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## Protecting the Impartial Jury: A Solution of Questions

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## PROTECTING THE IMPARTIAL JURY: A SOLUTION OF QUESTIONS

### INTRODUCTION

God of heaven! have we already under our form of government (which we have so often been told is the best calculated of all governments to secure all our rights) arrived at a period when a trial in a court of justice, where life is at stake, shall be but a solemn mockery, a mere idle form and ceremony to transfer innocence from the gaol to the gibbet, to gratify popular indignation, excited by bloodthirsty enemies!<sup>1</sup>

The tensions between the First Amendment rights of liberty of the press and freedom of expression and those of the Sixth Amendment's guarantee to an impartial jury are not new, but have rather transformed with each new age and advent of technology.<sup>2</sup> As far back as 1807, United States' courts have wrestled with the tension of pretrial publicity and its effects on juror impartiality. In the famed treason trial of former Vice President Aaron Burr,<sup>3</sup> counsel for Burr, Luther Martin,<sup>4</sup> expressed concern that Burr would be unable

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1. *Argument of Luther Martin in the Aaron Burr Trial*, UNIVERSITY OF MISSOURI-KANSAS CITY SCHOOL OF LAW, <http://law2.umkc.edu/faculty/projects/ftrials/burr/martinargument.html> (last visited Jan. 23, 2015).

2. MATTHEW D. BUNKER, *JUSTICE AND THE MEDIA: RECONCILING FAIR TRIALS AND FREE PRESS 1* (Lawrence Erlbaum Assocs. 1997).

3. The "Burr Conspiracy" began with Burr's fall from political grace in the aftermath of his fatal duel with former Secretary of the Treasury, Alexander Hamilton. In need of a new, untapped source of power, Burr turned to the western territories where he gained disreputable and gullible friends as well as funding for his new, largely clouded schemes. Although the truth of Burr's plans has never been fully decided, it has been argued that his aims in amassing funding, supplies, and allies was to take control of a portion of Spanish owned Florida, and combine it with the newly, loosely governed western territories, in order to detach from the United States and create a new state, with himself as its leader. However, before Burr could enact his plans, one of his allies, James Wilkinson, governor of the recently-purchased Louisiana Territory, turned Burr in to President Jefferson, most likely in an attempt to clear his own name. While attempting to flee the United States for Europe in order to escape arrest, Burr was intercepted and brought up on charge of treason. See DAVID S. HEIDLER & JEANNE T. HEIDLER, *OLD HICKORY'S WAR: ANDREW JACKSON AND THE QUEST FOR EMPIRE 1-5* (2003); MARSHALL SMELSER, *THE DEMOCRATIC REPUBLIC: 1801-1815 112-123* (1968).

4. Luther is a recognized figure in American history, although perhaps not as well-known as he should be in the author's opinion. A supporter of American independence, delegate to the 1787 Constitutional Convention who opposed strong central government, defense counsel in attempted impeachment proceedings of Chief Justice Samuel Chase in 1805, and the Maryland

to have a fair trial due to the preconceived biases of the public and potential jurors.<sup>5</sup> In making this argument to Chief Justice Marshall, Luther stated, “I have with pain heard it said that such are the public prejudices against Colonel Burr, that a jury, even should they be satisfied of his innocence, must have considerable firmness of mind to pronounce him not guilty.”<sup>6</sup>

Although the Court’s acquittal of Burr is important for any number of reasons – narrowly defining treason and the refusal of a sitting president to testify or supply documentation to an ongoing trial – Chief Justice Marshall’s response to concerns about the effects of an impartial jury has been extremely influential in the legal field’s understanding of what constitutes an impartial juror.<sup>7</sup> Marshall wrote, “an impartial jury as required by the common law, and as secured by the constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it.”<sup>8</sup> He further noted that it would be foolish for a court of law to expect informed jurors to be without opinions prior to hearing evidence presented to them at trial.<sup>9</sup> The goal, Marshall believed, is that those jurors perform their jury duty while keeping an open mind and allow their decisions to be made on what is presented in trial rather than on a prejudiced opinion obtained from extraneous information gathered outside the confines of the courtroom.<sup>10</sup>

In light of Marshall’s interpretation of jury impartiality, this note will examine the tensions between the First and Sixth Amendments, especially in the context of the ever-present and growing reliance upon technology and the internet as means of communication. Further, it will advocate for a stronger, more effective use of voir dire as a means to combat pretrial publicity in order to uphold the impartiality of the jury. Section I will survey the tensions between the First Amendment’s freedom of speech and press, and the Sixth Amendment’s guarantee of a trial by an impartial jury. Section II will look at media and internet use in America in order to show its widespread, omnipresent nature. In Section III, the focus will be on the effect of pretrial publicity on potential jurors, as evidenced through academic studies,

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Attorney General who argued the landmark *McCulloch v. Maryland* case, Luther’s impact on the American legal system is widespread, yet underappreciated. National Archives and Records Administration, *America’s Founding Fathers: Delegates to the Constitutional Convention, Maryland*, [http://www.archives.gov/exhibits/charters/constitution\\_founding\\_fathers\\_maryland.html](http://www.archives.gov/exhibits/charters/constitution_founding_fathers_maryland.html) (last visited Jan. 23, 2015).

5. Argument of Luther Martin, *supra* note 1; THE AARON BURR TREASON TRIAL 34 (Charles F. Hobson ed., Fed. Jud. Center 2006).

6. Argument of Luther Martin, *supra* note 1.

7. THE AARON BURR TREASON TRIAL 1 (Charles F. Hobson ed., Fed. Jud. Center 2006).

8. *U.S. v. Burr*, 25 F.Cas. 49, 50 (C.C.D. Va. 1807).

9. *Id.*

10. *Id.*

statements from judges who have encountered the problem, and analyses of cases on the subject. Finally, Section IV narrows the scope to examine how these problems have affected Missouri courts and how the State is prepared to handle the future of such misconduct.

### I. TENSIONS BETWEEN THE FIRST AND SIXTH AMENDMENTS

Two of the most valued rights in the United States Constitution's Bill of Rights are the First Amendment's freedom of speech and press and the Sixth Amendment's guarantee of a fair and impartial jury trial.<sup>11</sup> Although these two rights do not necessarily contradict each other, there is certainly a tension between the two when it comes to media coverage of a trial.<sup>12</sup> When does the media's First Amendment right invade and endanger the fair trial rights of a defendant? Should one set of rights be forced to give way to the other?

#### A. *The First Amendment*

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."<sup>13</sup>

The First Amendment has always been a dominating set of rights for Americans. To many, it is "enshrined . . . to facilitate robust debate and discussion essential to democratic self-government. It serves as a bulwark against government encroachment on individual expression. It offers a safe harbour against laws or officials seeking to punish dissenters or silence unpopular views."<sup>14</sup> The freedom of the press in particular is believed to allow for greater security for the citizenry.<sup>15</sup> In fact, America's democratic values dictate that the people's ultimate sovereignty must correlate directly with the freedoms enjoyed by the press.<sup>16</sup> As Tocqueville remarks in *Democracy in America*, "Whenever each citizen is granted the right to govern society, recognition has to be given to his capacity to choose between the different viewpoints which trouble his fellow citizens and to appreciate the different facts which may guide his judgment."<sup>17</sup> Thus the press' liberty encapsulates the individual American's rights to be free from tyranny.

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11. James Landman, *Balancing Act: First and Sixth Amendment Rights in High-Profile Cases* 69 SOC. EDUC. 182, 182 (2005).

12. *Id.*

13. U.S. CONST. amend. I.

14. *Free Speech and Media: Little to 'Like'*, THE ECONOMIST, (December 3, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/12/free-speech-and-social-media>.

15. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 211 (Penguin Books 2003) (1840).

16. *Id.*

17. *Id.*

While the Amendment provides for the freedoms of speech and press, implicit there are also the freedoms to listen and have public access to trials.<sup>18</sup> But what about the public's access to information gathered pretrial? Herein lies the dangerous potential for perspective jurors to develop biases and prejudices before hearing evidence on the matter. One example of pretrial publicity having effects on potential jurors is when evidence is found to be inadmissible ahead of trial.<sup>19</sup> If this evidence is reported on by media outlets, there is great potential for the jury pool to be influenced before they are even chosen for the case.<sup>20</sup>

Courtrooms traditionally have been accessible areas.<sup>21</sup> However, courts have also stated that while reporting garners some First Amendment protections, the Amendment only provides journalists with a degree of access that is equal to that which the general public enjoys.<sup>22</sup> Because of their general accessibility, in order to restrict access, the court must weigh the competing interests.<sup>23</sup> To make a determination about the competing interests, the court assesses the strength of the counter interest and evaluates if those concerns outweigh the constitutional right it seeks to overcome.<sup>24</sup>

When certain highly-valued fundamental rights, like those protected in the First Amendment, are restricted, judges most often apply a strict scrutiny test.<sup>25</sup> Under this test, "First Amendment interests are upheld unless the governmental interest in regulation is compelling, and that interest is achieved in the least restrictive manner."<sup>26</sup> The likely result of the strict scrutiny test is for the First Amendment's interests to prevail over the proposed restriction.<sup>27</sup> But to what result when the competing interest is another highly-valued, fundamental right?

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18. Landman, *supra* note 11, at 183.

19. Landman, *supra* note 11, at 183.

20. Landman, *supra* note 11, at 183.

21. THE FIRST AMENDMENT HANDBOOK, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS 51 (Gregg P. Leslie ed., 7th ed. 2011).

22. *Id.* at 59.

23. *Id.*; BUNKER, *supra* note 2, at 28.

24. BUNKER, *supra* note 2, at 28.

25. BUNKER, *supra* note 2, at 15. The Strict Scrutiny approach originated with the case of *Carolene Products* in 1938 when the Court held that "there may be a narrower scope for the operation of the presumption of constitutionality when the legislation appears on its face to be within the specific prohibition of the Constitution." *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). Thus, when speech and freedom of the press are at issue, the court must engage in a more active judicial review of the encroaching act. BUNKER, *supra* note 2, at 16.

26. BUNKER, *supra* note 2, at 15.

27. BUNKER, *supra* note 2, at 30.

B. *The Sixth Amendment: An Iron Curtain*

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .”<sup>28</sup>

The roots of the Sixth Amendment’s protections, as with most of the other amendments in the Bill of Rights, can be traced both to English common law traditions and to a reaction from British oppression during the colonial period.<sup>29</sup> The Amendment’s protection of a defendant’s right to an impartial jury is a way for the people to provide a more direct check on their government.<sup>30</sup> This is the view of the Amendment’s protections exhibited in the Declaration of Independence.<sup>31</sup>

R. Carter Pittman, a constitutional law scholar and former member of the Georgia Board of Bar Examiners, has analyzed the Sixth Amendment’s important role in political history, from the Glorious Revolution in England in 1688, to the American Revolution in 1776.<sup>32</sup> Under the protections of the Amendment, juries would be composed of ordinary people who lived under the current government, not those who ran the government.<sup>33</sup> Pittman states, “Impartial juries are essential to freedom, just as partial judges or juries are essentials to despotism.”<sup>34</sup> As such, the Amendment stands as an iron curtain between the accused individual’s liberty and the power of the state.<sup>35</sup>

The understanding of a criminal jury trial as a check on government power was further explained in the United States Supreme Court case of *Duncan v. Louisiana*. In that case, Defendant was on trial for battery and sought to have a trial by jury despite a Louisiana state statute that restricted jury trials only to

28. U.S. CONST. amend. VI.

29. *6th Amendment US Constitution – Rights of Accused in Criminal Prosecutions*, U.S. GOV’T PUBL’G OFFICE 1397, 1404, <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-7.pdf> (last visited Jan. 16, 2016).

30. R. Carter Pittman, *The Creation of the Sixth Amendment Right to a Fair Trial*, in *THE BILL OF RIGHTS: THE RIGHT TO A FAIR TRIAL*, 27, 28 (Enid W. Langbert, Esq. ed., 2005). “We are reminded of years spent in dungeons by martyrs to our liberty; of secret trials by servile judges, or partial juries sometimes called from afar and often called from the very household of the tyrant who headed the state . . .” *Id.*

31. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration lists a history of the grievances suffered at the hand of King George III. Among those listed are “For depriving us in many cases, of the benefits of Trial by Jury: For transporting us beyond Seas to be tried for pretended offences.” *Id.*

32. Pittman, *supra* note 30, at 29. Pittman refers to the fact that tyrannical governments had “poisoned the streams of justice.”

33. Pittman, *supra* note 30, at 29.

34. Pittman, *supra* note 30, at 29.

35. Pittman, *supra* note 30, at 31; *see also* NANCY S. MARDER, *THE JURY PROCESS* 14 (Foundation Press 2005) (explaining the significance of juries in allowing citizens to participate in government action).

those offenses punishable by death or imprisonment at hard labor.<sup>36</sup> Despite the state's argument that the Constitution did not require the individual states to grant criminal defendants the right to a jury trial, the Supreme Court found the right to be so fundamental to the concept of justice, that states must afford this protection to criminal defendants.<sup>37</sup>

The Court further discussed at some length the history and necessary purpose that the right to a jury trial has in American jurisprudence.<sup>38</sup> Justice White, writing for the majority, wrote that, "providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."<sup>39</sup> Thus, the Court held that the Sixth Amendment's right to a jury trial in criminal proceedings<sup>40</sup> was extended to the states by the Fourteenth Amendment.<sup>41</sup>

The Sixth Amendment is an overall conglomerate of American values. It combines protection of due process rights with an essential citizenship responsibility.<sup>42</sup> In that capacity, it serves two functions. Firstly, as it is reserved for US citizens, it has often been referred to as a badge, capable of indicating, "who counts and who does not."<sup>43</sup> Historically, jury service was denied to women and African-Americans.<sup>44</sup> For this reason, serving on a jury became one outward way to demonstrate the political struggles and eventual success of these groups in particular.<sup>45</sup> Jury service also provides citizens with a way and means to participate in and understand their democratic government.<sup>46</sup> Because this Amendment combines both a check on tyranny as

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36. *Duncan v. State of La.*, 391 U.S. 145, 146 (1968).

37. *Id.* at 149.

38. *See id.* at 149–157.

39. *Id.* at 156.

40. The Court makes a caveat to this statement – petty offenses do not necessarily warrant this protection. The "possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications." *Id.* at 160.

41. *Id.* at 147.

42. Thomas Jefferson once said, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 2 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 335, 336 (Thomas Jefferson Randolph ed., 1829).

43. NANCY S. MARDER, *THE JURY PROCESS* 13, 14 (Foundation Press 2005).

44. *Id.*

45. *Id.*

46. *Id.* *See generally* TOCQUEVILLE, *supra* note 15, at 315–322. Tocqueville references the political institutional nature of the jury, noting how this system places the control of justice, and by extension, of society in the hands of the people, rather than the political elite. He further remarks on the extraordinary ability of the jury system to educate the people. *Id.* at 321.

well as an important duty of citizens, it too holds a special place in American hearts.

C. *The First Amendment vs. The Sixth: The Competition for Top Billing*

When such fundamental rights as liberty of the press and the right to an impartial jury are in competition, what is the result? The Court discussed this delicate balancing problem in *Sheppard v. Maxwell*. In that case, the Defendant was standing trial for the brutal murder of his pregnant wife.<sup>47</sup> Prior to his trial, the media hounded the defendant and published numerous stories and editorials all attempting to show the defendant's guilt.<sup>48</sup> Once the trial began, the media intensity only gained in strength – the media had designated table space right next to the jury box, were given the names and addresses of the veniremen (which they published), and television news cameras were set up on the steps of the courthouse to capture images of potential jurors as they entered and left the courthouse.<sup>49</sup> The media frenzy was so great that at times it was difficult for witnesses to be heard by the jury and for counsel to raise issues with the judge.<sup>50</sup> Although the trial court did impose a rule prohibiting camera use during the actual substance of the trial, there was no such rule in place to bar pictures and interviews to occur during court recess.<sup>51</sup>

Further, jurors were also regularly exposed to the content of this media as the information gathered by the reporters was then published in that day's papers, to which jurors had access during the trial.<sup>52</sup> Eleven of the twelve jurors also testified during voir dire that they had each read or heard about the case in their local newspapers and television news stations.<sup>53</sup> The only real attempts made by the judge to shield the jurors from this rampage of extrinsic information, was to merely tell the jury to “pay no attention whatever to that type of scavenging. Let's confine ourselves to this courtroom, if you please.”<sup>54</sup>

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Tocqueville says, of the jury experience that it must be “looked upon as a free and ever-open classroom in which each juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes and is taught the law. . . I believe one must attribute the practical intelligence and good political sense of Americans primarily to their long experience of jury service. . .” *Id.* at 320–321.

47. *Sheppard v. Maxwell*, 384 U.S. 333, 336–340 (1966).

48. *Id.* Newspaper reports honed in on the fact that the Defendant refused a lie detector test as well as the fact that his family and friends became very protective of his privacy in order to make it appear that he had something to hide. *Id.* at 338–339.

49. *Id.* at 341–344.

50. *Id.* at 344.

51. *Id.*

52. *Id.* at 345.

53. *Sheppard*, 384 U.S. at 345.

54. *Id.* at 348.



The Court's analysis began by first acknowledging the importance of the responsible press and openness of judicial proceedings.<sup>55</sup> This fundamental principle is rooted in the notion that the press acts as a check and safeguard against miscarriages of justice.<sup>56</sup> Thus, courts have been extremely hesitant to set out sweeping limitations on the press' liberty.<sup>57</sup> However, the Court noted that the press' free range of publicity must not be permitted to alter and destroy the legal processes for which the court is in existence to attend to.<sup>58</sup> Chiefly, the Court seeks to uphold a limitation on the press only to the extent that "jury's verdict must be based on evidence received in the open court, not from outside sources."<sup>59</sup> After examining the totality of the circumstances – including the extensive coverage, the intrusive nature during the trial, and the exposure of jurors to the media information that was never heard on the witness stand – the Court determined that Defendant was denied due process because of the media's effect on the minds of the jurors deciding the case.<sup>60</sup> The Court goes on further to say that while "there is nothing that proscribes the press from reporting events that transpire in the courtroom,"<sup>61</sup> trial judges have a duty to protect a defendant's right to an impartial jury from inherently prejudicial publicity.<sup>62</sup>

Supreme Court Justice Potter Stewart tackled a similar question in *Gannett Co. v. DePasquale*. In that case, two Defendants being prosecuted for second degree murder, grand larceny, and robbery sought to have the press and public barred from attending their trial out of fear that their presence would generate adverse publicity that would hinder their ability to get a fair trial.<sup>63</sup> *Gannett Co.*, who owned newspapers that provided quite an extensive amount of coverage of the crime up to the date of the trial, wrote to the trial judge insisting their reporters' rights to cover the trial.<sup>64</sup>

Justice Potter acknowledged the difficulties of adverse publicity on a defendant's ability to receive a fair trial.<sup>65</sup> He noted that the difficulty is particularly present during pretrial suppression hearings because of the very nature and purpose of those hearings – to screen out evidence that would not

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55. *Id.* at 349–50.

56. *Id.* at 350.

57. *Id.* Especially when "there was 'no threat or menace to the integrity of the trial,' we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism." *Id.*

58. *Id.* at 350, 351.

59. *Sheppard*, 384 U.S. at 351.

60. *Id.* at 352.

61. *Id.* at 362–363.

62. *Id.* at 363.

63. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 374–375 (1979).

64. *Id.* at 375.

65. *Id.* at 378.

be submissible to the jury.<sup>66</sup> The Sixth Amendment's guarantees, Potter writes, are "personal to the accused," and were created for the benefit of the defendant, not the public.<sup>67</sup> Although there are societal interests in public trials as safeguards against government secrecy and oppression, the Supreme Court has found no correlative constitutional right on the part of the public to insist on their inclusion into criminal or civil cases.<sup>68</sup>

The battle between these two amendments has been hard-fought. While both offer significant rights and consideration, it became clear to the courts that they must reach a verdict. Although the legal community "seemed reluctant to inhibit media coverage of the criminal justice system, the consensus view seemed to be that, at some point, the free expression concerns had to give way to the need to preserve a criminal defendant's right to a fair trial."<sup>69</sup>

## II. THE RISE OF TECHNOLOGY USE

The rise and increased use of technology has permeated every aspect of society. People are able to communicate constantly and can find the answer to any question instantly.<sup>70</sup> Improvements in and reliance on technology – particularly internet use – have presented the judicial system with new challenges.<sup>71</sup> This is especially so when dealing with members of a jury who might not even realize that what they are doing is in any way wrong.<sup>72</sup> With the prevalence of technology and communication, is it really reasonable to expect that jurors will refrain from something almost second-nature?

### A. Americans' Internet and Media Use

The internet "changed the way that people got information and shared it with each other, affecting everything from users' basic social relationships to

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66. *Id.*

67. *Id.* at 379–80 (citing *Faretta v. California*, 422 U.S. 806, 848 (1975)); *Id.* at 380.

68. *Gannett*, 443 U.S. at 392.

69. BUNKER, *supra* note 2, at 63.

70. Hillary Hylton, *Tweeting in the Jury Box: A Danger to Fair Trials?*, TIME (Dec. 29, 2009), <http://content.time.com/time/nation/article/0,8599,1948971,00.html>. Former jury consultant and Milwaukee lawyer Anne Reed stated, "Googling for more information is an unconscious habit for most of us." She went on to express a worry that leaving jurors unchecked in their use of Googling information at trials could lead to planting misinformation on the internet. *Id.*

71. *Id.*

72. John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, D1–D3 N.Y. TIMES (Mar. 18, 2009), [http://www.floridasupremecourt.org/decisions/probin/sc10-51\\_AppendixD.pdf](http://www.floridasupremecourt.org/decisions/probin/sc10-51_AppendixD.pdf); *For Modern Jurors, Being on a Case Means Being Offline*, NATIONAL PUBLIC RADIO (June 24, 2013, 4:09 PM), <http://www.npr.org/blogs/alltechconsidered/2013/06/24/195172476/JURORS-AND-SOCIAL-MEDIA>.

the way that they work, learn, and take care of themselves.”<sup>73</sup> To monitor this continued rise and the challenges that accompany it, the Pew Research Center seeks to “be an authoritative source on the evolution of the internet through surveys that examine how Americans use the internet and how their activities affect their lives.”<sup>74</sup> To that end, Pew has collected copious amounts of data and conducted numerous surveys to demonstrate and evaluate internet and media use by Americans since the advent of the internet.<sup>75</sup>

The increased use arguably stems from three waves of technology revolutions.<sup>76</sup> The first wave came in the form of faster internet speeds.<sup>77</sup> Prior to the development and widespread use of broadband, internet users had to rely on slower dial-up connection.<sup>78</sup> In June 2000, for example, 34% of American adults had dial-up access in their homes as compared to only 3% of broadband users.<sup>79</sup> In contrast, as of May 2013, 70% of adults had a broadband connection at home, compared to only 3% who still used dial-up service.<sup>80</sup>

Broadband connections allowed people to spend greater periods of time online.<sup>81</sup> This “always-on connection” changed the way people use the internet. They were now able to use the internet in a more expansive way. As of 2011, American adults reported using the internet for personal communications, looking up general information, using financial services, consumer services, entertainment, job seeking, and school work.<sup>82</sup> This increase in usage, dependent upon high-speed connection, has resulted in the internet becoming an integral part of American life.<sup>83</sup>

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73. *Three Technology Revolutions*, PEW RESEARCH CENTER (2016), <http://www.pewinternet.org/three-technology-revolutions/>.

74. *Public Opinion Polls and Surveys- Resource Guide*, U. S. FL. LIBRARIES (Dec. 8, 2015, 2:18 AM), <http://guides.lib.usf.edu/c.php?g=6187&p=28091>.

75. *Id.*

76. *Three Technology Revolutions*, *supra* note 73.

77. Kathryn Zickuhr & Aaron Smith, *Home Broadband*, PEW RESEARCH CENTER (August 26, 2013), <http://www.pewinternet.org/2013/08/26/home-broadband-2013/>.

78. *Id.*

79. *Id.*

80. *Id.* The United States Department of Commerce, National Telecommunications & Information Administration’s survey assessment confirms the trend in broadband use, by noting that “as of October 2012, 72.4 percent of American households (88 million households) have high-speed internet at home – a 3.8 percentage point increase over the July 2011 figure.” *Household Broadband Adoption Climbs to 72.4 Percent*, NAT’L TELECOMM. & INFO. ADMIN. (2013), <http://www.ntia.doc.gov/blog/2013/household-broadband-adoption-climbs-724-percent>.

81. *Three Technology Revolutions*, *supra* note 73.

82. *Exploring the Digital Nation: America’s Emerging Online Experience*, NAT’L TELECOMM. & INFO. ADMIN. v (June 2013), <https://www.ntia.doc.gov/report/2013/exploring-digital-nation-americas-emerging-online-experience>.

83. *Id.*

The second technology wave arrived in the form of mobile connectivity – in cellphones, smartphones, and tablets.<sup>84</sup> These platforms make information accessible from any place at any time, thus changing the way Americans communicate and how they use their time.<sup>85</sup> As of 2014, 90% of adults have a cellphone, 58% of which have a smartphone, while 42% use a tablet.<sup>86</sup> As of May 2013, 63% of adults with cellphones use their phones to access the internet.<sup>87</sup> This number has doubled since 2009 when only 31% of cellphone owners used the internet from their phones.<sup>88</sup> Furthermore, of those who use their phones to access the internet, 34% rely on their phone for access more so than on a laptop or desktop.<sup>89</sup>

The mobile technological wave has made the ease of access to the internet an important consideration in American life.<sup>90</sup> For example, 44% of adult cellphone owners reported that they sleep with their phones beside their beds to make sure they would not miss any important updates, while 29% claim they could not imagine living without their phone.<sup>91</sup> Internet use via mobile devices has led to an instant gratification culture which permeates into almost every aspect of American life.<sup>92</sup>

The third, and most recent wave of technology, takes the form of social media.<sup>93</sup> These networks have blurred many lines, including the ones between private and public life, as well as being “a consumer of information and a producer of it.”<sup>94</sup> According to Pew’s research, 74% of adults use social networking sites, with 42% using multiple sites.<sup>95</sup> Breaking that down by individual media sites, Pew posits that 18% have a Twitter account, 71% have a Facebook page, 21% use Pinterest, 22% are on LinkedIn and 17% have an

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84. *Three Technology Revolutions*, *supra* note 73.

85. *Three Technology Revolutions*, *supra* note 73.

86. *Mobile Technology Fact Sheet*, PEW RESEARCH CENTER (Oct. 2014), <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/>.

87. Maeve Duggan & Aaron Smith, *Cell Internet Use*, PEW RESEARCH CENTER 2 (Sept. 16, 2013), [http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP\\_CellInternetUse2013.pdf](http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_CellInternetUse2013.pdf).

88. *Id.*

89. *Id.*

90. *Mobile Technology Fact Sheet*, *supra* note 86.

91. *Mobile Technology Fact Sheet*, *supra* note 86.

92. See Christopher Muther, *Instant Gratification is Making us Perpetually Impatient*, THE BOSTON GLOBE, (Feb. 2, 2013), <http://www.bostonglobe.com/lifestyle/style/2013/02/01/the-growing-culture-impatience-where-instant-gratification-makes-crave-more-instant-gratification/q8tWDNGeJB2mm45fQxtTQP/story.html>.

93. *Three Technology Revolutions*, *supra* note 73.

94. *Three Technology Revolutions*, *supra* note 73.

95. Maeve Duggan & Aaron Smith, *Social Media Update 2013*, PEW RESEARCH CENTER (Dec. 30, 2013), <http://www.pewinternet.org/2013/12/30/social-media-update-2013/>.

Instagram account.<sup>96</sup> With such a degree of interconnectivity, it is no wonder that Americans' use of social media and the internet has become almost second nature.<sup>97</sup>

*B. How do We Gather Information?*

Americans' increased use of the internet and social media has had a great impact on how information is disseminated. The American Press Institute has provided research in this area to illustrate that point. The API "conducts research, training, convenes thought leaders and creates tools to help chart a path ahead for journalism in the 21<sup>st</sup> century."<sup>98</sup>

Recently, the API released the results of a study on how Americans get their news.<sup>99</sup> According to their research, the majority of Americans feel that it is easier to keep up with news and current events with the expansion of the digital age.<sup>100</sup> This is evidenced in the frequency and methods used by Americans to get news information. API's study found that 33% of Americans follow news stories throughout the day and 49% of adults say they investigate deeper into stories to which they initially paid attention.<sup>101</sup> The research also revealed the most frequently used devices by which Americans get their news: television (87%), laptops/computers (69%), radio (65%), print sources (61%), and cellphones/tablets (56%).<sup>102</sup> Adults with smartphones are much more likely to get their news from social media and the internet rather than more traditional sources.<sup>103</sup> API's research concluded that the more of these devices a person owns, the more likely they are to enjoy keeping up with the news throughout the day.<sup>104</sup>

API's research also examined the perceived trustworthiness of the sources of their news. While social media is growing in importance in terms of learning news, it remains one of the lowest trusted sources.<sup>105</sup> API reports that "only 15 percent of adults who get news through social media say they have high levels of trust in the information they get from that means of discovery."<sup>106</sup>

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96. *Id.*

97. *Three Technology Revolutions*, *supra* note 73.

98. *About us*, AM. PRESS INST., [http://www.americanpressinstitute.org/about/about-us/?utm\\_content=nav](http://www.americanpressinstitute.org/about/about-us/?utm_content=nav) (last visited Jan. 18, 2016).

99. *How Americans Get their News*, AM. PRESS INST. (March 17, 2014, 3:00 PM), <http://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news/>.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *How Americans Get Their News*, *supra* note 99.

106. *How Americans Get Their News*, *supra* note 99.

## III. EFFECT OF PRETRIAL PUBLICITY ON POTENTIAL JURORS

“I remember one of those sorrowful farces in Virginia, which we call a jury trial. A noted desperado killed Mr. B., a good citizen, in the most wanton and cold-blooded way. Of course, the papers were full of it; all men capable of reading read about it; and, of course, all men not deaf and dumb and idiotic talked about it.”<sup>107</sup>

The effect of pretrial publicity on jurors and the public at large has long been a concern. Former Chairman of the FCC and law professor Newton N. Minow, continues to bolster the position Mark Twain espoused in the above quote from his 1872 classic, *Roughing It*.<sup>108</sup> Newton states, “I think it’s madness, in today’s mass media society, to search for jurors who know nothing.”<sup>109</sup> Newton explains his position by using the example of Megan’s Law.<sup>110</sup> The law resulted from a sad case involving a seven-year old girl named Megan who was abducted, sexually abused, and murdered.<sup>111</sup> The suspect was a recently released convict with a prior sexual abuse record.<sup>112</sup> The community lobbied the New Jersey State Legislature to pass a law requiring any person convicted of past sexual assaults to notify the community in which they reside.<sup>113</sup> At trial of the man charged with Megan’s murder, potential jurors were asked during voir dire whether they understood what Megan’s Law was.<sup>114</sup> Jurors who responded affirmatively, were sought to be stricken from empaneling because defense counsel argued they would incorrectly associate the defendant with those facts.<sup>115</sup> According to Newton, at the time of the trial, every person in that community knew Megan’s Law, meaning that it would be nearly impossible to find twelve ignorant jurors.<sup>116</sup> Newton concluded, with

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107. MARK TWAIN, *ROUGHING IT* 223 (Reader’s Digest ed., Reader’s Digest Association, Inc. 1994) (1872).

108. *Id.* Mark Twain details a jury trial he alleges to have witnessed in Virginia. *Id.* As he explains, the jury trial was invented by Alfred the Great in a scramble, yet it has become “the most ingenious and infallible agency for *defeating* justice that human wisdom could contrive.” *Id.* He goes on to claim that an impartial jury may have been achievable in Alfred the Great’s day and age, but “in our day of telegraph and newspapers his plan compels us to swear in juries composed of fools and rascals, because the system rigidly excludes honest men and men of brains.” *Id.* Twain expresses his disdain for the jury system for promoting ignorance and perjury instead of honesty and intelligence by saying, “it is a shame that we must continue to use a worthless system because it was good a thousand years ago.” *Id.* at 224.

109. Newton N. Minow, *Informed Jurors Can be Impartial*, in *THE BILL OF RIGHTS: THE RIGHT TO A FAIR TRIAL* 92, 94 (Enid W. Langbert, Esq. ed., 2005).

110. *Id.* at 93–4.

111. *Id.* at 93.

112. *Id.*

113. *Id.* at 94.

114. *Id.*

115. Minow, *supra* note 109, at 94.

116. Minow, *supra* note 109, at 94.

reference to Chief Justice Marshall's statements in the Aaron Burr case from 1807, that there is a distinction between an impartial juror and an impartial jury.<sup>117</sup> He stated that the purpose of having twelve people on a jury is "not to find 12 people who are all the same," but to find 12 people who will fairly hear evidence presented.<sup>118</sup>

Media today is composed of stories produced around the clock, both for the public's benefit and for their entertainment.<sup>119</sup> With the advances in technology and internet communication, the concern for tainting the impartiality of jurors has heightened. The concern is founded in the fact that high profile trials generate top ratings for news outlets.<sup>120</sup> The potential for sensationalizing criminal trials is great, as media publicity can create biases within a jury.<sup>121</sup>

Just as in the example of Megan's Law with widespread knowledge of its particulars, how do judges safeguard the impartiality of a jury when potential jurors today have become so exposed to pretrial media and extraneous information?

#### A. *Studies on Exposure to Pretrial Media*

To help courts to assess when pretrial publicity risks reach compelling levels, several studies have been conducted that help explain how the media can influence decision-making of a panel of jurors. Prior to instant media access via the internet, researchers conducted surveys and studies focused on information gained from newspapers and news presented on the television, as evidenced in Dexter, Penrod & Otto's 1994 study.<sup>122</sup> This study, done just around the advent of personal computers, summarized several prior studies and distinguished them from their own findings.<sup>123</sup> One such study, conducted by Costantini and King in 1980-1981, assessed the relationship between the quantity of information a subject could recall about a case and their level of prejudgment.<sup>124</sup> They found that those with more knowledge about a particular

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117. Minow, *supra* note 109, at 94.

118. Minow, *supra* note 109, at 92, 94.

119. Michelle-Ramos Burkhart, *Overconsumption: Our Media, Our Jurors, and Its Impact on Our Verdicts*, DELIBERATIONS (Nov. 4, 2013), <http://jurylaw.typepad.com/deliberations/2013/11/overconsumption-our-media-our-jurors-and-is-impact-on-our-verdicts.html>; We live in a "media-saturated society," Minow, *supra* note 109, at 93.

120. Minow, *supra* note 109, at 93.

121. Minow, *supra* note 109, at 93-94.

122. Amy L. Otto, Steven D. Penrod, & Hedy R. Dexter, *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 LAW & HUM. BEHAV. 453, 453-455 (1994).

123. *Id.*

124. *Id.*

case were more likely to have a preconceived bias in favor of the prosecution.<sup>125</sup>

Another approach to studying pretrial publicity effects is jury simulation, whereby a mock trial is set up and the jurors are shown a variety of publicity specially created for the study.<sup>126</sup> In one jury simulation conducted in 1992 by Dexter, Cutler, and Moran, participants were shown various pretrial publicity for a week before being shown a video of a mock trial.<sup>127</sup> The study concluded that juries composed of those who were exposed to negative publicity about the trial beforehand were more likely to convict the defendant even in the face of a thorough voir dire process.<sup>128</sup>

However, as Dexter et al. state, the research conducted in this field is not without its faults and inconclusive results. For that reason, they urge a study of how pretrial publicity influences the decision-making process of juries, rather than merely the formation of biases before trial begins.<sup>129</sup> To achieve this, researchers created a trial simulation in which groups of six to twenty participants were given instructions to treat this as realistically as possible to actual jury service and were given differing types of media concerning the case to read.<sup>130</sup> After reading “newspaper articles” on subjects ranging from prior police records of the defendant to statements made by the defendant’s neighbor, participants were shown a video of the trial, then asked to discuss their verdicts with the researchers.<sup>131</sup> The study concluded that pretrial publicity certainly has an impact on jurors’ pretrial judgments concerning the case.<sup>132</sup> It also found that while evidence produced at trial has the ability to lessen the influence of the pretrial publicity, it cannot eliminate the effects altogether.<sup>133</sup>

#### B. *Traditional Solutions to Juror Impartiality – Jury Instructions & Admonitions*

Internet users have the ability to locate information or post a thought within seconds, and considering the nature and degree of American internet use, it is no surprise that social media has “wreak[ed] havoc in the jury box.”<sup>134</sup> This havoc is encountered when jurors relay thoughts and information learned

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125. *Id.* at 455.

126. *Id.*

127. *Id.* at 455–456.

128. Otto et al., *supra* note 122 at 456.

129. Otto et al., *supra* note 122 at 457.

130. Otto et al., *supra* note 122 at 458.

131. Otto et al., *supra* note 122 at 458.

132. Otto et al., *supra* note 122 at 466.

133. Otto et al., *supra* note 122 at 466.

134. Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 2, 8 (2012).



during their jury service through social media.<sup>135</sup> This not only aggravates judges, but it also calls into question the impartiality of jurors.<sup>136</sup>

Instilling the importance of an impartial jury is a crucial responsibility of the trial judge.<sup>137</sup> In the life of a juror, there exist several occasions where the trial judge should execute this duty. Traditionally, and most commonly, trial judges have taken their opportunity in the form of jury instructions and admonitions to the panel both before the trial begins and at the close of evidence.<sup>138</sup> Research shows that over 80% of judges will issue a model instruction about refraining from social media or other communication in both civil and criminal trials.<sup>139</sup> Furthermore, almost 65% of judges who do issue such an instruction do so both before the trial process starts as well as prior to deliberations.<sup>140</sup> The United States Judicial Conference Committee on Court Administration and Case Management (CACM) has developed the following model jury instructions to be given both before and after the presentation of the case:

[Before Trial:] . . . Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of other social networking websites, including Facebook, My Space, LinkedIn, and Youtube.

[At the Close of the Case:] During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or

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135. *Id.*

136. *Id.* at 9.

137. *State v. Barton*, 998 S.W.2d 19, 25 (Mo. 1999). “Control of voir dire is within the discretion of the trial judge; only abuse of discretion and likely injury justify reversal.” *Id.* See also *Mu’Min v. Virginia*, 500 U.S. 415, 429 (1991).

138. *St. Eve & Zuckerman*, *supra* note 134, at 25.

139. MEGHAN DUNN, JURORS’ USE OF SOCIAL MEDIA DURING TRIALS AND DELIBERATIONS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 6 (Fed. Jud. Ctr., ed., Nov. 22, 2011).

140. DUNN, *supra* note 139.

Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.<sup>141</sup>

Some 67% of judges issued a jury instruction that deviated from the model set forth by CACM.<sup>142</sup> The Eighth Circuit, for example, adopted this model jury instruction concerning the duties of jurors in criminal trials,

During the trial, while you are in the courthouse and after you leave for the day, do not provide any information to anyone by any means about this case. Thus, for example, do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or Website such as Facebook, MySpace, YouTube, or Twitter, or any other way to communicate to anyone any information about this case until I accept your verdict.

Do not do any research – on the Internet, in libraries, in the newspapers, or in any other way – or make any investigation about this case on your own. Do not visit or view any place discussed in this case and do not use Internet programs or other device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge.<sup>143</sup>

The purpose of these rules is to attempt to impart upon the jury the significance of the integrity of the trial process.<sup>144</sup> Deciding the case based upon information obtained outside of the courtroom denies parties their right to a fair trial.<sup>145</sup>

In response to the growing prominence of the problem and the varied responses of judges, Judge Amy J. St. Eve, a United States District Court Judge in the United States District Court for the Northern District of Illinois,<sup>146</sup> has written several articles detailing methods used by courts to help curb the effects of social media in the courtroom. According to one of St. Eve's informal jury surveys, several jurors reported that the reason why they did not yield to the temptation to use social media during the trial or deliberations was

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141. JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (Jun. 2012), <http://www.uscourts.gov/file/3159/download>.

142. DUNN, *supra* note 139, at 7.

143. JUDICIAL COMMITTEE ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT: *1.08 Conduct of the Jury* 19 (2014), [http://www.juryinstructions.ca8.uscourts.gov/Manual\\_of\\_Model\\_Criminal\\_Jury\\_Instructions.pdf](http://www.juryinstructions.ca8.uscourts.gov/Manual_of_Model_Criminal_Jury_Instructions.pdf).

144. *Id.*

145. *Id.* at 20.

146. *See* St. Eve & Zuckerman, *supra* note 134, at 1.

due at least in part to the judge's instruction regarding the prohibition on social media use.<sup>147</sup> Judge St. Eve believes that prophylactic measures, especially jury instructions, can "effectively mitigate the risks of juror misconduct associated with social media."<sup>148</sup>

Judges also rely on other means to try to curb the effects of technology use by jurors in the courtroom. Some courts have required jurors to sign a compliance statement or pledge to refrain from social media use, while some have confiscated electronic devices during the trial or deliberations and still others have elected to instruct jurors about the prohibition of social media usage multiple times throughout the trial process.<sup>149</sup> Overall, these preventative measures have been only somewhat successful.<sup>150</sup>

### C. *A Solution of Questions – Voir Dire*

While current efforts in the form of jury instructions may yield some success, perhaps the strongest solution lies in a more vigorous voir dire process. It seems easy to take a teleological approach to the problem and simply reminisce about a simpler time in the past when communities were not so interconnected and plugged in. However, the problem is as old as the press. There have always been means of communicating and distributing information about which a community concerns itself. As technology has advanced, this preoccupation with being "in the know" has only escalated. Today's world is so saturated and dependent upon technology – from WiFi in our homes and offices, to smartphones and tablets that allow us to communicate with anyone, anytime, anywhere – that its use is almost compulsive. How then, can we remotely expect our jurors to refrain from the perpetual bombardment of news and information when it has become a force of habit? Perhaps the most effective way to ensure juror impartiality is not with old method jury instructions, but in effectively choosing which jurors to empanel.

Voir dire is the "preliminary examination of a prospective juror by judge or lawyer. . . Loosely, the term refers to the jury-selection phase of a trial."<sup>151</sup> The purpose of the process is "to determine whether they are qualified, and competent, and can act impartiality."<sup>152</sup> In a criminal case, the purpose of voir

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147. St. Eve & Zuckerman, *supra* note 134, at 21–22.

148. St. Eve & Zuckerman, *supra* note 134, at 24.

149. St. Eve & Zuckerman, *supra* note 134, at 20.

150. St. Eve & Zuckerman, *supra* note 134, at 24; Anita Ramasastry, *Why Courts Need to Ban Jurors' Electronic Communications Devices*, FINDLAW, Aug. 11, 2009, <http://writ.news.findlaw.com/ramasastry/20090811.html>.

151. *Voir Dire*, BLACK'S LAW DICTIONARY (9th ed. 2009).

152. 50A C.J.S. *Juries* § 474 (2015).

dire is to ensure that a defendant's constitutional right to a fair trial by an impartial jury is upheld.<sup>153</sup>

The jury selection process is such a crucial step in ensuring a fair jury trial, yet it is often one of the poorest utilized segments. This is attributed the inadequacy of attorney performance, the reluctant disappointment of federal judges, and the distaste of the process by jurors.<sup>154</sup> In a series of questionnaires drafted by STARR and used at CLE seminars between 1997 and 2000 in Arizona, judges, prospective jurors, and trial lawyers were asked to name their concerns with the voir dire process.<sup>155</sup> Judges' top concerns included the fact that lawyers tended to preach during the allotted time rather than determining which of the panel were unqualified; it wasted court time; lawyers were not prepared to ask the right questions and even when they did ask relevant questions they were unable to effectively process the answers they received.<sup>156</sup> Prospective jurors stated that they were concerned by the fact that lawyers do not seem to listen to the potential jurors; lawyers are perceived to pick on the jurors they do not like and belittle them; and the questions asked by the lawyers invade privacy of the potential jurors.<sup>157</sup> Finally, trial lawyers showed concern that the time allotted for questioning was too short to be helpful; opposing counsel wastes time trying to bond with prospective jurors; and prospective jurors lie on their questionnaires and offer untrustworthy answers during voir dire.<sup>158</sup>

Interestingly, all three surveyed groups also listed that the voir dire process that it is too boring.<sup>159</sup> This is because lawyers talk too much during the questioning.<sup>160</sup> The ideal time allotment would be a 30/70 split – lawyers would speak only 30% of the time, allowing potential jurors to respond to questions and express their views for 70% of the time.<sup>161</sup> If this balance is not met, the wrong questions – the questions that do not seek information that would help in determining qualified jurors – are being asked.<sup>162</sup>

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153. *Id.*

154. Rachel Harris, *Questioning the Questions: How Voir Dire is Currently Abused and Suggestions for Efficient and Ethical Use of the Voir Dire Process*, 32 J. LEGAL PROF. 317, 320–322 (2008).

155. V. HALE STARR & MARK MCCORMICK, JURY SELECTION 18-6 (4th ed. 2009).

156. *Id.*

157. *Id.*

158. *Id.* at 18-7.

159. *Id.* at 18-6–18-7.

160. *Id.* at 18-7.

161. STARR & MCCORMICK, *supra* note 155, at 18-7.

162. STARR & MCCORMICK, *supra* note 155, at 18-7.

Once the pool of potential jurors has been brought into the courtroom, the jury selection process begins.<sup>163</sup> After a brief introduction by the trial judge of the type of case, the judge and the lawyers may proceed with their questioning.<sup>164</sup> While there is no statutory or judicially created test for determining impartiality of jurors, the voir dire process seeks to determine, through series of targeted questions, the possible presence of impartial jurors.<sup>165</sup> A liberal attitude should be taken by judges so that as long as the scope of the questioning corresponds with the purpose of uncovering prejudices or biases so as to construct an impartial jury, the questions will be permitted.<sup>166</sup>

Although voir dire has been used, unwisely, more as a type of preliminary opening statement,<sup>167</sup> the more appropriate purpose of the process is to obtain “information, information, information.”<sup>168</sup> It is important for trial lawyers to elicit information regarding the potential for partiality, analytic abilities, and group dynamics in order to ensure the fairness of a trial.

Discovering which jurors can actually be impartial and which have insurmountable prejudices is the “single most important factor determining the outcome of a case within the control of the trial lawyers.”<sup>169</sup> The most effective way to procure such information is through open-ended questions.<sup>170</sup> Open-ended questions allow the individual to go into more detail about their own experiences and attitudes and therefore will be of more use than a simple yes or no answer.<sup>171</sup> Questions like, “what do you do at work?” and “tell me about your views on punitive damages,” will not only provide information about the

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163. *How the Courts Work Jury Selection*, AM. BAR ASS'N, [http://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/juryselect.html](http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect.html) (last visited Jan. 8, 2016).

164. *Id.* “The court may examine prospective jurors or may permit the attorneys for the parties to do so.” FED. R. CRIM. P. 24(a)(1). There is an analogous rule allowing either the judge or the lawyers to conduct voir dire in civil cases as well. FED. R. CIV. P. 47(a).

165. 50A C.J.S. *Juries* § 474 (2015).

166. *State v. Ousley*, 419 S.W.3d 65, 73 (Mo. 2013). The Missouri Supreme Court reaffirmed the principle from *State v. Clark*, 981 S.W.2d 143, 146 (Mo. 1998) that a sufficient voir dire is included in the defendant’s right to a fair and impartial jury. *Id.* See also *State v. Granberry*, 484 S.W.2d 295, 299 (Mo. 1972).

167. *Harris*, *supra* note 154, at 322. Using voir dire to inappropriately influence jurors, while it wastes court time and annoys judges and jurors alike, could also violate the Professional Rules of Conduct that govern lawyers. See MODEL RULES OF PROF’L CONDUCT R. 3.2; MODEL RULES OF PROF’L CONDUCT R. 3.4; MODEL RULES OF PROF’L CONDUCT R. 3.5.

168. STARR & MCCORMICK, *supra* note 155, at 18-9.

169. MARDER, *supra* note 43, at 67; STARR & MCCORMICK, *supra* note 155, at 18-15.

170. MARDER, *supra* note 43, at 67; STARR & MCCORMICK, *supra* note 155, at 18-15; Kenneth M. Mogill & William R. Nixon, Jr., *A Practical Primer on Jury Selection*, 65 MICH. B.J. 52, 54 (1986).

171. Jeffrey T. Frederick, *Effective Voir Dire*, 16 COMPLEAT L. 26, 26-28 (1997).

individual's opinions, but will also allow jurors to open up to the process in general.<sup>172</sup> Avoiding questions that encourage jurors to look good is also essential.<sup>173</sup> Jurors, like all people, are reluctant to admit that they would have trouble being fair and impartial.<sup>174</sup> Asking the question, "Do you believe you could be a fair and impartial juror," is a useless question. It provides little insight into the juror's frame of mind and only invites a predictive answer in the affirmative.<sup>175</sup>

The concern over identifying prejudices due to pretrial publicity and exposure to extraneous information during voir dire was raised famously in *Mu'Min v. Virginia*. Defendant was a convicted murderer serving a 48-year prison sentence when, during his fifteenth year, he was transferred to work detail at the Virginia Department of Transportation.<sup>176</sup> While there, Defendant escaped briefly and went to a nearby shopping center where he murdered a storeowner.<sup>177</sup> During the months leading up to his trial, numerous newspaper articles were written about the pending case and detailed the defendant's prior criminal record as well as facts about the investigation of the murder.<sup>178</sup> The trial court declined to utilize any of the defense counsel's proposed questions during voir dire that related to pretrial publicity.<sup>179</sup> Instead, the trial judge simply asked generic questions to gauge whether any of the panel members had prior knowledge of the case.<sup>180</sup>

Despite the seemingly cursory questioning, the Supreme Court held that this was sufficient.<sup>181</sup> While questions aimed at discerning the source and content of the pre-trial publicity would be helpful, helpfulness is not enough to constitutionally compel an inquiry into the specific content of the sources.<sup>182</sup> The Court found that unless the amount and intrusiveness of pretrial publicity reached severe levels, voir dire is not constitutionally required to delve into the

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172. *Id.* at 26.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Mu'Min v. Virginia*, 500 U.S. 415, 418 (1991).

177. *Id.*

178. *Id.*

179. *Id.* at 420.

180. *Id.* at 420. The trial judge did not ask about the source or content of the prior knowledge. Instead, he asked the following questions: "Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?" and "... In view of everything you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?" *Id.*

181. *Mu'Min*, 500 U.S. at 431.

182. *Id.* at 425.

content of the publicity.<sup>183</sup> The voir dire process is left chiefly to the discretion of the trial court as gatekeeper of fair trials.<sup>184</sup>

Voir dire also provides the opportunity to question the potential jurors regarding their “analytic ability and tendency toward authoritarianism.”<sup>185</sup> An individual’s analytic ability is a sought-after trait because it helps an individual make important distinctions and assists in understanding complex issues.<sup>186</sup> On the other hand, individuals with a tendency toward authoritarianism are less valued on juries because they are more likely to make up their minds early on in the presentation of evidence and less likely to accept the presumption of innocence.<sup>187</sup>

Another key element to search for on voir dire is that of the group dynamic – understanding what role each individual juror is likely to play.<sup>188</sup> This requires attorneys to identify potential leaders, followers, “fillers,” negotiators, and those able to withstand pressure to conform through both personality and status.<sup>189</sup> For example, leaders may be identified via social interaction or vocation, while the followers may be identified as those less forthcoming in their decisiveness.<sup>190</sup> The individuals who will simply fill the position are likely the most silent during the voir dire process and are likely to go along with the majority.<sup>191</sup>

Negotiators – individuals identified by their pride in considering all perspectives – will play an important role in deliberation as they will be able to initiate compromise and cohesion.<sup>192</sup> Finally, those with the ability to fiercely hold onto their opinion should be approached with caution and may be identified by their disdain for authority and pride in nonconformity.<sup>193</sup> It is

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183. *Id.* at 428; MARDER, *supra* note 43, at 73. *See* *Irwin v. Dowd*, 366 U.S. 717 (1961) for an example of a “severe level” of pretrial publicity. In that case, pretrial publicity consisted of “a barrage of newspaper headlines, articles, cartoons and pictures . . . during the six or seven months preceding his trial . . . newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and . . . the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents.” *Irwin*, 366 U.S. at 725.

184. *Mu’Min*, 500 U.S. at 431. *See also Ex parte Spies*, 123 U.S. 131, 179 (1887) (explaining that a trial court’s determination of juror partiality ought not to be set aside unless “error is manifest” in the decision).

185. Kenneth M. Mogill & William R. Nixon, Jr., *A Practical Primer on Jury Selection*, 65 MICH. B.J. 52, 56 (1986).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 56–57.

190. *Id.* at 56–57.

191. Mogill & Nixon, *supra* note 185, at 57.

192. Mogill & Nixon, *supra* note 185, at 57.

193. Mogill & Nixon, *supra* note 185, at 57.

crucial for attorneys to pay attention to and cultivate a suitable group dynamic in order to enhance the probability of receiving an unbiased consideration at trial.<sup>194</sup>

After the completion of questioning, either lawyer may request that a specific juror be excused “for cause,” meaning the potential juror had a conflict of interest, or the party had a valid reason for seeking dismissal.<sup>195</sup> In addition, each party may exercise a limited amount of peremptory challenges.<sup>196</sup> In contrast to for cause challenges, a peremptory challenge “need not be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex.”<sup>197</sup> Both challenges allow both parties to select the most impartial jury in order to satisfy the right to a fair trial.<sup>198</sup>

#### IV. IN MISSOURI

The issues surrounding the exacerbation of tensions between the First and Sixth Amendments by both pretrial publicity and other extraneous information made accessible by increased technology use are not confined to federal courts or distant locales.<sup>199</sup> By examining how Missouri courts have approached these challenging issues, one is able to grasp the difficulty in reigning in the misconduct.

##### A. Avoiding “Prejudicial Haste”<sup>200</sup>: *State v. Mayfield*

Recently, Missouri courts had to address the issue of publicity introducing new evidence into the minds of jurors in the case of *State v. Mayfield*. Defendant Mayfield was charged with twelve counts of illicit sexual conduct with minors in 2007.<sup>201</sup> At the close of the presentation of evidence, the jury began its deliberations on a Thursday afternoon.<sup>202</sup> After almost nine hours, the jury had not yet reached a decision and requested a recess over the Veterans’ Day weekend.<sup>203</sup> When the jurors reconvened, they were asked if any had been

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194. Mogill & Nixon, *supra* note 185, at 57.

195. *How the Courts Work*, *supra* note 163.

196. In a federal civil case, each side has three peremptory challenges. FED. R. CIV. P. 47(b); 28 U.S.C. § 1870 (2015). In a criminal case, the number of challenges depends on the type of crime involved. FED. R. CRIM. P. 24(b).

197. *Challenge* BLACK’S LAW DICTIONARY (9th ed. 2009).

198. *See How the Courts Work*, *supra* note 163.

199. 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, 325 (2010).

200. *State v. Mayfield*, 220 S.W.3d 422, 426 (Mo. Ct. App. 2007).

201. *Id.* at 423.

202. *Id.* at 424.

203. *Id.*



exposed to information in the media concerning the present case, to which six jurors responded affirmatively.<sup>204</sup>

The trial judge conducted a thorough debriefing of each juror and concluded that only two of the six had been made aware of new information not presented at trial.<sup>205</sup> The two jurors admitted to watching a television news story about Mayfield's prior convictions and prison sentences.<sup>206</sup> However, after questioning the jurors, the judge was satisfied with the jurors' statements that they would not allow the news story to affect their own deliberations.<sup>207</sup>

After Mayfield was convicted by the jury and his motion for a mistrial was denied, he appealed his conviction on a theory of being unfairly prejudiced by the news story two of the jurors had watched.<sup>208</sup> Although the Court acknowledged that the jurors should not have watched the news story, the Court found that their exposure was not sufficiently prejudicial to justify overturning Mayfield's conviction.<sup>209</sup>

They reached this decision in examining the trial judge's debriefing of the potentially biased jurors.<sup>210</sup> Because they did not share the new information with other jurors, assured the judge that they would not allow that information to affect their deliberations, and because there was substantial deliberations prior to the jurors learning the new information, appellate court did not find the jury's deliberations to be tainted.<sup>211</sup>

*B. The "Ubiquitous Addiction"*<sup>212</sup>: *Ross-Paige v. St. Louis Metropolitan Police Department*

The issue of Googling and Wikipedia use during jury deliberations was tackled by the Missouri judiciary in the case of *Ross Paige vs. the St. Louis Metropolitan Police Department*.<sup>213</sup> Ross-Paige filed suit against the Police Department for sexual harassment and retaliation following the filing.<sup>214</sup> Following the jury's deliberations, they found against Ross-Paige on her claim

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204. *Id.*

205. *Id.*

206. *State v. Mayfield*, 220 S.W.3d 422, 424 (Mo. Ct. App. 2007).

207. *Id.*

208. *Id.* at 424. The news story Jurors Windsor and Eirvin watched revealed that Mayfield had previously been convicted and sentenced for similar crimes – assaults on two minor children. Furthermore, the story referred to Mayfield as a “sexual predator.”

209. *Id.* at 425.

210. *Id.*

211. *Id.* at 425–26.

212. *Ross-Paige v. St. Louis Metropolitan Police Department*, No. 1122-CC10917, slip op. at 11 (Mo. Cir. 2014).

213. *Id.* at 8–9.

214. *Id.* at 1.

of discrimination, but in favor of her claim of retaliation.<sup>215</sup> The jury awarded Ross-Paige \$300,000 in damages and \$7,200,000 in punitive damages.<sup>216</sup>

Facing such a large judgment, the Police Department filed motions both for judgment notwithstanding the verdict and for a new trial.<sup>217</sup> The Court quickly dismissed with the motion notwithstanding the verdict and moved on to consider the motion for a new trial.<sup>218</sup> The motion for a new trial was based, in large part, on the allegation of juror misconduct during deliberation.<sup>219</sup> The conduct the defendant referred to was the “gathering of extrinsic evidence concerning matters under deliberation.”<sup>220</sup>

In this case, the juror used his cellphone to access Google in order to find a Wikipedia article that defined ‘punitive damages’.<sup>221</sup> When the juror was questioned about his conduct, he stated that he had not adequately understood the meaning of punitive damages when the jury was instructed to deliberate on the matter.<sup>222</sup>

The Court unequivocally stated that the juror’s conduct was wrong.<sup>223</sup> Throughout the trial, the Court repeatedly advised the jury that they should not do any outside research of their own about the issues of the case, nor should they use the internet or other forms of communication in relation to the matters before them.<sup>224</sup> Furthermore, the Court discussed its concerns about the danger of using electronic communication in the deliberation process.<sup>225</sup> Extrinsic information found online can produce incorrect and prejudicial information that could undermine the entire trial process.<sup>226</sup>

Despite the Court’s admonition of “such knucklehead juror misconduct,” it found there to be no prejudice in the matter and dismissed the motion for a new trial.<sup>227</sup> It reached this decision after considering whether the jury’s decision was based on information they heard presented in the trial or whether it was reached based on information gained outside the confines of the courtroom.<sup>228</sup> The Court recognizes the naivety of “hermetically sealed, antiseptically cloistered, and totally immune” jurors who would be able to set aside “stray

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215. *Id.* at 2.

216. *Id.*

217. *Id.*

218. *Ross-Paige*, No. 1122-CC10917 at 4.

219. *Id.*

220. *Id.* at 4–5.

221. *Id.* at 8.

222. *Id.* at 9–10.

223. *Id.* at 10.

224. *Ross-Paige*, No. 1122-CC10917 10–11.

225. *Id.* at 12.

226. *Id.*

227. *Id.* at 11–12.

228. *Id.* at 13.

comments in the halls of the courthouse, prattle around the dinner table at home, or public policy opinions blathered in the news media.<sup>229</sup> Once the Court was satisfied that the ultimate decision of the jury was not inconsistent with the information presented in trial, they found that the juror's misconduct did not warrant setting the verdict aside.<sup>230</sup>

C. *J.T. ex rel. Taylor v. Anbari*

The Court of Appeals for the Southern District of Missouri had to weigh in on the issue of social media use by jurors during trial in the case of *J.T. ex rel. Taylor v. Anbari* on January 23, 2014.<sup>231</sup> The case involved the failed diagnosis and negligent treatment of petitioner's mother.<sup>232</sup> After trial, the jury returned a verdict in favor of Dr. Anbari and the Taylors appealed the decision, in part, on the grounds of juror misconduct.<sup>233</sup> During the trial, one juror, Doenning posted such comments to his Facebook as: "Reporting for jury duty – at Greene County Judicial Facility," "Civic duty fulfilled and justice served. Now where's my cocktail ? ? ? ?"<sup>234</sup>

The Court found the juror's comments on social media did not warrant a reversal of the jury's verdict. In reaching that decision, the Court's analysis focused on the balance between avoiding the appearance of bias, and the reality of living in a technologically-entrenched society. In support of avoiding bias, the Court stated that the "purpose of the rule against communications between jurors and third parties is to prevent the jury from receiving information about the case that is not part of the evidence in record."<sup>235</sup> To ensure that even the appearance of impartiality is avoided, the court should engage in a fact specific inquiry into the impartiality of the juror.<sup>236</sup> Here, the Court noted that the juror's comments were not related to the specifics of the case, but rather were more akin to what he ate for lunch.<sup>237</sup>

The Court also posits a rather realistically-focused dicta concerning the modern age. They note,

We now live in an age of ubiquitous electronic communications. To say the comments in this case, which simply informed people Doennig was serving jury duty, were improper simply because they were posted on Facebook would

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229. *Id.*

230. *Ross-Paige*, No. 1122-CC10917 at 12.

231. *Ex rel. Taylor*, 442 S.W.3d 49, 49 (Mo. Ct. App. 2014). Although this was a civil case, the issue of juror misconduct via social media is no different from the applicable analysis in criminal cases.

232. *Id.* at 52.

233. *Id.*

234. *Id.* at 58.

235. *Id.*

236. *Id.*

237. *Ex rel. Taylor*, 442 S.W.3d at 58–59.

be to ignore the reality of society's current relationship with communication technology. This can be seen by looking at the content of these messages. If they were communicated to a person face-to-face, they would not be improper. The comments in this case were more similar to those that would be involved when a person informed his or her supervisor or co-workers they would not be at work because they had jury duty.<sup>238</sup>

By taking this approach, the Court was able to weigh the need for combatting impartiality with the reality that technology and social media are omnipresent.<sup>239</sup> As a result, the Court found that Juror Doenning's Facebook posts were sufficiently limited and did not divulge any case details, such that, despite his failure to abide by the Court's instructions, it did not warrant the verdict's reversal.<sup>240</sup>

#### V. OBSERVATIONS AND CONCLUSIONS ON MISSOURI'S APPROACH

These presented cases demonstrate three importantly related subcategories of issues raised by the tensions between the First and Sixth Amendments. The courts each shy away from setting a bright line rule and opt instead for a fact specific inquiry. This is wise given the numerous ways in which this issue could affect jury deliberations – from Googling information, to making phone calls during deliberations, to speaking to media about the case. The courts have each used the approach of examining whether the information jurors obtained outside of the evidence presented sufficiently tainted their ability to decide a case. The *Anbari* case gives the best discussion of realistic approach to this problem.

Weighing the importance of avoiding even the appearance of impartiality against the omnipotence of internet accessibility allows the court to discuss its abhorrence of this type of jury misconduct while still recognizing that it does not necessarily warrant reversal in every case. As evidenced in previously discussed studies and writings, it is clear that courts are concerned with this behavior and its potential for infringing upon the rights of defendants and the adversary system as a whole. By trying to develop new jury instructions and

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238. *Id.* at 59–60.

239. *See* *State v. Polk*, 415 S.W.3d 692, 695–96. This case shows that prosecutors, as well as jurors, are susceptible to the ubiquity of social media. Circuit Attorney Jennifer Joyce commented on her Twitter account concerning the trial of a man accused of raping an eleven year old girl twenty years previously. Joyce's posts on Twitter included, "David Polk trial next week. DNA hit linked him to 1992 rape of 11 yr old girl. 20 yrs later, victim now same age as prosecutor," and "I have respect for attys who defend child rapists. Our system of justice demands it, but I couldn't do it. No way, no how." *Id.* Although the Court was troubled by Joyce's statements, the risk of tainting the jury's perception of the trial, and especially by the timing of the comments, they held that the comments did not rise to the level of substantial prejudice and, therefore, the conviction was not reversed. *Id.*

240. *Ex rel. Taylor*, 442 S.W.3d at 59.

other tactics to combat this problem, judges are sending a clear signal that care must be taken to halt this conduct.

While these cases take a realistic approach to these issues, perhaps they missed an opportunity posit a more effective way to root out the problems at an earlier stage in the trial process. At the state level, voir dire is generally left to the attorneys, although the court may participate as well.<sup>241</sup> Additionally, Missouri courts prefer counsel to use oral voir dire rather than only questionnaires in order to garner the most useful information.<sup>242</sup> In criminal cases, Missouri attorneys are supposed to be given a fairly wide latitude into the questions they pursue, although there are some limits.<sup>243</sup>

These more open and receptive rules promote the importance of the voir dire process. Furthermore, these rules favoring attorney-conducted voir dire, combined with case law that takes a realistic approach to determining impartiality of jurors, provides a platform for a more robust voir dire process as the favored solution to counter the effects of pretrial publicity and jurors' use of technology in the courtroom. Upon asking the right questions and allowing jurors to open up about their internet exposure and social media use, attorneys could better discover which jurors are likely to access media or information from others online despite court admonition to refrain from so doing.

Tackling the source of the problem as early as possible is the best solution. While there is no guarantee that attorneys would be able to discern with complete accuracy those jurors predisposed to accept pretrial publicity or to seek out further information about the trial, more of an attempt to do so should be made. These questions may very well be the best solution for protecting the impartial jury from the encroachment of outside influences.

CLAIRE C. KATES\*

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241. *Trial Judges Criminal Benchbook, Voir Dire by the Court*, YOUR MO. CTS. (2007), [http://www.courts.mo.gov/hosted/resourcecenter/TJCB%20Published%20April%202011/TJBB.htm#CH\\_07\\_JurySelect\\_2d\\_files/CH\\_07\\_JurySelect\\_2d.htm](http://www.courts.mo.gov/hosted/resourcecenter/TJCB%20Published%20April%202011/TJBB.htm#CH_07_JurySelect_2d_files/CH_07_JurySelect_2d.htm).

242. *Id.*

243. *Id.* These limits include attempting to induce potential jurors into giving commitments to positions they would take on different issues, advising the jury on the law, or trying to persuade potential jurors to accepting facts in one party's favor. *Id.*

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