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## Note

### Armchair Jury Consultants: The Legal Implications and Benefits of Online Research of Prospective Jurors in the Facebook Era

Adam J. Hoskins\*

In the 2003 film *Runaway Jury*, Rankin Fitch—played by Gene Hackman—justifies his role as a scientific jury consultant by saying that “trials are too important to be left up to juries.”<sup>1</sup> At one point, this pronouncement carried the day in the American legal system, as jury consultants were *de rigueur* in the courtroom<sup>2</sup> and scientific jury consulting was a \$400 million per year industry.<sup>3</sup> Jury consultants were—and, to a lesser extent, still are—used before, during, and after jury selection in high-stakes cases.<sup>4</sup> These trial consultants, though considered by many to be effective analysts of juror tendencies,<sup>5</sup> were often prohibitively expensive.<sup>6</sup>

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\* J.D. Candidate, 2012, University of Minnesota Law School; B.A., 2008, Truman State University. The author would like to thank Professor Perry Moriearty for her invaluable guidance throughout the writing process. Many thanks also to the editors and staff of the *Minnesota Law Review* for their tireless work and dedication. Finally, the author would like to thank his wonderful family and friends for their unwavering support and patience. Copyright © 2012 by Adam J. Hoskins.

1. RUNAWAY JURY (20th Century Fox 2003).

2. See Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, If Anything, to Do About It*, 1999 WIS. L. REV. 441, 442–43 (“So common is consulting in large jury trials that one Boston trial lawyer opined, ‘[n]o self-respecting trial lawyer will go through the process of jury selection in an important case without the assistance of highly-paid trial consultants.’” (citation omitted)).

3. 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 (2001) (providing background information on the economic impact of jury consultants).

4. See *id.*

5. See Strier & Shestowsky, *supra* note 2, at 460 (“When real juror verdicts are at issue, [scientific jury selection] has been shown to increase the

The advent of the Internet has made attorneys everywhere into amateur jury consultants.<sup>7</sup> Many states facilitate such investigation by releasing information about prospective jurors weeks before jury selection.<sup>8</sup> In these states, attorneys are free to search public records, perform Google searches on prospective jurors, or access jurors' Facebook pages long before jury selection begins.<sup>9</sup> States that do not provide juror information in advance have seen attorneys use laptops in the courtroom to research potential jurors.<sup>10</sup> This pretrial investigation of jurors is often effective in revealing information about prospective jurors, as an increasing amount of Americans have detectable online presences.<sup>11</sup> In this relatively uncharted technological area, there are competing concerns—some practitioners say it is tantamount to malpractice *not* to conduct Internet research on prospective jurors,<sup>12</sup> while others warn that this practice is

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predictability of juror verdicts appreciably, especially if the evidence in the case is at all equivocal.” (citation omitted).

6. See Redgrave & Stover, *supra* note 3, at 212.

7. See, e.g., *id.* at 211–12 (discussing how “the dawn of the internet age has provided a powerful new investigatory tool that can be utilized by attorneys themselves,” even in small cases).

8. See, e.g., State v. Harbison, 238 S.E.2d 449, 453 (N.C. 1977) (noting juror information released fifty-five days prior to the start of trial).

9. See, e.g., Christopher B. Hopkins, *Internet Social Networking Sites for Lawyers*, 28 TRIAL ADVOC. Q. 12, 13–14 (2009) (recommending a series of online searches on potential jurors).

10. See, e.g., Evan Brown, *Judge Should Have Let Lawyer Google Potential Jurors During Jury Selection*, INTERNET CASES (Sept. 4, 2010), <http://blog.internetcases.com/2010/09/04/judge-should-have-let-lawyer-google-potential-jurors-during-jury-selection/> (examining a New Jersey state judge's attempt to prohibit attorneys from researching potential witnesses during jury selection using the courthouse's wireless Internet).

11. See Jeffrey T. Frederick, *You, the Jury, and the Internet*, 39 BRIEF 12, 17 (2010) (noting that 77% of American adults use the Internet and 47% use social networking sites such as Facebook or Twitter). Further, the fact that a prospective juror does *not* have a detectable Internet presence conveys certain demographic information—age, intelligence, income level—that savvy attorneys may use in jury selection. *Id.*

12. See Redgrave & Stover, *supra* note 3, at 218 (describing attorneys as bound by the Model Rules of Professional Conduct to perform all possible Internet research on prospective jurors); see also MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010) (“Competent representation requires the legal knowledge, skill, *thoroughness*, and *preparation* reasonably necessary for the representation.” (emphasis added)).

ethically murky,<sup>13</sup> invades jurors' privacy,<sup>14</sup> and contributes to biased juries.<sup>15</sup>

Part I of this Note introduces the practice of jury investigation and describes its evolution and increasing prevalence in the Internet era. Part II identifies and analyzes the typical criticisms of preselection jury investigation. Part III contends, however, that pretrial online investigation of potential jurors comports with the rationale of peremptory challenges, allows for more equal trial preparation between rich and cash-strapped parties, and helps create more impartial juries and fairer trials. Finally, this Note proposes that because pretrial jury investigation results in fairer trials, states should uniformly adopt a standard of providing information about potential jurors in advance of jury selection, and explicitly sanction such investigation.

#### I. BACKGROUND ON INTERNET-BASED JUROR RESEARCH: A NEW LOOK AT A LONGSTANDING PRACTICE

While online pretrial Internet research of jurors is a relatively recent phenomenon, it is one that can be understood by examining longstanding jurisprudence on issues regarding jury selection. This Part examines the constitutional right to a jury trial, the process by which a jury is selected, the legality and prevalence of paid jury consultants, and the connection between jury selection and fairness of trials.

##### A. RIGHT TO A JURY TRIAL

The Sixth Amendment to the United States Constitution provides that in criminal trials, a defendant has "the right to a speedy and public trial, by an impartial jury of the State."<sup>16</sup> Although the Constitution is silent on the matter, courts have defined an "impartial jury" as one that is "capable and willing to decide the case solely on the evidence before it" and not

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13. See Redgrave & Stover, *supra* note 3, at 218 (outlining a countervailing argument that there are potential ethical concerns when conducting Internet research on prospective jurors).

14. See Michael R. Glover, Comment, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CALIF. L. REV. 708, 713 (1982) (warning that information gathered from outside investigation may implicate privacy concerns).

15. See *id.* at 716–17 (theorizing that these privacy concerns may affect the partiality of the jury, implicating Sixth Amendment issues).

16. U.S. CONST. amend. VI.

based on outside knowledge or prejudice.<sup>17</sup> Judges have considerable discretion in investigating alleged partialities among jurors<sup>18</sup> and may dismiss individual jurors or declare a mistrial to remedy such partialities.<sup>19</sup>

In addition to the Sixth Amendment protection for criminal juries, the Seventh Amendment preserves the right to a jury in many civil cases.<sup>20</sup> The right to a jury is available “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars.”<sup>21</sup> The right to a civil jury extends only to cases involving legal, as opposed to equitable, claims.<sup>22</sup> Since many new causes of action developed after the distinction between courts of law and equity was eliminated, courts determine the right to a jury trial for such claims by analogy to the Eighteenth Century courts of law and equity.<sup>23</sup>

#### B. JUROR SELECTION PROCESS

The jury-selection process is responsible for populating these constitutionally protected juries.<sup>24</sup> Voir dire is the method by which potential jurors—known as veniremen—are questioned about their predispositions and biases.<sup>25</sup> Depending on the state, the court, parties’ counsel, or a combination conducts the juror examination.<sup>26</sup> As part of the voir dire examination,

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17. *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

18. *See, e.g., United States v. Greig*, 133 F. Supp. 2d 697, 701 (D.V.I. 2001) (discussing the process by which the court explored an allegation that a juror disclosed extraneous and prejudicial information about the defendant).

19. *See, e.g., United States v. Dale*, 614 F.3d 942, 959 (8th Cir. 2010) (noting trial judges’ considerable discretion to remedy alleged impartiality).

20. *See* U.S. CONST. amend. VII.

21. *Id.*

22. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (“[T]he Court has understood ‘Suits at common law’ to refer ‘not merely [to] suits, which the *common* law recognized among its old and settled proceedings, but [to] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.”(citation omitted)).

23. *See id.* at 348–49.

24. *See* 76 AM. JUR. *Trials* § 1 (2000).

25. *See generally id.* §§ 4–5 (discussing various modes of conducting voir dire in the state and federal systems).

26. *Compare* FED R. CRIM. P. 24(a)(1) (“The court may examine prospective jurors or may permit the attorneys for the parties to do so.”), *and* ALASKA R. CRIM. P. 24(a) (identical to Federal Rule), *with* MINN. R. CRIM. P. 26.02 subdiv. 4 (“The court must allow the parties to conduct voir dire examination to discover grounds for challenges for cause and to assist in the exercise of peremptory challenges.”).

prospective jurors may be asked questions, either orally or in writing.<sup>27</sup> Such questions must be connected to the prospective jurors' ability to serve fairly and impartially.<sup>28</sup> In some cases, such a process can last several days.<sup>29</sup> Trial judges retain a large amount of discretion in structuring the voir dire process.<sup>30</sup>

Potential jurors may be eliminated from the jury pool through two mechanisms—strikes for cause and peremptory challenges.<sup>31</sup> Counsel may strike an unlimited number of jurors for cause.<sup>32</sup> Today, challenges for cause fall into one of two categories.<sup>33</sup> The *propter defectum* class of challenges are brought because of a perceived defect in the prospective juror, such as “alienage, infancy, [or] lack of statutory requirement . . . .”<sup>34</sup> The second class of challenges, the *propter affectum* class, may be brought when jurors have “some bias or partiality” that affects their competence to serve as a juror.<sup>35</sup> For purposes of this Note, only the *propter affectum* class of challenges is relevant.

When considering whether to disqualify a prospective juror for cause, courts look to the probability of bias or prejudice that would result by allowing the prospective juror to sit on the jury.<sup>36</sup> A trial court generally must “consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, [and] to make a full inquiry to examine those circumstances . . . .”<sup>37</sup> Any doubts about a juror's qualifications must be resolved in favor of excusing the juror.<sup>38</sup> Challenges for cause must be premised on an individual's actu-

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27. See 76 AM. JUR. *Trials* § 43 (2000).

28. See, e.g., *State v. Bishop*, 472 S.E.2d 842, 851 (N.C. 1996).

29. See *Hopkins*, *supra* note 9, at 13.

30. See, e.g., *Turner v. Murray*, 476 U.S. 28, 37 (1986) (citing *Ham v. South Carolina*, 409 U.S. 524, 527 (1973)).

31. See 76 AM. JUR. *Trials* § 61 (2000).

32. See *id.* § 68.

33. See, e.g., *Butler v. Greensboro Fire Ins. Co.*, 145 S.E. 3, 4 (N.C. 1928) (noting a transition away from the traditional challenges that were “subdivided at common law into four classes: Propter honoris respectum, out of respect of rank or honor; propter defectum, on account of some defect; propter delictum, on account of crime; and propter affectum, on account of affection or prejudice”).

34. *Tenn. Farmers Mut. Ins. Co. v. Greer*, 682 S.W.2d 920, 923 (Tenn. Ct. App. 1984).

35. *Id.* at 923–24.

36. See, e.g., *O'Dell v. Miller*, 565 S.E.2d 407, 411 (W. Va. 2002).

37. E.g., *Black v. CSX Transp., Inc.*, 648 S.E.2d 610, 615–16 (W. Va. 2007).

38. See, e.g., *id.* at 616.

al qualifications and biases and not on assumptions based on stereotypes.<sup>39</sup>

In addition to challenges for cause, many jurisdictions provide parties with a certain number of peremptory challenges.<sup>40</sup> If the jurisdiction allows such challenges,<sup>41</sup> counsel may exercise their allotted challenges to strike any potential juror without cause.<sup>42</sup> Counsel typically strike jurors perceived to be resistant to their case, basing their decisions on information gleaned from the voir dire, jury questionnaire, juror research, or on stereotypes.<sup>43</sup> When selecting the jury, attorneys often rely on their experience and intuition to inform their selections, making decisions about jurors based on their “gender, profession, nationality, race, religion, physical features, economic strata, and even gait.”<sup>44</sup> Clarence Darrow’s jury selection strategy offers a glimpse into the role of stereotyping in jury selection.<sup>45</sup> Darrow suggested that a lawyer “[n]ever take a wealthy man on a jury. He will convict unless the defendant is accused of violating the anti-trust law, selling worthless stocks or bonds or something of that kind.”<sup>46</sup> Additionally, he stated both that “[an Irishman] is emotional, kindly and sympathetic”<sup>47</sup> and that lawyers should keep “Unitarians, Universalists, Congregationalists, Jews and other agnostics.”<sup>48</sup>

There are limits to peremptory challenges, however. In jury selection, attorneys are not allowed to exercise their peremptory challenges based solely on the race<sup>49</sup> or sex<sup>50</sup> of the prospective juror. Prospective jurors can be excluded, however, for other Darrow-esque demographic factors, such as religion, po-

39. See, e.g., *State v. Lane*, 922 A.2d 1107, 1111 (Conn. App. Ct. 2007).

40. See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991)).

41. See *id.* (describing peremptory challenges as a state creation and not constitutionally protected by the Sixth Amendment).

42. See 76 AM. JUR. *Trials* § 72 (2000).

43. See *id.* §§ 84–89.

44. Strier & Shestowsky, *supra* note 2, at 465.

45. See Clarence Darrow, *Attorney for the Defense*, ESQUIRE, May 1936, at 36, 211.

46. *Id.*

47. *Id.* at 37.

48. *Id.* at 211.

49. *Batson v. Kentucky*, 476 U.S. 79, 85 (1986); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618 (1991) (extending the *Batson* ruling to civil trials).

50. *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (extending *Batson*’s ruling to peremptory challenges based on juror’s sex).

litical affiliation, or age.<sup>51</sup> Though courts have, in dicta, discouraged the use of peremptory challenges based on stereotype alone,<sup>52</sup> attorneys generally have considerable latitude in exercising their peremptory challenges.<sup>53</sup>

### C. JURY CONSULTING AND RESEARCH ON PROSPECTIVE JURORS

Attorneys have long conducted pretrial research on prospective jurors.<sup>54</sup> The limits of juror investigation are set only by local rules<sup>55</sup> and ethical constraints.<sup>56</sup> Courts both acknowledge and permit pretrial investigation of potential jurors.<sup>57</sup> Many jurisdictions facilitate pretrial investigation by providing attorneys with names of potential jurors weeks before trial.<sup>58</sup> Courts that do not release jury lists in advance often have wireless Internet connections for attorneys to use during jury selection.<sup>59</sup> A party's legal team can use this Internet ac-

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51. See Charles Nesson, *Peremptory Challenges: Technology Should Kill Them?*, 3 LAW, PROBABILITY & RISK 1, 10 (2004) (“[R]ace and gender now stand as the only declared impermissible bases for peremptory challenges, but these lack any strong distinction from other demographic factors like religion or politics or age, which apparently continue to be legitimate grounds for peremptory challenges.”).

52. See, e.g., *J.E.B.*, 511 U.S. at 142.

53. See, e.g., *State v. Rivera*, 32 P.3d 292, 295 (Wash. Ct. App. 2001) (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000)) (noting that peremptory strikes reinforce Sixth Amendment right to an impartial jury).

54. See Redgrave & Stover, *supra* note 3.

55. *Id.* at 212; see also, e.g., MINN. GEN. R. PRAC. 807 (detailing regulations relating to juror questionnaires).

56. See Redgrave & Stover, *supra* note 3, at 219 (noting attorneys' ethical responsibility, under the ABA standards, to use only “investigatory methods that neither harass nor unduly embarrass potential jurors or invade their privacy”).

57. See, e.g., *State v. Knerr*, 426 N.W.2d 654, 656 (Iowa Ct. App. 1988) (“It is a recognized practice for an attorney to make investigations of prospective jurors so that [peremptory] challenges can be utilized intelligently . . . There is no doubt that pretrial investigations of prospective jurors are both legal and common.”).

58. See, e.g., *State v. Harbison*, 238 S.E.2d 449, 453 (N.C. 1977); Redgrave & Stover, *supra* note 3, at 212 (“[M]any of these state laws explicitly state that the reason for releasing jury lists prior to voir dire is to permit counsel to undertake pretrial investigation of prospective jurors.”).

59. See Amanda McGee, Note, *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, 316 (2010) (discussing how the Internet should be provided in courtrooms because “[i]n order to properly present their case, counsel must have stable access to laptops, cell phones, and other such technologies”). *But see* Katherine A. Helm, *Courtrooms All Atwitter*, NAT'L L.J. (Aug. 10, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432841336> (noting that some courtrooms have “bar[red] all communication devices from

cess to research prospective jurors during jury selection.<sup>60</sup> When given juror information in advance, attorneys frequently outsource this juror investigation to jury consultants, especially in high-stakes or high-profile cases.<sup>61</sup> Attorneys and their hired jury consultants have considerable leeway in researching prospective jurors, provided that they refrain from contacting the jurors or their families.<sup>62</sup> Under the Model Rules of Professional Conduct, attorneys are responsible for the actions of those working for or underneath them, including jury consultants or paralegals conducting juror research.<sup>63</sup>

The practice of researching potential jurors implicates considerable privacy concerns.<sup>64</sup> Though individuals may cede certain privacy expectations by performing public duties,<sup>65</sup> individuals do not, by becoming jurors, forfeit any of their constitutionally protected rights to privacy.<sup>66</sup> Generally, however, courts have found that individuals engaging in online communication—chat rooms, blog postings and other publicly searchable communication—do not have a reasonable expectation of privacy with respect to those communications.<sup>67</sup> Regardless, to allay privacy concerns, many practitioners caution against “overt references to a juror’s personal information” that has been discovered through outside research.<sup>68</sup>

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courtrooms” after a spate of mistrials based on impermissible outside research from jurors themselves).

60. See McGee, *supra* note 59, at 319–20.

61. See Redgrave & Stover, *supra* note 3.

62. See MODEL RULES OF PROF’L CONDUCT R. 3.5 (2010) (“[A lawyer shall not] communicate ex parte with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order.”).

63. See *id.* R. 5.3(c).

64. See Glover, *supra* note 14, at 712 n.22 (“The privacy concerns in the voir dire context are identical to those in cases that have recognized the right’s existence.”).

65. See *id.* at 711–12.

66. See, e.g., *People v. James*, 710 N.E.2d 484, 489 (Ill. App. Ct. 1999) (citing *Brandborg v. Lucas*, 891 F. Supp. 352, 356 (E.D. Tex. 1995)).

67. See, e.g., *United States v. Charbonneau*, 979 F. Supp. 1177, 1184–85 (S.D. Ohio 1997) (finding no expectation of privacy in e-mail and chat room discussions); *Commonwealth v. Proetto*, 771 A.2d 823, 831 (Pa. Super. Ct. 2001) (finding no expectation of privacy for personal website).

68. Hopkins, *supra* note 9, at 14.



## D. PREVALENCE OF PRETRIAL INTERNET RESEARCH

Because the use of pretrial jury research has long been sanctioned and acknowledged by the courts,<sup>69</sup> attorneys have not been shy in their use of Internet research as a litigation tool.<sup>70</sup> Because the official juror information provided by the courts is so limited,<sup>71</sup> attorneys use Internet research in an attempt to gain a competitive advantage over the opposing party.<sup>72</sup> Whereas extensive research on a jury venire would have been prohibitively expensive in the pre-Internet era, attorneys can now quickly and anonymously gather an immense amount of information about prospective jurors through Internet research.<sup>73</sup>

Pretrial Internet research on jurors and prospective jurors is now the industry standard for litigators.<sup>74</sup> This widespread practice has been noted by practitioners,<sup>75</sup> scholars,<sup>76</sup> journalists,<sup>77</sup> and courts themselves.<sup>78</sup> Some practitioners even claim that to not conduct this research is tantamount to malpractice and a failure to zealously advocate for one's client.<sup>79</sup>

Practicing attorneys offer a variety of advice on how best to mine the Internet for information on prospective jurors. Google searches, Facebook, Twitter, MySpace, consumer complaint websites, arrest records,<sup>80</sup> jurors' personal blogs,<sup>81</sup> online news-

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69. See, e.g., *State v. Knerr*, 426 N.W.2d 654, 656 (Iowa Ct. App. 1988).

70. See, e.g., *Redgrave & Stover*, *supra* note 3, at 213–15.

71. See *id.* at 212 (“Given the general paucity of information concerning prospective jurors officially provided to counsel, such [pretrial Internet] investigation may be necessary in order to accurately identify those jurors who should be challenged.”).

72. See *Hopkins*, *supra* note 9, at 13 (“[R]esearch may reveal detailed individual profiles of the prospective jurors . . . and may provide you with exclusive information that opposing counsel had not uncovered.”).

73. See *Redgrave and Stover*, *supra* note 3, at 214 (“The internet’s most profound effects can be seen in the type and scope of information that can be discovered, as well as the anonymity with which attorneys can now learn intimate details about a juror’s personal life.”).

74. See *id.* at 211.

75. See, e.g., *id.*

76. See, e.g., *Nesson*, *supra* note 51, at 1.

77. See, e.g., *John Schwartz, As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1.

78. See, e.g., *Brown*, *supra* note 10 (noting a judge’s failed attempt to curtail attorney’s research of prospective jurors).

79. See *supra* note 12.

80. *Redgrave and Stover*, *supra* note 3, at 214.

81. *Rosalind R. Greene & Jan Mills Spaeth, Are Tweeters or Googlers in Your Jury Box?*, 46 ARIZ. ATT’Y 38, 45 (2010).

papers' letters to the editor, online petitions, campaign contributions, club membership pages,<sup>82</sup> and online public records<sup>83</sup> are all rife with potentially relevant information. Some practitioners even advocate asking prospective jurors about their Internet usage so attorneys can narrow the focus of their research.<sup>84</sup>

While pretrial research has been greatly aided by the Internet and the information sources listed above, such research can be contextualized by examining the traditional standards of a fair and impartial jury.

#### E. DEFINING A FAIR TRIAL AND IMPARTIAL JURY

The right to an impartial jury is created by an amalgam of the Sixth Amendment,<sup>85</sup> the Seventh Amendment,<sup>86</sup> and the Due Process clauses of the Fifth<sup>87</sup> and Fourteenth Amendments.<sup>88</sup> A partial jury implicates considerable constitutional concerns,<sup>89</sup> and a verdict delivered by a partial jury may be overturned on appeal.<sup>90</sup> The Supreme Court has defined an impartial jury as one that is "capable and willing to decide the case solely on the evidence before it" and not based on outside knowledge or prejudice.<sup>91</sup>

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82. *Id.*

83. Frederick, *supra* note 11.

84. See Vesna Jaksic, *A New Headache for Courts: Blogging Jurors*, LAW.COM (Mar. 19, 2007), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1174035813248> ("Any lawyer who does not inquire during jury selection about a juror's Internet presence—whether it be a Web site, a blog, an account on MySpace or an account on Match.com—hasn't done their [sic] job.")

85. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .").

86. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .").

87. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

88. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

89. McGee, *supra* note 59, at 303–04 ("The failure to provide an accused with a fair hearing essentially strips him of his constitutional right and 'violates even the minimal standards of due process.'" (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961))).

90. See, e.g., *Johnson v. Agoncillo*, 515 N.W.2d 508, 514–15 (Wis. Ct. App. 1994) (considering whether alleged juror bias necessitated overturning verdict on appeal).

91. *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

One of the problems with ascertaining the effects that pre-trial research has on the fairness of trials is one of evidence. Because there are so many variables involved, it is difficult to say with certainty what influence the jury selection has on the outcome of the trial.<sup>92</sup> If a prospective juror feels intimidated or threatened by the amount of invasive research parties have conducted, such research may amount to obstruction of justice.<sup>93</sup> Obstruction of justice is committed, as defined in the relevant federal statute, by “[w]hoever corruptly . . . endeavors to influence, intimidate, or impede any grand or petit juror . . . in the discharge of his duty . . .”<sup>94</sup> This statutory provision also applies to prospective jurors.<sup>95</sup>

By grafting the new technology of Internet research onto the existing framework created by this traditional jurisprudence, Part II of this Note examines the practical effect of technological advances on longstanding notions of trial fairness.

## II. THE EFFECT OF PRETRIAL INTERNET RESEARCH ON FAIRNESS OF TRIALS

Several commentators have noted the seeming unfairness of pretrial juror investigation.<sup>96</sup> This Part first addresses and attempts to dispel the concerns raised by critics of juror investigation—that the practice infringes upon prospective jurors’ privacy, amounts to a manipulation of the jury pool, may lead to pretextual strikes for cause, and ultimately undermines the fairness of trials. This Part then analyzes the potential benefits of pretrial investigation—arguing that the practice decreases the likelihood that strikes will be based on stereotypes, increases the number of meritorious strikes for cause, and decreases the importance of peremptory strikes.

### A. DISPELLING THE TYPICAL CRITICISMS OF PRETRIAL INTERNET JURY RESEARCH

Critics of pretrial Internet research point to several bases for their objections to the practice—among them privacy concerns and concerns over the manipulation of the justice sys-

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92. See Strier & Shestowsky, *supra* note 2, at 463 (“[T]here appears no way to assert with certainty that a successful verdict in an actual trial is directly and solely attributable to . . . jury selection.”).

93. See *id.* at 479.

94. 18 U.S.C. § 1503(a) (2006).

95. See *Osborn v. United States*, 385 U.S. 323, 324 (1966).

96. See, e.g., Redgrave & Stover, *supra* note 3, at 216–17.

tem.<sup>97</sup> Each of these concerns is ultimately aimed at ensuring a fair trial for all parties.<sup>98</sup> This Section identifies and dispels the most prevalent of these arguments.

1. Although Pretrial Jury Investigation Implicates Privacy Concerns, Such Actions Do Not Amount to an Invasion of Jurors' Privacy.

One of the frequent criticisms of both traditional jury consulting and Internet-based research is the potential infringement on prospective jurors' right to privacy.<sup>99</sup> Even practitioners offering tips on how to most effectively research prospective jurors acknowledge that such Internet research may be invasive.<sup>100</sup> Courts have found that prospective jurors should have no reasonable expectation of privacy based on their actions on the Internet—their chat room discussions, publicly accessible Facebook profiles, or message board posts.<sup>101</sup> This standard is complicated, however, because much of the research for relevant information is conducted through channels that prospective jurors have limited control over, such as online church bulletins or other social club newsletters.<sup>102</sup>

Regardless of whether jurors should have a reasonable expectation of privacy regarding their online presence—and thus, a constitutional right to privacy—the research and use of such information in jury selection certainly implicates privacy concerns.<sup>103</sup> When attorneys confront jurors with ostensibly private information during the jury-selection process—often in front of other prospective jurors, the court, and attorneys—jurors may feel like their privacy has been invaded, whether or not the ac-

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97. See, e.g., McGee, *supra* note 59, at 318–20.

98. See *id.* at 318.

99. See, e.g., Lisa C. Wood, *Social Media Use During Trials: Status Updates from the Jury Box*, 24 ANTITRUST 90, 93 (2009).

100. See Hopkins, *supra* note 9, at 14 (“[S]ince the foregoing [recommended] seventeen Internet searches are fairly invasive, a careful lawyer should avoid overt references to a juror’s personal information during jury selection and trial.”).

101. See, e.g., *United States v. Charbonneau*, 979 F. Supp. 1177, 1184–85 (S.D. Ohio 1997) (holding chat room and e-mail discussions are not entitled to a reasonable expectation of privacy); *Commonwealth v. Proetto*, 771 A.2d 823, 831 (Pa. Super. Ct. 2001) (holding personal websites not entitled to a reasonable expectation of privacy).

102. See Frederick, *supra* note 11.

103. See Strier & Shestowsky, *supra* note 2, at 480.

tion meets the legal standard for invasion of privacy.<sup>104</sup> This reaction may taint the proceedings by “lead[ing] to resentment of the attorney who conducted the inquiry.”<sup>105</sup>

Extensive pretrial research of prospective jurors can implicate significant privacy concerns:

The questioning of prospective jurors can sometimes delve . . . into intensely private and intimate details of the questioned individual’s life . . . . [T]hey employ trial consultants . . . who may suggest voir dire interrogations that might violate privacy. This affront to the sensibilities of the panelists might nonetheless be justifiable, on balance, if there were clearly demonstrable countervailing benefits . . . . Contrasting our system with that of England, where both peremptory challenges and pretrial investigations have been virtually eliminated, one scholar observed: “In the United States, where voir dire allows for vast intrusions into individuals’ lives, the result has not been greater impartiality, but a proliferation of methods by which skilled litigators and expensive consultants tailor juries to their clients’ needs.”<sup>106</sup>

These privacy concerns, however, are ultimately outweighed by the perceived benefits of trial consultants. Courts have recognized and sanctioned jury consultants’ rights to conduct research on prospective jurors.<sup>107</sup> Such research often involves more invasive measures than modern-day Internet research, such as seeking information from jurors’ neighbors and friends.<sup>108</sup> There have been numerous technological advances—including searchable Internet records and social networking—that allow for less invasive research into prospective jurors’ backgrounds.<sup>109</sup> Despite the unease that jurors may feel when being confronted with information from their seemingly private online profiles, there is generally no privacy right implicated,<sup>110</sup> as long as attorneys abide by their ethical guidelines against directly contacting prospective jurors by, for example, adding a prospective juror as a “friend” on Facebook to gain access to that juror’s profile.<sup>111</sup>

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104. See Redgrave & Stover, *supra* note 3, at 217 (“Being confronted with this [seemingly private] information in open court could realistically diminish a prospective juror’s feeling of privacy.”).

105. *Id.*

106. Strier & Shestowsky, *supra* note 2, at 480.

107. See, e.g., *State v. Knerr*, 426 N.W.2d 654, 656 (Iowa Ct. App. 1988).

108. See Redgrave & Stover, *supra* note 3, at 217.

109. See *id.*

110. See, e.g., *United States v. Charbonneau*, 979 F. Supp. 1177, 1184–85 (S.D. Ohio 1997).

111. See Wood, *supra* note 99 (“[Attorneys] have been admonished in several matters where they gained access to confidential Internet sites under false pretenses.”); see also MODEL RULES OF PROF’L CONDUCT R. 3.5 (2010)

Further, the hypothetical resentment a prospective juror may feel toward an attorney asking probing, personal questions is too attenuated and theoretical to constitute the basis for an unfair trial.<sup>112</sup> Practitioners advise attorneys to proceed tactfully when asking questions about information gleaned from pre-trial Internet research.<sup>113</sup> Such tact or avoidance of direct questioning can help to allay jurors' privacy concerns.<sup>114</sup> Further, states may consider implementing a Juror Bill of Rights.<sup>115</sup>

While many commentators rest their objections to pretrial research on the privacy interests of prospective jurors, many others point to the tendency for attorneys to use this information to manipulate the justice system.

## 2. Allowing Parties to Conduct Internet Research on Prospective Jurors Will Lead to Decreased Manipulation of Juries and Verdicts.

Many critics of both jury consulting and pretrial Internet research of potential jurors decry the practices as manipulative of the trial process.<sup>116</sup> Even though peremptory strikes and challenges for cause are premised on improving fairness in trials, attorneys often use these techniques instead to gain a competitive advantage over the opposing party.<sup>117</sup> This angling for advantage seems antithetical to the purposes of voir dire, which is to determine whether jurors possess biases that should disqualify them from service.<sup>118</sup> Further, such methods

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("[A lawyer shall not] communicate ex parte with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order.").

112. See Strier & Shestowsky, *supra* note 2, at 463–64 (arguing that it would be nearly impossible to show with empirical evidence that jury selection alone generally cannot be shown to result in favorable verdicts).

113. See Hopkins, *supra* note 9, at 14 (cautioning attorneys not to "reference a juror's personal information during jury selection").

114. See *id.* (arguing that background research on potential jurors can be "fairly invasive").

115. See *infra* Part III.B.

116. See, e.g., Strier & Shestowsky, *supra* note 2, at 472–73 (discussing the "public perception of the jury being manipulated by psychological devices").

117. See Marni Becker-Avin, *The Real Purpose of Voir Dire*, THE RIGHT JURY, [http://www.therightjury.com/publications\\_real\\_purpose.html](http://www.therightjury.com/publications_real_purpose.html) (last visited Jan. 5, 2012) ("There is conflict between the inherent purpose of voir dire, which is to find impartial jurors from a pool representative of the community, and the true yet unstated purpose of every attorney, which is to find jurors predisposed to their position.").

118. See *Schlinsky v. United States*, 379 F.2d 735, 738 (1st Cir. 1967) ("[T]he purpose of the voir dire is to ascertain disqualifications, not to afford

run counter to the Supreme Court's decisions in *Batson v. Kentucky*<sup>119</sup> and *J.E.B. v. Alabama*,<sup>120</sup> in which the Court condemned and outlawed race- and sex-based challenges.<sup>121</sup>

Because courts have allowed both pretrial jury investigation and peremptory challenges, the practice of Internet research of prospective jurors is preferable to the more invasive research alternatives. Concerns about the manipulation of justice by jury research and selection metrics are more pronounced when only one side has access to jury consultants and research assistants.<sup>122</sup> This unequal distribution of resources contributes to disparities in the fairness of trial preparation.<sup>123</sup> All parties, however, are able to ascertain tendencies among prospective jurors through the use of comparatively inexpensive Internet research.<sup>124</sup> This allows parties to make peremptory challenges that balance the jury pool by eliminating the most objectionable potential members.<sup>125</sup> This elimination of jurors with obvious predilections will result in the fairest possible jury pool.<sup>126</sup>

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individual analysis in depth to permit a party to choose a jury that fits into some mold that he believes appropriate for his case.”); Reid Hastie & Nancy Pennington, *The O.J. Simpson Stories: Behavioral Scientists' Reflections on The People of the State of California v. Orenthal James Simpson*, 67 U. COLO. L. REV. 957, 975 (1996) (“[S]cientific jury selection methods are not applied to identify and eliminate prejudiced and partial jurors; the major effect of the lengthy examinations and the exercise of peremptory challenges is to create systematically unrepresentative panels and, sometimes, to produce unbalanced juries.”).

119. 476 U.S. 79 (1986) (forbidding prosecutor from peremptorily challenging potential jurors solely on account of their race); see also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (applying the principles of *Batson* to civil trials).

120. 511 U.S. 127 (1994) (extending *Batson* to cover peremptory challenges based on sex).

121. See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL DEMOCRACY* 175 (1994) (describing jury consulting as contradicting “the new ethic” outlined by the Supreme Court in *Batson* and *J.E.B.*).

122. See Strier & Shestowsky, *supra* note 2, at 471 (“The impartiality mandate would seem most threatened when only one side has access to jury science.”).

123. See *id.*

124. See Redgrave & Stover, *supra* note 3, at 211–12 (“[Pretrial Internet juror research] will increasingly level the playing field between the plaintiff’s and defendant’s bar.”).

125. See *id.* at 475 (“Within the adversarial context, it is presumed each side will eliminate those prospective jurors most favorable to the other side and that the end result will be an impartial jury.”).

126. See *id.*

### 3. Pretrial Jury Research Will Not Lead to an Increase in Pretextual Strikes for Cause

When considering pretrial jury research, many commentators point out that information gleaned from research may lead an attorney to attempt to make a strike for cause where he may otherwise invoke a peremptory strike.<sup>127</sup> Critics of the practice have pointed to this possibility as the one legal foundation on which a future ban of jury consulting and pretrial investigation could rest.<sup>128</sup>

It is possible that an attorney would use a strike for cause in an attempt to evade the *Batson* and *J.E.B.* decisions and exclude prospective jurors based on either their sex or race.<sup>129</sup> If an attorney wants to exclude minorities or women from the jury, she could focus her pretrial research on investigating black or female jurors' Internet presence in an attempt to build a case for a challenge for cause. If successful in the challenge for cause, the party would retain its allotted number of peremptory challenges.<sup>130</sup>

These concerns, while not baseless, do not outweigh the benefits of pretrial Internet research of prospective jurors. If attorneys did attempt to "fish" for information for a pretextual strike for cause, there are several safeguards in place that would protect the sanctity of the fair trial. First, when considering a motion to strike for cause, a judge must look at the totality of the circumstances.<sup>131</sup> If an attorney were attempting to strike all women or all African-Americans for cause, for exam-

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127. See, e.g., Redgrave & Stover, *supra* note 3 (arguing that questions tailored to individual jurors after research is more likely to lead to a successful strike for cause).

128. See Strier & Shestowsky, *supra* note 2, at 481 (arguing that advocates of banning jury consultant "must demonstrate something singularly pernicious about consulting, such as unduly facilitating or encouraging race—or gender—based exclusions outlawed by the Supreme Court . . .").

129. See *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (extending *Batson* ruling to peremptory challenges based on juror's sex); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson's* holding to include civil trials); *Batson v. Kentucky*, 476 U.S. 79 (1986) (forbidding prosecutor from peremptorily challenging potential jurors solely on account of their race); 76 AM. JUR. *Trials* § 61 ("Trial counsel may object . . . to individual veniremen for cause, or peremptorily.").

130. See 76 AM. JUR. *Trials* § 65 (2000) ("Challenges for cause should be pursued by counsel to avoid wasting peremptory challenges.").

131. See, e.g., *O'Dell v. Miller*, 565 S.E.2d 407, 411 (W. Va. 2002) ("[W]hen considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror . . .").



ple, that trial strategy would be quite transparent. Further, if there are pretextual strikes for cause, such strikes would be appealable post trial.<sup>132</sup> While attorneys “gaming” the peremptory strike system is a concern that has led some to advocate for the complete elimination of peremptory strikes,<sup>133</sup> the appreciable benefits of the peremptory strike system justify its retention.

#### B. PRETRIAL INTERNET INVESTIGATION IS BENEFICIAL FOR JURORS AND DEFENDANTS ALIKE.

Perhaps because of the notion that researching prospective jurors in an attempt to gain a favorable jury pool is tantamount to cheating the judicial system, many people react to this practice with skepticism.<sup>134</sup> By examining this practice more closely, however, several benefits of pretrial juror investigation emerge.

##### 1. Jurors Will Be Excluded Based on Stereotype-Alone Less Often

In attempting to create their ideal jury pool, attorneys often exercise their peremptory strikes to remove potential jurors based on little more than a stereotype or a hunch.<sup>135</sup> Courts have, in dicta, frowned on disqualifying jurors on stereotypes alone, but have not held such disqualification illegal.<sup>136</sup> With prospective jurors having more robust online presences, however, attorneys may now invoke their peremptory strikes based on jurors’ actual personalities, activities and predilections.<sup>137</sup> Lawyers may discover information during their Internet research that they would not have been able to uncover using traditional voir dire alone.<sup>138</sup> Because the information gathered

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132. See, e.g., *Holly v. Straub*, No. 02-10126-BC, 2004 WL 1765525, at \*12 (E.D. Mich. July 19, 2004) (considering and rejecting claim “that excusing . . . jurors for cause was merely a pretext employed to disguise an improper racial motive or a substitute for unlawful peremptory strikes”).

133. See *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring) (finding that the goal of eliminating racial discrimination from jury selection “can be accomplished only by eliminating peremptory challenges entirely”).

134. See *supra* Part II.A.

135. See Strier & Shestowsky, *supra* note 2, at 465.

136. See *J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994) (finding a peremptory strike based on a stereotype “denigrates the dignity of the excluded juror”).

137. See Strier & Shestowsky, *supra* note 2, at 466 (“Without external information, attorneys almost inevitably rely on stereotypes and intuitions.”).

138. See Shannon Awsumb, *Social Networking Sites: The Next E-Discovery Frontier*, 66 *BENCH & B. MINN.*, Nov. 2009, at 22–23 (“Trial consultants regularly use Internet research as a means of vetting prospective jurors and learn-

from this outside research is more “detailed and accurate” than an attorney’s stereotype or intuition about prospective jurors,<sup>139</sup> attorneys will be better able to accurately and effectively use their peremptory strikes.<sup>140</sup>

Many commentators advocate for the elimination of peremptory strikes in order to allay concerns about their manipulative nature and potential misuse.<sup>141</sup> Former Supreme Court Justice Thurgood Marshall argued for completely eliminating peremptory strikes.<sup>142</sup> One of the main objections to such challenges is that they, by necessity, rely on attorneys’ excluding prospective jurors based on stereotypes.<sup>143</sup> By allowing noninvasive pretrial Internet research on prospective jurors, however, attorneys’ reliance on stereotypes in invoking peremptory challenges—and the constitutional objection to such reliance—will diminish.

## 2. There Will Be More Legitimate Strikes for Cause

When exercised for legitimate reasons, strikes for cause are almost universally upheld.<sup>144</sup> If a juror has either a prior rela-

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ing information jurors may not reveal on jury questionnaires or during voir dire, “including how they vote, how they spend money and if they’ve spoken out on controversial issues.” (citing Carol J. Williams, *Jury Duty? You May Want to Edit Your Online Profile*, L.A. TIMES, Sept. 29, 2008)); Greene & Spaeth, *supra* note 81 (“[A]ttorneys can use social networks . . . to learn more about their prospective jurors . . . [P]aying attention to jurors’ social networking, blogs and Web sites can tell a lot about their values, attitudes and experiences that would never be fully revealed in *voir dire*.”).

139. Nesson, *supra* note 51, at 2.

140. *See id.* (predicting that technological advances in jury investigation will lead to increased transparency in peremptory strikes and may eventually force courts “either to rationalize peremptory strikes or eliminate them altogether”).

141. *See, e.g.*, STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 224 (1994) (“Eliminating peremptory challenges means destroying the only means through which lawyers can . . . ‘get a jury you like the look of’ . . . . And it would mean that decades of stereotypes about how people of various ethnic groups are likely to vote would become moot. Black and white, fat and skinny, young and old, transit worker and physicist all would be treated alike.”).

142. *See* *Batson v. Kentucky*, 476 U.S. 79, 103 (1986) (Marshall, J., concurring).

143. *See, e.g.*, Cheryl G. Bader, *Batson Meets the First Amendment: Prohibiting Peremptory Challenges that Violate a Prospective Juror’s Speech and Association Rights*, 24 HOFSTRA L. REV. 567, 590–92 (1996).

144. *See* 76 AM. JUR. *Trials* § 66 (2000) (explaining that review of trial judges’ grants of strikes for cause are reviewed on appeal under an abuse of discretion standard); *see also, e.g.*, *Black v. CSX Transp., Inc.*, 648 S.E. 2d 610, 617 (W. Va. 2007) (finding that trial court abused its discretion when it denied

tionship with the parties, attorneys, or witnesses, or, has a provable bias against one party, he will not contribute to a fair and impartial jury pool.<sup>145</sup> Pretrial Internet research on prospective jurors assists meritorious strikes for cause by potentially revealing something that would disqualify a juror on its own basis or by providing a questioning avenue for attorneys to follow in voir dire. By tailoring their questions, attorneys may increase their likelihood of discovering something during voir dire that could lead to a challenge for cause.<sup>146</sup> Such tailoring is important, as many view peremptory challenges as one of the only mechanisms for eliminating jurors with a strong suspected bias.<sup>147</sup>

### 3. Informal Pretrial Jury Research Equalizes Resources Between Wealthy and Non-Wealthy Parties

One of the most important roles that pretrial jury research serves is as an equalizer between wealthy and nonwealthy parties. Whereas only attorneys for wealthy parties can usually afford jury consultants, any attorney with an Internet connection can conduct online research on prospective jurors.<sup>148</sup> This is especially important since the root of many of the fairness concerns outlined above is the fear that parties have disproportionate resources.<sup>149</sup> Since Internet research provides both parties with the same opportunities at their fingertips, fewer advantages will inhere to the wealthier parties.<sup>150</sup> Smaller law

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a lawyers repeated motions for cause).

145. See, e.g., 76 AM. JUR. *Trials* § 68 (2000) (listing factors to consider whether a juror will be fair and impartial when deciding whether to dismiss for cause).

146. See Redgrave & Stover, *supra* note 3 (“Any insight into a juror’s personality permits a trial attorney to tailor his or her voir dire questions in such a way as to maximize the likelihood of revealing a particular trait that may support a challenge for cause.”).

147. See, e.g., Strier & Shestowsky, *supra* note 2, at 484 (“If the jurisdiction is one that limits voir dire inquiry, or prospective jurors are not candid about their biases, the voir dire process will not provide adequate opportunity to create grounds for a challenge for cause.”).

148. See Redgrave & Stover, *supra* note 3, at 211–12.

149. See, e.g., Strier & Shestowsky, *supra* note 2, at 473 (“Instead of a jury representing a cross-section of the values of the community, it may seem a body stacked with people holding biases favoring the side with the trial consultant, or the best trial consultant.”).

150. See Hopkins, *supra* note 9, at 13 (“[T]he lawyer’s team can accomplish the same outside research performed by jury consultants without the expense.”).

firms will also be able to better compete with their larger counterparts.<sup>151</sup>

Further, the Internet allows attorneys to use jury investigation in smaller cases.<sup>152</sup> This capability will ensure that even when there are small amounts at stake, parties will have the benefit of research on prospective jurors.<sup>153</sup> If pretrial Internet research is a beneficial practice, as this Note argues it is, then the process should be available to every party in every jury trial. The cost-effective and equalizing nature of Internet research makes this a feasible goal.<sup>154</sup>

#### 4. Pretrial Internet Research Makes Juries Inherently More Fair and Impartial

Ultimately, the benefits described above lead to the conclusion that permitting attorneys to conduct research on prospective jurors causes the resulting jury pool to be fairer and more impartial. Because resources are better balanced between parties, the jury pool will not favor one side, and parties will balance each other out in their peremptory strikes.<sup>155</sup> Strier and Shestowsky, in their analysis of the effect of jury consultants on the fairness of trials, write:

Within the adversarial context, it is presumed each side will eliminate those prospective jurors most favorable to the other side and that the end result will be an impartial jury. Yet this assumes equal resources and skills for the two sides. The viability of the adversary system to ensure a fair and impartial jury and trial, in jury selection as well as in other stages of the trial, is sorely tested when the adversaries possess unequal resources. In this light, the major ethical problem with social science in the courtroom is not the techniques themselves but rather the fact that, *in our society, the condition for equality of resources is most often not met.*<sup>156</sup>

Because of the increasing use of Internet research to gather information on prospective jurors, the resources of wealthy and nonwealthy parties have, to a large extent, been equal-

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151. See Jonathan M. Redgrave, *Litigation and Technology: How the Internet is Changing the Practice*, 47 THE FED. LAW., Jan. 2000, at 25, 25 (“As a result [of the Internet], smaller firms can now access research materials just as quickly and efficiently as their larger counterparts.”).

152. See Redgrave & Stover, *supra* note 3, at 211–12 (“The internet’s vast information resources permit litigators, even in small cases, to immediately access information about prospective jurors . . .”).

153. See *id.*

154. See *id.*

155. See Strier & Shestowsky, *supra* note 2, at 475 (citing VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 93–94 (1986)).

156. *Id.*

ized.<sup>157</sup> The equalizing nature of this pretrial research dispels the concerns that unequal resources lead to different levels of trial preparation, and ultimately to unfair trials.<sup>158</sup>

Further, pretrial Internet research, coupled with traditional voir dire questioning, is much more likely to reveal actual biases that would preclude a juror from being able to decide the case based only on the presented evidence.<sup>159</sup> Thus, by augmenting traditional voir dire with outside Internet research, attorneys will ultimately be able to strike down more prospective jurors that would be prejudiced against their position. With each side striking prejudiced jurors, the resulting jury pool is increasingly balanced and impartial.

### III. A COPROMISED SOLUTION: MORE COURT FACILITATION OF PRETRIAL INTERNET RESEARCH, MORE CONCERN FOR PROSPECTIVE JURORS' PRIVACY RIGHTS

As outlined above, there are numerous appreciable benefits to pretrial Internet research of prospective jurors—jurors being excluded from service for their actual beliefs and not stereotypes, an increase in successful strikes for cause, an equalization of pretrial strategies between wealthy and less fortunate parties, and an increase in the fairness and impartiality of juries.<sup>160</sup> Accordingly, courts should uniformly release potential juror lists prior to trial in order to give attorneys ample time to conduct research on prospective jurors. Because there are considerable privacy concerns for jurors, however, state legislatures should pass a standard “Juror Bill of Rights” to allay these legitimate privacy concerns.

#### A. COURTS SHOULD UNIFORMLY RELEASE LISTS OF POTENTIAL JURORS PRIOR TO TRIAL

As it stands, many, but not all courts release to attorneys lists of potential jurors prior to the start of trial.<sup>161</sup> In order to

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157. See *supra* Part II.B.3.

158. See Strier & Shestowsky, *supra* note 2, at 475 (discussing how peremptory strikes create unfairness mainly in situations where adversarial parties have unequal resources).

159. See *id.* (“Within the adversarial context, it is presumed each side will eliminate those prospective jurors most favorable to the other side and that the end result will be an impartial jury.”).

160. See *supra* Part II.B.

161. See, e.g., *State v. Harbison*, 238 S.E.2d 449, 452–53 (N.C. 1977).

gain the benefits of pretrial online juror investigation—a decreased reliance on stereotypes, a leveled playing field between wealthy and poorer parties and the resulting impartiality<sup>162</sup>—courts should release a list of prospective jurors in advance of all jury trials. Further, courts should be more explicit about allowing Internet research of prospective jurors. Currently, practitioners and judges seem to operate in a system of winks and nudges—courts have sanctioned pretrial investigation,<sup>163</sup> but practitioners still advise against mentioning that investigation during voir dire.<sup>164</sup> The result is the occasional judge admonishing attorneys for what he perceives to be ethically questionable behavior.<sup>165</sup> By sanctioning and providing this list, however, courts will be saying that this pretrial research is both acceptable and expected.

B. STATES SHOULD IMPLEMENT A “JUROR BILL OF RIGHTS” TO ALLAY PRIVACY CONCERNS

Despite the efficacy of pretrial Internet research, prospective jurors still have legitimate concerns about potential invasions of their privacy.<sup>166</sup> The balancing of these concerns with the effectiveness of the research should result in a nationwide “Juror Bill of Rights,” similar to those that have been proposed or enacted in several states.<sup>167</sup> Such a Bill of Rights would come in the mail with a prospective jurors’ summons and advise the juror about her rights. This disclosure would notify the juror that she had been selected for the jury pool and inform her that her limited personal information has been released to attorneys who are bound by ethical codes and the rules of the court to keep such information confidential. This enclosure would further notify the juror that attorneys for both parties have the right to conduct publicly available Internet searches for relevant information about the juror. Finally, this Bill of Rights

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162. See *supra* Part II.B.

163. See, e.g., *State v. Knerr*, 426 N.W.2d 654, 656 (Iowa Ct. App. 1988) (“There is no doubt that pretrial investigations of prospective jurors are both legal and common.”).

164. See *Hopkins*, *supra* note 9, at 14 (cautioning against “overt reference to a juror’s personal information” that has been discovered through outside research).

165. See, e.g., *Brown*, *supra* note 10.

166. See *supra* notes 64–66 and accompanying text.

167. See, e.g., B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 285 (1996) (showing that a factor in Arizona jury reform was promulgating a “Bill of Rights” for Arizona jurors).

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would provide contact information for the court, and encourage prospective jurors to report attorneys who attempt to contact them through online social media.

This proposed system would have immense benefits for jurors, courts, and the parties themselves. Jurors would feel that their privacy interests are being protected by the court, and the contact information would provide them with an outlet if they feel those privacy rights were being trampled. The court would benefit because with jurors vigilant for privacy-related ethical violations, practitioners would be less likely to cross impermissible boundaries. Finally, the parties would benefit because this previously surreptitious practice would be brought out into the open and officially sanctioned by the courts.

### CONCLUSION

Pretrial Internet research on prospective jurors is now a widespread practice among attorneys. Attorneys have long researched prospective jurors either themselves or through jury consultants, but the Internet has made such research much more cost- and time-effective. Because such research seems antithetical to the system of justice, it implicates several policy and procedural concerns—commentators have argued that it invades juror's privacy, amounts to manipulation of the justice system, and may lead to pretextual strikes for cause.

Ultimately, however, this practice of Internet-based research has many advantages over traditional jury investigation and consulting. Among these are an increased balance between rich and poor parties, jury selection based on actual knowledge instead of stereotype, and an increased success rate in attempts to strike jurors for cause. By acknowledging this pretrial research as an effective means of trial preparation, while maintaining jurors' privacy rights through the proposed Juror Bill of Rights, courts can further this trend towards fairer and more impartial juries.