_Australia\\_A%20Wallace.ashx](http://www.nsccl.org/~/medi/Files/PDF/Information%20and%20Resources/juries%20and%20social%20media_Australia_A%20Wallace.ashx); Roxanne Burd & Jacqueline Horan, *Protecting the Right to a Fair Trial in the 21st Century—Has Trial by Jury Been Caught in the World Wide Web?*, 36 CRIM. L. J. 103, 117 (2012), available at <http://netk.net.au/jury/jury3.pdf>.

juror misconduct a criminal offense subject to a two-year prison sentence.<sup>12</sup> The Criminal Justice and Courts Bill 2013–14 proposes four new laws, which target the following acts of juror misconduct: (1) researching the case, (2) sharing details of a case, (3) disclosing details of juror deliberations, and (4) “engaging in other prohibited conduct” such as using evidence not put before the court to decide a case.<sup>13</sup>

In the United States, California was one of the first states to pass a law targeting internet-related juror misconduct.<sup>14</sup> Three years ago, California strengthened its civil and criminal contempt penalties to specifically address juror misconduct.<sup>15</sup> The new law allows “punishment of jurors who electronically discuss confidential legal proceedings.”<sup>16</sup> Those favoring passage of the California law claimed, “It’s really just the law catching up with technology when it comes to the sanctity of the jury room.”<sup>17</sup>

It is difficult to assess whether these new laws created by California, Australia and Britain, are effective at reducing internet-related juror misconduct. This is because quantifying juror misconduct is no easy task. Jurors, not surprisingly, are reluctant to report that they have violated the courts rules.<sup>18</sup> Furthermore, jurors deliberate in secret and have limited interaction with non-jurors; consequently, any misconduct may not be readily apparent.<sup>19</sup> Finally, there are few com-

10. For the purposes of this article, “Britain” includes only England and Wales.

11. See Cram, *supra* note 5.

12. Heather Saul, *Jurors Face Two-Year Jail Sentence for Researching Cases on the Internet*, INDEPENDENT (Feb. 5, 2014), <http://www.independent.co.uk/news/uk/crime/jurors-face-two-year-jail-sentence-for-researching-cases-on-the-internet-9109909.html>.

13. See generally HOUSE OF COMMONS, CRIMINAL JUSTICE AND COURTS BILL, BILL NO. 169, 2013–14, H.C. 14/8 (U.K.), available at <http://www.parliament.uk/briefing-papers/rp14-8.pdf>. It should be noted that these offenses are already unlawful under the Contempt of Court Act of 1981.

14. CAL. PENAL CODE § 166(a)(6) (West Supp. 2014) (amended 2015); *New California Law Takes Aim at Jurors’ Uses of Internet*, CRIME SUITES (Oct. 31, 2011), <http://crimeinthesuites.com/new-california-law-takes-aim-at-jurors-uses-of-internet/>.

15. Cal. Assemb. B. 141, 2011 Leg., Reg. Sess. (Cal. 2011) (“Jurors: electronic communications”).

16. Cheryl Miller, *Bill Targets Web-Surfing Jurors*, RECORDER (Feb. 22, 2010), <http://www.therecorder.com/id=1202443956562/Bill-Targets-WebSurfing-Jurors>.

17. *Id.* (internal quotation marks omitted).

18. Daniel P. Westman & Jeremy Ben Merkelson, *You’re Out of Order: Jurors, Social Media and Legal Ethics*, SOCIALLY AWARE (Oct. 1, 2011), <http://www.sociallyawareblog.com/2011/10/01/you%E2%80%99re-out-of-order-jurors-social-media-and-legal-ethics/>.

19. Daniel William Bell, Note, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 86 n.38 (2010) (“Given the public’s widespread reliance on the Internet for information, we can reasonably surmise that undetected Internet usage by jurors is quite common.”).

prehensive surveys or studies examining the frequency of juror misconduct.<sup>20</sup>

One advantage of codified criminal penalties is that they provide greater clarity and consistency as to what constitutes juror misconduct. Codified laws can set maximum periods of incarceration and create specific fine amounts. For example, in 2008, the Australian state of Victoria increased its monetary fine for juror misconduct to \$13,000.<sup>21</sup>

The importance of clarity and consistency in laws regulating juror misconduct is noted in the 2013 Law Commission Report (LCR),<sup>22</sup> which was commissioned by the British Parliament. The LCR's purpose was to bring together experts in the field to examine how to improve the jury system in England and Wales.<sup>23</sup> The LCR, in one of its recommendations to Parliament, suggested passage of new laws targeting juror misconduct in order to provide jurors with "clear restrictions on [their] conduct."<sup>24</sup> The LCR also found that new laws would help "avoid the potential uncertainty which could arise under the present system where judges' instructions to a jury may take different forms and which run the risk of being misconstrued . . ."<sup>25</sup>

Nonetheless, new criminal laws targeting juror misconduct raise concerns. First, some wonder whether they are even necessary. For instance, in New South Wales, one of the first jurisdictions to create criminal offenses for internet-related juror misconduct, there have

20. See, e.g., Robert P. MacKenzie III & C. Clayton Bromberg Jr., *Jury Misconduct What Happens Behind Closed Doors*, 62 ALA. L. REV. 623, 624–25 (2011) (addressing the types of situations when juror misconduct occurs, but fails to examine the frequency of juror misconduct); LAW COMM'N, *supra* note 5, at 1 (discussing the laws present in Australia, Canada, New Zealand and Ireland to address juror misconduct, but fails to examine the frequency of the problem). However, one notable exception is the study by the Federal Judiciary in 2014, which surveyed "district court judges to assess the frequency with which jurors used social media to communicate during trials and deliberations . . ." MEGHAN DUNN, FED. JUDICIAL 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 (2014), available at [http://www.fjc.gov/public/pdf.nsf/lookup/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf/\\$file/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf/$file/jurors-attorneys-social-media-trial-dunn-fjc-2014.pdf).

21. Milanda Rout, *Jury Room Saboteurs*, AUSTRALIAN (Sept. 25, 2008, 12:00 AM), <http://www.theaustralian.com.au/business/legal-affairs/jury-room-saboteurs/story-e6fgr97x-1111117575135?nk=163881b7b672aaa199c8cfe9ffea63a>.

22. LAW COMM'N, CONTEMPT OF COURT (1): JUROR MISCONDUCT AND INTERNET PUBLICATIONS 65 (2013) (U.K.), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/274266/0860.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274266/0860.pdf) [hereinafter CONTEMPT OF COURT].

23. See *id.* at 2–3.

24. *Id.* at 71–72.

25. *Id.* at 74.

been few prosecutions.<sup>26</sup> This could mean that the laws are extremely effective at crime prevention or perhaps just a “dead letter.” Other concerns with codification center on whether these laws create a chilling effect, in which jurors are increasingly hesitant to report their fellow juror’s transgressions for fear that those jurors may be criminally prosecuted.<sup>27</sup>

Finally, there is a question as to whether new criminal penalties will hinder the courts’ efforts at discovering the root cause of suspected juror misconduct.<sup>28</sup> For example, a juror might choose to remain silent, rather than cooperate with the court’s investigation and potentially make incriminating statements. This has led the California Judicial Council (CJC) to call for the repeal of California’s criminal law targeting jurors who electronically discuss confidential legal proceedings.<sup>29</sup> The CJC believes that a better approach is to punish jurors with civil contempt, if necessary.<sup>30</sup>

### B. Contempt

To date, contempt of court is the most common method of punishing jurors who have run afoul of the court’s rules.<sup>31</sup> Jurors around the world have been held in contempt for a variety of transgressions, ranging from researching legal terms<sup>32</sup> to “friending” the defendant.<sup>33</sup> Punishments imposed through contempt proceedings vary broadly by jurisdiction.

26. JILL HUNTER, JURORS’ NOTIONS OF JUSTICE: AN EMPIRICAL STUDY OF MOTIVATIONS TO INVESTIGATE & OBEDIENCE TO JUDICIAL DIRECTIONS (2014) (Austl.) (University of New South Wales Jury Study).

27. See Amanda McGee, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 317 (2010) (“By expressly drawing the line as to what constitutes misconduct in the eyes of the law, jurors will be less likely to engage in that type of behavior.”); but see Michael K. Kiernan & Samuel E. Cooley, *Juror Misconduct in the Age of Social Networking*, 62 FDCC Q. 179, 187 (2012).

28. POL’Y COORDINATION AND LIAISON COMM. & CRIM. LAW ADVISORY COMM., JUDICIAL COUNCIL–SPONSORED LEGISLATION: MISDEMEANOR JUROR CONTEMPT 2–3 (2013), available at <http://www.courts.ca.gov/documents/jc-20131213-itemE.pdf> [hereinafter MISDEMEANOR JUROR CONTEMPT].

29. Thaddeus Hoffmeister, *CA Backtracking on Jurors who Google*, JURIES (Dec. 16, 2013), <http://juries.typepad.com/juries/2013/12/ca-backtracking-on-jurors-who-google.html>; see also MISDEMEANOR JUROR CONTEMPT, *supra* note 28, at 1–2.

30. MISDEMEANOR JUROR CONTEMPT, *supra* note 28, at 2.

31. See *infra* notes 32–33.

32. Lydia O’Hagan, *Jurors on Trial: Lawyers Using the Internet to Research Prospective Jurors*, 45 VICTORIA U. WELLINGTON L. REV. 161, 162 (2014) (citing AG v. Dallas, [2012] EWHC (Admin) 156 (Eng.)); see also Mark Pearson, *When Jurors Go ‘Rogue’ on the Internet and Social Media . . .*, JOURNALAW (May 30, 2013), <http://journalaw.com/2013/05/30/when-jurors-go-rogue-on-the-internet-and-social-media/>.

33. AG v. Frail, [2011] EWHC (Admin) 1629 [13], [35] (Eng.).

Compared to codified criminal penalties, the rules governing when a judge may hold a juror in contempt are not as clear or consistent. According to the LCR, the phrase “contempt of court” is not self-explanatory to the layperson; moreover, none of the applicable penalties are clearly spelled out.<sup>34</sup>

In one case from the United States, a juror used the Internet to discover that the defendant who was on trial for sexual assault had a prior conviction for molesting a child.<sup>35</sup> The juror then revealed this information to other jurors, which resulted in the trial judge declaring a mistrial.<sup>36</sup> The judge held the juror in contempt of court and fined him \$1,200.<sup>37</sup> The \$1,200 fine represented the amount the court had paid the jurors for the two days they had deliberated in the trial prior to the declaration of a mistrial.<sup>38</sup> In other instances of misconduct in the United States, jurors have been publicly embarrassed and forced to write essays on the importance of jury duty.<sup>39</sup>

British courts have imposed severe contempt punishments for juror misconduct, and appear to take a much tougher stance on this issue.<sup>40</sup> In *Attorney General v. Dallas*, the court sentenced a juror to six months imprisonment for using the Internet to define a term that the judge used (“grievous”) and to personally investigate the defendant.<sup>41</sup> The juror conducted this research despite repeated warnings by the court not to do so.<sup>42</sup>

In another British case, *Attorney General v. Fraill*, a juror named Joanne Fraill was given an eight-month sentence for communicating with one of the acquitted defendants, Jamie Sewart, via Facebook and for using the Internet to research another defendant despite instructions from the court not to do so.<sup>43</sup> Fraill’s actions were discovered

34. CONTEMPT OF COURT, *supra* note 22, at 66.

35. AnnMarie Timmins, *Juror Behind Mistrial Pleads, Pays \$1,200*, CONCORD MONITOR (Oct. 10, 2009), <http://www.concordmonitor.com/article/juror-behind-mistrial-pleads-pays-1200>.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Update: Detroit-Area Juror Fined, Ordered to Write Essay for Talking ‘Guilty’ Defendant on Facebook*, MLIVE (Sept. 2, 2010), [http://www.mlive.com/news/detroit/index.ssf/2010/09/warren\\_woman\\_bounced\\_from\\_jury.html](http://www.mlive.com/news/detroit/index.ssf/2010/09/warren_woman_bounced_from_jury.html).

40. O’Hagan, *supra* note 32, at 162.

41. *AG v. Dallas*, [2012] EWHC (Admin) 156 [17]–[18], [47] (Eng.).

42. *Id.* at [12]–[15].

43. *AG v. Fraill*, [2011] EWHC 1629 (Admin) 1629 [6], [12]–[13], [57] (Eng.).

because Sewart informed her solicitor about her contact with Fraill.<sup>44</sup> The solicitor then informed Sewart's counsel who told the trial judge.<sup>45</sup> The Facebook interaction, which was initiated by Fraill, included the following:

**Sewart:** "what's happenin with the other charge??" [Sewart is asking about the other criminal charges against her boyfriend who was a co-defendant. At this point, Sewart had been acquitted but her boyfriend was still facing charges.]

**Fraill:** "which," then "yours?"

**Sewart:** wrote "no the class b."

**Fraill:** "cant get anywaone to go either no one budging pleeeeeese don't say anything cause jamie they could call mmisstrial and I will get 4cked to0."

**Sewart:** "I know I have deleted all the messages"

**Fraill:** "awe fuck nos hw a didn't get caught wiv my nods and blinks hand signals . . ."

**Fraill:** "don't worry about that chge no way it can stay hung for me lol . . ."

**Fraill:** "at least then yer all home n dry"

**Fraill:** "when we gsve that first on gail I was crying cause they held on to yours because I couldn't make her mind up"

**Fraill:** "ah will nearly fucking there . . . get all your property back too . . ."

**Sewart:** "I will be doin ha ha and trying for compo"

**Sewart:** "keep in touch Ill get you a nice pressie if I get anything out of um. . ." <sup>46</sup>

While this case represents an extreme example<sup>47</sup>—it nonetheless highlights that certain countries, like Britain, take a very draconian approach to those jurors who run afoul of the court's rules in this area.

44. *Id.* at [17].

45. *Id.*

46. *Id.* at [16].

47. See also Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010), <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>.



### C. Limiting Access<sup>48</sup>

In addition to contempt proceedings and criminal statutes, the court may also penalize jurors by depriving them of the tools they need to engage in internet-related misconduct. At present, a number of jurisdictions across the United States restrict juror access to cell phones and the Internet.<sup>49</sup> Limiting juror access to electronic communication devices can take a variety of different forms. For instance, a few American courts do not allow jurors to enter the courthouse with any electronic communication devices.<sup>50</sup> Other American courts impose restrictions only during deliberations.<sup>51</sup>

Similarly, courts in Australia take various approaches to restricting juror access to electronic communication devices. For example, in New South Wales, court officials confiscate the phones of jurors while they are in court.<sup>52</sup> In Victoria, phones are not confiscated from jurors; however, jurors cannot use them in the courtroom or during deliberations.<sup>53</sup> In Western Australia, jurors lose access to phones during deliberations.<sup>54</sup>

The LCR took a middle ground approach and made the following recommendations regarding juror access to electronic communication devices:

1. there should not be an automatic prohibition on jurors having or using internet-enabled devices in the court building;
2. judges be provided with a statutory power to remove internet-enabled devices from jurors;
3. the power should be automatically applied every time a jury is deliberating in the jury room; and

48. "Banning all cell phones, I-Pads [sic], and laptops for everyone called in for jury duty is unlikely to work and will be viewed as a Luddite solution with little support in the jury pool." The Honorable Dennis M. Sweeney, Retired Circuit Court Judge, *The Internet, Social Media and Jury Trials: Lessons Learned from the Dixon Trial*, Address to the Litigation Section of the Maryland State Bar Association 3-4 (Apr. 29, 2010) (transcript available at <http://juries.typepad.com/files/judge-sweeney.doc>).

49. See generally Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 REYNOLDS COURTS & MEDIA L.J. 307 (2011).

50. *Id.* at 307, 353-55.

51. MEGHAN DUNN, FED. JUDICIAL CTR., *JURORS USE OF SOCIAL MEDIA DURING TRIALS AND DELIBERATIONS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT* 8 (Nov. 22, 2011).

52. A GUIDE FOR JURORS: WELCOME TO JURY SERVICE, SHERIFF OF NSW 13 (2007).

53. VICTORIA LAW FOUND., *JUROR'S HANDBOOK* 9 (2012), available at [https://www.courts.vic.gov.au/assets/publications/jurors\\_handbook.pdf](https://www.courts.vic.gov.au/assets/publications/jurors_handbook.pdf).

54. *Jurors Frequently Asked Questions*, GOV'T W. AUSTL. DEP'T ATTORNEY GEN., [http://www.courts.dotag.wa.gov.au/1/jurors\\_frequently\\_asked\\_questions.aspx](http://www.courts.dotag.wa.gov.au/1/jurors_frequently_asked_questions.aspx) (last updated Jan. 17, 2013).

4. judges should also have discretion to remove internet-enabled devices from jurors at other times, where necessary in the interests of justice and proportionate.<sup>55</sup>

In discussing why it was so important to take away phones during deliberations, the LCR offered the following explanation:

[Deliberation] is also the time when gaps in the evidence are likely to become apparent, as the judge will have told the jury in summing up that they will hear no more evidence. It is also likely that at this time jurors will feel the most pressure to reach the “right” verdict.<sup>56</sup>

#### D. Sequestration

Of the possible punishments available, sequestration best ensures juror compliance with court rules.<sup>57</sup> This is because sequestration provides the court with direct control of the jurors’ environment. While popular in the past and still relied upon in some jurisdictions for high-profile and capital trials, sequestration is not widely used today in the United States.<sup>58</sup> Nonetheless, some believe that sequestration, because of its deterrent effect, should be mentioned to all jurors upon initial empanelment.<sup>59</sup>

In Australia, at least one judge has suggested sequestering jurors as a way of preventing them from improperly using the Internet during trial.<sup>60</sup> At present, some Australian states permit juror sequestration, such as New South Wales, South Australia, and Victoria.<sup>61</sup> However,

55. CONTEMPT OF COURT, *supra* note 22, at 128.

56. *Id.* at 119.

57. Marilyn Krawitz, *Guilty as Tweeted: Jurors Using Social Media Inappropriately during the Trial Process* (Univ. of W. Austl.-Faculty of Law Research Paper No. 2012-02), available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID2176634\\_code170891.pdf?abstractid=2176634&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2176634_code170891.pdf?abstractid=2176634&mirid=1).

58. Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2713 (1996) (“Eventually, the sluggish pace of trials prompted courts to abandon their first line of defense against jury misconduct: sequestration.”); see also Marcy Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 71–72 (1996).

59. Timothy J. Fallon, Note, *Mistrial in 140 Characters or Less? How the Internet and Social Networking Are Undermining the American Jury System and What Can Be Done to Fix It*, 38 HOFSTRA L. REV. 935, 966 (2010); see also Ralph Artigliere et al., *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, 84 FLA. BUS. J. 8 (2010), <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/8c9f13012b96736985256aa900624829/d9a2f95a71f304778525769b006dd8d5!OpenDocument>.

60. *R v Bell* [1998] NSWSC 570 (Austl.).

61. See Jane Goodman-Delahunty et al., *Practices, Policies and Procedures That Influence Juror Satisfaction in Australia*, 87 AUSTL. INST. CRIMINOLOGY 3 (2007), available at <http://www.aic.gov.au/documents/0/F/3/%7b0F34D51E-AAD2-4A06-9149-257DA8DF4E18%7drpp87-app.pdf>.

sequestration is a rare occurrence and generally reserved for cases that receive an inordinate amount of attention in the media.<sup>62</sup>

One twist to the traditional idea of sequestration is “virtual sequestration.”<sup>63</sup> Here, jurors remain in their own home but consent to having their access to the Internet and certain electronic devices either monitored or blocked. While arguably less burdensome and probably less expensive than regular sequestration, virtual sequestration may be viewed by some as snooping and overly intrusive.<sup>64</sup> However, as discussed below, some attorneys currently conduct an informal version of virtual sequestration by investigating and monitoring the online activities of jurors.

## II. OVERSIGHT

In addition to punishing jurors, some jurisdictions rely on greater oversight as a tool for curbing internet-related juror misconduct. This oversight is conducted by everyone in the courtroom, starting with the judge and bailiff who regularly observe the behavior of the jurors while the jurors are in their presence. Attorneys also exercise oversight by investigating and monitoring jurors.<sup>65</sup> Finally, the jurors themselves even play a role by regulating and observing the behavior of each other. These last two examples—juror investigations and self-policing—will be discussed in greater detail next.

62. Jodie O’Leary, *Who’s Who in the Legal Zoo: The Jury*, 17 NAT’L LEGAL EAGLE 21, 22 (2011) <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1172&context=nle>.

63. This idea was raised at a conference attended by the author. See Professor Eric Chaffee, Address at the Legal Scholarship Conference at the University of Toledo College of Law (June 2010). This author is unaware of any jurisdiction that has implemented virtual sequestration. However, at least one enterprising district attorney in Texas is considering offering jurors free access to the court’s wireless network in exchange for temporarily “friending” his office, which, depending on privacy settings, would allow the district attorney to monitor the juror’s Facebook account. See Ana Campoy & Ashby Jones, *Searching for Details Online, Lawyers Facebook the Jury*, WALL ST. J., Feb. 22, 2011, <http://www.wsj.com/articles/SB10001424052748703561604576150841297191886>; see also Jack Zemlicka, *Judges in Wisconsin Set Electronic Media Limits for Juries*, WIS. L. J. (2010) (citing a circuit judge who suggested that judges “could ask jurors engaged in social networking that, if empanelled, would they consent to being ‘friended’ by the court.”).

64. See, e.g., Julie Kay, *Social Networking Sites Help Vet Jurors*, N.J. L. J. (Aug. 13, 2008), available at <http://www.njlawjournal.com/id=1202423725315/Social-Networking-Sites-Help-Vet-Jurors?slreturn=20150407135003>.

65. See Thaddeus Hoffmeister, *U.S. v. Daugerdas: A Cautionary Tale About Investigating Jurors*, CHAMPION, Dec. 2012, at 61. Additionally, in certain high profile cases, the media will also investigate jurors. See *Media Influence in Capital Cases*, CAPITAL PUNISHMENT CONTEXT, <http://www.capitalpunishmentincontext.org/issues/media> (last visited May 7, 2015).

### A. Investigating Jurors

Jury investigations, carried out primarily in the United States, involve either attorneys or their staff researching jurors via the Internet.<sup>66</sup> Attorneys<sup>67</sup> investigate jurors by searching the juror's digital trail<sup>68</sup> or Internet footprint.<sup>69</sup> The practice, which occurs before, during, and after trials, can take various forms.<sup>70</sup> The most basic level is a name search on an Internet search engine. However, many attorneys employ far more sophisticated procedures, such as extracting information from social networking sites and databases<sup>71</sup> and monitoring online activities.<sup>72</sup>

As of late, online investigations of jurors have gained increased acceptance among American practitioners.<sup>73</sup> Indeed, courts and state bar associations in the United States have both approved<sup>74</sup> and encouraged the practice.<sup>75</sup> Proponents argue that the online investigation

66. See Jonathan M. Redgrave & Jason J. Stover, *The Information Age, Part II: Juror Investigation on the Internet—Implications for the Trial Lawyer*, 2 SEDONA CONF. J. 211, 211–12 (2001) (stating that some attorneys conduct offline investigations, but the primary method today is via the Internet).

67. For a discussion of judges investigating jurors, see John DiMotto, *Judges and the Internet—Juror Information*, BENCH & BAR EXPERIENCES (Apr. 28, 2010), <http://johndimotto.blogspot.com/2010/04/judges-and-internet-juror-information.html> (blog of a Milwaukee County Circuit Court Judge).

68. The Digital Age has also impacted attorneys who investigate jurors online. See generally, Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. REV. DISCOURSE 28 (2011); cf. Tresa Baldas, *Open Web, Insert Foot: Ethical Stumbles Online Leave Digital Trail for Bar Counsel*, 32 NAT'L L.J. 1, 1 (2010) (discussing lawyers "talking trash about clients—online, leaving a digital trail for bar counsel to follow").

69. Jeffrey T. Frederick, *Seasoned Jury Expert Shares Secrets of Voir Dire and Jury Selection*, YOURABA, Mar. 2011, available at <http://www.americanbar.org/content/dam/aba/publications/YourABA/201103youraba.authcheckdam.pdf> (suggesting that attorneys can minimize Internet threats by "establishing the jurors' footprint" on the Internet by ascertaining through *voir dire* and juror questionnaires the jurors' presence and use of Internet resources"); see also Kay, *supra* note 64.

70. See Zemlicka, *supra* note 63 ("Since the explosion of social networking, [a Wisconsin attorney] regularly researches jurors and monitors their online activity during lengthy trials. 'It's not unusual for someone in my office to run the name of a juror, if we get them ahead of time, through Google, Twitter or Facebook,' he said.").

71. *Id.*

72. *Id.*; see also Kay, *supra* note 64.

73. Duncan Stark, Note, *Juror Investigations: Is In-Courtroom Internet Research Going Too Far?* 7 WASH. J. L. TECH. & ARTS 93, 97 (2011).

74. See, e.g., NYCLA Comm. On Prof'l Ethics, Formal Op. 743 (2011) [hereinafter N.Y. Ethics Opinion] ("It is proper and ethical . . . for a lawyer to undertake a pretrial search of a prospective juror's social networking site . . .").

75. See, e.g., Johnson v. McCullough, 306 S.W.3d 551, 558–59 (Mo. 2010) (encouraging attorneys to prevent retrials by investigating jurors' litigation history prior to empanelling the jury).

of jurors has uncovered numerous instances of juror misconduct.<sup>76</sup> Furthermore, they claim that once jurors realize that many of their voir dire answers can be verified, they either will be more truthful or will request dismissal from the case.<sup>77</sup> Finally, jurors who know that their online activities will be investigated are more likely to follow court instructions throughout the trial.<sup>78</sup>

At present, it appears that investigations of jurors are primarily an American phenomenon.<sup>79</sup> According to one Australian law professor, juror investigations “would be impossible in Australia because of the lack of information about jurors that is provided by the courts.”<sup>80</sup> Also, few countries have a voir dire process as extensive as the United States.<sup>81</sup> Another factor to consider is that online references may not be as readily available in countries where individuals have a right to be forgotten.<sup>82</sup>

### B. Self-Policing

Self-policing involves jurors regulating the behavior of one another. One of the challenges with self-policing is that jurors may not want to break rank and report on a fellow juror. This explains why jurors who do report the misbehavior of a fellow juror usually do so after the trial.<sup>83</sup> This reluctance to report is magnified if a juror believes that the other juror will face criminal sanctions.<sup>84</sup> For self-policing to work, jurors have to place the institution of the jury above their fellow jurors.

76. For a blog collecting stories of such misconduct, see, for example, JURIES, <http://juries.typepad.com/juries/jury-misconduct/> (last visited May 7, 2015).

77. Molly McDonough, *Rogue Jurors*, 92 A.B.A. J. 39, 43 (2006) (“Because judges are emphasizing [criminal background] checks [for jurors] . . . more jurors drop out before the jury is formally seated and thus ‘fewer and fewer people are coming up with a criminal record in contradiction of their jury questionnaire.’” (quoting a district attorney)).

78. David P. Goldstein, Note, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589, 603 (2011) (“With the knowledge that they are under the watchful eye of the court, jurors are less likely to discuss trials on their social networking sites.”).

79. See also O’Hagan, *supra* note 32, at 167 (finding little evidence of attorneys in New Zealand who have researched jurors).

80. Krawitz, *supra* note 57, at 39.

81. Marie D. Natoli, *Au Revoir, Voir Dire and Other Costly and Socioeconomically Unjust Judicial Practices*, 47 NEW ENG. L. REV. 605, 618 (2013).

82. Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Espanola de Proteccion de Datos, Mario Costeja Gonzalez*, 2014 E.C.R. 317. Generally speaking, the right to be forgotten “give[s] individuals the right to not have their data retained and expressly deleted when the data is no longer needed for a legitimate purpose.” Jasmine E. McNealy, *The Emerging Conflict between Newsworthiness and the Right to Be Forgotten*, 39 N. KY. L. REV. 119, 122 (2012).

83. *AG v. Dallas* [2012] EWHC (Admin) 156 (Eng.).

84. HUNTER, *supra* note 26.

Another challenge with self-policing is the physical set-up of the courtroom. Jurors are normally kept together in close confines. They are rarely, if ever, alone with the judge. Thus, some jurors are hesitant to come forward or alert the judge about potential problems for fear that others may take notice of their actions.<sup>85</sup>

Some legal commentators, especially those from Britain and Australia, have suggested putting systems or procedures in place to facilitate reporting by jurors, such as a telephone or email hotline.<sup>86</sup> Under a proposal suggested by an Australian law professor, “courts could establish a hotline for jurors to call to anonymously report other jurors . . . that used social media inappropriately during a trial or during deliberations.”<sup>87</sup> Due to the expense associated with a hotline, this professor also suggested the creation of “an email address specifically for jurors to email if they want to report other jurors using social media inappropriately.”<sup>88</sup>

These proposals could also work in the United States if the hotline or email went directly to the judge. Of course, the judge would then be obligated to share this information with the attorneys in the case because, procedurally, failure to do so could result in a mistrial or an overturned verdict later.<sup>89</sup> This email or hotline may also be helpful to jurors who have questions about the case when they are at home or away from the courtroom. Rather than guess or make a wrong decision, jurors can contact the judge for the right answer.

### III. EDUCATION

Absent sequestration, it is difficult to prevent a determined juror from violating the court’s rules, either in the United States or another country.<sup>90</sup> The Digital Age has made it easy to do so. Thus, if courts want jurors to follow instructions, they have to educate jurors about the importance of those instructions. This education can occur both inside and outside of the courtroom. When conducted outside of the courtroom, education generally involves teaching citizens about the

85. CONTEMPT OF COURT, *supra* note 22, at 121 (“jurors must be given the opportunity to give information without other jurors knowing, as jurors are reluctant to ‘break ranks . . .’”).

86. Krawitz, *supra* note 57, at 38.

87. *Id.*

88. *Id.*

89. *See also* Canela v. State, 997 A.2d 793, 800–01 (Md. Ct. Spec. App. 2010), *rev’d*, Perez v. State, 21 A.3d 1048 (Md. 2011).

90. Kiernan & Cooley, *supra* note 27, at 191–92.

history of the legal system with a particular emphasis on the role of the jury. Juror education inside the courtroom can take many different forms, ranging from jury oaths to jury instructions to juror questions.

### A. Out-of-Court

Educating citizens about the significant history and importance of the jury goes a long way in encouraging jurors to follow the court's instructions. Although each country's experience with the jury will be somewhat different, some universal truths can be taught in any jurisdiction.

This education can start as early as primary school. According to the LCR, there should be an emphasis on "teaching in schools about the role and importance of jury service."<sup>91</sup>

The goal is for individuals to see that serving on a jury is more than just determining liability or guilt. Rather, the jury represents grand democratic principles, and everyone who honorably serves upholds those principles.<sup>92</sup> According to Professor Andrew Ferguson, "This constitutional linkage will . . . shape how jurors act during jury service. . . . It instills a heightened sense of seriousness, purpose, and respect for the institution."<sup>93</sup>

With greater awareness of the jury, jurors will be less likely to violate the court's rules because they have increased appreciation and understanding of what the jury represents. Furthermore, greater respect and awareness of the jury will make jurors more inclined to elevate the institution over the interests of others. This in turn will reduce a juror's hesitation to come forward when they become aware of misconduct by another juror.

### B. In-Court

#### 1. Allowing Questions

In addition to the out-of-court education efforts, there are several steps that can be taken inside the courtroom to ensure that jurors are better informed. One such measure is allowing jurors to ask questions of witnesses, which works to reduce improper online juror communi-

91. CONTEMPT OF COURT, *supra* note 22, at 109.

92. Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 16 (2014).

93. *Id.* at 1153.

cations and research.<sup>94</sup> This is because jurors who have their questions answered are less likely to go looking elsewhere.<sup>95</sup> Prohibiting questions leads jurors to seek alternative avenues, such as the Internet, for information.<sup>96</sup>

In American courts that allow jurors to ask questions, the normal procedure is as follows: at the conclusion of a witness' testimony, the judge asks the jurors whether they have any questions.<sup>97</sup> If the jurors do have questions, they write them down and then hand them to the bailiff, who gives the questions to the judge.<sup>98</sup> Next, the judge and the attorneys review the questions.<sup>99</sup> The judge, after hearing any possible objections from the attorneys, then decides whether he or she will answer or pose the question to the witness.<sup>100</sup>

However, not all American judges and practitioners support the practice of juror questions. Some opponents doubt whether allowing questions would decrease or prevent juror misconduct.<sup>101</sup> A similar ambivalence appeared in the LCR, which offered the following recommendation:

[T]hat the Judicial College consider, in light of research findings, a form of direction to reflect what we consider to be the correct balance between being too explicit in seeking questions from jurors, which could lead to judges being inundated and time wasted with unanswerable or irrelevant questions, and deterring jurors from asking proper and pertinent questions.<sup>102</sup>

94. See Ellen Brickman et al., *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 296 (2008) ("If jurors are turning to the Internet because they are confused by important ideas or terminology in a trial, it is in everyone's best interest to forestall that by maximizing comprehension and minimizing confusion.").

95. CONTEMPT OF COURT, *supra* note 22, at 110 ("We proposed that jurors be given clearer instruction on how to ask questions during the proceedings and encouragement to do so. We considered that this might discourage them from undertaking research to try to find their own answers.").

96. *Id.*

97. A. Barry Cappello & G. James Strenio, *Juror Questioning: The Verdict is In*, 36 TRIAL 44, 44 (2000).

98. *Id.* at 48.

99. *Id.*

100. *Id.*

101. Eric Lyttle, *Should Jurors Directly Question Witnesses? It's Up to Judge*, COLUMBUS DISPATCH (Apr. 30, 2014, 5:51 AM)

<http://www.dispatch.com/content/stories/local/2014/04/30/questionable-jury.html>. See also, Kristen L. Sweat, Note, *Juror Questioning of Witnesses in Criminal Trials: The "Jury's Still Out" in Illinois*, 2014 U. ILL. L. REV. 271.

102. CONTEMPT OF COURT, *supra* note 22, at 128.



## 2. Instructions

Other methods of in-court education include jury instructions. To date, numerous jurisdictions around the world have updated, or are in the process of updating, their jury instructions to address the new methods by which jurors communicate and research.<sup>103</sup> For example, in New South Wales, the following instruction is provided to judges so that they may warn jurors about using the Internet:

It is a serious criminal offense for a member of the jury to make any enquiry for the purpose of obtaining information about the accused, or any other matter relevant to the trial. This prohibition continues from the time the juror is empanelled until the juror is discharged. It includes asking a question of any person; conducting any research using the internet.<sup>104</sup>

In Britain, jurors receive early instruction about not using the Internet.<sup>105</sup> In addition to a summons, British jurors receive a booklet entitled *Your Guide to Jury Service*.<sup>106</sup> Among other things, this guide tells prospective jurors not to “discuss the evidence with anyone outside your jury either face to face, over the telephone or over the internet via social networking sites such as Facebook, Twitter or Myspace.”<sup>107</sup> Upon arrival at the courthouse, jurors watch a video in which they are again instructed to refrain from using the Internet.<sup>108</sup> This video is supplemented by the following guidance provided by jury managers:

The judge will tell you that you DO NOT discuss the evidence with anyone outside of your jury either face to face, over the telephone or over the internet via social networking such as Facebook, Twitter, or Myspace. If you do this, you risk disclosing information, which is confidential to the jury. Each juror owes a duty of confidentiality to the other jurors, to the parties and to the court. Jurors can only dis-

103. Even the military is getting into the act. See Kent Harris, *Jury Instructions to Include Rules on Use of New Media*, STARS & STRIPES (June 21, 2009), <http://www.stripes.com/news/jury-instructions-to-include-rules-on-use-of-new-media-1.92649> (noting that, following cases of juror misconduct, a military judge “said he’s been working on specific language addressing networking phenomena such as Twitter and Facebook that judges would use when instructing troops who sit on court-martial panels.”). See also, Robinson, *supra* note 49, at 307.

104. Krawitz, *supra* note 57, at 20. This early intervention is essential because some jurors start researching cases upon first receipt of the jury summons. See *Russo v. Takata*, 774 N.W.2d 441, 454 (S.D. 2009).

105. LAW COMM’N, *supra* note 5, at 64.

106. *Id.*

107. *Id.* (quoting HM COURTS AND TRIBUNALS SERVICE, YOUR GUIDE TO JURY SERVICE 5 (2011)) (internal quotation marks omitted).

108. *Id.*

cuss the evidence when all 12 jurors are in the jury deliberating room at the conclusion of the evidence in the trial.<sup>109</sup>

While Britain may provide jurors the earliest information regarding use of the Internet, the United States appears to have the most in-depth instructions on the topic.<sup>110</sup> Examples of in-depth instructions include those used by defense counsel in *United States v. Barry Bonds* which were drafted by this author and read as follows:

**Introduction:** Serving on a jury is an important and serious responsibility. Part of that responsibility is to decide the facts of this case using only the evidence that the parties will present in this courtroom. As I will explain further in a moment, this means that I must ask you to do something that may seem strange to you: to not discuss this case or do any research on this case. I will also explain to you why this rule is necessary and what to do if you encounter any problems with it.

**Communications:** During this trial, do not contact anyone associated with this case. If a question arises, direct it to my attention or the attention of my staff. Also, do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. This includes, but is not limited to, discussing your experience as a juror on this case, the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony, exhibits, or any aspect of the case or your courtroom experience. “No discussion” extends to all forms of communication, whether in person, in writing, or through electronic devices or media such as: email, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, iPads, iPhones, iTouches, Google, Yahoo!, or any other Internet search engine or form of electronic communication for any purpose whatsoever, if it relates to this case.

I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don’t think that you are paying attention. I do it because, in my experience, this is the hardest instruction for jurors to follow. I know of no other situation in our culture where we ask strangers to sit together watching and listening to something, then go into a little room together and not talk about the one thing they have in common, that which they just watched together. There are at least three reasons for this rule.

The first is to help you keep an open mind. When you talk about things, you start to make decisions about them, and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you will not have heard that until the very end of the trial.

109. *Id.* at 65.

110. The instructions from *United States v. Bonds* illustrate this fact. See *United States v. Bonds*, No. CR 07-00732 SI, 2009 WL 416445, at \*1 (N.D. Cal. Feb. 19, 2009); see also, Robinson, *supra* note 49.

The second reason is that by having conversations in groups of two or three during the trial, you will not remember to repeat all of your thoughts and observations to the rest of your fellow jurors when you deliberate at the end of the trial. The third, and most important, reason is that by discussing the case outside of the jury room you increase the likelihood that you will either be influenced by an outside third party or that you will reveal information about the case to a third party. If any person tries to talk to you about this case, tell that person you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to myself or my staff.

**Research:** Do not perform any research or make any independent personal investigations into any facts, individuals, or locations connected with this case. Do not look up or consult any dictionaries or reference materials. Do not search the Internet, websites, or blogs. Do not use any of these or any other electronic tools or other sources to obtain information about any facts, individuals, or locations connected with this case. Do not communicate any private or special knowledge about any facts, individuals, or locations connected with this case to your fellow jurors. Do not read or listen to any news reports about this case. The law prohibits a juror from receiving evidence not properly admitted at trial. If you have a question or need additional information, contact me or my staff. I, along with the attorneys, will review every request. If the information requested is appropriate for you to receive, it will be released in court.

In our daily lives, we may be used to looking for information online and “Googling” things as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. However, the moment you try to gather information about this case or the participants is the moment you contaminate the process and violate your oath as a juror. Looking for outside information is unfair because the parties do not have the opportunity to refute, explain, or correct what you discovered or relayed. The trial process works through each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. You must resist the temptation to seek outside information for our system of justice to work as it should. Once the trial ends and you are dismissed as jurors, you may research and discuss the case as much as you wish. You may also contact anyone associated with this case. [Questions by the judge to the jury: Are there any of you who cannot or will not abide by these rules concerning communication or research with others in any way during this trial? Are there any of you who do not understand these instructions?]

**Ramifications:** If you communicate with anyone about the case or do outside research during the trial, it could lead to a mistrial, which is a tremendous expense and inconvenience to the parties, the court, and, ultimately, you as taxpayers. Furthermore, you could be held in contempt of court and subject to punishment such as paying the

costs associated with having a new trial. If you find that one of your fellow jurors has conducted improper communications or research or if you conduct improper communications or research, you have a duty to report it to myself or my staff so that we can protect the integrity of this trial.<sup>111</sup>

### 3. Oaths

In addition to improving instructions and allowing jurors to ask questions, some judges attempt to educate jurors by requiring them to sign an oath or affidavit acknowledging the prohibitions on Internet use.<sup>112</sup> This oath may be structured in a variety of different ways. For example, rather than have jurors sign a formal document promising to adhere to the rules, some courts issue the juror a specific warning in writing.<sup>113</sup> The juror then acknowledges notice of this warning.<sup>114</sup> In discussing this issue, the LCR seems to be in support of oaths and recommends “consideration be given to jurors having to sign a written declaration on their first day of jury service, after they have received a warning not to conduct their own research.”<sup>115</sup>

Oaths are not commonly used in the United States. The few courts that have employed them sometimes require jurors to take both a written and oral pledge.<sup>116</sup> For example, in the 2011 U.S. trial of notorious arms dealer Viktor Bout, who had a substantial Internet footprint, the judge required jurors to sign the following pledge under pains of perjury<sup>117</sup>:

I agree to follow all of the Court’s preliminary instructions, including the Court’s specific instructions relating to Internet use and communications with others about the case. I agree that during the duration of this trial, I will not conduct any research into any of the issues or parties involved in this trial. Specifically, I will not use the Internet to conduct any research into any of the issues or parties involved in this trial. I will not communicate with anyone about the issues or parties in this trial, and I will not permit anyone to communicate

111. See Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 465–68 (2012) (quoting the jury instructions used in *Bonds*, 2009 WL 416445, at \*1).

112. *United States v. Bout*, No. 08 Cr. 365(SAS), 2011 WL 2693720, at \*1 (S.D.N.Y. July 11, 2011).

113. CONTEMPT OF COURT, *supra* note 22, at 112.

114. *Id.*

115. CONTEMPT OF COURT, *supra* note 22, at 115.

116. JONATHAN LIPPMAN, NEW YORK STATE UNIFIED COURT SYSTEM TRIAL JUROR’S HANDBOOK 16 (Spring 2009) (requiring courts to administer oral juror pledges).

117. Jeffrey T. Frederick, *What Is It About “Don’t Twitter” You Do Not Understand?*, NAT’L LEGAL RES. GRP., INC. (Dec. 19, 2011, 4:12 PM), <http://www.nlrg.com/blogs/jury-research/bid/72541/What-Is-It-About-Don-t-Twitter-You-Do-Not-Understand>.

with me. I further agree that I will report any violations of the Court's instructions immediately.

Signed under penalty of perjury

\_\_\_\_\_  
\_\_\_\_\_

(Sign and Print)

Dated: New York, New York

October 11, 2011

#### CONCLUSION

The purpose of this article is to illustrate how countries around the world have used different types of punishment, oversight, and education to help stem the tide of internet-related juror misconduct. To date, no country has completely solved this multi-faceted problem. However, jurisdictions can still learn and adopt practices from each other. For example, to determine the effectiveness or deterrence value of imposing tougher penalties on jurors, one might study the British jury system, which has taken a hard line on juror misconduct.<sup>118</sup> Similarly, those jurisdictions that believe jury instructions are the best way to solve juror misconduct should review the in-depth jury instructions employed by the United States.

In 1932, Associate Supreme Court Justice Louis Brandeis stated in *New State Ice Co. v. Liebmann* that a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>119</sup> Applying this quote to juror misconduct, it now seems that countries, rather than states, serve as the laboratories in which others can learn of the methods that work and those that do not.

118. AG v. Dallas [2012] EWHC (Admin) 156 (Eng.); AG v. Frail, [2011] EWHC (Admin) 1629 (Eng.).

119. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 387 (1932).