

NOTE

GOOGLING, PROFILING, AND DRAFTING A “FANTASY TEAM” OF JURORS: CONTEXTUALIZING ONLINE INVESTIGATIONS INTO JURORS AND VENIREPERSONS WITHIN CENTURIES OF ANALOG LITIGATION PRACTICES

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In recent years, judges and commentators have sounded the alarm on litigators’ increasingly extensive research into jurors’ and venirepersons’ online presences. Despite critics’ ethical and practical concerns, the age of “voir google” continues to thrive and evolve. In this Note, I seek to contextualize the era of online investigations within the broader era of American jury selection. In Part I, I cover the essentials of online investigations into jurors and venirepersons. I outline the forms that these investigations take, review how lawyers use them in jury selection and at trial, consider objections to the practice, and assess the current landscape of court decisions and ethics codes regulating it. In Part II, I analyze how online investigations are not fundamentally different but are in line with existing practices on jury selection and trials. I detail how online investigations function as beneficial supplements to voir dire. Then, I assess how online investigations have non-digital analogs in the work done by lawyers conducting field investigations, pre-digital age, and in trial consultants assisting lawyers with their trial strategies. I propose that although online investigations into jurors and venirepersons may appear to be a newer practice, it is not a revolution but a natural evolution from existing litigation practices.

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INTRODUCTION

Trial judges have such respect for juries—reverential respect would not be too strong to say—that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information.¹

Judge William Alsup, United States District Judge for the Northern District of California, expressed his deep frustration with the pervasive practice of lawyers and trial consultants researching jurors and venirepersons in his 2016 *Oracle America, Inc. v. Google Inc.* opinion.² “[Venirepersons] are not celebrities or public figures,” Judge Alsup declared, “[nor] a fantasy team composed by consultants, but good citizens commuting from all over our district, willing to serve our country, and willing to bear the burden of deciding a . . . dispute the parties themselves cannot resolve.”³ Judge Alsup’s opinion was fraught with concern about how various parties would respond to the reality that lawyers frequently google the venire—jurors, feeling it is unfair for lawyers to research them while they cannot research the case, may impermissibly research the case anyway;⁴ lawyers may leverage their findings to

¹ *Oracle America, Inc. v. Google Inc.*, 172 F. Supp. 3d 1100, 1101 (N.D. Cal. 2016).

² *See id.*

³ *Id.* at 1103.

⁴ *See id.* at 1102.

target improper personal appeals to particular jurors; society as a whole may suffer because the practice undermines jurors' privacy.⁵ The Judge expressed strong apprehension about lawyers using juror information during trial:

For example, if a search found that a juror's favorite book is *To Kill A Mockingbird*, it wouldn't be hard for counsel to construct a copyright jury argument (or a line of expert questions) based on an analogy to that work and to play upon the recent death of Harper Lee, all in an effort to ingratiate himself or herself into the heartstrings of that juror. The same could be done with a favorite quote or with any number of other juror attitudes on free trade, innovation, politics, or history. Jury arguments may, of course, employ analogies and quotations, but it would be out of bounds to play up to a juror through such a calculated personal appeal, all the moreso since the judge, having no access to the dossiers, couldn't see what was really in play.⁶

His opinion raised many of the core concerns that scholars have expressed about internet research of jurors: ethics, privacy, and fairness.⁷

Judge Alsup raises salient concerns that may seem intuitive, yet his opinion is an outlier. "What Judge Alsup has done is truly unique," observes law professor Thaddeus Hoffmeister.⁸ In reality, the practices that Judge Alsup worried about are embraced by litigators, judges, and state bar associations across the United States.⁹ Law professor and legal ethics consultant Jan L. Jacobowitz frames online research as an essential duty, remarking that "failing to consider social media may alter the outcome of a client's case, thereby calling into question a lawyer's fundamental duties of competence, diligence, and communication."¹⁰ One trial consultant put it more strongly: "[a]nyone who [does not] make use of [Internet searches] is bordering on malpractice."¹¹ Lawyers and trial consultants extol the benefits of online research, with one trial

⁵ See *id.* at 1103.

⁶ *Id.*

⁷ See *id.* at 1102-03.

⁸ Sudhin Thanawala, *Judge Reignites Debate over Researching Jurors Online*, AP NEWS (July 16, 2016), <https://apnews.com/article/7be31b151b88499e948c8231cf09f151> [<https://perma.cc/S4L9-RK26>].

⁹ See Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 U. KAN. L. REV. 611, 612 (2012) (citing various sources to this point).

¹⁰ Jan L. Jacobowitz, *Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond*, 23 VAND. J. ENT. & TECH. L. 279, 293 (2021).

¹¹ Hoffmeister, *supra* note 9, at 612.

consultant observing that “[j]urors are like icebergs—only 10 percent of them is what you see in court [during voir dire] But you go online and sometimes you can see the rest of the juror iceberg that’s below the water line.”¹² Litigators Stephen P. Laitinen and Hilary J. Loynes argue that

lawyers cannot afford to ignore how such media impacts every aspect of litigation. The Internet houses a potential gold mine of information that a savvy attorney can use in various litigation stages, from voir dire to discover and eliminate a potential juror who could prejudice a client, to closing to craft a persuasive argument that is tailored to an audience.¹³

Supporting lawyers who research jurors, a cottage industry of jury selection iPad apps emerged in the early 2010s and continues to exist through apps such as JuryBox,¹⁴ which enables lawyers to compile notes on jurors, score jurors, and track dismissals.¹⁵ One now-defunct app, JuryPad, let lawyers “take a street level tour past a juror’s house and neighborhood . . . and . . . predict jurors’ votes.”¹⁶

Many lawyers engage in, or endorse, the very practices that Judge Alsup derides. Litigators Laitinen and Loynes express no qualms with tailoring opening and closing arguments to jurors’ personal interests, adding that

[a]ttorneys can make use of social media to tailor their opening statements and closing arguments. For example, as discussed above, a juror’s “fan” lists on his or her Facebook page can provide valuable information about that person’s values and opinions. If a juror’s Facebook page reveals that the person is a “fan” of a particular environmental group or charity, or that the person is an avid animal lover, when appropriate, a savvy lawyer might be able to use analogies or anecdotes to gain sympathy for a client.¹⁷

¹² See Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, REUTERS LEGAL (Feb. 17, 2011, 11:50 AM), <https://www.reuters.com/article/us-courts-voirdire/internet-v-courts-googling-for-the-perfect-juror-idUSTRE71G4VW20110217> [<https://perma.cc/M75H-NB5N>].

¹³ Stephen P. Laitinen & Hilary J. Loynes, *A New “Must Use” Tool in Litigation?*, DRI FOR THE DEFENSE, Aug. 2010, at 16.

¹⁴ JURYBOX, <https://www.juryboxapp.com/> [<https://perma.cc/7NQQ-FQNK>] (last visited Apr. 15, 2022).

¹⁵ See *Top 3 Jury Selection Apps on the Market Today?*, JURYBOX (Sept. 21, 2020), <https://www.juryboxapp.com/blog/jury-selection-apps/> [<https://perma.cc/Y5ZH-FTBX>].

¹⁶ Colin K. Kelly & Aliyya Z. Haque, *Twit or Tweet: A Trial Lawyer’s Guide to Using Social Media Information During Trial*, DRI FOR THE DEFENSE, Oct. 2013, at 23.

¹⁷ Laitinen & Loynes, *supra* note 13, at 16.

Litigators Colin K. Kelly and Aliyya Z. Haque recommend that lawyers “[e]xamine the music, television shows, and movies that an individual ‘likes’ on Facebook.” They observe that prosecutors may wish to strike venirepersons who enjoy watching crime procedurals, as they may possess unrealistic expectations about how criminal investigations work.¹⁸

While internet and social media research may feel like a novel frontier, raising concerns unique to the digital age, online investigations are not all that different from existing and previous litigation practices. They supplement, rather than revolutionize, existing litigation procedures. Their contributions are conceptually similar to the work that lawyers and their proxies, such as private investigators and trial consultants¹⁹ have done for decades.

This Note will proceed in two parts. In Part I, I will cover the essentials of online investigations into jurors and venirepersons. In subpart I.A, I will outline the forms that these investigations take and review how lawyers use them in jury selection and at trial. Subsequently, in subparts I.B and I.C, I will walk through objections to the practice and the current landscape of court decisions and ethics codes regulating it. I will wrap up Part I.D by discussing the prevalence of online investigations. In Part II, I will analyze how online investigations are not fundamentally different but are in line with existing practices on jury selection and trials. In Part II.A, I will detail how online investigations function as beneficial supplements to voir dire. Next, in Parts II.B and II.C, I will assess how online investigations have non-digital analogs in the work done by lawyers conducting field investigations, pre-digital age, and in trial consultants assisting lawyers with their trial strategies.

I

INTERNET RESEARCH OF JURORS

As of February 2021, 72 percent of United States adults used at least one social media site.²⁰ Sixty-nine percent of United States adults used Facebook, 40 percent used Instagram, and 28 percent used LinkedIn.²¹ Social media use

¹⁸ See Kelly & Haque, *supra* note 1616, at 24.

¹⁹ While many use the terms “jury consultant” or “litigation consultant,” I will use “trial consultant.”

²⁰ *Social Media Fact Sheet*, PEW RSCH. CTR., (Apr. 21, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [https://perma.cc/23NN-9A5S].

²¹ *Id.*

has continually risen since its inception.²² Research into jurors' and venirepersons' social media, and into other online sources, provides a wealth of information to lawyers hoping to craft their ideal jury.²³

A. Forms and Use of Online Investigations into Jurors and the Venire

Lawyers will scour social media for information on the venire and on selected jurors. Facebook, Twitter, and LinkedIn are readily available to lawyers. Lawyers may view Facebook users' public profiles by searching on Facebook or googling their profiles.²⁴ Lawyers may similarly search individuals' Twitter handles and/or names, scanning their tweets and retweets to uncover what their tweets and follows say about their likely attitudes and their abilities to be impartial.²⁵ LinkedIn searches can reveal clues into how individuals' employment and education histories may sway their views.²⁶

In addition to social media, online research avenues are plentiful. Lawyers may leverage Westlaw and LexisNexis' comprehensive public records search services.²⁷ Westlaw's "PeopleMap" connects researchers with business records, deep web data, and business and corporate data, as well as data on individuals' assets, licenses held, litigation histories, adverse legal filings, social networks, blogs, chat room activities, and websites.²⁸ The possibilities seem endless with even more resources accessible online, ranging from individuals' arrest records and letters to the editor²⁹ to their political contribution histories, business credit ratings,³⁰ and news clippings on their community involvement.³¹ Further, the U.S. Census Bureau's

²² See *id.* For perspective on social media's rise, in 2016, 68 percent of United States adults used Facebook, 28 percent used Instagram, and 25 percent used LinkedIn. *Id.* In 2012, 54 percent of United States adults used Facebook, 9 percent used Instagram, and just 16 percent used LinkedIn. *Id.*

²³ See Laitinen & Loynes, *supra* note 13, at 18.

²⁴ See Kelly & Haque, *supra* note 1616, at 24.

²⁵ See *id.*

²⁶ See *id.* at 25.

²⁷ See Stephanie M. Ibarra, *Welcome to the Age of Voir-Google: Harmonizing Attorney Ethical Obligations, the Internet, and the Voir Dire Process in Texas*, 17 TEX. TECH ADMIN. L.J. 129, 135 (2015).

²⁸ See *id.* at 135; Raymond Rossi, *Researching Jurors Online: Voir Dire in the Digital Age*, 101 ILL. B. J. 514, 516 (2013).

²⁹ See Andrew Kasabian, *Litigating in the 21st Century: Amending Challenges for Cause in Light of Big Data*, 43 PEPP. L. REV. 173, 180 (2015).

³⁰ See Rossi, *supra* note 28, at 516.

³¹ Christine Martin, *Social Media: A Hidden Force at Jury Trials*, 17 WESTLAW J. INTELL. PROP. 1, 3 (2010).

website provides detailed demographic information about a venireperson's community.³² Lawyers can discover myriad personal details on social media, such as prospective jurors' favorite television shows, music preferences, recommended books, religious backgrounds, drinking habits, social events, potential biases, political affiliations, voting practices, spending habits, and opinions on controversial issues.³³ With information from these sources in hand, lawyers can calibrate their approaches to jury selection and trial.

1. *Use in Jury Selection*

Lawyers use their online research to sway which jurors they select and strike through for-cause and peremptory challenges.³⁴ Investigations can yield insights into whether a prospective juror will be impartial, biased, dishonest, or otherwise undesirable.

Online investigations help lawyers evaluate venirepersons' likely impartiality and equip them to safeguard defendants' Sixth Amendment "impartial jury" rights.³⁵ Social media research may turn up evidence that an individual is connected to, and potentially biased toward, a party through social media.³⁶ A juror's dislikes may also be indicative of impartiality.³⁷ A very opinionated individual's Twitter tirade about some issue, however unrelated to the case, may signify that the person is unlikely to fully consider all the evidence in a given matter.³⁸

Lawyers may find information that evokes certain undesirable juror biases and attributes. For lawyers assessing potential biases, jurors' education and employment histories may be informative.³⁹ If a person previously worked for an environmental nonprofit, for example, the person may be more sympathetic to a plaintiff in a toxic tort case and less sympathetic toward a large corporate defendant.⁴⁰ Venirepersons' personalities, expressed through their online presences, often hold

³² See Rossi, *supra* note 28, at 516.

³³ Zachary Mesenbourg, *Voir Dire in the #LOL Society: Jury Selection Needs Drastic Updates to Remain Relevant in the Digital Age*, 47 J. MARSHALL L. REV. 459, 474 (2013); see Rossi, *supra* note 28, at 516.

³⁴ See Katy (Yin Yee) Ho, *Defining the Contours of an Ethical Duty of Technological Competence*, 30 GEO. J. LEGAL ETHICS 853, 859–60 (2017).

³⁵ U.S. CONST. amend. VI.

³⁶ See Kelly & Haque, *supra* note 1616, at 24.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

predictive value.⁴¹ Individuals with authoritarian personalities, for example, are more conviction-prone and are thus less promising to defendants.⁴² On the other hand, an agreeable venireperson may be more willing to consider a defendant's story.⁴³ Lawyers may contemplate demographic information gleaned from their research. For instance, while preparing for jury selection in a capital punishment case, a defense lawyer may notice that a venireperson frequently posts about their Catholicism. The defense lawyer may look favorably upon the Catholic venireperson knowing that the Catholic church opposes the death penalty, and that Catholics are less likely to vote for it as a sentencing option.⁴⁴

Lawyers can use the internet to monitor juror misconduct during jury selection. Individuals' online presences may raise red flags about their likelihood of committing misconduct. Prospective jurors who follow multitudes of news outlets on Twitter may tend to check the news for evidence and case updates during trial.⁴⁵ Frequent posters may be more tempted to impermissibly post about their jury experiences during trial.⁴⁶ Online investigations can also catch individuals committing misconduct. Online research can help lawyers discover whether a venireperson has intentionally or unintentionally lied during voir dire,⁴⁷ since lawyers can compare the individual's voir dire responses to the information on their online profiles.

Using information from online investigations into jurors and venirepersons has many practical benefits. Online investigations save lawyers time.⁴⁸ Lawyers often have a short time frame between receiving the names of the venirepersons and the start of voir dire, and online investigations are an efficient

⁴¹ See Ashley R. Nance, *Social Media Selection: How Jury Consultants Can Use Social Media to Build a More Favorable Jury*, 39 LAW & PSYCHOL. REV. 267, 276 (2015).

⁴² See *id.* Authoritarian personalities are marked by distrust and aggression toward outsiders and strict adherence to authority. See *id.* They may aggressively share their pro-authority political views on their social media. See *id.*

⁴³ See *id.* at 278. Agreeable personalities are generally reliable, sympathetic, and cooperative. See *id.* They may have overall pleasant interactions on their social media. See *id.*

⁴⁴ See BRIAN H. BORNSTEIN & EDIE GREENE, *THE JURY UNDER FIRE: MYTH, CONTROVERSY, AND REFORM* 284 (1st ed. 2017).

⁴⁵ See Kelly & Haque, *supra* note 1616, at 24.

⁴⁶ See *id.*

⁴⁷ See John G. Browning, *Voir Dire Becomes Voir Google: Ethical Concerns of 21st Century Jury Selection*, A.B.A.: BRIEF, Winter 2016, at 42.

⁴⁸ See Hoffmeister, *supra* note 9, at 630.

use of their time.⁴⁹ Online investigations save courts time, too, as they prevent courts from wasting time in voir dire for lawyers to question ultimately unsuitable venirepersons.⁵⁰ Investigations also save lawyers resources, since online searches are cheaper to carry out than field investigations.⁵¹ The practice is cost-effective even in low-dollar value cases.⁵² The financial accessibility of internet research minimizes wealth gaps between parties.⁵³

2. Use in Preventing Juror Misconduct

Online investigations can prevent juror misconduct. Before or during trial, a lawyer may find that a juror made a posting online that calls a defendant's impartial jury right into question.⁵⁴ An investigation may reveal that jurors have impermissibly communicated with each other about the case.⁵⁵ Such communications can cause jurors to form premature judgments, undermining open and full deliberations by leading to selective interpretation and recall of evidence.⁵⁶ While juror misconduct is difficult to study, as jurors are loath to report their own improper communications, data on the subject suggests that online misconduct is not particularly widespread.⁵⁷ Nonetheless, misconduct still occurs, and internet research may expose information that is grounds for an appeal,⁵⁸ over-

⁴⁹ See *id.* at 635.

⁵⁰ See Thanawala, *supra* note 8.

⁵¹ See Hoffmeister, *supra* note 9, at 630.

⁵² See Rossi, *supra* note 28, at 515.

⁵³ See Hoffmeister, *supra* note 99, at 631. Consequently, smaller firms can better compete with larger firms. See Adam J. Hoskins, *Armchair Jury Consultants: The Legal Implications and Benefits of Online Research of Prospective Jurors in the Facebook Era*, 96 MINN. L. REV. 1100, 1118–19 (2012).

⁵⁴ See Hoffmeister, *supra* note 9, at 614.

⁵⁵ See BORNSTEIN & GREENE, *supra* note 4444, at 302.

⁵⁶ See *id.* at 302–03. In criminal cases, studies suggest that pre-trial media exposure increases venirepersons' beliefs in a defendant's guilt. See Ellen Brickman, Julie Blackman, Roy Futterman & Jed Dinnerstein, *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 290 (2008).

⁵⁷ See Daniel J. Ain, *The Tweeting Juror: Prophylactic and Remedial Methods for Judges to Manage the Risk of Internet-Based Juror Misconduct*, 98 MASS. L. REV. 16, 17–18 (2016). On the other hand, in a survey Professor Hoffmeister conducted in 2012, a not-insignificant 10 percent of the interviewed federal judges, prosecutors, and public defenders reported that they knew of jurors conducting internet research. See Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 415 (2012). The Hoffmeister study did not interview actual jurors. See *id.*

⁵⁸ See Hoffmeister, *supra* note 9, at 614.

turned verdict,⁵⁹ mistrial,⁶⁰ or new trial.⁶¹ When lawyers discover juror misconduct at the time it occurs, courts can swiftly respond.

3. *Use in Trial*

Lawyers use online research to inform their trial strategy. They can use their knowledge to bolster their connections with jurors.⁶² This may occur through a lawyer analogizing a case to the plot of a juror's favorite book during closing argument, as Judge Alsup observed.⁶³ Or, a lawyer may sprinkle in athletic references calculated to appeal to sports fans,⁶⁴ or analogies and anecdotes meant to appeal to animal lovers who like environmental charities on Facebook.⁶⁵

Like Judge Alsup,⁶⁶ other commentators have taken issue with lawyers using personal appeals stemming from their Internet research.⁶⁷ Lawyer Whitney Hart worries that calculated personal appeals will cloud jurors' objectivity. Hart notes that "[t]he emotional connection that the juror would feel may interfere with [their] ability to see the case [they are] sitting for through an objective lens, and instead consider how [they] would feel if there were a copyright infringement against [their] favorite late author."⁶⁸ Hart analogizes internet-inspired personal appeal concerns to the motivating factors underlying evidentiary law. Hart notes that this information risks violating the Federal Rules of Evidence on account of its prejudicial value "substantially outweigh[ing]" its probative value.⁶⁹ Hart argues that unfair prejudice is often interpreted to encompass things that "induc[e] a decision on a purely emotional basis," and asserts that "[e]xploiting specific personal information about jurors during trial proceedings for the benefit of one's

⁵⁹ See Browning, *supra* note 47, at 42.

⁶⁰ See Hoffmeister, *supra* note 57, at 413.

⁶¹ See Luke A. Harle, *A Status Update for Texas Voir Dire: Advocating for Pre-Trial Internet Investigation of Prospective Jurors*, 49 ST. MARY'S L.J. 665, 667 (2018).

⁶² See Hoffmeister, *supra* note 9, at 614; Laitinen & Loynes, *supra* note 13, at 19.

⁶³ See Oracle America, Inc. v. Google Inc., 172 F. Supp. 3d 1100, 1103 (N.D. Cal. 2016).

⁶⁴ See Hoffmeister, *supra* note 9, at 614.

⁶⁵ See Laitinen & Loynes, *supra* note 13, at 18.

⁶⁶ Oracle America, Inc., 172 F. Supp. at 1103.

⁶⁷ See, e.g., Whitney Hart, *Researching the Jury's Internet and Social Media Presence: The Ethical and Privacy Implications*, 41 N. Ill. U. L. Rev. 230, 256-57 (2020).

⁶⁸ See *id.* at 257.

⁶⁹ *Id.* at 256-57 (quoting FED. R. EVID. 403).

case is nothing more than another version of introducing evidence that induces a decision based upon impermissible considerations.”⁷⁰ Exploiting jurors’ personal information to craft snappier closing arguments does not sit well with Hart, Judge Alsup, and others, who fear that the practice will improperly disturb jurors’ impartial fact-finding.

There are reasons to find these concerns overstated. The use of facts like a juror’s favorite book are more innocuous than other appeals known to be impermissible. For example, it is impermissible to employ certain bias-centered appeals, like appeals that endorse racial or ethnic stereotypes.⁷¹ Such bias-centered appeals clearly “shift[] [an argument’s] emphasis from evidence to emotion.”⁷² Many personal appeals rooted in Internet research will not rise to this level. If a court were to draw a hard line on lawyers mining their online research for analogy inspiration, this line would be extremely difficult to monitor.⁷³ There is no obvious, surefire way of distinguishing between appeals based on information collected and appeals that the lawyer thought of independently.⁷⁴

Prohibiting these appeals may not even have a significant impact on litigation practices. Lawyers are likely better off focusing their time and energy on strengthening their case’s presentation on the merits than they are devoting mental energy to picking the “perfect quote” to drop in their closing.⁷⁵ Further, lawyers, in practice, may be unlikely to make personal calculated appeals because individualized appeals risk alienating other jurors, who may be unsympathetic or hostile to the given appeal.⁷⁶ Online research helps enhance lawyers’ trial storytelling without major drawbacks.

B. Concerns with Online Investigations into Jurors and the Venire

The primary critiques surrounding online investigations concern threats to privacy, inconsistency with court procedures, and practical difficulties of implementation.

The practice raises privacy concerns because lawyers will ultimately learn information that they would not have gathered

⁷⁰ *Id.*

⁷¹ See Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1314 (1996).

⁷² *Id.*

⁷³ See Harle, *supra* note 61, at 692.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See Robert E. Shapiro, *Facebook Fandango*, LITIGATION, Winter 2017, at 61.

through voir dire alone.⁷⁷ Some fear that this exposure to scrutiny will cause a chilling effect on people wanting to serve on juries.⁷⁸ Many prospective jurors already do not want to serve on juries for a variety reasons, ranging from jury service's perceived inconvenience to a lack of confidence in their abilities to serve on juries.⁷⁹ Many prospective jurors distrust the government.⁸⁰ For individuals who are already wary of the judicial branch, the knowledge that a prosecutor or defense attorney has scoured their social media may compound their distrust of judiciary.

Courts and many commentators, however, note that these privacy concerns do not hold too much water. Federal and state courts have held that individuals should lack a legitimate expectation of privacy when they post to social networking sites.⁸¹ Lawyers may view jurors' "Facebook comments, forum threads, blog posts, etc." without violating their rights to privacy.⁸² Many people are not troubled by others looking them up online. Many social media users view the Internet as a public, or semipublic, forum.⁸³ Hoffmeister finds that younger individuals more accustomed to living their lives online are less likely to be ruffled by privacy concerns, given that the information that lawyers will uncover is already publicly available.⁸⁴ Moreover, before the digital age, lawyers would employ investigation techniques that were just as, if not more, intrusive, like hiring private detectives to investigate jurors.⁸⁵

Additionally, commentators fear that online juror investigations allow lawyers to circumvent court rules.⁸⁶ For example, some courts prohibit lawyers from inquiring into venirepersons' political affiliations, but lawyers can uncover venirepersons' political attitudes through online research.⁸⁷ Online research, if left unchecked, can undermine court procedure.

⁷⁷ See Hoffmeister, *supra* note 9, at 612.

⁷⁸ See *id.* at 636.

⁷⁹ See BORNSTEIN & GREENE, *supra* note 44, at 21–23.

⁸⁰ See *id.* at 22.

⁸¹ See Laitinen & Loynes, *supra* note 1313, at 20 (citing cases from the Sixth Circuit and state courts in Maryland and Minnesota); Nance, *supra* note 41, at 274 (citing cases from the Sixth Circuit and state courts in Ohio, California, and Minnesota as examples).

⁸² See Mesenbourg, *supra* note 33, at 470–71.

⁸³ See Nance, *supra* note 41, at 273.

⁸⁴ See Hoffmeister, *supra* note 9, at 637.

⁸⁵ See *id.* at 638.

⁸⁶ See Grow, *supra* note 12.

⁸⁷ See *id.*

Online investigations are fraught with practical difficulties. Venirepersons may be hard to find if they have common names, use nicknames or pseudonyms, or use their maiden names.⁸⁸ Lawyers may encounter fake or intentionally falsified profiles,⁸⁹ and even when they find a person's real profile, they may encounter lies posted about that person online.⁹⁰ A reluctant venireperson could even post controversial or biased statements online in the hopes that a lawyer will discover them and strike the venireperson during jury selection.⁹¹ Working off of false information, a lawyer may needlessly exercise a peremptory challenge on a prospective juror that would have been qualified to serve.⁹²

Given the widespread use of online research, however, these privacy-related, procedural, and practical concerns do little to stop lawyers from integrating online investigations into their litigation routines.

C. Current Landscape Regulating Online Investigations into Jurors and the Venire

Bar associations and courts vary on the extent to which they encourage, require, or discourage online juror investigations. Approaches vary, with courts and bar associations alternatively permitting, prohibiting, or encouraging online investigations, and in some instances providing no opinion at all.

Many bodies permit online investigations. The American Bar Association (ABA)'s Committee on Ethics and Professional Responsibility takes a permissive approach to online investigations.⁹³ The ABA allows lawyers to "passive[ly] review" jurors' online presences, provided the lawyer does not send any access requests to individuals.⁹⁴ The ABA cautions lawyers against taking measures that will alert jurors and venirepersons to their searches, but does not prohibit these notifications because they are "beyond the control of the reviewer."⁹⁵ Penn-

⁸⁸ See Mesenbourg, *supra* note 33, at 474.

⁸⁹ See Ibarra, *supra* note 27, at 139; *see also id.* at 475 (noting that millions of Facebook profiles are fake).

⁹⁰ See Mesenbourg, *supra* note 33, at 475.

⁹¹ Eric P. Robinson, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM. J. TRIAL ADVOC. 597, 629 (2013).

⁹² See Mesenbourg, *supra* note 33, at 475.

⁹³ See Hart, *supra* note 67, at 245.

⁹⁴ ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014) (Lawyer Reviewing Jurors' Internet Presence).

⁹⁵ *Id.*

sylvania, Colorado, and Washington, D.C. follow the ABA Committee's rules.⁹⁶

The Kentucky Bar Association and New York County Lawyers' Association allow passive monitoring of online sources but deem any actions that will alert a juror to the lawyer's search to be impermissible communications.⁹⁷ Connecticut, Missouri, Oregon, and New York City similarly find that "friend requests," LinkedIn connection requests, and the like generally constitute impermissible communications.⁹⁸ The New York State and San Diego County Bar Associations only permit lawyers to access publicly available social networking sources.⁹⁹

Even when state bar associations do not speak directly about online research through ethics opinions or rules, broader bar association rules may indirectly apply to the online context.¹⁰⁰ For example, the California Bar Association does not specifically address online research of prospective jurors, but there is a California Rule of Professional Conduct that prohibits attorneys from "communicat[ing] directly or indirectly" with venirepersons and jurors.¹⁰¹

Some bar associations take a different approach and allow lawyers to request access to jurors and venirepersons' social media under certain circumstances. Oregon's State Bar Association permits lawyers to request access to nonpublic information from persons not represented by counsel, provided the lawyer has not presented themselves as disinterested.¹⁰² In New

⁹⁶ See Hart, *supra* note 67, at 246.

⁹⁷ See Ky. Bar Ass'n, Op. E-434 (2012); N.Y. Cnty. Lawyers Ass'n Comm. on Pro. Ethics, Formal Op. 743 (2011) (prohibiting "friend" requests, LinkedIn communications, Twitter follows, and signing up for a juror's blog's RSS feed).

⁹⁸ See Conn. Bar Ass'n, Informal Op. 2011-4 (prohibiting "friend" requests); ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014) (citing Mo. Bar Ass'n, Informal Op. 2009-0003) (prohibiting "friend" requests); Or. State Bar Ass'n, Formal Op. 2013-189 (prohibiting requests to access a juror's nonpublic social media); Ass'n of the Bar of the City of N.Y. Comm. on Pro. Ethics, Formal Op. 2012-2 (prohibiting lawyers from chatting with, messaging, or sending "friend" requests to jurors).

⁹⁹ See N.Y. State Bar Ass'n, Advisory Op. 843 (2010); N.H. Bar Ass'n, Op. 2012-13/05; San Diego Cnty. Bar Legal Ethics Op. 2011-2; *see also* Kelly & Haque, *supra* note 16, at 23.

¹⁰⁰ See Michael Begovich, *Voir Dire in a Digital World: A Model for Ethical Internet Investigation of the Venire*, 36 T. JEFFERSON L. REV. 225, 232 (2014) (opining that when applicable rules of professional conduct "do not prohibit digital fingerprint investigation of prospective jurors[,] . . . an ethical and thorough trial attorney may wish to analyze ethics opinions germane to this unique issue.").

¹⁰¹ See *id.* at 231-32 (2014) (citing CAL. RULES OF PRO. CONDUCT R. I-100(A) (2013)).

¹⁰² See Or. State Bar Ass'n, Formal Op. 2013-189; Or. State Bar Ass'n, Formal Op. 2005-164.

Hampshire, lawyers may request access to private social media provided they identify themselves and inform individuals of their involvement in the matter.¹⁰³ In Philadelphia, a lawyer may not deceptively gain access to an individual's private social media, but the lawyer may "forthrightly" request access.¹⁰⁴

Some governing bodies regulate lawyers' uses of third parties to investigate jurors' online presences. The ABA maintains that a lawyer may not use a third party to take actions that the lawyer is prohibited from taking directly.¹⁰⁵ Oregon's Bar Association expressly prohibits lawyers from friending or contacting individuals through third parties.¹⁰⁶

Various courts have spoken to this issue, with patchwork results. New Jersey follows a permissive approach, finding that parties are on a "level playing field" to investigate jurors when they both have Internet access.¹⁰⁷ The Second Circuit has declined to prohibit online research.¹⁰⁸ Florida has settled for no firm stance, with the Florida Supreme Court declining to require public records searches due to the difficulty of uniformly implementing such a requirement.¹⁰⁹

Missouri took the strongest stance on encouraging online investigations in a case that "remains an anomaly."¹¹⁰ In *Johnson v. McCullough*, Missouri's Supreme Court found that "it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage."¹¹¹ Following *Johnson*, Missouri's Supreme Court promulgated a rule that imposed an affirmative duty on lawyers to perform online searches of venirepersons.¹¹² New Hampshire's Bar Association encourages investigations as well, asserting that lawyers have a "general duty to be aware of social media as a source of potentially useful information in litigation . . . and to know how to make effective use of that information in litigation."¹¹³

¹⁰³ See N.H. Bar Ass'n, Op. 2012-13/05.

¹⁰⁴ See Phila. Bar Ass'n, Advisory Op. 2009-02.

¹⁰⁵ See ABA Comm. on Ethics & Pro. Resp., Formal Op. 466 (2014).

¹⁰⁶ See Or. State Bar Ass'n, Formal Op. 2013-189 (prohibiting lawyers from enlisting agents to request access to jurors' non-public social media).

¹⁰⁷ See Hart, *supra* note 67, at 238.

¹⁰⁸ See *id.* at 235-36.

¹⁰⁹ See *id.* at 237.

¹¹⁰ See Ibarra, *supra* note 27, at 137.

¹¹¹ See *id.* at 136 (citing *Johnson v. McCullough*, 306 S.W.3d 551, 558-59 (Mo. 2010)).

¹¹² See Hart, *supra* note 67, at 241-42 (citing Mo. R. Civ. P. 69.025).

¹¹³ N.H. Bar Ass'n, Op. 2012-13/05.

It is rare for courts to prohibit online investigations.¹¹⁴ However, prohibitions on Internet research are not unheard of. Courts in the Eastern District of Michigan and Northern District of Illinois have both prohibited online investigations into prospective jurors in high-profile cases involving government corruption.¹¹⁵ Their district-level holdings were not binding on other courts within their states, though. In the Southern District of Illinois, for example, a different Illinois judge imposed an affirmative duty on lawyers to research jurors online.¹¹⁶

D. Prevalence of Online Juror Investigations

Despite the practice's commonness, lawyers and judges remain unaware of exactly how, and how often, attorneys research jurors online.¹¹⁷ Lawyers are sometimes unsure of the extent to which online investigations are permissible and are consequently reluctant to speak about their methods. In 2011, Reuters reached out to several law firms and trial consultants as part of an investigation into how they craft juror profiles, and ten firms and five trial consultants declined their request to observe, worrying that judges would not approve of their methods.¹¹⁸ Lawyer use of social media investigations has ebbed and flowed since the advent of social media. The ABA reported in 2012 that 43.7 percent of lawyer-respondents used social media for online juror investigations, while this number fell to 22.2 percent in 2014.¹¹⁹ The ABA viewed these results as representative of an unwillingness by lawyers to expend their resources researching social media, though it may also be that the initial boom simply leveled off.¹²⁰

Surveys of judicial attitudes reveal conflicting information that suggests judges are largely in the dark about lawyers' investigation methods. In 2014, 73.3 percent of United States district judges reported that they did not know how many attorneys conducted online investigations of jurors during voir

¹¹⁴ See Leslie Ellis & Samantha L. Schwartz, *The Ethics of Social Media and Jurors: The Rising Importance of Social Media in the Courtroom*, DRI FOR THE DEFENSE, Mar. 2017, at 16.

¹¹⁵ See Hart, *supra* note 67, at 244 (citing *United States v. Kilpatrick*, No. 10-20403, 2012 WL 3237147, at *3 (E.D. Mich. Aug. 7, 2012)); Kelly & Haque, *supra* note 16, at 23 (citing *United States v. Sorich*, 427 F. Supp. 2d 820 (N.D. Ill. 2006), *aff'd*, 523 F.3d 702 (7th Cir. 2008)).

¹¹⁶ See Hart, *supra* note 67, at 243 (citing *Burden v. CSX Transp., Inc.*, No. 08-cv-04-DRH, 2011 WL 3793664, at *9 (S.D. Ill. Aug. 24, 2011)).

¹¹⁷ See Hart, *supra* note 67, at 232.

¹¹⁸ See Grow, *supra* note 12.

¹¹⁹ Ibarra, *supra* note 27, at 135.

¹²⁰ See *id.*

dire.¹²¹ The same study found that 90.6 percent of respondents did not know what form lawyers' online research took and that 69.3 percent did not discuss online juror investigations with lawyers before voir dire.¹²² The Federal Judicial Center surveyed judges in 2011 and 2014 about social media investigations.¹²³ The surveys found that approximately 28.8 percent of judges addressed conducting social media research on jurors in their courtrooms during voir dire.¹²⁴ Just 26 percent of this subset of judges forbade social media research on jurors, citing concerns for "privacy, intimidation, prolonged voir dire, distractions, and logistics."¹²⁵ Nonetheless, judges accept the practice, with nearly 75 percent of judges surveyed in 2015 permitting lawyers to investigate prospective jurors' social media.¹²⁶

II

CONTEXTUALIZING ONLINE INVESTIGATIONS WITHIN EXISTING PRACTICES

Online investigations into jurors and venirepersons may involve new methods, such as Google searches and incognito LinkedIn browsing. In reality, however they are better classified as extensions of previous and existing trial practices. Online investigations are a means of expanding existing voir dire to be more involved. The benefits that accrue and the attendant risks of conducting online investigations track with the already-existing risks that accompany non-digital juror investigations and the work of trial consultants.

A. Online Investigations as Supplements to Voir Dire

Online investigations supplement voir dire and verify jurors' answers.¹²⁷ As lawyer Stephanie M. Ibarra notes, "[i]n theory, the Internet provides attorneys with a supplement to juror questionnaires."¹²⁸ Online searches can help lawyers uncover juror bias.¹²⁹ Individuals' myriad interests, ranging from

¹²¹ See Hart, *supra* note 67, at 232.

¹²² *Id.* at 232–33.

¹²³ See Ellis & Schwartz, *supra* note 114, at 16.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Jessica L. Boylan, "Jury Duty": *The Ethical Obligations of Attorneys Researching Jurors Using Social Media Technology*, 29 GEO. J. LEGAL ETHICS 867, 871 (2016).

¹²⁷ See Laitinen & Loynes, *supra* note 13, at 18; Boylan, *supra* note 126, at 871.

¹²⁸ See Ibarra, *supra* note 27, at 134.

¹²⁹ See *id.*

their spending habits to litigation histories to music tastes, carry hints into how much common ground a prospective juror may share with a party.¹³⁰ Supplementing voir dire with online research decreases the chance that a venireperson will be struck based on stereotype alone.¹³¹ Online investigations can also uncover information that venirepersons are unwilling to reveal during voir dire. In the courtroom, venirepersons may feel intimidated from disclosing certain information, including biases, when they are in a public setting, before a judge, with a court reporter recording what they say.¹³² Internet research fills the resulting gaps.

Online investigations yield the benefits of an expanded voir dire without necessitating lengthened voir dire in the courtroom.¹³³ In *Challenges to Achieving Fairness in Civil Jury Selection*, Professor Valerie P. Hans remarked on several of these benefits. Hans writes,

In an expansive voir dire, questioning is wide-ranging, and includes both closed-ended and open-ended questions. If there is a concern about tainting other members of the jury pool, questioning may be conducted individually, outside the presence of other prospective jurors. In this approach, rather than relying on the prospective juror's self-assessment of bias, the judge and attorneys are able to make independent judgments about the possibility of juror bias.¹³⁴

During expanded voir dire, jurors speak more in their own words, better conveying information that may trigger peremptory challenges.¹³⁵ In comparison, limited voir dire is less likely to identify unfavorable jurors.¹³⁶ Hans reports on a mock jury experiment that she and her colleagues undertook evaluating limited versus expanded voir dire.¹³⁷ The experiment's extended voir dire questioning predicted mock jurors' decisions on liability and damages, whereas the limited voir dire questions did not.¹³⁸

Social psychologist Jessica M. Salerno et al. conducted another mock jury experiment that echoes the findings of Profes-

¹³⁰ See Mesenbourg, *supra* note 33, at 474.

¹³¹ See Hoskins, *supra* note 53, at 1116.

¹³² See BORNSTEIN & GREENE, *supra* note 44, at 40.

¹³³ See Ellis & Schwartz, *supra* note 114, at 16.

¹³⁴ Valerie P. Hans, *Challenges to Achieving Fairness in Civil Jury Selection*. Paper presented at Pound Civil Justice Institute's 2021 Forum for State Appellate Court Judges 1, 18 (July 2021).

¹³⁵ See *id.* at 20.

¹³⁶ See *id.* at 19.

¹³⁷ See *id.* at 18–19.

¹³⁸ See *id.*

sor Hans and her colleagues. Salerno et al. similarly found that extended voir dire has predictive value.¹³⁹ Extended voir dire questions predicted both verdicts and damage awards in the experiment.¹⁴⁰ The mock jury experiment also revealed that extended voir dire illuminates venireperson biases that would not have necessarily come to light with limited voir dire.¹⁴¹ In extended voir dire, 42 percent of mock jurors acknowledged views and biases that could have excluded them from the jury, compared to 2 percent of mock jurors questioned through limited voir dire.¹⁴²

Social media investigations lead lawyers to sources where prospective jurors express themselves in their own words. Furthermore, they provide an expansive slate of information that stretches beyond what lawyers learn in ordinary voir dire. Through online searches, lawyers can discover more nuances in jurors' views and attitudes, and even biases that prospective jurors would be reluctant to express inside the courtroom. Lawyers can ultimately use their strikes more effectively. Thus, online investigations are a means through which lawyers can achieve the benefits of an expanded voir dire without actually conducting an expanded voir dire in court.

B. Similarities to Existing Practices by (Analog) Investigators

Online investigations bear striking similarities to the sorts of investigations that lawyers commonly performed before the digital age. In *Investigating Jurors in the Digital Age: One Click at a Time*, Hoffmeister observes that “[o]btaining information about jurors outside of the traditional voir dire process and prior to trial is not a new concept,” and is in fact one that dates back to the 1700s.¹⁴³ Indeed, the First United States Congress passed a statute that authorized defendants accused of treason or capital charges to access and investigate the venire before

¹³⁹ Jessica M. Salerno et al. *The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases*, 45(4) L. & HUM. BEHAV. 336, 353 (2021).

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 339, 353.

¹⁴² See *id.* at 353. In the study, limited voir dire questions asked jurors to identify and report their own biases, whereas extended voir dire questions asked about more specific preexisting views that may lead to for cause challenges. See *id.* at 350. For example, the extended voir dire questions dealt with a mock case in the healthcare field and included questions about mock jurors' views of plaintiffs, lawyers, doctors, insurance companies, burdens of proof, and limitations on litigation. See *id.*

¹⁴³ See Hoffmeister, *supra* note 9, at 615–16.

trial.¹⁴⁴ Hoffmeister details a rise in the 1900s of lawyers investigating jurors by hiring detectives, juror-investigation companies, and private investigators.¹⁴⁵ Through these means, lawyers learned about jurors' lives, habits, reputations, and standings in the community through various sources, including jury books, newspapers, public archives, conversations with other attorneys, "drive-bys" of juror residences, and conversations with jurors' neighbors, and by following jurors.¹⁴⁶ A venireperson's marital problems, treatment of minorities, drinking habits, and more were considered fair game.¹⁴⁷ When the federal government was a litigant, government counsel would often enlist the assistance Federal Bureau of Investigation (FBI) and other agencies.¹⁴⁸ The FBI could access information, such as information from banks, stock brokerage firms, and insurance companies, that private investigators would not have access to.¹⁴⁹

The favored status of juror investigations rose and fell throughout the twentieth century.¹⁵⁰ Hoffmeister tracks the history of juror investigations through the rise of trial consultants, who both refined the research process and developed other consulting services, ranging from community surveys to mock trials.¹⁵¹ Yet a wave of criticisms followed this surge in juror investigations, coming from all angles, with judges, scholars, and members of the public increasingly disfavoring juror

¹⁴⁴ See *id.* at 616 (citing Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 118 (codified as amended at 18 U.S.C. § 3432 (2006))).

¹⁴⁵ See Hoffmeister, *supra* note 9, at 616.

¹⁴⁶ See *id.* at 616–19. In his 1968 article on investigations of jurors and venirepersons, Professor Joshua Okun remarked that investigators would, at minimum, seek information on "age, employment, marital status, previous court litigation, religion, political affiliation, status as a property owner, and previous accident record." Joshua Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L. J. 839, 851 (1968). Some investigators would go even further, researching venirepersons' "length of residence and type of home, reputation in the neighborhood, union membership or activity, credit rating and background, and standard of living." *Id.* at 851.

¹⁴⁷ See Rachel Hartje, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41 CAL. W. L. REV. 479, 494 (2005).

¹⁴⁸ See Okun, *supra* note 146, at 852–53.

¹⁴⁹ See *id.* at 853. Involvement of the FBI poses additional special considerations. First, individuals may have felt more reluctant to turn down a conversation with the FBI than they would with a less powerful private investigator. See *id.* Second, "[i]t is difficult to conceive of a situation where a government agent, acting under orders, would be punished for his investigation or contact with a trial juror." *Id.*

¹⁵⁰ See Hoffmeister, *supra* note 9, at 622–25.

¹⁵¹ See *id.* at 622.

investigations.¹⁵² Critics derided investigations for creating juror privacy concerns as well as equity concerns, since prosecutors and affluent defendants disproportionately carried out investigations.¹⁵³ Some courts responded by withholding juror names from parties.¹⁵⁴ Investigations also grew less profitable, as trials grew shorter in duration.¹⁵⁵ This decline in the latter half of the twentieth century set the stage for a resurgence in juror investigations with the onset of the digital age.¹⁵⁶

Judges tended to view “analog” juror investigations favorably and take permissive approaches to online juror investigations,¹⁵⁷ only criticizing the practice when jury members were directly contacted.¹⁵⁸ Judges appreciated lawyers doing their own research before commencing voir dire.¹⁵⁹ It has also historically been commonplace to give lawyers’ access to venireperson’s names prior to trial, with about 90 percent of state courts providing this information to attorneys.¹⁶⁰ Over 60 percent of state courts offer prospective jurors’ home addresses to lawyers before trial, and over 50 percent share information about jurors’ qualifications with lawyers before trial.¹⁶¹ Even today, in jurisdictions where courts disclose the names and addresses of potential jurors, litigator teams will still employ field investigators.¹⁶²

Many benefits and criticisms of this twentieth-century research echo those sounding in the digital age. Concerns that jurors’ neighbors might tell jurors that they had been questioned¹⁶³ resemble concerns that jurors might learn of lawyers’ investigation through accidental LinkedIn requests. The goals of twentieth-century juror research similarly resemble the goals of digital age juror research, with lawyers seeking a better understanding into jurors’ lives and personalities beyond what they would discover in voir dire. Some of the information, such

¹⁵² See *id.* at 623–25.

¹⁵³ See *id.* at 623–25.

¹⁵⁴ See *id.* at 625 (citing Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 VAND. L. REV. 123, 130 (1996)); Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHN’S J. LEGAL COMMENT. 457, 458–60 (1999)).

¹⁵⁵ See Hoffmeister, *supra* note 9, at 625.

¹⁵⁶ See *id.*

¹⁵⁷ See Boylan, *supra* note 126, at 871.

¹⁵⁸ See Robinson, *supra* note 91, at 608.

¹⁵⁹ See Boylan, *supra* note 126, at 871.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See Hartje, *supra* note 147, at 494.

¹⁶³ See Hoffmeister, *supra* note 9, at 618–19.

as an individual's reputation in the community and habits, is not the sort of information likely to be included in a juror questionnaire. To some commentators, online investigations may preserve privacy even better than in-person investigations and voir dire.¹⁶⁴ Lawyer Luke A. Harle notes that

In typical voir dire scenarios, prospective jurors may be required to divulge private information, out loud, in front of several dozen strangers. An attorney, by reviewing an online social media profile, may be able to obtain the desired information before the question is asked. Online investigations may also be less intrusive than former "traditional" investigations, in which attorneys would hire private investigators to survey homes of jurors.¹⁶⁵

Therefore, many of the drawbacks and advantages of online investigations versus in-person investigations are conceptually the same.

C. Similarities to Existing Practices by Trial Consultants

"It's gotten to the point where if the case is large enough, it's almost malpractice not to use them."¹⁶⁶ While this may sound like a quote a lawyer would say about the essential nature of online investigations, this line was actually uttered by a New York lawyer to a journalist in 1989 on the use of trial consultants.¹⁶⁷ For decades, particularly since the 1970s, trial consultants have provided services to lawyers, aiding in jury selection and helping with lawyers with trial strategy.¹⁶⁸ The American Society of Trial Consultants (ASTC) has nearly 300 members.¹⁶⁹

¹⁶⁴ See Harle, *supra* note 61, at 693.

¹⁶⁵ *Id.* at 693–94; see also Nance, *supra* note 41, at 274 (internal citations omitted) (observing that "[l]oss of privacy through social media exploration is considered superior to the alternative" of traditional investigations).

¹⁶⁶ NEIL JEFFREY KRESSEL, STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING 75 (1st ed. 2002).

¹⁶⁷ See *id.*

¹⁶⁸ See Stephanie M. Coughlan, *The (Im)partial Jury: A Trial Consultant's Role in the Venire Process*, 84 BROOK. L. REV. 671, 674–75 (2019) (noting trial consulting's roots in the early 1970s).

¹⁶⁹ *Mission and History*, AM. SOC'Y OF TRIAL CONSULTANTS (last visited May 4, 2022), https://www.astcweb.org/history_mission_statement [<https://perma.cc/2AEG-NVSR>]. While I will not discuss all of the services that consultants offer, the ASTC provides a helpful list of services on their website:

case theory and presentation, change of venue studies, community attitude surveys, continuing legal education seminars, deposition preparation, expert testimony, focus groups, graphics and demonstrative evidence, jury selection, language and the law, media relations, mediation and arbitration (ADR), mock jury trials, negotiations, opening statement and closing argument preparation

The similarities between trial consultants' assistance and the practice of online research do not begin and end with the fact that many view their use as essential to success at trial. Many of the key benefits and attributes of consultants' work seem to rip a page right out of the online investigations playbook. Proponents view trial consultants' work, which may include help with investigations, as beneficial to "effectively identifying and derailing stealth jurors" during jury selection¹⁷⁰ and approaching jury selection "more fairly and scientifically" than lawyers who "traditionally have drawn on ethnic, occupational, and other stereotypes," while remaining mysterious to the general public.¹⁷¹ While their assistance with jury selection has not always been digital, their contribution of seeking out nuance in selecting jurors is similar to the contributions wrought by online investigations.

Some of the techniques that critics have derided as improper personal appeals in trial strategy mirror work that trial consultants do to help lawyers improve their storytelling through focus groups, mock trials, shadow juries, and community surveys. In focus groups and trial simulations, lawyers workshop their arguments with an eye towards honing their strategies, themes, and storytelling for maximum effect on juries.¹⁷² In mock trials, trial consultants will assemble mock jurors, often from the local community, and watch them react to a trial simulation and deliberate.¹⁷³ Mock trials show lawyers what arguments, strategies, and evidence are most persuasive and give lawyers a sense of the ideal juror characteristics and jury composition for their case.¹⁷⁴ Focus groups will reveal how jurors are likely to perceive the facts and issues in a case.¹⁷⁵ Consultants also hire shadow jurors who will observe actual trials and report back to a handler on their

and evaluation, post-trial juror interviews, presentation strategy, pro bono services, trial simulations, trial technology, voir dire strategy and witness preparation.

Id.

¹⁷⁰ KRESSEL, *supra* note 166, at 72.

¹⁷¹ *Id.* at 79.

¹⁷² *Id.* at 144–45.

¹⁷³ See Hartje, *supra* note 147, at 496.

¹⁷⁴ See Robert Garvey & Stephen Hnat, *Mock Trials: Useful Preparation for Taking your Case to Court*, MICH. BAR J., Oct. 2002, at 40. For further information on how consultants conduct mock trials, see Stephanie Leonard Yarbrough, *The Jury Consultant—Friend or Foe of Justice*, 54 SMU L. REV. 1885, 1892 (2001).

¹⁷⁵ See Yarbrough, *supra* note 174, at 1892. For a detailed discussion of how focus groups are usually conducted, see Robert F. Ruckman, Michael S. Krzak, Patrick E. Bradley, Marygrace J. Schaeffer, *Focusing Your Case Through Jury Research: Mock Trials and Other Tools*, A.B.A.: BRIEF, Spring 2017, at 59–60.

impressions, perspectives, and questions throughout the trial.¹⁷⁶ Trial consultants will additionally rely on community surveys, opinion polls of residents from jurors' or venirepersons' communities.¹⁷⁷ Consultants will look for correlations between desirable traits and demographics of community members so that they can create profiles of likely favorable and unfavorable jurors.¹⁷⁸

These trial consulting services are targeted at ensuring lawyers reach the average jury to the best of their abilities by connecting with jurors, appearing relatable, and crafting winning cases. Trial consultants' focus groups and simulated trials are perhaps more involved than online research in getting inside jurors' heads and understanding how they tick. While online research may give lawyers general ideas of prospective jurors' preferences and attitudes on things like politics and big business, mock trials are more targeted at how lawyers can best appeal to jurors. The benefits from more broadly appealing, and overall stronger, storytelling outweigh the impact of one specific appeal to one juror. The use of shadow juries has the added benefit of teaching lawyers how to adjust on the fly during trial, not just to how lawyers *predict* jurors will respond, but to how lawyers *know* jurors respond. Community surveys are the most like online and pre-digital investigations since they tell lawyers where a person comes from and what their community's values are, giving lawyers a sense of how a person's community may have shaped them. Community surveys facilitate personalized appeals. For years, trial consultants have used all these strategies to help lawyers tell stories more profoundly, without the power of the internet. Online investigations are merely another method of pursuing effective storytelling.

CONCLUSION

The era of "Voir Google"¹⁷⁹ has been driven by increased access to juror and venireperson information coming from numerous sources—social media sites, online databases, online publications, blogs, and more—and commentators have been

¹⁷⁶ Jeff Patterson & Luke Spencer, *Lessons Learned in Jury Research: Mock Jurors, Shadow Jurors, Post-Truth Jurors, and Jury Consultants*, A.B.A.: BRIEF, Fall 2019, at 60.

¹⁷⁷ See Hartje, *supra* note 147, at 493–94.

¹⁷⁸ See *id.*; Maureen E. Lane, *Twelve Carefully Selected Not So Angry Men: Are Jury Consultants Destroying the American Legal System?*, 32 SUFFOLK U. L. REV. 463, 473 (1999); Yarbrough, *supra* note 174, at 1894–95.

¹⁷⁹ See Browning, *supra* note 47, at 41.

quick to dive into the conversation. While some fear that online research will erode juror privacy, courtroom procedure, and pose practical difficulties, others extol the benefits of online research on jury selection, the integrity of litigation through increased monitoring for misconduct, and trial. Ongoing debates notwithstanding, the practice has been widely embraced in the United States by lawyers, in ethics codes, and by judges.

While this era of online investigations may seem, on its face, to be a revolutionary era spawning unprecedented concerns, it is really more of the same. “Voir Google,” in effect, constitutes an expanded version of voir dire. Instead of dispatching private investigators to conduct field investigations of jurors, lawyers conduct the same essential research on the Internet. Similarly, trial consultants have spent decades testing the boundaries of what they can do to improve lawyers’ trial strategies, employing methods that promote the same goals as online investigations. Even the debates surrounding these practices concentrate on many of the same core issues: privacy concerns, fear of inadvertent contact with the juror, worry about researching the wrong person or encountering false information, the propriety of making individualized personal appeals to jurors, and so on. While social media and Internet research may boast a digital sheen, they are not fundamentally unique and worthy of differential attention. Rather, online investigations present a revamped approach that supplements and mirrors non-digital litigation practices, sharing many of the same core impacts, advantages, and disadvantages that lawyers have contended with for centuries.

