“TRIAL BY GOOGLE”: CAN FAIR CRIMINAL JURY TRIALS STILL BE GUARANTEED IN THE DIGITAL AGE?

by

Elizabeth Diana Matheson

Submitted in partial fulfilment of the requirements
for the degree of Master of Laws

at

Dalhousie University
Halifax, Nova Scotia
August 2024

Dalhousie University is located in Mi’kma’ki, the
ancestral and unceded territory of the Mi’kmaq.
We are all Treaty people.

This one's for me. For all the late nights. All the mid-afternoon cups of coffee. All the side-hustling. All the cancelled plans. All the tears. All the little victories. And, most of all, for the eight-year-old girl who decided that, when she grew up, she wanted to be a writer. While this is far from the fantasy epic she imagined she would write, it sure is something.

TABLE OF CONTENTS

ABSTRACT

The jury has long had a place within the criminal legal systems of the world, including Canada's. The wisdom of our system's continued endorsement of the criminal jury depends on the validity of a key presumption: that verdicts rendered by criminal juries are *fair*. However, a modern obstacle has thrown a wrench into this presumption, challenging the long-held notion we can guarantee fair jury trials: the Internet. Indeed, jury trials are increasingly being derailed by jurors who turn to the Internet to conduct independent research into the facts, evidence, parties, and/or law surrounding the case. In this project, the author explores the likely prevalence of online juror research ["OJR"], its impact on the accused's constitutional right to a fair trial, jurors' underlying motivation(s) for engaging in OJR, and, ultimately, the efficacy of any tactics used to deter or detect such misconduct, whether currently in use or that could potentially be implemented. In doing so, the author seeks to contribute toward an issue that has, to this point, been relatively unexplored within the (particularly Canadian) legal scholarship.

LIST OF ABBREVIATIONS USED

CJC	Canadian Judicial Council
OJR	Online juror research

ACKNOWLEDGEMENTS

Graduate studies are an enormous undertaking that, for me, would not have been possible without several very special people. First, I am incredibly grateful to my supervisor, Steve Coughlan. Thank you for your insightful and considered comments and guidance at every stage of the writing process, as well as for pushing me outside of my comfort zone and, in doing so, helping me to make this project what it is today. I am also immensely thankful to Robert Currie, not only for serving as advisor on my committee, but also for the many years of invaluable opportunities and mentorship. Finally, I am extremely grateful to Archibald Kaiser for generously agreeing to serve as my examiner.

Further, I would not be where I am today without support from my many other mentors. My most sincere thanks go to Andrew-Flavelle Martin, Karla O'Regan, Dawne Clarke, Jonathan Hughes, and Peter Dostal. Thank you also to Justices James C. MacPherson and Mary-Lou Benotto of the Court of Appeal for Ontario, both of whom provided tireless guidance and invaluable knowledge during my clerkship year, as well as encouraged me to undertake graduate studies.

Most importantly, I thank my loved ones who have provided unwavering support throughout this (at some points, grueling) process. I begin with all my friends, whose love and presence in my life has served as an ultimate escape from my own mind. Tyler, thank you for remaining my oldest and dearest friend and never failing to make me laugh. Brandon and Dylan, without our Wednesday *Survivor* nights, I might not have made it. Brittany, I am grateful for all our chats about the thrills and pitfalls of pursuing a career in research – it was invaluable both to commiserate and to cheer each other on.

Thank you to my family. Mum and Dad, thank you for being my longest and loudest cheerleaders and, from the very beginning, supporting all my crazy dreams. Whenever I'm down, picking up the phone and calling you always makes me feel better (especially because I know it will prompt you to send me some of the most horrifically awkward photos of our family dog). Zach, thank you for your endless support, hype-sessions, reality TV marathons, and home-cooked meals delivered to my desk. I could not have done this without you. Finally, to Waylon, thank you for being the bestest boy and

always putting on a show with your squeaky toys (especially your rubber chicken). You bring me more joy than you could possibly know.

CHAPTER 1: INTRODUCTION

The jury has long had a place within the criminal legal systems of the world. Records of bodies performing jury-like functions, including the famous Athenian general assemblies, can be traced back to as early as the 6th and 7th centuries B.C.[1] The beginnings of the common law jury system as we know it had its roots in England during the reign of William the Conqueror, nearly 1000 years ago.[2] As noted by Lord Devlin, one of the most prominent English jurists of the 20th century, the jury "is not what it is because some lawgiver so decreed but because that is the way it has grown up."[3]

Canada, as a member of the Commonwealth, inherited the English jury system. The four original Canadian provinces – New Brunswick, Nova Scotia, Ontario, and Quebec – took up the English jury tradition in the mid-to-late 18th century.[4] At Confederation, in 1867, jurisdiction over criminal law was vested in the Canadian federal Parliament, which chose to continue the jury tradition within Canada as a newly constituted country. In 1892, the enactment of the first version of the *Criminal Code* cemented jury trials, and the procedure surrounding them, into Canadian law.[5] Since that time, the jury system has been endorsed as a "cornerstone" of Canadian criminal law.[6] Its fundamental importance was further cemented by the constitutional entrenchment of criminal jury trials in 1982 with the enactment of the *Canadian Charter of Rights and Freedoms*. Together, sections 11(d) and (f) of the *Charter* guarantee the benefit of a trial by an independent and impartial jury to all accused persons charged with an offence with a maximum punishment of imprisonment for five years or more.[7]

The wisdom of our system's continued endorsement of the criminal jury, as well as the benefit of its present constitutional status, depends on the validity of a key

---

[1] See *R v Sherratt*, [1991] 1 SCR 509, 63 CCC (3d) 193.
[2] See *Regina v Bryant* (1984), 48 OR (2d) 732, 16 CCC (3d) 408 (CA).
[3] Patrick Devlin, *Trial by Jury*, 3rd ed (London: Stevens, 1966) at 4.
[4] Regina Schuller & Neil Vidmar, "The Canadian Criminal Jury" (2011) 86:1 Chi-Kent L Rev 497 at 497-98.
[5] *Ibid.*
[6] *R v Find*, 2001 SCC 32 at para 1.
[7] *Canadian Charter of Rights and Freedoms*, ss 11(d), (f), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

presumption: that verdicts rendered by criminal juries are *fair*. Indeed, as the Supreme Court of Canada noted in *R v Find,* trial by jury "offers the citizen the right to be tried by an impartial panel of peers and imposes on those peers the task of judging fairly and impartially."[8] Similarly, in *R v Spence*, it was observed that, "[o]ver the years, people accused of serious crimes have generally chosen trial by jury in the expectation of a fair result" and that "[t]his confidence in the jury system on the part of those with the most at risk speaks to its strength."[9]

However, a modern obstacle has thrown a wrench into this presumption, challenging the long-held notion that we can guarantee fair jury trials: the Internet. Indeed, over the past three decades, criminal trials have been derailed at an increasing rate as a result of online juror misconduct. By "online juror misconduct," I refer to one of two concerns: what Harvey has helpfully dubbed "information in" or, conversely, "information out."[10] In this context, "information in" refers to situations where jurors use technology to seek out extraneous information which could improperly influence the deliberation process. Practically, this boils down to jurors conducting independent online research about either the case or the law. "Information out," on the other hand, refers to situations where jurors use technology to *communicate* about their experience serving on a jury or about the case being tried, as well as when they use the Internet to contact the parties or counsel.

This project will contribute to, and build upon, the existing (and, at this point, limited) body of literature on online juror misconduct in the Digital Age and its impact on accused persons' fair trial rights. While both types of misconduct are worthy of further academic inquiry, particularly within the context of Canadian juries, this project's scope is limited to "information in." That is, I will be focusing solely on online juror research ["OJR"] – jurors' independent research into the facts of the case, the evidence, and the

[8] *Find*, *supra* note 6.
[9] *R v Spence*, 2005 SCC 71 at para 22.
[10] David Harvey "The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm" (2014) NZ L Rev 203 at 209-13.

parties ("factual research"), as well as into relevant legal rules and principles ("legal research").

Of course, independent research by jurors has been a cause for concern since well before the Digital Age.[11] Indeed, trial judges have long instructed jurors to refrain from accessing "legacy media," such as newspaper articles or television or radio broadcasts about the case, as well as from attempting to learn more about relevant legal concepts.[12] However, the nature of juror research has changed dramatically alongside the rise of technology and has, as a result, become an increasingly significant issue. Gone are the days when independent research was limited to jurors visiting the crime scene, going to the library to look up legal terms or news articles, or seeking out information through word-of-mouth. Now, we are forced to confront the reality that jurors are turning to the Internet to improperly conduct research into the case or law before them. This "modern twist" on one of criminal law's classic conundrums has raised whether current measures for addressing juror research are sufficient and, if not, what strategies can – and should – be imposed to effectively target this misconduct.

By undertaking this project, I seek to provide answers to this problem. Throughout the subsequent Chapters, I engage in a systematic assessment of OJR in Canada. In doing so, I explore the likely prevalence of the phenomenon, its impact on the accused's constitutional right to a fair trial, jurors' underlying motivation(s) for engaging in online research, and, ultimately, the efficacy of any tactics used to deter or detect such misconduct, whether currently in use or that could potentially be implemented. In conducting this work, I seek to contribute to the, thus far, sparse collection of literature on online juror misconduct. This is a relatively under-researched area in general, due to the unique hurdles associated with jury research – namely, the jury secrecy rule, which

---

[11] See e.g. Robbie Manhas, "Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms" (2014) 112:5 Mich L Rev 809 at 810; Thaddeus Hoffmeister, "Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age" (2012) 83:2 U Colorado L Rev 409 at 417.

[12] See e.g. Ellen Brickman et al, "How Juror Internet Use Has Changed the American Jury" (2008) 1:2 J Court Innovation 287 at 291; Matthew Aglialoro, "Criminalization of Juror Misconduct Arising From Social Media Use" (2015) 28:1 Notre Dame JL Ethics & Pub Pol'y 101 at 105; Rebecca M Hayes & Kate Luther, *#Crime: Social Media, Crime, and the Criminal Legal System* (New York: Palgrave MacMillan, 2018) at 58-59.

has been retained across common law jurisdictions to differing extents and prevents jurors from divulging information about their deliberative process. What sets my research apart, however, is that I am tackling the issue of online misconduct using a specifically Canadian lens. In Canada, research into online juror misconduct is not just uncommon – it has been virtually *untouched*.[13] Thus, by bringing the Canadian perspective into a conversation from which it has, thus far, been largely excluded, I submit that the analysis and findings contained within the Chapters of this project are of considerable jurisprudential significance.

This project consists of, in addition to this brief introductory Chapter, five substantive Chapters. In Chapter 2, I undertake an examination of the prevalence of OJR as a phenomenon within Canadian jury trials. To demonstrate that OJR occurs *at least* occasionally, reported instances of OJR throughout the common law world are surveyed. From there, the jury secrecy rule is identified as a hurdle to determining the exact prevalence of OJR with any degree of certainty, both because it necessitates private jury deliberations and creates significant restrictions on empirical research involving actual jurors. After identifying this weakness, I move on to an exploration of two factors that suggest OJR to be a phenomenon that occurs somewhat regularly in Canada: (1) rates of Internet use, both generally and for the specific purpose of information-seeking and consumption; and (2) existing empirical data from other jurisdictions on jurors' Internet use during service.

In Chapter 3, I discuss the negative impact of OJR on the accused's constitutional right to a fair trial. I divide my discussion between "factual research" and "legal research." I argue that the former puts trial fairness at risk due to its negative impact on two essential guarantees: (1) the right to an impartial trier of fact, and (2) the right to make full answer and defence. With respect to partiality, I establish that, when jurors engage in online factual research, they risk exposing themselves to information that has not been vetted by the trial judge and, thus, may be prejudicial, irrelevant, or even inaccurate. On this point, I provide compelling evidence that this risk may be

[13] To date, this is the sole Canadian article published on the topic of online juror misconduct: Keith W Hogg, "Runaway Jurors: Independent Juror Research in the Internet Age" (2019) 9:1 W J Legal Stud 1.

heightened for racialized accused, given the overrepresentation (and, often, largely *negative* portrayal) of racialized persons in crime news coverage. I also demonstrate that online factual research has the effect of denying the accused the right to make full answer and defence, given that they will, in most cases, be unaware that research has been conducted and, therefore, denied the opportunity to challenge the validity of any extraneous information. From there, I go on to demonstrate that online *legal* research may also jeopardize trial fairness, given that it creates the risk that key legal principles and concepts will be improperly interpreted and applied by jurors.

In Chapter 4, I explore jurors' underlying motivations for engaging in online research. In doing so, I put forward four viable, explanatory theories as to *why* jurors engage in OJR: (1) moral obligation (OJR as a means to discover the "truth" about a case and come to the "correct" verdict); (2) confusion (OJR as a response to case or legal complexity); (3) habit (OJR stemming from jurors' Internet-use habits); and (4) addiction (OJR as a product of a juror's Internet addiction). In addition, I introduce the concept of "recalcitrant" jurors – a subset of the juror population who, despite knowledge of the prohibition on independent research, have no intention of following it.

In Chapter 5, I canvass and critically examine the strategies currently used in Canada to detect, prevent, and ameliorate the negative consequences of OJR. In line with Harvey's triad of responses to online juror misconduct,[14] I categorize these measures as being either deterrent, preventative, or remedial in nature. Deterrent measures include jury sequestration and banning or confiscating electronic devices. Preventative measures include judicial instruction with respect to both OJR generally and a specific instruction that jurors "self-police." Remedial measures include the accused's ability (in certain circumstances) to elect a trial by judge alone, as well as the impeachment of jury verdicts/behaviour. In this Chapter, I set out the rationale and procedure underpinning each strategy and provide criticism as to the weaknesses inherent in each approach. Ultimately, I conclude that the strategies canvassed, both individually and collectively, fall short of what is required to truly mitigate the trial fairness risks posed by OJR,

[14] Harvey, *supra* note 10 at 227.

largely due to their inability to effectively target jurors' underlying motivation(s) for engaging in online research.

Finally, in Chapter 6, I put forward five potential reforms to Canadian jury procedure that would, in my view, meaningfully address the issue of OJR: (1) routinely permitting an Internet-use-based challenge for cause; (2) modifying the jurors' oath/affirmation to contain an explicit promise to refrain from engaging in independent research; (3) updating Canadian model jury instructions on OJR; (4) expanding jurors' ability to ask questions; and (5) criminalizing independent research by jurors. I argue that, collectively, these strategies would help to minimize the impact of jurors' online research through the employment of diverse, motivation-based strategies for the prevention and detection of OJR. I conclude with recommendations for further research on OJR that would, I submit, build upon the strong foundation this project has created.

CHAPTER 2: EXPLORING THE PREVALENCE OF ONLINE JUROR RESEARCH IN CANADA

2.1 INTRODUCTION

Somewhat ironically, one need only do a quick online search to discover that, across common law jurisdictions, there have been numerous reported incidents of online juror research ["OJR"]. Consider, for example, *R v Karakaya*,[1] a UK case in which the accused stood trial for multiple instances of sexual assault against a 14-year-old girl. The complainant gave evidence against the accused, and the jury ultimately found him guilty. His conviction was quashed, however, after a bailiff discovered several online printouts in the jury room – documents entitled, for instance, "The Feminist Position on Rape" and "Rape and the Criminal Justice System." It was found to be "virtually certain" that the documents were brought in by a juror after an overnight adjournment.[2] *United States of America v Frank Hernandez et al*, which involved a federal pharmaceutical drug trial out Florida,[3] is yet another high-profile example. After about seven weeks of proceedings, the trial judge received a note from a juror who was "distressed" upon hearing a fellow juror indicate that he had conducted online research about medications mentioned during trial. Once the impugned juror admitted to this misconduct, the judge proceeded to question the rest of the jurors, at which point he was shocked to find out that *eight* others had done precisely the same thing: turned to the Internet to do their own independent sleuthing. The judge had no option but to declare a mistrial.[4]

Incidents like these raise an important question: are they just "one off" instances of misconduct by "bad egg" jurors or, instead, indicative of a widespread systemic problem? Put simply, just *how* common an occurrence is OJR? Unfortunately, determining the true prevalence of OJR has proven difficult. Indeed, in Canada, we have

---

[1] *R v Karakaya*, [2005] EWCA Crim 346.
[2] See Nicole Martin, "Rape retrial after jury uses internet" *The Telegraph* (17 February 2005), online: <https://www.telegraph.co.uk/news/uknews/1483727/Rape-retrial-after-jury-uses-internet.html>.
[3] See Deirdra Funcheon, "Jurors Gone Wild: Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies" *Miami New Times* (23 April 2009), online: <https://www.miaminewtimes.com/news/jurors-gone-wild-6332969>.
[4] See John Schwartz, "As Jurors Turn to Web, Mistrials Are Popping Up" *The New York Times* (17 March 2009), online: <https://www.nytimes.com/2009/03/18/us/18juries.html>.

seen relatively few reported cases of OJR, either in case law or news media, and have virtually no empirical data on incidence. This is, largely, due to certain hurdles created by the "jury secrecy rule," a legal rule at both common law and under statute that prohibits disclosure of information concerning a jury's deliberative process. This uncertainty poses a problem not just for our criminal justice system, forced to contend with an issue of unknown scope and gravity, but also within the context of this project – it creates the formidable challenge of establishing OJR as a pressing issue worthy of study despite a lack of direct evidence of its prevalence.

However, in this Chapter, I hope to establish that, despite the challenges posed by jury secrecy in determining the prevalence of OJR, it is reasonable to conclude that OJR is likely a prevalent and underreported issue in Canada and, indeed, the common law world more broadly. I begin by surveying reported instances of OJR, in an effort to demonstrate that it is, indeed, an occurring phenomenon, as well as to reveal the usual subject matter of jurors' independent online investigations. I then proceed to examine the jury secrecy rule and the challenges it poses to accurately determining the prevalence of OJR in Canada. More specifically, I consider two "hurdles" which stem from jury secrecy, both of which inhibit the gathering of information required to accurately assess the frequency of OJR: the private nature of jury deliberations and restrictions on empirical jury research. From there, I turn to an examination of two factors which, I submit, lend support to the contention that OJR is likely a regular occurrence: (1) rates of Internet use within Canada, both generally and for the specific purpose of information-seeking and consumption; and (2) existing empirical data on jurors' Internet use during service. I explore both factors in detail and, ultimately, argue that, when considered alongside reported instances of OJR across the common law world, they add significant weight to the argument that OJR is, indeed, a concern worth addressing.

2.2 ONLINE RESEARCH AS AN OCCURRING PHENOMENON

As a starting point, it is clear that OJR is a phenomenon that occurs *at least* occasionally. This is due to specific instances of OJR being reported, both in the news and within case law. Indeed, in Canada, we have seen several reported instances of OJR,

many of which have come out of Ontario.[5] OJR has also been reported (and, indeed, more often) in other common law jurisdictions that have retained the criminal jury tradition, including Australia,[6] the United Kingdom,[7] and, most frequently, the United States.[8]

These reports demonstrate the breadth in subject matter of jurors' independent online investigations. Jurors have, for instance, used the Internet as a tool to learn more about the factual circumstances underpinning a case. Take, for instance, *R v Farinacci*, an Ontario drug trial during which multiple jurors conducted online searches to determine the price of cocaine.[9] Jurors have also ventured online to clarify unfamiliar legal concepts and "terms of art." These include, for example, the elements of the offences being tried

---

[5] See e.g. *R v Farinacci*, 2015 ONCA 392 (jurors on Ontario drug trial conducted online searches with respect to the prior record, as well as the price of cocaine); *R v Bains*, 2015 ONCA 677 (jurors on Ontario drug trafficking trial conducted online research with respect to the "beyond a reasonable doubt" standard, as well as accessed American online news media materials on the high-profile acquittal of Casey Anthony); *R v Ampadu*, 2018 ONSC 2797 (juror on Ontario manslaughter and assault trial conducted online research into the accused, judge, and trial lawyers, as well as created a computer-generated map of the crime scene); *R v Schirmer*, 2020 BCSC 2257 (juror on British Columbia drug trafficking trial used the Internet to look up information related to evidence presented at trial); Betsy Powell, "Court cases can go off the rails when jurors go to Google" *Toronto Star* (13 January 2020), (describing the mistrial that occurred in Calvin Nimoh's trial for the 2015 death of cancer researcher Mark Ernsting in downtown Toronto when a juror went online to find information about Nimoh's prior criminal record), online: <https://www.thestar.com/news/gta/court-cases-can-go-off-the-rails-when-jurors-go-to-google/article_c9157b71-eaa6-5493-a8d5-a35edfdeaa3b.html>. See also, in the civil context, *Patterson v Peladeau*, 2020 ONCA 137 (juror on a motor vehicle personal injury action looked up legislation not provided to the jury or mentioned at trial on the Ontario provincial government website).

[6] See e.g. *R v Sio (No 3)*, [2013] NSWSC 1414; *R v Sio (No 4)*, [2013] NSWSC 1415; *Registrar of the Supreme Court of South Australia v S; Registrar of the Supreme Court of South Australia v C*, [2016] SASC 93. See also Tony Keim, "Queensland Murder Trial Aborted as Juror Researches Case on 'Facebook'" *The Courier Mail* (8 August 2014), online: <https://www.couriermail.com.au/news/queensland/queensland-murder-trial-aborted-as-juror-researches-case-on-facebook/news-story/efa2ca3f43199b4f04f5fe9bdc6b1b20>.

[7] See e.g. *Karakaya*, *supra* note 1; *R v Marshall*, [2007] EWCA Crim 35; *R v Hawkins*, [2005] EWCA Crim 2842; *Attorney-General v Dallas*, [2012] EWHC 156. See also Owen Bowcott, "Two jurors jailed for contempt of court after misusing internet during trials" *The Guardian* (29 July 2013), online: <https://www.theguardian.com/law/2013/jul/29/jurors-jailed-contempt-court-internet>; Robyn Vinter, "Juror jailed for causing rape trial to collapse by researching defendant online" *The Guardian* (25 May 2023), online: <https://www.theguardian.com/uk-news/2023/may/25/juror-jailed-for-causing-trial-to-collapse-by-researching-defendant-online>.

[8] See e.g. *Tapanes v State*, 43 So 3d 159 (Fla Dis Ct App 2010); *Allan Jake Clark v State of Maryland*, No 0953/08 (Md Ct Special App, 2009); *Hill v Gipson*, No 12-CV-00504-AWI-DLB (HC) (ED Cal Aug 22, 2012); *People v Oritz*, Crim No B205674 (Cal App, 2d Dist 2009). See also Brian Grow, "As jurors go online, U.S. trials go off track" *Reuters* (8 December 2010), online: <https://www.reuters.com/article/us-internet-jurors-idUSTRE6B74Z820101208#:~:text=The%20data%20show%20that%20since,%2D%2D%2021%20since%20January%202009.>.

[9] *Farinacci*, *supra* note 5 at para 25.

before them,[10] as well as the meaning of the burden of proof "beyond a reasonable doubt."[11]

Jurors have also turned to the Internet to learn more about matters of expert evidence. A 2009 Maryland murder conviction, for example, was overturned on appeal upon discovery that one of the jurors had conducted an online search of scientific terms relating to blood flow after death.[12] Similarly, a capital trial in Pennsylvania for an infant's murder was derailed by a juror's online search for "retinal detachment," an injury suffered by the victim.[13] Other similar instances of online research have occurred with respect to, for instance, the effect of certain prescription medications,[14] the use of cellular phone records,[15] the characteristics of addiction,[16] various psychological conditions, including "rape trauma syndrome"[17] and "oppositional defiant disorder,"[18] and the steps of illicit drug production.[19]

Finally, jurors appear to rely on the Internet as a tool to learn more about the various *parties* involved in the cases they hear. Most often, their curiosity surrounds the

---

[10] See e.g. *R v Benbrika*, [2009] VSC 142 (multiple jurors on a Victoria terrorism trial used Wikipedia and Reference.com to search for definitions of "membership," "intentional," and "organization"); *R v JP (No 1)*, [2013] NSWSC 1678; *R v JP (No 2)*, [2013] NSWSC 1679 (a New South Wales juror conducted online research to discern the difference between murder and manslaughter); *United States v Lawson*, 677 F 3d 629 (4th Cir 2012) (a juror on a South Carolina "cockfighting" trial used the Internet to look up the definition of "sponsor," an element of the offence); Glenn Kauth, "Focus: Defence lawyers warned of mistrial risks" *LawTimes* (31 December 2012) (describing an Arizona murder trial in which jurors googled the meaning of first- versus second-degree murder, as well as the definition of "premeditation"), online: <https://www.lawtimesnews.com/news/features/focus-defence-lawyers-warned-of-mistrial-risks/260468>.
[11] See e.g. *Bains*, *supra* note 5; *Martin v R* (2010), 28 VR 579; *Marshall and Richardson v Tasmania*, [2016] TASCCA 21.
[12] See *Allan Jake Clark*, *supra* note 8.
[13] See Brian Grow, "Juror could face charges for online research" *Reuters* (19 January 2011), online: <https://www.reuters.com/article/ctech-us-internet-juror-idCATRE70I5KI20110119>.
[14] See *United States of America v Frank Hernandez et al*, as described in Funcheon, *supra* note 3; Schwartz, *supra* note 4.
[15] See *Hill v Gipson*, *supra* note 8.
[16] See *Hawkins*, *supra* note 7.
[17] See Susannah Bryan, "Davie police officer convicted of drugging, raping family member to get new trial" *The Palm Beach Post* (15 December 2010), online: <https://www.palmbeachpost.com/story/news/2010/12/16/davie-police-officer-convicted-drugging/7469608007/>.
[18] Andrea F Siegel, "Judges Confounded by Jury's Access to Cyberspace" *Baltimore Sun* (13 December 2009), online: <https://www.baltimoresun.com/2009/12/13/judges-confounded-by-jurys-access-to-cyberspace/>.
[19] See Heather McNeill, "Calls to overhaul WA jury system after juror dismissed for Facebook post" *WAtoday* (13 October 2016), online: <https://www.watoday.com.au/national/western-australia/calls-to-overhaul-wa-jury-system-after-juror-dismissed-for-facebook-post-20161012-gs0wwa.html>.

accused person being tried.[20] Jurors have used the Internet to uncover details about an accused's previous trial(s),[21] as well any prior criminal record they may have.[22] They have also been known to uncover evidence of prejudicial post-offence conduct. Consider, for example, a Florida murder trial in which a prospective juror googled the name of the accused and told others: "This is a bad guy. He ran away to Nicaragua after the murder."[23] However, juror curiosity is not limited to *just* the accused. Jurors have also been known to conduct online searches about victims,[24] as well as the lawyers and/or judge involved in the trial.[25]

2.3 JURY SECRECY: A HURDLE TO DETERMINING PREVALENCE

While these reports are confirmatory of the fact that OJR is a phenomenon that occurs at least sometimes, they fail to provide insight into how often OJR *actually* occurs. Indeed, despite the regularity with which instances of OJR crop up in the news (particularly in certain jurisdictions, such as the United States),[26] they still clearly represent the minority of all criminal matters heard by juries. The question, then, is whether these reports represent one-off instances of bad behaviour by naughty jurors or, perhaps, are representative of a widespread, systemic problem within the criminal trial

---

[20] See Tasmania Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Final Report No 3, January 2020) at 7.

[21] See e.g. Joanna Menagh, "Judge 'almost speechless with rage' after third Ronald Pennington trial for 1992 murder aborted" *ABC News* (31 July 2014) (discussing the third aborted murder trial of Ronald Pennington in Western Australia in 2014, following independent online research by jurors as to the details of Pennington's first two trials), online: <https://www.abc.net.au/news/2014-07-30/judge-27speechless-with-rage27-after-third-trial-for-1992-mur/5636388>.

[22] See e.g. *R v K*, (2003) 59 NSWLR 431(in a New South Wales trial, where the accused stood charged with the murder of his first wife, jurors conducted online research about the same accused's previous trial for the murder of his second wife); Powell, *supra* note 5 (describing the mistrial that occurred in Calvin Nimoh's trial for the 2015 death of cancer researcher Mark Ernsting in downtown Toronto when a juror went online to find information about Nimoh's prior criminal record); Josh Gauntt, "Judge declares mistrial after Google search" *WBRC* (21 September 2018) (describing the mistrial that occurred in Fessor Pearson's 2018 Alabama murder trial after a juror googled Pearson's criminal record), online: <https://www.wbrc.com/2018/09/21/judge-declares-mistrial-after-google-search/>.

[23] See Jane Musgrave, "Juror mischief a growing concern" *Palm Beach Post* (13 May 2012).

[24] See e.g. *R v JH (No 3)*, 2014 NSWSC 1966 (a juror on a New South Wales murder trial conducted online searches to find a photograph of the deceased victim). See also Bowcott, *supra* note 7 (describing a juror on a Surrey fraud trial who used Google to "dig up extra information" about the victims); and Keim, *supra* note 6 (describing a juror on a Queensland murder trial who researched the deceased victim on Facebook).

[25] See e.g. *Ampadu*, *supra* note 5 (juror on Ontario manslaughter and assault trial conducted online research into the judge and trial lawyers).

[26] See Tasmania Law Reform Institute, *supra* note 20 at 36.

process. After all, the fact that these instances of misconduct *have* occurred, even multiple times across multiple jurisdictions, does not necessarily mean they occur with any routine regularity. Indeed, they could be outliers which just so happen to have attracted the interest of the media and, by extension, the public. Connor & Skove, for instance, have argued that it is precisely *because* juror misconduct is so rare that the media report such stories at a very high rate, a practice that can be "devastating to the system of justice."[27]

Unfortunately, it is currently impossible to measure the prevalence of OJR among jurors with any degree of certainty.[28] As observed by Hannaford-Agor, Rottman & Waters, given that most of the available information about jurors' online misconduct comes from media reports, it remains largely anecdotal, with estimates of incidence of jurors' misuse of the Internet being "no more than a step above" what can be gleaned from such anecdote.[29] As put by Professor Kerstin Braun of the University of Southern Queensland, "while it is unclear and under researched how prevalent jurors' social media use is in criminal trials, media reports document that this type of use occurs in different common law jurisdictions on a regular basis. The current scope of the phenomenon, however, remains speculative only."[30]

I submit that this uncertainty is due, in large part, to the "jury secrecy rule,"[31] a legal rule at both common law and under statute that prohibits disclosure of information concerning a jury's deliberations. In this section, I provide an overview of the jury secrecy rule as it currently operates in Canada, as well as various justifications for the rule's continued retention. I then proceed to examine the challenges posed by jury

---

[27] Jacqueline Connor & Anne Endress Skove, "Dial 'M' for Misconduct: The Effect of Mass Media and Pop Culture on Juror Expectations" in *Future Trends in State Courts* (Williamsburg, VA: National Center for State Courts, 2004) at 104. See also Patrick C Brayer, "The Disconnected Juror: Smart Devices and Juries in the Digital Age of Litigation" (2016) 30 Notre Dame JL Ethics & Pub Pol'y 25 at 37.
[28] See e.g. Nancy S Marder, "Jurors and Social Media: Is a Fair Trial Still Possible" (2014) 67:3 SMU L Rev 617 at 630; John G Browning & Arjen J Meter, "Googling a Mistrial: Online Juror Misconduct in Alabama" (2022) 14:1 Faulkner L Rev 67 at 69; Tasmania Law Reform Institute, *supra* note 20 at 31.
[29] Paula Hannaford-Agor, David B Rottman & Nicole L Waters, *Juror and Jury Use of New Media: A Baseline Exploration* (The National Center for State Courts, 2012).
[30] Tasmania Law Reform Institute, *supra* note 20 at 36.
[31] See Law Commission of New Zealand, *Contempt in Modern New Zealand* (Wellington, NZ: Law Commission of New Zealand, 2014) at 5.24.

secrecy in accurately determining the prevalence of independent online research by Canadian jurors. More specifically, I consider two "hurdles" which stem from the jury secrecy rule, both of which inhibit the gathering of information required to accurately assess the frequency of OJR: (1) the private nature of jury deliberations; and (2) restrictions on empirical jury research.

2.3.1 JURY SECRECY IN CANADA

The modern jury secrecy rule is based on the principle, deeply rooted in English common law, that "the jury must deliberate in private, free from outside influence."[32] This principle was transformed into an evidentiary rule in 1785, upon release of Lord Mansfield's decision in *Vaise v Delaval*.[33] In that case, jurors flipped a coin to resolve a deadlock and avoid a hung jury. The accused sought to have the verdict set aside, presenting the court with affidavits from two jurors attesting that the "verdict had been based on a game of chance."[34] Refusing to consider the affidavits, Lord Mansfield observed doing so would be contrary to the rule that jurors are not permitted to impeach their own verdicts. This decision created what would become a long-standing evidentiary prohibition on disclosure of occurrences within the jury room.

The Supreme Court of Canada considered the modern formulation of Mansfield's rule in *R v Pan*.[35] The Court held that, at common law, any statements made, opinions expressed, arguments advanced, or votes cast by members of the jury during their deliberations are inadmissible in any legal proceedings. In other words, jurors may not testify about the effect of anything on their or other jurors' minds, emotions, or ultimate decision.[36]

However, in determining the parameters of the common law rule, the Court recognized a distinction between matters *intrinsic* and *extrinsic* to deliberations. While the former are covered by the jury secrecy rule, the latter are not. As a result, while a

---

[32] *R v Pan; R v Sawyer*, 2001 SCC 42 at para 47.
[33] *Vaise v Delaval* (1785), 1 TR 11, 99 ER 944 (KB).
[34] Daniel S Harawa, "Sacrificing Secrecy" (2021) 55 Georgia L Rev 593 at 608.
[35] *Pan*, *supra* note 32.
[36] *Ibid* at para 77.

court may not receive information about the *effect* any information – including information the jury was not supposed to consider – had on deliberations, the common law rule does not render inadmissible the fact that jurors were *exposed* to such information, which may or may not have tainted deliberations.[37] Thus, using OJR as an illustrative example, a juror would be permitted to report to the trial judge that a fellow juror (or that they themselves) conducted independent online research into some aspect of the case. Indeed, they could reveal details as to the exact nature and subject of the online research conducted. However, they would not be permitted to divulge how, if at all, the jury's exposure to that external information *impacted* the deliberative process.

In 1972, Parliament expanded the scope of the jury secrecy rule through the enactment of what is now section 649 of the *Criminal Code*.[38] This provision was a response to the concern that jurors, after delivering their verdict, would divulge information about the deliberative process to the media, as is often done in the United States.[39] Section 649 creates a summary conviction offence prohibiting jurors from disclosing information relating to "proceedings of the jury" when it was absent from the courtroom not, subsequently, disclosed in open court.[40] Per the Court in *Pan*, this refers to the same information inadmissible under the common law rule: that which relates to the jury's deliberations.[41] However, the scope of section 649 is much broader – jurors are barred from disclosing aspects of the jury's deliberations not just to the court but, indeed, to *anyone*. Thus, the provision, as noted by the Court of Appeal of Manitoba in *R v Roussin*, enshrouds the jury room in a "veil of secrecy."[42]

However, section 649's prohibition on disclosure is not absolute. A juror may divulge information with respect to jury proceedings for the purposes of cooperating with an investigation into, or giving evidence in criminal proceedings relating to, allegations

---

[37] *Ibid*.
[38] *Criminal Code*, RSC 1985, c C-46 ["*Code*"], s 649. The provision was originally enacted as s 576. See *Criminal Law Amendment Act, 1972*, SC 1972, c 13.
[39] Marie Comiskey, "Initiating Dialogue about Jury Comprehension of Legal Concepts: Can the Stagnant Pool be Revitalized?" (2010) 35:2 Queen's LJ 625 at 661-62.
[40] *Code*, *supra* note 38, s 649(1).
[41] *Pan*, *supra* note 32 at para 85.
[42] *R v Roussin (B.)*, 2011 MBCA 103 at para 17.

of obstruction of justice.[43] In addition, Parliament recently amended the provision to allow jurors to discuss their experience, including deliberations, with a health care professional, such as a counsellor, psychologist, or psychiatrist.[44] These exceptions are *exhaustive* – outside the bounds of these specific circumstances, disclosure is strictly prohibited.

2.3.2 JUSTIFICATIONS FOR SECRECY

In *Pan*, the Court also took the opportunity to reflect upon the various justifications for retaining jury secrecy in Canada. First, and perhaps most importantly, the guarantee of secrecy promotes "full and frank debate" within the jury room.[45] As put by Arbour J, jurors should be free to "explore out loud all avenues of reasoning without fear of exposure to public ridicule, contempt or hatred."[46] This, in turn, permits jurors to explore "unpopular" verdicts, such as the potential acquittal of a notorious or controversial accused or one charged with a particularly gruesome or repulsive offence, without fear of public backlash.

Jury secrecy also works to protect jurors' privacy. Without a guarantee of confidentiality, jurors deemed by the public as "responsible" for unpopular or controversial verdicts may experience harassment and, conceivably, might even feel pressure to publicly defend the position they took during deliberations.[47] This would be unfair, given that sitting on a jury is an act of public service, often performed at great personal cost – both financial and emotional. On that point, Arbour J identified this justification as particularly compelling, given that the continued operation of jury trials depends largely upon the public's participation and willingness to serve.[48]

---

[43] *Code*, *supra* note 38, ss 649(2)(a), (b).
[44] *Ibid*, s 649(2)(c).
[45] *Pan*, *supra* note 32 at para 50.
[46] *Ibid*.
[47] See Jennifer Tunna, "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9:1 Canterbury L Rev 79 at 86.
[48] *Pan*, *supra* note 32 at para 52.

Further, jury secrecy ensures the finality of verdicts, thereby protecting the "solemnity" of the verdict as a "product of unanimous consensus."[49] While there will always be room for speculation, the confidentiality of deliberations makes it such that the precise reasoning behind jury verdicts will remain a mystery. This tends to insulate verdicts from doubt or uncertainty, as well as prevent the "endless rehashing over the legality of specific comments of individual jurors."[50] Put simply, it forces the public to accept the jury's ultimate decision as legal, rational, and legitimate.[51]

Finally, and somewhat relatedly, jury secrecy tends to promote public confidence in the jury system.[52] We have long valued the jury as a *collective* decision-maker, the rationale being that the deliberative efforts of twelve citizens from all walks of life tend to result in verdicts representative of the "conscience of the community."[53] Publicizing deliberations would undermine the communitarian value of juries by putting individual compromises and differences of opinion on display. As noted by Tunna, the public will be more accepting of verdicts for which *no* reasons are provided than verdicts which show marked differences in reasoning.[54]

2.3.3 JURY SECRECY AS A HURDLE TO DETERMINING PREVALENCE

Despite the clear validity of these justifications,[55] the jury secrecy rule poses a challenge for determining the extent of OJR amongst Canadian jurors. More specifically, I submit that the rule creates two "hurdles" which inhibit the gathering of information required to accurately assess the prevalence of OJR. First, jury secrecy necessitates that

---

[49] *Ibid* at para 51.
[50] Tunna, *supra* note 47 at 85.
[51] *Ibid.*
[52] *Pan*, *supra* note 32 at para 89.
[53] See Abraham S Goldstein, "Jury Secrecy and the Media: The Problems of Postverdict Interviews" (1993) 93 U Ill L Rev 295 at 295-96.
[54] Tunna, *supra* note 47 at 87.
[55] There is substantial consensus among commentators with respect to the validity of the justifications for jury secrecy, as endorsed by the Court in *Pan*. However, some have questioned their continuing relevance. For critiques of the arguments in favour of jury secrecy, see e.g. Jason Donnelly, *Decisions Without Reasons – Rethinking Jury Secrecy* (Queensland: Bookpal, 2008) at 7-26; Clifford Holt Ruprecht, "Are Verdicts, Too, Like Sausages: Lifting the Cloak of Jury Secrecy" (1997) 146:1 U Pa L Rev 217 at 226-232; Nik Khakhar, "'Reviewing Our Peers': Evaluating the Legitimacy of the Canadian Jury Verdict in Criminal Trials" (2022) 80:1 UT Fac L Rev 42 at 58-60.

jurors deliberate in private, meaning that any wrongdoing which may take place during deliberations is shielded from direct observation. This, in combination with the statutory jury secrecy rule housed in section 649 of the *Code*, which prevents jurors from discussing the deliberative process with anyone once a verdict has been rendered, makes it such that there are only two "avenues of discovery" through which OJR can be detected: (1) where a juror reports such misconduct, or (2) where evidence of such misconduct is subsequently discovered. Unfortunately, as I will demonstrate, both avenues are of questionable efficacy. Second, because of the jury secrecy rule, there are significant restrictions on conducting empirical jury research in Canada involving *real* jurors. As I establish below, this creates a substantial hurdle with respect to gathering data on the prevalence of OJR, given that Canadian researchers are unable to question (or, at the very least, unwilling to risk the potential consequences of questioning) jurors about the frequency and nature of their Internet use.

2.3.3.1 THE PRIVATE NATURE OF JURY DELIBERATIONS

To best safeguard the secrecy of jury deliberations, jurors deliberate in private, outside the courtroom and away from the observation of even the trial judge and other court officials.[56] While this procedure helps to protect the jury's deliberative process from outside interference, it also, unfortunately, tends to hide any *wrongdoing* that may occur during that process, including OJR. Indeed, as observed by the Tasmania Law Reform Institute, very rarely will misconduct of this kind "involve an overt act in the courtroom that is detectable by the presiding trial judge."[57] Such wrongdoing, instead, typically takes place during the deliberation phase, within which the jury is shielded from outside eyes.[58] Further, as discussed above, once the trial has concluded and a verdict has

[56] See e.g. *Pan*, *supra* note 32 at para 47; *Contempt in Modern New Zealand*, *supra* note 31 at 5.24; Thaddeus Hoffmeister & Ann Charles Watts, "Social Media, the Internet, and Trial by Jury" (2018) 14:2 Annu Rev L Soc Sci 259 at 264.
[57] Tasmania Law Reform Institute, *supra* note 20 at 32. See also Meghan Dunn, *Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management* (Washington, DC: Federal Judicial Center, 2014) at 6.
[58] See Hoffmeister & Watts, *supra* note 56 at 264.

been rendered, jurors are precluded from discussing the deliberative process with anyone.[59]

The requirement that jurors deliberate in private creates a narrow set of circumstances in which juror misconduct – and OJR in particular – is discoverable. Indeed, as a direct result of the "privacy" condition necessitated by the jury secrecy rule, OJR will typically only come to light where: (1) a juror either self-reports their own misconduct or discloses it to a fellow juror who subsequently reports it, or (2) evidence of such misconduct happens to be discovered. In theory, this would be sufficient, so long as these two "avenues of discovery" enabled the routine detection of OJR. Unfortunately, as I demonstrate below, there is evidence to suggest that both avenues are of questionable efficacy. Consequently, the already-narrow path toward the discovery of incidents OJR, as necessitated by the jury secrecy rule, is littered with significant obstacles, the result being that a substantial portion of such misconduct likely goes undiscovered.

Let us now turn to the first avenue of discovery: jurors reporting incidents of OJR. When OJR is detected, it is often due to misconduct being reported, typically to the trial judge, by either the transgressing juror or, more often, one of their fellow jurors. Take, for instance, the British Columbia case of *R v Schirmer*,[60] in which the accused was on trial for possession of various illicit substances for the purpose of trafficking, as well as for the possession of a prohibited weapon. One of the accused's jurors, on two occasions turned to the Internet to search for information related to certain evidence admitted at trial. The juror's misconduct came to light after she wrote a note to the trial judge, looking to clarify some of the information she discovered. Similarly, in 2021, a New Jersey trial involving the assault of a US Immigration and Customs Enforcement Officer,

[59] The exception, here, is the "whistleblowing juror," who violates their secrecy obligations by speaking out about the jury's deliberative process. Take, for instance, the juror in the 2011 second-degree murder trial of Christophe Lewis who, days after Lewis' conviction was entered, publicly alleged that another juror retrieved prejudicial information from the Internet and, further, that it may have influenced the jury's deliberations. See Reakash Walters, Anthony N Morgan & Joshua Sealy-Harrington, "Canada's courts need a system update to deal with internet-connected juries" *The Globe and Mail* (30 November 2020), online: <https://www.theglobeandmail.com/opinion/article-canadas-courts-need-a-system-update-to-deal-with-internet-connected/>.

[60] See *Schirmer*, *supra* note 5.

ended in a mistrial after a juror reported to the trial judge that another juror had "performed outside research on matters related to the case."[61]

However, it may be naïve to expect that jurors are always, or even usually, willing to engage in this so-called "self-policing" or "self-regulation."[62] A 2010 UK study, for instance, found that "[a] substantial proportion of jurors said they would not know or were uncertain what to do if something improper occurred while serving on the jury" and, further, that most jurors feel "strongly that they should not be allowed to discuss what is said in the deliberating room."[63] Indeed, jurors may be hesitant to report a fellow juror's misconduct out of fear of the misbehaving juror getting into trouble. For example, a juror who, after sitting on the 2019 New York trial of drug kingpin Joaquín "El Chapo" Guzmán, as an explanation for not reporting online misconduct that occurred during the trial, said "I didn't want to say anything or rat out my fellow jurors. I didn't want to be that person."[64] In addition, jurors may refrain from reporting for reasons of self-interest – they may be afraid of being singled out for "breaking rank," or simply wish to avoid doing anything that may extend the already burdensome time commitment associated with jury duty.[65]

Further, it appears the reliance upon self-policing may be especially questionable in the context of OJR. In a 2013 study of improper juror conduct by Professor Cheryl Thomas of University College London,[66] participating jurors were asked to indicate what they would do in various scenarios involving improper conduct occurring while serving

---

[61] Jim Walsh, "Juror fined, found in criminal contempt after causing mistrial" *Courier Post* (29 June 2021), online: <https://www.courierpostonline.com/story/news/2021/06/29/juror-misconduct-mistrial-camden-federal-court-kugler/7802008002/>. For further examples of juror self-policing in the OJR context, see e.g. *Ampadu*, *supra* note 5; *Schirmer*, *supra* note 5; Funcheon, *supra* note 3.

[62] See Thaddeus Hoffmeister, "Preventing Juror Misconduct in a Digital World" (2015) 90:3 Chicago-Kent L Rev 981 at 992; Nicola Haralambous, "Educating jurors: technology, the Internet and the jury system" (2010) 19:3 Inf & Comm Tech L 255 at 260.

[63] Cheryl Thomas, "Are juries fair?" (2010) UK Ministry of Justice Research Series 1/10 at 49. See also Haralambous, *ibid*.

[64] Keegan Hamilton, "Inside El Chapo's jury: A juror speaks for the first time about convicting the kingpin" *VICE* (20 February 2019), online: <https://www.vice.com/en/article/vbwzny/inside-el-chapos-jury-a-juror-speaks-for-first-time-about-convicting-the-kingpin#:~:text=The%2012%20jurors%20and%20six,public%20who%20chose%20to%20attend.>.

[65] See e.g. Thomas, *supra* note 63 at 49; Amanda McGee, "Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms" (2010) 30 Loy LA Ent L Rev 301 at 323.

[66] Cheryl Thomas, "Avoiding the perfect storm of juror contempt" (2013) 6 Crim LR 483.

on a jury. The two scenarios where the highest proportion of jurors said they would not feel comfortable doing *anything* both related to improper online activity: 14% of participants noted they would not take action if a fellow juror introduced additional information into deliberations that had not been presented in the trial, while 10% reported that they would not feel comfortable reporting a fellow jurors' use of a mobile phone.[67] Similarly, in the Tasmania Law Reform Institute's recent report on the impact of jurors' online activities on trial fairness, it was observed that "[a]ll indications are that juror misconduct of this kind is under-reported" and that "the reported cases represent the *bare minimum* of cases of misconduct of this kind."[68] This is cause for concern, given that, as noted by the Court of Appeal for Ontario in *R v Farinacci*, without self-policing, OJR is likely to go undetected.[69]

Having demonstrated the weaknesses inherent in the first avenue of discovery, we now turn to the second: the discovery of evidence of misconduct.[70] This is frequently referred to as the "paper trail" of OJR,[71] given that the "evidence" discovered is often a printout of information from online sources left or discarded in the jury room. Consider, for example, *R v Bains*,[72] an Ontario drug trafficking case that was tried before a jury. Within an hour of the jury's verdict being rendered, court staff discovered a document in the jury room containing sections of model jury instructions on the "beyond a reasonable doubt" standard and the weighing of witness credibility, as well as excerpts from media coverage of the high-profile Casey Anthony trial in the United States, which criticized Anthony's acquittal as "just the latest sign of juries' ignorance, failure to use common sense, and inability – or disinclination – to properly weigh evidence." This is just one of several reported instances of physical evidence of OJR being left behind after a jury's dismissal.[73] However, the trail is not *always* physical. Take, for instance, the California case of *People v Oritz*,[74] in which a juror sitting on a murder trial posted information

---

[67] *Ibid* at 498-99.
[68] Tasmania Law Reform Institute, *supra* note 20 at 32 (emphasis added).
[69] *Farinacci*, *supra* note 5 at para 42.
[70] Browning & Meter, *supra* note 28 at 69-70.
[71] See e.g. Tasmania Law Reform Institute, *supra* note 20 at 6, 32.
[72] *Bains*, *supra* note 5.
[73] See e.g. *Karakaya*, *supra* note 1; *Marshall*, *supra* note 7; *Marshall and Richardson*, *supra* note 11; *Martin*, *supra* note 11; *Benbrika*, *supra* note 10.
[74] *People v Oritz*, *supra* note 8.

about the difference between a medical examiner and a coroner, obtained through independent online research, on his personal blog.

However, given the nature of online information, it is unlikely that a "paper trail" will be left in most cases where OJR occurs. As observed by the Tasmania Law Reform Institute, "Internet sources can be viewed and shared easily on a screen or from memory and there is no need to produce a hardcopy of the information and thereby create an easily detectable trace that may be discovered."[75] Further, the Institute points out that privacy settings on social media accounts can "limit those who can view and potentially discover and report relevant activity of jurors," assuming that jurors are even *able* to be identified by their accounts (and are not, instead, accessing such platforms anonymously or using a "throwaway" or "burner" account).[76] Indeed, considering the inherently "digital" characteristics of online sources of information, the likelihood that a discernable "paper trail" will be left behind in most cases of OJR appears remote.

2.3.3.2 RESEARCH RESTRICTIONS STEMMING FROM JURY SECRECY

A second hurdle to determining the prevalence of OJR resulting from jury secrecy is the restrictions the rule places on conducting empirical research on juries in Canada. A consequence of secrecy and, particularly, the prohibition on disclosure contained in section 649 of the *Code*, is that it has largely prevented legal and social science researchers from conducting jury studies involving *real* jurors ["real jury research"]. Indeed, strict adherence to secrecy in jury research, as is required in Canada, has resulted in what some commentators refer to as a "jury-shaped hole" in legal scholarship.[77]

Before considering the impact of jury secrecy on research involving real jurors, it is important, first, to understand precisely what sorts of research projects fall under the category of "real jury research." For my purposes, real jury research includes any

---

[75] Tasmania Law Reform Institute, *supra* note 20 at 32.
[76] *Ibid*.
[77] See e.g. Yvette Tinsley, Claire Baylis & Warren Young, "'I Think She's Learnt Her Lesson': Juror Use of Cultural Misconceptions in Sexual Violence Trials" (2021) 52: VUWLR 463 at 469-70; Lewis Ross, "The curious case of the jury-shaped hole: A plea for real jury research" (2023) 27:2 Int'l J Evidence & Proof 107 at 110.

research that involves retrieving information from jurors who serve on real cases. The sole defining characteristic, then, is contact with *actual* jurors. Thus, the scope of real jury research is quite broad – jury experts across jurisdictions have conducted such research to evaluate, among other things, comprehension of judicial instructions,[78] the impact of pre-trial publicity on deliberations,[79] and the way juries tend to reach consensus.[80] Data collection methods also vary. Researchers often collect data from jurors using surveys/questionnaires or post-verdict interviews. It is worth noting that, at least at this point, researchers, regardless of jurisdiction, are generally not permitted to observe or record a jury's "live" (i.e., in-room) deliberations.[81]

I now turn to the impact of jury secrecy on the ability to undertake real jury research in Canada. As discussed above, the jury secrecy rule is specifically meant to target information stemming from the jury's *deliberative* process, i.e., the effect of anything on jurors' minds, emotions, or ultimate decision.[82] However, real jury research is not limited to research concerning deliberations. There is much to be learned from jurors about *non-deliberative* aspects of service, such as, for instance, the financial impact of jury duty and comprehension of judicial instructions. The same rings true in the context of research surrounding OJR. Indeed, just as crucial as the *effect* of independent online research on jury verdicts is, for instance, the motivation driving such research and the frequency with which it occurs, research into either of which would not require directly inquiring into a jury's deliberations.

Because the jury secrecy rule has been specifically identified as targeting deliberation-related communications, one might expect that non-deliberative research may be more readily permitted than research that would have the effect of prying into a jury's decision-making process. For this reason, I divide my discussion into two parts: (1)

---

[78] See e.g. Geoffrey P Kramer & Dorean M Koenig, "Do Jurors Understand Criminal Jury Instructions – Analyzing the Results of the Michigan Juror Comprehension Project" (1990) 23:3 U Mich JL Reform 401; Benjamin Spivak et al, "The Impact of Fact-Based Instructions on Juror Application of the Law: Results from a Trans-Tasman Field Study" (2020) 101:1 Soc Sci Q 346.
[79] See e.g. Thomas, *supra* note 63.
[80] See e.g. Warren Young, Neil Cameron & Yvette Tinsley, *Juries in Criminal Trials Part Two: Volume 2* (Wellington, NZ: Law Commission of New Zealand, 1999).
[81] See Ross, *supra* note 77 at 110.
[82] See *Pan*, *supra* note 32 at para 77.

the permissibility of real jury research that *does* involve collecting information about the jury's deliberative process; and (2) the permissibility of real jury research that *does not* involve collecting information about the jury's deliberative process.

There is broad agreement that section 649 of the *Code* creates a blanket prohibition on real jury research that would disclose any aspect of a jury's deliberative process. Chopra & Ogloff, for example, argue that it is "impossible" for Canadian researchers to speak with jurors about their deliberations or the reasons for their verdict.[83] Similarly, in discussing the American practice of interviewing jurors to gain insight into their decision-making process, Hans notes that, in Canada, such interactions are "forbidden by law."[84] The consensus on this issue is unsurprising, as focus on the jury's deliberative process directly encroaches upon the sphere of information protected by the jury secrecy rule. As a result, any study that would attempt to examine the *effect* of OJR on jury decision-making would not be permitted.

And yet, presumably, a real jury research project examining OJR *could* be constructed in a way that would not pry into the jury's deliberative process, such as one that looked solely at prevalence, as opposed to impact. Indeed, this has been done in research out of the University College London's Judicial Institute, which has attempted to measure both the incidence and nature of UK jurors' Internet use during trial.[85] As to the permissibility of such research in Canada, however, opinion is divided. Some have suggested that section 649 of the *Code* bars *any* research involving real jurors. Bouck, for instance, argues that the provision, "in effect prevents all communication with jurors once a trial is over."[86] On the other hand, others assert that, so long as no information about deliberations is disclosed, real jury research may be conducted. Chopra & Ogloff have observed that "there exists the possibility of discussing some aspects of the juror

---

[83] Sonia R Chopra & James RP Ogloff, "Evaluating Jury Secrecy: Implications for Academic Research and Jury Stress" (2000) 44:2 Crim LQ 190 at 208.
[84] See Valerie P Hans, "Canadian Jury Research: The Contributions of Anthony N. Doob" (2013) 55:4 CJCCJ 533 at 537.
[85] See Thomas, *supra* note 63; Thomas, *supra* note 66.
[86] John C Bouck, "Criminal Jury Trials: Pattern Instructions and Rules of Procedure" (1993) 72:2 Can Bar Rev 129 at 138. See also Michelle I Bertrand & Richard Jochelson, "Mock-Jurors' Self-Reported Understanding of Canadian Judicial Instructions (Is Not Very Good)" (2018) 66:1-2 Crim LQ 136 at 136-37, who argue that "the study of ex-jurors is essentially prohibited by the Criminal Code of Canada."

experience," including "[c]arefully crafted questions that avoid delving into the deliberation process, instead focusing on the jurors' interpretations and opinions about what was presented in open court, their understanding of the legal concepts they were instructed about and their feelings about jury service."[87] Similarly, Professor V. Gordon Rose of Simon Fraser University has argued that section 649 does not preclude asking former jurors "general questions about their jury experience," so long as "the sphere of deliberations is respected."[88]

From a purely legal standpoint, the latter position is likely correct, given that the "fruits" of non-deliberative real jury research fall outside the ambit of jury secrecy as interpreted by Canadian courts. Indeed, in its 2009 *Report on Jury Reform*, the Steering Committee on Justice Efficiencies and Access to the Justice System noted that section 649 "probably does not preclude general studies of former jurors on issues that would not lead them to make a determination on the deliberation process."[89] Further, there has already been successful Canadian research using real jurors. In 1979, for example, Anthony Doob published a study featuring real jurors' opinions on the merits of jury service, jury nullification, the unanimity requirement, juror compensation, and the quality of performance by counsel.[90]

However, in practice, lack of clarity has resulted in a dearth of non-deliberative real jury research. To date, Doob's study, now nearly 50 years old, is still one of the *only* real jury research projects that has ever taken place in Canada.[91] This is likely due to researchers' unwillingness to risk criminal sanction under section 649, given that the scope of the provision's application has remained so unclear.[92] In Doob's study, for

---

[87] Chopra & Ogloff, *supra* note 83 at 208.
[88] See Comiskey, *supra* note 39, fn 174.
[89] Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Jury Reform* (Ottawa: Department of Justice, 2009) [Steering Committee] at 39.
[90] Anthony N Doob, "Canadian Juror's View of the Criminal Jury Trial" in Law Reform Commission of Canada, *Studies on the Jury* (Ottawa: Law Reform Commission of Canada, 1979).
[91] At time of writing, the author has only been able to locate two additional Canadian research projects involving real jurors, both of which focus on juror stress: Sonia R Chopra, *Juror Stress: Sources, Severity, and Solutions* (PhD Dissertation, Simon Fraser University, 2002); Lorne D Bertrand, Joanne J Paetsch & Sanjeev Anand, *Juror Stress Debriefing: A Review of the Literature and an Evaluation of a Yukon Program* (Whitehorse: Yukon Department of Justice, 2008).
[92] See Comiskey, *supra* note 39 at 664.

instance, there was fear among the research team that the work being undertaken was illegal, even though the project had the Department of Justice's stamp of approval.[93]

Considering the research restrictions created by the jury secrecy rule, both actual and perceived, it is unsurprising that, to date, no real jury research considering jurors' Internet use during trial, whether deliberative or non-deliberative in nature, has been undertaken in Canada. Further, given the hesitancy on the part of researchers to attempt projects involving contact with jurors, it seems unlikely that many projects (if any) will be attempted moving forward, even if it could be done in a manner that would guarantee non-disclosure of information surrounding the jury's deliberative process.[94] Unfortunately, so long as we are unable (or unwilling) to question jurors about their Internet use, the scope of the problem will remain unknown. Indeed, as recently noted by the Australian Lawyers Alliance, short of a study surveying juror experience, including their use of the Internet, there is "no way of knowing" the extent to which jurors are engaging in inappropriate online activities, including OJR.[95]

2.3.4 IMPLICATIONS FOR DETERMINING PREVALENCE

In essence, the jury secrecy rule casts a veil over the deliberative process, concealing misconduct, including OJR, from external scrutiny. While "self-policing" on the part of jurors and evidence left behind in the form of a "paper trail" have both successfully uncovered individual instances of OJR, they are unable to provide a comprehensive view of OJR as an issue, including, importantly, just how often it occurs. Indeed, as observed by Browning & Meter, there is likely "a sizable iceberg under the surface comprised of undiscovered instances of online juror misconduct."[96] Further, given the considerable restriction – if not closer to a practical *ban* – on real jury research stemming from Canada's approach to jury secrecy, we are unable to supplement the existing anecdotal evidence of OJR with empirical data on jurors self-reported Internet

[93] Doob, *supra* note 90 at 35-36.
[94] See Keith W Hogg, "Runaway Jurors: Independent Juror Research in the Internet Age" (2019) 9:1 W J Legal Stud 1 at 5.
[95] See Tasmania Law Reform Institute, *supra* note 20 at 35.
[96] Browning & Meter, *supra* note 28 at 69-70.

use. Together, these hurdles make it such that it is not currently possible to say, in absolute terms, how common OJR is among Canadian jurors.

2.4 THE LIKELY PREVALENCE OF ONLINE JUROR RESEARCH

Given the above-canvassed challenges posed by the jury secrecy rule, it raises the question: can *any* conclusions be drawn with respect to the prevalence of OJR? Interestingly, despite the difficulty in obtaining precise prevalence data, several commentators have identified OJR as a pervasive issue. Browning & Meter, for instance, note that such misconduct likely occurs at a "concerning" frequency.[97] Such estimates are, I submit, unsurprising when placed in the broader context of contemporary society's Internet and technology-use patterns, as well as existing empirical data on jurors' online activities. Indeed, statistical findings demonstrate high rates of technology and Internet use within Canada, both generally and for the specific purpose of information-seeking and consumption. Further, although OJR remains a relatively underexplored topic within legal scholarship, some (albeit limited) empirical research has been conducted with jurors and justice system officials in *other* jurisdictions, which provides a limited, yet undoubtedly relevant, glimpse into the prevalence of OJR that is likely generalizable to the Canadian experience. In this section, I explore both factors in detail and, ultimately, argue that, when considered alongside reported instances of OJR across the common law world as surveyed at the outset of this Chapter, they add significant weight to the argument that OJR is, indeed, a prevalent concern worthy of academic exploration.

2.4.1 PREVALENCE OF INTERNET/TECHNOLOGY USE

One of the key indicators that OJR is likely a ubiquitous issue within the criminal trial process is the high rate of Internet and technology use across Canada. In general, Internet use rates within Canada are extremely high. In 2022, it was estimated that approximately 95% of Canadians use the Internet at least occasionally.[98] Further, for

[97] *Ibid* at 69. See also Tasmania Law Reform Institute, *supra* note 20 at 32;
[98] See Richard Wike et al, "Internet, smartphone and social media use" (2022), online: *Pew Research Center* <https://www.pewresearch.org/global/2022/12/06/internet-smartphone-and-social-media-use-in-

those between the ages of 15 and 44, that figure jumps above 99%.[99] While rates of Internet usage are lower for older generations, they are still significant. In the same year, 96% of Canadians between ages 45 and 64 used the Internet, as well as 83% of those above 65 years of age.[100]

Most Canadians are also engaged on social media, i.e., online platforms "that allow users to create and share content (e.g., text-based posts, photos and videos) and online profiles, and to interact with other users."[101] For instance, in a 2022 study by Wike et al, 75% of surveyed Canadians reported using social media: 90% of those aged 18-29; 85% of those aged 30-49; and 60% of those 50 years of age or older.[102] Popular social media platforms include Facebook, Instagram, X, Reddit, and TikTok, with usage rates varying both generally and according to user age. Facebook, for instance, remains the dominant social media platform in Canada. In 2022, 80% of online Canadian adults reported having a Facebook account, and the platform had the highest percentage of daily users (70%).[103] However, TikTok is currently the *fastest growing* social media platform, with usership growth of 11% between 2020 and 2022.[104] It is also a particularly popular platform among younger Canadians. In 2022, while only 26% of Canadian Internet users used TikTok, 76% of those aged 18-24 and 54% of those aged 25-34 engaged with the platform.[105]

These figures encompass not only traditional "computer" use (i.e., access from a desktop or laptop computer) but also Internet and social media access through mobile devices, most notably smartphones. In 2022, Wike et al estimated that 84% of Canadians

---

advanced-economies-2022/>; Statistics Canada, *Internet use by province and age group*, Table No 22-10-0135-01 (Ottawa: Statistics Canada, 2023).

[99] Statistics Canada, *ibid*.

[100] *Ibid*.

[101] Christophe Schimmele, Jonathan Fonberg & Grant Schellenberg, *Canadians' assessments of social media in their lives*, in *Economic and Social Reports*, Catalogue No 36-28-0001 at 2 (Ottawa: Statistics Canada, 2021). For a more in-depth discussion of the characteristics of "social media", see Steve Coughlan & Robert J Currie, "Social Media: The Law Simply Stated" (2013) 11:2 Can J L & Tech 229 at 229-33.

[102] Wike et al, *supra* note 98.

[103] See Philip Mai & Anatoliy Gruzd, *The State of Social Media in Canada: 2022* (Toronto: Social Media Lab Toronto Metropolitan University, 2022) at 6-7.

[104] *Ibid* at 5.

[105] *Ibid* at 15.

owned a smartphone.[106] They found ownership rates to be particularly high among younger Canadians: 98% for those aged 18-29 and 95% for those aged 30-49.[107] Indeed, the widespread ownership and use of smartphones, especially among younger demographics, underscores the pervasive integration of Internet and social media access into the everyday lives of Canadians.

Apart from the prevalence of Internet use, the sheer *amount* of time the average "digital" Canadian spends online is quite remarkable. In 2020, 27% of Canadians spent 20 hours or more per week on the Internet for personal use.[108] Importantly, this *excluded* time spent watching streamed video content, such as Netflix or Disney+, as well as using online video gaming services, such as Steam or PlayStation Plus.[109] Thus, those hours were limited to "active" forms of Internet use (e.g. information seeking or social media use), as opposed to more "passive" forms of Internet use that are, perhaps, simply analogous to the consumption of "legacy" entertainment, such as movies, television shows, and reading for pleasure. Further, in a typical day, 43% of Canadians reported checking their smartphone at least every 30 minutes, with 71% of younger Canadians (i.e., those aged 15 to 24), checking their smartphone at least every 30 minutes, and 17% checking their phone every *five* minutes. Canadians have clearly grown accustomed to free and regular Internet access and connectivity. Indeed, in 2020, just over half of Canadians reported that checking their smartphone was the first thing they did when they woke up (53%) and the last thing they did before going to bed (51%).[110]

What does this this mean for the prevalence of OJR in Canada? From my perspective, the integration of the Internet into the daily lives of the vast majority of Canadians suggests that jurors may find it challenging to refrain from accessing the "online world" during jury service. This, I submit, includes access that it is inappropriate to their role, such as OJR. Indeed, as was noted by the Law Society of Tasmania when questioned about the likely prevalence of online juror misconduct, the sheer prevalence

---

[106] Wike et al, *supra* note 98.
[107] *Ibid.*
[108] Statistics Canada, *Canadian Internet Use Survey, 2020* (Ottawa: Statistics Canada, 2021).
[109] *Ibid*.
[110] *Ibid*.

of Internet usage "strongly suggests its inappropriate use."[111] Similarly, as was observed by the Australian Lawyers Alliance, the Internet *must* be widely used by jurors, by virtue of "how ingrained its use has become in modern behaviour."[112] Put simply, the habitual use of the Internet in Canadians' daily lives suggests that same habitual use within the jury context or, at the very least, a desire or willingness to engage.

2.4.2 PREVALENCE OF INTERNET USE FOR INFORMATION-SEEKING

Perhaps even more relevant to the assessment of prevalence is the fact that the Internet has become an oft-relied-upon tool for seeking out *information*. It is estimated, for instance, that Google processes approximately 99,000 search queries per second, translating to a whopping 8.5 *billion* searches per day.[113] At an individual level, the average person conducts between three and four Google searches per day.[114] And, of course, Google is just one of many search engines available for answering unknown questions.[115]

The Internet's information-seeking function is perhaps most commonly engaged in the context of access to news information. Indeed, the rise of the Digital Age has fundamentally altered the way that Canadians consume news. In 2020, 80% of Canadians were found to follow current affairs through the Internet, making it the *leading* method of news consumption in Canada.[116] The figure was even higher for younger Canadians – 95% of those aged 15-34 went online to follow the news, as well as 87% of those aged

---

[111] Tasmania Law Reform Institute, *supra* note 20 at 36-37.
[112] *Ibid* at 37.
[113] See e.g. Rob Robbins, "How Many Google Searches Per Day Are There?" (2024), online: *Clicta Digital* <https://clictadigital.com/how-many-google-searches-per-day-are-there/#:~:text=On%20average%2C%20people%20do%20three,for%20users%20without%20Google%20accounts.>; Meg Prater, "31 Google Search Statistics to Bookmark ASAP" (30 August 2023), online: *HubSpot* <https://blog.hubspot.com/marketing/google-search-statistics>.
[114] *Ibid*.
[115] Others include, for instance, Microsoft Bing, Yahoo, AOL, and Ask.com.
[116] Statistics Canada, *Media Consumption in Canada: Are Canadians in the Know?* Catalogue No 11-627-M (Ottawa: Statistics Canada, 2023). See also Nic Newman et al, *Reuters Institute Digital News Report 2023* (Oxford: Reuters Institute for the Study of Journalism, 2023) at 115. In the American context, see Pew Research Center, "News Platform Fact Sheet" (15 November 2023), online: <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/>: 85% of Americans get their news from digital devices at least sometimes, with 56% doing so often.

35-54.[117] As a result, the impact of traditional news media outlets has diminished. During that same period, far fewer Canadians utilized traditional media sources, such as radio (40%), newspapers (36%), and magazines (11%).[118] Even television news, the next leading source of current events information after the Internet (67%), was only *preferred* among those over 55 years of age, while Canadians aged 15 to 54 preferred the Internet as a news source.[119] Interestingly, social media in particular is becoming an increasingly popular hub for learning about current events. In 2023, 24% of Canadians reported getting their news from social media platforms such as Facebook, Instagram, X, and TikTok.[120] Similar to the general use of the Internet for news consumption, social media usage for this purpose is particularly high among younger Canadians. In the same period, 48% of Canadians aged 18-34 reported social media as a preferred source for accessing news or information.[121]

However, society's utilization of the Internet's information-retrieval function extends beyond just keeping up with the news. Indeed, people now turn to the Internet for answers to questions relating to *all* aspects of life,[122] including relationships,[123] parenting,[124] legal advice,[125] and tech support.[126] In recent years, the online sphere has even become a trusted source for *financial* information. According to a 2023 Canadian survey, 39% of Canadians use social media as a source for financial advice.[127] In particular, young people appear to have embraced the world wide web as a financial guru

---

[117] Statistics Canada, *ibid.*
[118] *Ibid.*
[119] *Ibid.*
[120] Statistics Canada, *Canadian Social Survey – Quality of Life, Virtual Health Care and Trust, 2023* (Ottawa: Statistics Canada, 2023).
[121] *Ibid*. See also Luca Casaletto, "Majority of Canadians get their news from mainstream sources, study shows" *CityNews* (28 September 2022), online: <https://toronto.citynews.ca/2022/09/28/credible-canadian-news-sources-mainstream/>.
[122] Take, for instance, various popular advice-seeking forums, particularly on Reddit: r/advice (1 million members); r/needadvice (385,000 members); r/Needafriend (373,000 members); and r/AmItheAsshole (19 million members). See online: *Reddit* <https://www.reddit.com>.
[123] See e.g. "r/relationships" (3.5 million members), online: *Reddit* <https://www.reddit.com/r/relationships/>; "r/relationship_advice" (13 million members), online: *Reddit* <https://www.reddit.com/r/relationship_advice/>.
[124] See "r/parenting" (7.3 million members), online: *Reddit* <https://www.reddit.com/r/Parenting/>.
[125] See "r/legaladvice" (2.7 million members), online: *Reddit* <https://www.reddit.com/r/legaladvice/>.
[126] See "r/techsupport" (2.6 million members), online: *Reddit* <https://www.reddit.com/r/techsupport/>.
[127] See Michelle Bates, "50% of Canadians get their financial advice from family and friends; banks follow close behind: survey" *WealthRocket* (27 July 2023), online: <https://www.wealthrocket.com/survey-canadians-financial-advice/>.

– a 2023 study by Forbes Advisor found that 79% of millennials and Gen Zers have gotten financial advice from social media, with Reddit and YouTube identified as the most trusted platforms.[128]

The Internet has also become a trusted tool for self-diagnosing illnesses and other health conditions.[129] Using what is often referred to as "Dr. Google," consumers engage with technology by "applying their own knowledge and skills to generate medical diagnoses themselves, without the participation of a health care professional."[130] This phenomenon appears to be quite common within Canada. In 2013, for instance, more than half of Canadians who were polled about their tendencies to self-diagnose an ailment with a Google search reported that they had researched a health-related issue within the month prior.[131] Similarly, in 2014, Tonsaker, Bartlett & Trpkov estimated that 70% of Canadians go online to search for medical or health-related information.[132] Most recently, in 2020, a survey found that 69% of Canadians had used the Internet to search for health information.[133]

We have also witnessed a growing reliance on the information-delivery function of the Internet in *professional* settings. Physicians, for instance, have grown accustomed

---

[128] See John Egan, "Nearly 80% of Young Adults Get Financial Advice From This Surprising Place" *Forbes* (4 March 2023), online: <https://www.forbes.com/advisor/investing/financial-advisor/adults-financial-advice-social-media/#:~:text=Outside%20of%20social%20media%2C%20those,reliable%20insights%20about%20personal%20finance>.

[129] See e.g. Irit Hochberg, Raviv Allon & Elad Yom-Tov, "Assessment of the Frequency of Online Searches for Symptoms Before Diagnosis: Analysis of Archival Data" (2020) 22:3 J Med Internet Res (open access) at 1; Daniel J Amante et al, "Access to Care and Use of the Internet to Search for Health Information: Results From the US National Health Interview Survey" (2015) 17:4 J Med Internet Res (open access) at e106; Taleen Lara Ashekian, "The rise of 'Dr. Google,' the risks of self-diagnosis and searching symptoms online" *Vancouver Sun* (19 August 2022), online: <https://vancouversun.com/health/local-health/taleen-lara-ashekian-the-rise-of-dr-google-the-risks-of-self-diagnosis-and-searching-symptoms-online>.

[130] Nichola Robertson, Michael Polonsky & Lisa McQuilken, "Are My Symptoms Serious Dr Google? A Resource-Based Typology of Value Co-Destruction in Online Self-Diagnosis" (2014) 22:3 Australasian Marketing J 246 at 246. See also Noor Van Riel et al, "The effect of Dr Google on doctor–patient encounters in primary care: a quantitative, observational, cross-sectional study" (2017) 1:2 BJGP (open access) at 2.

[131] See Michael Oliveira, "More than half of Canadians use 'doctor Google' to self-diagnose" *Global News* (31 July 2013), online: <https://globalnews.ca/news/752415/more-than-half-of-canadians-use-doctor-google-to-self-diagnose/>.

[132] Tabitha Tonsaker, Gillian Bartlett & Cvetan Trpkov, "Health information on the Internet: Gold mine or minefield?" (2014) 60:5 Can Fam Physician 407 at 407.

[133] Statistics Canada, *supra* note 108.

to using the Internet as a diagnostic and treatment tool.[134] A survey by Wolters Kluwer Health of over 300 doctors found that that two-thirds of physicians use Internet search engines such as Google and Yahoo to look for information related to the diagnosis and treatment of patients.[135] Similarly, a 2009 study commissioned by Google demonstrated that 86% of physicians use the Internet to gather health, medical, or prescription drug information, with 71% reporting that they start with a search engine.[136] Some doctors have even reported turning to the Internet for guidance on performing *surgical procedures*. Hsieh, for one, remarks that this "happens every day" in hospitals, recalling as an example his reliance on YouTube videos to "refresh [his] memory" on techniques for performing unfamiliar surgeries.[137]

The legal profession has also been impacted by the information-retrieval capabilities of the Internet. An increasing number of lawyers are favouring search engines and online encyclopedias (such as Wikipedia) for legal research, despite the existence of specialized services and subscriptions.[138] Indeed, according to the American Bar Association's 2013 Technology Report, 37% of US attorneys start legal research with general search engines, almost equal to the percentage of those who begin with fee-based services, such as Westlaw and LexisNexis Quicklaw, with Google being the free platform used most often for legal research.[139] An unprecedented wrench has been thrown into this practice by the recent widespread availability of generative-AI platforms

---

[134] See e.g. Hangwi Tang & Jennifer Hwee Kwoon Ng, "Googling for a diagnosis – use of Google as a diagnostic aid: internet based study" (2006) 333 BMJ 1143 at 1143-44; Ken Masters, "For what purpose and reasons do doctors use the Internet: A systematic review" (2008) 77 Int'l J Medical Informatics 4 at 8, 12.

[135] Pamela Lewis Dolan, "Physicians rely on search engines to find clinical information" (2011) 54:23 Am Medical News 57.

[136] *Ibid.*

[137] Paul Hsieh, "Doctors Use Youtube And Google All The Time. Should You Be Worried?" *Forbes* (30 December 2019), online: <https://www.forbes.com/sites/paulhsieh/2019/12/30/doctors-use-youtube-and-google-all-the-time-should-you-be-worried/?sh=6f746e6f7436>.

[138] See e.g. Jonathan Rayner, "Net-surfing lawyers warned of compliance risk" *Law Society Gazette* (1 July 2008), online: <https://www.lawgazette.co.uk/news/net-surfing-lawyers-warned-of-compliance-risk-/47152.article>; Natasha Choolhun, "Google: to use, or not to use. What is the question?" (2009) 9:3 Legal Information Management 168 at 168; "Why Attorneys Shouldn't Use Internet Search Engines for Legal Research" *LexisNexis* (22 April 2020), online: <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/why-attorneys-shouldnt-use-internet-search-engines-research>; "Useful Google tips and tricks for lawyers" *Canadian Lawyer* (15 August 2011), online: <https://www.canadianlawyermag.com/news/general/useful-google-tips-and-tricks-for-lawyers/268297>.

[139] See Ruth S Stevens, "Using Google for Legal Research" (2014) 93:7 Mich Bar J 56 at 56.

such as ChatGPT. Indeed, it appears that, despite accuracy concerns, lawyers across North America are using generative-AI to conduct their legal research for them.[140]

I submit that our significant dependence upon the Internet's information-retrieval function, as has developed throughout the Digital Age, is highly relevant to estimating the prevalence of OJR. The increasing reliance on the Internet for accessing unknown information, in both personal and professional contexts, highlights society's general inclination toward seeking out information online, irrespective of the nature of the information sought. This trend, when juxtaposed with the complexity and relative unfamiliarity of the criminal trial process for jurors, suggests that they, like the general population, may be tempted to seek out information online in the form of OJR.

2.4.3 EXISTING EMPIRICAL DATA ON JUROR INTERNET HABITS

Finally, while, as canvassed above, empirical research projects surrounding OJR involving real jurors have not yet been conducted in Canada, in other common law jurisdictions, data on jurors' online habits and activities has been collected.[141] These studies provide insight from trial judges, lawyers (both prosecutors and defence lawyers), and prospective, sitting, and past jurors on jurors' Internet habits, including, importantly, the prevalence of OJR. Cumulatively, I submit that they tend to demonstrate that OJR is likely a pervasive issue within the criminal trial process, as opposed to a collection of "one off" incidents by misbehaving jurors.

One of the earliest studies on jurors' Internet use took place in 2010, when, at the request of the UK Ministry of Justice, Professor Cheryl Thomas conducted a broad examination of the fairness of jury trials in England and Wales.[142] A subset of her

---

[140] See e.g. Aly Thomson, "Lawyer warns 'integrity of the entire system in jeopardy' if rising use of AI in legal circles goes wrong" *CBC* (1 March 2024), online: <https://www.cbc.ca/news/canada/nova-scotia/artificial-intelligence-lawyers-law-nova-scotia-1.7126732#:~:text=In%20October%2C%20the%20Nova%20Scotia,with%20%22meaningful%20human%20control.%22>; Jason Proctor, "B.C. lawyer reprimanded for citing fake cases invented by ChatGPT" *CBC* (27 February 2024), online: <https://www.cbc.ca/news/canada/british-columbia/lawyer-chatgpt-fake-precedent-1.7126393>; Kathryn Armstrong, "ChatGPT: US lawyer admits using AI for case research" *BBC* (27 May 2023), online: <https://www.bbc.com/news/world-us-canada-65735769>.

[141] This is due, in large part, to these jurisdictions adopting a more relaxed approach to the jury secrecy rule.

[142] See Thomas, *supra* note 63.

examination was the impact of the Internet on jury trials. Using anonymous, post-verdict questionnaires, Thomas surveyed 668 real jurors who served on trials in London, Nottingham, and Winchester as to whether they had conducted online research, and if so, where they had looked.[143] The study was designed to include both "standard" cases (those lasting less than two weeks with little media coverage) and "high-profile" cases (those lasting two weeks or more with substantial pre-trial and in-trial media coverage).[144]

Thomas found that, in standard cases, 5% of participating jurors indicated that they had gone looking for information online.[145] The figure was significantly higher for jurors serving on high-profile cases, with almost three times as many participants (12%) admitting to doing so.[146] It is noteworthy that Thomas indicated a belief that these figures likely "reflect the minimum numbers of jurors who looked for information on the Internet during cases," given that participating jurors were being asked to confess to doing something (albeit with the guarantee of anonymity) that they were explicitly told not to do by the trial judge.[147] Indeed, in both types of cases, a much higher proportion of participating jurors reported *seeing* online media reports about their cases during trial than those who admitted to purposefully *seeking out* such information (13% of jurors on standard cases, 26% of jurors on high-profile cases).[148]

Also in 2010, Reuters Legal, using data from the Westlaw online legal research service, conducted an analysis of reported American appeals and overturned verdicts between 1999 and 2010. The survey revealed that, during this period, at least 90 verdicts were challenged on the basis of jurors' online misconduct.[149] Perhaps most noteworthy was the fact that more than *half* of these challenges occurred during the final two surveyed years.[150] At first glance, the results of this survey might indicate that such misconduct is rare, given the sheer *number* of jury trials conducted in the United States.

---

[143] *Ibid* at 40.
[144] *Ibid.*
[145] *Ibid* at 43.
[146] *Ibid.*
[147] *Ibid.*
[148] *Ibid.*
[149] Grow, *supra* note 8.
[150] *Ibid.*

Indeed, 450,000 took place during the three-year period from 2008 to 2010 alone.[151] However, it is worth noting that this study only examined reported *appellate* decisions and, thus, excluded from its purview any incidents of online juror misconduct that occurred at the trial level that either went unreported or were connected to a matter that was not subject to an appeal.[152] Further, as noted by Grow, the figures stemming from this survey necessarily excluded "the many incidents that escape judicial notice."[153]

This study provides considerable insight into the impact of the onset of the Digital Age on juror misconduct. Between 1999 and 2010, the world experienced a substantial rise in access to, and reliance upon, personal technology as a gateway to the online world. In Canada, for instance, at the turn of the century, only 42% of households had even a *single* member who regularly accessed the Internet.[154] By 2010, however, 80% of Canadians were Internet-users.[155] Because this period bore witness to such a *significant* increase in Internet-usage over a relatively short timeframe, it is unsurprising that the survey uncovered an "upward arc in frequency"[156] of online misconduct by jurors, the logic being that the more a particular tool is utilized, the more likely it will be utilized in a variety of contexts, including where doing so is improper. Indeed, given that, as discussed above, Internet use rates now hover around 95%, the "snapshot" this survey provides continues to have implications for estimating the prevalence of OJR. Namely, it stands to reason that, as rates of Internet usage have surged, so likely have rates of such online misconduct by jurors.

In 2012, Professor Thaddeus Hoffmeister of the University of Dayton conducted a survey on jury service in the Digital Age, which was distributed to federal judges, prosecutors, and public defenders.[157] The aim of the survey was to learn how legal practitioners viewed the impact of the rise of digital technology and Internet access on

---

[151] See Hannaford-Agor, Rottman & Waters, *supra* note 29 at 2.
[152] Browning & Meter, *supra* note 28 at 69.
[153] Grow, *supra* note 8.
[154] Statistics Canada, *Household Internet Use Survey* (Ottawa: Statistics Canada, 2000).
[155] Statistics Canada, *Canadian Internet Use and E-Commerce: Data from the 2010 Canadian Internet Use Survey* (Ottawa: Statistics Canada, 2014).
[156] Browning & Meter, *supra* note 28 at 69.
[157] Thaddeus Hoffmeister, "Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age (2012) 83:2 University of Colorado Law Review 409.

jurors in criminal trials and, notably, focused primarily upon OJR (as opposed to improper online communication by jurors, i.e., "information out").[158] In undertaking this survey, one of Hoffmeister's goals was to determine the *extent* of the Digital Age's impact on jury service – namely, the prevalence of online misconduct. The results demonstrated that the "effect is statistically significant," with approximately 10% of respondents reporting personal knowledge of a juror conducting OJR.[159] Further, Hoffmeister noted that, given the difficulty of detecting this type of juror misconduct, this percentage "probably underrepresents the actual number of jurors who use the Internet to research cases."[160]

Also in 2012, the US National Center for State Courts undertook a research project exploring the impact of "new media" on juries, which involved surveying the jurors, judges, and lawyers involved in six criminal trials and seven civil trials, as well as prospective jurors from 22 other trials, across seven American states.[161] All participating judges viewed jurors' use of new media as a "moderately severe" problem. One a scale of 1 (not at all severe) to 7 (very severe), more than half of the judges rated independent research by jurors as a problem at either a 4 or 5 level.[162] Counsel also rated the problem as "moderately severe," with the prospect of OJR receiving an average score of 4.8.[163] As for the jurors themselves, while few reported actually *engaging* in misconduct,[164] a "sizeable proportion" reported a *desire* to use the Internet to obtain information about legal terms (44%), the case (26%), the parties involved (23%), the lawyers (20%), the judge (19%), the witnesses (18%), and their fellow jurors (7%).[165] Further, while most participating judges provided jurors with an explicit instruction to refrain from engaging

---

[158] *Ibid* at 415.
[159] *Ibid.*
[160] *Ibid.*
[161] See Hannaford-Agor, Rottman & Waters, *supra* note 29.
[162] *Ibid* at 5. The "Judge Survey" solicited opinions from judges "about the severity of the problems related to juror use of communication technologies in the local jurisdiction."
[163] *Ibid*. The "Attorney Questionnaire" solicited "attorney opinions about the severity of the problems related to juror use of communication technologies in the local jurisdiction."
[164] *Ibid* at 7.
[165] *Ibid* at 6.

in *any* sort of independent online research, 15% of surveyed jurors believed that some types of OJR would not violate the judge's instruction, while 20% remained unsure.[166]

In 2013, Professor Thomas returned to the subject of online juror misconduct, surveying 239 jurors across 20 Crown Court criminal trials throughout the Greater London Area.[167] As part of the survey, she provided four different statements about the limits of Internet use by jurors and asked each juror to identify which they felt was the most accurate statement.[168] Results revealed that 23% of surveyed jurors were "clearly confused" about the rules surrounding Internet use: 16% thought they could not use the Internet for *any reason* while serving as a juror; 5% believed there were *no* restrictions at all on their Internet use; and 2% thought they could look for information about their case so long as their research did not affect their judgment.[169] Jurors were also asked about the *purpose* for which they had used the Internet during trial, if they had done so. 78% of participating jurors attested to using the Internet in some way while serving.[170] While most reported Internet use was harmless, such as checking emails and travel routes, communicating with family, and looking up information about the court or jury duty,[171] 7% of jurors admitted looking for information about the legal teams involved in their trial, and 6% revealed that they had looked up definitions of legal terms.[172] A few even confessed to virtually "visiting" the crime scene through online software, such as Google Earth or Streetview.[173]

That same year, Professor Jill Hunter of the University of New South Wales published the results of a study conducted with real jurors between 2004 and 2011, whereby 78 jurors across 20 Australian trials filled out post-verdict questionnaires about various aspects of the juror experience.[174] When questioned about the appropriateness of independent research, 12 (15%) of the surveyed jurors indicated such conduct to be "very

---

[166] *Ibid*.
[167] Thomas, *supra* note 66.
[168] *Ibid* at 488.
[169] *Ibid*.
[170] *Ibid* at 490.
[171] *Ibid* at 490-91.
[172] *Ibid* at 491.
[173] *Ibid*.
[174] Jill Hunter, *Jurors' Notions of Justice: An Empirical Study of Motivations to Investigate & Obedience to Judicial Directions* (New South Wales: Law and Justice Foundation of New South Wales, 2013).

acceptable" in circumstances where a juror is frustrated with the adequacy of evidence in a trial.[175] An additional two surveyed jurors were "neutral" on this question.[176] Interestingly, ten of the 12 jurors who found such sleuthing to be acceptable held this view despite acknowledging they had "received clear judicial directions to the contrary."[177] Indeed, six of these ten jurors were even told by the judge that, in Australia, independent research is a *crime*.[178]

Also in 2013, Professor Patrick Keyzer of Bond University and others undertook a research project to gauge the opinions of key Australian stakeholders on the impact of social media on law.[179] 62 judges, magistrates, tribunal members, court workers, court public information officers, and academics working in the field of judicial administration were asked to rank challenges that social media poses for the court system in order of importance.[180] "By far […] the most significant concern that participants expressed" was "juror misuse of social and digital media leading to aborted trials."[181] Similarly, in 2014, Shilo attempted to evaluate the prevalence of online juror misconduct, including OJR, by conducting an anonymous survey of New Hampshire Superior Court judges.[182] The survey collected information both about the judges' experiences with online misconduct by jurors, as well as the mechanisms currently in place in their courtrooms to prevent such misconduct.[183] Notably, 30% of surveyed judges had observed or detected instances of jurors improperly conducting online research.[184]

Most recently, in 2020, the Tasmania Law Reform Institute engaged in an inquiry into the nature and gravity of online juror misconduct in Tasmania, as well as across common law jurisdictions more broadly.[185] To assist with this inquiry, the Institute

---

[175] *Ibid* at 5, 27.
[176] *Ibid.*
[177] *Ibid* at 6.
[178] *Ibid.*
[179] Patrick Keyzer et al, "The courts and social media: what do judges and court workers think?" (2013) 25:6 Judicial Officers' Bull 47.
[180] *Ibid* at 48.
[181] *Ibid* at 49.
[182] Brooke Lovett Shilo, "Juror Internet Misconduct: A Survey of New Hampshire Superior Court Judges" (2014) 12:2 UNH L Rev 245.
[183] *Ibid* at 256.
[184] *Ibid* at 257.
[185] Tasmania Law Reform Institute, *supra* note 20.

sought input from key justice system stakeholders about their experience of jurors using the Internet and social media during criminal trials and, more particularly, the prevalence of this issue.[186] The predominant view among the surveyed stakeholders was that "juror misconduct of this kind is 'prevalent': 'a serious issue facing the criminal justice system'; a 'very real problem'; and a 'widespread problem.'"[187] Indeed, the Legal Aid Commission of Tasmania submitted that it "does happen, and happens with some frequency."[188]

2.5 CONCLUSION

In conclusion, at present, it is simply impossible to conclusively determine the prevalence of OJR as a phenomenon within Canadian trials. This is largely a result of hurdles created by the jury secrecy rule, which both requires that jurors engage in a private deliberation process and prevents legal researchers from gathering empirical data about OJR, including its prevalence, from real jurors. However, as I have demonstrated in this Chapter, the high rates of Internet usage in Canada, both generally and for the specific purpose of information-seeking and consumption, and the existing empirical data on jurors' Internet use collected in other common law jurisdictions tend to suggest that OJR occurs at least somewhat regularly. Indeed, I submit that these factors, when considered in light of the instances of Canadian OJR that *have* been uncovered, provide compelling evidence that OJR likely occurs in Canada at least as often as in these comparator jurisdictions and, thus, is a prevalent issue within the Canadian legal sphere, occurring at a frequency that warrants concern.

It is from this position that each subsequent Chapter will "jump off." Moving forward, I will proceed on the assumption that OJR is a somewhat commonly occurring phenomenon in Canada. By tackling the question of prevalence at the outset, it is my hope that I have successfully presented OJR as a pressing issue worthy of study, despite

[186] *Ibid* at 32-33.
[187] *Ibid* at 36.
[188] *Ibid*.

the lack of direct evidence as to the frequency with which it occurs and, thus, have laid a strong foundation for the remainder of the project.

CHAPTER 3: ASSESSING THE IMPACT OF ONLINE JUROR RESEARCH ON THE ACCUSED'S RIGHT TO A FAIR TRIAL

3.1 INTRODUCTION

Now that online juror research ["OJR"] has been established as a phenomenon which likely occurs at least *somewhat* regularly in Canada, the question becomes: why exactly is this problematic? Put another way, before any meaningful analysis of measures used to address OJR may be conducted, it must first be determined what negative consequences, if any, result from such behaviour on the part of jurors. In this Chapter, I set out to demonstrate that OJR negatively impacts accused persons and, indeed, the criminal trial process more broadly, due to its adverse effects on trial fairness.

The accused's right to a fair trial is a fundamental guarantee, one which has historically coloured and shaped procedure governing criminal trials throughout the common law world.[1] Indeed, the "fair trial" has been described as a "cornerstone of our Canadian democratic society."[2] In addition, trial fairness has, in more recent years, garnered constitutional protection through the entrenchment of the *Canadian Charter of Rights and Freedoms*. Section 11(d) of the *Charter* guarantees "any persons charged with an offence" the right "*a fair and public hearing* by an independent and impartial tribunal."[3] While the right to a fair trial does not guarantee a *perfect* trial, nor even one that is most advantageous to the accused, as the Supreme Court of Canada observed in *R v Harrer*, a fair, *Charter*-compliant trial must "satisf[y] the public interest in getting at the truth, while preserving basic procedural fairness to the accused."[4] By providing these guarantees, the right to a fair trial works to safeguard the constitutional presumption of

[1] See e.g. *R v Darrach*, 2000 SCC 46 at para 43; Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 7th ed (Toronto: Irwin Law, 2021) at 350.
[2] *R v Stillman*, [1997] 1 SCR 607 at para 72, 144 DLR (4th) 193.
[3] *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] (emphasis added).
[4] *R v Harrer*, [1995] 3 SCR 562 at para 45, 128 DLR (4th) 98.

innocence,[5] minimizing the risk for miscarriage of justice and, by extension, wrongful conviction.[6]

In this Chapter, I argue that, by conducting OJR, jurors risk subverting the trial's truth-finding function by infringing upon certain guarantees necessary to ensure trial fairness. In exploring the trial fairness risks associated with OJR, I divide my discussion between "online factual research" and "online legal research." The former occurs when jurors turn to the Internet for information about a case's factual or evidentiary issues, whereas the latter describes situations where jurors seek out information online surrounding the legal rules or principles relevant to a case. Below, I demonstrate that online *factual* research puts the accused's right to a fair trial at risk due to its negative impact on two essential trial fairness guarantees: (1) the right to an impartial trier of fact, and (2) the right to make full answer and defence. With respect to the former guarantee, I argue that the risk for partiality created by factual research is likely exacerbated for racialized accused persons. In addition, I illustrate that, by undertaking online *legal* research, jurors usurp the trial judge's role as "trier of law," thereby eroding one of the key shields of trial fairness.

3.2 THE IMPACT OF ONLINE FACTUAL RESEARCH

As discussed in the preceding Chapter, jurors are turning to the Internet to access extraneous information surrounding the cases they hear. Sometimes, they do so to learn more about the factual circumstances underpinning a case. They might wish to know, for instance, the going price of a certain drug in the accused's city[7] or which areas of the crime scene would have been visible by security cameras.[8] Other times, jurors go online to educate themselves on matters of expert evidence. They might wonder what sorts of

---

[5] See *Charter*, *supra* note 3, s 11(d), which guarantees that all accused persons will be "presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." See also *R v N.S.*, 2012 SCC 72 at para 67; *R v Ryan (D.)*, 2012 NLCA 9 at para 86.
[6] See e.g. *N.S.*, *ibid*; *R v J.J.*, 2022 SCC 28 at para 329; *United States v Burns*, 2001 SCC 7 at para 95; *R v C.P.*, 2021 SCC 19 at para 61.
[7] See e.g. *R v Farinacci*, 2015 ONCA 392 (jurors on Toronto drug trial conducted online searches with respect to the price of cocaine).
[8] See e.g. *R v Ampadu*, 2018 ONSC 2797 (a juror on Ontario manslaughter and assault trial created a computer-generated map of the crime scene, drawing lines representing what he thought to be the angles of certain video surveillance footage).

injuries are consistent with certain types of violence[9] or the effect of certain prescription medications.[10] Finally, jurors have been caught using the Internet (and social media platforms particularly) to learn more about the *parties* involved in their cases. They may wish to know if the accused has a prior criminal history,[11] to learn more about a deceased victim,[12] or to dig into the career history of one of the lawyers or the trial judge.[13] For the purposes of this Chapter, I refer to all such inquiries, collectively, under the umbrella of "online factual research" in the sense that they all involve jurors seeking out information specific to the case being made against the accused, as opposed to information about the law or criminal justice system.

In this section, I aim to demonstrate that, when jurors engage in online factual research, the accused's right to a fair trial is compromised. This is due to the practice's negative implications with respect to two essential components of the trial fairness

---

[9] See Brian Grow, "As jurors go online, U.S. trials go off track" *Reuters* (8 December 2010) (a capital trial in Pennsylvania for an infant's murder was derailed by a juror's online search for "retinal detachment," an injury suffered by the young victim), online: <https://www.reuters.com/article/us-internet-jurors-idUSTRE6B74Z820101208#:~:text=The%20data%20show%20that%20since,%2D%2D%2021%20since%20January%202009.>.

[10] See e.g. *United States of America v Frank Hernandez et al*, as described in Deirdra Funcheon, "Jurors Gone Wild: Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies" *Miami New Times* (23 April 2009), online: <https://www.miaminewtimes.com/news/jurors-gone-wild-6332969>.

[11] See e.g. *R v K*, (2003) 59 NSWLR 431(in a New South Wales trial, where the accused stood charged with the murder of his first wife, jurors conducted online research about the same accused's previous trial for the murder of his second wife); Betsy Powell, "Court cases can go off the rails when jurors go to Google" *Toronto Star* (13 January 2020) (describing a Toronto murder trial in which a juror went online to find information about the accused's prior criminal record), online: <https://www.thestar.com/news/gta/court-cases-can-go-off-the-rails-when-jurors-go-to-google/article_c9157b71-eaa6-5493-a8d5-a35edfdeaa3b.html>; Josh Gauntt, "Judge declares mistrial after Google search" *WBRC* (21 September 2018) (describing the mistrial that occurred in Fessor Pearson's 2018 Alabama murder trial after a juror googled Pearson's criminal record), online: <https://www.wbrc.com/2018/09/21/judge-declares-mistrial-after-google-search/>.

[12] See e.g. *R v JH* (No 3), 2014 NSWSC 1966 (a juror on a New South Wales murder trial conducted online searches to find a photograph of the deceased victim); Owen Bowcott, "Two jurors jailed for contempt of court after misusing internet during trials" *The Guardian* (29 July 2013) (describing a juror on a Surrey fraud trial who used Google to "dig up extra information" about the victims), online: <https://www.theguardian.com/law/2013/jul/29/jurors-jailed-contempt-court-internet>; Tony Keim, "Queensland Murder Trial Aborted as Juror Researches Case on 'Facebook'" *The Courier Mail* (8 August 2014) (describing a juror on a Queensland murder trial who researched the deceased victim on Facebook), online: <https://www.couriermail.com.au/news/queensland/queensland-murder-trial-aborted-as-juror-researches-case-on-facebook/news-story/efa2ca3f43199b4f04f5fe9bdc6b1b20>.

[13] See e.g. *Ampadu*, *supra* note 8 (juror on Ontario manslaughter and assault trial conducted online research into the accused, judge, and trial lawyers).

guarantee: (1) the right to an impartial trier of fact, and (2) the right to make full answer and defence. I will now canvass concerns surrounding both guarantees in further detail.

3.2.1 THE RIGHT TO AN IMPARTIAL TRIER OF FACT

To begin, I submit that the guarantee of trial fairness is diminished by online factual research because of the impact such research has on the accused's right to an impartial trier of fact. An impartial trier of fact is a key component of the right to a fair trial.[14] Indeed, this is evident in the very wording of section 11(d) of the *Charter*, which guarantees "a fair and public hearing by an independent and *impartial* tribunal."[15] In the context of jury trials, an impartial jury has been recognized as one capable of deciding a case based solely upon the evidence presented at trial, without resort to outside information or sources.[16]

It is true that, in acting as factfinders, jurors "are expected to bring to their task their entire life's experiences."[17] Indeed, it is this prior knowledge of human behaviour and social life upon which jurors draw to complete some of their most fundamental tasks, such as assessing the credibility of witnesses and drawing inferences from trial evidence.[18] At the same time, notwithstanding the varied life experience jurors bring to the decision-making process, when it comes to information that bears directly on the case at hand, to remain impartial, a jury must rely solely upon trial evidence in reaching its verdict.[19] As put by Harvey, "as far as the instant case is concerned, [the jury's] collective mind must be a blank, informed only by the evidence that has been presented to them in

---

[14] See Keith W Hogg, "Runaway Jurors: Independent Juror Research in the Internet Age" (2019) 9:1 W J Legal Stud 1 at 2.
[15] *Charter*, *supra* note 3, s 11(d) (emphasis added).
[16] See e.g. Nancy S Marder, "Jurors and Social Media: Is a Fair Trial Still Possible" (2014) 67:3 SMU L Rev 617 at 621; Oscar Battell-Wallace, "No Search Results in Fairness: Addressing Jurors' Independent Research in the 21st Century" (2018) 49:1 Victoria U Wellington L Rev 83 at 85; Thaddeus Hoffmeister, "Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age (2012) 83:2 U Colorado L Rev 409 at 417; Amanda McGee, "Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms" (2010) 30 Loy LA Ent L Rev 301 at 303.
[17] *R v Pan; R v Sawyer*, 2001 SCC 42 [*Pan*] at para 62. See also David Harvey "The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm" (2014) NZ L Rev 203 at 205.
[18] See *Pan*, *ibid.*
[19] See e.g. *R v Bains*, 2015 ONCA 677 at paras 58, 69; *Pan*, *ibid* at para 43.

court."[20] Indeed, jurors are routinely instructed that they must consider *only* the evidence they see and hear within the courtroom[21] and, further, that they are to disregard any outside information and refrain from conducting independent research.[22]

It is the trial judge, not the jury, who defines what constitutes evidence, "as well as what falls beyond its reach and thus cannot be used as a basis for findings of fact."[23] In this sense, the trial judge safeguards the jury's impartiality by acting as a "gatekeeper," filtering the information to which the jury will have access.[24] A trial judge may deem it necessary to keep certain evidence from the jury for a number of reasons. It may, for instance, lack relevance to the accused's case[25] or be too unreliable.[26] The information may also have been obtained by police in breach of the accused's *Charter* rights, such that admitting it would bring the administration of justice into disrepute.[27] Or the probative value of the information may simply be outweighed by its prejudicial effect.[28]

Where jurors conduct factual research, the trial judge's gatekeeping function is subverted and, as a result, the guarantee of impartiality is threatened.[29] When jurors engage in this sort of independent investigating, they risk exposing themselves to and, indeed, relying upon, prejudicial, irrelevant, or completely inaccurate information that has "completely evade[d] the safeguards of the judicial process."[30] Put another way, where a juror uncovers information about the case, the evidence, or the parties involved that was unknown to, or specifically excluded by, the trial judge, that knowledge may prevent that juror (or the entire jury, should the juror divulge their findings to the group),

---

[20] Harvey, *supra* note 17 at 205.
[21] Canadian Judicial Council, *Model Jury Instructions* [*CJC Instructions*], 3.1[2], 3.2[1], 8.2[4], online: *National Judicial Institute* <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>
[22] *Ibid*, 3.3[7], 3.8[5], 8.4[1].
[23] *Bains*, *supra* note 19 at para 58.
[24] See Hogg, *supra* note 14 at 2; Harvey, *supra* note 17 at 205.
[25] See Hogg, *ibid* at 3.
[26] See e.g. *Harrer*, *supra* note 4 at para 46.
[27] *Ibid.*
[28] *Ibid*.
[29] See e.g. Harvey, *supra* note 17 at 205; Hogg, *supra* note 14 at 3; Matthew Aglialoro, "Criminalization of Juror Misconduct Arising From Social Media Use" (2015) 28:1 Notre Dame JL Ethics & Pub Pol'y 101 at 104.
[30] *United States v Resko*, 3 F 3d 684, 690 (3d Cir 1993). See also Robbie Manhas, "Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms" (2014) 112:5 Mich L Rev 809 at 812; Battell-Wallace, *supra* note 16 at 86.

from impartially weighing the evidence presented during trial, thereby prejudicing the accused's case.[31]

The danger of jurors considering extraneous information becomes especially clear when one considers the most common form of such information available to jurors: pre-trial publicity. Pre-trial publicity refers to "any information disseminated via the media about a case that is making its way toward trial," whether that be news articles, coverage of press conferences, or social media posts by journalists following the case.[32] Empirical research has demonstrated that jurors' exposure to pre-trial publicity can be "highly influential" on their decision-making process.[33] A study by Ruva & Hudak, for example, found that jurors exposed to such publicity tend to "provide […] significantly higher guilt ratings."[34] Similarly, Daftary-Kapur et al's study found that jurors exposed to negative, "pro-prosecution oriented" pre-trial publicity tend to be more punitive in their guilt ratings, as well as that the more expansive pre-trial coverage is, the greater the effect it tends to have on consuming jurors.[35] These are just two of many examples.[36] Indeed, multiple meta-analyses support the proposition that jurors' exposure to negative pre-trial publicity tends to impact their decisions with respect to the culpability of accused persons.[37]

---

[31] See McGee, *supra* note 16 at 303-04.
[32] Tarika Daftary-Kapur et al, "Examining Pretrial Publicity in a Shadow Jury Paradigm: Issues of Slant, Quantity, Persistence and Generalizability" (2014) 38:5 L & Hum Behav 462 at 462. See also Suzanne Mannes, "The Power of the Pen: The Impact of Knowledge of Defendant's Character Present in Pretrial Publicity Varies by Defendant Race" (2016) 12:1 Applied Psychol in Crim Just 36 at 36.
[33] Ellen Brickman et al, "How Juror Internet Use Has Changed the American Jury" (2008) 1:2 J Court Innovation 287 at 289-90.
[34] Christine L Ruva & Elizabeth M Hudak, "Pretrial publicity and juror age affect mock-juror decision making" (2013) 19:2 Psychol, Crime & L 179 at 187.
[35] Daftary-Kapur et al, *supra* note 32 at 474.
[36] See e.g. Christine L Ruva, Stephanie E Diaz Ortega & Kathleen O'Grady, "What Drives a Jury's Deliberation? The Influence of Pretrial Publicity and Jury Composition on Deliberation Slant and Content" (2022) 28:1 Psychol, Pub Pol'y & L 32; Amy L Otto, Steven D Penrod & Hedy R Dexter, "The Biasing Impact of Pretrial Publicity on Juror Judgments" (1994) 18:4 L & Hum Behav 453; Christina A Studebaker & Steven D Penrod, "Pretrial Publicity: The Media, the Law, and Common Sense" (1997) 3:2-3 Psychol, Pub Pol'y & L 428.
[37] See e.g. Nancy Mehrkens Steblay et al, "The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review" (1999) 23:2 L & Hum Behav 219; Lori A Hoetger et al., "The Impact of Pretrial Publicity on Mock Juror and Jury Verdicts: A Meta-Analysis" (2022) 46:2 L & Hum Behav 121.

3.2.1.1 PARTIALITY RISK HEIGHTENED IN THE DIGITAL AGE?

Of course, the concern that extraneous information, such as pre-trial publicity, may affect jurors' ability to remain impartial is not new. As Manhas points out, independent research has "long been an issue" in criminal jury trials.[38] Indeed, prior to the "Internet explosion," trial judges commonly instructed jurors to refrain from accessing "legacy media," such as newspaper articles or television or radio broadcasts, about the case.[39] However, I submit that the onset of the Digital Age has "changed the game" with respect to jurors' ability to undertake independent factual research, such that the risk it poses for partiality has dramatically increased.

For one thing, information has never been so accessible. Traditionally, "only the most highly motivated" jurors would go to the trouble of seeking out newspaper archives or consulting community members for more details about a case.[40] However, jurors now have access to "a vast array of updated and archival information available via the Internet."[41] Indeed, jurors now have powerful search engines, countless online news outlets, and discussions on social media (whether by active journalists or concerned citizens) at their fingertips. As a result, the partiality concerns stemming from factual research "take on a whole new dimension" in the Digital Age.[42] Jurors no longer need to exert significant effort into hunting down specific, case-related information – the Internet now exists as "a ready source of extra-record material and misconduct because unauthorized, potentially influential contact is just a few 'clicks' away."[43]

This increased accessibility has challenged a key assumption our legal system makes about the impact of extraneous information on jury trials and, thus, the dangers of independent research: the "fade factor," or the idea that the passage of time reduces the

---

[38] Manhas, *supra* note 30 at 810. See also Hoffmeister, *supra* note 16 at 417.
[39] See Brickman et al, *supra* note 33 at 291; Aglialoro, *supra* note 29 at 105; Rebecca M Hayes & Kate Luther, *#Crime: Social Media, Crime, and the Criminal Legal System* (New York: Palgrave MacMillan, 2018) at 58-59.
[40] Brickman et al, *ibid.*
[41] Harvey, *supra* note 17 at 206.
[42] Brickman et al, *supra* note 33 at 291. See also Hayes & Luther, *supra* note 39 at 58-59.
[43] Matthew Fredrickson, "Conformity in Confusion: Applying a Common Analysis to Wikipedia-Based Jury Misconduct" (2013) 9:1 Wash J L Tech & Arts 19 at 29.

prejudicial impact of pre-trial publicity and other extraneous information about a case.[44] To be influenced by crime news coverage, jurors "must first encounter information, remember it and then apply it when reaching a verdict."[45] Historically, the lion's share of information available to the public about instances of criminality has been subject to the traditional "news cycle," in which coverage is heaviest when the actual crime occurs and subsequently declines as time goes on. Thus, because trials typically take place a significant period after an offence was allegedly committed, the fade factor assumes jurors will forget the details of news coverage and, as a result, that the risk of prejudice to the accused is diminished.[46]

The realities of the Digital Age, however, call the continued validity of the fade factor into question. The ease with which the Internet allows us to access information, particularly with respect to news and current events, has largely resulted in the death of the traditional news cycle. As observed by Burd & Horan, "[m]edia websites, YouTube and search engines provide quick access to current *and historic* news 24 hours a day, seven days a week."[47] By accessing the Internet, jurors can now easily find information about a case, irrespective of when that information was initially made publicly available. Indeed, as was aptly observed by the Ontario Superior Court of Justice in *R v Biddersingh*, in the Digital Age, "[t]he life of a news story no longer expires as of the next day's fish wrapping."[48]

A consequence of the increased accessibility of information in modern criminal trials is that certain traditional measures for ameliorating the potential prejudice associated with jurors' access to pre-trial publicity and other extraneous information have

---

[44] See Geoffrey P Kramer, Norbert L Kerr & John S Carroll, "Pretrial Publicity, Judicial Remedies, Jury Bias" (1990) 14:5 L & Hum Behav 409 at 414.
[45] Roxanne Burd & Jacqueline Horan "Protecting the right to a fair trial in the 21st century – has trial by jury been caught in the world-wide web?" (2012) 36 Crim LJ 103 at 113.
[46] See e.g. Rebecca McEwen & John Eldridge, "Judges, Juries and Prejudicial Publicity: Lessons from Empirical Legal Scholarship" (2016) 41:2 Alternative LJ 110 at 111; Rebecca McEwen, John Eldridge & David Caruso, "Differential or Deferential to Media? The Effect of Prejudicial Publicity on Judge or Jury" (2018) 22:2 Int'l J Evidence & Proof 124 at 127; Cheryl Thomas, "Are juries fair?" (2010) UK Ministry of Justice Research Series 1/10 at 8.
[47] Burd & Horan, *supra* note 45 at 114 (emphasis added).
[48] *R v Biddersingh*, 2015 ONSC 6498 at para 23. For discussion of the unique longevity of online news information, see e.g. *R v Sipes*, 2012 BCSC 1728 at para 7; *R v Durant*, 2019 ONSC 3169 at paras 21, 28; *R v Knight and MacDonald*, 2017 ONSC 6606 at paras 11, 24.

become far less effective. Take adjournments, for instance, which permit the trial judge to delay some aspect of the accused's criminal proceedings. Sometimes, proceedings will be adjourned to a later date because significant publicity still surrounds the case[49] and, thus, a further "cool down" period is needed until the "sting of publicity has faded."[50] This strategy stems from adherence to the "fade factor", the idea being that, throughout the period of the adjournment, the flow of potentially prejudicial publicity will wane, making it easier to eventually select impartial jurors. However, given the diminished effectiveness of the fade factor in the Digital Age, critics have begun to question the value of adjournments as a remedy.[51] Online information has a permanent quality that distinguishes it from that contained in legacy media; an article that is a year (or even multiple years) old will show up in a Google search just as readily as a current headline published the very same day.[52] Indeed, as noted by Burd & Horan, "within seconds a simple online search can reveal a wealth of prejudicial information, and refresh a juror's memory."[53] The reality is that, in today's world, delaying an accused person's trial has very little impact on how accessible extraneous information is to jurors.

Venue changes are another traditional means of addressing pre-trial publicity, the effectiveness of which has been curtailed by the "Internet explosion." Section 599(1) of the *Criminal Code* empowers the court to order that a trial be held in a different region of the province than would ordinarily be the case where it "appears expedient to the ends of justice."[54] Sometimes, change of venue applications are brought on the basis of pre-trial publicity. These motions hinge on the argument that it will be impossible for the accused to receive a fair trial within their community, given the extensive media coverage and discussion surrounding their alleged criminal activity.[55] Thus, when bringing a change of venue motion, the applicant must establish that "publicity about the alleged crime and the

---

[49] See e.g. *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 881, 120 DLR (4th) 12; *R v Keegstra*, 1991 ABCA 97 at para 16; *R v T.R.*, 2017 SKQB 89 at para 16; *R v Shrubsall* (2000), 187 NSR (2d) 310 (Sup Ct) at para 23; *R v J. S-R* (2008), 236 CCC (3d) 519 (Ont SC) at para 45.
[50] *Toronto Star Newspapers Ltd. v Canada*, 2009 ONCA 59 at para 65.
[51] See e.g. Newton Minow & Fred Cate, "Who Is an Impartial Juror in an Age of Mass Media" (1990) 40 Am U L Rev 631 at 647-48.
[52] See Brickman et al, *supra* note 33 at 292.
[53] Burd & Horan, *supra* note 45 at 114.
[54] *Criminal Code*, RSC 1985, c C-46, s 599(1).
[55] See e.g. *Regina v Alward* (1976), 73 DLR (3d) 290, 15 NBR (2d) 551 (CA); *R v Suzack* (2000), 141 CCC (3d) 449, 30 CR (5th) 346 (Ont CA).

accused's trial is focused in the judicial district where the alleged crime occurred."[56] Traditionally, doing so was accomplished by "consider[ing] the audience reach of local newspapers and television stations in an attempt to quantify the publicity associated to an accused."[57] Unfortunately, this strategy – and, by extension, venue changes as a remedy – is considerably less effective in the Digital Age, given that jurors' access to information spans jurisdictions. Indeed, criminal trials are no longer local affairs. As Brickman et al note, the Internet "has truly transformed much of the world into a global village, and jurors are no longer limited to 'local' news. Virtually every trial is newsworthy to someone and can therefore end up on the Internet where jurors can easily find it."[58] Indeed, Canadian courts have, in recent years, begun criticizing venue changes as unsuitable to address pre-trial publicity, given the widespread online attention that criminal cases tend to garner.[59]

Publications bans are yet *another* illustrative example. Where "necessary to prevent a serious risk to the proper administration of justice,"[60] a publication ban may be imposed, which prevents anyone, including journalists and media outlets, from publishing, broadcasting, or sending certain information with respect to criminal proceedings. This is sometimes done to better guarantee that jurors base their decisions solely on trial evidence, rather than information about the case as disseminated in the media.[61] However, as the Supreme Court of Canada observed in as early as 1994, in *Dagenais v Canadian Broadcasting Corp.,* technological advancement has severely curtailed the efficacy of publication bans:

> It should also be noted that recent technological advances have brought with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and shortwave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow

[56] *R v ASM*, 2021 ABQB 895 at para 55.
[57] *R v Scalzo*, 2019 ONSC 6061 at para 78.
[58] Brickman et al, *supra* note 33 at 292.
[59] See e.g. *ASM*, *supra* note 56 at paras 48-55; *R v Haevischer*, 2013 BCSC 2014 at para 12; *R v Millard and Smich*, 2015 ONSC 6206 at para 90.
[60] See *Dagenais*, *supra* note 49; *R v Mentuck*, 2001 SCC 76.
[61] See e.g. *Dagenais*, *ibid*; *Biddersingh*, *supra* note 48; *T.R.*, *supra* note 49.

> of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing.

Indeed, publication bans, like venue changes, are often undermined by the national (and sometimes even international) reach of online media outlets.[62] An added difficulty is that, in Canada, publication bans do not operate retroactively.[63] This means that media outlets cannot be compelled to take down or redact online articles about criminal cases, so long as they were published *before* a publication ban was initially imposed. In the Digital Age, this has the practical effect of severely curtailing the effectiveness of such bans, given that jurors, with the click of a key or tap of a screen, can easily search for pre-ban news articles and coverage surrounding a case.

Further, critics have questioned the *reliability* of online information, particularly when compared to legacy media sources. Fredrickson, for one, argues that the Internet, "has the potential to affect the analysis because it is transient and much of its content is not subject to the integrity constraints of other media."[64] Put simply, anyone can make a claim or share an opinion through the medium of the Internet (and social media platforms particularly) and, thus, information is "not subject to the same type of editorial scrutiny or held to the same verification process"[65] as traditional news media. Canadian courts have begun to echo this concern.[66] In *R v Bains*, for example, Watt JA of the Court of Appeal for Ontario made the following observation:

> But the growing availability of and apparently insatiable appetite for information poses a formidable challenge to the right to a fair trial in the 21st century. Traditional forms of media have expanded onto the worldwide web. New forms of media have emerged as the web makes everyone a publisher, and social media help disseminate publications, both traditional and untraditional. It has become increasingly difficult to control the dissemination of information, with jurors able to use not only computers and tablets but also smartphones and even watches to access

---

[62] See McEwen & Eldridge, *supra* note 46 at 111.
[63] See e.g. *R v Canadian Broadcasting Corp*., 2018 SCC 5; *R v Riley*, 2023 NSSC 377; Brooke MacDonald, "Has the internet made publication bans obsolete?" *Canadian Bar Association* (29 March 2018), online: <https://nationalmagazine.ca/en-ca/articles/law/opinion/2018/has-the-internet-made-publication-bans-obsolete>.
[64] Fredrickson, *supra* note 43 at 29. See also Marder, *supra* note 16 at 627.
[65] Leslie Y Garfield Tenzer, "Social Media, Venue and the Right to a Fair Trial" (2019) 71:2 Bay L Rev 421 at 453.
[66] See e.g. *Millard and Smich*, *supra* note 59 at para 86.

> online material, and to curb the appetite of jurors for it. And with little quality control over content. The sensational trumps the accurate; fevered imaginings, truth.[67]

This lack of reliability is, in my view, intimately tied to the risk for juror partiality. Indeed, when investigating jurors go online, there may be a higher chance that they will encounter *misinformation* that has potential to unduly influence their decision-making, thereby compromising trial fairness.

3.2.1.2 PARTIALITY RISK HEIGHTENED FOR RACIALIZED ACCUSED?

To this point, I have considered the risk of juror partiality stemming from online factual research in a *general* sense. By this, I mean that my examination of the issue has considered the interests of accused persons as a homogenous group, theoretically impacted *uniformly* by OJR. However, such an approach does not, I submit, accurately describe the true impact of online factual research on *all* accused persons in Canada. Thus, before moving on to discuss the additional trial fairness risks created by OJR, whether factual or legal, I take the opportunity below to narrow my "partiality investigation" to focus on a particular subset of Canadian accused: racialized accused persons. In this section, I argue that online factual research likely has a *disproportionately* negative impact on racialized accused, in the sense that, in many cases, it tends to create a heightened threat for partiality due to the overrepresentation (and, often, largely *negative* portrayal) of racialized persons in crime news coverage.

As a society, we tend to have implicit, preconceived ideas about who constitutes a "criminal." Unfortunately, these preconceptions, for many, are often tied to race. Canadian courts have long recognized the "insidious" nature and "corrosive" impact of racial bias within the criminal justice system.[68] Indeed, in *R v Spence*, the Supreme Court of Canada observed racial prejudice amidst jury pools to be an "intractable feature […] of

---

[67] *Bains*, *supra* note 19 at para 70.
[68] *R v Williams*, [1998] 1 SCR 1128 at paras 21-22, 159 DLR (4th) 493. See also *R v Koh* (1998), 42 OR (3d) 668, 131 CCC (3d) 257 (CA); *R v Parks* (1993), 15 OR (3d) 324, 84 CCC (3d) 353 (CA).

our society,"[69] one "so notorious and indisputable that its existence will be admitted without any need of evidence."[70]

Racial bias, whether explicit or implicit, has been shown to impact jurors' decision-making.[71] Several American studies, for instance, have found implicit associations between the race of the accused and the likelihood of a guilty verdict.[72] Take, for instance, a study by Levinson & Young, which found that even just a subtle manipulation of an accused's skin colour impacted how jurors evaluated the evidence presented and, indeed, their evaluation of the accused's guilt.[73] Canadian research similarly suggests the continuing existence of juror bias against racialized accused, including Black[74] and Indigenous accused.[75] Indeed, Canadian courts have recognized the pervasive threat of racial bias in the jury trial context – it is for this reason that, where an accused is racialized, they are automatically entitled to bring a challenge for cause on the basis that some jurors may be unable to carry out their duty as trier of fact in an impartial manner.[76]

Interestingly, news media outlets play a significant role in promoting bias against racialized accused. To start, it has long been recognized that public opinion on various issues tends to be significantly influenced by the media to which the public is exposed.[77] The widespread, pervasive nature of media bestows upon it the power to impact both

---

[69] *R v Spence*, 2005 SCC 71 at para 1.
[70] *Ibid*, para 5.
[71] Jacqueline M Kirshenbaum & Monica K Miller, "Judges' experiences with mitigating jurors' implicit biases" (2021) 28:5 Psychiatry, Psychol & L 683 at 684; Christine L Ruva et al., "Battling bias: can two implicit bias remedies reduce juror racial bias?" (2022) Psychol, Crime & L 1 at 2 (ahead of print).
[72] See Justin D Levinson, Huajian Cai & Danielle Young, "Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test" (2010) 8:1 Ohio St J Crim L 187 at 207; Kirshenbaum & Miller, *ibid*.
[73] Jerry Kang et al., "Implicit bias in the courtroom" (2012) 59:5 UCLA L Rev 1124 at 1144-45, citing Justin D Levinson & Danielle Young, "Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence" 112 W VA L Rev 307 at 332-337.
[74] See e.g. Regina A Schuller, Veronica Kazoleas & Kerry Kawakami, "The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom" (2009) 33:4 L & Hum Behav 320 at 325; Evelyn M Maeder et al, "Race Salience in Canada: Testing Multiple Manipulations and Target Races" (2015) 21:4 Psychol, Pub Pol'y & L 442 at 448; Evelyn M Maeder & Laura A McManus, "Mosaic or Melting Pot? Race and Juror Decision Making in Canada and the United States" (2022) 37:1-2 J Interpersonal Violence 991 at 1004-05.
[75] See e.g. Maeder et al, *ibid*; Maeder & McManus, *ibid*.
[76] See e.g. *Spence*, *supra* note 69 at para 5; *Williams*, *supra* note 68 at paras 21-22; *Parks*, *supra* note 68.
[77] See e.g. Charles S Ungerleider, "Media, minorities, and misconceptions: the portrayal by and representation of minorities in Canadian news media" (1991) 23:3 Can Ethnic Stud 158 at 158.

what issues citizens think about and *how* they think about them.[78] As put by Mahtani, "the media is responsible for the ways that Canadian society is interpreted, considered, and evaluated among its residents," given its capacity to "siphon […] and select […] the information we receive to make choices about our day-to-day realities."[79] Indeed, "[t]he media provide a window on the world that potentially molds our beliefs and expectations, especially about the lesser-known aspects of the environment we live in."[80]

This rings true for crime news media specifically. Dixon & Linz have acknowledged the power of "crime stories" to shape societal conceptions of order and justice.[81] Similarly, in the Canadian context, Dowler, Fleming & Muzzatti observe that the media has "become central in the production and filtering of crime ideas."[82] Take, for instance, the results of a 2003 survey conducted by the Research and Evaluation Branch of the Royal Canadian Mounted Police on the impact of media coverage on organized crime:

> Almost all interviewed police managers stated emphatically that public opinion regarding organized crime is definitely influenced by the media. This situation is said to have a negative impact. In fact, several managers argue that the media give citizens the impression that organized crime generates much more violence than it actually does. The way organized crime-related events are covered by the media heightens the sense of insecurity in the community and causes citizens to call on the police more often to deal with violent criminal activities.[83]

Bjornstrom et al similarly highlight the significance of media in shaping public opinion on crime and, in particular, those responsible for committing it:

---

[78] See e.g. Danielle C Slakoff, "The representation of women and girls of color in United States crime news" (2020) 14:1 Sociology Compass 1 at 1.
[79] Minelle Mahtani, "Representing minorities: Canadian media and minority identities" (2001) 33:3 Can Ethnic Stud 99.
[80] Jeroen Vaes et al, "They Are All Armed and Dangerous! Biased Language Use in Crime News With Ingroup and Outgroup Perpetrators" (2019) 31:1 J Media Psychol 12 at 12.
[81] Travis L Dixon & Daniel Linz, "Overrepresentation and underrepresentation of African Americans and Latinos as lawbreakers on television news" (2000) 50:2 J Communication 131 [Dixon & Linz 2000] at 131-32.
[82] Ken Dowler, Thomas Fleming & Stephen L Muzzatti, "Constructing Crime: Media, Crime, and Popular Culture" (2006) 48:6 Can J Criminology & Crim Just 837 at 839.
[83] Judith Dubois, *Media Coverage of Organized Crime - Police Managers Survey* (Ottawa: Royal Canadian Mounted Police, Research and Evaluation Branch, 2003) at 3, online: <https://www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn16152090-eng.pdf>.

> Media representations of crime shape public opinion in important ways, including through the frequency with which, and how they present criminal participants and victims. For example, views of the nature of the crime problem and who, or what, is responsible for said problem in a locale may be shaped by the extent to which specific groups are over- or underrepresented as perpetrators or victims in crime news relative to other groups or their share of criminal involvement or victimization. On the one hand, if media sources overrepresent certain groups (e.g., males, people of color, etc.) as perpetrators, this may promote racial or gender stereotypes or reinforce public hostility toward such groups.[84]

It has been observed that media representations of crime are particularly influential on people who have little interaction with crime in their day-to-day lives.[85]

Given the power of news media to influence public perception of crime, the question becomes: how are racialized persons depicted in crime news media? To start, racialized persons have been observed as being *overrepresented* in such media. Indeed, several studies have found that racialized persons appear in crime news coverage at a higher rate than their non-racialized counterparts.[86] Take, for instance, an American study by Poindexter, Smith & Heider that examined the "racial focus" of reporter-delivered news stories, which revealed that "Black-focused" stories were nearly two-and-a-half-times more likely than White-focused stories to be about crime.[87]

In addition, when racialized persons appear in crime news coverage, they are more likely to be portrayed in a negative light.[88] As Professor Charles S Ungerleider of the University of British Columbia observes, news content typically follows a "narrative"

---

[84] Eileen ES Bjornstrom et al, "Race and Ethnic Representations of Lawbreakers and Victims in Crime News: A National Study of Television Coverage" (2010) 57:2 Soc Prob 269 at 269-70.
[85] See Slakoff, *supra* note 78 at 1.
[86] See e.g. Wesley Crichlow & Sharon Lauricella, "An Analysis of Anti-Black Crime Reporting in Toronto: Evidence from News Frames and Critical Race Theory" in Monish Bhatia, Scott Poynting & Waqas Tufail, eds, *Media, Crime and Racism* (New York: Palgrave Macmillan, 2018) at 311; Pamela M Poindexter, Laura Smith & Don Heider, "Race and Ethnicity in Local Television News: Framing, Story Assignments, and Source Selections" (2003) 47:4 J Broad & Elec Media 524 at 531; Lanier Frush Holt, "Writing the Wrong: Can Counter-Stereotypes Offset Negative Media Messages about African Americans?" (2013) 90:1 Journalism & Mass Comm Q 108 at 108; Vaes et al, *supra* note 80 at 12; Laura Jacobs, "Patterns of criminal threat in television news coverage of ethnic minorities in Flanders (2003-2013)" (2017) 43:5 J Ethnic & Migration Stud 809 at 812.
[87] Poindexter, Smith & Heider, *ibid*.
[88] See Sadia Jamil & Jessica Retis, "Media Discourses and Representation of Marginalized Communities in Multicultural Societies" (2023) 17:1 Journalism Practice 1 at 1.

or "story" structure, which tends to frame issues as "conflicts between opposing forces often cast in the role of hero and the other of villain."[89] Indeed, the portrayal of crime within the media has been said to represent "a modern play," in which the "devil" is both symbolically and physically cast out from the society by its "guardians," i.e., the police and judiciary.[90] Unfortunately, racialized persons tend to overwhelmingly occupy the "villain" role in crime news coverage. Indeed, several studies have demonstrated that racialized persons are overrepresented in the role of perpetrator when compared their actual presence in crime statistics.[91] This has been found to especially be the case in crime news that focuses on "visible and threatening crimes," such as crimes of violence, property crime, and gang-related offending.[92] Racialized persons have also been found, in both the Canadian and American contexts, to be *underrepresented* in the "hero" role: they are markedly less likely to be showcased as either victims or "law-defenders," such as lawyers, judges and police officers.[93]

Further, when portrayed as perpetrators, racialized persons are often depicted more negatively than their non-racialized counterparts. Klein & Naccarato's examination of local television newscasts in Pittsburgh, for instance, found almost 80% of references to Black persons to be negative, in comparison to the less than two thirds of references to white persons which were rated as negative.[94] A similar study by Dixon & Linz, conducted in Los Angeles, found Black and Latino accused persons *twice as likely* as their white counterparts to be associated with prejudicial statements found in local pre-trial coverage.[95] In the Canadian context, mainstream Canadian news outlets tend to frame Indigenous persons as "problematic" in the sense that they tend to be

---

[89] Ungerleider, *supra* note 77 at 160.
[90] Dixon & Linz 2000, *supra* note 81 at 131-32.
[91] See e.g. Roger D Klein & Stacy Naccarato, "Broadcast News Portrayal of Minorities: Accuracy in Reporting" (2003) 46:12 Am Behavioral Scientist 1611 at 1612; Jacobs, *supra* note 86 at 812; Vaes, *supra* note 80 at 12; Dixon & Linz 2000, *ibid* at 131. There is some (albeit limited) evidence that this has begun to lessen in recent years: see Travis L Dixon, "Good Guys Are Still Always in White? Positive Change and Continued Misrepresentation of Race and Crime on Local Television News" (2017) 44:6 Comm Research 775.
[92] Jacobs, *ibid* at 822.
[93] Vaes et al, *supra* note 80 at 12. See also Ungerleider, *supra* note 77 at 158.
[94] Klein & Naccarato, *supra* note 91 at 1612.
[95] Travis L Dixon & Daniel Linz, "Television News, Prejudicial Pretrial Publicity, and the Depiction of Race" (2002) 46:1 J Broad & Elec Media 112 [Dixon & Linz 2002] at 112.

"unreasonable" and "highly emotional,"[96] inherently connected to drugs, crime, and violence.[97] Indeed, Fleras describes the impact of mainstream Canadian news as both "criminalizing Aboriginality" and "Aboriginalizing crime."[98] Similarly, modern news representations of Black Canadians tend to construct them as "ensconced in a life of crime, poverty, and violence."[99] In general, Jacobs emphasizes that racialized persons are more likely to be depicted as "dangerous and threatening," which cultivates "an image of minorities as more prone to violent forms of criminal behaviour."[100]

How can this difference in depiction be explained? News media is often observed to reflect and uphold societal views and prejudices. As put by Jamil & Retis:

> News cannot be perceived merely as commodity for lucid public discourse, but as the public construction of exact images of society […]. Both theory and empirical research on media discourse, suggests that stereotypes […] are maintained via interaction with the messages offered in mass media fare.[101]

This is particularly relevant with respect to the portrayal of racialized persons in news. It has been argued that the media "replicates part of the everyday biased practices against members of marginalized communities"[102] by relying on harmful stereotypes to frame news stories, thereby entrenching and re-entrenching these stereotypes.[103] In the context of crime news coverage, the stereotypical association between certain races/ethnicities and tendency toward criminality, as discussed at the outset of this section, are reflected and perpetuated through the (over)representation of racialized persons.[104] Indeed, Jacobs observes that "news has been held responsible to disseminate stereotypical images of

---

[96] Yasmin Jiwani & Mary Lynn Young, "Missing and Murdered Women: Reproducing Marginality in News Discourse" (2006) 31:4 Can J Comm 895 at 898.
[97] Beverly Marsden, "Burying the Hatchet: Addressing Disproportionate Media Representations of Indigenous Missing and Murdered Peoples" (2021) 16 Undergraduate Rev 75 at 79, citing Brad Clark, "Framing Canada's Aboriginal Peoples: A Comparative Analysis of Indigenous and Mainstream Television News" (2014) 34:2 Can J Native Stud 41. See also Mahtani, *supra* note 79.
[98] Augie Fleras, *The Media Gaze: Representations of Diversities in Canada* (Vancouver: UBC Press, 2011) at 21.
[99] Crichlow & Lauricella, *supra* note 86 at 301.
[100] Jacobs, *supra* note 86 at 812, 822.
[101] Jamil & Retis, *supra* note 88 at 1.
[102] *Ibid.*
[103] See Slakoff, *supra* note 78 at 1-2.
[104] See e.g. Holt, *supra* note 86 at 108; Slakoff, *ibid* at 1-2.

ethnic minorities, linking them with social problems, disruptive activities and deviant behaviour," such as criminal activity.[105]

This differential portrayal also serves to reinforce the power imbalance between racialized communities and the dominant (i.e., white) population. By associating racialized persons with violence and criminality, the media engages in an "argumentative ploy" that "celebrates the existing social order" by discrediting racialized groups and causes in news discourse.[106] Indeed, as Mahtani observes:

> Media images of Canadian minorities are not just a random panoply of representations. Decisions about representations of cultural diversity ought to be envisioned within a series of competing discourses taking place within media institutions. Despite what we would like to believe, Canadian media is not fair and democratic, nor objective in nature […]. The "traditional" journalistic focus on balance, objectivity, and impartiality does not mean that everyone receives equal treatment in media representations. Minority groups are regularly excluded and marginalized, and the dominant culture is reinforced as the norm.[107]

This, of course, explains the stark contrast with respect to how white persons tend to be represented in crime news coverage: they are consistently showcased in the "hero" role, overrepresented as both justice officials (e.g. lawyers, judges, police officers) and crime victims.[108] Further, when non-racialized individuals *are* depicted as criminal perpetrators, they are often given more grace. Indeed, as observed by Slakoff, albeit in the American context, the media will often excuse the crimes of white offenders, whether by highlighting the offender's "legitimate mental health concerns" or portraying them as especially likely to reform.[109]

What does this mean in the context of online factual research by jurors? As discussed above, online factual research often amounts to jurors searching for news coverage related to the cases upon which they sit, to learn more about the surrounding

---

[105] Jacobs, *supra* note 86 at 810.
[106] Jiwani & Young, *supra* note 96 at 898; Ungerleider, *supra* note 77 at 161. See also Klein & Naccarato, *supra* note 91 at 1613-14.
[107] Mahtani, *supra* note 79.
[108] See e.g. *ibid*; Dixon, *supra* note 91 at 786.
[109] Slakoff, *supra* note 78 at 2.

events and, indeed, the nature and extent of the accused's potential involvement. I submit that, due to the overrepresentation and often negative portrayal of racialized persons in crime news coverage, the risk of juror partiality stemming from online factual research is likely disproportionate for racialized accused persons.

To begin, because racialized persons tend to be overrepresented in crime news media, it follows that jurors conducting online factual research in cases involving racialized accused may be more likely to encounter extraneous information. In this sense, the risk of partiality is heightened because there is a disproportionate likelihood of exposure to information that may unfairly influence juror decision-making. Further, the fact that crime news coverage surrounding racialized persons/communities is disproportionately *negative* is cause for concern. Because racialized persons are more often depicted within media as "problematic" or even inherently violent perpetrators than their non-racialized counterparts, when jurors conduct independent online research, they may be more likely to encounter information about a racialized accused that is unfavourable, prejudicial, or potentially rooted in harmful stereotypes.

Finally, there is the risk that, where jurors discover negative or prejudicial information about a racialized accused through online factual research, they may be more likely to believe (and subsequently consider) that information. Indeed, empirical research suggests that jurors are more susceptible to influence by incriminating inadmissible evidence when an accused is racialized.[110] This is likely, in part, the result of confirmation bias stemming from the belief at least *some* jurors will hold, whether explicitly or implicitly, that those of certain races/ethnicities are more likely to engage in criminal activity. As noted by Nickerson, confirmation bias "connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."[111] Thus, if a juror believes that racialized persons are more likely to commit crime, when their own independent research presents them with information

---

[110] See e.g. James D Johnson et al, "Justice is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence" (1995) 21:9 Personality & Soc Psychol Bull 893.
[111] Raymond S Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises" (1998) 2:2 Rev Gen Psychol 175 at 175. See also Uwe Peters, "What Is the Function of Confirmation Bias?" (2022) 87 Erkenntnis 1351 at 1353.

consistent with that belief (i.e., that a racialized accused has committed the crime with which they have been charged), they may be more likely to accept that information as true. This may be particularly likely when, as discussed above, serving on a jury is one of the first interactions the investigating juror has had with the criminal justice system.

This heightened vulnerability to partiality is extremely troubling, given the general disadvantage racialized persons *already* face within the system. Racialized persons are overrepresented at virtually all stages of the Canadian criminal justice system – they are more likely to be arrested, charged, detained in custody without bail, convicted, and, ultimately, imprisoned.[112] In 2015/16, for instance, Indigenous people comprised 25% of all accused, while representing only 5% of the Canadian population, meaning they were overrepresented by a factor of five.[113] Further, in 2023, Indigenous offenders accounted for 28% of all federally sentenced individuals and 32% of all individuals in custody.[114] The figures are even more concerning for incarcerated Indigenous *women*, who comprise 50% of all federally incarcerated women.[115] Black Canadians also experience significant overrepresentation. During those same periods, Black persons were overrepresented by a factor of two in the accused population, accounting for 6% of all accused while representing only 3% of the Canadian population,[116] as well as overrepresented within the prison population, with Black offenders constituting 9% of offenders under federal corrections jurisdiction.[117]

---

[112] See *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada* (Ottawa: Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, 2018) [*Innocence at Stake*] at 231.
[113] See Charbel Saghbini, Angela Bressan & Lysiane Paquin-Marseille, *Indigenous People in Criminal Court in Canada: An Exploration Using the Relative Rate Index* (Ottawa: Department of Justice Canada, 2021) at 11.
[114] See "Parliamentary Committee Notes: Overrepresentation (Indigenous Offenders)" (9 March 2023), online: *Public Safety Canada* <https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20230720/12-en.aspx#:~:text=Despite%20accounting%20for%20approximately%205,of%20all%20federally%20incarcerated%20women>.
[115] *Ibid.*
[116] See "Overrepresentation of Black people in the Canadian criminal justice system" (December 2022) at 4-5, online: *Department of Justice Canada* <https://www.justice.gc.ca/eng/rp-pr/jr/obpccjs-spnsjpc/pdf/RSD_JF2022_Black_Overrepresentation_in_CJS_EN.pdf>.
[117] *Ibid* at 7.

What is more, it has been widely recognized that racialized accused already experience a disproportionate risk for wrongful conviction.[118] Indeed, Amanda Carling, lawyer and co-founder of the Canadian Registry of Wrongful Convictions, asserts that Indigenous and Black Canadians are particularly vulnerable in this respect.[119] In 2018, for instance, Indigenous and Black convicted persons were the subject of 25% and 15%, respectively, of active Innocence Canada cases.[120] According to Mason, this exacerbated risk is a result of, among other factors, systemic racism and discrimination, often stemming from widespread, racist stereotypes that associate racialized people with crime.[121] Thus, in my view, the enhanced partiality risk online factual research poses for racialized persons compounds the disadvantage they already experience when in contact with the Canadian criminal justice system. Indeed, it subjects racialized persons to yet another dimension of unfairness, further perpetuating a cycle of injustice.

3.2.2 THE RIGHT TO MAKE FULL ANSWER AND DEFENCE

The trial fairness guarantee is also diminished by online factual research because of the impact such research has on the accused's ability to make full answer and defence. The right to make full answer has long existed at common law[122] and has, more recently, achieved constitutional status – it is a principle of fundamental justice, protected under both sections 7 and 11(d) of the *Charter*.[123] Indeed, the right to make full answer has been recognized as an integral component of the right to a fair trial,[124] observed by the

---

[118] See e.g. Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015) 17 Flanders LJ 203 at 203; Robert Mason, *Wrongful Convictions in Canada* (Ottawa: Parliamentary Information and Research Service, 2020) at 10; *Innocence at Stake*, *supra* note 112 at 232; Innocence Canada, "Causes of Wrongful Convictions," online: <https://www.innocencecanada.com/causes-of-wrongful-convictions/>; Canadian Institute for the Administration of Justice, "Wrongful Convictions in Canada" (24 August 2022), online: <https://ciaj-icaj.ca/en/2022/08/24/wrongful-convictions-2022-conference-on-dignity-panel-2/>.

[119] See David Fraser, "Researchers hope wrongfully convicted database will lead to reforms, more releases" *CTV* (20 February 2023), online: <https://www.ctvnews.ca/canada/researchers-hope-wrongfully-convicted-database-will-lead-to-reforms-more-releases-1.6281311>.

[120] See *Innocence at Stake*, *supra* note 112 at 233.

[121] Mason, *supra* note 118 at 11.

[122] *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1.

[123] See e.g. *R v Mills*, [1999] 3 SCR 668 at para 5, 180 DLR (4th) 1; *R v Rose*, [1998] 3 SCR 262 at paras 2, 16, 166 DLR (4th) 385.

[124] See *Rose*, *ibid* at para 16.

Supreme Court of Canada in *R v Stinchcombe* as being "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted."[125]

What does it mean to be able to make "full answer and defence"? The right to make full answer is comprised of two distinct guarantees: the right to know and the right to respond. The first describes the accused's entitlement to hear the *entire* case made out against them.[126] Put another way, the accused has the right to a trial based only upon evidence that they know about.[127] In the context of a jury trial, this means that any information the jury considers in coming to a verdict must also have been known to the accused. Indeed, per the classic statement made by the United States Supreme Court in *Patterson v Colorado*, the "theory" of the criminal jury system is that "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[128]

The right to respond, on the other hand, describes the importance of the accused having a fair opportunity to *challenge* any evidence put before the jury.[129] As noted by Hoffmeister, "to ensure fairness in the trial process, the parties must have the opportunity to refute, explain, or correct the information jurors receive."[130] Often, this will be achieved through cross-examination, an "essential" tool for testing credibility[131] that allows parties to reveal any frailties or discrepancies in the opposing party's witness' evidence. In the criminal context, cross-examination is a tool for the accused to expose weaknesses in the Crown's case.[132] As a result, an "essential component" of the accused's right to make full answer and defence is their ability to cross-examine witnesses "without significant and unwarranted constraint."[133]

---

[125] *Stinchcombe*, *supra* note 122. See also *Mills*, *supra* note 123 at para 5.
[126] See *R v Chambers*, [1990] 2 SCR 1293, 59 CCC (3d) 321; Tasmania Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Final Report No 3, January 2020) at 1; *R v Karakaya*, [2005] EWCA Crim 346.
[127] See Harvey, *supra* note 17 at 206.
[128] *Patterson v Colorado*, 205 US 454 at 462 (1907).
[129] See e.g. *R v Seaboyer*, [1991] 2 SCR 577, 83 DLR (4th) 193; *Karakaya*, *supra* note 126; Tasmania Law Reform Institute, *supra* note 126 at 1.
[130] Hoffmeister, *supra* note 16 at 454.
[131] See *R v Osolin*, [1993] 4 SCR 595, 109 DLR (4th) 478.
[132] See Marder, *supra* note 16 at 622.
[133] *R v Lyttle*, 2004 SCC 5 at para 41. See also *Osolin*, *supra* note 131.

When jurors conduct online factual research, the accused is robbed of both these guarantees. To start, unless a juror's independent research is discovered, neither the accused, nor their counsel, will know that exposure to extraneous information occurred.[134] Indeed, as observed by the England & Wales Court of Appeal (Criminal Division) in *R v Karakaya*, such research "will have happened in the absence of the prosecution and the defence and the trial judge and remaining members of the jury. None of them will know."[135] As a result, the accused is denied the opportunity to hear the case made out against them in its entirety. Instead, misbehaving jurors, in conducting online factual research, "cloud the transparency of the public trial process" by considering information outside that which was revealed during trial.[136]

Online factual research also denies accused persons their right to respond.[137] Unlike when evidence is presented in court, information discovered by way of OJR is not subject to adversarial review;[138] parties cannot cross-examine, rebut, or object to information jurors find online because, as discussed, they have no way of knowing such information was accessed in the first place.[139] Put simply, the accused is given no opportunity to disprove or call into question the extraneous information discovered by a juror's online investigating.[140] As observed by Manhas, this has the effect of "twist[ing] our adversarial system into something more akin to the European inquisitorial system."[141]

3.2.2.1 DENIAL OF FULL ANSWER: LINGERING POST-TRIAL EFFECTS?

It is worth noting that the denial of the right to make full answer and defence prejudices the accused not only during trial, but also in the event of any post-trial advocacy. Unlike trial judges, juries do not provide reasons for their verdicts.[142] This lack of transparency means that, when an appellate court reviews a jury's verdict, its

---

[134] See Battell-Wallace, *supra* note 16 at 86; *Karakaya*, *supra* note 126.
[135] *Karakaya*, *ibid*.
[136] Hogg, *supra* note 14 at 3-4.
[137] *Ibid.*
[138] See Manhas, *supra* note 30 at 812.
[139] See Hoffmeister, *supra* note 16 at 417; *Karakaya*, *supra* note 126.
[140] See Battell-Wallace, *supra* note 16 at 86.
[141] Manhas, *supra* note 16 at 812.
[142] See *Pan*, *supra* note 17 at para 44.

consideration is limited to the information contained in the trial record. This is, theoretically, acceptable, as the record *should* contain all evidence the jury had at its disposal when making its decision. However, when a juror conducts independent research that subsequently goes undiscovered, any extraneous information they obtain will remain undisclosed and, thus, unexaminable. This creates a significant problem, as a reviewing court will be unable to assess the extent to which unauthorized, extraneous information impacted a jury's verdict and, indeed, will be unaware that such information even entered the jury room.

Consider, for instance, where an accused person appeals their conviction on the basis that the jury's verdict was unreasonable. In such cases, the test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered."[143] Because, unlike trial judges, juries do not provide reasons for their findings which can be used to inform review, appellate courts, in determining whether verdicts are unreasonable, are left only to consider the sufficiency of the evidence that was before the jury.[144] Indeed, a reviewing court will "review, analyse and […] weigh the evidence"[145] to determine whether "judicial fact-finding preclude[d] the conclusion reached by the jury."[146]

Indeed, appellate courts are empowered to "overturn jury verdicts where there is compelling evidence that their conclusions relied unreasonably on evidence with significant reliability concerns."[147] However, in reviewing a jury's verdict for reasonableness, they are required to adopt a culture of deference toward the jury as trier of fact. They cannot act as a "13th juror."[148] Instead, they must "give due weight to the advantages of the jury as the trier of fact who was present throughout the trial and saw

---

[143] See e.g. *Corbett v R*, [1975] 2 SCR 275, 42 DLR (3d) 142; *R v Yebes*, [1987] 2 SCR 168, 43 DLR (4th) 424; *R v W.H.*, 2013 SCC 22 at para 26.
[144] See Andrew Furgiuele, "The Self-Limiting Appellate Courts and Section 686" (2007) 52:2 Crim LQ 237 at 240.
[145] *R v Biniaris*, 2000 SCC 15 at para 36.
[146] *Ibid* at para 39.
[147] Nik Khakhar, "'Unlocking Pandora's Box?': Resolving the Clash of Infrastructure Amidst the Risks of Jury Secrecy" (2023) 81:2 U Toronto Fac L Rev 191 at 202.
[148] *W.H.*, *supra* note 143 at para 27.

and heard the evidence as it unfolded"[149] by "articulat[ing] as explicitly and as precisely as possible" any grounds for intervention.[150] As the Court instructed in *R v Biniaris*:

> The exercise of appellate review is considerably more difficult when the court of appeal is required to determine the alleged unreasonableness of a verdict reached by a jury. If there are no errors in the charge, as must be assumed, there is no way of determining the basis upon which the jury reached its conclusion. But this does not dispense the reviewing court from the need to articulate the basis upon which it finds that the conclusion reached by the jury was unreasonable. It is insufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence. This "lurking doubt" may be a powerful trigger for thorough appellate scrutiny of the evidence, but it is not, without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of a jury.[151]

As Khakhar observes, this standard of explicitness is beneficial in the sense that it "serves as a safeguard for the jury verdict, preventing appellate judges from second-guessing the jury's analysis using the bulk of their judicial experience unless there is a tangible basis for them to do so."[152]

And yet, this requirement of explicitness is incompatible with detecting sources of potential prejudice or error that the reviewing court *does not know occurred*. As the Court observed in *R v W.H.*, the presence of certain types of "special" or "challenging" evidence on the trial record will sometimes be an indicator to which an appellate court may point to establish the unreasonableness of a jury's verdict. Examples include, for instance, evidence from jailhouse informants/accomplices or eyewitness identification evidence.[153] Importantly, while the reviewing court will not be able to determine the extent to which the jury relied upon such information, it will know that it was *available* to the jury. However, the elusive nature of independent research makes it such that it will not appear on the trial record. As a result, a reviewing court will be unlikely to detect that it occurred and, thus, factor it into their analysis. Indeed, it is for this reason that some

---

[149] *Ibid.*
[150] *Biniaris*, *supra* note 145 at para 42.
[151] *Ibid* at para 38.
[152] Khakhar, *supra* note 147 at 203.
[153] *W.H.*, *supra* note 143 at para 29.

critics have questioned the efficacy of the *Code*'s appeal provisions in light of the secretive nature of jury deliberations, particularly in the Digital Age.[154]

3.3 THE IMPACT OF ONLINE LEGAL RESEARCH

As observed in the previous Chapter, jurors are also turning to the Internet to conduct *legal* research. This describes situations where jurors seek assistance online to better understand the legal rules or principles relevant to a case. In practice, such conduct has ranged from googling the definitions of key legal terms,[155] to accessing legal resources to learn about important legal concepts, such as the standard of proof "beyond a reasonable doubt,"[156] to conducting research on aspects of criminal procedure or advocacy, such as "witness coaching."[157]

Legal research, like factual research, also raises alarm bells with respect to the accused's guarantee of trial fairness. This concern is rooted in the clear distinction in role between jurors and the trial judge. In a criminal trial, the jury acts as the sole "trier of fact." After hearing the evidence, it is the task of the jury to determine what happened and to apply the law to those factual findings to render a verdict.[158] The jurors do not however, determine or interpret the *law* – that task is reserved for the trial judge. The judge, as "trier of law", is responsible for instructing the jury with respect to any legal principles relevant to the case.[159] Jurors are required to accept these governing legal principles and apply them to the facts as they find them.[160] This means that the trial judge

---

[154] See e.g. Khakhar, *supra* note 147.
[155] See e.g. *Attorney General v Dallas*, [2012] EWHC 156 (a UK juror was held in contempt for conducting an online search for the meaning of the word "grievous"); *R v Benbrika*, [2009] VSC 142 (multiple jurors on a Victoria terrorism trial used Wikipedia and Reference.com to search for definitions of "membership," "intentional," and "organization"); *R v JP (No 1)*, [2013] NSWSC 1678; *R v JP (No 2*), [2013] NSWSC 1679 (a New South Wales juror conducted online research to discern the difference between murder and manslaughter); *United States v Lawson*, 677 F 3d 629 (4th Cir 2012) (a juror on a South Carolina "cockfighting" trial used the Internet to look up the definition of "sponsor," an element of the offence).
[156] See e.g. *Bains*, *supra* note 19; *Martin v R* (2010), 28 VR 579; *Marshall and Richardson v Tasmania*, [2016] TASCCA 21.
[157] See Diana Hefley, "Juror's research forced mistrial in child rape case" *Herald Net* (11 December 2012), online: <https://www.heraldnet.com/news/juror%C2%92s-%C2%91research%C2%92-forced-mistrial-in-child-rape-case/>.
[158] See *Bains*, *supra* note 19 at para 57.
[159] See *Pan*, *supra* note 17 at para 43.
[160] See *Bains*, *supra* note 19 at para 57; *R v Spackman*, 2012 ONCA 905 at para 243.

is the jury's *exclusive* source of legal information. Indeed, jurors are routinely warned that they are not permitted to rely on their own ideas about what the law is (or should be), nor may they rely on information about the law from any other sources.[161]

This clear division of responsibility between jurors and the trial judge with respect to factual and legal findings stems from the inherent complexity of the law. Given their extensive and continuing legal education and daily engagement with legal matters, judges are in a prime position to describe the current state of the law to jurors. Jurors, on the other hand, lack formal legal education. This is by design – those with legal training, such as lawyers, judges, and (in some provinces) even law students, are specifically exempt from jury service.[162] This exclusion protects the collective nature of jury decision-making. Indeed, the presence of legal professionals on juries could unduly influence deliberations, given that lay jurors might simply defer to the professional's opinion, "rather than objectively evaluating the facts and evidence for themselves based on their own personal and societal knowledge."[163] The fear is that legal professionals would dominate discussions with their knowledge and experience, potentially overshadowing other jurors' perspectives. By excluding those with legal knowledge and experience from jury service, the logic is that we can better guarantee representative verdicts based on diverse perspectives and equal footing among all jurors.[164]

Consequently, however, jurors are generally unprepared to correctly interpret the vast and complex body of criminal law, given that they are necessarily unfamiliar with legal and evidentiary rules and principles. Indeed, as observed by Blackstone, although juries are "the best investigators of the truth," they are less well-equipped to determine issues of *law*, given that "if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts."[165] Put simply, it is unlikely that jurors

---

[161] See *CJC Instructions*, *supra* note 21, 3.2[2].
[162] See e.g. *Jury Act*, RSNB 2016, c 103, s 3(d); *Juries Act*, RSO 1990, c J.3, s 3(1)4; *Jury Act*, RSBC 1996, c 242, s 3(1)(j).
[163] Nik Khakhar, "'Reviewing Our Peers': Evaluating the Legitimacy of the Canadian Jury Verdict in Criminal Trials" (2022) 80:1 U Toronto Fac L Rev 42 at 48.
[164] *Ibid.*
[165] William Blackstone, *Commentaries on the Laws of England*, as cited in Douglas G Smith, "The Historical and Constitutional Contexts of Jury Reform" (1996) 25:2 Hofstra L Rev 377 at 415.

would be able to correctly identify and apply the legal principles relevant to the case before them. This is a task better suited to the trial judge.

By undertaking legal research, jurors essentially usurp the trial judge's role as trier of law, often, I would argue, at the expense of trial fairness. In conducting independent legal research, jurors will be exposed to information about the law that may be unreliable, irrelevant, or incorrect, or that they simply do not fully understand. This prejudices the accused's right to a fair trial because it opens the door to the improper interpretation and application of key legal principles and concepts. This, of course, may distort the jury's overall understanding of the case and, ultimately, improperly impact the verdict. Indeed, while juries are vested with the authority to apply the law to the facts as they find them, the law they apply must be *correct*; otherwise, we are left with verdicts that are both unfair and legally unsound.

Of course, these risks attach to *any* independent legal research by jurors, not just that which is undertaken in the online sphere. However, I submit that the "online dimension" of legal research by jurors *exacerbates* the practice's risk to trial fairness. This is so for three key reasons: (1) the increased accessibility of legal information in the online forum; (2) the questionable reliability of much online legal information; and (3) the heightened risk for misinterpretation. I will now discuss each of these reasons in further detail.

3.3.1 INCREASED ACCESSIBILITY OF ONLINE LEGAL INFORMATION

To start, legal information has never been as readily available as it is in the Digital Age. Of course, like with factual research, the risk that jurors will engage in independent legal research is not new. Indeed, jurors have long been admonished against engaging in traditional forms of legal research, such as going to the library to consult a legal textbook.[166] It has been observed, however, that, historically, while legal information was publicly available, it was "practically obscure."[167] As put by Marder:

---

[166] See e.g. Hoffmeister, *supra* note 16 at 422-23; Marder, *supra* note 16 at 629.
[167] Marder, *ibid* at 626.

> Although jurors might have always had questions during trials, they did not always have the tools or easy access to information that they now have. A layperson might not have known where to begin legal research when cases could only be found in bound volumes of reporters in law libraries. The information was available in specialized books and libraries, but one had to have legal training to know what to look for as well as how to look for and understand it.[168]

This has all changed in the Digital Age – with the click of a key, jurors now have available "a vast array of updated and archival information," including general information about the criminal justice process, the criminal law, the rules of evidence, and definitions of legal terms and principles.[169] Indeed, as Hoffmeister points out, legal research is no longer tied to a physical location. Instead, it can be accomplished anywhere a juror has Internet access.[170]

The rise of the Internet has also significantly broadened the *range* of sources available for online legal research. For instance, jurors now have access to not only the types of information traditionally found in legal texts and treatises at their local libraries, but also to "online experts": individuals who possess – or, at least, claim to possess – specialized legal knowledge, who respond to online queries about law-related topics. Indeed, as noted by Marder, via the Internet, jurors have access to a "a network of individuals who have specialized knowledge" they are willing to share across a variety of platforms, such as X, Facebook, Reddit, and various legal blogs, "that once was available only if you happened to know such an expert."[171] The subreddit "r/legaladvice," for example, which has 2.7 million members and is, popularity-wise, in the top 1% of subreddits, is advertised as "a place to ask simple legal questions." Many lawyers are frequent browsers of the subreddit and provide answers to posted questions.[172]

The consequence of legal information becoming so accessible is that the risk of jurors improperly *accessing* such information has been amplified. Put simply, traditional

---

[168] *Ibid.*
[169] Harvey, *supra* note 17 at 206.
[170] Hoffmeister, *supra* note 16 at 418.
[171] Marder, *supra* note 16 at 626-27.
[172] See "r/legaladvice" (2.7 million members), online: *Reddit* <https://www.reddit.com/r/legaladvice/>. There is also a subreddit limited solely to Canadian legal questions that has nearly 500,000 members. See "r/legaladvicecanada" (476k members), online: *Reddit* <https://www.reddit.com/r/legaladvicecanada/>.

means of conducting independent legal research required a lot of effort. Jurors needed to make their way to the library and pour over complex texts filled with unfamiliar concepts, all while avoiding detection by their fellow jurors or the trial judge. Presumably, for many jurors, such effort would be enough to deter them from engaging in the practice. Now, however, with the Internet at their fingertips, jurors can easily and discretely access a vast array of legal resources whenever the temptation to do so arises.

3.3.2 QUESTIONABLE RELIABILITY OF ONLINE LEGAL INFORMATION

A second concern is that many online sources of legal information are of questionable *reliability*. Indeed, as pointed out by the Tasmania Law Reform Institute in their recent investigation into the impact of Internet access on modern juries, "[w]hen jurors go online to conduct enquiries on legal terms and concepts, the reliability and accuracy of the source is unknown."[173] Unlike traditional sources of legal information, such as textbooks and practitioners' legal databases (e.g. Westlaw, LexisNexis Quicklaw), the accuracy of online content varies widely.[174] Indeed, jurors may inadvertently rely on legal information that is outdated, inapplicable, or simply incorrect, which could improperly impact the decision-making process. This, I submit, is a particular concern when jurors access popular crowdsourced resources, such as Wikipedia, where anyone with a computer can edit or rewrite entries/articles and, further, can do so anonymously.[175] This problem was aptly described by A.J. Goodman J of the Ontario Superior Court of Justice in *R v Scalzo*, who noted that "[s]ocial media can pose challenges in that opinion and information may be skewed, uninformed and anonymous."[176]

Concerns about reliability are perhaps currently at their height, given society's increasing reliance on generative-AI software. Use of this type of software has become

---

[173] Tasmania Law Reform Institute, *supra* note 126 at 4.
[174] LexisNexis, "Why Attorneys Shouldn't Use Internet Search Engines for Legal Research" (22 April 2020), online: <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/why-attorneys-shouldnt-use-internet-search-engines-research>.
[175] See "Wikipedia, the Father of Crowdsourcing" (31 October 2015), online: *Harvard MBA Student Perspectives* <https://d3.harvard.edu/platform-digit/submission/wikipedia-the-father-of-crowdsourcing/>; Marder, *supra* note 16 at 627.
[176] *Scalzo*, *supra* note 57 at para 74.

extremely common; ChatGPT, for instance, is the fastest-growing online consumer application in *history*, having amassed a weekly user-base of approximately 100 million people.[177] The issue is that generative-AI platforms, including ChatGPT, are prone to "hallucinations"; the software "will occasionally make up facts or […] outputs, meaning that some proportion of computer-generated answers are simply inaccurate."[178]

Unfortunately, it appears that hallucinations may be more common when users request *legal* information. Indeed, ChatGPT's creator, OpenAI, has confirmed that the risk for hallucination is "heightened in the legal realm, where the facts, data and precedents need to be accurately described."[179] Perhaps unsurprisingly, then, there have been a number of reported cases across North America of legal missteps attributable to generative-AI. In 2023, for instance, two New York attorneys were ordered to pay $5,000 in costs after submitting a legal brief to the court that, unbeknownst to them, included six fictitious case citations generated by ChatGPT.[180] Similarly, a British Columbia lawyer was reprimanded for including two "hallucinated" citations in their submissions in a child custody matter.[181] As a result of these incidents, courts and law societies have felt the need to issue warnings to lawyers about relying on generative-AI for conducting legal research.[182]

---

[177] See Jon Porter, "ChatGPT continues to be one of the fastest-growing services ever" *The Verge* (6 November 2023), online: <https://www.theverge.com/2023/11/6/23948386/chatgpt-active-user-count-openai-developer-conference>; Cindy Gordon, "ChatGPT Is The Fastest Growing App In The History of Web Applications" *Forbes* (3 February 2023), online: <https://www.forbes.com/sites/cindygordon/2023/02/02/chatgpt-is-the-fastest-growing-ap-in-the-history-of-web-applications/>.

[178] Daniel Lublin, "Considering using AI for legal advice? Here's why it's not ready" *The Globe and Mail* (8 September 2023), online: <https://www.theglobeandmail.com/business/careers/article-considering-using-ai-for-legal-advice-heres-why-its-not-ready/>. See also Aly Thomson, "Lawyer warns 'integrity of the entire system in jeopardy' if rising use of AI in legal circles goes wrong" *CBC* (1 March 2024), online: <https://www.cbc.ca/news/canada/nova-scotia/artificial-intelligence-lawyers-law-nova-scotia-1.7126732#:~:text=In%20October%2C%20the%20Nova%20Scotia,with%20%22meaningful%20human%20control.%22>.

[179] Lublin, *ibid*. See also Thomson, *ibid*.

[180] See e.g. Kathryn Armstrong, "ChatGPT: US lawyer admits using AI for case research" *BBC* (27 May 2023), online: <https://www.bbc.com/news/world-us-canada-65735769>; Thomson, *ibid*.

[181] See e.g. Jason Proctor, "B.C. lawyer reprimanded for citing fake cases invented by ChatGPT" *CBC* (27 February 2024), online: <https://www.cbc.ca/news/canada/british-columbia/lawyer-chatgpt-fake-precedent-1.7126393>; Thomson, *ibid*.

[182] See Thomson, *ibid*.

If lawyers, who benefit from significant legal training and practice experience, as well as who are subject to ethical standards of competence by their regulators, are relying on generative-AI to their own detriment, it follows that the risk of misuse by lay jurors may be significant. As discussed, jurors, by design, do not possess the legal literacy of lawyers and other legal professionals. They lack the expertise required to evaluate the credibility and authenticity of legal sources. Thus, when presented with false or misleading legal information by ChatGPT or other similar software, jurors may accept it at face value, believing it to be accurate and trustworthy. Moreover, generative-AI software can create a false sense of expertise to which jurors may fall prey. Even when incorrect, such software has been found to present legal information as authoritative.[183] In the New York case mentioned above, for instance, ChatGPT "doubled down" when asked whether the fictitious citations it initially provided were real, insisting they could be found on case law databases such as Westlaw and LexisNexis.[184]

3.3.3 HEIGHTENED RISK OF MISINTERPRETATION

Finally, and building off my point about legal literacy, there is always the risk that legal information found online, even if reliable, will be *misinterpreted* by lay jurors. A prime example of the risk for misinterpretation, and one which has manifested in several reported criminal cases in the Digital Age, is where jurors unknowingly obtain and rely upon information from another jurisdiction on a jurisdiction-specific matter. Take, for instance, a 2009 Rhode Island murder trial in which a juror took to the Internet to search for the definitions of "manslaughter," "murder," and "self-defense." Unbeknownst to the juror, however, the definitions found were applicable in California, not Rhode Island.[185] Similarly, a murder conviction was overturned in Arizona after it came to light that trial jurors had googled the legal definitions of "first-degree murder," "second-degree murder," and "pre-meditation," all of which differed significantly from the definitions provided in that state's model jury instructions.[186] This may be a particular problem for

[183] See Armstrong, *supra* note 180; Thomson, *ibid*.
[184] See Armstrong, *ibid*.
[185] See Hoffmeister, *supra* note 16 at 418.
[186] See Glenn Kauth, "Focus: Defence lawyers warned of mistrial risks" *Law Times* (31 December 2012), online: <https://www.lawtimesnews.com/news/features/focus-defence-lawyers-warned-of-mistrial-

Canadian jurors, who, in conducting online legal research, will likely come across (and may be influenced by) the vast array of American legal information and resources available on the Internet, much of which will be inapplicable/incorrect in the Canadian context.[187]

Misinterpretation of legal information has serious implications for the accused's guarantee of trial fairness. Accused persons are entitled to a trial based on the law as it exists, not as a juror *thinks* it exists or reasons it *should be*. Indeed, where verdicts are based on faulty interpretations the law, the accused is denied a trial on its merits. Of course, as discussed above, this risk is inherent in *any* independent legal research by jurors, not just that conducted online. However, I would argue that the increased accessibility of legal information in the Digital Age has amplified this issue. The sheer amount of information now available to jurors online has likely exacerbated the risk for misinterpretation, given that jurors who *do* engage in independent legal research will be exposed to a much higher volume of legal information.

3.4 CONCLUSION

The accused's right to a fair trial is perhaps the most sacred and fundamental guarantee within the criminal trial process: it safeguards the presumption of innocence, thereby minimizing the risk for miscarriage of justice and wrongful conviction. However, when jurors engage in independent research, whether that be via the Internet or through more traditional means, the right to a fair trial is diminished. Where that research is factual in nature, jurors risk exposing themselves to information that has not been vetted by the trial judge and, thus, may be prejudicial, irrelevant, or simply inaccurate. As discussed, this risk may be heightened for racialized accused, given the

---

risks/260468>. In the Canadian context, consider *Patterson v Peladeau*, 2020 ONCA 137, an Ontario motor vehicle personal injury case in which jurors looked up provincial legislation which ended up being completely irrelevant to the issues before them.

[187] Consider, for instance, the results of a 2023 Canadian survey which revealed many Canadians fail to understand the difference between the *Canadian Charter of Rights and Freedoms* and the American *Declaration of Independence* and, indeed, often think it is the rights to contained in the latter to which we are subject. See Stephanie Taylor, "'People are confused': Survey suggests Canadians need education on Charter rights" *CityNews* (10 December 2023), online: <https://vancouver.citynews.ca/2023/12/10/canadians-charter-rights-confused/>.

overrepresentation (and, often, largely *negative* portrayal) of racialized persons in crime news coverage. Independent factual research also has the effect of denying the accused the right to make full answer and defence, given that they will, in most cases, be unaware that research has been conducted and, therefore, are denied the opportunity to challenge the validity of any extraneous information. Legal research also jeopardizes trial fairness, given that it creates the risk that key legal principles and concepts will be improperly interpreted and applied by jurors.

However, as demonstrated in this Chapter, the online dimension of juror research has *exacerbated* the risk for unfairness. Information, both factual and legal, has never been as accessible, nor so digestible, as it is in the Digital Age. As a result, the "fade factor" has diminished with respect to pre-trial publicity and other extraneous information (and, along with it, several key measures for ameliorating the potential prejudice associated with jurors' exposure to such information). With respect to legal research, jurors now have easier and more discrete access to complex information about the law. In addition, the Digital Age has borne witness to a "reliability decline," such that investigating jurors are now more susceptible to encountering *misinformation*, both factual and legal. Today, anyone with an Internet connection can be an author, a publisher, or a news source and, thus, information is no longer subject to the same scrutiny or verification process as that shared through traditional media. Similar concerns exist with respect to online legal information, which is often outdated, inapplicable, or simply incorrect, an issue which has only become more troublesome in our current era of widespread reliance on generative-AI.

Due to these modern frailties, the integrity of the criminal trial process is threatened. This threat, I submit, has resulted in a diminished presumption of innocence and, as a result, a heightened risk that accused persons may fall victim to miscarriages of justice and, indeed, even wrongful convictions. This is simply unacceptable, particularly within the bounds of Canada's constitutional framework. Thus, to ensure the continued preservation of trial fairness in the Digital Age, it is imperative that measures be put in place to prevent, to the greatest extent possible, independent online research by jurors. However, the effectiveness of any given measure cannot, in my view, be meaningfully

evaluated without first exploring the context which necessitates its imposition: *why* jurors are engaging in OJR in the first place. That is the inquiry to which we turn in Chapter 4.

CHAPTER 4: DISCERNING JURORS' MOTIVATIONS FOR CONDUCTING ONLINE RESEARCH

4.1 INTRODUCTION

As established in the previous Chapter, online juror research ["OJR"], whether factual or legal, poses a substantial risk to trial fairness. The accused's right to a fair trial is fundamentally important, having attracted constitutional status under section 11(d) of the *Canadian Charter of Rights and Freedoms*,[1] due to its role in safeguarding the validity of verdicts and preventing miscarriages of justice, including wrongful convictions.[2] For this reason, it is imperative that our system respond to trial fairness threats effectively, with OJR being no exception. Put simply, the strategies selected to prevent/deter OJR have to *work*, given what is at stake if they do not.

To ensure, to the greatest extent possible, that trial fairness is not diminished by jurors' online research, a critical evaluation of tactics used to address OJR is essential. This includes both those strategies currently in use and those which could be implemented going forward. The final two Chapters of this project, respectively, comprise this analysis. However, any meaningful evaluation of measures used to combat OJR is impractical, if not impossible, without first understanding *why* jurors conduct online research in the first place. Familiarity with the underlying reasons for such misconduct is crucial for both assessing and designing effective responses. Indeed, I submit that, by first identifying jurors' motivation(s) for conducting online research, I will be better equipped to: (1) evaluate the effectiveness of current measures used to prevent/address OJR in Canada; and (2) design novel strategies that target the root cause(s) of OJR, thereby increasing their likelihood of success.

So, what *does* motivate jurors to engage in online research? Existing literature on OJR is relatively silent on this point. In this Chapter, I aim to close this fundamental gap

---

[1] *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[2] See e.g. *R v N.S.*, 2012 SCC 72 at para 67; *R v J.J.*, 2022 SCC 28 at para 329; *United States v Burns*, 2001 SCC 7 at para 95; *R v C.P.*, 2021 SCC 19 at para 61.

by putting forward viable, explanatory theories as to *why* jurors engage in OJR. These theories will serve as foundational pillars in the following two Chapters, in which I evaluate Canada's current approach to tackling OJR, as well as propose reforms to enhance the OJR prevention scheme.

Below, I explore existing empirical research on jurors' experiences, as well as psychology literature on the impact of technology on human social life. Further, I survey cases and news articles (both Canadian and non-Canadian) and testimonials from practitioners, past jurors, and laypersons, all of which focus upon jurors' online habits and activities. With this data, I attempt to draw out emerging themes with respect to the rationale(s) behind jurors engaging in online research. Ultimately, I articulate four theories, all of which seek to explain potential motivations underpinning OJR:

1. Moral Obligation – OJR as a means to discover the truth.
2. Confusion – OJR as a response to complexity.
3. Habit – OJR stemming from jurors' Internet-use habits.
4. Addiction – OJR as a product of Internet addiction.

Before concluding, I also turn briefly to Marder's conception of the "recalcitrant juror": the juror who, despite possessing knowledge of the prohibition on OJR, simply has "no intention" of following it.[3] In doing so, I consider the implications of recalcitrance on the assessment and development of effective strategies to curb OJR.

4.2 RESEARCH AS A RESULT OF MORAL OBLIGATION

I begin with the "moral obligation theory," which presumes that some jurors will undertake OJR out of a sense of duty to discover the truth. This theory stems from Hoffmeister's vision of the "conscientious juror": a juror who takes their fact-finding duty very seriously and aspires to undertake their role to the best of their ability.[4] These so-called conscientious jurors typically define "justice" in terms of the accuracy of an

[3] Nancy S Marder, "Jurors and Social Media: Is a Fair Trial Still Possible" (2014) 67:3 SMU Law Review 617 at 618-19.
[4] Thaddeus Hoffmeister, "Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age (2012) 83:2 U Colorado L Rev 409 at 419.

outcome, as opposed to adherence to court procedure and eidentiary rules.[5] Indeed, instead of passively consuming trial information and, subsequently, relying on that information to render a verdict, conscientious jurors often hope to "solve" the cases before them.[6]

Given this preoccupation with "accuracy," conscientious jurors are often dissatisfied with the prospect of receiving only a vetted picture of the case before them. As discussed in detail in the previous Chapter, when serving on a jury, jurors are expected to focus solely upon the evidence presented in court and, further, to disregard any other information about the case or law that they either know going in or learn over the course of trial.[7] The trial judge facilitates this by acting as a "gatekeeper," carefully controlling which pieces of evidence the jury sees and hears.[8] This is done to preserve the accused's right to an impartial trier of fact, shielding jurors from unjustifiably prejudicial, or otherwise inadmissible, material.

However, critics have questioned whether the merits of this approach translate to jurors, particularly given their status as laypersons without formal legal training. The fear, of course, is that jurors, instead, feel that the wool is being pulled over their eyes.[9] As noted by Harvey, jurors "are burdened with the task of determining the fate of the accused, and probably wonder why that decision should not be informed by *all* the information."[10] Consider, for instance, the following remarks made by former American jurors:

> When I have served on juries, the limitation of our ability to get information seemed absurd. The legal system seemed to be more interested in keeping us under their control than in learning the truth. Judging from other postings, my experience was the rule, not the exception. Our legal system needs to be cleaned up so that those on the

---

[5] See e.g. Saul M Kassin & Lawrence S Wrightsman, *The American Jury on Trial: Psychological Perspectives* (New York: Hemisphere, 1988) at 110; Caren Myers Morrison, "Jury 2.0" (2010) 62:6 Hastings LJ 1579 at 1610.
[6] Hoffmeister, *supra* note 4 at 420.
[7] See *R v Bains*, 2015 ONCA 677 at para 58.
[8] *Ibid*.
[9] See e.g. David Harvey, "The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm" (2014) NZ L Rev 203 at 213; Gareth S Lacy, "Should Jurors Use the Internet?" (2010) at 2, online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600585>.
[10] Harvey, *ibid* (emphasis added).

> jury are encouraged to learn as much as they can. We need intelligent informed juries to maximize justice.[11]
>
> …
>
> I served on a jury once, and I was very disturbed by the fact that I was being asked to judge guilt or innocence of a human being based on information that I could not validate independently. I'm an engineer with a degree in a scientific field, so it's probably ingrained into me. The two lawyers presented their arguments, but without a way to check those independently, there's no more validity to the decision than one made by a coin toss. And this is supposed to be justice?[12]

Indeed, as observed by Artigliere, jurors often "consider the limits placed by judges and lawyers on information presented in trial to be abhorrent to finding the truth."[13]

This frustration likely stems, at least in part, from jurors' mistrust of the legal system and its participating actors. According to a study by Farrell, Pennington & Cronin, jurors' trust and confidence in legal authorities, including the courts and other justice system participants, is often explanatory of juror conduct, in the sense that "legitimacy perceptions are important in circumstances where individuals are asked to take an active role in the criminal justice process."[14] Indeed, where trust in the legal process is low, jurors may become "dissatisfied with due process rights and legal procedures that they perceive as getting in the way of the ability of courts to 'do justice'" and, as a result, may become more likely to engage in acts of "vigilantism," such as OJR, in which jurors "take the law into their own hands."[15] Unfortunately, Canadians tend to report relatively low levels of confidence in the criminal justice system. In 2023, for instance, less than half of Canadians reported either good or great levels of confidence in the justice system and the

---

[11] John Schwartz, "As Jurors Turn to Web, Mistrials Are Popping Up" *The New York Times* (17 March 2009), David E Harrison (commenter), online: <https://www.nytimes.com/2009/03/18/us/18juries.html>.
[12] *Ibid*, Joe Rabbit (commenter).
[13] Ralph Artigliere, "Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial" (2011) 59:3 Drake L Rev 621 at 640.
[14] Amy Farrell, Liana Pennington & Shea Cronin, "Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases" (2013) 38:4 Law & Soc Inquiry 773 at 793.
[15] *Ibid.*

courts.[16] Further, there is evidence that public trust in the court system is on the decline. The overall number of Canadians who report "a great deal of trust" in the courts declined from 26% to 11% between 2008 and 2023. In the same period, those who report having *no* trust has risen from 4% to slightly above 10%.[17]

Frustration with limits on access to information may also be more broadly attributable to what Nichols has dubbed the "death of expertise": the "collapse of any division between professionals and laypeople, students and teachers, knowers and wonderers – in other words, between those of any achievement in an area and those with none at all."[18] An "expert," for this purpose, is someone "with knowledge accrued in an accredited fashion, who then operates with a high degree of independence as a result of that knowledge and skill."[19] In recent years (and particularly because of the strong anti-expert sentiment which arose during the COVID-19 pandemic), there has been considerable "distrust and disdain" levelled at experts.[20] Indeed, Nichols argues that many now view experts as mere "technicians" – inherently skeptical of authority, they make use of expert knowledge as an "off-the-shelf convenience as needed and only so far as desired."[21] In the context of criminal trials, where "experts" (i.e., lawyers and judges) fail to provide information *perceived* to be essential, a sense of frustration or injustice may result for the morally-obligated juror. Indeed, growing suspicion with respect to expertise may even be *heightened* where legal actors are concerned, given the above-

---

[16] Statistics Canada, "Do Canadians have confidence in their public institutions?" (23 November 2023), online: <https://www.statcan.gc.ca/o1/en/plus/5041-do-canadians-have-confidence-their-public-institutions>.

[17] Andrea Lawlor & Erin Crandall, "Longstanding Canadian confidence in the judicial system may be on shaky ground" *Policy Options* (24 August 2023), online: <https://policyoptions.irpp.org/magazines/august-2023/judicial-system-confidence/#:~:text=First%2C%20the%20overall%20number%20of,cent%20over%20the%20same%20period.>.

[18] Tom Nichols, *The Death of Expertise: The Campaign Against Established Knowledge and Why it Matters*, 2nd ed (New York: Oxford University Press, 2024) at 3.

[19] Cara Reed, "Why so many people have had enough of experts – and how to win back trust" *The Conversation* (28 June 2023), online: <https://theconversation.com/why-so-many-people-have-had-enough-of-experts-and-how-to-win-back-trust-206134>.

[20] Elizabeth Rogers, "Why people trust or distrust experts when it comes to critical issues" *Waterloo News* (17 May 2022), online: <https://uwaterloo.ca/news/arts/why-people-trust-or-distrust-experts-when-it-comes-critical>. See also Katharine Dommett & Warren Pearce, "What do we know about public attitudes towards experts? Reviewing survey data in the United Kingdom and European Union" (2019) 28:6 Pub Understanding of Science 669 at 669-70.

[21] Nichols, *supra* note 18 at 4.

noted rise of public distrust of the courts and justice system; as Reed observes, "[o]ne way the authority of experts diminishes is when societal institutions and structures that have traditionally supported them […] themselves face criticism."[22]

Juror frustration may also occur in the *aftermath* of trial, where jurors become privy to information that was hidden from them during proceedings. In such cases, considerable distress can occur. Take, for instance, Ed Rosenberg's 2003 conviction on federal drug charges related to growing medicinal marijuana. Rosenberg, a California resident, was convicted by a jury of three federal counts of cultivation and conspiracy. However, growing marijuana for medicinal purposes had been permitted under California state law since 1996 – a fact which the trial judge barred Rosenberg's defence counsel from mentioning in the presence of the jury.[23] Once the jurors learned this, they released a joint statement that they would not have voted to convict if they had been allowed to consider the state law. "I'm sorry doesn't begin to cover it," one of the jurors said. "It's the most horrible mistake I've ever made in my entire life. And I don't think that I personally will ever recover from this."[24]

As a result of this frustration, and out of desire to avoid any subsequent weight on their conscience, jurors may find it difficult to resist seeking out extraneous information to supplement the narrative provided during trial.[25] Exploring information beyond the trial's confines may instill jurors with confidence that they have gained a more comprehensive understanding of the case, which will, ultimately, provide a more reliable, accurate verdict. A prime example of this phenomenon at play is the mistrial granted in the 2009 murder trial of Ryan Widmer in Warren County, Ohio. Widmer was accused of drowning his wife in their home the year prior.[26] The defence claimed that Widmer found his wife floating face-down in the couple's bathtub and immediately called 911 and

---

[22] Reed, *supra* note 19.
[23] Dean E Murphy, "Jurors Who Convicted Marijuana Grower Seek New Trial" *New York Times* (5 February 2003), A14.
[24] *Ibid*.
[25] See e.g. Kassin & Wrightsman, *supra* note 5 at 111.
[26] See Denise G Callahan, "Widmer found guilty of murder" *Springfield News-Sun* (16 February 2011) ["Callahan 2011"], online: <https://www.springfieldnewssun.com/news/crime--law/widmer-found-guilty-murder/KWjivKOmamQFNSF8uNbN5L/#:~:text=In%20Widmer's%20first%20trial%2C%20he,it%20took%20to%20dry%20off>.

began performing CPR.[27] However, when first responders arrived at the couple's home just six minutes after Widmer's 911 call, the scene was virtually dry.[28] The jury ultimately found Widmer guilty. However, a mistrial was declared after it came to light that multiple jurors, so concerned by the prospect of wrongfully convicting Widmer, conducted at-home experiments to determine how long it would take their bodies to air dry after bathing.[29] They went on to share their findings with their fellow jurors – that their own bodies had taken a much longer period to dry than the timeline presented by the defence.[30] As observed by Hoffmeister, the Widmer case demonstrates just how far some jurors will go to ensure that they make the "right" decision.[31]

There is plenty of evidence to suggest that this phenomenon extends into the realm of (and, indeed, is a significant factor with respect to) OJR. Out of a sense of responsibility to render the "right" verdict, jurors may be tempted to look online for additional information about the accused, or the case more generally, to ensure that they have "all the facts." With the Internet as a resource, jurors have an abundance of knowledge at their fingertips to learn more about a case than they otherwise would within the confines of the courtroom. This poses a dilemma for the conscientious juror, who prioritizes accuracy and justice over adherence to evidentiary rules.

This is a strong theme within existing literature on OJR. Myers Morrison, for instance, argues that, while the media's reaction to OJR has primarily been one of "gleeful horror, focusing on the shock value of 'Jurors Gone Wild' headlines," most jurors who engage in OJR are merely trying to gain information about the accused's background or the circumstances surrounding the alleged offence to achieve the most

---

[27] See Travis Gettys, "Widmer Juror: Home Tests Influenced My Guilty Vote" *WLWT5* (23 April 2009), online: <https://www.wlwt.com/article/widmer-juror-home-tests-influenced-my-guilty-vote/3499071>. See also Hoffmeister, *supra* note 4 at 420.
[28] Denise G Callahan, "Widmer juror speaks out about trial" *Dayton Daily News* (30 March 2010) ["Callahan 2010"], online: <https://www.daytondailynews.com/news/crime--law/widmer-juror-speaks-out-about-trial/T7jiWJjy28YQALEcrRJxqJ/>.
[29] See Callahan 2010, *ibid*; Hoffmeister, *supra* note 4 at 420.
[30] See Gettys, *supra* note 27.
[31] Hoffmeister, *supra* note 4 at 420.

accurate result.[32] Indeed, she points out that such misconduct often stems from "a misplaced sense of responsibility to render the 'right' decision."[33]

Further support can be found in testimonials from past jurors. A 2009 New York Times article, "As Jurors Turn to Web, Mistrials Are Popping Up,"[34] prompted a slew of responses from former jurors about the temptation to engage in OJR. The following are just a few of those responses, all of which highlight the role of moral obligation in the context of online research:

> I have served on two juries, both times as the chairperson. One criminal, one civil trial. I followed the rules but abhorred them. I had many questions about seemingly "obvious" things that didn't get asked or answered. Yes, we were able to submit questions, but that doesn't cover it, and they might or might not get answered fully. If justice is to be served, all the facts should come out. THEN the attorneys can explain why something is not pertinent, is tainted, etc... not the other way around. Taking away cell phones, as others point out, only delays the illicit research (if one is to do it) till that evening. Change the rules. It's way past time. Not because we have the technology – but because it's the right thing to do."[35]
>
> …
>
> I was on a jury that was deeply frustrated by poor preparation and presentation by the prosecution. We requested clarification of some evidence and wasn't provided any (in our case it was simple information regarding the weather on the evening of the crime). This was before cell phones with internet were common. I think all of us would have accessed this information, if we could have. I am not a lawyer so I cannot argue the principle of evaluating a set body of facts, but we certainly did not feel that we could fairly evaluate the guilt of someone playing with only half the deck, so to say. Of my two experiences serving on juries, they were deeply dissatisfying and did not convince me of the benefits of trial by a jury of peers.[36]
>
> …

[32] Myers Morrison, *supra* note 5 at 1581. See also Marder, *supra* note 3 at 626; Artigliere, *supra* note 13 at 640; Hoffmeister, *supra* note 4 at 419-20.
[33] Myers Morrison, *ibid* at 1581.
[34] Schwartz, *supra* note 11.
[35] *Ibid*, GaryD (commenter).
[36] *Ibid*, mother of two (commenter).

> The legal system is not designed to discover the truth, but rather to reward whichever party presents the most convincing argument and evidence. Jurors, on the other hand, feel the weight of their responsibility and would prefer to know the truth. As someone who has sat on several juries, in each case myself and the other jurors felt frustrated by the lack of key information that would help us feel comfortable that we made the right decision, We also felt deeply frustrated at our inability to fill those gaps in our knowledge. While I understand that the use of smartphones violates the judicial process, I empathize with the jurors who did it.[37]

4.3 RESEARCH AS A RESPONSE TO JUROR CONFUSION

Another potential explanation for incidents of OJR is that jurors undertake online research to address confusion with respect to the law or some aspect of the case before them. This theory is compelling, given the complexity of criminal trials, particularly from the vantage point of those without formal legal training. Jurors are expected not only to understand the law as described to them by the trial judge, but also to apply those legal concepts to the facts as demonstrated by the evidence.[38] Given the often complicated and nuanced nature of criminal law, this will pose a challenge for *any* juror. Indeed, as was noted by Daniel Brown, Toronto defence lawyer and past-president of the Criminal Lawyers' Association, "[j]urors are given a near impossible task to correctly interpret and apply complex laws to complex facts. Even highly trained and experienced judges occasionally make mistakes in this area."[39]

However, juries are not meant to be homogenous creatures; instead, as oft noted by the Supreme Court of Canada, they must be selected through procedure that provides "a fair opportunity for a broad cross-section of society to participate in the jury process."[40] Thus, juries will typically be comprised of individuals from all walks of life, with varied background characteristics, including socioeconomic status and level of education. Such factors can impact just *how* complex the trial experience is perceived by individual jurors. In an American study by Kramer & Koenig, for instance, a juror's

---

[37] *Ibid*, Brad (commenter).
[38] See *R v Pan; R v Sawyer*, 2001 SCC 42 at para 43.
[39] See Betsy Powell, "Jurors who google can derail trials: Problems arise when jury members do their own research" *Toronto Star* (14 January 2020).
[40] See e.g. *R v Kokopenace*, 2015 SCC 28 at para 2.

education level was found to have a significant impact on their ability to grasp legal concepts.[41] Put simply, the experience of complexity tends to vary amongst members of the *petit jury*, often in accordance with the individual characteristics of each participating juror.

Considering this complexity (and its potentially varied impacts), effective instruction of the jury is key. Indeed, as observed by Trimboli, "understanding the meaning of instructions given by judges and judicial summing-up of trial evidence is crucial if a jury is to effectively carry out its responsibility of determining whether, upon the evidence presented, the prosecution has proved the guilt of the accused."[42] Unfortunately, however, laboratory studies, as well as surveys and interviews with real jurors[43] have consistently demonstrated that many jurors do not understand much of the instruction they receive.

Comprehension of jury instructions is a relatively understudied topic in Canada due, in large part, to the research restrictions created by section 649 of the *Code*,[44] canvassed more comprehensively in Chapter 2. However, the limited Canadian studies that *have* been conducted demonstrate a disconnect between the delivery of information and juror comprehension. In 1979, Jones & Myers[45] attempted to test comprehension of judicial instructions using a mock juror study. Upon testing mock jurors' comprehension of a standard jury charge in a murder case, they found the average comprehension score to be only 55%.[46] In 2001, Rose & Ogloff,[47] using the Canadian Criminal Jury

---

[41] Geoffrey P Kramer & Dorean M Koenig, "Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project" (1990) 23 U Mich JL Ref 401 at 432. See also Grant Amey, "Social Media and the Legal System: Analyzing Various Responses to Using Technology from the Jury Box" (2010) 35:1 J Legal Prof 111 at 113-14.
[42] Lily Trimboli, "Juror understanding of judicial instructions in criminal trials" 119 Contemp Iss Crime & Just 1 at 1.
[43] Such studies are limited to jurisdictions where research involving real jurors is permitted/regularly conducted. See Chapter 1 for further detail on the extremely limited availability of "real jury research" in Canada.
[44] *Criminal Code*, RSC 1985, c C-46, s 649.
[45] C Stanley Jones & Edward R Myers, "Comprehension of Jury Instructions in a Simulated Canadian Court" in Law Reform Commission of Canada, *Studies on the Jury* (Ottawa: Law Reform Commission of Canada, 1979), online: <https://www.ojp.gov/pdffiles1/Digitization/62650NCJRS.pdf>.
[46] *Ibid*.
[47] V Gordon Rose & James RP Ogloff, "Evaluating the Comprehensibility of Jury Instructions: A Method and an Example" (2001) 25 L & Hum Behav 409.

Instructions on criminal conspiracy, tested comprehension rates of three mock juror groups – undergraduate students, law students, and jury-eligible members of the public. The authors observed that, across the board, participants' ability to apply judicial instructions to the scenario before them was "abysmally poor" and ultimately concluded that jury instructions on the aspects of the law tested "are not capable of being understood and applied even by well-educated and intelligent members of society, much less by the average citizen."[48] Most recently, in 2018, Bertrand & Jochelson[49] examined mock jurors' understanding of the Canadian Judicial Council's Model Jury Instructions on various criminal charges, the burden of proof, and the presumption of innocence. They found that participants were generally unable to either comprehend or correctly apply information from the Instructions, observing particular difficulty with legal terms of art such as "intent," as well as the standard of proof beyond a reasonable doubt.[50]

Other jurisdictions have tackled the issue of comprehension more thoroughly, most notably the US, where the bulk of jury research has been conducted. American studies, utilizing both real and mock jurors as participants, have consistently demonstrated the difficulty jurors experience comprehending trial information. In a 1990 study by Kramer & Koenig,[51] for instance, jurors filled out a post-trial survey which assessed their understanding of key legal concepts upon which they were instructed during trial. Results were compared to those provided by a second participant group, which had not received *any* judicial instruction prior to filling out the survey. The authors were discouraged to find that instructions often had "little impact" on comprehension and, indeed, even sometimes *decreased* comprehension rates.[52] Similarly, in 1992, Reifman, Gusick & Ellsworth[53] surveyed hundreds of Michigan citizens called for jury duty to assess comprehension of the law canvassed in the judge's instructions. Consistent

---

[48] *Ibid* at 429.
[49] Michelle I Bertrand & Richard Jochelson, "Mock-Jurors' Self-Reported Understanding of Canadian Judicial Instructions (Is Not Very Good)" (2018) 66:1-2 Crim LQ 136.
[50] *Ibid* at 156-57.
[51] Kramer & Koenig, *supra* note 41.
[52] *Ibid* at 425.
[53] Alan Reifman, Spencer M Gusick & Phoebe C Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16:5 L & Hum Behav 539.

with previous studies on juror comprehension, the authors found that actual jurors understood fewer than *half* of the instructions received at trial.[54]

Further, there is evidence to suggest that comprehension issues will become more common and significant as time goes on. This is because the largely oral legal tradition upon which our adversarial trial process is based is incompatible with the learning style of so-called "Digital Natives." This term refers to those born after 1980[55] who, as a result, grew up immersed in digital technology and, thus, are naturally "technologically adept and engaged."[56] Exposure to technology has changed the way Digital Natives think and learn.[57] They tend to operate with a shorter attention span as compared to non-digital natives – they generally struggle to concentrate on one task or point of focus for a prolonged period, preferring, instead, to "multitask."[58] As a result, Digital Natives tend to crave speed and lack tolerance for slow-paced environments.[59] Further, Digital Natives have become accustomed to active, as opposed to passive, learning – they prefer to learn through activity rather than simply reading or listening.[60] These qualities are incongruent with the criminal trial tradition, in which evidence, submissions and instructions are presented orally, generally without juror participation. Indeed, as pointed out by Harvey, to Digital Natives, the experience of receiving information in this format may appear "archaic"[61] and can impact their ability to fully digest and understand key information and concepts. The result of this disconnect is that, as time goes by and pools of eligible jurors become more saturated with Digital Natives, rates of juror comprehension may further decrease.

---

[54] *Ibid* at 539.
[55] See Charles Kivunja, "Theoretical Perspectives of How Digital Natives Learn" (2014) 3:1 Intl J Higher Edu 94 at 94.
[56] See Nina Sarkar, Wendy Ford & Christina Manzo, "Engaging Digital Natives through Social Learning" (2017) 15:2 J Systemics, Cybernetics & Informatics 1 (open access).
[57] See e.g. Bernard Cornu, "Digital Natives: How Do They Learn?" (Russian Federation: UNESCO Institute for Information Technologies in Education, 2011), online: <https://unesdoc.unesco.org/ark:/48223/pf0000216681>; Sarkar, Ford & Manzo, *ibid* at 1-2.
[58] See Cornu, *ibid* at 7.
[59] See Sarkar, Ford & Manzo, *supra* note 56 at 2.
[60] See *ibid* at 2; Cornu, *supra* note 57 at 7.
[61] Harvey, *supra* note 9 at 214-15.

Given these concerns, the "confusion theory" of OJR presumes that jurors will seek out online resources to help better understand the law they are required to apply or the evidence they are being asked to consider.[62] Indeed, we have seen this play out time and time again in instances of OJR that have come to light. Jurors have been known, for instance, to conduct online investigations into unfamiliar legal "terms of art." For instance, a jury in Washington County Circuit Court was dismissed after the trial judge became aware that two jurors disobeyed his orders by looking up the terms "implied consent" and "beyond a reasonable doubt" on the Internet.[63] Similarly, an appellate court in Florida was forced to overturn the manslaughter conviction of a man charged with killing his neighbor due to the jury foreman's use of an iPhone to look up the definition of "prudent."[64] Jurors have also been caught turning to the Internet to learn more about complex medical/scientific terms or concepts. Take, for example, a Baltimore case in which a conviction was overturned after a juror researched "oppositional defiant disorder" online and told his fellow jurors that the condition was associated with lying,[65] or a case out of Pennsylvania in which a mistrial was declared after a juror conducted online research on "retinal detachment," the injury allegedly suffered by the victim at the hands of the accused.[66]

4.4 RESEARCH AS A RESULT OF EXISTING ONLINE HABITS

Some instances of OJR may also stem from jurors' habitual Internet use. As remarked by Clayton, Leshner & Almond, the Internet – and the personal digital devices through which we access it – has become a "ubiquitous" presence in our lives, with "smart" technology now representing "an extension of our physical selves – an umbilical

---

[62] See Hoffmeister, *supra* note 4 at 420-21.
[63] See Jerry Casey, "Juries raise a digital ruckus" *The Oregonian* (13 January 2008), online: <https://www.oregonlive.com/washingtoncounty/2008/01/juries_raise_a_digital_ruckus.html>.
[64] See Brian Grow, "As jurors go online, U.S. trials go off track" *Reuters* (8 December 2010), online: <https://www.reuters.com/article/idUSTRE6B74Z8/>.
[65] See Andrea F Siegel, "Judges Confounded by Jury's Access to Cyberspace" *Baltimore Sun* (13 December 2009), online: <https://www.baltimoresun.com/2009/12/13/judges-confounded-by-jurys-access-to-cyberspace/>.
[66] See Brian Grow, "Juror could face charges for online research" *Reuters* (19 January 2011), online: <https://www.reuters.com/article/ctech-us-internet-juror-idCATRE70I5KI20110119>.

cord, anchoring the information society's digital infrastructure to our very bodies."[67] This is unsurprising, given the staggeringly high rates of Internet and electronic device use in Canada, as canvassed in detail in Chapter 2. In 2022, for instance, 95% of Canadians reported using the Internet, 84% owned a smartphone, and 75% used social media.[68] Further, for the vast majority who use electronic devices, screen time is high, with Canadian adults averaging 3.2 hours per day.[69]

Indeed, reliance on the Internet and PDDs has, for many, become a way of life – they act simultaneously as our alarm clocks, our cameras, our medium of communication (both personal and professional), our encyclopedia, and our news source. Most noteworthy (at least for my purposes), however, is the fact that *seeking out information* online has become almost second nature in the Digital Age.[70] As remarked by Marder, "it merely feels like what one does anytime one needs additional information. The response to check information on one's cell phone – whether to answer a question, define a term, or check a fact – has become almost second nature to many people."[71]

Given the almost reflexive way in which we search for information online, some have identified the Internet as the latest iteration of the "transactive memory partner." First conceptualized by Wegner, Giuliano & Hertel in 1985,[72] a transactive memory partner is an external, accessible memory source.[73] Traditionally, transactive memory partners were humans functioning within a "transactive memory system," within which information is distributed across a group, with each individual responsible for possessing

---

[67] Russell B Clayton, Glenn Leshner & Anthony Almond, "The Extended iSelf: The Impact of iPhone Separation on Cognition, Emotion and Physiology" (2015) 20:2 J Computer-Mediated Comm 119 at 120.
[68] See e.g. Richard Wike et al., "Internet, smartphone and social media use" *Pew Research Center* (2022), online: <https://www.pewresearch.org/global/2022/12/06/internet-smartphone-and-social-media-use-in-advanced-economies-2022/>; Statistics Canada, "Internet use by province and age group" (20 July 2023), online: *Statistics Canada* <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2210013501>.
[69] See Statistics Canada, "How sedentary are Canadian adults? It depends" (19 October 2022), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/221019/dq221019e-eng.htm>.
[70] See e.g. Betsy Sparrow, Jenny Liu & Daniel M Wegner, "Google Effects on Memory: Cognitive Consequences of Having Information at Our Fingertips" (2011) 333 Science 776 at 776; Artigliere, *supra* note 13 at 627; Hoffmeister, *supra* note 4 at 422.
[71] Marder, *supra* note 3 at 629.
[72] Daniel Wegner, Toni Giuliano & Paula Hertel "Cognitive Interdependence in Close Relationships" in William Ickes, ed, *Compatible and Incompatible Relationships* (New York: Springer-Verlag, 1985) at 253.
[73] See Sparrow, Liu & Wegner, *supra* note 70 at 776.

a specified area of expertise.[74] These systems consist of two key elements: internal memory ("What do I know?") and external memory ("Who knows what?").[75] The idea, then, is that by making each transactive memory partner responsible for a specific type of knowledge, *collective* knowledge will be greater than what could ever be known by a single individual.

Transactive memory systems were, thus, originally conceived of as *social* systems. However, in recent years, several commentators have endorsed the Internet as the latest transactive memory partner relied upon to obtain knowledge.[76] We, as consumers, rely on information we know can be found online, thus relieving us from having to possess first-hand knowledge of said information. As explained by Fisher, Goddu & Keil:

> [T]o access knowledge in the transactive memory system, the Internet user must navigate the Internet's information in much the same way that one transactive memory partner might know about and query the knowledge contained in another's mind. This interactive aspect of accessing knowledge on the Internet distinguishes it from the way our minds access other information sources. With its unique, supernormal characteristics that allow us to access it much the same way we access human minds, the Internet might be more similar to an ideal memory partner than a mere external storage device. In short, the cognitive systems may well be in place for users to treat the Internet as functionally equivalent to an all-knowing expert in a transactive memory system.[77]

The Internet has been described as a "supernormal stimulus," in the sense that its breadth and immediacy "far surpass any naturally occurring transactive partner to which our minds might have adapted."[78] Thus, the Internet may arguably be the world's most trusted and highly valued transactive memory partner, given its status as an "all knowing"

---

[74] See Matthew Fisher, Mariel K Goddu & Frank C Keil, "Searching for Explanations: How the Internet Inflates Estimates of Internal Knowledge" (2015) 144:3 J Experimental Psychol 674 at 674.
[75] *Ibid*.
[76] See e.g. Oscar Battell-Wallace, "No Search Results in Fairness: Addressing Jurors' Independent Research in the 21st Century" (2018) 49:1 Victoria U Wellington L Rev 83; Fisher, Goddu & Keil, *ibid*; Sparrow, Liu & Wegner, *supra* note 70; Evan F Risko & Sam J Gilbert, "Cognitive Offloading" (2016) 20:9 Trends in Cognitive Sciences 676; Amanda M Ferguson, David McLean & Evan F Risko, "Answers at your fingertips: Access to the Internet influences willingness to answer questions" (2015) 37 Consciousness & Cognition 91.
[77] Fisher, Goddu & Keil, *ibid* at 675.
[78] *Ibid*.

truth-teller. Indeed, some have suggested that online knowledge-seeking has generated a transactive memory system so powerful that it has become difficult to determine where our own personal knowledge on a subject ends and the Internet's begins.[79]

Society's reflexive reliance on the Internet as an information source may help to explain jurors' motivation for undertaking OJR. Put simply, it would be naïve to expect that ingrained habits will magically disappear upon being called for jury duty – instead, those habits are likely put to use in the context of the cases jurors consider.[80] As observed by Pardu JA of the Court of Appeal for Ontario, "[i]n this information rich age, devices able to access the internet are ubiquitous. Some people use their cell phones as reflexively as others might glance at a wristwatch. They might use them as a dictionary, to look at maps, the search the names of the accused, counsel, the judge, or to seek technological information. Legal research is available at the click of a button."[81]

When the accessibility and breadth of online information is considered in the context of the Internet's role as a modern transactive memory partner, the problem becomes clearer. A common result of engagement within a transactive memory system is a phenomenon referred to as "cognitive offloading." This is the idea that, within a transactive memory system, we tend to offload responsibility for knowledge to a memory partner, given that it is easier to remember how to *find* that knowledge than it is to commit it to memory.[82] As observed by Battell-Wallace, in the context of juries, this is problematic, as jurors who habitually rely upon the Internet as a transactive memory partner may struggle to retain key information, driving them to conduct OJR to fill gaps in their own knowledge.[83]

Further, evidence suggests that engaging with a transactive memory partner can cause consumers to doubt their *own* knowledge where their partner appears more "qualified" with respect to certain information or concepts.[84] The Internet is no

---

[79] See *ibid*; Risko & Gilbert, *supra* note 76 at 682-83.
[80] See e.g. Hoffmeister, *supra* note 4 at 422; Steve Lash, "Md. Court of Appeals rules Wikipedia search voids murder conviction" *The Daily Record* (7 December 2009); Casey, *supra* note 63.
[81] *R v Farinacci*, 2015 ONCA 392 at para 42.
[82] See Battell-Wallace, *supra* note 76 at 91.
[83] *Ibid*.
[84] *Ibid* at 93.

exception[85] and, indeed, given its broad, "all knowing" character, provides ample space for feelings of inferiority. Take, for instance, a study by Risko & Gilbert,[86] in which participants were asked to report whether they knew the answer to a series of general knowledge questions. In one condition, where participants did not know the answer to a question, they were permitted to look it up online. In a second condition, however, if participants did not know the answer, they were simply required to move on to another question. Crucially, where participants *knew* they would subsequently have access to the Internet, they were more likely both to answer "I don't know" to questions and report lower "feeling-of-knowing" overall.[87] The concern, in the context of criminal trials, is that jurors may perceive the Internet as an "expert" with respect to both legal concepts and facts about the case and, thus, be more comfortable searching for information online than relying on their own memory/understanding.[88] Such reliance is, of course, troubling, given the reliability and accuracy concerns with respect to online information, both factual and legal, as canvassed in the previous Chapter.

Indeed, online "information-gathering" appears to have become such a natural, pervasive part of everyday life that some jurors are unable to identify doing so as "research," nor to understand that it is wrong.[89] This is a consistent theme emerging from detected instances of OJR. Take, for instance, a 2010 mistrial coming out of Florida,[90] where a police officer convicted of drugging and sexually assaulting a family member received a new trial. A mistrial was declared because the jury foreperson downloaded information about "rape trauma syndrome" from Wikipedia and brought it into the jury room during deliberations. When questioned by the trial judge about her misconduct, she was adamant that she did not think she was doing anything wrong. "I didn't read about the case in the newspaper or watch anything on TV," she said. "To me, I was just looking

---

[85] See Ferguson, McLean & Risko, *supra* note 76 at 98; Risko & Gilbert, *supra* note 76 at 683.
[86] Risko & Gilbert, *ibid*.
[87] *Ibid* at 682-83.
[88] See Battell-Wallace, *supra* note 76 at 91-93.
[89] See e.g. Robbie Manhas, "Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms" (2014) 112:5 Mich L Rev 809 at 821; Marder, *supra* note 3 at 629, 643.
[90] Susannah Bryan, "Davie police officer convicted of drugging, raping family member to get new trial" *The Palm Beach Post* (15 December 2010), online: <https://www.palmbeachpost.com/story/news/2010/12/16/davie-police-officer-convicted-drugging/7469608007/>.

up a phrase." Similarly, Maryland's Court of Special Appeals was forced to overturn a felony murder conviction because a juror conducted a Wikipedia search for the terms "*livor mortis*" and "*algor mortis*," printed out their findings, and brought them into the jury room.[91] When questioned, the juror said, "To me that wasn't research. It was a definition." In the Canadian context, *R v Farinacci*,[92] an Ontario drug trafficking case, is illustrative. After a verdict had been rendered, it was revealed that some of the jurors "googled" information about the case during trial. On appeal, it was determined that the googling jurors did not understand that, in doing so, they were violating the trial judge's instructions to refrain from conducting independent research.[93]

4.5 RESEARCH AS A RESULT OF INTERNET ADDICTION

Finally, some instances of OJR may be attributable to a legitimate Internet addiction on the part of misbehaving jurors. While the term "addiction" has traditionally been associated with psychoactive substances, such as alcohol or tobacco,[94] in recent years, experts have identified the Internet as the latest "substance" to which a person may develop a dependency. First proposed by the late Professor Kimberly S. Young in 1998,[95] "Internet addiction" (also commonly referred to as "problematic," "compulsive," or "pathological" Internet use or dependence[96]) refers to a "psychological dependence"[97] resulting in an "inability to control one's use of the Internet."[98] Typically, an individual

[91] Dennis M Sweeney, "The Internet, social media and jury trials: lessons learned from the Dixon trial" (29 April 2010, address to the litigation section of the Maryland State Bar Association), online: <http://juries.typepad.com/files/judge-sweeney.doc>.
[92] Farinacci, *supra* note 81.
[93] *Ibid* at para 42.
[94] Francesca C Ryding & Linda K Kaye, "'Internet Addiction': A Conceptual Minefield" (2018) 16:1 Intl J Mental Health & Addiction 225 at 225.
[95] Kimberly S Young, "Internet Addiction: The Emergence of a New Clinical Disorder" (1998) 1:3 CyberPsychology & Behav 237.
[96] See e.g. Hilarie Cash et al, "Internet Addiction: A Brief Summary of Research and Practice" (2012) 8:4 Curr Psychiatry Rev 292 at 292-93; Wen Li et al, "Characteristics of internet addiction/pathological internet use in U.S. university students: a qualitative-method investigation" (2015) 10:2 PlOS One 1 at 1.
[97] Brigitte Stangl et al, "Internet addiction continuum and its moderating effect on augmented reality application experiences: digital natives versus older users" (2023) 40:1 J Travel & Tourism Marketing 38 at 39.
[98] Li et al, *supra* note 96 at 2.

experiencing Internet addiction will spend many hours each day engaged in non-work-related Internet activities, such as social media or video games.[99]

There has been considerable variance in reported Internet addiction prevalence rates. Fontalba-Navas, Gil-Aguilar & Pena-Andreu, for instance, identify prevalence rates in Europe and the US as between 1.5% and 8.2%, with even higher estimated rates in Asia, at approximately 20%.[100] Li et al provide a higher estimate for the US population, noting that as many as 6-11% of American Internet users are estimated to experience Internet addiction.[101] In a 2020 meta-analysis of Internet addiction studies across the globe, Pan, Chiu & Lin found the average rate of prevalence to be approximately 7%, with rates increasing over time.[102] Cash et al, on the other hand, observed that some studies have reported prevalence rates as high as 38%.[103] These figures have major implications with respect to OJR – even if the true rate of prevalence in Canada is at the low end of these estimates, this would still encompass a not-insignificant portion of the jury-eligible population.

Given both its nature and prevalence, I submit that Internet addiction is likely explanatory of at least *some* instances of OJR. As remarked by Artigliere, "[t]o some jurors, the cell phone, iPad, notebook, or other digital device is a lifeline to which they feel addicted."[104] The probable correlation between Internet addiction and OJR is best understood through an examination of the symptoms of Internet addiction. Internet addiction is marked by the afflicted person's "preoccupation" with the Internet and digital media, resulting in an inability to reduce the amount of time "spent interfacing with digital technology."[105] Withdrawal symptoms, such as panic, anxiety, depression, and

---

[99] Cash et al, *supra* note 85 at 292.
[100] Andres Fontalba-Navas, Virginia Gil-Aguilar & Jose Miguel Pena-Andreu, "Towards an Epidemiological Model of Internet Addiction" in Margaret Adams, ed, *Internet Addiction: Prevalence, Risk Factors and Health Effects* (New York: Nova Publishers, 2017) at 12
[101] Li et al, *supra* note 96 at 3.
[102] Yuan-Chien Pan, Yu-Chuan Chiu & Yu-Hsuan Lin, "Systematic review and meta-analysis of epidemiology of internet addiction" (2020) 118 Neuroscience & Biobehavioral Rev 612 at 614.
[103] Cash et al, *supra* note 96 at 293.
[104] Artigliere, *supra* note 13 at 639-40.
[105] See e.g. Cash et al, *supra* note 96 at 292; Li, *supra* note 96 at 2.

physiological stress[106] have been known to accrue where an addicted person is forced to cease engagement with the online world.[107] This suggests that, for those jurors who experience Internet addiction, disengaging from the online world for the duration of a criminal trial could be an extremely challenging and, indeed, even painful or harmful, experience.

Furthermore, evidence suggests that withdrawal symptoms may be exacerbated where an Internet-addicted person performs a "cognitive task" without Internet access. In a 2015 study, Clayton, Leshner & Almond[108] investigated the impact of participants' separation from their smartphones on their ability to complete word-search puzzles. They found that separation caused increased heartrate and blood pressure, as well as self-reported feelings of anxiety and unpleasantness, and led to a decline in cognitive performance with respect to the puzzles.[109] Conversely, once participants were permitted to complete the puzzles with their iPhone in their possession, heart rate and blood pressure levels returned to baseline and cognitive performance improved.[110] These findings are cause for concern, given that serving on a jury requires *significant* cognitive output. Jurors are expected to understand and apply complex legal rules and concepts, as well as to retain and analyze voluminous evidence. Such demands could exacerbate the withdrawal symptoms associated with Internet addiction, impairing jurors' ability to fulfil the cognitive tasks associated with jury duty and, thereby, render jurors less likely to resist engaging in OJR to supplement these deficits.

An additional symptom of Internet addiction is reliance on the Internet as a means of relieving stress or coping with negative moods, including anxiety.[111] This symptom is relevant in the context of criminal juries, given that many jurors report experiencing considerable stress while serving on a trial.[112] For instance, in a 2002 study conducted by

---

[106] See e.g. Clayton, Leshner & Almond, *supra* note 67 at 120, 122; Patrick C Brayer, "The Disconnected Juror: Smart Devices and Juries in the Digital Age of Litigation" (2016) 30 Notre Dame JL Ethics & Pub Pol'y 25 at 31.
[107] See e.g. Cash et al, *supra* note 96 at 292; Li et al, *supra* note 96 at 2; Stangl et al, *supra* note 97 at 39.
[108] Clayton, Leshner & Almond, *supra* note 67.
[109] *Ibid* at 132.
[110] *Ibid*.
[111] See e.g. Cash et al, *supra* note 96 at 293; Li et al, *supra* note 96 at 2.
[112] See e.g. Sonia R Chopra, *Juror Stress: Sources, Severity, and Solutions* (PhD Dissertation, Simon Fraser University, 2002); Lorne D Bertrand, Joanne J Paetsch & Sanjeev Anand, *Juror Stress Debriefing: A*

Chopra, which involved surveying former jurors about any anxieties experienced as a result of being called for jury duty, two-thirds of participants indicated they had experienced stress because of their jury service, with one-third reporting stress reactions similar to those experienced by individuals diagnosed with post-traumatic stress disorder.[113] Thus, it is possible that the stressful reality of jury service could render a juror who experiences Internet addiction more likely to engage in OJR as a means of coping with their current environment.

Finally, it is worth noting that some Internet addiction experts suggest that an afflicted person's addiction will generally be to a particular online *experience*, as opposed to the physical medium facilitating the online activity, such as a computer or a smartphone.[114] This explains, for instance, why only one subset of Internet addiction, "Internet Gaming Disorder," has, thus far, been included in the appendix of the DSM-5.[115] Evidence indicates that, for many individuals struggling with Internet addiction, their dependency is rooted in the immediate accessibility of online information.[116] In the psychology field, this subset of Internet addiction is commonly referred to as "compulsive information seeking," a condition marked by "an uncontrollable urge to gather and organize" the wealth of data and knowledge that exists on the Internet.[117] Consequently, jurors affected by compulsive information seeking may be more inclined to succumb to the temptation to conduct OJR. This logic is particularly compelling with respect to jurors of the "digital generation." As observed by Cornu, compulsive

---

Review of the Literature and an Evaluation of a Yukon Program (Whitehorse: Yukon Department of Justice, 2008); Michelle Longergan et al, "Prevalence and severity of trauma- and stressor-related symptoms among jurors: A review" (2016) 47 J Crim Just 51.

[113] Chopra, *ibid* at 75.

[114] See e.g. Stangl et al, *supra* note 97 at 38; Ryding & Kaye, *supra* note 94 at 226.

[115] See Matthias Brand, Kimberly S Young & Christian Laier, "Prefrontal control and Internet addiction: a theoretical model and review of neuropsychological and neuroimaging findings" (2014) 8 Frontiers in Human Neuroscience 1 at 1.

[116] *Ibid.*

[117] See "Internet Addiction" (last modified 9 January 2024), online: *Addiction Center* <https://www.addictioncenter.com/drugs/internet-addiction/#:~:text=Compulsive%20Information%20Seeking&text=For%20some%2C%20the%20opportunity%20to,existing%2C%20obsessive%2Dcompulsive%20tendencies>.

information seeking is likely most prevalent among Digital Natives, who must be "permanently connected, since knowledge is in the connectivity."[118]

4.6 A LOST CAUSE? THE PROBLEM OF RECALCITRANT JURORS

Before concluding, it is worthwhile to briefly turn to the subject of "recalcitrant" jurors, a unique subset of jurors in the Digital Age. Generally speaking, a recalcitrant or "rogue" juror is one who, as observed by Kerans, "refuse[s] to conscientiously participate" in the criminal trial process.[119] They will generally ignore the evidence, the arguments of their fellow jurors, the directions of the trial judge and, indeed, their oath as a juror to give a "true verdict."[120] Put simply, the recalcitrant juror lacks interest in following the necessary rules and procedures that accompany jury service.

Marder, however, has assigned a narrower meaning to the term "recalcitrant juror" in the context of juror misconduct in the Digital Age – specifically, OJR. She asserts that, in this context, recalcitrant jurors are those who simply have "no intention of following the prohibition" on online research;[121] although fully aware of the prohibition (as well as its justifications), they remain "unmoved" by it, regardless of any instructions directing them to abstain from the practice.[122] As Marder puts it, "[s]uch a juror *cannot* be educated by the court."[123]

While being recalcitrant does not technically constitute a "motivation" for engaging in OJR, it is, nevertheless, important to consider at this stage of the project. Recalcitrant jurors differ from those jurors who would engage in OJR on the basis of any of the theories of motivation outlined in this Chapter. Unlike said jurors, whose moral obligation, confusion, habit, or even addiction could potentially be ameliorated or accommodated by a sufficiently precise measure, the recalcitrant juror's particular brand of wilful defiance cannot be targeted in the same way. Indeed, recalcitrant jurors will

---

[118] Cornu, *supra* note 57 at 7.
[119] Roger Kerans, "What do you do with a rogue juror?" *The Globe and Mail* (28 July 2004), online: <https://www.theglobeandmail.com/opinion/what-do-you-do-with-a-rogue-juror/article744889/>.
[120] *Ibid*.
[121] Marder, *supra* note 3 at 618.
[122] *Ibid* at 619, 662.
[123] *Ibid* at 662 (emphasis added).

remain unmoved by measures to educate or persuade them against engaging in OJR, as well as may seek to find their way around measures used to restrict access to the online world.

As a result, approaches to targeting OJR by recalcitrant jurors must, necessarily, be unique. Indeed, I submit that any measure used or developed to prevent OJR which hopes to target recalcitrant jurors must be either deterrent or remedial, as opposed to preventative, in nature.[124] Put another way, the key measure of a strategy's effectiveness will be its ability to either *detect* recalcitrance among the jury pool and, ultimately, the *petit jury*, or to appeal to recalcitrant jurors' sense of self-preservation, in the sense that the risk of engaging in OJR outweighs the satisfaction of engaging in the practice.

4.7 CONCLUSION

In this Chapter, I put forward four viable theories to explain jurors' underlying motivations for undertaking OJR. For some, OJR is likely conducted out of a sense of moral obligation to discover the truth, by jurors who find rules of admissibility and the trial judge's discretionary "gatekeeper" role abhorrent to their personal sense of justice. For these jurors, the Internet serves as a resource for collecting additional information relevant to the case in furtherance of reaching an informed verdict. Others undertake OJR to address confusion with respect to the law or some aspect of the case before them. Thus, OJR is a direct response to the factual and/or legal complexity of criminal proceedings, the experience of which will typically fluctuate, depending on the individual characteristics of each participating juror, as well as is generally exacerbated by the incompatibility of the criminal trial tradition with the learning style of Digital Natives.

For others still, the temptation to engage in OJR will be a result of personal Internet habits and, in particular, a growing reliance on the Internet as a primary transactive memory partner. Such jurors have become so accustomed to quickly seeking out information online in their daily lives that they cannot easily let go of the habit while serving as a juror but are also unable to even identify doing so as "independent research,"

[124] To learn more about these classifications, see Chapter 5.

nor to understand that it is wrong. Finally, albeit for a smaller proportion of jurors, I have suggested that OJR is likely attributable to a genuine Internet addiction, that which would make disengaging from the "online world" for the duration of a criminal trial extremely challenging, particularly given the stressful and mentally strenuous nature of jury duty.

These four theories will serve as foundational pillars in the final two Chapters of the project, which: (1) assess Canada's current approach to tackling OJR, and (2) propose a revised approach for combating OJR moving forward. They, along with Marder's conception of the "recalcitrant juror" in the Digital Age, are essential to both tasks, as they work together to provide an invaluable framework for meaningfully evaluating the merits of any given approach to OJR prevention/detection: one which seeks to determine whether the root cause(s) of the practice are adequately addressed.

CHAPTER 5: EVALUATING CANADA'S CURRENT APPROACH TO COMBATING ONLINE JUROR RESEARCH

5.1 INTRODUCTION

Now that I have articulated the various underlying motivations which, in my view, primarily drive online juror research ["OJR"], as well as the concerns surrounding the presence of so-called "recalcitrant" jurors, I will now move on to discuss the strategies currently used to detect, prevent, and ameliorate the negative consequences of this juror practice. The purpose of this Chapter is two-fold: (1) to *identify* the measures currently employed in Canada to combat OJR, and (2) to *critically examine* the effectiveness of those measures, with particular emphasis on their ability to target the aforementioned motivations. Indeed, throughout this Chapter, I not only set out the rationale and procedure underpinning each strategy, but also provide criticism with respect to the weaknesses inherent in each approach. Ultimately, I set out to establish that, given my criticisms, these measures are both independently and collectively insufficient to counter OJR and, thus, novel solutions must be implemented to safeguard trial fairness in Canada.

I have organized my discussion of current approaches in accordance with Harvey's triad of responses to online juror misconduct: (1) deterrent measures; (2) preventative measures; and (3) remedial measures.[1] In my discussion of deterrent measures, I canvass the viability of sequestering juries (both for the duration of trial and solely during deliberations) and banning/confiscating electronic devices. My survey of preventative measures discusses the efficacy of judicial instructions with respect to OJR generally, as well as that of a specific instruction that jurors "self-police." Finally, in my survey of remedial measures, I examine the accused's ability (in certain circumstances) to elect a trial by judge alone, as well as the impeachment of jury verdicts/behaviour.

[1] David Harvey "The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm" (2014) NZ L Rev 203 at 227.

5.2 DETERRENT MEASURES

I begin by canvassing the deterrent measures currently available under Canadian law to combat OJR. As noted by Harvey, these measures involve the possibility of imposing some sort of sanction upon jurors,[2] either generally or as a response to misconduct. In essence, they subject jurors to punishment or restriction to better ensure compliance with the prohibition on OJR. Such strategies do not attempt to directly ameliorate any of the underlying motivations for OJR canvassed in the previous Chapter – they will not cure confusion, quell moral concerns, or cure an Internet addiction, nor will they magically reform recalcitrant jurors. Instead, they have the effect of *indirectly* targeting *all* underlying motivations for OJR by limiting jurors' access to the medium through which OJR is conducted – their personal digital devices (e.g. smartphones, laptops, iPads). In the Canadian context, there are two deterrent measures currently employed that are worth discussing: sequestering the jury and banning/confiscating electronic devices.

5.2.1 SEQUESTERING THE JURY

At first blush, it might appear that the answer to preventing jurors from conducting improper online research is obvious: sequester them for the entirety of trial. When a jury is sequestered, they are kept together, isolated from the outside world and subject to near-constant observation by court officials. At the end of each day, instead of returning to their homes, jurors are put up in hotels.[3] Further, sequestered jurors do not have access to any means of communication with, or access to, the outside world. That means no newspapers, radio, television, or, importantly, personal digital devices, such as computers or smartphones.[4]

---

[2] *Ibid.*
[3] See Dana DeFilippo, "Solitude, snacks, and constant supervision in store for sequestered Cosby jurors" *Whyy* (5 June 2017), online: <https://whyy.org/articles/solitude-snacks-and-constant-supervision-in-store-for-sequestered-cosby-jurors/:~:text=Jurors%20on%20the%20O.J.,in%202011,%20cost%20nearly%20$187,000.>.
[4] *Ibid*.

As a result, were jurors to be sequestered at the very outset of trial, the constraints accompanying sequestration would make it such that it would be virtually *impossible* for them to engage in OJR, regardless of their motivation for doing so. Indeed, given the isolation and control associated with sequestration, it has been recognized that such practice would likely resolve most of the risks associated with online juror misconduct, including OJR.[5] The rationale is that the fewer freedoms granted to jurors while serving on a trial, the lesser the risk for misconduct.[6] As observed by Hoffmeister, "[o]f the possible remedies available, sequestration best ensures juror compliance […] because the court has direct control of the jurors' environment."[7] Indeed, sequestration is the "ultimate negative rule," given that exposure to outside information, particularly via personal digital devices, is so closely monitored and regulated that a jurors' ability to engage in OJR is "effectively blocked."[8]

Such an approach would align with the traditional approach to criminal jury trials at common law. Historically, sequestration commenced once trial began. Indeed, common law rules with respect to the control and observation of juries were "extremely strict."[9] Upon being sworn, jurors were "lock[ed] up without meat, drink, fire and tobacco" until they were able to agree upon a verdict.[10] This, of course, meant that jurors were separated from the rest of society for the entirety of trial, including the examination of witnesses, presentation of exhibits, and opening and closing statements by counsel, as well as any *voir dire* that might take place – a period which could be weeks or, indeed, even *months* long.

However, this approach has fallen out of favour in modern times. Sequestration from the outset of trial is now an *extremely* rare practice in Canada. Section 647(1) of the

---

[5] See e.g. *R v Pan*, 2014 ONSC 4645 [*Pan ONSC*] at para 42; Thaddeus Hoffmeister, "Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age" (2012) 83:2 U Colorado L Rev 409 [Hoffmeister 2012] at 441; Thaddeus Hoffmeister, "Preventing Juror Misconduct in a Digital World" (2015) 90:3 Chi-Kent L Rev 981 [Hoffmeister 2015] at 989; Robbie Manhas, "Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms" (2014) 112:5 Mich L Rev 809 at 816-17.
[6] See *R v Hertrich* (1982), 137 DLR (3d) 400 at para 91, 67 CCC (2d) 510 (Ont CA).
[7] Hoffmeister 2012, *supra* note 5 at 441. See also Hoffmeister 2015, *supra* note 5 at 989.
[8] Manhas, *supra* note 5 at 816-17.
[9] *R v Nash* (1949), 94 CCC 288 (NBCA).
[10] *R v Krieger*, 2006 SCC 47. See also *Nash*, *ibid*; *R v Gumbly*, 1996 NSCA 213.

Code provides trial judges authority to permit jurors to separate at any time up to the point when they are set to deliberate:

> **647 (1)** The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate.[11]

While the language of this provision might suggest that declining to require the jury sequester for the whole trial is the *exception*, rather than the rule, the reality is that, at present, juries are seldom sequestered for the entirety of trial.[12] As noted by the Court of Appeal for Ontario in *Re Global Communications Ltd.*, in Canada, "the sequestration of jurors throughout a trial occurs *only exceptionally*."[13] This is true even in the most serious of cases, except where "special circumstances" exist that necessitate jurors being separated from society.[14]

As Roach has observed, Canadian courts have shown a clear "aversion" to sequestering juries for an entire trial.[15] This disinclination appears to be primarily rooted in the hardship imposed on jurors by long periods of sequestration. Sequestration has been found to take a severe emotional toll on jurors. Jurors generally have a negative outlook on sequestration, with many likening it to the experience of imprisonment.[16] As observed by Manhas, jurors, when sequestered, "are effectively under a form of arrest for the duration of the trial."[17] On a similar note, Strauss points out that, in many ways, the lives of sequestered jurors "may involve as great, if not greater limits on freedom" than even the *accused*, who may have the opportunity to seek bail pending conviction.[18] While sequestered, jurors are forced to live in a controlled environment, away from their homes,

---

[11] *Criminal Code*, RSC 1985, c C-46 ["*Code*"], s 647(1).
[12] See e.g. *Hertrich*, *supra* note 6; *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 120 DLR (4th) 12 (per Gonthier J, dissenting); *Pan ONSC*, *supra* note 5; *R v Horne*, 1987 ABCA 108 at para 14.
[13] *Re Global Communications Ltd. and Attorney-General for Canada* (1984), 44 OR (2d) 609, 5 DLR (4th) 634 (CA) (emphasis added).
[14] See *Hertrich*, *supra* note 6 at para 91. Consider, for example, *R c Ouellette*, [1988] RJQ 810, in which the jury was sequestered for the entirety of trial because one of the accused was a Member of Parliament and the case had been the subject of significant pre-trial publicity.
[15] Kent Roach, "Public Inquires, Prosecutions or Both" (1994) 43 UNBLJ 415 at 425.
[16] See e.g. Hoffmeister 2012, *supra* note 5 at 441-42; Keith W Hogg, "Runaway Jurors: Independent Juror Research in the Internet Age" (2019) 9:1 W J Legal Stud 1 at 12; Marcy Strauss, "Sequestration" (1996) 24:1 Am J Crim L 63 at 108-09.
[17] Manhas, *supra* note 5 at 816-17.
[18] Strauss, *supra* note 16 at 107.

their jobs, and their family and friends, an experience which can be profoundly difficult. According to Helena Barthell, who served as a juror on the Manhattan murder trial of disgraced criminal lawyer Joel Steinberg, "Until you've been sequestered, you can't imagine how horrible it is."[19] Indeed, sequestration often has troubling implications for jurors' mental health. An O.J. Simpson juror, for instance, was excused from service after five months because she required hospitalization for severe depression brought on by serving on the trial.[20] Similar experiences were described by those jurors who served on the trial of Charles Manson. One divorced in aftermath of the trial, attributing the strain of sequestration to the end of their marriage. Another described feeling "like a prisoner. I had no rights. No nothing." Yet another attempted suicide.[21]

This hardship has long been cited as the primary reason for doing away with full-trial sequestration in Canada.[22] Indeed, as early as the mid-nineteenth century, Canadian judges began to adopt a more lenient approach to allowing jurors to separate prior to the commencement of deliberations. Take, for instance, the following observation made by Halliburton CJ of the Supreme Court of Nova Scotia:

> We must recollect that much greater strictness, I might say severity, prevailed in dealing with Jurors and conducting trials formerly than in the present day. It is within the recollection of many of us that, even in civil cases, a Jury when once sworn, were cut off from all communication with others until they pronounced their verdict, and we look back, not without some surprise, at the labors and harshness they then underwent. A more common sense view is now taken of the subject, and where the trial of a cause occupies more than one day, Juries are now permitted to separate in civil cases, until the cause is given them in charge by the Court, and I see no objection to extending that practice to criminal cases, with the usual warning not to converse with others or allow others to talk with them, upon the subject of the trial. This is a great improvement upon the practice which formerly prevailed when exhausted Judges gave instructions to exhausted Juries.[23]

---

[19] *Ibid*.
[20] *Ibid* at 108.
[21] *Ibid*.
[22] See e.g. *Hertrich*, *supra* note 6 at para 91; *Alberta v The Edmonton Sun*, 2003 ABCA 3 at para 48; *Horne*, *supra* note 12 at para 14.
[23] *Queen v Kennedy* (1856-59), 3 NSR 203 at 207.

This judicial outlook has continued in modern years. In *R v One Yellow Rabbit Theatre Association*, the Alberta Court of Appeal, in response to a request made by counsel to have a jury sequestered for the entirety of trial, rebuked the suggestion as "monstrous," emphasizing that "No citizens presently offer a greater contribution to the enforcement of the right to a fair trial in this case than the jurors. Why should they suffer more?"[24] Similarly, in *Alberta v The Edmonton Sun*, it was observed that "[t]he sequestration of the jury imposes an incalculable cost on the individual juror by separating the jurors from their families and occupations."[25] The idea is that, because jurors perform an act of public service, often at great sacrifice (whether personal, financial, or both), it would be unfair to regularly expect them to endure the emotional suffering that accompanies full-trial sequestration.

A secondary (a more pragmatic) explanation for trial judges' reluctance to sequester jurors for the entirety of trial is the associated cost of doing so. Sequestering a jury for a whole trial is extremely expensive.[26] The exact cost of sequestration for any given trial is difficult to estimate in advance,[27] given that cases vary in length, complexity, and notoriety. However, the costs associated with sequestering a jury undoubtedly add up to a significant figure, when one takes into account the price of hotel stays, meals, snacks, transportation between the hotel and the courthouse, entertainment for jurors on longer trials, and employing the court personnel responsible for overseeing the jurors' sequestration.[28] Take, for example, the 2010 Pittsburgh murder trial of Julius "Juice" Wise; only three days in length, it cost US$19,000 to sequester the jury.[29] Expenses only increase for longer, more high-profile trials. The 57-day sequestration in the Rodney King trial, for instance, cost approximately US$204,000,[30] whereas the seven-week Casey Anthony trial in 2011 ran the State of Florida nearly US$187,000.[31] Perhaps the most extreme example is the high-profile trial of O.J. Simpson, which

---

[24] *R v One Yellow Rabbit Theatre Association*, 1992 ABCA 107 at para 13.
[25] *Edmonton Sun*, *supra* note 22 at para 48.
[26] See e.g. Strauss, *supra* note 16 at 105; Manhas, *supra* note 5 at 816-17.
[27] See Strauss, *ibid*.
[28] See DeFilippo, *supra* note 3.
[29] *Ibid.*
[30] See Strauss, *supra* note 16 at 106.
[31] See DeFilippo, *supra* note 3.

required the sequestration of 24 jurors for approximately nine months, costing the state a whopping *three million* US dollars.[32] With Canadian court resources already stretched thin,[33] utilization of full-trial sequestration is, simply put, unrealistic.

For these two reasons, while sequestering jurors for the duration of trial is *technically* still an option "on the books" for trial judges to use to address the trial fairness risks posed by OJR, it is extremely unlikely to be invoked. Instead, in almost every modern criminal trial in Canada, jurors are permitted to leave each other's company at the end of each day of evidence.[34] Sequestration only begins once deliberations start.[35] At that point, jurors must stay together until they have reached their verdict, with meals and hotel accommodations arranged if required. During this period of sequestration, jurors are not permitted to use any personal digital devices, including cellphones and smartphones.[36]

Unfortunately, however, this less-restrictive approach to sequestration is far less effective with respect to addressing the risk of online juror misconduct, including OJR. Because sequestration, as a deterrent measure, does not directly address jurors' underlying motivations for conducting OJR, the measure of its success lies in its ability to keep jurors away from the mediums through which online research may be conducted. While Canada's more lenient version of sequestration, by and large, prevents online research from being conducted while the jury *deliberates*, it leaves jurors unrestricted in their ability to do so during the trial itself, either while at the courthouse or at home

---

[32] See Strauss, *supra* note 16 at 105-106.
[33] See e.g. Rachel Watts, "In Quebec's north, criminal cases are being dropped because of a drastic lack of resources" *CBC* (8 September 2023), online: <https://www.cbc.ca/news/canada/montreal/nunavik-abitibi-témiscamingue-criminal-cases-dropped-drastic-lack-of-resources-1.6961144>; Kathryn Marshall, "Our judicial system is broke, but politicians don't seem to care" *National Post* (3 December 2023), online: <https://nationalpost.com/opinion/kathryn-marshall-our-judicial-system-is-broken-but-politicians-dont-seem-to-care>; Zena Olijnyk, "Preserving trust in justice system comes down to resources, building confidence: judges at CBA forum" *Canadian Lawyer* (4 July 2023), online: <https://www.canadianlawyermag.com/news/general/preserving-trust-in-justice-system-comes-down-to-resources-building-confidence-judges-at-cba-forum/377490>.
[34] See e.g. Canadian Judicial Council, *Model Jury Instructions* [*CJC Instructions*], 6.5[2], online: *National Judicial Institute* <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>; David Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Reuters, 2023) [*Watt's Instructions*], 41[2].
[35] *Pan ONSC*, *supra* note 5 at para. 42.
[36] See *CJC Instructions*, *supra* note 34, 6.5[4]; *Watt's Instructions*, *supra* note 34, 41[4].

during the evenings.[37] Put simply, the morally obligated or confused juror, the habitual Internet user, and the online addict can all still engage in OJR during these unregulated periods. The same goes for the recalcitrant juror. Indeed, by the time jurors reach the deliberation stage, damage may have already been done, with extraneous information having already "poisoned" one (or multiple) jurors.

5.2.2 BANNING/CONFISCATING ELECTRONIC DEVICES

A second, less restrictive deterrent measure is the banning or confiscation of jurors' personal digital devices, such as cell phones, laptops, and tablets. Indeed, restricting jurors' access to their devices was one of the first responses by courts across common law jurisdictions to address the rise of OJR.[38] The logic behind this strategy, which is sometimes referred to as the "Luddite solution,"[39] is clear: not unlike sequestration, it deprives jurors of the tools they need to engage in online research.[40] Put simply, if jurors do not have access to their electronic devices, they will be unable to go online seeking information.

Device confiscation/restriction has taken a variety of forms, with approaches varying by location. Some jurisdictions restrict the use of electronic devices within the courthouse generally. For example, in Arizona,[41] South Carolina,[42] and North Carolina,[43] the use of devices is prohibited while jurors are on site at the courthouse and must always be turned off apart from during scheduled breaks.[44] The Australian approach is even

---

[37] See Daniel William Bell, "Juror Misconduct and the Internet" (2010) 38:1 Am J Crim L 81 at 87.
[38] Thaddeus Hoffmeister and Ann Charles Watts, "Social Media, the Internet, and Trial by Jury" (2018) 14:2 Annu Rev Law Soc Sci 259 at 267.
[39] See *ibid*; Hoffmeister 2012, *supra* note 5 at 440.
[40] See e.g. Hoffmeister 2012, *ibid* at 439; Hoffmeister 2015, *supra* note 5 at 988; Nancy S Marder, "Jurors and Social Media: Is a Fair Trial Still Possible" (2014) 67:3 SMU L Rev 617 at 646.
[41] *Revised Arizona Jury Instructions (Criminal)*, 6th ed (as amended September 2022), Preliminary Criminal 13, online: <https://www.azbar.org/media/g01ktaqc/raji-criminal-6th-ed-2022.pdf>.
[42] The Supreme Court of South Carolina, *Order No 2009-07-20-01 (Re: Juror use of Personal Communication Devices)*, online: <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-07-20-01>.
[43] *North Carolina Pattern Jury Instructions* (as amended June 2013), r 100.25, online: <https://www.sog.unc.edu/resources/microsites/north-carolina-pattern-jury-instructions/north-carolina-pattern-jury-instructions-criminal-cases>.
[44] In the American context more generally, see Eric P Robinson, "Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media" (2011) 1:3 Reynolds Ct & Media LJ 307.

stricter. In Victoria[45] and Queensland,[46] for instance, jurors are either forbidden from bringing electronic devices to the courthouse at all or must turn them over to a bailiff upon arrival each day. Other jurisdictions impose restrictions only during deliberations. Take Idaho[47] and Indiana,[48] for example, where bailiffs confiscate jurors' devices upon their entry into the jury room. In Canada, the latter approach has been adopted: jurors are generally only required to relinquish their cell phones and other devices at the deliberation stage. Upon being sequestered and sent to the jury room, court staff collect the jurors' devices and arrange for their safekeeping throughout the duration of deliberations.[49] Devices are only returned to jurors once they have settled upon a verdict.[50]

Commentators have criticized restricting jurors' access to their personal digital devices as a valid strategy for preventing OJR. Some view the approach as overly restrictive, arguing that depriving jurors of ties to the "real world" can constitute a "significant hardship."[51] This is particularly so in the Digital Age, in which "[d]igital connection is no longer a fad and disconnection is no longer a mere inconvenience."[52] Indeed, loss of access to communication devices, such as cellphones and laptops, may be extremely distressing for jurors who are also parents or primary caregivers, as well as for those who run their own business or are self-employed.[53] The imposition such restrictions cause may not only result in certain jurors experiencing "extreme anxiety"[54] but, as

[45] See Juries Victoria, "Serving on a Jury" (as amended 2 August 2021), online: <https://www.juriesvictoria.vic.gov.au/individuals/serving-on-a-jury>.
[46] See Queensland Courts, "Going to court as a juror" (as amended 22 August 2023), online: <https://www.courts.qld.gov.au/jury-service/going-to-court-as-a-juror>.
[47] *Idaho Criminal Jury Instructions* (as amended 21 April 2023), r 108, online: <https://isc.idaho.gov/main/criminal-jury-instructions>.
[48] *Indiana Rules of Court: Jury Rules* (as amended 1 January 2021), r 26(b), online: <https://www.in.gov/courts/rules/jury/>.
[49] See *CJC Instructions*, *supra* note 34, 3.3[7], fn 21; 6.5[4]; *Watt's Instructions*, *supra* note 34, 41[4].
[50] See *CJC Instructions*, *ibid*, 6.5[4]; *Watt's Instructions*, *ibid*.
[51] See Hoffmeister 2012, *supra* note 5 at 439.
[52] Patrick C Brayer, "The Disconnected Juror: Smart Devices and Juries in the Digital Age of Litigation" (2016) 30 Notre Dame JL Ethics & Pub Pol'y 25 at 34.
[53] See Brayer, *ibid* at 34-35; Marder, *supra* note 40 at 646; Hogg, *supra* note 16 at 12.
[54] Hoffmeister & Watts, *supra* note 38 at 267.

pointed out by Brayer, could have the unintended effect of pushing jurors to rush through their deliberations to get their devices back more quickly.[55]

However, the far more common – and, indeed, compelling – criticism with respect to Canada's approach to device confiscation is that it is simply ineffective at preventing jurors from engaging in OJR. The weakness in this tactic is akin to that resulting from the Canadian practice of only sequestering jurors during deliberations. While it prevents jurors from engaging OJR while deliberating, it does nothing to prevent them from doing so *during trial*, whether covertly at the courthouse or when they go home at night.[56] Consider, for instance, the following American testimonials on the pitfalls of this strategy:

> This isn't simply about 'taking cell phones' away from jurors when the trial starts! I just served on a criminal trial where everyone of us had cell phones or iPods (although we turned them off in the courtroom). But when you go home, you can turn on your computer! How does the judge avoid that? Confiscate your home PC? The judge did instruct us not to look on the internet, but IMHO, he was not specific enough as to what we couldn't say or discuss...like texting a friend general details of the trial, etc.. its a whole new world now. This will be tough to figure out.[57]
>
> …
>
> Having jurors surrender their devices would only address the problem at the courthouse. In most trials, jurors are not sequestered and go home every night where they are free to go online.[58]
>
> …
>
> The solution is not as simple as checking Blackberries at the door, because if you give them back to jurors at the end of each day, they can just use them at that point. Realize that many trials can go on for weeks or months, and presumably the courts will not permanently confiscate all smartphones

---

[55] Brayer, *supra* note 52 at 35-36.
[56] See e.g. Nicola Haralambous, "Educating jurors: technology, the Internet and the jury system" (2010) 19:3 Inf & Comm Tech L 255 at 261; Ralph Artigliere, "Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial" (2011) 59:3 Drake L Rev 621 at 640; Marder, *supra* note 40 at 618; Manhas, *supra* note 5 at 815-16.
[57] John Schwartz, "As Jurors Turn to Web, Mistrials Are Popping Up" *The New York Times* (17 March 2009), Amy (commenter), online: <https://www.nytimes.com/2009/03/18/us/18juries.html>.
[58] *Ibid*, D. Burton (commenter).

> 24/7 for that long. I'm not sure what the solution is. As a lawyer, though, this terrifies me.[59]

Thus, like with sequestration, there is a key weakness in this indirect attempt to target jurors' motivations to engage in online research. Canada's approach to device confiscation is ineffective at keeping jurors away from the mediums of OJR in any meaningful sense. Indeed, as noted by Marder, such bans are "only effective for a limited amount of time, and meanwhile, the court runs the risk of alienating jurors."[60]

5.3 PREVENTATIVE MEASURES

I will now move on to discuss the preventative strategies used in Canada to address OJR. These consist largely of explanatory approaches, in the sense that they involve educating jurors about their obligations, as well as conduct that is prohibited.[61] The aim of these measures is to use education as a vehicle to influence jurors' behaviour in a manner conducive to the prevention and identification of OJR. In this section, I discuss the two preventative measures utilized within the Canadian scheme of OJR prevention/detection: (1) jury instructions relating to the prohibition on independent online research; and (2) instructing jurors to "self-police."

5.3.1 JUDICIAL INSTRUCTION ON THE RESEARCH PROHIBITION

The primary preventative strategy used by judges to curb OJR is the utilization of jury instructions.[62] Jury instructions not only provide explanations with respect to legal concepts relevant to the case being heard, but also canvass what sorts of juror behaviour are *not* permitted.[63] The logic behind providing jurors with such instruction is clear: that "[b]y expressly drawing the line as to what constitutes misconduct in the eyes of the law,

---

[59] *Ibid*, atn (commenter).
[60] Marder, *supra* note 40 at 646.
[61] See Harvey, *supra* note 1 at 227.
[62] See Hoffmeister 2012, *supra* note 5 at 451.
[63] See Ahunanya Anga, "Jury Misconduct: Can Courts Enforce a Social Media and Internet Free Process? We 'Tweet,' Not" (2013) 18:2 J Tech L & Pol'y 265 at 281-82.

jurors will be less likely to engage in that type of behavior."[64] In this sense, jury instructions prohibiting online research are, theoretically, capable of targeting two of the key motivations addressed in the previous Chapter: habit and moral obligation. Clear instructions may effectively target those jurors who engage in OJR due to ingrained Internet-use habits by clearly reminding them of their obligations to refrain from engaging in such research. Further, such instructions have potential to appeal to those jurors who would engage in independent research out of a sense of moral responsibility to "find the truth" by emphasizing the inaccuracies, biases, and complexities inherent in much online legal and factual information.

In delivering their instructions to the jury, most judges rely upon "model jury instructions" – a standardized set of instructions that support the public's interest "in uniform application of the law."[65] In Canada, for instance, the model instructions most commonly relied upon[66] are those authored by the Canadian Judicial Council's ["CJC"] National Committee on Jury Instructions [the "*CJC Instructions*"], hosted and made publicly available by the National Judicial Institute.[67] Many jurisdictions have incorporated specific warnings prohibiting jurors from seeking out online information about the case, law, or parties into their model jury instructions.[68] Canada is no exception. As noted by Court of Appeal for Ontario in *R v Bains*, "[p]reliminary and final instructions enjoin outside research and reliance on anything other than what the law considers evidence fit for jury consumption."[69] The *CJC Instructions*, for example, direct that, as part of the trial judge's preliminary instructions to the jury, jurors be repeatedly made aware of their obligations to refrain from engaging in online research:

> 3.3[7] What you hear outside this courtroom about this case or about any of the persons involved in it is not evidence. What you hear on radio, or

---

[64] Amanda McGee, "Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms" (2010) 30 Loy LA Ent L Rev 301 at 317.
[65] Anga, *supra* note 63 at 281.
[66] See Betsy Powell, "Court cases can go off the rails when jurors go to Google" *Toronto Star* (13 January 2020), online: <https://www.thestar.com/news/gta/court-cases-can-go-off-the-rails-when-jurors-go-to-google/article_c9157b71-eaa6-5493-a8d5-a35edfdeaa3b.html>.
[67] *CJC Instructions*, *supra* note 34. While these are the most relied upon instructions, there are others which have also been cited as authoritative. See e.g. *Watt's Instructions*, *supra* note 34.
[68] See e.g. Anga, *supra* note 63 at 281-82; Artigliere, *supra* note 56 at 637-38; Bell, *supra* note 37 at 89; Hoffmeister 2012, *supra* note 5 at 451; Marder, *supra* note 40 at 643-46; Manhas, *supra* note 5 at 820.
[69] *R v Bains*, 2015 ONCA 677 at para 69.

> see on television, in the newspaper or any Internet source, or what you may have heard from other persons is not evidence. You must ignore it completely. You must avoid all media coverage of this case. You must not do your own research. You must consider only the evidence put before you in the courtroom.[70]
>
> …
>
> 3.8[5] Finally, you are not lawyers or investigators. You must not investigate, seek out any information, or do any research about the case, the persons involved in it, or the law that applies to it by any means, including the Internet. Do not consult other people or other sources of information, printed or electronic.[71]
>
> …
>
> 3.8[6] Do not use the Internet or any electronic device in connection with this case in any way. This includes chat rooms, Facebook, MySpace, Twitter, apps, or any other electronic social network. Do not read or post anything about this trial. Do not engage in tweeting or texting about this trial. Do not discuss or read anything about this trial on a blog. Do not discuss this case on e-mail. You must decide the case solely on the evidence you hear in the courtroom.[72]

In addition, the CJC suggests that a final reminder be provided directly before deliberations commence:

> 8.4[1] The only information that you may consider is the evidence that has been put before you in the courtroom. You must disregard completely any information from radio, television, or newspaper accounts, Internet sources, Twitter, Facebook, or any other social media, that you have heard, seen or read about in respect of this case, or about any of the persons or places involved or mentioned in it. Any other information about the case from outside the courtroom, is not evidence.[73]

Thus, Canadian jurors are generally provided with multiple instructions to refrain from engaging in OJR at any point within their term of service. Notably, in Canada, not only are jurors "bound to follow the law as it is explained by the trial judge,"[74] including

---

[70] *CJC Instructions*, *supra* note 34, 3.3[7] (emphasis added).
[71] *Ibid*, 3.8[5] (emphasis added).
[72] *Ibid*, 3.8[6] (emphasis added).
[73] *Ibid*, 8.4[1] (emphasis added).
[74] See *R v Corbett*, [1988] 1 SCR 670 at para 39, 41 CCC (3d) 385.

any admonishments with respect to prohibited behaviour (such as OJR), but there is also a strong presumption that jurors *can and do* follow such instructions.[75] This includes, of course, directions provided in accordance with a model charge like the CJC's. As was put by Dickson CJ in *R v Corbett*, "until the paradigm is altered by Parliament, [courts] should not be heard to call into question the capacity of juries to do the job assigned to them."[76]

However, despite this presumption, OJR has continued to occur in the face of clear admonishments from trial judges. A 2018 manslaughter and assault trial out of Bradford, Ontario, for instance, came crashing to a halt after a juror, contrary to instructions to refrain from conducting any online research, took to the Internet to look up the lawyers and trial judge, as well as to create a digital map of the crime scene.[77] Similarly, just one day after the Crown opened its case against Cavlin Nimoh, who was accused of fatally stabbing cancer researcher Mark Ernsting in downtown Toronto in 2015, a juror ignored the trial judge's instructions and looked up the accused online. He discovered Nimoh's criminal record and shared his findings with his fellow jurors, resulting in a mistrial.[78] These are just two of several reported instances of OJR occurring in Canada despite judicial instruction to the contrary.[79]

Thus, it is clear that judicial instruction is ineffective at preventing at least *some* instances of misconduct. Why is this? To start, as discussed in the previous Chapter, evidence suggests jurors often fail to comprehend that looking up information online constitutes the "independent research" they have been instructed to avoid. Take, for example, a South Dakota wrongful death action, *Russo v Takata Corp.*, in which a juror conducted online research on the Takata corporation. The juror "did not recognize Takata by name or product line" and wondered "what they did," as well as wanted to know if the corporation had been involved in any prior lawsuits.[80] To find out this information, he

---

[75] See e.g. *Bains*, *supra* note 69 at para 61; *R v Baranec*, 2020 BCCA 156 at para 214; *R v Theodore*, 2020 SKCA 131 at para 148.
[76] *Corbett*, *supra* note 74 at para 40.
[77] See *R v Ampadu*, 2018 ONSC 2797.
[78] See Powell, *supra* note 66.
[79] See e.g. *R v Farinacci*, 2015 ONCA 392; *Bains*, *supra* note 69; *R v Schirmer*, 2020 BCSC 2257; *Patterson v Peladeau*, 2018 ONSC 2625.
[80] *Russo v Takata Corp.*, 774 N W 2d 441 (2009 SD 83) at para 7.

turned to Google, despite having been warned not to "seek out evidence regarding th[e] case."[81] Later, during deliberations, he revealed his research to a fellow juror, who reported his misconduct to the trial judge who, subsequently, declared a mistrial. The defendants appealed to the South Dakota Supreme Court, which affirmed the trial judge's decision. Importantly, the appeal court observed that "[it] may well be that [the juror] did not realize that performing a Google Search on the names of the Defendants Takata and TK Holdings constituted 'seek[ing] out evidence.'"[82] Indeed, a 2013 UK study of online juror misconduct found that a not-insignificant portion of jurors remain "clearly confused" about the rules surrounding Internet use in the aftermath of judicial instructions: 5% believed there were no restrictions at all on their Internet use; and 2% thought they could look for information about their case so long as their research did not affect their judgment.[83] Similarly, in a 2012 American study involving real jurors, it was found that, upon being instructed with respect to the prohibition on OJR, 35% of jurors remained confused – 15% believed that some types of independent research would not violate the judge's instruction, while 20% remained unsure.[84]

Some argue that this disconnect stems from a lack of specificity within model jury instructions – namely, that they fail to provide jurors with sufficient detail as to what constitutes "research."[85] Indeed, as noted by Hoffmeister, "[s]ome jurors violate the rules against conducting improper research because the instructions in place either are unclear or do not specifically address the technological advancements ushered in by the Digital Age."[86] In the Canadian context, the *CJC Instructions* encourage trial judges to direct jurors to refrain from conducting "research" or "seeking out information,"[87] as well as to "disregard completely any information from […] Internet sources."[88] However, there is no explanation as to the precise *kind* of online activities that constitute research, such as

---

[81] *Ibid*, fn 1.
[82] *Ibid*.
[83] Cheryl Thomas, "Avoiding the perfect storm of juror contempt" (2013) 6 Crim LR 483 ["Thomas 2013"] at 488.
[84] Paula Hannaford-Agor, David B Rottman & Nicole L Waters, *Juror and Jury Use of New Media: A Baseline Exploration* (The National Center for State Courts, 2012) at 6.
[85] See e.g. McGee, *supra* note 64 at 316-17; Manhas, *supra* note 5 at 821-22.
[86] Hoffmeister 2012, *supra* note 5 at 452.
[87] *CJC Instructions*, *supra* note 34, 3.3[7], 3.8[5]
[88] *Ibid* at 8.4[1].

looking up a legal term on Wikipedia, googling articles about the alleged offence, or searching for the accused's Facebook or Instagram profile.

Lack of understanding may also be linked to the fact that model instructions have failed to keep pace with online advancements.[89] Indeed, the portions of the *CJC Instructions* that focus on OJR were last revised in 2012, meaning that they are, by now, quite outdated. This is particularly so with respect to the online platforms mentioned as potential *sources* for OJR. The instructions admonish, for instance, jurors' use of "chatrooms," online spaces which have suffered "a relatively quiet and unmourned death" since the early days of the Internet.[90] In addition, they reference Myspace, which, while wildly popular in the early-to-mid 2000s, has since largely faded into obscurity,[91] as well as Twitter, which shut down in mid-2023 and was subsequently replaced by "X."[92] Further, the *Instructions* fail to mention many of the leading, modern online information-sharing platforms, including Instagram, TikTok, Reddit, YouTube, Wikipedia and, most importantly, Google.

Given that looking up unknown information online has become almost second nature in the Digital Age, the efficacy of the *CJC Instructions* likely suffers as a result of being both surface-level and outdated. This will likely pose a particular problem for jurors who engage with the Internet *habitually*. As noted in the previous Chapter, these jurors often struggle to identify common sources of online information-gathering (e.g. conducting Google searches, consulting Wikipedia articles, or accessing online news sources) as doing "research." The lack of specificity inherent in the *CJC Instructions* on OJR, in my view, only works to further promote this disconnect.

---

[89] See Artigliere, *supra* note 56 at 637-38.
[90] See Norberto Gomez, "A Stranger-web: The Death and Rebirth of the Chatroom," online: *Digital America* <https://www.digitalamerica.org/a-stranger-web-the-death-and-rebirth-of-the-chatroom-norberto-gomez-jr/>.
[91] See Ellis Stewart, "What Happened to Myspace? The Fall of the World's First Social Media Giant" (14 November 2023), online: *EM360* <https://em360tech.com/tech-article/what-happened-to-myspace#:~:text=Myspace%20is%20still%20active%20today,for%20the%20site's%20early%20days>.
[92] Saqib Shah & Alan Martin, "Why is Twitter now called X? The big rebranding explained" *The Standard* (22 August 2023), online: <https://www.standard.co.uk/news/tech/x-twitter-logo-rebrand-why-elon-musk-b1096363.html>.

Another problem with reliance upon jury instructions to curb OJR is that, even when jurors understand what constitutes "independent research," some still give into temptation and undertake such research anyway. Indeed, in a 2013 Australian study of jurors' obedience to judicial instructions, 15% of surveyed jurors indicated independent research to be "very acceptable" where a juror is frustrated with the adequacy of evidence in a criminal trial.[93] Over 80% of these jurors held this view despite acknowledging that they had received clear judicial directions to the contrary.[94] Similarly, in a 2012 American study, despite having received instructions to refrain from conducting online research, a "sizeable proportion" of surveyed jurors reported a desire to use the Internet to obtain information about, for instance, legal terms (44%), the case (26%), the parties (23%), the lawyers (20%), and the trial judge (19%).[95]

Professor Jacqui Horan of Monash University, for one, has argued against reliance on jury instructions, given that increasing reported instances of OJR demonstrate that jurors will ignore these instructions where they consider there to be a gap in the information needed to do their job properly.[96] MacPherson & Bonora describe the juror perspective in this sense as follows:

> Jurors want more information— more clarity about the meaning of legal terms, more background and context, and a better understanding of who the parties really are and what their situation is. When the answers are readily available, the wired jurors believe that fairness will be enhanced, not harmed, by gathering that information. They are likely to reject outright the notion that getting more information about the parties and facts in dispute—from what is presumed to be a neutral source—would negatively affect their ability to make an impartial decision. […] The deeply ingrained habit of satisfying one's curiosity or resolving even minor factual disputes by getting instant answers online makes it difficult to accept the prohibition on doing so when confronted with a truly

---

[93] Jill Hunter, *Jurors' Notions of Justice: An Empirical Study of Motivations to Investigate & Obedience to Judicial Directions* (New South Wales: Law and Justice Foundation of New South Wales, 2013) at 5.
[94] *Ibid* at 6.
[95] Hannaford-Agor, Rottman & Waters, *supra* note 84 at 6.
[96] See e.g. Jacqueline Horan, *Juries in the Twenty First Century* (Alexandria, NSW: Federation Press, 2012) at 167; Roxanne Burd & Jacqueline Horan "Protecting the right to a fair trial in the 21st century - has trial by jury been caught in the world-wide web?" (2012) 36 Crim LJ 103 at 133.

> important decision. When the judge says, "Don't use the Internet," some jurors can't believe the judge really means, "No Internet use."[97]

This phenomenon aligns with the theory of juror "reactance," which posits that jurors (particularly morally obligated ones) are often unwilling or unable to set aside relevant information, regardless of judicial instruction to the contrary, due to a reluctance to adhere to "rules that eliminate the freedom of jurors to decide matters on their own common-sense view of justice."[98] This can, in large part, be related back to one of the key determinants of morally obligated jurors, as canvassed in the previous Chapter: distrust, both of the justice system and its actors and, more broadly, of "expertise" in general.

Critics have suggested that jury instructions, as currently formatted, fail to curb reactance because they omit sufficient instruction as to *why* OJR is not permitted.[99] The *CJC Instructions*, for instance, fail to provide any commentary explaining why independent research, including OJR, is prohibited – they simply admonish jurors from engaging in the practice. At the outset of trial, jurors are told they are not permitted to use the Internet in connection with the case, including reading anything online about the trial.[100] Similarly, directly before deliberations commence, they are reminded that the only information they may consider is evidence put before them in the courtroom and that they must "disregard completely" any information from Internet sources and social media.[101] However, at no point do the *CJC Instructions* provide insight into the reasons for these prohibitions, such the importance of protecting the accused's right to a fair trial by an impartial trier of fact, the potential reliability concerns surrounding out-of-court information, or the fact that, by accessing extraneous online information, both parties are robbed of the opportunity to challenge that information by way of cross-examination.[102]

---

[97] Susan MacPherson & Beth Bonora, "The Wired Juror, Unplugged" (2010) November Trial 40 at 42.
[98] See Jane Johnston et al, *Juries and Social Media: A report prepared for the Victorian Department of Justice* (Victoria: Department of Justice, January 2013) at 15-16.
[99] See e.g. Gareth S Lacy, "Untangling the Web: How Courts Should Respond to Juries Using the Internet for Research" (2011) 1 Reynolds Cts & Media LJ 167 at 178.
[100] *CJC Instructions*, *supra* note 34, 3.8[6].
[101] *Ibid*, 8.4[1].
[102] See Hoffmeister 2012, *supra* note 5 at 454. However, note that Watt does go into further detail: *Watt's Instructions*, *supra* note 34, 20A[10]-[15].

As a result of these crucial omissions, jurors – particularly "conscientious" or "morally obligated" ones – will often be left feeling they have been given an insufficient explanation for the rationale underpinning the rule against OJR.[103] This lack of explanation decreases the likelihood of juror compliance.[104] This is because, as observed by Hoffmeister, where jurors are denied transparent explanations, it can feed their mistrust of legal system.[105] As discussed in the previous Chapter, jurors are keenly aware that the information presented at trial may not represent the "full picture" of the events underpinning the case and that their own independent investigations may uncover further information that could, from their perspective, be helpful in making a very important and difficult decision.

For this reason, several commentators have suggested that judicial instruction admonishing the practice of outside "sleuthing" by jurors may have little effect on a "morally obligated" juror, arguing that they tend to resist instructions that "clash with their innate sense of justice."[106] As observed by Steblay et al, for instance, such jurors "may be influenced to comply [with judicial instructions] only to the extent to which they agree with the judge's explanation as to why certain evidence should be disregarded."[107] Put simply, "[p]ronouncements from on high" represent an inadequate substitute for an explanation that treats jurors as intelligent individuals and recognize the gravity of the role into which jurors are thrust.[108] In this respect, Hogg provides a compelling analogy: "As any parent knows, an edict not to do something will always have more force if it can be backed up with a justification – 'because I said so' rarely suffices."[109]

Thus, I submit that, while judicial instruction has the *potential* to effectively target both habitual Internet users and morally obligated jurors, the *CJC Instructions*, as currently structured, fall short on both fronts: they are both too vague and outdated to provide comprehensive warning to those who would engage in OJR out of habit, as well

---

[103] See MacPherson & Bonora, *supra* note 97 at 42.
[104] See Hoffmeister 2012, *supra* note 5 at 454.
[105] See *ibid* at 454; Lacy, *supra* note 99 at 178.
[106] Caren Myers Morrison, "Jury 2.0" (2010) 62:6 Hastings LJ 1579 at 1610.
[107] Nancy Steblay et al, "The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis" (2006) 30 L & Hum Behav 469 at 473.
[108] Manhas, *supra* note 5 at 821.
[109] Hogg, *supra* note 16 at 13.

as fail to provide a justification for the prohibition to satisfy morally obligated jurors. While trial judges retain discretion to alter or "beef up" model instructions with respect to OJR to address the criticisms articulated above,[110] judges are often reluctant to stray from or modify these model charges, given their approval and adoption by appellate courts.[111] Indeed, the *CJC Instructions* have been endorsed as authoritative on several occasions by the Supreme Court of Canada.[112] As a result, without amendments to address these deficiencies, the current warning provided to jurors regarding OJR is, in my view, insufficient to deter such behaviour.

5.3.2 JUDICIAL INSTRUCTION ON "SELF-POLICING"

The second preventative strategy used to deter OJR in Canada is instructing jurors to report any knowledge of misconduct to the trial judge. This is commonly referred to as "self-policing," as well the "watchdog" effect.[113] As discussed in detail in Chapter 2, when instances of OJR are detected, it is often due to them being reported by a juror who learns of a fellow juror's bad behaviour. Indeed, because jury secrecy prevents courts from investigating a jury's deliberative process, we have become "heavily reliant on the jury as a self-regulatory body."[114] As put by McGee, "[e]nforcement of the court's rules […] goes even beyond what the judge can do, and it is often left up to each juror to make sure that the others stay in line."[115]

To encourage jurors to report any knowledge of misconduct, model jury instructions will typically include explicit encouragement for jurors to inform the trial judge about any instances of independent research that come to their attention – i.e., an instruction to "self-police." The *CJC Instructions*, for example, instruct jurors that, if something occurs during the course of trial that could impact their ability to perform their duties as a juror, to write it down, put it in a sealed envelope, and deliver it to a court

---

[110] See Powell, *supra* note 66.
[111] See Artigliere, *supra* note 56.
[112] See e.g. see e.g. *R v Sundman*, 2022 SCC 31 at para 32; *R v Walle*, 2012 SCC 41 at para 64; *R v Layton*, 2009 SCC 36, para 2; *R v J.M.H.*, 2011 SCC 45 at para 25.
[113] See e.g. Hoffmeister 2015, *supra* note 5 at 992; Hoffmeister 2012, *supra* note 5 at 456.
[114] Haralambous, *supra* note 56 at 260.
[115] McGee, *supra* note 64 at 323.

official, who will then give it to the trial judge.[116] In addition, where the *Instructions* emphasize to jurors that telling anyone anything about their deliberations that has not been disclosed in open court constitutes a criminal offence under section 649 of the *Code*, they provide that an explicit exception exists for jurors to tell the trial judge about "any problems."[117]

There are undoubtedly benefits associated with a self-policing instruction. Primarily, it tends to encourage compliance with the OJR prohibition. Indeed, a self-policing instruction may have the effect of deterring jurors who would otherwise engage in OJR from doing so, given their awareness that the jurors have been instructed to monitor each other's behaviour.[118] Further, where jurors fail to heed the trial judge's warning and engage in OJR, a self-policing instruction may render such jurors less likely to reveal their findings to the group, out of fear of their misconduct being reported.[119] As noted by Hoffmeister, this avoids the entire jury being "tainted" by fruits of a single juror's improper investigation.[120]

Currently, however, there are issues with reliance on self-reporting, particularly in the Canadian context. First and foremost, the *CJC Instructions* lack specificity – they fail to explicitly pinpoint OJR as a juror behaviour that should be brought to the trial judge's attention. Instead, the instruction is vague, simply noting that jurors should let the trial judge know if "any problems"[121] or "something […] that may affect [their] ability to do [their] duty as a juror"[122] occurs during trial. This lack of specificity, I submit, decreases the likelihood of both juror vigilance with respect to improper online activity, as well as may lead to a disconnect between detected instances of OJR and jurors' obligation to self-report.

Further, as discussed in Chapter 2, there is evidence calling into question the effectiveness of self-reporting as a response to OJR. A 2010 study by Professor Cheryl

---

[116] *CJC Instructions*, *supra* note 34 at 6.2[2].
[117] *Ibid* at 6.2[1].
[118] See e.g. Hoffmeister 2012, *supra* note 5 at 456; Manhas, *supra* note 5 at 822.
[119] See Hoffmeister 2012, *ibid* at 456.
[120] *Ibid.*
[121] *CJC Instructions*, *supra* note 34 at 6.2[1].
[122] *Ibid*, 6.2[2].

Thomas of the University College London found that "[a] substantial proportion of jurors […] would not know or were uncertain what to do if something improper occurred while serving on the jury" and, further, that most jurors feel "strongly that they should not be allowed to discuss what is said in the deliberating room."[123] Jurors may refrain from reporting for reasons of self-interest – they may be afraid of being singled out for "breaking rank," or simply wish to avoid doing anything that may extend their jury service obligations.[124] In addition, jurors may be hesitant to report a fellow juror's misconduct out of fear of the misbehaving juror getting into trouble. As observed by Hoffmeister, "[f]or self-policing to work, jurors have to place the institution of the jury above their fellow jurors."[125]

What is more, reliance on self-policing may be especially questionable in the context of OJR. In a follow-up study conducted by Thomas in 2013, participating jurors were asked to indicate what they would do in various scenarios involving improper conduct occurring while serving on a jury. Thomas found that "almost all" jurors expressed that they would report more "traditional" forms of juror misconduct to the trial judge or another court official, such as where it becomes clear that contact or communication occurred between a fellow juror and a party involved in the case.[126] In contrast, the two scenarios where the highest proportion of jurors said they would not feel comfortable doing *anything at all* both related to improper online activity: 14% of participants noted they would not take action if a fellow juror introduced additional information into deliberations that had not been presented in the trial, while 10% reported that they would not feel comfortable reporting a fellow jurors' use of a mobile phone.[127]

This discrepancy, in my view, is likely the result of the fact that OJR, when compared to other traditional forms of juror misconduct, is not currently viewed by many as socially unacceptable. In the Digital Age, constant use of, and accessibility to, the Internet has been normalized. As discussed in the previous Chapter, the Internet has

---

[123] Cheryl Thomas, "Are juries fair?" (2010) UK Ministry of Justice Research Series 1/10 at 49.
[124] See Hoffmeister 2015, *supra* note 5 at 992; McGee, *supra* note 64 at 323.
[125] Hoffmeister 2015, *ibid* at 992.
[126] Thomas 2013, *supra* note 83 at 498.
[127] *Ibid* at 498-99.

become a "ubiquitous" presence in our daily lives,[128] particularly with respect to its use for information-gathering.[129] This has serious implications for jury trials, as jurors, like the larger population, have grown accustomed to reflexive reliance on the Internet as a primary source of information in their daily lives. As a result, jurors may not view online research with the same severity as they would other, more conventional infractions, such as discussing the case with outsiders or striking up a relationship with a party to the case or one of the lawyers, and, therefore, may be more reluctant to report such conduct. Put simply, the pervasive nature of digital technology has likely blurred the lines between acceptable and unacceptable behaviour in the jury context, leading to a diminished sense of gravity with respect to conducting OJR.

5.4 REMEDIAL MEASURES

Finally, I will now discuss the remedial measures available in Canada to target OJR. As noted by Harvey, these measures focus upon maintaining the accused's right to a fair trial, rather than directly tackling the root causes of the behaviour that they address – online research by jurors.[130] Remedial strategies do not address *any* of the underlying motivations for OJR. Instead, they seek to mitigate the impact of any unfairness that might result from jurors engaging in independent online research. In this sense, they respond to the potential *effects* of OJR, as opposed to the underlying cause(s). In this section, I discuss two remedial strategies: (1) electing judge-alone trials, and (2) the impeachment of jury verdicts/behaviour, resulting in either the discharge of individual jurors or the declaration of a mistrial (or, where misconduct goes undiscovered until after the jury's verdict has been rendered, an appellate finding of a miscarriage of justice).

[128] Russell B Clayton, Glenn Leshner & Anthony Almond, "The Extended iSelf: The Impact of iPhone Separation on Cognition, Emotion and Physiology" (2015) 20:2 J Computer-Mediated Comm 119 at 120.
[129] See e.g. Marder, *supra* note 40 at 629; Betsy Sparrow, Jenny Liu & Daniel M Wegner, "Google Effects on Memory: Cognitive Consequences of Having Information at Our Fingertips" (2011) 33:3 Science 776 at 776; Artigliere, *supra* note 56 at 627.
[130] Harvey, *supra* note 1 at 227.

5.4.1 ELECTING A JUDGE-ALONE TRIAL

I begin with a discussion of a remedial measure that may be utilized at the *outset* of criminal proceedings: the accused's option to elect a trial by judge alone. In Canada, most accused persons can elect their preferred mode of trial – in provincial court before a judge alone, in superior court before a judge alone, or in superior court before a judge and jury.[131] Indeed, despite section 471 of the *Code*, which provides that "[e]xcept where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury,"[132] the opportunity to elect gives accused persons considerable control over the manner in which their trial will be conducted. As a result, where an accused person is concerned about the risk that jurors will engage in OJR, in most cases, they have the option to choose to avoid a jury trial altogether.

However, not *every* accused person is granted an election. Indeed, in some cases, a jury trial will be required, even where the accused would prefer a trial by judge alone. Where an accused has been charged with an offence listed under section 469 of the *Code*, they are denied an election and must be tried before a jury. Section 469 offences are some of the most serious offences known to Canadian law, and include treason, crimes against humanity and, importantly, murder,[133] as well as conspiring to commit,[134] or being an accessory after the fact to,[135] murder. This is troubling, in light of the trial fairness concerns raised by OJR (as canvassed in detail in Chapter 3), given that convictions with respect to section 469 offences carry with them some of the highest penalties available under Canadian criminal law. For instance, a murder conviction carries with it a mandatory sentence of life imprisonment.[136] Further, these cases are often subject to heightened pre-trial publicity and discussion, including in the online sphere.[137]

---

[131] *Code*, *supra* note 11, ss 536(2), 536(2.1).
[132] *Ibid*, s 471.
[133] *Ibid*, s 469(a).
[134] *Ibid*, s 469(e).
[135] *Ibid*, s 469(b).
[136] *Ibid*, s 235(1).
[137] See Lauren Chancellor, "Public Contempt and Compassion: Media Biases and Their Effect on Juror Impartiality and Wrongful Convictions" (2019) 42:3 Man LJ 427 at 428.

The only mechanism currently available to secure a trial by judge alone when charged with a section 469 offence is found in section 473(1) of the *Code*.[138] The provision permits an accused charged with such an offence to be tried by judge alone, so long as they obtain the consent of the Attorney General. Additionally, the case law has developed such that, where the Attorney General does *not* consent, the accused can bring an application to the court for an order permitting a judge-alone trial.[139]

However, relief pursuant to section 473(1) is, in practice, extremely inaccessible. The case law demonstrates that Attorneys General rarely consent to these requests and, without such consent, a barrier forms between the accused and this remedy that is extremely difficult to penetrate. For a court to grant a judge alone trial, the accused is required to establish that "the time-honoured statutory and common law procedures designed to preserve and protect the right of every accused to a fair trial by an impartial tribunal are insufficient in the particular circumstances of his or her case."[140] This threshold has been described as "demanding"[141] and "difficult to meet,"[142] given that the *status quo* of jury trials for very serious cases "should not be interfered with lightly."[143] Indeed, in *R v Khan*, the Court of Appeal for Ontario observed that the test for a judge-alone trial "will not be an easy one to meet" and that the presumption that section 469 offences should be tried before a jury "should only be overridden in the clearest of cases."[144]

The utility of section 473(1) is rendered even more dubious when we consider what has *not* been deemed a sufficiently "clear" case: the second high-profile trial of Dennis Oland, which took place in Saint John, New Brunswick in 2018 after the first resulted in a mistrial. Oland was charged with second-degree murder in relation to the bludgeoning death of his father, Richard Oland, businessman and former executive of Moosehead Breweries Ltd. The Oland case has been recognized as the most highly

---

[138] *Code*, *supra* note 11, s 473(1).
[139] See *R v Biddersingh*, 2022 ONCA 6 at para 15.
[140] *R v Khan*, 2007 ONCA 779 at para 15.
[141] *R v Millard*, 2017 ONSC 6040 at para 14; *R v Oland*, 2018 NBQB 253 at para 63.
[142] *Biddersingh*, *supra* note 139 at para 16.
[143] *Khan*, *supra* note 140 at para 13.
[144] *Ibid* at para 16.

publicized criminal case in New Brunswick history[145] and, by the time his second trial was set to begin, Dennis Oland's alleged involvement in his father's death had already been the subject of significant news media coverage, a CBC "Fifth Estate" documentary, two books, and extensive social media commentary.[146]

Due to this nearly unheard-of level of pre-trial publicity, Oland sought a trial by judge alone under section 473(1) of the *Code*. To support the claim, Oland's counsel commissioned a public opinion poll, which not only showed that 27% of general respondents in the Saint John area believed Oland to be guilty, but also that 46% of those who indicated they would "very much" like to serve on his jury believed he was guilty.[147] And yet, the trial judge dismissed Oland's application on the basis that he was not convinced a fair and impartial jury could not be empanelled.[148]

While Oland was ultimately granted a judge alone trial, it was on different grounds; the trial judge eventually decided to hear the case on their own after a mistrial was declared during jury selection due to improper jury vetting by members of the Saint John police department.[149] However, considering the incredible notoriety of the Oland case, it raises the question: if Dennis Oland's murder trial was not one of "the clearest of cases," what sort of extraordinary circumstances are required to access this remedy? Indeed, I submit that the high bar created by section 473(1), in effect, largely takes the "life" out of the remedy and severely reduces its utility in practice.

Further, even where an accused person can "elect out" of a jury trial, the question becomes whether it is fair that they might feel pressured to do so on account of trial fairness concerns posed by OJR. The right to a trial by jury has long been viewed as a privilege enjoyed by accused persons. Indeed, Sir William Blackstone described the jury as "the glory of the English law" and "the most transcendent privilege which any subject

---

[145] Bobbi-Jean MacKinnon, "Dennis Oland defence tried to get judge-alone trial a year ago" *CBC* (21 November 2018), online: <https://www.cbc.ca/news/canada/new-brunswick/dennis-oland-survey-guilt-jury-judge-1.4911710>.
[146] *Oland*, *supra* note 141.
[147] MacKinnon, *supra* note 145.
[148] *Oland*, *supra* note 141 at para 119.
[149] Chris Morris, "Mistrial declared in Dennis Oland murder retrial after police 'improprieties'" *CTV* (20 November 2018), online: <https://atlantic.ctvnews.ca/mistrial-declared-in-dennis-oland-murder-retrial-after-police-improprieties-1.4184485>.

can enjoy."[150] In more recent years, Canadian courts have adopted a similar outlook. In *R v Turpin*, the Supreme Court of Canada described trial by jury as an "important right" in which individuals "have historically *enjoyed* in the common law world."[151] Similarly, in *R v Kokopenace*, an accused's right to be tried by a jury of their peers was noted to be "one of the *cornerstones* of our criminal justice system."[152] Most recently, in *R v Stillman*, the Court observed that, "at the individual level," trial by jury serves a protective function of "*utmost* importance."[153] This privilege has attained constitutional status in the age of the *Charter*,[154] enshrined in both section 11(d),[155] which guarantees the right to a fair trial by an independent and impartial trier of fact, as well as section 11(f),[156] which guarantees the "benefit" of trial by jury.

The long-standing endorsement of the institution of the jury as a privilege to be "enjoyed" by accused persons is unsurprising, given the beneficial qualities associated with juries as decision-making bodies. Juries have been noted as being superior factfinders, due to their collective approach to decision-making. Twelve minds work together to recall and scrutinize evidence: as observed by the Law Reform Commission of Canada in its 1980 Working Paper on criminal juries, "[w]hat was insignificant and forgotten by one juror, will be significant to another, and will be remembered."[157] Further, the collective life experiences a jury brings to a criminal case tends to "represent […] a spectrum of society," providing a stronger basis for the evaluation of human behaviour in which a trier of fact must engage.[158] In addition, the jury can serve a protective purpose by acting "as the final bulwark against oppressive laws or their

---

[150] William Blackstone, *Commentaries on the Laws of England, Volume 3*, 8th ed (1778) at 379.
[151] *R v Turpin*, [1989] 1 SCR 1296, 48 CCC (3d) 8 (emphasis added).
[152] *R v Kokopenace*, 2015 SCC 28 at para 1 (emphasis added).
[153] *R v Stillman*, 2019 SCC 40 at para 28 (emphasis added).
[154] See *Kokopenace*, *supra* note 152 at para 1.
[155] *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[156] *Ibid*, s 11(f).
[157] Law Reform Commission of Canada, *The Jury in Criminal Trials, Working Paper 27* (Ottawa: Department of Justice Canada, 1980) ["LRC"] at 6.
[158] *Ibid*. See also *R v Sherratt*, [1991] 1 SCR 509.

enforcement."[159] Indeed, through its nullification power, the jury can shield the accused from the fallout of any potential abuse by the Crown.[160]

Given these benefits, it is difficult, in my view, to characterize the ability to "elect out" of having a jury trial as a legitimate remedial measure to combat OJR. The idea that an accused would decide against trial by jury simply to avoid the potential unfairness posed by OJR should not be viewed as defence strategy; instead, I submit, it should be viewed as a failure of the justice system because it denies the accused the ability to enjoy the full benefit of trial by jury as imagined within the common law tradition. Indeed, if concerns with respect to OJR did not exist, an accused might prefer to retain the jury as their trier of fact and, with it, the critical benefits canvassed above. If threat of OJR, alone, would prompt an accused person to forego these benefits, it highlights a systemic problem that needs addressing, rather than a legitimate choice on the part of the accused.

5.4.2 IMPEACHING JURY VERDICTS/BEHAVIOUR

The remaining remedial measures to combat OJR are only engaged once evidence of misconduct has been discovered. As discussed in Chapter 2, the jury secrecy rule prevents jurors from disclosing any statements made, opinions expressed, arguments advanced, or votes cast throughout the course of their deliberations.[161] However, as observed by the Court of Appeal for Ontario in *R v Bains*, "despite the combined force of the common law secrecy rule and s. 649 of the *Criminal Code*, the impeachment of jury verdicts is not a mere shibboleth devoid of substance."[162] Evidence indicating that the jury may have been exposed to extraneous information or influence is admissible for the purpose of considering whether it could reasonably affect the jury's decision-making process.[163] In other words, the jury secrecy rule does not render inadmissible evidence of

[159] See *Sherratt*, *ibid*.
[160] See LRC, *supra* note 157 at 12.
[161] See *R v Pan; R v Sawyer*, 2001 SCC 42 ["*Pan SCC*"] at para 59.
[162] *Bains*, *supra* note 69 at para 68.
[163] See *Pan SCC*, *supra* note 161 at para 59.

facts, statements or events *extrinsic* to the deliberation process, whether originating from a juror or from a third party, that may taint the jury's verdict.[164]

This includes evidence that a juror (or multiple jurors) engaged in independent online research.[165] Where evidence of OJR is discovered *prior* to the jury's verdict being rendered, the trial judge will conduct an inquiry and assess whether it is suitable for individual offending jurors or, indeed, the jury as a whole, to move forward with the trial.[166] Where, on the other hand, evidence of OJR is not discovered until *after* the verdict has been delivered, the trial judge's inquiry will be conducted with the aim of creating a record for appellate review. An appellate court will then examine that record to determine whether there was an irregularity and, if so, its potential impact on the jury.[167] The relevant question, regardless of the point in proceedings in which an irregularity is discovered, is whether there is a reasonable possibility that the information discovered through a juror's online investigation influenced the jury's decision-making process.[168] Where a jury verdict is impeached on the basis of OJR, there are three remedial measures which may be invoked: (1) the discharge of the offending juror from the *petit jury*; (2) the declaration of a mistrial; or (3) an appellate finding of a miscarriage of justice. I will now discuss each measure in further detail.

Where evidence surfaces that a juror has engaged in OJR, the trial judge may exercise their discretion to remove the offending juror from the *petit jury*. Section 644(1) of the *Code* provides that "[w]here in the course of a trial the judge is satisfied that a juror should not, by reason of illness *or other reasonable cause*, continue to act, the judge may discharge the juror."[169] Trial judges have broad discretion under section 644(1), reflected in the manner in which the courts have interpreted the phrase "other reasonable cause": namely, as "any cause that could reasonably affect a juror's ability to discharge the duties of a juror in a competent and impartial manner."[170] Indeed, as observed by the Court of

---

[164] *Ibid* at para 77.
[165] See *Bains*, *supra* note 69 at para 68.
[166] *Ibid* at para 72.
[167] *Ibid*.
[168] *Ibid* at para 73; *Pan SCC*, *supra* note 161 at para 59.
[169] *Code*, *supra* note 11, s 644(1).
[170] *R v Kossyrine*, 2017 ONCA 388 at para 50. See also *R v Budai*, 2001 BCCA 349 at para 39; *R v Wolfe*, 2005 BCCA 307 at para 5; *Pan ONSC*, *supra* note 5 at para 33.

Appeal for Ontario in *R v Giroux*, the language "is broad enough to encompass a situation where the conduct of a juror threatens to interfere with the integrity of the jury process and the ability of the jury to carry out its deliberations."[171] If a trial judge becomes aware of circumstances that indicate a juror may have engaged in misconduct, they will conduct an inquiry into the alleged incident to determine whether there is reasonable cause to dismiss the juror in question.[172] This includes whether there is evidence to suggest that a juror has engaged in OJR.[173] If, at the end of the inquiry, the trial judge concludes that the juror's OJR – and, by extension, exposure to extraneous information – could reasonably affect their ability to discharge the duties of a juror in a competent and impartial manner, they have the authority to dismiss the juror from service.[174]

Alternatively, where it becomes clear that a jury has been exposed to extraneous information as a result of OJR, the trial judge may conduct an inquiry to determine whether a mistrial should be declared. Similarly, where the contamination is only discovered in the aftermath of a verdict being rendered, an appellate court may set aside a conviction and order a new trial. In both situations, the inquiry is the same: whether the jury's exposure to the extraneous information denied the accused a fair trial and, thus, can properly be characterized as a miscarriage of justice.[175]

Mistrials, in general, are a remedy of "last resort," only to be granted in the "clearest of cases."[176] Put another way, a mistrial will only be appropriate where no other remedy, short of a new trial, will adequately address the actual harm that has been caused.[177] In the context of jury interference, including instances of OJR, the key question is whether it is likely that the jurors' exposure to extraneous information could have affected the jury to the point that the entire trial was compromised.[178] To make this determination, courts will consider, among other things, the extent to which the jurors

---

[171] *R v Giroux* (2006), 207 CCC (3d) 512 (Ont CA) at para 30.
[172] See e.g. *Wolfe, supra* note 170 at para 5; *Giroux*, *ibid* at para 4; *Bains*, *supra* note 69 at para 72.
[173] See e.g. *Ampadu*, *supra* note 77; *Schirmer*, *supra* note 79; *R v Graham*, 2020 ONSC 3901.
[174] See *Kossyrine*, *supra* note 170 at para 50; *Budai*, *supra* note 170 at para 39.
[175] See generally *Khan*, *supra* note 140 at para 27; *R v Burke*, 2002 SCC 55 at para 75; *R v Chiasson*, 2009 ONCA 789 at para 14. In the context of OJR, see *Bains*, *supra* note 69 at para 88-91; *Schirmer*, *supra* note 79 at para 20; *Ampadu*, *supra* note 77 at para 133; *Pan ONSC*, *supra* note 5 at para 30.
[176] See e.g. *R v Toutissani*, 2007 ONCA 773 at para 9; *R v Karim*, 2010 ABCA 401 at para 27.
[177] See *Toutissani*, *ibid*; *Pan ONSC*, *supra* note 5 at para 30.
[178] *Pan*, *ibid*; *Ampadu*, *supra* note 77 at para 130.

actually reviewed and discussed the extraneous material, the length of time it was available, and the relationship of the extraneous information to the contested issues at trial.[179]

5.4.2.1 THE PROBLEM WITH IMPEACHMENT

While these various forms of impeachment may appear to be fruitful vehicles through which OJR may be addressed, I submit that there are multiple issues inherent in reliance on this remedial strategy. The primary concern with respect to impeachment, regardless of the form it takes, is that it only works when misconduct is *detected*.[180] Indeed, because impeachment fails to target any of the underlying motivations for OJR, the point of the strategy is not to produce a decrease in such misconduct.[181] Instead, it provides a means to *ameliorate* the trial fairness concerns posed by the misconduct once discovered. In theory, there is nothing wrong with approaching the OJR problem in this fashion. Unfortunately, however, as discussed in Chapter 2, there is consensus that OJR is a severely underreported phenomenon,[182] with reported cases representing "the *bare minimum* of cases of misconduct of this kind."[183] Indeed, as remarked by Browning & Meter, there is likely a "sizeable iceberg under the surface comprised of undiscovered instances of online juror misconduct."[184] Consequently, the efficacy of impeachment as a solution is inherently limited – it relies directly on the detection of conduct that often goes unnoticed.[185]

Further, even in cases where OJR *is* detected, these measures come at a high price, both financial and emotional. For one thing, mistrials represent a hefty financial burden on the criminal justice system. Indeed, several critics of mistrials as a legitimate

---

[179] See *Bains*, *supra* note 69 at paras 99-106.
[180] See Bell, *supra* note 37 at 86.
[181] *Ibid*.
[182] See e.g., *ibid*, fn 38; Tasmania Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Final Report No 3, January 2020) at 32; John G Browning & Arjen J Meter, "Googling a Mistrial: Online Juror Misconduct in Alabama" (2022) 14:1 Faulkner L Rev 67 at 69-70.
[183] Tasmania Law Reform Institute, *ibid* at 32 (emphasis added).
[184] Browning & Meter, *supra* note 182 at 69-70.
[185] See Bell, *supra* note 37 at 86.

solution for addressing OJR have emphasized how prohibitively expensive they are.[186] While there are currently no published figures as to the precise cost of mistrials in Canada, in the case law, the price has been described as "tremendous."[187] Legislative choices by Parliament are also informative. Section 653.1 of the *Code*, for instance, states that, in the event of a mistrial, rulings relating to the *Charter* or the disclosure or admissibility of evidence made during the original trial are binding in any new trial, so long as they were made (or could have been made) before the stage at which evidence on the merits was presented.[188] This provision was part of the 2011 *Fair and Efficient Criminal Trials Act* [189] and was created to minimize the consequences of mistrials on court resources.[190]

Figures from other jurisdictions are also demonstrative. In 2010, the San Francisco Office of Court Research estimated the daily cost to operate a California criminal courtroom to be approximately US$2,500.[191] The price tag rises significantly when a jury is involved. In 2012, the estimated cost for running an Australian jury trial was around AUD$8000 per day.[192] More recently, in 2021, the United States Attorney's Office reported that it cost over USI$11,000 to empanel a jury in the state of New Jersey.[193] In addition, it is important to consider the cost of *prosecuting* an accused person, particularly in long, complex cases. For example, by the time the 2009 Florida pharmaceutical drug trial of Frank Hernandez and others was upended after several jurors admitted to engaging in OJR, it was estimated that the government had already spent "millions of dollars, easily" prosecuting the case.[194]

---

[186] See e.g. Hoffmeister 2012, *supra* note 5 at 413, 454-55; Manhas, *supra* note 5 at 823-24; Bell, *supra* note 37 at 86; McGee, *supra* note 64 at 306-07.
[187] See *R v Pickton*, 2007 BCSC 1293 at para 3.
[188] *Code*, *supra* note 11, s 653.1
[189] *Fair and Efficient Criminal Trials Act*, SC 2011, c 16.
[190] See e.g. *R v Victoria*, 2018 ONCA 69 at para 49; *R v Windebank*, 2014 ONSC 5135 at para 5.
[191] See McGee, *supra* note 64, fn 49.
[192] See Lisa Davies, "Lesson for jurors: how to avoid a mistrial" *Sydney Morning Herald* (14 May 2012), online: <https://www.smh.com.au/national/nsw/lesson-for-jurors-how-to-avoid-a-mistrial-20120514-1yltw.html>.
[193] See Jim Walsh, "Juror fined, found in criminal contempt after causing mistrial" *Courier Post* (29 June 2021), online: <https://www.courierpostonline.com/story/news/2021/06/29/juror-misconduct-mistrial-camden-federal-court-kugler/7802008002/>.
[194] See Deirdra Funcheon, "Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies" *Broward Palm Beach New Times* (23 April 2009), online:

In addition, mistrials are costly for the parties involved. The financial burden on the accused is obvious – as noted by McGee, when a large amount of money is poured into a trial, whether for legal fees or hiring expert witnesses, where the jury proceeds to reach its verdict based on extraneous evidence, "all of these resources become completely wasted."[195] However, the *emotional* price paid when a mistrial occurs cannot be underestimated. Both the accused and victim are denied finality. Witnesses are forced to go through the often-traumatizing exercise of testifying a second time. Indeed, the partner of the deceased victim in the upended trial Toronto trial of Calvin Nimoh, who was forced to re-testify after a mistrial was declared, publicly stated that "every prospective juror should consider the anguish that can result from mistrials caused by googling."[196]

We tolerate these costs – both financial and emotional – as unavoidable consequences of our commitment to justice. Indeed, as observed by McGee, "[a]lthough our adversarial system involves huge transaction costs, the extremely high premium placed on the system's truth-finding properties causes society to tolerate these expenditures."[197] However, given the significant costs associated with impeachment, measures that effectively eliminate/curb juror misbehaviour are preferable, as opposed to reactive measures, only capable of addressing problematic behaviour once discovered. Put simply, impeachment, because of its inability to address the root causes of OJR, merely constitutes a "band-aid" remedy. As observed by Manhas, because of this, "our system should ideally be able to depend on other rules eliminating and channeling juror action" so that retrials, and the consequences that accompany them for both the system and the parties involved, may be kept to a minimum.[198]

5.5 CONCLUSION

As demonstrated in this Chapter, there are a myriad of responses currently available under Canadian law to tackle jurors' inclination to engage in independent online

<https://www.browardpalmbeach.com/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies-6326977>.
[195] McGee, *supra* note 64 at 306-07.
[196] Powell, *supra* note 66.
[197] McGee, *supra* note 64 at 306-07.
[198] Manhas, *supra* note 5 at 823-24.

research. These range from deterrent measures, such as sequestration or the confiscation of electronic devices, which impose some sort of sanction upon jurors; to preventative measures, such as instructions to refrain from engaging in OJR, as well as to "self-police," which use education as a vehicle to influence jurors' behaviour; to remedial measures, such as electing a judge-alone trial or impeaching the jury's verdict, which largely focus upon the preservation of the accused's right to a fair trial.

Unfortunately, while there are benefits associated with each of these strategies (albeit some attracting more benefits than others), they are also each subject to their own pitfalls. These weaknesses, in my view, stem primarily from the inability of each strategy to effectively target, whether directly or indirectly, jurors' underlying motivation(s) for engaging in independent online research in the first place. Because of this deficiency, the strategies canvassed, both individually and collectively, fall short of what is required to truly mitigate the trial fairness risks OJR poses. This, I submit, is unacceptable – a more targeted and, ultimately, effective approach to combating OJR is required. This is exactly what I aim to provide in the final Chapter of this project: a comprehensive set of proposed reforms to our criminal jury procedure that will meaningfully address the pressing issue of OJR in Canada.

CHAPTER 6: DISCUSSION: PROPOSING SOLUTIONS TO ADDRESS ONLINE JUROR RESEARCH

6.1 MOVING FORWARD: A FORK IN THE ROAD

To this point, my goal has been to highlight online juror research ["OJR"] as a significant concern within the context of criminal trials. I have done so by examining its prevalence, discussing its serious implications for trial fairness (particularly with respect to racialized accused), exploring its underlying motivations, and, finally, critiquing Canada's current approach to targeting it as largely unresponsive to these motivations. It is at this point that the project shifts, in the sense that I will now consider potential *solutions* to the OJR problem. Based on my findings thus far, I submit that we have reached a metaphorical "fork in the road." As canvassed in Chapter 2, evidence suggests that OJR is a relatively frequently occurring phenomenon in Canada. Given the profound trial fairness implications of OJR, as discussed in Chapter 3, combined with the inadequacy the tactics surveyed in Chapter 5, it appears that two options remain: eliminating juries altogether in criminal matters or adopting further viable strategies to *meaningfully* address OJR.

The former option is both unrealistic and, in my view, undesirable. As highlighted in the previous Chapter, the right to a trial by jury is constitutionally entrenched in Canada by virtue of section 11(f) of the *Charter*, which guarantees the right to a jury trial in any case where the offence for which the accused is being tried is subject to a maximum penalty of five years or greater.[1] Because of this entrenchment, abolishing juries would be an extremely difficult task, one which could only be accomplished through constitutional amendment or, conceivably, use of the notwithstanding clause, both of which are unlikely to occur.[2] As a result, there has long been consensus that juries

---

[1] *Canadian Charter of Rights and Freedoms*, s 11(f), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[2] See e.g. Peter Sankoff, "Rewriting the *Canadian Charter of Rights and Freedoms*: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process" (2008) 40 SCLR 349 at 366-67; Kazi Stastna, "Jury duty: Unfair burden or civic obligation?" *CBC* (8 November 2011), online <https://www.cbc.ca/news/canada/jury-duty-unfair-burden-or-civic-obligation-1.994514#:~:text=Some%20in%20the%20legal%20community,voting%20in%20an%20election%20does.>.

are here to stay.[3] Professor Peter Sankoff, for instance, describes the criminal jury as "effectively immutable" and observes there to be "little room for future debate on the role of the jury in Canada."[4] Indeed, Sankoff goes on to surmise that "we are forever locked into the jury process as the primary option for resolving serious criminal trials."[5] Similarly, Professor Steven Penney has observed that, because of the elevated constitutional status of juries, "any changes that you do see to the jury system in Canada are going to be incremental as opposed to radical."[6] The courts have taken a similar position. Indeed, the Supreme Court of Canada has held that, given the constitutional status of juries, they "*will* continue to be an important component of our criminal justice system."[7] Similarly, in *R v Parks*, Doherty JA of the Court of Appeal for Ontario noted that, despite the "longstanding debate" as to the jury's suitability as an adjudicative body, our system *requires* us to accept the jury system as effective.[8]

In addition to the formidable challenge, and perhaps *impossibility*, of abolishing juries in the criminal context, I further submit that doing so would be an undesirable course of action. The jury has consistently been recognized as "a vital component of our criminal justice system."[9] Indeed, as Khakhar reminds us, "it is necessary to recognize the fundamental role of the jury in the enforcement and application of law, as well as its societal support."[10] Jury trials provide several benefits, particularly for accused persons. As discussed in Chapter 5, juries have been recognized as superior factfinders.[11] Further, the collective nature of jury decision-making infuses "community values" into the criminal justice system[12] and, thus, may result in greater confidence by the accused that their trier of fact will be "capable of understanding their lived experiences, adding a

---

[3] See e.g. Edson L Haines, "Criminal and Civil Jury Charges" (1968) 46:1 Can B Rev 48 at 51; Sankoff, *ibid* at 361-68; Nik Khakhar, "'Reviewing Our Peers': Evaluating the Legitimacy of the Canadian Jury Verdict in Criminal Trials" (2022) 80:1 UT Fac L Rev 42 at 66.
[4] Sankoff, *ibid* at 365-66.
[5] *Ibid* at 367.
[6] See Stastna, *supra* note 2.
[7] *R v Pan; R v Sawyer*, 2001 SCC 42 [*Pan*] at para 83 (emphasis added).
[8] *R v Parks* (1993), 15 OR (3d) 324, 84 CCC (3d) 353 (CA).
[9] *Pan*, *supra* note 7 at para 41. See also *R v Sherratt*, [1991] 1 SCR 509, 63 CCC (3d) 193; *R v Cinous*, 2002 SCC 29 at para 193; *R. v G. (R.M.)*, [1996] 3 SCR 362 at paras 13-14, 110 CCC (3d) 26.
[10] Khakhar, *supra* note 3 at 65.
[11] See e.g. Law Reform Commission of Canada, *The Jury in Criminal Trials, Working Paper 27* (Ottawa: Department of Justice Canada, 1980) [LRC] at 6; *Sherratt*, *supra* note 9.
[12] See e.g. LRC, *ibid* at 10; *Sherratt*, *ibid*.

necessary human counterbalance to the professionalization of the criminal trial."[13] However, the continued use of juries also benefits society at large. Juries serve an "educative function," in the sense that they tend to increase the public's knowledge of criminal law.[14] Finally, citizen participation has been found to produce greater societal trust in the justice process, along with heightened confidence in criminal verdicts.[15] It would be regrettable to forfeit these benefits due to concerns about OJR, particularly if reforms could be tailored to address the trial fairness concerns stemming from the practice.

That is what I set out to do in this Chapter: present novel strategies which, if implemented, could better address the issue of OJR in Canada. These strategies seek to address both the underlying motivations for OJR, as outlined in Chapter 4, as well as the weaknesses in Canada's current approaches, as identified in Chapter 5. Importantly, no single reform will adequately address *all* possible motivations for OJR, nor provide solutions for the weaknesses inherent in *all* approaches. Further, in designing a strategy to address OJR, there is more than one goal in play – we want to both *prevent* OJR from being conducted in the first place, as well as to *detect* it in cases where it does occur. These are two very different objectives and, thus, will require varied responses. Thus, I advocate in favour of a myriad of approaches which, I submit, would work *together* to best target the problem. Indeed, as observed by Manhas, in tackling online juror misconduct, "[t]he goal is to create a more *robust* system that better addresses the consequences of pervasive internet use."[16]

In this Chapter, the following five proposed reforms are explored: (1) routinely permitting an Internet-use-based challenge for cause; (2) modifying the jurors' oath/affirmation to contain an explicit promise to refrain from engaging in independent research; (3) updating the Canadian Judicial Council's *Model Jury Instructions* [*CJC Instructions*]; (4) expanding jurors' ability to ask questions; and (5) criminalizing

---

[13] Khakhar, *supra* note 3 at 65.
[14] See e.g. LRC, *supra* note 11 at 13; *Sherratt*, *supra* note 9.
[15] See e.g. LRC, *ibid* at 15-16; *Sherratt*, *ibid*; Stastna, *supra* note 2.
[16] Robbie Manhas, "Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms" (2014) 112:5 Mich L Rev 809 at 829 (emphasis added).

independent research by jurors. Collectively, these reforms represent an attempt to meaningfully address the risk of OJR across *all* stages of proceedings, in line with Marder's "process view" of juror education,[17] an approach to addressing online juror misconduct which recognizes every stage at which the court or trial judge interacts with jurors as an opportunity to educate them about their obligations. Indeed, as Marder explains:

> Informing jurors about the dangers posed by the Internet and social media should not be limited to a one-shot effort on the part of the court, as is currently practiced in many courtrooms today. Rather, courts need to view juror education as an ongoing process. They need to make use of every stage and every judge-jury or court-jury interaction, and view it as an opportunity to reinforce the lesson that jurors must refrain from using the Internet.[18]

I submit that, together, these reforms align with Marder's vision. Not only would they serve as periodic reminders as to the limits placed on jurors' Internet-use during trial but would also employ *diverse* strategies to target different motivations for independent research, as well as to detect instances of such misconduct.

6.2 AN INTERNET-USE-BASED CHALLENGE FOR CAUSE

My initial proposal relates to the jury *selection* process: the routine allowance of an Internet-use-based challenge for cause. This challenge would centre on prospective jurors' self-assessment of their ability to refrain from inappropriate Internet-use during trial. Such challenges, not unlike challenges for cause responding to substantial pre-trial publicity, would properly find their footing in the *Criminal Code*'s existing challenge for cause scheme: namely, as an exploration of potential partiality.[19] In this section, I argue that Internet-use-based challenges fit squarely within the established scheme for partiality-based challenges, as outlined by the Supreme Court of Canada in *R v Find*,[20] as

---

[17] See Nancy S Marder, "Jurors and Social Media: Is a Fair Trial Still Possible" (2014) 67:3 SMU L Rev 617 at 649.
[18] *Ibid.*
[19] See *Criminal Code*, RSC 1985, c C-46 [*Code*], s 638(1)(b).
[20] *R v Find*, 2001 SCC 32.

well as that, in light of recent developments in challenge for cause jurisprudence, such challenges should be permitted routinely, as opposed to exceptionally.

To begin, it is worth noting that such an approach would align with current strategies for combating OJR within the common law world. In the United States, for instance, potential jurors' Internet habits are regularly examined at the *voir dire* stage of jury selection, which involves the screening of potential jurors through comprehensive, often "interrogative"[21] questioning about their personal characteristics, such as their marital status, occupation, prior knowledge of the case, and any previous contact with the criminal justice system.[22] The main purpose of the *voir dire* examination is to determine whether a potential juror may be biased, prejudiced, or unqualified.[23] American trial judges and lawyers often utilize the *voir dire* process to question prospective jurors about their ability to refrain from communicating about the trial online or conducting independent online research,[24] as well as their general online presence.[25] Hoenig, for instance, endorses a "[g]ood, solid *voir dire* of prospective jurors" on their online activity, observing that counsel "may need to do more to identify the serious bloggers and tweeters, the veteran Internet surfers, much as they explore other behaviorisms."[26]

However, in Canada, we have rejected the American approach to jury selection where "every jury panel is suspect" and "[e]very candidate for jury duty may be challenged and questioned as to preconceptions and prejudices on any sort of trial."[27] Instead, we are much more limited in our ability to challenge potential jurors for cause. This is because the Canadian jury selection process operates under the presumption that

---

[21] Roxanne Burd & Jacqueline Horan "Protecting the right to a fair trial in the 21st century - has trial by jury been caught in the world-wide web?" (2012) 36 Crim LJ 103 at 118.
[22] See Marder, *supra* note 17 at 651-52.
[23] See Amanda McGee, "Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms" (2010) 30 Loy LA Ent L Rev 301 at 318.
[24] See e.g. *ibid* at 317-18; Marder, *supra* note 17 at 652.
[25] See e.g. Grant Amey, "Social Media and the Legal System: Analyzing Various Responses to Using Technology from the Jury Box" (2010) 35:1 J Legal Prof 111 at 128-29; Manhas, *supra* note 16 at 825.
[26] Michael Hoenig, "Juror Misconduct on the Internet" (2009) 242 NYLJ 3 at 4.
[27] *R v Williams*, [1998] 1 SCR 1128 at para 12, 124 CCC (3d) 481. See also *R v Chouhan*, 2021 SCC 26 at para 120.

candidates for jury duty are impartial and, thus, capable of "deciding the case on the evidence without regard to personal biases."[28]

Thus, while the *Criminal Code* empowers both the accused and the prosecutor to bring forth "any number" of challenges for cause against prospective jurors,[29] grounds of challenge are limited to those provided in section 638(1).[30] Most of these grounds concern whether potential jurors are qualified to serve, such as lack of Canadian citizenship,[31] language barriers,[32] or prior convictions for criminal offences.[33] However, by far the most *common* ground for bringing a challenge for cause[34] is partiality: an accusation that a potential juror is "not indifferent" to the outcome of the case.[35] As observed by the Court in *R v Williams*, partiality, in this context, refers to "the possibility that a juror's knowledge or beliefs may affect the way he or she discharges the jury function in a way that is improper or unfair to the accused."[36]

Bringing a challenge for cause on this ground involves a two-step process. First, the trial judge, acting as a gatekeeper, determines whether a given challenge question, which must go to an issue relevant to partiality, may properly be put to either an individual juror or to the entire panel.[37] This will only be permitted where the challenger displaces the presumption of juror objectivity by establishing a "realistic potential" for partiality.[38] Establishing a realistic potential for partiality generally requires satisfying the court both that "widespread bias" exists in the community and that "some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision."[39] As held by the Court in *R v Find*, these two requirements reflect,

---

[28] *Parks*, *supra* note 8. See also *Williams*, *ibid* at para 13; *Find, supra* note 20 at para 26; *R v Spence*, 2005 SCC 71 at para 21.
[29] *Code*, *supra* note 19, s 638(1).
[30] *Ibid*, s 638(2).
[31] *Ibid*, s 638(1)(d).
[32] *Ibid*, s 638(1)(f).
[33] *Ibid*, s 638(1)(c).
[34] See *Hubbert v R* (1975), 11 OR (2d) 464, 29 CCC (2d) 279 (CA).
[35] *Code*, *supra* note 19, s 638(1)(b).
[36] *Williams*, *supra* note 27 at para 9.
[37] See *Parks*, *supra* note 8.
[38] See *Williams*, *supra* note 27 at paras 13-14; *Spence*, *supra* note 28 at para 23; *Find*, *supra* note 20 at para 25.
[39] *Find*, *ibid* at para 32.

respectively, the "attitudinal" and "behavioural" components of partiality.[40] If the trial judge is satisfied and permits the challenge for cause, the question then becomes whether the potential juror(s) in question will be able to *set aside* their bias and undertake their duty as a juror in an impartial manner.[41]

I submit that OJR fits into the above-described challenge for cause scheme, in the sense that the practice creates a "realistic potential" for juror partiality. Indeed, as discussed in detail in Chapter 3, perhaps the biggest trial fairness concern posed by OJR is its negative impact on the accused's constitutional guarantee of an impartial trier of fact: when jurors engage in OJR, they risk exposing themselves to and, indeed, relying upon, prejudicial, irrelevant, or completely inaccurate information that has "completely evade[d] the safeguards of the judicial process."[42] In line with the language used by the Court in *Find*, the practice creates the potential for "bias" among jurors. While the "bias" stemming from OJR is clearly different from more *obvious* forms of bias upon which a party may raise a partiality challenge (such as say, racial prejudice), it is still, nonetheless, a pressing concern, albeit an indirect one – it serves as a "vehicle" for partiality within the jury pool and, ultimately, the *petit jury*. In this sense, OJR may be likened to another indirect source of bias that has *long* been recognized as constituting a valid basis for a partiality challenge: pre-trial publicity,[43] which, like OJR, has the potential to influence jurors' perceptions of the parties and evidence.

With respect to the "attitudinal" component of partiality, this project (and, in particular, Chapter 2) has presented substantial evidence that OJR is a widespread concern in Canada. Indeed, on a general level, extensive and pervasive use of the Internet across this country is "capable of immediate and accurate demonstration."[44] Approximately 95% of Canadians are Internet-users, with that figure jumping to nearly

---

[40] *Ibid.*
[41] See generally *Williams*, *supra* note 27.
[42] *United States v Resko*, 3 F 3d 684, 690 (3d Cir 1993). See also Manhas, *supra* note 16 at 812; Oscar Battell-Wallace, "No Search Results in Fairness: Addressing Jurors' Independent Research in the 21st Century" (2018) 49:1 Victoria U Wellington L Rev 83 at 86.
[43] See e.g. *Sherratt*, *supra* note 9; *R v Merz* (1999), 46 OR (3d) 161, 140 CCC (3d) 259 (CA); *R v Keegstra*, 1991 ABCA 97; *R v Pietrangelo* (2001), 152 CCC (3d) 475 (Ont CA).
[44] *Find*, *supra* note 20 at para 48.

100% for those below the age of 45.[45] Screen time is high – Canadian adults average 3.2 hours per day,[46] with 27% of Canadians spending over *twenty* hours of free, non-work-related time per week online.[47] As articulated in Chapter 2, these high rates of Internet use (both generally and for the specific purpose of information-seeking and consumption), in combination with reported instances of OJR (both in Canada and across the common law world) and existing empirical data on jurors' Internet use during service, suggest that OJR is a phenomenon that likely occurs at least *somewhat* regularly in Canadian jury trials, perhaps even *commonly*.

In addition, in line with the "behavioural" component of partiality under the challenge for cause regime, previous Chapters within this project have established that some jurors will be incapable of refraining from engaging in OJR, despite existing trial safeguards. Much of this has to do with the weaknesses inherent in the tactics currently used in Canada to address OJR, as canvassed in detail in Chapter 5. This includes both those aimed at *preventing* OJR, such as sequestration, the confiscation of electronic devices, and judicial instruction, as well as those which seek to *detect* incidents of OJR, such as instructing jurors to "self-police." Further, even if the frailties of these measures were to be addressed, or novel measures (such as, for instance, those advocated for in this Chapter) to be implemented, as discussed in Chapter 4, there are still portions of the juror population that would likely be either unable or unwilling to refrain from engaging in OJR. This includes the not-insignificant portion of the population that experiences a legitimate addiction to the Internet,[48] as well as so-called "recalcitrant" jurors, who simply *refuse* to abide by the prohibition. Finally, as a matter of common sense, the fact

---

[45] See Statistics Canada, *Internet use by province and age group*, Table No 22-10-0135-01 (Ottawa: Statistics Canada, 2023), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2210013501>; See Richard Wike et al, "Internet, smartphone and social media use" (2022), online: *Pew Research Center* <https://www.pewresearch.org/global/2022/12/06/internet-smartphone-and-social-media-use-in-advanced-economies-2022/>.

[46] See Rachel C Colley et al, *How sedentary are Canadian adults? It depends on the measure*, Catalogue No 82-003-X (Ottawa: Statistics Canada, 2022).

[47] See Statistics Canada, *Canadian Internet Use Survey, 2020* (Ottawa: Statistics Canada, 2021).

[48] See e.g. Kimberly S Young, "Internet Addiction: The Emergence of a New Clinical Disorder" (1998) 1:3 CyberPsychology & Behav 237; Brigitte Stangl et al, "Internet addiction continuum and its moderating effect on augmented reality application experiences: digital natives versus older users" (2023) 40:1 J Travel & Tourism Marketing 38; Wen Li et al, "Characteristics of internet addiction/pathological internet use in U.S. university students: a qualitative-method investigation" (2015) 10:2 PlOS One 1.

that instances of OJR continue to crop up in the case law and news media, both in Canada and throughout the common law world, where efforts have already been made to address OJR, supports the idea that at least *some* jurors are unable to resist the temptation of engaging in online research.

Given that, as demonstrated, OJR fits effectively within the above-described challenge for cause scheme, it is perhaps unsurprising that the challenge mechanism has, on occasion, been used to address the risk of jurors engaging in online research. For instance, in 2018, when jurors were selected for the highly publicized New Brunswick re-trial of Dennis Oland for the murder of his father, the trial judge permitted counsel to ask potential jurors whether they would "be able to follow […] instructions not to conduct online research or read or listen to news media accounts about the case or about Dennis Oland."[49] Another example is the 2017 Ontario trial of Dellen Millard and Mark Smich for the first-degree murder of Laura Babcock. Due to their prior convictions for the first-degree murder of Timothy Bosma, the trial for which had, give the brutality of the killing, "attracted intense media and public interest in Ontario, if not in the whole country,"[50] the trial judge permitted defence counsel to question potential jurors about their ability to resist conducting online research about the case or, importantly, the two accused.[51]

However, it is important to note that partiality-based challenges have, at least traditionally, not been routinely permitted. Although the right to bring partiality challenges is "essential" to the accused's constitutional right to a fair trial,[52] due to the presumption of juror impartiality, the approach to such challenges has been one of restraint. Indeed, as observed by Professor Steve Coughlan, Canadian courts have "consciously set a limited role for this ground."[53] Similarly, Petersen notes that, in Canada, counsel are "rarely permitted" to challenge a juror for cause on this ground.[54] Per the Supreme Court of Canada in *R v Sherratt,* this restrained approach seeks to avoid

---

[49] See *R v Oland*, 2018 NBQB 256 at para 53.
[50] *R v Millard*, 2017 ONSC 6040 at para 5.
[51] *Ibid* at para 27.
[52] *Parks*, *supra* note 8.
[53] Steve Coughlan, *Criminal Procedure*, 4th ed (Toronto: Irwin Law, 2020) at 472.
[54] Cynthia Petersen, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38:1 McGill LJ 147 at 176.

challenges that "stray into illegitimacy" by being used as "fishing expeditions" – merely as tools to learn more about individual potential jurors, rather than to target reasonable suspicions of bias.[55] Thus, the Court held that, when pursuing a partiality-based challenge for cause, while the risk of partiality need not be "extreme," an "air of reality" must attach to any application.[56]

The only recognized exception to this restrained approach has been for partiality challenges brought on the basis of an accused's race. Canadian courts have observed that race-based preconceptions cannot easily be set aside (or, indeed, even identified), even where a potential juror wishes to do so.[57] Indeed, racial prejudice against visible minorities in Canada has been recognized as "so notorious and indisputable" that it is appropriate in *every case* for judicial notice to be taken of the risk it creates for partiality and, thus, for a challenge question to be permitted.[58] Put another way, the courts have decided that the "air of reality" test set out in *Sherratt* will *automatically* be met where an accused person is racialized, given that the potential for racism "pervades all cases involving minority accused."[59] Thus, where an accused is racialized, courts will generally permit a "*Parks* question" to be put to potential jurors:

> "Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is [a member of a particular racialized community]?"[60]

Where a partiality challenge is *not* race-related, however, the stricter approach to judicial gatekeeping, as discussed above, has traditionally been required.

However, a recent decision from the Supreme Court of Canada signals that, moving forward, a more expansive approach to permitting partiality challenges may be appropriate. In *R v Chouhan*, the Court appeared to liberalize the scope of partiality-based challenges. In *Chouhan*, the majority observed that the *Code*'s challenge for cause

---

[55] *Sherratt*, *supra* note 9.
[56] *Ibid.*
[57] See *Williams*, *supra* note 27 at para 21.
[58] *Spence*, *supra* note 28 at para 5. See also *Parks*, *supra* note 8; *Williams*, *ibid* at paras 21-22.
[59] See *R v Koh* (1998), 42 OR (3d) 668, 131 CCC (3d) 357.
[60] See e.g. *Parks*, *supra* note 8; *Spence*, *supra* note 28 at para 1.

provisions are meant to provide a "robust mechanism" for accused persons to raise concerns about potential jurors' partiality.[61] As a result, they recognized that "a wide range of characteristics," including, *but not limited to,* race, "can create a risk of prejudice and discrimination, and are the proper subject of questioning on a challenge for cause."[62] Further, the majority observed that the burden for raising a partiality challenge is not onerous.[63] Instead, challenges must be available when "the experience of the trial judge […] dictates that, in the case before them, a realistic potential for partiality arises."[64] Courts have subsequently interpreted *Chouhan* as having broadened the scope of partiality challenges, observing that the case endorsed a "flexible,"[65] "expansive,"[66] and "modestly liberalized"[67] approach to addressing bias within the jury panel, one which provides the trial judge "significant discretion" in exercising their gatekeeping function.[68]

In light of this apparent liberalization, I submit that Internet-use-based challenges for cause should, going forward, be *routinely* permitted. The Internet has changed the way our society operates and, in particular, how we seek out and consume information. Indeed, it is uncontroversial that the Internet provides broad and historically unprecedented access to information directly relevant to criminal cases: the facts, the law, and the parties. This is a fact that our jury selection process must be responsive to – in this sense, *every* potential juror is potentially suspect. Put simply, the all-encompassing nature of the online sphere has created a "realistic potential" for partiality in *all* cases, one which the accused should be entitled to address by challenging potential jurors for cause. This proposal finds considerable strength in the Court's recent commentary in *Chouhan*, which acknowledged the "wide range of characteristics," apart from race, that create risk for prejudice and, thus, must be the proper subject of questioning.[69]

---

[61] *Chouhan*, *supra* note 27 at para 47.
[62] *Ibid* at para 61.
[63] *Ibid* at para 62.
[64] *Ibid*.
[65] *R v Veltman*, 2023 ONSC 3759 at para 2.
[66] *R v Hanssen*, 2021 ONSC 7669 at para 12; *R v Martin*, 2021 ONSC 5333 at para 16.
[67] *R v O.(R.)*, 2021 ONSC 6331 at para 13.
[68] *Hanssen*, *supra* note 66 at para 11; *R v Korca*, 2023 ABKB 311 at para 13; *Veltman*, *supra* note 65 at para 2; *R v Bhogal*, 2021 ONSC 4925 at para 21.
[69] *Chouhan*, *supra* note 27 at para 61.

The ability to challenge potential jurors on this basis would target multiple motivations underlying OJR, as outlined in Chapter 4. First and foremost, an Internet-use-based challenge would target jurors who seek out information online *habitually*, acting as a strategic reminder at the outset of proceedings that, during trial, jurors will be required to adopt a relationship with the Internet that may be very different than the one in their day-to-day lives. Indeed, as observed by the Court in *Chouhan*, "the challenge for cause procedure is itself a vehicle for promoting active self-consciousness and introspection."[70] By receiving and responding to the question, these jurors will be "sensitized" from the outset of their service to the need to break from habit to remain impartial.

Furthermore, and as discussed earlier in this section, such challenges represent a means of eliminating those jurors who will be either unwilling or unable to refrain from engaging in OJR. This includes "addicted" jurors – those who experience a legitimate compulsion or dependence which leaves them unable to resist engaging in inappropriate Internet use during trial.[71] An Internet-use-based challenge question may also serve to identify any "recalcitrant" jurors, i.e., those who understand the OJR prohibition but have no intention of adhering to it.[72] Take, for instance, Kansas City attorney Peter Carter, who recalled a trial in which he asked potential jurors if they would follow the trial judge's instructions to refrain from engaging in online research. About six to 10 said they would not and, further, six or seven revealed they already had.[73]

While the specific phrasing of any challenge question is a matter to be determined by the trial judge and counsel, I submit that the following sequence of questions would be appropriate:

> **Question #1:** Do you use the Internet? This includes, for example, keeping up the with news online, using social media platforms, such as Facebook or Instagram, or searching for unknown information on Google.

---

[70] *Ibid* at para 63.
[71] Thaddeus Hoffmeister, "Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age (2012) 83:2 U Colorado L Rev 409 at 457.
[72] See Marder, *supra* note 17 at 661.
[73] See Hoffmeister, *supra* note 71, fn 332.

> **Question #2:** (to be asked if a prospective juror answers "Yes" to the first question) Would you be able to follow the trial judge's instructions not to conduct online research about the case, the law, or [insert the names of relevant parties, including the accused and the victim(s)]? To be clear, this includes conducting Google searches, looking up profiles on social media platforms such as Facebook and Instagram, and reading online news articles.

6.3 MODIFYING THE JUROR'S OATH/AFFIRMATION

My second proposal is that the jurors' oath/affirmation should be modified to reflect jurors' fundamental obligation to refrain from seeking out extraneous information, including that available online. Such a change, I submit, would better reflect the importance of a juror's obligation to remain impartial and, in rendering a verdict, consider only the information placed before them during trial. In this section, I discuss the power of oaths – both generally and in the context of jury duty – for compelling adherence to promises and obligations. From there, I go on to argue that, by amending the oath in the manner described above, we would be better able to deter OJR, as well as communicate the practice to jurors as being socially unacceptable.

Jurors are already required to make a solemn promise to adhere to certain rules in furtherance of rendering a fair verdict. Per section 631(4) of the *Code*, once a juror has been selected, they will be "sworn" by an officer of the court.[74] This is a procedure whereby the juror chooses to either take an oath on the Bible (or another religious text) or make a solemn affirmation.[75] Regardless of whether a juror opts to make a religious or secular promise, the content of the agreement is the same: to provide a true verdict based on the evidence presented at trial. Generally, the oath/affirmation administered to Canadian jurors is as follows:

> Do you juror number [insert juror number] of panel number [insert panel number] swear/affirm that you shall well and truly try, and true deliverance make, between His Majesty the King and the accused at the

[74] *Code*, *supra* note 19, s 631(4).
[75] See e.g. Government of Newfoundland and Labrador, "Jury Administration" at 3, online: <https://www.gov.nl.ca/jps/files/court-jury.pdf>; Legal Info Nova Scotia, "Jury Duty," online: <https://www.legalinfo.org/criminal-law/jury-duty#what-happens-once-the-jury-is-selected>; Ontario Justice Education Network, "Mock Jury Selection" (2019) [OJEN] at 31, online: <https://ojen.ca/wp-content/uploads/2019/09/Mock-Jury-Selection_final.pdf>.

> bar whom you shall have in change, and true verdict give, according to the evidence, so help you God? ["So help you God" to be omitted if the juror affirms].[76]

The content of the oath/affirmation is generally emphasized to jurors during the trial judge's preliminary instructions. For instance, the *CJC Instructions* remind jurors that their oath/affirmation requires them to "listen closely to the evidence that will be presented and to decide [the] case solely on that evidence and the instructions" provided by the trial judge.[77] Thus, while the oath, as currently worded, does require jurors to promise to base their verdict on the evidence provided at trial, it fails to require them to make an explicit promise not to seek out extraneous information – online or otherwise.

6.3.1 THE POWER OF OATH-TAKING

However, it has been suggested that amending the oath to include such an explicit promise could curtail juror misbehaviour.[78] After all, the oath of honesty is "an ancient and time-tested mechanism designed to eliminate misbehavior by asking a person to commit to the truth."[79] Historically, oaths drew upon religious convictions, thereby imposing "solemn obligations" upon oath-takers, fostering accountability that swearers "will be conscientious in the discharge of [their] duty."[80] Indeed, as observed by English philosopher and jurist Jeremy Bentham, an oath is "a ceremony composed of words and gestures, by means of which the Almighty is engaged eventually to inflict on the taker of the oath […] punishment" in the event of breaking it.[81] Modern endorsements of oaths as behaviour-constraining devices, on the other hand, are largely based on the social psychology theory of "commitment," which centres upon an individual's need to behave

---

[76] See e.g. OJEN, *ibid*; Peter Bowal, "I swear to – a true verdict give" (2000) 24:5 Law Now 27 at 27.
[77] Canadian Judicial Council, *Model Jury Instructions* [*CJC Instructions*], 3.1[2], online: *National Judicial Institute* <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>.
[78] See e.g. Marder, *supra* note 17 at 653; Nicola Haralambous, "Educating jurors: technology, the Internet and the jury system" (2010) 19:3 Inf & Comm Tech L 255 at 260-61.
[79] Nicolas Jacquemet et al, "Do truth-telling oaths improve honesty in crowd-working" (2021) 16:1 Plos One 1 [Jacquemet et al 2021] at 2.
[80] Kathleen M Knudsen, "The Juror's Sacred Oath: Is There a Constitutional Right to a Properly Sworn Jury?" (2016) 32:3 Touro L Rev 489 at 493.
[81] See Tobias Beck et al, "Can Honesty Oaths, Peer Interaction, or Monitoring Mitigate Lying?" (2020) 163 J Business Ethics 467 at 468-69.

consistently.[82] The idea is that swearing an oath changes the swearer's identity, making the breaking of an oath more severe than the breaking of a standard promise.[83] After all, as pointed out by Mazar, Amir & Ariely, "people typically value honesty [… and] have strong beliefs in their own morality, and […] they want to maintain this aspect of their self-concept."[84] In this sense, making an oath raises self-expectations on the part of the swearer and, therefore, renders them more likely to live up to their word to avoid inner conflict, even if that means foregoing some benefit.[85]

There is significant empirical research demonstrating the power of oath-taking for promoting truth-telling and adherence to promises.[86] Oaths appeal to our "moral incentives" and may be viewed as an "active commitment" to a particular behaviour.[87] Further, as observed by Babin, Chauhan & Liu, oaths "act as a mechanism to deter strategic misbehavior."[88] Because the decision to lie or stray from a commitment made will typically be the result of a "cost-benefit analysis" that weighs the advantages of deception against its risks, taking an oath has been found to lower the net benefit of lying because of the "psychic cost" of deception on the liar.[89] This has been found to be especially true for "big" or particularly consequential lies.[90] Several empirical studies support this view. Kulik & Carlino, for instance, found that parents who promised to give their children all antibiotic medication prescribed to them were more likely to actually do

---

[82] See Ann-Kathrin Koessler et al, "Commitment to pay taxes: Results from field and laboratory experiments" (2019) 115 Euro Econ Rev 78 at 79.
[83] See e.g. Beck et al, *supra* note 81 at 469; Nicolas Jacquemet et al, "Preference elicitation under oath" (2013) 65:1 J Environmental Economics & Management 110 [Jacquemet et al 2013] at 111.
[84] Nina Mazar, On Amir & Dan Ariely, "The Dishonesty of Honest People: A Theory of Self-Concept Maintenance" (2008) 45:6 J Marketing Research 633 at 634.
[85] See Koessler et al, *supra* note 82 at 79.
[86] See e.g. Tobias Beck, "How the honesty oath works: Quick, intuitive truth telling under oath" (2021) 94 J Behavioral & Experimental Economics 101728; Janis H Zickfeld et al, "Commitment to honesty oaths decreases dishonesty, but commitment to another individual does not affect dishonesty" (2023) 27:1 Communications Psychology (open access); Fredrik Carlsson, "The truth, the whole truth, and nothing but the truth—A multiple country test of an oath script" (2013) 89 J Economic Behavior & Organization 105; Jérôme Hergueux et al, "Leveraging the Honor Code: Public Goods Contributions under Oath" (2022) 81:3 Envtl & Resource Econ 591.
[87] Carlsson, *ibid* at 106.
[88] J Jobu Babin, Haritima S Chauhan & Feng Liu, "You Can't Hide Your Lying Eyes: Honesty Oaths and Misrepresentation" (2022) 98 J Behav & Experimental Econ 101880.
[89] *Ibid.*
[90] See e.g. *ibid*; Jacquemet et al 2021, *supra* note 79.

so.[91] Similarly, Wang & Katzev observed that people who signed a contract to recycle paper actually recycled much more than those who did not.[92] Joule, Girandola & Bernard observed similar results with those who promised to use energy-efficient light bulbs.[93] Analogous results have emerged out of studies examining the power of oaths on, for instance, the efficacy of an "honour system" in street-side newspaper sales;[94] compliance with tax repayment schemes;[95] and incidence of shirking and lying among crowd-sourced Internet workers.[96]

In addition, oaths have been found to be particularly powerful truth-compulsion devices in certain contexts relevant to jury duty. For instance, as observed by Jacquemet et al, oaths tend to result in stricter adherence to promises in "loaded environments," where subjects are given "moral reminders of ethical standards."[97] In such situations, there is less room for "moral 'wiggle room' for self-deception."[98] As discussed above, Canadian model jury instructions direct trial judges to refer jurors back to their oath, providing a reminder of not only the promise made, but also the attached obligations. The commitment power of oaths has also been found to be stronger where oaths are publicly expressed, such as the juror's oath/affirmation, which is taken in open court.[99]

6.3.2 THE UNIQUE POWER OF THE JUROR'S OATH

The *juror's* oath has been observed as constituting a particularly powerful promise. Canadian courts, for instance, have observed the oath's power to "bind […] the

---

[91] See James A Kulik & Patricia Carlino, "The Effect of Verbal Commitment and Treatment Choice on Medication Compliance in a Pediatric Setting" (1986) 10:4 J Behavioral Medicine 367.
[92] Theodore H Wang & Richard D Katzev, "Group Commitment and Resource Conservation: Two Field Experiments on Promoting Recycling" (1990) 20:4 J Applied Soc Psychol 265.
[93] Robert-Vincent Joule, Fabien Girandola & Françoise Bernard, "How Can People Be Induced to Willingly Change Their Behavior? The Path from Persuasive Communication to Binding Communication" (2007) 1:1 Soc & Personality Psychol Compass 493.
[94] See Gerald J Pruckner & Rupert Sausgruber, "Honesty on the Streets: A Field Study on Newspaper Purchasing: Honesty on the Streets" (2013) 11:3 J Euro Econ Assn 661.
[95] See Koessler et al, *supra* note 82.
[96] See Jacquemet et al 2021, *supra* note 79.
[97] Nicolas Jacquemet et al, "Truth Telling Under Oath" (2019) 65:1 Management Science 426 [Jacquemet et al 2019] at 426-27.
[98] Pruckner & Sansgruber, *supra* note 94 at 677. See also Nicolas Jacquemet et al, "Can We Commit Future Managers to Honesty?" (2021) 12 Frontiers in Psychology 701627.
[99] See Jacquemet et al 2013, *supra* note 83 at 113.

conscience,"[100] as well as that jurors are typically "impressed" by the oath and solemnity of proceedings.[101] This has been shown to be true in the specific context of online juror misconduct. In a 2014 American study on jurors' social media use, a federal district court judge and a state criminal court judge anonymously surveyed 583 Illinois jurors as to whether they were tempted to communicate about the case online and, if so, what prevented them from doing so.[102] Numerous jurors cited their oath as the driving force preventing them from engaging in online communication:[103]

- "I took an oath"
- "My oath"
- "I follow rules under the oath I made"
- "I knew it was my duty to fulfill the oath I took before the court not to say anything"
- "My duty as a jur[or] under oath"
- "Took oath not to communicate"
- "My oath not to tell"
- "I took this very seriously and wanted to do what I swore I would"
- "I swore not to"
- "I had to remind myself that this is a job and I made an oath and was going to follow rules under the oath I made"

In response to this feedback, the authors ultimately recommended that "jury instructions should remind the jurors of their oath and its importance, and work in references to civic pride, respect, and democratic ideals" because "[t]hese concepts resonate with jurors."[104] While this study focuses on improper online communication ("information out") as opposed to OJR ("information in"), it still demonstrates the power of the oath, particularly in the context of jurors' online activities.

---

[100] See *Parks*, *supra* note 8.
[101] *Spence*, *supra* note 28 at para 22.
[102] Hon Amy St Eve, Charles Burnes and Michael Zuckerman, "More From the #Jury Box: The Latest on Juries and Social Media" (2014) 12 Duke L & Tech Rev 64 at 78-79.
[103] *Ibid* at 81-82.
[104] *Ibid* at 90.

6.3.3 THE JUROR'S OATH AS A SOLUTION

Given the above-demonstrated power of oaths to compel honesty and adherence to promises made, I submit that the jurors' oath/affirmation could be used as a vehicle to deter jurors from engaging in independent research. To do so, I recommend that the jurors' oath be amended to include explicit reference to this obligation:

> Do you juror number [insert juror number] of panel number [insert panel number] swear/affirm that you shall well and truly try, and true deliverance make, between His Majesty the King and the accused at the bar whom you shall have in change, and true verdict give, according to only the evidence presented during the course of this trial and without reliance on or reference to any outside information, so help you God? ["So help you God" to be omitted if the juror affirms].

By amending the juror's oath to include an explicit admonition, the "moral pull" created by oaths would apply directly to the research prohibition, thereby intensifying the inner conflict experienced by jurors tempted to conduct independent research.[105]

Such an amendment would also provide an opportunity to communicate to jurors that OJR, as a practice, is *socially unacceptable*. This is particularly important, given that technology and Internet access, as discussed in previous Chapters, have become so deeply engrained in the fabric of Digital Age culture. Put simply, in nearly every other context outside of jury duty, *not* being able to seek out information online is abnormal. With that comes the difficulty of persuading jurors that, *within* the context of jury duty, inappropriate use of the Internet is "serious business" and not merely an admonition to be brushed aside. However, by attaching the prohibition to the oath, a device with which jurors are generally impressed and feel holds weight, its significance may be "verified."[106] Indeed, as Jacquemet et al point out, the oath has been used throughout history to "align internal incentives with social goals."[107]

---

[105] See Koessler et al, *supra* note 82 at 79.
[106] Hoffmeister, *supra* note 71 at 456-57. See also Law Commission of England and Wales, *Contempt of Court (1): Juror Misconduct and Internet Publications* (London: Law Commission of England and Wales, 2013) [LCEW], 5.27.
[107] Jacquemet et al 2013, *supra* note 83 at 129.

Perhaps nearly as important as the content of the revised oath itself is the fact that amending the oath to explicitly forbid independent research would enable trial judges to periodically remind jurors of their commitment *throughout trial*.[108] In line with Marder's "process view" of juror education, this would reinforce both the content and solemnity of jurors' obligations. In particular, it would allow trial judges the opportunity to link the prohibition against independent research directly to OJR by explaining that this aspect of the oath/affirmation includes not only traditional means of learning more about the case but also by seeking out information online. Thus, I further recommend that any amendment to the oath/ affirmation be accompanied by a corresponding update to the *CJC Instructions* that expands upon the obligations created by the oath. Namely, instead of simply reminding jurors that their oath requires them to decide the case solely on the evidence presented at trial,[109] an ideal revised instruction would identify OJR as a subset of forbidden "outside information," as well as provide specific examples of prohibited online activities, such as conducting a Google search or exploring an accused's social media profile.

Crucially, above and beyond acting as a general deterrent against OJR, given the powerful commitment created when one takes an oath, I submit that an amended oath requiring jurors to explicitly promise to refrain from engaging in independent research would be particularly helpful in targeting two of the key motivations for conducting OJR canvassed in Chapter 4: moral obligation and habit. The morally obligated juror is conscientious, in the sense that their main goal is to discover the truth and ensure that they reach the "right" verdict.[110] Thus, to prevent such jurors from seeking out additional information, there must be mechanisms in place which convey the *gravity* of the OJR prohibition – namely, the negative implications of independent research for trial fairness. Commentators have observed that an amended oath/affirmation would do just that – it would "verify the […] importance"[111] and "underscore the significance"[112] of the prohibition by, as discussed above, communicating its social unacceptability. Further, an

---

[108] See Marder, *supra* note 17 at 653.
[109] See *CJC Instructions*, *supra* note 77, 3.1[2].
[110] Hoffmeister, *supra* note 71 at 419-20.
[111] *Ibid* at 456-57.
[112] LCEW, *supra* note 106, 5.27.

amended oath/affirmation, when coupled with judicial instruction clearly linking that promise to jurors' online activities, would provide *yet another* reminder to jurors for whom it has become second nature to turn to the Internet to acquire information that doing so is inconsistent with a juror's role. Indeed, given the "ubiquitous" presence of the Internet in our daily lives,[113] repetition of an "Internet warning" is crucial for preventing online misconduct by jurors.[114]

6.4 UPDATING THE CJC *MODEL JURY INSTRUCTIONS*

My third proposal is to update the *CJC Instructions* to be more responsive to the issue of OJR. While, as discussed in Chapter 5, these instructions, as currently worded, admonish jurors against conducting online research, there are gaps and omissions that curtail their effectiveness. This is problematic, given that, as noted by Hoffmeister, for jury instructions targeting OJR to be effective, they must "be written in such a manner as to create the optimum atmosphere for acceptance."[115] Thus, to maximize the effectiveness of the *CJC Instructions*, I recommend that four crucial additions be made: (1) a better explanation as to what constitutes "online research"; (2) a justification for the prohibition on OJR; (3) the potential consequences of conducting OJR; and (4) an OJR-specific "self-policing" instruction.

6.4.1 PROVIDING A DEFINITION FOR "ONLINE RESEARCH"

As discussed in Chapter 5, the *CJC Instructions* encourage trial judges to direct jurors to refrain from conducting "research"[116] or "seeking out information,"[117] as well as to "disregard completely any information from […] Internet sources."[118] However, there is no explanation as to the precise *kinds* of online activities that constitute research. Critics have emphasized the importance of such an explanation in better guaranteeing the

---

[113] Russell B Clayton, Glenn Leshner & Anthony Almond, "The Extended iSelf: The Impact of iPhone Separation on Cognition, Emotion and Physiology" (2015) 20:2 J Computer-Mediated Comm 119 at 120.
[114] See e.g. Daniel William Bell, "Juror Misconduct and the Internet" (2010) 38:1 Am J Crim L 81 at 91; Marder, *supra* note 17 at 656.
[115] Hoffmeister, *supra* note 71 at 452.
[116] *CJC Instructions*, *supra* note 77, 3.3[7].
[117] *Ibid*, 3.8[5].
[118] *Ibid*, 8.4[1].

effectiveness of an OJR instruction,[119] given that, when left to their own devices, jurors tend to have a narrower vision of what constitutes "research" than what is realistic in the Digital Age. As observed by Bell, by providing jurors with clear, detailed instruction as to what sorts of online activities constitute "research," jurors will be better able to "understand that some aspects of their everyday Internet usage are no more permissible than the more formal behavior that they likely associate with the word 'research,'"[120] such as gathering information at the library, consulting an expert, or visiting the crime scene.

Thus, I submit that the aspects of the *CJC Instructions* that admonish independent research (and OJR particularly) should be modified to specifically define "research" as including a vast array of online activities, many of which, in jurors' everyday lives, will be perfectly acceptable. These include, for instance, looking up terms and concepts on Wikipedia, googling articles about the alleged offence, or searching for the accused's Facebook or Instagram profile. Indeed, as noted by Manhas, "specifying potential violations […] is worthwhile because there is evidence that jurors would not realize that certain activities, such as Googling a term, constitute 'research.'"[121] Consequently, an essential component of any amendment to the *CJC Instructions* will be a terminology update with respect to specific social media platforms. As discussed in Chapter 5, the CJC's OJR instructions are quite outdated; they admonish jurors from using obsolete platforms, such as chatrooms, Myspace, and Twitter, as opposed to warning them to stay away from *current* leading platforms, such as X, Instagram, TikTok, Reddit, YouTube, Wikipedia, and, perhaps most importantly, Google.

Providing clear instructions as to what constitutes "research" in the context of jury service would, I submit, directly target jurors who engage in OJR out of habit. As canvassed in detail in Chapter 4, turning to the Internet to retrieve information has, for many, become reflexive. This is no less true in the context of criminal jury trials. Cases

---

[119] See e.g. Keith W Hogg, "Runaway Jurors: Independent Juror Research in the Internet Age" (2019) 9:1 W J Legal Stud 1 at 13; Hoffmeister, *supra* note 71 at 452; Manhas, *supra* note 17 at 821-22; McGee, *supra* note 23 at 316; Bell, *supra* note 114 at 95.
[120] Bell, *ibid*.
[121] Manhas, *supra* note 16 at 821-22.

have demonstrated that this online "information-gathering" has become such a natural, pervasive part of everyday life that some jurors are unable to identify doing so as "research," nor to understand that it is wrong.[122] By revising the *CJC Instructions* to clearly delineate what constitutes prohibited "research" in the Digital Age, jurors will be forced to confront the need to adjust their online habits to comply with the obligations of jury duty. As highlighted by Bell, the more specific instructions are in this regard, the more likely jurors will understand that their "everyday Internet habits and 'modern reflexes' may constitute impermissible research."[123]

6.4.2 PROVIDING A JUSTIFICATION FOR THE PROHIBITION

The *CJC Instructions* also currently fail to explain *why* independent research (including OJR) is prohibited. Instead, they simply admonish jurors from engaging in the practice. As discussed in the previous Chapter, at the outset of trial, jurors are told they are not permitted to use the Internet or any electronic devices in connection with the case, including reading anything online about the trial.[124] Similarly, directly before deliberations commence, they are reminded that the only information they may consider is evidence put before them in the courtroom and that they must "disregard completely" any information from Internet sources and social media.[125] However, at no point do the *Instructions* provide insight into the *reason(s)* for these prohibitions.

There is consensus among commentators that providing jurors with a justification for the research prohibition would go a long way in improving rates of compliance.[126] The rationale, of course, is that by explicitly alerting jurors to the trial fairness concerns which arise as a result OJR, the trial judge's instructions may help to "persuade jurors that not all information is helpful to their decision making process and that indeed much

---

[122] See e.g. Manhas, *ibid* at 821; Marder, *supra* note 17 at 629, 643.
[123] Bell, *supra* note 114 at 91. See also Susan MacPherson & Beth Bonora, "The Wired Juror, Unplugged" (2010) November Trial 40 at 42.
[124] *CJC Instructions*, *supra* note 77, 3.8[6].
[125] *Ibid*, 8.4[1].
[126] See e.g. Manhas, *supra* note 16 at 821-822; Marder, *supra* note 17 at 654; Hoffmeister, *supra* note 71 at 452-53; Bell, *supra* note 114 at 95; Gareth S Lacy, "Untangling the Web: How Courts Should Respond to Juries Using the Internet for Research" (2011) 1 Reynolds Cts & Media LJ 167 at 178; Hogg, *supra* note 119 at 13.

information is harmful."[127] Without such an instruction, jurors may view the research prohibition as a somewhat arbitrary restriction.[128] After all, as pointed out by Hogg, "because I said so" is rarely a very satisfying answer in *any* context – a restriction will generally have more force when supported by a compelling justification.[129]

Thus, I recommend that the *CJC Instructions* be amended to provide jurors with an explanation for the research prohibition. Such an instruction should both highlight the importance of protecting the accused's constitutional right to a fair trial and direct jurors' attention to the risks OJR poses to trial fairness canvassed in Chapter 3. Namely, it would alert jurors that access to extraneous information could colour their perception of the case and, thus, prevent them from approaching the issues in an impartial manner and perhaps even cause them to reach a premature conclusion without fully engaging with the trial evidence.[130] At this point, where relevant, it would be prudent to emphasize the exacerbated partiality risks that racialized accused persons experience when jurors engage in OJR. Further, it would emphasize that, to ensure trial fairness, the right to make full answer and defence must be guaranteed: "the parties must have the opportunity to refute, explain, or correct the information jurors receive."[131] By accessing extraneous online information, jurors rob the accused of the opportunity to challenge that information by way of cross-examination. Finally, such an instruction would highlight the general untrustworthiness of out-of-court information, whether factual or legal; namely, that it could be incomplete, unreliable, or simply incorrect.[132]

In my view, by providing jurors with a clear explanation for the research prohibition, two key motivations underpinning OJR would be targeted: habit and moral obligation. As observed by MacPherson & Bonora, "[t]he deeply ingrained habit of satisfying one's curiosity or resolving even minor factual disputes by getting instant answers online makes it difficult to accept the prohibition on doing so when confronted

---

[127] Bell, *ibid*.
[128] See Marder, *supra* note 17 at 654.
[129] Hogg, *supra* note 119 at 13. See also MacPherson & Bonora, *supra* note 123 at 42.
[130] See David Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Reuters, 2023) [*Watt's Instructions*], 20-A[12].
[131] Hoffmeister, *supra* note 71 at 454.
[132] *Watt's Instructions, supra* note 130, 20-A[14].

with a truly important decision."[133] Because online information-gathering has become so reflexive in the Digital Age, providing an explanation as to *why* that reflex is prohibited in the trial context would serve as a reminder to jurors of the importance of setting aside those habits for the duration of their service.

The morally obligated juror, who craves the information they perceive as required to reach a just verdict, is also targeted. The value of providing an explanation for the research prohibition lies in its ability to convince such jurors that they must look to the courtroom, not to the Internet, for the information needed to make an informed decision. In this sense, their desire to make the "right" decision is the key[134] – providing the above-noted justifications would demonstrate to jurors the harm that can result from OJR and that, in many cases, the practice may be the *cause* of injustice, as opposed to a vehicle to avoid it. Indeed, an instruction that includes such an explanation "treats jurors more respectfully than a mere prohibition and sets a tone of respect for jurors and their role."[135] On the other hand, failure to provide an explanation for the prohibition on research not only decreases the likelihood of compliance but may also breed mistrust within these so-called "conscientious" jurors toward the court system generally.[136] As noted by Bell, in the absence of such an instruction, "jurors' sense of moral duty will continue to be misdirected, and restrictions on accessing information will continue to be perceived as, at best, a set of arbitrary rules and, at worst, a subversion of justice."[137]

6.4.3 WARNING OF POTENTIAL CONSEQUENCES OF RESEARCH

The *CJC Instructions* are also currently silent on the *consequences* which may stem from jurors engaging in independent research. In my view, there is value in amending the *Instructions* to explicitly alert jurors to the potential repercussions of independent investigating, both external and internal. On the external front, where detected, jurors' research may result in a mistrial and, thus, an enormous waste of case

---

[133] MacPherson & Bonora, *supra* note 123 at 42.
[134] See *ibid*.
[135] Marder, *supra* note 17 at 654.
[136] See e.g. Lacy, *supra* note 126 at 178; Hoffmeister, *supra* note 71 at 454.
[137] Bell, *supra* note 114 at 95.

and party resources.[138] Further, it will often necessitate that the accused, the victim(s), and any witnesses go through the retraumatizing process of another trial.[139] Even more importantly, where undetected, independent research by jurors could result in a miscarriage of justice and, in some circumstances, even a wrongful conviction. As for internal repercussions, should my recommendation with respect to the "criminalization" of OJR, as advocated for later in this Chapter, also be implemented, trial judges could use their instructions to the jury as a reminder of their personal risk of being held criminally liable, should they engage in OJR and be caught. Put simply, by telling jurors what is at stake, an amended instruction could help foster recognition that the costs of independent research (including OJR) are high and exist at "both [an] individual and societal" level.[140]

Such an amendment, in my view, would likely work to deter OJR as a juror practice. Alerting jurors to the personal risk they take by engaging in OJR (i.e., the risk of being held criminally liable and the corresponding vulnerability to punishment) would likely work as a general deterrent, in the sense that it would reduce incidence of OJR across the board by forcing jurors to confront their own potential jeopardy.[141] Further, I submit that the "external" cost reminders would likely target jurors motivated by habit, confusion, or a moral obligation for truth-seeking. The modified instruction would emphasize the importance of compliance with the research prohibition by communicating the risk of loss, both to the system and for the parties involved. By confronting jurors with these risks, they would, I submit, be less likely to give into the temptation of habit or to engage in research as a means of "due diligence" or resolving confusion. This position is supported by social science literature, which suggests that "internal sanctions," such as feelings of guilt, shame, and disapproval, are powerful deterrents of prohibited behaviour.[142]

---

[138] See *ibid* at 96-97.
[139] See Hoffmeister, *supra* note 71 at 454-55.
[140] Marder, *supra* note 17 at 656.
[141] For a more in-depth discussion of the deterrent power of criminalizing OJR, see *The Criminalization of OJR*, below.
[142] Heather Mann et al, "What Deters Crime? Comparing the Effectiveness of Legal, Social, and Internal Sanctions Across Countries" (2017) 7:85 Frontiers in Psychology 1 at 2. See also Kelli D Tomlinson, "An Examination of Deterrence Theory: Where Do We Stand?" (2016) 80:3 Federal Probation 33; Daniel S Nagin & Greg Pogarsky, "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model

6.4.4 ADDING A SPECIFIC "SELF-POLICING" INSTRUCTION

Finally, I submit an OJR-specific "self-policing" instruction should be added to the *CJC Instructions*. At present, the CJC's self-policing instructions fail to explicitly pinpoint OJR as something that should be brought to the judge's attention. Instead, the instruction is vague, simply noting that jurors should let the trial judge know if "any problems"[143] or "something […] that may affect [their] ability to do [their] duty as a juror"[144] occurs during trial. As I noted in Chapter 5, this is problematic, as it may lead to decreased juror vigilance with respect to improper online activity, as well as to a disconnect between detected instances of OJR and jurors' obligation to self-report. To rectify these concerns, an additional self-policing instruction should be added to the overall OJR warning contained in the *CJC Instructions*. This instruction would remind jurors that, where it becomes apparent that a member of the *petit jury* has engaged in OJR, they have a duty to immediately report that misconduct to a court official. In addition, the amended instruction should remind jurors that, because the jury secrecy rule prevents them from disclosing information about their deliberations at any point, including after the trial has concluded,[145] their obligation to self-police is extremely important – as highlighted in Chapter 2, it is one of the *only* avenues through which OJR is discoverable.

Such an addition would strengthen the general deterrent value of a self-policing instruction, as discussed in Chapter 5. Indeed, self-policing instructions, when crafted precisely, can have the effect of deterring jurors who would otherwise engage in OJR from doing so, given their awareness that jurors have been instructed to monitor each other's behaviour.[146] Further, the addition would appeal to juror morality, emphasizing to jurors that their cooperation is required to ensure that the accused receives a fair trial,[147]

---

of General Deterrence: Theory and Evidence" (2001) 39:4 Criminology 865; Raymond Paternoster & Alex Piquero, "Reconceptualizing Deterrence: An Empirical Test of Personal and Vicarious Experiences" (1995) 32:3 J Res Crime & Delinquency 251.

[143] *CJC Instructions*, *supra* note 77, 6.2[1].

[144] *Ibid*, 6.2[2].

[145] *Code*, *supra* note 19, s 649.

[146] See e.g. Hoffmeister, *supra* note 71 at 456; Manhas, *supra* note 16 at 822.

[147] See Marder, *supra* note 17 at 655.

as well as providing yet another opportunity to communicate OJR as an unacceptable practice.

6.5 EXPANDING JURORS' ABILITY TO ASK QUESTIONS

My fourth proposal is that jurors should routinely be permitted to ask questions of witnesses and parties/counsel as a means of addressing any confusion and curbing curiosity. In this section, I canvass the restrained approach to such questions currently taken in Canada before exploring the possibility of allowing them more liberally. In doing so, I explore the alignment of such an approach with the "active juror" model of juror participation, address the leading criticisms of a liberal question model, and articulate how a more expansive approach to juror questions would target multiple underlying motivations for OJR.

In Canada, juror questions are technically already permitted. They are, however, a matter of judicial discretion – trial judges have the authority to allow jurors to pose questions to witnesses throughout the course of trial.[148] Indeed, section 4.6 of the *CJC Instructions* provide the following guidance:[149]

> 4.6[1] It is not the role of jurors to conduct the trial. It is your duty to consider the evidence that is presented, not to decide what questions the witnesses should be asked or how to ask them.
>
> 4.6[2] Sometimes you might wish to ask a witness a question. It is usually best to listen to the rest of the witness's testimony in case your question is answered later. It may even be answered by another witness. This is why it is generally best simply to be patient and listen closely to all the evidence.
>
> 4.6[3] However, if there is an important point that you believe needs to be clarified, put up your hand to indicate that you have a question. Please hand your question to me in writing. After I have read the question, I will decide what to do. I may need to ask you to go to the jury room while I discuss the question with the lawyers.

---

[148] See e.g. *R v Andrade* (1985), 18 CCC (3d) 41 (Ont CA); *R v A.G.*, 2015 ONCA 159 at para 63; *R v Druken*, 2002 NFCA 23; *R v Koopmans*, 2015 BCSC 2501 at para 18; *R v Gagnon* (1992), 74 CCC (3d) 385 (QCCA).

[149] *CJC Instructions*, *supra* note 77, 4.6[1]-[3].

Reflecting the discretionary nature of the question power, a footnote to section 4.6[3] notes that this instruction is *optional* and should "only be given when the judge decides to permit jurors to ask questions and to tell them that they may do so."[150]

Despite their *authority* to permit questions, however, trial judges seldom allow them. As courts have observed, while "[t]his practice is not unknown in Canadian law, […] it is permitted very rarely."[151] and questions, when permitted, "should normally be very few in number."[152] My proposal is that juror questions should be permitted *regularly*, as opposed to exceptionally. Permissible questions would target subject matter that, without clarification, might prompt a juror to engage in OJR, such as vague or unclear witness testimony, complex evidence (including expert evidence), information that may impact witness credibility, and any confusing arguments made by counsel.

The idea behind this approach is that, if jurors have their questions answered during proceedings, they are less likely to go looking for answers online. Indeed, Hoffmeister observes that allowing juror questions "would significantly reduce the detrimental impact of the Digital Age on jury service" and, indeed, even goes so far as to suggest that "[p]rohibiting questions *leads* jurors to seek alternative avenues for information,"[153] particularly as the length and complexity of criminal trials continue to increase.[154] This is because, as Manhas points out, juror questions "counter one factor that presumably leads jurors to turn to the internet in the first place – the existence of burning questions that jurors are unable to answer through allowed channels."[155] As put by Myers Morrison, a jury "that received answers to its questions, or that at least was given some reasonable explanation as to why certain questions should not be answered, would be much less likely to search for supplementary information on the Internet."[156]

---

[150] *Ibid*, 4.6[3], fn 1.
[151] *A.G.*, *supra* note 148 at para 66.
[152] *Druken*, *supra* note 148 at para 78.
[153] Hoffmeister, *supra* note 71 at 446-47.
[154] Nancy S Marder, "Juries and Technology: Equipping Jurors for the Twenty-First Century" (2001) 66(4) Brooklyn L Rev 1257 [Marder 2001] at 1260-61.
[155] Manhas, *supra* note 16 at 827-28.
[156] Caren Myers Morrison, "Jury 2.0" (2010) 62:6 Hastings LJ 1579 at 1628-29.

6.5.1 THE "ACTIVE JUROR" MODEL

An expanded approach to juror questions aligns with what is often referred to as the "active juror" model, as opposed to the traditional "passive juror" model, under which jurors are expected to silently examine and listen to all evidence and then be able to recall and evaluate that evidence during the deliberation stage of trial.[157] The passive model of jury service has long been criticized for its faulty presumption that jurors are able to "simply absorb information like a sponge."[158] Indeed, as Marder points out, "the passive observer model is inconsistent with how people actually absorb information" – jurors do not function as "human 'tape-recorders.'"[159] Put simply, it is unrealistic to expect jurors to sit through days, weeks, or even *months* of evidence and subsequently be able to remember and understand it come time for deliberation.

Thus, many commentators and practitioners[160] have begun to advocate for a more active approach to jury service, where jurors are transformed from passive observers to active participants involved in the fact-finding process from the outset of proceedings.[161] The argument is that, by taking a more active role, jurors will be in a better position to "process the large amount of information they are exposed to during trial."[162] These jurors are provided with tools to assist with their engagement, such as the ability to take notes, peruse copies of trial materials, and, most importantly, ask questions of witnesses and parties,[163] all of which facilitates their ability to organize and analyze the information presented at trial.[164] By doing so, jurors are equipped "with an authority commensurate with their responsibility for resolving issues at trial."[165]

---

[157] Nancy S Marder, "Answering Jurors' Questions: Next Steps in Illinois" (2010) 41:4 Loy U Chi LJ 727 [Marder 2010] at 736-37; Steven I Friedland, "The competency and responsibility of jurors in deciding cases" (1990) 85:1 Northwestern U L Rev 190 at 198; B Michael Dann, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries" (1993), 68 Ind LJ 1229 at 1242.
[158] Marder 2001, *supra* note 154 at 1261. See also Marder 2010, *ibid* at 736-37.
[159] Marder 2010, *ibid* at 736-37.
[160] See e.g. Marder 2001, *supra* note 154 at 1267; Dann, *supra* note 157 at 1230.
[161] See e.g. Dann, *ibid* at 1241-42; Friedland, *supra* note 157 at 192.
[162] Marder 2001, *supra* note 154 at 1267.
[163] See e.g. Dann, *supra* note 157; Marder 2010, *supra* note 157 at 737.
[164] See e.g. Marder 2001, *supra* note 154 at 1261; Marder 2010, *ibid* at 737.
[165] Friedland, *supra* note 157 at 192.

Notably, there has been renewed interest in the active juror model within legal scholarship as a response to the onset of the Digital Age.[166] As emphasized by Marder, for instance, "[a]lthough the call for 'active jurors' has been made before, as has the call for giving jurors new tools with which to perform their tasks, both calls need to be renewed now as we consider the fate of the jury in the twenty-first century."[167] This urgency stems from the both novel and exacerbated opportunities for juror misconduct that have arisen alongside the "Internet explosion." Indeed, Marder acknowledges that it is "particularly appropriate that this question of new tools be renewed today as we experience a technological revolution."[168]

Juror questions are perhaps the clearest manifestation of the active juror model and have received considerable support, both by individual critics and practitioners. As Marder observes, "lawyers and judges who actually have experience with juror questions usually support the practice."[169] Indeed, several American trial judges have endorsed juror questions. This includes Judge Mark Frankel of the Dane County Circuit Court in Wisconsin, who permits jurors to ask questions "in almost all civil and criminal trials" over which he presides, noting "the importance of expanding the procedural tools available to jurors struggling with critically important factual determinations."[170] Other judicial proponents include retired superior court Judge B. Michael Dann of Maricopa County, Arizona,[171] Judges Daniel T.K. Hurley and James R. Stewart Jr., both of Palm Beach County, Florida,[172] and retired Judge Warren D. Wilson of the Illinois First District Appellate Court, whom is often referred to as the founding mind of the juror question, given the seminal article he published on the subject in the Chicago Bar Association Record in 1987.[173] More broadly, an expanded approach to juror questions has enjoyed wide support in other common law jurisdictions. Permitting jurors to ask

---

[166] See e.g. Marder 2001, *supra* note 154 at 1260-61; Stephen R Kaufmann & Michael P Murphy, "Juror Questions During Trial: An Idea Whose Time Has Come Again" (2011) 99:6 Illinois BJ 1.
[167] Marder 2001, *ibid*.
[168] *Ibid.*
[169] Marder 2010, *supra* note 157 at 727.
[170] Mark A Frankel, "A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking" (1990) 85 Nw U L Rev 221 at 221-22.
[171] See Dann, *supra* note 157.
[172] See Friedland, *supra* note 157 at 217.
[173] Hon Warren D Wolfson, "An Experiment in Juror Interrogation of Witnesses" (February 1987) CBA Rec 12 as cited in Kaufmann & Murphy, *supra* note 166 at 2.

witnesses questions is, for instance, "part of the normal procedure" in the United Kingdom.[174] Similarly, in the United States, several states have incorporated juror questions into their trial procedures.[175] Indeed, in certain states, juror questions have been *mandated*: in Colorado,[176] Arizona,[177] and Indiana,[178] trial judges are *required* to permit jurors to ask questions of witnesses.

6.5.2 ADDRESSING CRITICISMS OF JUROR QUESTIONS

Both empirical research and practice experience have addressed the two key concerns skeptics have raised about a broad approach to permitting juror questions. First, some have expressed the concern that questions will unacceptably lengthen trials.[179] However, in practice, questions have been found to take up "only a modest commitment of court time."[180] Indeed, Judge Frankel suggests that the average number of questions asked in each of his cases is between three and seven, with questions only requiring an additional two to three minutes of each witness' time.[181] A similar conclusion was drawn in Mott's empirical study of 130 state-level cases, which found the median number of questions per case to be seven.[182] It has also been suggested that the extra "front-end" time taken to permit juror questions may be made up for at the "back end," given that the opportunity to ask questions may reduce requests to reread testimony and shorten deliberations.[183]

---

[174] Kristen DeBarba, "Maintaining the adversarial system: the practice of allowing jurors to question witnesses during trial" (2002) 55:5 Vand L Rev 1521 at 1533. See also Eugene R Sullivan & Akhil R Amar, "Jury Reform in America – A Return to the Old Country" (1996) 33:4 Am Crim L Rev 1141 at 1142-43.
[175] See Myers Morrison, *supra* note 156 at 1628-29; Kaufmann & Murphy, *supra* note 166 at 3.
[176] *Colorado Rules of Criminal Procedure* (last amended 2 May 2024), r 24(g), online: <https://casetext.com/rule/colorado-court-rules/colorado-rules-of-criminal-procedure>.
[177] *Arizona Rules of Criminal Procedure* (last amended 6 December 2023), r 18.6(e), online: <https://casetext.com/rule/arizona-court-rules/arizona-rules-of-criminal-procedure>.
[178] *Indiana Rules of Court: Jury Rules* (last amended 1 January 2021), r 20(a)(7), online: <https://www.in.gov/courts/rules/jury/>.
[179] See e.g. Marder, *supra* note 17 at 727-28, 733; Kaufmann & Murphy, *supra* note 166 at 2.
[180] Shari Siedman Diamond et al., "Juror Questions During Trial: A Window into Juror Thinking" (2006) 59 Vand L Rev 1927 at 1965.
[181] Frankel, *supra* note 170 at 225; Friedland, *supra* note 157 at 216-17.
[182] Nicole L Mott, "The Current Debate on Juror Questions: To Ask or Not to Ask, That Is the Question" (2003) 78:3 Chi-Kent L Rev 1099 at 1112-13.
[183] See e.g. Frankel, *supra* note 170 at 224; Marder 2010, *supra* note 157 at 734.

The second common criticism is that jurors may ask inappropriate questions, or those which could yield inadmissible testimony.[184] However, existing research suggests that jurors rarely ask improper questions. As noted by Frankel, jurors generally ask "rather straightforward, nonargumentative questions" focused on "matters of time, place, distance, and relationships between witnesses."[185] Indeed, he points out that lawyers raise "surprisingly few" objections against juror questions and, further, that most objections go to question *form* and are typically "successfully remedied by a minor modification in wording."[186] Further, experience has shown that concerns about question content can be addressed through thoughtful procedural design. Trial judges, in their role as gatekeeper, have the power to "veto" any inappropriate questions before witnesses are given the opportunity to provide an answer.[187] Indeed, the *CJC Instructions* provide that, where questions are permitted, jurors must write their questions down and present them to the trial judge, who will then decide whether they should be put to the witness.[188] Not only does this prevent witnesses from divulging inadmissible information in the presence of the jury, but it also, in line with Marder's "process view," provides yet another opportunity to educate jurors about why certain information may *not* be considered, driving home the importance of protecting the accused's right to a fair trial.

6.5.3 A MEANS TO TARGET JURORS' MOTIVATION(S) TO RESEARCH?

I submit that juror questions would target several of the underlying motivations for OJR, as canvassed in Chapter 4. Most notably, it would serve as a way to address juror confusion with respect to the facts of the case or the relevant evidence. As noted by Marder, permitting jurors to submit questions is an important tool available to courts "to ensure that jurors understand what they see and hear during the trial."[189] She emphasizes the power of juror questions to "help resolve juror confusion or misunderstanding as soon

---

[184] See e.g. Larry Heuer, Steven Penrod & Ronald Roesch, "Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking" (1988) 12:3 L & Hum Behav 231 [Heuer, Penrod & Roesch 1988] at 237-38; Kaufmann & Murphy, *supra* note 166 at 2.
[185] Frankel, *supra* note 170 at 223. See also Mott, *supra* note 182 at 1119.
[186] Frankel, *ibid.*
[187] See Marder 2010, *supra* note 157 at 730.
[188] *CJC Instructions*, *supra* note 77, 4.6[3].
[189] Marder 2010, supra note 157 at 729.

as it arises so that jurors can focus on the rest of the trial without feeling at sea."[190] This strength is showcased in the empirical research on the subject, which generally demonstrates that the opportunity to ask questions increases jurors' understanding of the case.[191] Further, juror questions may also have the effect of alerting counsel to points needing further clarification.[192] This means of addressing confusion is, in my view, particularly compelling in the Digital Age, given the compatibility of juror questions with the learning style of so-called "Digital Natives," as discussed in detail in Chapter 4. The opportunity to ask questions would satisfy Digital Natives' preference for interactive learning,[193] as well as provide the immediate feedback they crave in learning environments.[194]

Juror questions also target morally obligated jurors, given their ability to increase confidence in verdicts. Empirical research has shown that juror questions tend to increase jurors' satisfaction that they have they have sufficient information to deliver the "right" verdict.[195] Indeed, in a jury study by the Seventh Circuit Bar Association, 67% of surveyed jurors reported that the opportunity to ask questions increased the fairness of the trial process.[196] In this sense, juror questions address the main concern of the morally obligated juror: that the passive nature of jury duty, where the dissemination of information is under the complete control of counsel, is "abhorrent to finding the

---

[190] *Ibid* at 743. See also Hoffmeister, *supra* note 71 at 448; Dann, *supra* note 157 at 1243.
[191] See e.g. Larry Heuer, Steven Penrod & Ronald Roesch, "Juror Notetaking and Question Asking During Trials: A National Field Experiment" (1994) 18:2 L & Hum Behav 121 [Heuer, Penrod & Roesch 1994] at 142; Seventh Circuit Bar Association, *Seventh Circuit American Jury Project – Final Report* (2008) [SCBA] at 62, online: <https://www.uscourts.gov/sites/default/files/seventh_circuit_american_jury_project_final_report.pdf>.
[192] See e.g. Kaufmann & Murphy, *supra* note 166 at 2; Heuer, Penrod & Roesch 1988, *supra* note 184 at 237; Hoffmeister, *supra* note 71 at 448.
[193] See Nina Sarkar, Wendy Ford & Christina Manzo, "Engaging Digital Natives through Social Learning" (2017) 15:2 J Systemics, Cybernetics & Informatics 1 at 2; Bernard Cornu, "Digital Natives: How Do They Learn?" (Russian Federation: UNESCO Institute for Information Technologies in Education, 2011) at 7, online: <https://unesdoc.unesco.org/ark:/48223/pf0000216681>.
[194] See Sarkar, Ford & Manzo, *ibid*.
[195] See e.g. Heuer, Penrod & Roesch 1988, *supra* note 184 at 252; Heuer, Penrod & Roesch 1994, *supra* note 191 143; Mary Dodge, *Should Jurors Ask Questions in Criminal Cases? A Report Submitted to the Colorado Supreme Court's Jury System Committee* (2002) at 40, online: <https://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Jury_System_Standing_Committee/dodgereport.pdf>.
[196] SCBA, *supra* note 191 at 62.

truth."[197] As noted by Hoffmeister, by asking questions, jurors can become more confident in their own knowledge, which tends to decrease speculation and uncertainty during deliberations.[198]

Finally, juror questions have the potential to address habitual reliance on technology and the Internet. Digital Natives have grown accustomed to having instantaneous access to information. As put by Marder, "[t]he response to check information on one's cell phone-whether to answer a question, define a term, or check a fact-has become almost second nature to many people."[199] The opportunity for jurors to ask questions during trial could satisfy that impulse. The same logic – to a certain extent – may apply to the "addicted" juror. As canvassed in Chapter 4, an "addiction" experienced in relation to the Internet is generally to a certain *output* of technology (e.g. video games, online shopping, pornography), rather than the piece of hardware itself. For "compulsive information seekers," the subject of their addiction is *information*.[200] Given the relatively immediate feedback juror questions would provide, those jurors who experience addiction to instantaneous information access might find such a change particularly beneficial.

6.6 CRIMINALIZING JUROR RESEARCH

My final (and likely most controversial) proposal is the criminalization of OJR. I use the term "criminalization," in this context, to describe the imposition of some form of penalty on jurors who engage in such misconduct. More specifically, I argue in favour of the creation of a statutory offence, similar to that which currently exists in the United Kingdom and several Australian states, prohibiting independent research by jurors. Instead of targeting any of the specific, underlying motivations for OJR canvassed in

---

[197] Ralph Artigliere, "Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial" (2011) 59:3 Drake L Rev 621 at 640.
[198] Hoffmeister, *supra* note 71 at 448.
[199] Marder, *supra* note 17 at 629.
[200] Matthias Brand, Kimberly S Young & Christian Laier, "Prefrontal control and Internet addiction: a theoretical model and review of neuropsychological and neuroimaging findings" (2014) 8 Frontiers in Human Neuroscience 1 at 1; "Internet Addiction" (last modified 9 January 2024), online: *Addiction Center* <https://www.addictioncenter.com/drugs/internet-addiction/#:~:text=Compulsive%20Information%20Seeking&text=For%20some%2C%20the%20opportunity%20to,existing%2C%20obsessive%2Dcompulsive%20tendencies>.

Chapter 4, I submit that criminalization would work as a general deterrent against OJR for *all* jurors (including recalcitrant ones), regardless of what would otherwise drive them to engage in online research.

In this section, I begin by canvassing the two main advantages of the criminalization of OJR: (1) the deterrent effect of criminalization; and (2) criminalization's potential to communicate OJR as being socially unacceptable. I then go on to address the criticisms of criminalization as found in the literature, ultimately arguing that, despite its potential risks, criminalization is a worthwhile pursuit. From there, I move on to the practical issue of *implementing* criminalization. In doing so, I reject the contempt of court mechanism as unsuitable and, instead, advocate in favour of a stand-alone offence.

6.6.1 ADVANTAGES OF CRIMINALIZATION

6.6.1.1 DETERRING ONLINE JUROR RESEARCH

The primary advantage of criminalization is its ability to serve as a deterrent. Deterrence theory, as originally conceived of by Cesare Beccaria and Jeremy Bentham in the mid-to-late eighteenth century[201] and resurrected into mainstream discussion by Howard Becker in the late 1960s,[202] presumes that humans, as rational, self-interested individuals, will be influenced by the potential consequences of their actions.[203] In the criminal law sphere, it posits that the presence of legal sanction will deter at least *some* individuals from engaging in criminal activity.[204] Deterrence works at both the micro- and macro-levels, in the sense that criminal sanctions discourage both re-offending

[201] See e.g. Robert Apel, "Sanctions, Perceptions, and Crime" (2022) 5 Ann Rev Criminology 205 at 206; Raymond Paternoster, "How Much Do We Really Know about Criminal Deterrence" (2010) 100:3 J Crim L & Criminology 765 at 767; Tomlinson, *supra* note 142 at 33.
[202] See Mann et al, *supra* note 142 at 1.
[203] See Paternoster, *supra* note 201 at 767; Mann et al, *ibid.*
[204] See Paternoster, *ibid*; Mann et al, *ibid.*

(specific deterrence) and those who have not yet offended from committing a crime (general deterrence).[205]

Although 20th century criminology literature questioned the legitimacy of deterrence as a viable theory of crime prevention,[206] more recent studies have challenged this skepticism. While there is still debate as to the *extent* of deterrence's impact, contemporary research has increasingly endorsed the deterrent value of criminalizing conduct, demonstrating that the fear of legal sanction is often a relevant consideration in determining whether to commit crime.[207] In particular, there is a "strong consensus" that probability of sanction (i.e., *likelihood* of punishment, as opposed to the *severity* of said punishment) has a powerful deterrent effect.[208]

Several commentators have endorsed punishment as a potentially powerful general deterrent for combating OJR. The idea, of course, is that jurors who might otherwise be tempted to turn to the Internet to seek out extraneous information will be deterred by the knowledge that such behaviour has been criminalized. As observed by McGee, it is possible that the fear of incarceration or monetary fines may "dissuade jurors from engaging in Internet-related misconduct."[209] Indeed, the "looming threat of punishment" may well deter jurors from conducting OJR or, at the very least, from sharing the fruits of their investigations with their fellow jurors.[210]

---

[205] See Paternoster, *ibid* at 766; Tomlinson, *supra* note 142 at 33; Ben Johnson, *Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer* (St. Paul, MN: Minnesota House Research Department, 2019) at 2, online: <https://house.mn.gov/hrd/pubs/deterrence.pdf>.
[206] See Mann et al, *supra* note 142 at 2.
[207] See e.g. *ibid* at 2, 8; Tomlinson, *supra* note 142 at 37; Ronald L Akers, Christine S Sellers & Wesley G Jennings, *Criminological Theories: Introduction, Evaluation, & Applications*, 7th ed (New York: Oxford University Press, 2017) at 19.
[208] Juste Abramovaite et al, "Classical deterrence theory revisited: An empirical analysis of Police Force Areas in England and Wales" (2023) 20:5 Eur J Criminology 1663 at 1666-67. See also Siddhartha Bandyopadhyay, Samrat Bhattacharya & Rudra Sensarma, "An analysis of the factors determining crime in England and Wales: A quantile regression approach" (2015) 35:1 Econ Bull 665; Lu Han, Siddhartha Bandyopadhyay & Samrat Bhattacharya, "Determinants of violent and property crimes in England and Wales: a panel data analysis" (2013) 45:34 Applied Econ 4820; Martin Killias, David Scheidegger & Peter Nordenson, "The Effects of Increasing the Certainty of Punishment: A Field Experiment on Public Transportation" (2009) 6:5 Eur J Criminology 387; Stephen Machin & Costas Meghir, "Crime and Economic Incentives" (2004) 39:4 J Human Resources 958.
[209] McGee, *supra* note 23 at 322. See also Matthew Aglialoro, "Criminalization of Juror Misconduct Arising From Social Media Use" (2015) 28:1 Notre Dame JL Ethics & Pub Pol'y 101 at 113; Marder, *supra* note 17 at 647.
[210] Bell, *supra* note 114 at 88.

I submit that criminalizing OJR would likely have a deterrent effect, largely because juror-specific conduct is especially amenable to being deterred. The deterrent power of a sanction is directly related to the population's *knowledge* that the sanction exists. Indeed, as noted by Kennedy, "[f]or a threat of punishment to be effective as a deterrent, the threat must be […] communicated."[211] As discussed earlier in this Chapter, because jurors receive routine instruction from the trial judge with respect to their obligations, they are uniquely positioned to receive clear warnings about their vulnerability to criminal sanction as a result of any wrongdoing. Such explicit and targeted warnings from a *judge* in a *courtroom* are, I submit, likely to have a much more powerful deterrent effect compared to the mere existence of general criminal prohibitions applicable to the average citizen.

Furthermore, the court's control over the *petit jury* provides an opportunity to influence their perception of the risk of sanction. There is general agreement that subjective probability of punishment is a stronger deterrent than objective probability of sanction.[212] Put another way, an individual's *belief* about whether punishment is likely is more important than whether punishment is *actually* a likely outcome. In addition, we tend to update our "risk estimates" in response to both our own and others' experiences.[213] Thus, in the jury setting, the trial judge could attempt to influence jurors' subjective perception of risk by providing examples of actual cases where jurors suffered criminal sanctions because of their online misconduct. In doing so, the potential deterrent effect of criminalization could be heightened.

6.6.1.2 COMMUNICATING ONLINE RESEARCH AS UNACCEPTABLE

In addition to serving as a deterrent, criminalizing OJR may work to communicate the social unacceptability of the practice to both jurors and the public at large. This shift in perception would be beneficial. After all, the vast majority of jurors understand that they are not *supposed* to engage in independent research. However, as demonstrated in

---

[211] Kevin C Kennedy, "A Critical Appraisal of Criminal Deterrence Theory" (1983) 88:1 Dickinson L Rev 1 at 5-6.
[212] See e.g. *ibid* at 5; Johnson, *supra* note 205 at 6-7.
[213] See e.g. Johnson, *ibid*; Paternoster, *supra* note 201 at 818; Apel, *supra* note 201 at 221-22.

Chapter 4, underlying incentives – including a moral obligation to discover the truth, confusion about the evidence or the law, or the inherent desire to engage with technology in the way in which one has grown accustomed – often overpower this knowledge, leading jurors to prioritize personal motivation over legal restrictions. However, if OJR were to be transformed into something socially unacceptable, those motivations may no longer be sufficient to push jurors to engage in this prohibited conduct.

This aligns with the recent movement in favour of what Corda calls the "transformational function" of criminal law.[214] Traditionally, criminal law has been viewed as "inherently backward-looking, endorsing and reinforcing norms, values, and attitudes *already affirmed* within a given society" a measure which should intervene "only when a certain social norm has become so significant within […] society to justify its protection by means of penal sanctions."[215] However, in more recent years, criminal law has been endorsed as a mechanism to *promote* change, rather than simply reflect it. By enacting criminal law, the government is able to "move beyond extant levels of public permission in order to shift norms, allowing public sentiment to later catch up with the regulation."[216] In this sense, criminalization has also become a public policy tool.[217] Indeed, as pointed out by Walker, "people's moral standards are affected by what they believe to be the current climate of opinion, and […] the criminal law is regarded as an indicator of the state of this opinion."[218]

We have seen several examples of law's transformational effect on public sentiment throughout history. This includes, for instance, the introduction of mandatory

---

[214] See Alessandro Corda, "The Transformational Function of the Criminal Law: In Search of Operational Boundaries" (2020) 23:4 New Crim L Rev 584.
[215] *Ibid* at 584-87 (emphasis added).
[216] Ann P Kinzig et al, "Social Norms and Global Environmental Challenges: The Complex Interaction of Behaviors, Values, and Policy" (2013) 63:3 BioScience 164 at 170. See also Johnson, *supra* note 205 at 2; Hadar Aviram, "Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends" (2020) 68:1 Buff L Rev 199 at 202-04; "The Institution of Criminal Law" in Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016) at 13.
[217] See Luke McNamara et al, "Theorising Criminalisation: The Value of a Modalities Approach" (2018) 7:3 Intl J Crime Just & Soc Democracy 91 at 92.
[218] Nigel Walker, "Morality and the Criminal Law" (1964) 11:3 How J Penology & Crime Prevention 209 at 213.

seatbelt laws[219] and the creation of harsh penalties for impaired driving[220] in the 1970s and 80s, and the imposition of anti-smoking measures over the past approximately five decades.[221] In each one of these cases, "government action […] exceeded public sentiment at the time but later gained widespread public acceptance."[222] Indeed, while many grumbled about the intrusions these measures created on public life, eventually, the restrictions became representative of society's condemnation of harmful practices.[223] This, according to Walker, is penal law's "declaratory" function: it communicates to members of a society what is regarded as unacceptable conduct and, as a result, influences moral attitudes toward certain types of behaviour.[224]

In the context of OJR, criminalization could communicate to jurors – and, indeed, to the general public – that independent research is unacceptable. Introducing the potential for punishment would serve a communicative function, emphasizing the importance of protecting the accused's right to a fair trial and recognizing OJR's potential to diminish the integrity of the criminal law process.[225] Indeed, as noted by McGee, the threat of a fine or imprisonment would "convey a public message that such behavior will not be tolerated, thereby dissuading future jurors from researching […] the case online."[226]

---

[219] See Vawn Himmelsbach, "The buckling-up brouhaha: Seatbelts were once as polarizing as vaccines and masks" *Toronto Star* (24 September 2022), online: <https://www.thestar.com/autos/the-buckling-up-brouhaha-seatbelts-were-once-as-polarizing-as-vaccines-and-masks/article_49705a1a-9bc6-576d-818c-347472bc120c.html>.
[220] See Karen Walker, "Impaired Driving" (last amended 15 December 2013), online: *The Canadian Encyclopedia* <https://www.thecanadianencyclopedia.ca/en/article/impaired-driving>.
[221] See e.g. "A history of anti-smoking measures in Canada" *The Globe and Mail* (16 April 2024), online: <https://www.theglobeandmail.com/canada/article-cigarette-warning-labels-smoking-canada/#:~:text=Canada%20can%20claim%20many%20global,ban%20smoking%20on%20patios%20(Newfoundland>; "A legal history of smoking in Canada" *CBC* (19 November 2012), online: <https://www.cbc.ca/news/health/a-legal-history-of-smoking-in-canada-1.982213>.
[222] See Kinzig et al, *supra* note 216 at 170.
[223] In the context of seatbelt laws, for instance, see e.g. Himmelsbach, *supra* note 219; Andrew Steptoe et al, "Seatbelt use, attitudes, and changes in legislation: An international study" (2002) 23:4 Am J Preventative Medicine 254; "Stronger 'buckle up' laws change attitudes among young drivers" (21 October 2002), online: *University College London* <https://www.ucl.ac.uk/news/2002/oct/stronger-buckle-laws-change-attitudes-among-young-drivers>.
[224] Walker, *supra* note 220 at 213.
[225] See e.g. Aglialoro, *supra* note 209 at 115; LCEW, *supra* note 106 at 73-74.
[226] McGee, *supra* note 23 at 322.

6.6.2 ADDRESSING CRITICISMS OF CRIMINALIZATION

Critics have advanced two main criticisms of criminalization as a valid strategy to deal with OJR. The first is what I refer to as the "principled objection" – that it would be unfair to impose sanctions upon jurors "for ordinary, otherwise legal conduct that occurs in the course of compulsory state service."[227] The imposition of punishment has been identified as "contrary to the notion that jury duty is a civic responsibility,"[228] one that requires considerable sacrifice on the part of jurors. Indeed, as observed by Hogg, reluctance to punish is rooted in the fact that jurors "perform an important and commendable public service […,] spending weeks or months away from work, hearing often traumatic evidence in exchange for low pay and with little support."[229]

However, I submit that imposing criminal sanctions for OJR is justifiable, given its detrimental impact on the accused's right to a fair trial. As discussed in Chapter 3, in the context of jury trials, full enjoyment of this right requires that the jury to render a verdict based solely on the evidence presented at trial and the law as explained by the trial judge, after the accused has had the opportunity to make full answer and defence. When jurors conduct OJR and, thus, seek out external information, these guarantees are unacceptably undermined, potentially leading to an unjust outcome. Given the importance of ensuring trial fairness and the detrimental impact of miscarriages of justice (and, in particular, wrongful convictions), it is appropriate to impose penalties on those who knowingly engage in such destructive behaviour. This is particularly so because, as established in Chapter 3, racialized accused appear to be particularly vulnerable to some of the trial fairness risks stemming from OJR. Given the legal profession's necessary role in the reconciliation process, as well as the importance of swiftly responding to anti-Black racism in the wake of the Black Lives Matter movement, the implementation of a criminal prohibition is warranted.

---

[227] Bell, *supra* note 114 at 88-89.
[228] Jane Johnston et al, *Juries and Social Media: A report prepared for the Victorian Department of Justice* (Victoria: Victorian Department of Justice, 2013) at 19, online: <https://www.researchgate.net/publication/275037791_Juries_and_Social_Media_A_report_prepared_for_the_Victorian_Department_of_Justice/>;
[229] Hogg, *supra* note 119 at 13.

Further, while it is true that jurors are *generally* free to conduct online research in their everyday lives, it does not follow that they should be free to do so in the context of jury duty. Such a distinction is not unknown under our laws. We can, for instance, consume alcohol, but not if we plan to subsequently get behind the wheel of a vehicle. Jurors' sacrifices are, indeed, significant, but the protection of the accused's constitutional rights must remain our highest priority.

Commentators have also been critical of the potential impact of criminalization on "self-policing," i.e., jurors' willingness to report instances of OJR by fellow jurors to a court official. As discussed in Chapter 5, it has been suggested that, by introducing the threat of punishment into the mix, jurors may become less inclined to alert the trial judge about any misconduct that arises, either out of a sense of loyalty to their peers or an inherent sense of unfairness.[230] As observed by Hunter, the concern is that criminal sanctions "may be applied to a well-intentioned juror-detective," [which] "could well discourage other jurors from reporting misconduct."[231] This is certainly a criticism worth addressing, given that, as discussed in Chapter 2, due to the restrictions imposed by the jury secrecy rule, "self-policing" remains one of the few avenues through which OJR may be discovered.

However, I submit this concern is inadequate to warrant rejecting criminalization as a viable approach to addressing OJR. As discussed in Chapter 5, the risk that jurors will be unwilling to report on one another is *already* present. It does not follow, however, that, by criminalizing OJR, hesitancy to report will necessarily *increase*. Indeed, in 2013, when the Law Commission of England & Wales examined this very issue, it was determined that, while some jurors will inevitably have reservations about reporting the online misconduct of fellow jurors, there was little compelling evidence to suggest that risk of non-reporting would increase if OJR were to be formally criminalized.[232] In addition, any additional risk of non-reporting that might stem from criminalization may

---

[230] See e.g. LCEW, *supra* note 106 at 78-79; Hogg, *ibid* at 11; Johnston et al, *supra* note 228 at 19.
[231] Jill Hunter, *Jurors' Notions of Justice: An Empirical Study of Motivations to Investigate & Obedience to Judicial Instructions* (New South Wales: Law and Justice Foundation, 2013) at 42, online: <https://lawfoundation.net.au/wp-content/uploads/2023/12/UNSW_Jury_Study_Hunter_2013.pdf>.
[232] LCEW, *supra* note 106 at 79.

well be outweighed by the likely overall *decrease* in OJR criminalization would produce – namely, the propensity of criminalization, as established above, to deter OJR, thereby leading to fewer overall instances of such misconduct.

Further, it is possible that, by communicating OJR as socially unacceptable through criminalization, over time, hesitancy on the part of jurors to report on their peers may begin to wane. Indeed, as put by Kinzig et al, government action of this kind "can stimulate long-term changes in beliefs and norms, creating and reinforcing the behaviors needed to solidify and extend the public good."[233] Put another way, as OJR becomes more widely recognized as socially unacceptable, it is conceivable that jurors will become less tolerant of it and, as a result, *more* willing to report any issues to the trial judge.

6.6.3 IMPLEMENTING CRIMINALIZATION

I will now move on to discuss the most appropriate *form* of criminalization. In my view, there are two options. First, independent research (including, of course, OJR) could be criminalized through utilization of the courts' common law contempt power. This would have the effect of criminalizing OJR on the basis that it constitutes defiance of a court order.[234] On the other hand, OJR could be prohibited through a stand-alone statutory offence. This would require statutory amendment to create an offence that specifically criminalizes the act of engaging in independent research while serving as a juror.

6.6.3.1 CONTEMPT OF COURT: A SUITABLE MECHANISM?

I begin with an examination of contempt of court as a legitimate means of criminalizing OJR. Other jurisdictions have adopted contempt as a punitive response to

[233] Kinzig et al, *supra* note 216 at 164.
[234] See e.g. *United Nurses of Alberta v Alberta (AG)*, [1992] 1 SCR 901, 71 CCC (3d) 225 [*United Nurses*]; *Pro Swing Inc. v Elta Golf Inc.*, 2006 SCC 52 [*Pro Swing*] at para 35; *Carey v Laiken*, 2015 SCC 17 [*Carey*] at paras 32-35.

independent research by jurors. Prior to 2015,[235] jurors in the United Kingdom who engaged in OJR were often held in contempt. Take, for instance, the 2012 case of *Attorney General v Dallas*,[236] in which a juror was held in contempt and sentenced to six months imprisonment after conducting an online search for the term "grievous," as well as a search for the town in which the crime allegedly took place. Similarly, in 2013, a juror from Surrey was sentenced to two months imprisonment upon being cited in contempt for conducting a Google search into the victims of a fraud case.[237] Citing misbehaving jurors in contempt is also the predominant strategy used in the United States.[238] In 2009, for example, a juror was held in contempt and fined US$1,200 for conducting an online search into the accused's prior convictions and sharing their findings with their fellow jurors.[239] More recently, in 2021, a New Jersey juror was fined more than US$11,000 after being cited in contempt for OJR.[240]

Further, while the contempt power is not *currently* utilized in Canada to address OJR,[241] it appears there might be authority for trial judges to do so. In 2013, the Canadian Judicial Council released a policy framework to assist courts in accommodating the realities of our newfound "digital environment."[242] One of the key recommendations was the development of policy to "ensure that technology does not compromise trial fairness or the administration of justice."[243] It was specifically recommended that jurors "should be directed at the start of trials not to perform any independent research, including

---

[235] At this point, the UK's jury legislation was amended to create a statutory offence for jury research, discussed in further detail below: *Criminal Justice and Courts Act 2015* (UK).
[236] *Attorney-General v Dallas*, [2012] EWHC 156.
[237] See Owen Bowcott, "Two jurors jailed for contempt of court after misusing internet during trials" *The Guardian* (29 July 2013), online: <https://www.theguardian.com/law/2013/jul/29/jurors-jailed-contempt-court-internet>.
[238] See Hoffmeister, *supra* note 71 at 437.
[239] See Thaddeus Hoffmeister, "Preventing Juror Misconduct in a Digital World" (2015) 90:3 Chi-Kent L Rev 981 at 986.
[240] See Jim Walsh, "Juror fined, found in criminal contempt after causing mistrial" *Courier Post* (29 June 2021), online: <https://www.courierpostonline.com/story/news/2021/06/29/juror-misconduct-mistrial-camden-federal-court-kugler/7802008002/>.
[241] See Betsy Powell, "Court cases can go off the rails when jurors go to Google" *Toronto Star* (13 January 2020), online: <https://www.thestar.com/news/gta/court-cases-can-go-off-the-rails-when-jurors-go-to-google/article_c9157b71-eaa6-5493-a8d5-a35edfdeaa3b.html>.
[242] Jo Sherman, *Court Information Management: Policy Framework to Accommodate the Digital Environment* (Ottawa: Canadian Judicial Council, 2013) at iii, online: <https://cjc-ccm.ca/sites/default/files/documents/2019/Policy%20Framework%20to%20Accommodate%20the%20Digital%20Environment%202013-03.pdf>.
[243] *Ibid* at 41.

Internet searches of any of the people or places or issues involved in the case" and that anyone who breaches these directions "may be cited in contempt of court and where appropriate, prosecuted for obstruction of justice."[244] Appellate courts have also alluded to the possibility of jurors being held in contempt for engaging in OJR. In *R v Farinacci*, the practice in other common law jurisdictions of holding misbehaving jurors in contempt was mentioned without any indication that such proceedings would not be equally permissible under Canadian law.[245] The Court of Appeal for Ontario was even more explicit in *R v Bains*:

> In some cases, it may be helpful for the trial judge to instruct empanelled jurors not to bring computers, tablets, cellphones, smartwatches or any devices with research capacities to the jury room at any stage of the trial. This injunction is imperfect, of course, because it does not stop the curious from doing research elsewhere when the jury is not in the courtroom. In that respect, it may be appropriate to add some specifics to the injunction against research, as for example, that jurors are not to access legal databases, earlier decisions, pre-trial publicity or any other material of any kind relating to any subject or person connected with the trial. To underscore the point, if need be, a reminder that a breach of the injunction would amount to and be punishable as contempt might not go amiss.[246]

Thus, it appears that judges *could* invoke their contempt powers to address online research by jurors. In Canada, to be cited in contempt, one must be found to have knowingly breached a "clear and unequivocal" court order.[247] In such cases, the trial judge may exercise their discretion to hold a party, such as a misbehaving juror, in contempt to "uphold [the court's] dignity and process." In the context of OJR, the "court order" violated would be the trial judge's instruction to refrain from engaging in independent research. Put simply, the act of engaging in OJR, despite clear instruction to the contrary, would amount to a conscious breach of a court order.

And yet, despite this apparent authority, I submit that the courts' contempt power would be an unsuitable method for criminalizing OJR. Primarily, this is because of the unpredictable nature of contempt. As noted above, the certainty of legal sanctions is the

---

[244] *Ibid.*
[245] *R v Farinacci*, 2015 ONCA 392 at para 50.
[246] *R v Bains*, 2015 ONCA 677 at para 110.
[247] See *United Nurses*, *supra* note 234; *Carey*, *supra* note 234 at paras 32-35.

strongest deterrent of criminal activity. However, the reality of contempt proceedings is that they are, by their very nature, inconsistent in application. This is so for two reasons. First, contempt is a discretionary power, one which the Supreme Court of Canada has instructed must be used "cautiously and with great constraint."[248] What is more, in other jurisdictions, trial judges have been reluctant to invoke their contempt powers to deal with jury research, both due to the perceived unfairness of punishing jurors,[249] as well as fear that doing so will result in poor jury turnout.[250] Second, the ability to cite a juror in contempt is directly dependent on the instructions provided. As noted by the Court in *Carey v Laiken*, a party cannot be held in contempt where the "court order" allegedly breached was unclear, whether because it omitted essential details or incorporated overly broad language.[251] Accordingly, the utility of contempt to address an incident of OJR in any given case will "depend […] on the exact wording that each judge adopts in warning the jurors at the start of the trial."[252] As a result of this unpredictability, if criminalization were to take the form of contempt, its deterrent value would likely decrease.

Another issue surrounding the use of contempt is lack of clarity for jurors. To untrained laypersons, "contempt of court" is a confusing and abstract concept. Indeed, OJR-related contempt prosecutions in other jurisdictions have been criticized on the basis that jurors may often be unaware that their conduct constituted contempt or, equally as important, may not have understood the seriousness of potential penalties.[253] Doubt has been expressed, for instance, as to whether, from a juror's perspective, "it is obvious what 'a contempt' is or what the implications of this are."[254]

Finally, using the contempt power to address OJR risks straining the relationship between trial judges and jurors. In 2013, the Law Commission of England and Wales undertook a thorough investigation of the continued value of contempt citations to curtail OJR, part of which involved speaking with trial judges.[255] Responding judges

---

[248] *Carey*, *ibid* at para 36.
[249] See e.g. Bell, *supra* note 114 at 88-89; Johnston et al, *supra* note 228 at 19.
[250] See Bell, *ibid* at 89.
[251] *Carey*, *supra* note 234 at para 33.
[252] LCEW, *supra* note 106 at 65.
[253] See Hogg, *supra* note 119 at 10-11.
[254] LCEW, *supra* note 106 at 66.
[255] *Ibid.*

emphasized the importance of developing a "rapport" with new jurors, as well as that "the early moments when a jury is empanelled can be crucial to establishing the relationship between them and the court."[256] They noted that establishing such rapport is difficult when, at the same time, judges are issuing "orders" about what jurors can and cannot do and, further, threatening to imprison them for breaches.[257] Indeed, as pointed out by Marder, contempt proceedings tend to "place jurors and judges in an antagonistic, rather than a cooperative, relationship."[258]

6.6.3.2 RECOMMENDATION: CREATING A STATUTORY OFFENCE

Considering these disadvantages, I recommend, instead, that criminalization be achieved by the creation of a statutory offence, housed in the *Criminal Code*, explicitly prohibiting jurors from engaging in independent research, including OJR. This is the approach currently taken in other Commonwealth jurisdictions. For instance, since 2015, it has been an offence in the United Kingdom for jurors to conduct independent research, including OJR.[259] This prohibition includes research surrounding any person involved in the events relevant to the case, any person involved in the trial (i.e., the judge, lawyers, or witnesses), as well as legal research.[260] Further, it is also an offence for a juror to disclose any information obtained through independent research to a fellow juror.[261] A juror convicted of either offence is liable to a fine, up to two years imprisonment, or both.[262] Similar legislation exists in several Australian states.[263]

Criminalizing OJR by way of a statutory offence offers several key advantages and, thus, is preferrable to reliance on the courts' contempt power. First and foremost, unlike contempt, a statutory offence "would not turn on the form of words that a judge happened to adopt when directing the jury in a given case."[264] Instead, it would promote

---

[256] *Ibid* at 68.
[257] *Ibid.*
[258] Marder, *supra* note 17 at 647.
[259] *Juries Act 1974* (UK), ss 20A(1), 20A(3)(b).
[260] *Ibid*, s 20A(4).
[261] *Ibid*, s 20B(1)).
[262] *Ibid*, ss 20A(8), 20B(3).
[263] See e.g. *Jury Act 1977* (NSW), No 18, s 68C(1); *Jury Act 1995* (Qld), No 42, s 69A(1); *Juries Act 2000* (Vic), No 53, s 78A(1).
[264] See LCEW, *supra* note 106 at 76.

uniform, consistent application of the prohibition against OJR and, thus, better guarantee criminalization's function as a deterrent. After all, as noted above, certainty of criminal sanctions has been found to be the strongest indicator of a measures' deterrent effect.

A statutory offence would also provide *clarity* for jurors themselves. When compared with the contempt mechanism, "the message would be clearer" for jurors if they could be told that independent research is a *crime*.[265] Indeed, as observed by two representatives of the UK Senior Judiciary in 2013, a statutory offence "would avoid the potential uncertainty which could arise under [a contempt-based] system where judges' instructions to a jury may take different forms and which run the risk of being misconstrued by jurors as something less than a mandatory court order."[266] Further, given jurors' general lack of familiarity with the criminal law and limited understanding of legal terminology, the notion of a "crime" is likely to resonate more profoundly than the abstract concept of "contempt."[267] In addition, as discussed above, the trial judge could use their instruction of the jury as an opportunity to explain precisely what constitutes independent research, leaving little room for confusion.

Further, unlike the use of contempt citations, a statutory offence prohibiting independent research would be consistent with *existing* legislation regulating juror conduct. Indeed, as discussed in detail in Chapter 2, section 649 of the *Code* makes it an offence, punishable on summary conviction, to disclose "any information relating to the proceedings of the jury."[268] A similar research-based offence would be consistent with this existing framework. Such consistency was recognized as a strength by the UK Senior Judiciary, which advocated in favour of the 2015 swap to a stand-alone jury research offence in England and Wales.[269]

Lastly, implementing a stand-alone criminal provision would better safeguard the judge/jury relationship. Unlike the contempt mechanism, which demands that judges repeatedly warn jurors of their power to punish them for misconduct (and, thus,

---

[265] *Ibid* at 66. See also Hogg, *supra* note 119 at 10-11.
[266] LCEW, *ibid* at 73-74.
[267] *Ibid* at 66.
[268] *Code*, *supra* note 19, s 649(1).
[269] LCEW, *supra* note 106 at 73-74.

potentially strain their relationship with the jury), a statutory offence would shift this responsibility. Trial judges would, instead, be able to explain that it is *Parliament* that has criminalized independent research, thereby maintaining a more neutral dynamic between judge and jury.[270]

6.7 CONCLUSION

While, given the hurdles created by the jury secrecy rule, it is impossible, at present, to *conclusively* determine the prevalence of OJR as a phenomenon within Canadian trials, in the first Chapter of this project, I presented compelling evidence that it likely occurs at least *somewhat* regularly. This is cause for concern, given the risks OJR poses for the accused's constitutional guarantee of trial fairness. Indeed, as discussed in detail in Chapter 3, independent factual research with respect to a criminal case has negative implication for both the impartiality of the jury and the accused's right to make full answer and defence. Jurors risk exposing themselves to information that has not been vetted by the trial judge and, thus, may be prejudicial, irrelevant, or even inaccurate. This risk may be heightened for racialized accused, given the overrepresentation (and, often, largely *negative* portrayal) of racialized persons in crime news coverage. Further, because the accused and their counsel will, in most cases, be unaware that independent research was conducted, they are denied the opportunity to challenge the validity of any extraneous information. Legal research also puts trial fairness in jeopardy, as it risks key legal principles and concepts being improperly interpreted and applied by jurors.

What is more, these fairness concerns have been exacerbated in the Digital Age. Due to ease of accessibility of online information, the so-called "fade factor" has diminished and, along with it, several key measures for ameliorating the potential prejudice associated with jurors' exposure to pre-trial publicity and other extraneous information. In addition, the Digital Age has borne witness to a "reliability decline," such that investigating jurors are now more susceptible to encountering *misinformation*. These

[270] *Ibid* at 68.

modern failings have resulted in a heightened risk of accused persons falling victim to miscarriages of justice and, indeed, even wrongful convictions.

To meaningfully assess the effectiveness of various strategies aimed at combating OJR, in Chapter 4, I identified several underlying motivations for jurors conducting online research. Some do so out of a sense of moral obligation to discover the truth, by jurors who find rules of admissibility and the trial judge's discretionary "gatekeeper" role abhorrent to their personal sense of justice. Others undertake OJR to address confusion with respect to the law or some aspect of the case before them. For others still, the temptation to engage in OJR will be a result of personal Internet habits. In the same vein, albeit for a smaller proportion of jurors, OJR is likely attributable to a genuine Internet addiction, that which would make disengaging from the "online world" for the duration of a criminal trial extremely challenging, particularly given the stressful and mentally strenuous nature of jury duty. And finally, some "recalcitrant" jurors will simply refuse to adhere to the prohibition against independent research, despite knowledge of its existence and importance.

Equipped with these underlying motivations, in Chapter 5, I engaged in a critical evaluation of the strategies currently employed in Canada to detect, prevent, and ameliorate the practice of OJR. These include the deterrent measures of sequestering the jury and banning or confiscating electronic devices, the preventative measure of judicial instruction, both on the prohibition on OJR generally and jurors' obligation to "self-police," and, finally, the remedial measures of electing judge-alone trials and impeaching jury verdicts or juror behaviour. Unfortunately, I determined that these measures, both individually and collectively, fall short of what is required to truly mitigate the trial fairness risks OJR poses. This was, in large part, due to the inability of each strategy to effectively target, whether directly or indirectly, jurors' underlying motivations for engaging in independent online research in the first place.

Thus, in this final Chapter, upon rejecting the abolition of the criminal jury as a legitimate response to OJR, I set out to present a comprehensive set of proposed reforms to our criminal jury procedure which, if implemented, would represent a significant step toward meaningfully addressing online research by Canadian jurors. These strategies

build upon the existing Canadian framework for combating OJR by aiming to either *prevent* or, at the very least, *detect* online research. Each proposed tactic represents either a novel, stand-alone approach or enhances existing tactics by addressing their inherent weaknesses.

Most of the proposed measures would effectively target one or more of the underlying motivations for undertaking OJR discussed in Chapter 4 and, thus, can be set apart as distinct from current Canadian practice. A more expansive approach to juror questions would, for instance, provide a particularly compelling means to resolve juror confusion or misunderstanding, given the compatibility of juror questions with Digital Natives' interactive learning style, as well as quell concerns of morally obligated jurors by increasing their confidence in their own knowledge. Routinely permitting an Internet-use-based challenge for cause, on the other hand, would target those who engage in OJR out of habit by providing an early, strategic reminder that, during trial, jurors are required to adopt a relationship with the Internet that may differ considerably from the one they have in their everyday lives, as well as present an opportunity to detect potential jurors who may not be able to refrain from engaging in online research due to an Internet addiction. Amending the *CJC Instructions* to provide a clear definition of what constitutes online "research" would also target habitual Internet users, who are often unable to identify certain forms of OJR as "research," nor to understand that it is wrong. The same can be said for amending the *Instructions* to provide a *justification* for the prohibition on OJR – by explaining why online research is prohibited while serving as a juror, such an Instruction would serve as a reminder to habitual Internet users of the importance of setting aside any problematic Internet habits during trial. Morally obligated jurors would also be targeted by providing a justification; by demonstrating the harm that can result from OJR, a message is conveyed that the practice is often the *cause* of injustice, as opposed to a possible solution.

Other tactics respond to the issue by seeking to deter *all* jurors – including recalcitrant ones – from engaging in OJR. This includes amending the jurors' oath/affirmation to include an explicit promise to refrain from engaging in independent research, given the powerful commitment-creating power of oath-taking. It also includes,

of course, the criminalization of OJR through the creation of a statutory offence prohibiting independent research by jurors. This measure, as well as an amendment to the *CJC Instructions* warning jurors of its operation, would likely work to curb juror misbehaviour by introducing a realistic, foreseeable threat of punishment. Similarly, if a clear and explicit "self-policing" instruction were to be provided, jurors who might otherwise engage in OJR may be deterred from doing so, given their awareness that jurors have been instructed to monitor each other's behaviour.

Together, the implementation of the solutions discussed in this Chapter would, in my view, go a long way to *meaningfully* address the issue of OJR in Canada. Collectively, they would help to minimize the impact of jurors' online research through the employment of diverse, motivation-based strategies for the prevention and detection of OJR. What is more, they would align with Marder's "process view" of juror education, in the sense that they would educate jurors about the trial fairness risks such misconduct poses across *all* stages of proceedings, from jury selection to the final charge. This is consistent with Marder's instruction that, to be successful at addressing online juror misconduct, courts "need to view juror education as an ongoing process," in which they "make use of every stage and every judge-jury or court-jury interaction […] as an opportunity to reinforce the lesson that jurors must refrain from using the Internet."[271] Were these measures to be integrated into Canadian jury procedure, I submit that we would be in a better position to continue to safeguard fair trial rights, as guaranteed under the *Canadian Charter of Rights and Freedoms*, in the Digital Age.

Of course, it is important to remember that these recommendations, as well as certain key observations about OJR made in previous Chapters, have been based upon the (to this point) limited scholarship on jurors' online activities and, indeed, jurors in general. As discussed in Chapter 2, due to the operation of our jury secrecy rule, there has been a *particular* dearth of Canadian data on juries. Because of this, I relied extensively on information about juror behaviour and online juror misconduct from comparator jurisdictions, whose cultural landscapes and criminal law systems, albeit to various extents, differ from Canada's. Further, I had to rely on indirect evidence to assess the

[271] Marder, *supra* note 17 at 649.

incidence of, and underlying motivations for, online research, both of which constitute a significant component of the project, given the lack of empirical data on these topics.

Thus, while this project has provided valuable insight into a yet largely unexplored topic within the Canadian legal landscape, it has also highlighted several areas where further research is needed. Future studies should, in my view, focus on gathering empirical data with respect to OJR, including its frequency, underlying motivations, and impact. While, as discussed in Chapter 2, the jury secrecy rule makes it such that gathering this kind of information from jurors themselves may be difficult, it may still be worthwhile to seek permission to undertake real jury research projects on OJR, so long as they would not have the effect of prying into a jury's deliberative process. After all, jury research of this kind has been permitted, albeit sparingly, in Canada in more recent years, largely focusing on the impact of jury duty on jurors' mental health.[272] In the context of OJR, such studies could include an examination of the incidence of and motivations underpinning online research, neither of which would *necessarily* require participating jurors to discuss how their online activities impacted their decision-making process. In addition (or in the alternative, should permission to conduct a real jury research project on OJR be denied), it may be worthwhile for Canadian jury researchers to question justice system participants, such as judges, Crown prosecutors, and defence counsel, about the perceived frequency and impact of, and motivation(s) driving, online research by jurors. Similar studies conducted in other common law jurisdictions[273] have provided helpful insight into the prevalence and consequences of OJR. Ultimately, a more comprehensive body of empirical data on OJR in Canada would help to foster a more comprehensive understanding of the issue and, as a result, inform any novel strategies implemented to combat the practice. This is

---

[272] See e.g. Sonia R Chopra, *Juror Stress: Sources, Severity, and Solutions* (PhD Dissertation, Simon Fraser University, 2002); Lorne D Bertrand, Joanne J Paetsch & Sanjeev Anand, *Juror Stress Debriefing: A Review of the Literature and an Evaluation of a Yukon Program* (Whitehorse: Yukon Department of Justice, 2008).

[273] See e.g. Hoffmeister, *supra* note 71; Paula Hannaford-Agor, David B Rottman & Nicole L Waters, *Juror and Jury Use of New Media: A Baseline Exploration* (The National Center for State Courts, 2012), online: <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/HarvardExecSession_JurorAndJuryUse.pdf> ; Patrick Keyzer et al, "The courts and social media: what do judges and court workers think?" (2013) 25:6 Judicial Officers' Bull 47; Tasmania Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Final Report No 3, January 2020).

important, as such action is undoubtedly necessary if we are to preserve the integrity of criminal juries as we move forward in the Digital Age.

BIBLIOGRAPHY

CASE LAW

Alberta v The Edmonton Sun, 2003 ABCA 3.

Allan Jake Clark v State of Maryland, No 0953/08 (Md Ct Special App, 2009).

*Attorney-General v Dalla*s, [2012] EWHC 156.

Carey v Laiken, 2015 SCC 17.

Corbett v R, [1975] 2 SCR 275, 42 DLR (3d) 142.

Dagenais v Canadian Broadcasting Corp., [1994] 3 SCR 835, 120 DLR (4th) 12.

Hill v Gipson, No 12-CV-00504-AWI-DLB (HC) (ED Cal Aug 22, 2012).

Hubbert v R (1975), 11 OR (2d) 464, 29 CCC (2d) 279 (CA).

Marshall and Richardson v Tasmania, [2016] TASCCA 21.

Martin v R, (2010) 28 VR 579.

Patterson v Colorado, 205 US 454 (1907).

Patterson v Peladeau, 2020 ONCA 137.

People v Oritz, Crim No B205674 (Cal App, 2d Dist 2009).

Pro Swing Inc. v Elta Golf Inc., 2006 SCC 52.

Queen v Kennedy (1856-59), 3 NSR 203.

R c Ouellette, [1988] RJQ 810.

R v A.G., 2015 ONCA 159.

R v Ampadu, 2018 ONSC 2797.

R v Andrade (1985), 18 CCC (3d) 41 (Ont CA).

R v ASM, 2021 ABQB 895.

R v Bains, 2015 ONCA 677.

R v Baranec, 2020 BCCA 156.

R v Benbrika, [2009] VSC 142.

R v Bhogal, 2021 ONSC 4925.

R v Biddersingh, 2015 ONSC 6498.

R v Biddersingh, 2022 ONCA 6.

R v Biniaris, 2000 SCC 15.

R v Budai, 2001 BCCA 349.

R v Burke, 2002 SCC 55.

R v C.P., 2021 SCC 19.

R v Canadian Broadcasting Corp., 2018 SCC 5.

R v Chambers, [1990] 2 SCR 1293, 59 CCC (3d) 321.

R v Chiasson, 2009 ONCA 789.

R v Chouhan, 2021 SCC 26.

R v Cinous, 2002 SCC 29.

R v Corbett, [1988] 1 SCR 670, 41 CCC (3d) 385.

R v Darrach, 2000 SCC 46.

R v Druken, 2002 NFCA 23.

R v Durant, 2019 ONSC 3169.

R v Farinacci, 2015 ONCA 392.

R v Find, 2001 SCC 32.

R. v G. (R.M.), [1996] 3 SCR 362, 110 CCC (3d) 26.

R v Gagnon (1992), 74 CCC (3d) 385 (QCCA).

R v Giroux (2006), 207 CCC (3d) 512 (Ont CA).

R v Graham, 2020 ONSC 3901.

R v Gumbly, 1996 NSCA 213.

R v Haevischer, 2013 BCSC 2014.

R v Hanssen, 2021 ONSC 7669.

R v Harrer, [1995] 3 SCR 562, 128 DLR (4th) 98.

R v Hawkins, [2005] EWCA Crim 2842.

R v Hertrich (1982), 137 DLR (3d) 400, 67 CCC (2d) 510 (Ont CA).

R v Horne, 1987 ABCA 108.

R v J. S-R (2008), 236 CCC (3d) 519 (Ont SC).

R v JH (No 3), 2014 NSWSC 1966.

R v J.J., 2022 SCC 28.

R v J.M.H., 2011 SCC 45.

R v JP (No 1), [2013] NSWSC 1678.

R v JP (No 2), [2013] NSWSC 1679.

R v K, (2003), 59 NSWLR 431.

R v Karakaya, [2005] EWCA Crim 346.

R v Karim, 2010 ABCA 401.

R v Keegstra, 1991 ABCA 97.

R v Khan, 2007 ONCA 779.

R v Knight and MacDonald, 2017 ONSC 6606.

R v Koh (1998), 42 OR (3d) 668, 131 CCC (3d) 257 (CA).

R v Kokopenace, 2015 SCC 28.

R v Koopmans, 2015 BCSC 2501.

R v Korca, 2023 ABKB 311.

R v Kossyrine, 2017 ONCA 388.

R v Krieger, 2006 SCC 47.

R v Layton, 2009 SCC 36**.**

R v Lyttle, 2004 SCC 5.

R v Marshall, [2007] EWCA Crim 35.

R v Martin, 2021 ONSC 5333.

R v Mentuck, 2001 SCC 76.

R v Merz (1999), 46 OR (3d) 161, 140 CCC (3d) 259 (CA).

R v Millard, 2017 ONSC 6040.

R v Millard and Smich, 2015 ONSC 6206.

R v Mills, [1999] 3 SCR 668, 180 DLR (4th) 1.

R v N.S., 2012 SCC 72.

R v Nash (1949), 94 CCC 288 (NBCA).

R v O.(R.), 2021 ONSC 6331.

R v Oland, 2018 NBQB 253.

R v Oland, 2018 NBQB 256.

R v One Yellow Rabbit Theatre Association, 1992 ABCA 107.

R v Osolin, [1993] 4 SCR 595, 109 DLR (4th) 478.

R v Pan, 2014 ONSC 4645.

R v Pan; R v Sawyer, 2001 SCC 42.

R v Parks (1993), 15 OR (3d) 324, 84 CCC (3d) 353 (CA).

R v Pickton, 2007 BCSC 1293.

R v Pietrangelo (2001), 152 CCC (3d) 475 (Ont CA).

R v Riley, 2023 NSSC 377.

R v Rose, [1998] 3 SCR 262, 166 DLR (4th) 385.

R v Roussin (B.), 2011 MBCA 103.

R v Ryan (D.), 2012 NLCA 9.

R v Scalzo, 2019 ONSC 6061.

R v Schirmer, 2020 BCSC 2257.

R v Seaboyer, [1991] 2 SCR 577, 83 DLR (4th) 193.

R v Sherratt, [1991] 1 SCR 509, 63 CCC (3d) 193.

R v Shrubsall (2000), 187 NSR (2d) 310 (Sup Ct).

R v Sio (No 3), [2013] NSWSC 1414.

R v Sio (No 4), [2013] NSWSC 1415.

R v Sipes, 2012 BCSC 1728.

R v Spackman, 2012 ONCA 905.

R v Spence, 2005 SCC 71.

R v Stillman, [1997] 1 SCR 607, 144 DLR (4th) 193.

R v Stillman, 2019 SCC 40.

R v Stinchcombe, [1991] 3 SCR 326, 68 CCC (3d) 1.

R v Sundman, 2022 SCC 31.

R v Suzack (2000), 141 CCC (3d) 449, 30 CR (5th) 346 (Ont CA).

R v T.R., 2017 SKQB 89.

R v Theodore, 2020 SKCA 131.

R v Toutissani, 2007 ONCA 773.

R v Turpin, [1989] 1 SCR 1296, 48 CCC (3d) 8.

R v Veltman, 2023 ONSC 3759.

R v Victoria, 2018 ONCA 69.

R v W.H., 2013 SCC 22.

R v Walle, 2012 SCC 41.

R v Williams, [1998] 1 SCR 1128, 159 DLR (4th) 493.

R v Windebank, 2014 ONSC 5135.

R v Wolfe, 2005 BCCA 307.

R v Yebes, [1987] 2 SCR 168, 43 DLR (4th) 424.

Re Global Communications Ltd. and Attorney-General for Canada (1984), 44 OR (2d) 609, 5 DLR (4th) 634 (CA).

Regina v Alward (1976), 73 DLR (3d) 290, 15 NBR (2d) 551 (CA).

Regina v Bryant (1984), 48 OR (2d) 732, 16 CCC (3d) 408 (CA).

Registrar of the Supreme Court of South Australia v S; Registrar of the Supreme Court of South Australia v C, [2016] SASC 93.

Russo v Takata Corp., 774 N W 2d 441 (2009 SD 83).

Tapanes v State, 43 So 3d 159 (Fla Dis Ct App 2010).

Toronto Star Newspapers Ltd. v Canada, 2009 ONCA 59.

United Nurses of Alberta v Alberta (AG), [1992] 1 SCR 901, 71 CCC (3d) 225.

United States v Burns, 2001 SCC 7.

United States v Lawson, 677 F 3d 629 (4th Cir 2012).

United States v Resko, 3 F 3d 684, 690 (3d Cir 1993).

Vaise v Delaval (1785), 1 TR 11, 99 ER 944 (KB).

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Criminal Code, RSC 1985, c C-46.

Criminal Justice and Courts Act 2015 (UK).

Criminal Law Amendment Act, 1972, SC 1972, c 13.

Fair and Efficient Criminal Trials Act, SC 2011, c 16.

Juries Act 1974 (UK).

Juries Act 2000 (Vic), No 53.

Juries Act, RSO 1990, c J.3.

Jury Act 1977 (NSW), No 18.

Jury Act 1995 (Qld), No 42.

Jury Act, RSBC 1996, c 242.

Jury Act, RSNB 2016, c 10.

MODEL JURY INSTRUCTIONS

Canadian Judicial Council, *Model Jury Instructions*, online: *National Judicial Institute* <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>.

Idaho Criminal Jury Instructions (as amended 21 April 2023), online: <https://isc.idaho.gov/main/criminal-jury-instructions>.

North Carolina Pattern Jury Instructions (as amended June 2013), online: <https://www.sog.unc.edu/resources/microsites/north-carolina-pattern-jury-instructions/north-carolina-pattern-jury-instructions-criminal-cases>.

Revised Arizona Jury Instructions (Criminal), 6th ed (as amended September 2022), online: <https://www.azbar.org/media/g01ktaqc/raji-criminal-6th-ed-2022.pdf>.

Watt, David, *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Reuters, 2023).

GOVERNMENT DOCUMENTS

Bertrand, Lorne D, Joanne J Paetsch & Sanjeev Anand, *Juror Stress Debriefing: A Review of the Literature and an Evaluation of a Yukon Program* (Whitehorse: Yukon Department of Justice, 2008), online: <https://prism.ucalgary.ca/items/3bacab87-a42f-4e83-8965-2741e23e2dc9>.

Colley, Rachel C et al, *How sedentary are Canadian adults? It depends on the measure*, Catalogue No 82-003-X (Ottawa: Statistics Canada, 2022), online: <https://www150.statcan.gc.ca/n1/pub/82-003-x/2022010/article/00002-eng.htm#:~:text=On%20average%2C%20Canadian%20adults%20self,for%209.8%20hours%20per%20day>.

Connor, Jacqueline & Anne Endress Skove, "Dial 'M' for Misconduct: The Effect of Mass Media and Pop Culture on Juror Expectations" in *Future Trends in State Courts* (Williamsburg, VA: National Center for State Courts, 2004), online: <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/424>.

Cornu, Bernard, "Digital Natives: How Do They Learn?" (Russian Federation: UNESCO Institute for Information Technologies in Education, 2011), online: <https://unesdoc.unesco.org/ark:/48223/pf0000216681>.

Doob, Anthony N, "Canadian Juror's View of the Criminal Jury Trial" in Law Reform Commission of Canada, *Studies on the Jury* (Ottawa: Law Reform Commission of Canada, 1979), online: <https://www.ojp.gov/pdffiles1/Digitization/62650NCJRS.pdf>.

Dubois, Judith, *Media Coverage of Organized Crime - Police Managers Survey* (Ottawa: Royal Canadian Mounted Police, Research and Evaluation Branch, 2003), online: <https://www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn16152090-eng.pdf>.

Dunn, Meghan, *Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management* (Washington, DC: Federal Judicial Center, 2014), online: <https://www.nacdl.org/getattachment/735d628e-4f10-43e8-9d60-9670dce1f395/FJC-Report-Use-of-SM-2014.pdf?lang=en-US>.

Government of Newfoundland and Labrador, "Jury Administration," online: <https://www.gov.nl.ca/jps/files/court-jury.pdf>.

Hannaford-Agor, Paula, David B Rottman & Nicole L Waters, *Juror and Jury Use of New Media: A Baseline Exploration* (The National Center for State Courts, 2012), online: <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/HarvardExecSession_JurorAndJuryUse.pdf>.

Hunter, Jill, *Jurors' Notions of Justice: An Empirical Study of Motivations to Investigate & Obedience to Judicial Directions* (New South Wales: Law and Justice Foundation of New South Wales, 2013), online: <https://lawfoundation.net.au/wp-content/uploads/2023/12/UNSW_Jury_Study_Hunter_2013.pdf>.

Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada (Ottawa: Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, 2018), online: <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/is-ip-eng.pdf>.

Johnson, Ben, *Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer* (St. Paul, MN: Minnesota House Research Department, 2019), online: <https://house.mn.gov/hrd/pubs/deterrence.pdf>.

Johnston, Jane et al, *Juries and Social Media: A report prepared for the Victorian Department of Justice* (Victoria: Department of Justice, January 2013), online: <https://www.researchgate.net/publication/275037791_Juries_and_Social_Media_A_report_prepared_for_the_Victorian_Department_of_Justice/>.

Jones, C Stanley & Edward R Myers, "Comprehension of Jury Instructions in a Simulated Canadian Court" in Law Reform Commission of Canada, *Studies on the Jury* (Ottawa: Law Reform Commission of Canada, 1979), online: <https://www.ojp.gov/pdffiles1/Digitization/62650NCJRS.pdf>.

Law Commission of England and Wales, *Contempt of Court (1): Juror Misconduct and Internet Publications* (London: Law Commission of England and Wales, 2013), online: <https://lawcom.gov.uk/project/contempt-of-court-juror-misconduct-and-internet-publications/#related>.

Law Commission of New Zealand, *Contempt in Modern New Zealand* (Wellington, NZ: Law Commission of New Zealand, 2014), online: <https://www.lawcom.govt.nz/assets/Publications/IssuesPapers/NZLC-IP36.pdf>.

Law Reform Commission of Canada, *The Jury in Criminal Trials, Working Paper 27* (Ottawa: Department of Justice Canada, 1980), online: <https://publications.gc.ca/collections/collection_2022/jus/j32-1/J32-1-27-1980-eng.pdf>.

Mason, Robert, *Wrongful Convictions in Canada* (Ottawa: Parliamentary Information and Research Service, 2020), online: <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2020-77-e.pdf>.

"Overrepresentation of Black people in the Canadian criminal justice system" (December 2022), online: *Department of Justice Canada* <https://www.justice.gc.ca/eng/rp-pr/jr/obpccjs-spnsjpc/pdf/RSD_JF2022_Black_Overrepresentation_in_CJS_EN.pdf>.

"Parliamentary Committee Notes: Overrepresentation (Indigenous Offenders)" (9 March 2023), online: *Public Safety Canada* <https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20230720/12-en.aspx#:~:text=Despite%20accounting%20for%20approximately%205,of%20all%20federally%20incarcerated%20women>.

Saghbini, Charbel, Angela Bressan & Lysiane Paquin-Marseille, *Indigenous People in Criminal Court in Canada: An Exploration Using the Relative Rate Index* (Ottawa: Department of Justice Canada, 2021), online: <https://www.justice.gc.ca/eng/rp-pr/jr/eurri-efitr/docs/rsd-2021-rri-of-indigenous-people-in-criminal-court-en.pdf>.

Schimmele, Christophe, Jonathan Fonberg & Grant Schellenberg, *Canadians' assessments of social media in their lives*, in *Economic and Social Reports*, Catalogue No 36-28-0001 (Ottawa: Statistics Canada, 2021), online: <https://www150.statcan.gc.ca/n1/en/pub/36-28-0001/2021003/article/00004-eng.pdf?st=pYfagZTr>.

Sherman, Jo, *Court Information Management: Policy Framework to Accommodate the Digital Environment* (Ottawa: Canadian Judicial Council, 2013), online: <https://cjc-ccm.ca/sites/default/files/documents/2019/Policy%20Framework%20to%20Accommodate%20the%20Digital%20Environment%202013-03.pdf>.

Statistics Canada, *Canadian Internet Use and E-Commerce: Data from the 2010 Canadian Internet Use Survey* (Ottawa: Statistics Canada, 2014), online: <https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2014002-eng.htm>.

Statistics Canada, *Canadian Internet Use Survey, 2020* (Ottawa: Statistics Canada, 2021), online: <https://www150.statcan.gc.ca/n1/en/daily-quotidien/210622/dq210622b-eng.pdf?st=9Ur-1xS3>.

Statistics Canada, *Canadian Social Survey – Quality of Life, Virtual Health Care and Trust, 2023* (Ottawa: Statistics Canada, 2023), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/231110/dq231110b-eng.htm#:~:text=In%202023%2C%20the%20majority%20of%20Canadians%20got%20their%20news%20and,sources%20of%20information%20(2%25).>.

Statistics Canada, "Do Canadians have confidence in their public institutions?" (23 November 2023), online: <https://www.statcan.gc.ca/o1/en/plus/5041-do-canadians-have-confidence-their-public-institutions>.

Statistics Canada, *Household Internet Use Survey* (Ottawa: Statistics Canada, 2000), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/010726/dq010726a-eng.htm#:~:text=In%202000%2C%2051%25%20of%20all,time%20the%20survey%20was%20taken.>.

Statistics Canada, "How sedentary are Canadian adults? It depends" (19 October 2022), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/221019/dq221019e-eng.htm>.

Statistics Canada, "Internet use by province and age group" (20 July 2023), online: *Statistics Canada* <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2210013501>.

Statistics Canada, *Internet use by province and age group*, Table No 22-10-0135-01 (Ottawa: Statistics Canada, 2023), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2210013501>.

Statistics Canada, *Media Consumption in Canada: Are Canadians in the Know?* Catalogue No 11-627-M (Ottawa: Statistics Canada, 2023), online: <https://www150.statcan.gc.ca/n1/en/pub/11-627-m/11-627-m2022055-eng.pdf?st=t0u3A3Eo>.

Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Jury Reform* (Ottawa: Department of Justice, 2009), online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/scje-cdej/toc-tdm.html>.

Tasmania Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Final Report No 3, January 2020), online: <https://www.austlii.edu.au/au/other/lawreform/TASLRIIP/2019/30.pdf>.

Thomas, Cheryl, "Are juries fair?" (2010) UK Ministry of Justice Research Series 1/10, online: <http://channelmcgilchrist.info/wp-content/uploads/2022/01/Thomas-are-juries-fair.pdf>.

Young, Warren, Neil Cameron & Yvette Tinsley, *Juries in Criminal Trials Part Two: Volume 2* (Wellington, NZ: Law Commission of New Zealand, 1999), online: <https://www.lawcom.govt.nz/assets/Publications/PreliminaryPapers/NZLC-PP37-Vol-2.pdf>.

COURT POLICY/REGULATIONS

Arizona Rules of Criminal Procedure (last amended 6 December 2023), online: <https://casetext.com/rule/arizona-court-rules/arizona-rules-of-criminal-procedure>.

Colorado Rules of Criminal Procedure (last amended 2 May 2024), online: <https://casetext.com/rule/colorado-court-rules/colorado-rules-of-criminal-procedure>.

Indiana Rules of Court: Jury Rules (as amended 1 January 2021), online: <https://www.in.gov/courts/rules/jury/>.

Juries Victoria, "Serving on a Jury" (as amended 2 August 2021), online: <https://www.juriesvictoria.vic.gov.au/individuals/serving-on-a-jury>.

Queensland Courts, "Going to court as a juror" (as amended 22 August 2023), online: <https://www.courts.qld.gov.au/jury-service/going-to-court-as-a-juror>.

The Supreme Court of South Carolina, *Order No 2009-07-20-01 (Re: Juror use of Personal Communication Devices)*, online: <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-07-20-01>.

BOOKS/BOOK CHAPTERS

Akers, Ronald L, Christine S Sellers & Wesley G Jennings, *Criminological Theories: Introduction, Evaluation, & Applications*, 7th ed (New York: Oxford University Press, 2017).

Blackstone, William, *Commentaries on the Laws of England, Volume 3*, 8th ed (1778).

Coughlan, Steve, *Criminal Procedure*, 4th ed (Toronto: Irwin Law, 2020).

Crichlow, Wesley & Sharon Lauricella, "An Analysis of Anti-Black Crime Reporting in Toronto: Evidence from News Frames and Critical Race Theory" in Monish Bhatia, Scott Poynting & Waqas Tufail, eds, *Media, Crime and Racism* (New York: Palgrave Macmillan, 2018).

Devlin, Patrick, *Trial by Jury*, 3rd ed (London: Stevens, 1966).

Donnelly, Jason, *Decisions Without Reasons – Rethinking Jury Secrecy* (Queensland: Bookpal, 2008), online: <http://www.jdbarrister.com.au/Book.pdf>.

Fleras, Augie, *The Media Gaze: Representations of Diversities in Canada* (Vancouver: UBC Press, 2011).

Fontalba-Navas, Andres, Virginia Gil-Aguilar & Jose Miguel Pena-Andreu, "Towards an Epidemiological Model of Internet Addiction" in Margaret Adams, ed, *Internet Addiction: Prevalence, Risk Factors and Health Effects* (New York: Nova Publishers, 2017).

Hayes, Rebecca M & Kate Luther, *#Crime: Social Media, Crime, and the Criminal Legal System* (New York: Palgrave MacMillan, 2018).

Horan, Jacqueline, *Juries in the Twenty First Century* (Alexandria, NSW: Federation Press, 2012).

Kassin, Saul M & Lawrence S Wrightsman, *The American Jury on Trial: Psychological Perspectives* (New York: Hemisphere, 1988).

Nichols, Tom, *The Death of Expertise: The Campaign Against Established Knowledge and Why it Matters*, 2nd ed (New York: Oxford University Press, 2024).

Sharpe, Robert J & Kent Roach, *The Charter of Rights and Freedoms*, 7th ed (Toronto: Irwin Law, 2021).

"The Institution of Criminal Law" in Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016).

Wegner, Daniel, Toni Giuliano & Paula Hertel "Cognitive Interdependence in Close Relationships" in William Ickes, ed, *Compatible and Incompatible Relationships* (New York: Springer-Verlag, 1985).

SCHOLARLY ARTICLES

Aglialoro, Matthew, "Criminalization of Juror Misconduct Arising From Social Media Use" (2015) 28:1 Notre Dame JL Ethics & Pub Pol'y 101.

Amante, Daniel J et al, "Access to Care and Use of the Internet to Search for Health Information: Results From the US National Health Interview Survey" (2015) 17:4 J Med Internet Res (open access).

Abramovaite, Juste et al, "Classical deterrence theory revisited: An empirical analysis of Police Force Areas in England and Wales" (2023) 20:5 Eur J Criminology 1663.

Amey, Grant, "Social Media and the Legal System: Analyzing Various Responses to Using Technology from the Jury Box" (2010) 35:1 J Legal Prof 111.

Anga, Ahunanya, "Jury Misconduct: Can Courts Enforce a Social Media and Internet Free Process? We 'Tweet,' Not" (2013) 18:2 J Tech L & Pol'y 265.

Apel, Robert, "Sanctions, Perceptions, and Crime" (2022) 5 Ann Rev Criminology 205.

Artigliere, Ralph, "Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet During Trial" (2011) 59:3 Drake L Rev 621.

Aviram, Hadar, "Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends" (2020) 68:1 Buff L Rev 199.

Babin, J Jobu, Haritima S Chauhan & Feng Liu, "You Can't Hide Your Lying Eyes: Honesty Oaths and Misrepresentation" (2022) 98 J Behav & Experimental Econ 101880.

Bandyopadhyay, Siddhartha, Samrat Bhattacharya & Rudra Sensarma, "An analysis of the factors determining crime in England and Wales: A quantile regression approach" (2015) 35:1 Econ Bull 665.

Battell-Wallace, Oscar, "No Search Results in Fairness: Addressing Jurors' Independent Research in the 21st Century" (2018) 49:1 Victoria U Wellington L Rev 83.

Beck, Tobias, "How the honesty oath works: Quick, intuitive truth telling under oath" (2021) 94 J Behavioral & Experimental Economics 101728.

Beck, Tobias et al, "Can Honesty Oaths, Peer Interaction, or Monitoring Mitigate Lying?" (2020) 163 J Business Ethics 467.

Bell, Daniel William, “Juror Misconduct and the Internet” (2010) 38:1 Am J Crim L 81.

Bertrand, Michelle I & Richard Jochelson, “Mock-Jurors’ Self-Reported Understanding of Canadian Judicial Instructions (Is Not Very Good)” (2018) 66:1-2 Crim LQ 136.

Bjornstrom, Eileen ES et al, “Race and Ethnic Representations of Lawbreakers and Victims in Crime News: A National Study of Television Coverage” (2010) 57:2 Soc Prob 269.

Bouck, John C, “Criminal Jury Trials: Pattern Instructions and Rules of Procedure” (1993) 72:2 Can Bar Rev 129.

Bowal, Peter, “I swear to – a true verdict give” (2000) 24:5 Law Now 27.

Brand, Matthias, Kimberly S Young & Christian Laier, “Prefrontal control and Internet addiction: a theoretical model and review of neuropsychological and neuroimaging findings” (2014) 8 Frontiers in Human Neuroscience 1.

Brayer, Patrick C, “The Disconnected Juror: Smart Devices and Juries in the Digital Age of Litigation” (2016) 30 Notre Dame JL Ethics & Pub Pol’y 25.

Brickman, Ellen et al, “How Juror Internet Use Has Changed the American Jury” (2008) 1:2 J Court Innovation 287.

Browning, John G & Arjen J Meter, “Googling a Mistrial: Online Juror Misconduct in Alabama” (2022) 14:1 Faulkner L Rev 67.

Burd, Roxanne & Jacqueline Horan "Protecting the right to a fair trial in the 21st century – has trial by jury been caught in the world-wide web?" (2012) 36 Crim LJ 103.

Carlsson, Fredrik, “The truth, the whole truth, and nothing but the truth—A multiple country test of an oath script” (2013) 89 J Economic Behavior & Organization 105.

Cash et al, Hilarie, “Internet Addiction: A Brief Summary of Research and Practice” (2012) 8:4 Curr Psychiatry Rev 292.

Chancellor, Lauren, “Public Contempt and Compassion: Media Biases and Their Effect on Juror Impartiality and Wrongful Convictions” (2019) 42:3 Man LJ 427.

Choolhun, Natasha, “Google: to use, or not to use. What is the question?” (2009) 9:3 Legal Information Management 168.

Chopra, Sonia R & James RP Ogloff, "Evaluating Jury Secrecy: Implications for Academic Research and Jury Stress" (2000) 44:2 Crim LQ 190.

Clark, Brad, "Framing Canada's Aboriginal Peoples: A Comparative Analysis of Indigenous and Mainstream Television News" (2014) 34:2 Can J Native Stud 41.

Clayton, Russell B, Glenn Leshner & Anthony Almond, "The Extended iSelf: The Impact of iPhone Separation on Cognition, Emotion and Physiology" (2015) 20:2 J Computer-Mediated Comm 119.

Comiskey, Marie, "Initiating Dialogue about Jury Comprehension of Legal Concepts: Can the Stagnant Pool be Revitalized?" (2010) 35:2 Queen's LJ 625.

Corda, Alessandro, "The Transformational Function of the Criminal Law: In Search of Operational Boundaries" (2020) 23:4 New Crim L Rev 584.

Coughlan, Steve & Robert J Currie, "Social Media: The Law Simply Stated" (2013) 11:2 Can J L & Tech 229.

Daftary-Kapur, Tarika et al, "Examining Pretrial Publicity in a Shadow Jury Paradigm: Issues of Slant, Quantity, Persistence and Generalizability" (2014) 38:5 L & Hum Behav 462.

Dann, B Michael, "'Learning Lessons' and 'Speaking Rights': Creating Educated and Democratic Juries" (1993), 68 Ind LJ 1229.

DeBarba, Kristen, "Maintaining the adversarial system: the practice of allowing jurors to question witnesses during trial" (2002) 55:5 Vand L Rev 1521.

Diamond, Shari Siedman et al., "Juror Questions During Trial: A Window into Juror Thinking" (2006) 59 Vand L Rev 1927.

Dixon, Travis L, "Good Guys Are Still Always in White? Positive Change and Continued Misrepresentation of Race and Crime on Local Television News" (2017) 44:6 Comm Research 775.

Dixon, Travis L & Daniel Linz, "Overrepresentation and underrepresentation of African Americans and Latinos as lawbreakers on television news" (2000) 50:2 J Communication 131.

Dixon, Travis L & Daniel Linz, "Television News, Prejudicial Pretrial Publicity, and the Depiction of Race" (2002) 46:1 J Broad & Elec Media 112.

Dolan, Pamela Lewis, "Physicians rely on search engines to find clinical information" (2011) 54:23 Am Medical News 57.

Dommett, Katharine & Warren Pearce, "What do we know about public attitudes towards experts? Reviewing survey data in the United Kingdom and European Union" (2019) 28:6 Pub Understanding of Science 669.

Dowler, Ken, Thomas Fleming & Stephen L Muzzatti, "Constructing Crime: Media, Crime, and Popular Culture" (2006) 48:6 Can J Criminology & Crim Just 837.

Farrell, Amy, Liana Pennington & Shea Cronin, "Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases" (2013) 38:4 Law & Soc Inquiry 773.

Ferguson, Amanda F, David McLean & Evan F Risko, "Answers at your fingertips: Access to the Internet influences willingness to answer questions" (2015) 37 Consciousness & Cognition 91.

Fisher, Matthew, Mariel K Goddu & Frank C Keil, "Searching for Explanations: How the Internet Inflates Estimates of Internal Knowledge" (2015) 144:3 J Experimental Psychol 674.

Frankel, Mark A, "A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking" (1990) 85 Nw U L Rev 221.

Fredrickson, Matthew, "Conformity in Confusion: Applying a Common Analysis to Wikipedia-Based Jury Misconduct" (2013) 9:1 Wash J L Tech & Arts 19.

Friedland, Steven I, "The competency and responsibility of jurors in deciding cases" (1990) 85:1 Northwestern U L Rev 19.

Furgiuele, Andrew, "The Self-Limiting Appellate Courts and Section 686" (2007) 52:2 Crim LQ 237.

Garfield Tenzer, Leslie Y, "Social Media, Venue and the Right to a Fair Trial" (2019) 71:2 Bay L Rev 421.

Goldstein, Abraham S, "Jury Secrecy and the Media: The Problems of Postverdict Interviews" (1993) 93 U Ill L Rev 295.

Haines, Edson L, "Criminal and Civil Jury Charges" (1968) 46:1 Can B Rev 48.

Han, Lu, Siddhartha Bandyopadhyay & Samrat Bhattacharya, “Determinants of violent and property crimes in England and Wales: a panel data analysis” (2013) 45:34 Applied Econ 4820.

Hans, Valerie P, “Canadian Jury Research: The Contributions of Anthony N. Doob” (2013) 55:4 CJCCJ 533.

Haralambous, Nicola, “Educating jurors: technology, the Internet and the jury system” (2010) 19:3 Inf & Comm Tech L 255.

Harawa, Daniel S, “Sacrificing Secrecy” (2021) 55 Georgia L Rev 593.

Harvey, David, "The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm” (2014) NZ L Rev 203.

Hergueux, Jérôme et al, “Leveraging the Honor Code: Public Goods Contributions under Oath” (2022) 81:3 Envtl & Resource Econ 591.

Heuer, Larry, Steven Penrod & Ronald Roesch, “Increasing Jurors’ Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking” (1988) 12:3 L & Hum Behav 231.

Heuer, Larry, Steven Penrod & Ronald Roesch, “Juror Notetaking and Question Asking During Trials: A National Field Experiment” (1994) 18:2 L & Hum Behav 121.

Hochberg, Irit, Raviv Allon & Elad Yom-Tov, “Assessment of the Frequency of Online Searches for Symptoms Before Diagnosis: Analysis of Archival Data” (2020) 22:3 J Med Internet Res (open access).

Hoenig, Michael, “Juror Misconduct on the Internet” (2009) 242 NYLJ.

Hoetger, Lori A et al, “The Impact of Pretrial Publicity on Mock Juror and Jury Verdicts: A Meta-Analysis” (2022) 46:2 L & Hum Behav 121.

Hoffmeister, Thaddeus, “Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age” (2012) 83:2 U Colorado L Rev 409.

Hoffmeister, Thaddeus, “Preventing Juror Misconduct in a Digital World” (2015) 90:3 Chi-Kent L Rev 981.

Hoffmeister, Thaddeus & Ann Charles Watts, “Social Media, the Internet, and Trial by Jury” (2018) 14:2 Annu Rev L Soc Sci 259.

Hogg, Keith W, “Runaway Jurors: Independent Juror Research in the Internet Age” (2019) 9:1 W J Legal Stud 1.

Holt, Lanier Frush, “Writing the Wrong: Can Counter-Stereotypes Offset Negative Media Messages about African Americans?” (2013) 90:1 Journalism & Mass Comm Q 108.

Jacobs, Laura, “Patterns of criminal threat in television news coverage of ethnic minorities in Flanders (2003-2013)” (2017) 43:5 J Ethnic & Migration Stud 809.

Jamil, Sadia & Jessica Retis, “Media Discourses and Representation of Marginalized Communities in Multicultural Societies” (2023) 17:1 Journalism Practice 1.

Jacquemet, Nicolas et al, “Can We Commit Future Managers to Honesty?” (2021) 12 Frontiers in Psychology 701627.

Jacquemet, Nicolas et al, “Do truth-telling oaths improve honesty in crowd-working” (2021) 16:1 Plos One 1.

Jacquemet, Nicolas et al, “Preference elicitation under oath” (2013) 65:1 J Environmental Economics & Management 110.

Jacquemet, Nicolas et al, “Truth Telling Under Oath” (2019) 65:1 Management Science 426.

Jiwani, Yasmin & Mary Lynn Young, “Missing and Murdered Women: Reproducing Marginality in News Discourse” (2006) 31:4 Can J Comm 895.

Johnson, James D et al, “Justice is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence” (1995) 21:9 Personality & Soc Psychol Bull 893.

Joule, Robert-Vincent, Fabien Girandola & Françoise Bernard, “How Can People Be Induced to Willingly Change Their Behavior? The Path from Persuasive Communication to Binding Communication” (2007) 1:1 Soc & Personality Psychol Compass 493.

Kang, Jerry et al, “Implicit bias in the courtroom” (2012) 59:5 UCLA L Rev 1124.

Kaufmann, Stephen R & Michael P Murphy, “Juror Questions During Trial: An Idea Whose Time Has Come Again” (2011) 99:6 Illinois BJ 1.

Kennedy, Kevin C, “A Critical Appraisal of Criminal Deterrence Theory” (1983) 88:1 Dickinson L Rev 1.

Keyzer, Patrick et al, “The courts and social media: what do judges and court workers think?” (2013) 25:6 Judicial Officers’ Bull 47.

Khakhar, Nik, “‘Reviewing Our Peers’: Evaluating the Legitimacy of the Canadian Jury Verdict in Criminal Trials” (2022) 80:1 UT Fac L Rev 42.

Khakhar, Nik, “‘Unlocking Pandora’s Box?’: Resolving the Clash of Infrastructure Amidst the Risks of Jury Secrecy” (2023) 81:2 U Toronto Fac L Rev 191.

Killias, Martin, David Scheidegger & Peter Nordenson, “The Effects of Increasing the Certainty of Punishment: A Field Experiment on Public Transportation” (2009) 6:5 Eur J Criminology 387.

Kinzig, Ann P et al, “Social Norms and Global Environmental Challenges: The Complex Interaction of Behaviors, Values, and Policy” (2013) 63:3 BioScience 164.

Kirshenbaum, Jacqueline M & Monica K Miller, “Judges’ experiences with mitigating jurors’ implicit biases” (2021) 28:5 Psychiatry, Psychol & L 683.

Kivunja, Charles, “Theoretical Perspectives of How Digital Natives Learn” (2014) 3:1 Intl J Higher Edu 94.

Klein, Roger D & Stacy Naccarato, “Broadcast News Portrayal of Minorities: Accuracy in Reporting” (2003) 46:12 Am Behavioral Scientist 1611.

Knudsen, Kathleen M, “The Juror’s Sacred Oath: Is There a Constitutional Right to a Properly Sworn Jury?” (2016) 32:3 Touro L Rev 489.

Koessler, Ann-Kathrin et al, “Commitment to pay taxes: Results from field and laboratory experiments” (2019) 115 Euro Econ Rev 78.

Kramer, Geoffrey P & Dorean M Koenig, “Do Jurors Understand Criminal Jury Instructions – Analyzing the Results of the Michigan Juror Comprehension Project” (1990) 23:3 U Mich JL Reform 401.

Kramer, Geoffrey P, Norbert L Kerr & John S Carroll, “Pretrial Publicity, Judicial Remedies, Jury Bias” (1990) 14:5 L & Hum Behav 409.

Kulik, James A & Patricia Carlino, "The Effect of Verbal Commitment and Treatment Choice on Medication Compliance in a Pediatric Setting" (1986) 10:4 J Behavioral Medicine 367.

Lacy, Gareth S, "Should Jurors Use the Internet?" (2010), online: *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600585>.

Lacy, Gareth S, "Untangling the Web: How Courts Should Respond to Juries Using the Internet for Research" (2011) 1 Reynolds Cts & Media LJ 167.

Levinson, Justin D & Danielle Young, "Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence" 112 W VA L Rev 307.

Levinson, Justin D, Huajian Cai & Danielle Young, "Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test" (2010) 8:1 Ohio St J Crim L 187

Li, Wen et al, "Characteristics of internet addiction/pathological internet use in U.S. university students: a qualitative-method investigation" (2015) 10:2 PlOS One 1.

Longergan, Michelle et al, "Prevalence and severity of trauma- and stressor-related symptoms among jurors: A review" (2016) 47 J Crim Just 51.

Machin, Stephen & Costas Meghir, "Crime and Economic Incentives" (2004) 39:4 J Human Resources 958.

Maeder, Evelyn M et al, "Race Salience in Canada: Testing Multiple Manipulations and Target Races" (2015) 21:4 Psychol, Pub Pol'y & L 442.

Maeder, Evelyn M & Laura A McManus, "Mosaic or Melting Pot? Race and Juror Decision Making in Canada and the United States" (2022) 37:1-2 J Interpersonal Violence 991.

Mahtani, Minelle, "Representing minorities: Canadian media and minority identities" (2001) 33:3 Can Ethnic Stud 99.

Manhas, Robbie, "Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms" (2014) 112:5 Mich L Rev 809

Mann, Heather et al, "What Deters Crime? Comparing the Effectiveness of Legal, Social, and Internal Sanctions Across Countries" (2017) 7:85 Frontiers in Psychology 1.

Mannes, Suzanne, “The Power of the Pen: The Impact of Knowledge of Defendant’s Character Present in Pretrial Publicity Varies by Defendant Race” (2016) 12:1 Applied Psychol in Crim Just 36.

Marder, Nancy S, “Answering Jurors’ Questions: Next Steps in Illinois” (2010) 41:4 Loy U Chi LJ 727.

Marder, Nancy S, “Jurors and Social Media: Is a Fair Trial Still Possible” (2014) 67:3 SMU L Rev 617.

Marder, Nancy S, “Juries and Technology: Equipping Jurors for the Twenty-First Century” (2001) 66(4) Brooklyn L Rev 1257.

Marsden, Beverly, “Burying the Hatchet: Addressing Disproportionate Media Representations of Indigenous Missing and Murdered Peoples” (2021) 16 Undergraduate Rev 75.

Masters, Ken, “For what purpose and reasons do doctors use the Internet: A systematic review” (2008) 77 Int’l J Medical Informatics 4.

Mazar, Nina, On Amir & Dan Ariely, “The Dishonesty of Honest People: A Theory of Self-Concept Maintenance” (2008) 45:6 J Marketing Research 633.

McEwen, Rebecca & John Eldridge, “Judges, Juries and Prejudicial Publicity: Lessons from Empirical Legal Scholarship” (2016) 41:2 Alternative LJ 110.

McEwen, Rebecca, John Eldridge & David Caruso, “Differential or Deferential to Media? The Effect of Prejudicial Publicity on Judge or Jury” (2018) 22:2 Int'l J Evidence & Proof 124.

McGee, Amanda, “Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms” (2010) 30 Loy LA Ent L Rev 301.

McNamara, Luke, et al, “Theorising Criminalisation: The Value of a Modalities Approach” (2018) 7:3 Intl J Crime Just & Soc Democracy 91.

Minow, Newton & Fred Cate, “Who Is an Impartial Juror in an Age of Mass Media” (1990) 40 Am U L Rev 631.

Mott, Nicole L, “The Current Debate on Juror Questions: To Ask or Not to Ask, That Is the Question” (2003) 78:3 Chi-Kent L Rev 1099.

Myers Morrison, Caren, "Jury 2.0" (2010) 62:6 Hastings LJ 1579.

Nagin, Daniel S & Greg Pogarsky, "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence" (2001) 39:4 Criminology 865.

Nickerson, Raymond S, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises" (1998) 2:2 Rev Gen Psychol 175.

Otto, Amy L, Steven D Penrod & Hedy R Dexter, "The Biasing Impact of Pretrial Publicity on Juror Judgments" (1994) 18:4 L & Hum Behav 453.

Pan, Yuan-Chien, Yu-Chuan Chiu & Yu-Hsuan Lin, "Systematic review and meta-analysis of epidemiology of internet addiction" (2020) 118 Neuroscience & Biobehavioral Rev 612.

Paternoster, Raymond, "How Much Do We Really Know about Criminal Deterrence" (2010) 100:3 J Crim L & Criminology 765.

Paternoster, Raymond & Alex Piquero, "Reconceptualizing Deterrence: An Empirical Test of Personal and Vicarious Experiences" (1995) 32:3 J Res Crime & Delinquency 251.

Peters, Uwe, "What Is the Function of Confirmation Bias?" (2022) 87 Erkenntnis 1351.

Petersen, Cynthia, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38:1 McGill LJ 147.

Poindexter, Pamela M, Laura Smith & Don Heider, "Race and Ethnicity in Local Television News: Framing, Story Assignments, and Source Selections" (2003) 47:4 J Broad & Elec Media 524.

Pruckner, Gerald J & Rupert Sausgruber, "Honesty on the Streets: A Field Study on Newspaper Purchasing: Honesty on the Streets" (2013) 11:3 J Euro Econ Assn 661.

Reifman, Alan, Spencer M Gusick & Phoebe C Ellsworth, "Real Jurors' Understanding of the Law in Real Cases" (1992) 16:5 L & Hum Behav 539.

Risko, Evan F & Sam J Gilbert, "Cognitive Offloading" (2016) 20:9 Trends in Cognitive Sciences 676.

Roach, Kent, "Public Inquires, Prosecutions or Both" (1994) 43 UNBLJ 415.

Roach, Kent, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015) 17 Flanders LJ 203.

Robertson, Nichola, Michael Polonsky & Lisa McQuilken, "Are My Symptoms Serious Dr Google? A Resource-Based Typology of Value Co-Destruction in Online Self-Diagnosis" (2014) 22:3 Australasian Marketing J 246.

Robinson, Eric P, "Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media" (2011) 1:3 Reynolds Ct & Media LJ 307.

Rose, V Gordon & James RP Ogloff, "Evaluating the Comprehensibility of Jury Instructions: A Method and an Example" (2001) 25 L & Hum Behav 409.

Ross, Lewis, "The curious case of the jury-shaped hole: A plea for real jury research" (2023) 27:2 Int'l J Evidence & Proof 107.

Ruprecht, Clifford Holt, "Are Verdicts, Too, Like Sausages: Lifting the Cloak of Jury Secrecy" (1997) 146:1 U Pa L Rev 217.

Ruva, Christine L et al, "Battling bias: can two implicit bias remedies reduce juror racial bias?" (2022) Psychol, Crime & L 1 (ahead of print).

Ruva, Christine L & Elizabeth M Hudak, "Pretrial publicity and juror age affect mock-juror decision making" (2013) 19:2 Psychol, Crime & L 179.

Ruva, Christine L, Stephanie E Diaz Ortega & Kathleen O'Grady, "What Drives a Jury's Deliberation? The Influence of Pretrial Publicity and Jury Composition on Deliberation Slant and Content" (2022) 28:1 Psychol, Pub Pol'y & L 32.

Ryding, Francesca C & Linda K Kaye, "'Internet Addiction': A Conceptual Minefield" (2018) 16:1 Intl J Mental Health & Addiction 225.

Sankoff, Peter, "Rewriting the *Canadian Charter of Rights and Freedoms*: Four Suggestions Designed to Promote a Fairer Trial and Evidentiary Process" (2008) 40 SCLR 349.

Sarkar, Nina, Wendy Ford & Christina Manzo, "Engaging Digital Natives through Social Learning" (2017) 15:2 J Systemics, Cybernetics & Informatics 1 (open access).

Schuller, Regina & Neil Vidmar, "The Canadian Criminal Jury" (2011) 86:1 Chi-Kent L Rev 497.

Schuller, Regina A, Veronica Kazoleas & Kerry Kawakami, "The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom" (2009) 33:4 L & Hum Behav 320.

Shilo, Brooke Lovett, "Juror Internet Misconduct: A Survey of New Hampshire Superior Court Judges" (2014) 12:2 UNH L Rev 245.

Slakoff, Danielle C, "The representation of women and girls of color in United States crime news" (2020) 14:1 Sociology Compass 1.

Smith, Douglas G, "The Historical and Constitutional Contexts of Jury Reform" (1996) 25:2 Hofstra L Rev 377.

Sparrow, Betsy, Jenny Liu & Daniel M Wegner, "Google Effects on Memory: Cognitive Consequences of Having Information at Our Fingertips" (2011) 333 Science 776.

Spivak, Benjamin et al, "The Impact of Fact-Based Instructions on Juror Application of the Law: Results from a Trans-Tasman Field Study" (2020) 101:1 Soc Sci Q 346.

Stangl, Brigitte et al, "Internet addiction continuum and its moderating effect on augmented reality application experiences: digital natives versus older users" (2023) 40:1 J Travel & Tourism Marketing 38.

St Eve, Hon Amy, Charles Burnes and Michael Zuckerman, "More From the #Jury Box: The Latest on Juries and Social Media" (2014) 12 Duke L & Tech Rev 64.

Steblay, Nancy et al, "The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis" (2006) 30 L & Hum Behav 469.

Steblay, Nancy Mehrkens et al, "The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review" (1999) 23:2 L & Hum Behav 219.

Steptoe, Andrew et al, "Seatbelt use, attitudes, and changes in legislation: An international study" (2002) 23:4 Am J Preventative Medicine 254.

Stevens, Ruth S, "Using Google for Legal Research" (2014) 93:7 Mich Bar J 56.

Strauss, Marcy, "Sequestration" (1996) 24:1 Am J Crim L 63.

Studebaker, Christina A & Steven D Penrod, "Pretrial Publicity: The Media, the Law, and Common Sense" (1997) 3:2-3 Psychol, Pub Pol'y & L 428.

Sullivan, Eugene R & Akhil R Amar, "Jury Reform in America – A Return to the Old Country" (1996) 33:4 Am Crim L Rev 1141.

Tang, Hangwi & Jennifer Hwee Kwoon Ng, "Googling for a diagnosis – use of Google as a diagnostic aid: internet based study" (2006) 333 BMJ 1143.

Thomas, Cheryl, "Avoiding the perfect storm of juror contempt" (2013) 6 Crim LR 483.

Tinsley, Yvette, Claire Baylis & Warren Young, "'I Think She's Learnt Her Lesson': Juror Use of Cultural Misconceptions in Sexual Violence Trials" (2021) 52: VUWLR 463.

Tomlinson, Kelli D, "An Examination of Deterrence Theory: Where Do We Stand?" (2016) 80:3 Federal Probation 33.

Tonsaker, Tabitha, Gillian Bartlett & Cvetan Trpkov, "Health information on the Internet: Gold mine or minefield?" (2014) 60:5 Can Fam Physician 407.

Trimboli, Lily, "Juror understanding of judicial instructions in criminal trials" 119 Contemp Iss Crime & Just 1.

Tunna, Jennifer, "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 9:1 Canterbury L Rev 79.

Ungerleider, Charles S, "Media, minorities, and misconceptions: the portrayal by and representation of minorities in Canadian news media" (1991) 23:3 Can Ethnic Stud 158.

Vaes, Jeroen et al, "They Are All Armed and Dangerous! Biased Language Use in Crime News With Ingroup and Outgroup Perpetrators" (2019) 31:1 J Media Psychol 12.

Van Riel, Noor et al, "The effect of Dr Google on doctor–patient encounters in primary care: a quantitative, observational, cross-sectional study" (2017) 1:2 BJGP (open access).

Walker, Nigel, "Morality and the Criminal Law" (1964) 11:3 How J Penology & Crime Prevention 209.

Wang, Theodore H & Richard D Katzev, "Group Commitment and Resource Conservation: Two Field Experiments on Promoting Recycling" (1990) 20:4 J Applied Soc Psychol 265.

Wolfson, Hon Warren D, "An Experiment in Juror Interrogation of Witnesses" (February 1987) CBA Rec 12.

Young, Kimberly S, "Internet Addiction: The Emergence of a New Clinical Disorder" (1998) 1:3 CyberPsychology & Behav 237.

Zickfeld, Janis H et al, "Commitment to honesty oaths decreases dishonesty, but commitment to another individual does not affect dishonesty" (2023) 27:1 Communications Psychology (open access).

THESES/DISSERTATIONS

Chopra, Sonia R, *Juror Stress: Sources, Severity, and Solutions* (PhD Dissertation, Simon Fraser University, 2002), online: <https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR9326042/br-external/ChopraSonia-e.pdf>.

NEWS ARTICLES

"A history of anti-smoking measures in Canada" *The Globe and Mail* (16 April 2024), online: <https://www.theglobeandmail.com/canada/article-cigarette-warning-labels-smoking-canada/#:~:text=Canada%20can%20claim%20many%20global,ban%20smoking%20on%20patios%20(Newfoundland>.

"A legal history of smoking in Canada" *CBC* (19 November 2012), online: <https://www.cbc.ca/news/health/a-legal-history-of-smoking-in-canada-1.982213>.

Armstrong, Kathryn, "ChatGPT: US lawyer admits using AI for case research" *BBC* (27 May 2023), online: <https://www.bbc.com/news/world-us-canada-65735769>.

Ashekian, Taleen Lara, "The rise of 'Dr. Google,' the risks of self-diagnosis and searching symptoms online" *Vancouver Sun* (19 August 2022), online: <https://vancouversun.com/health/local-health/taleen-lara-ashekian-the-rise-of-dr-google-the-risks-of-self-diagnosis-and-searching-symptoms-online>.

Bowcott, Owen, “Two jurors jailed for contempt of court after misusing internet during trials” *The Guardian* (29 July 2013), online: <https://www.theguardian.com/law/2013/jul/29/jurors-jailed-contempt-court-internet>.

Bryan, Susannah, “Davie police officer convicted of drugging, raping family member to get new trial” *The Palm Beach Post* (15 December 2010), online: <https://www.palmbeachpost.com/story/news/2010/12/16/davie-police-officer-convicted-drugging/7469608007/>.

Callahan, Denise G, “Widmer found guilty of murder” *Springfield News-Sun* (16 February 2011), online: <https://www.springfieldnewssun.com/news/crime--law/widmer-found-guilty-murder/KWjivKOmamQFNSF8uNbN5L/#:~:text=In%20Widmer's%20first%20trial%2C%20he,it%20took%20to%20dry%20off>.

Callahan, Denise G, “Widmer juror speaks out about trial” *Dayton Daily News* (30 March 2010), online: <https://www.daytondailynews.com/news/crime--law/widmer-juror-speaks-out-about-trial/T7jiWJjy28YQALEcrRJxqJ/>.

Casaletto, Luca, “Majority of Canadians get their news from mainstream sources, study shows” *CityNews* (28 September 2022), online: <https://toronto.citynews.ca/2022/09/28/credible-canadian-news-sources-mainstream/>.

Casey, Jerry, “Juries raise a digital ruckus” *The Oregonian* (13 January 2008), online: <https://www.oregonlive.com/washingtoncounty/2008/01/juries_raise_a_digital_ruckus.html>.

Davies, Lisa, “Lesson for jurors: how to avoid a mistrial” *Sydney Morning Herald* (14 May 2012), online: <https://www.smh.com.au/national/nsw/lesson-for-jurors-how-to-avoid-a-mistrial-20120514-1yltw.html>.

DeFilippo, Dana, “Solitude, snacks, and constant supervision in store for sequestered Cosby jurors” *Whyy* (5 June 2017), online: <https://whyy.org/articles/solitude-snacks-and-constant-supervision-in-store-for-sequestered-cosby-jurors/:~:text=Jurors%20on%20the%20O.J.,in%202011,%20cost%20nearly%20$187,000.>.

Fraser, David, “Researchers hope wrongfully convicted database will lead to reforms, more releases” *CTV* (20 February 2023), online: <https://www.ctvnews.ca/canada/researchers-hope-wrongfully-convicted-database-will-lead-to-reforms-more-releases-1.6281311>.

Funcheon, Deirdra, “Jurors Gone Wild: Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies” *Miami New Times* (23 April 2009), online: <https://www.miaminewtimes.com/news/jurors-gone-wild-6332969>.

Gauntt, Josh, “Judge declares mistrial after Google search” *WBRC* (21 September 2018), online: <https://www.wbrc.com/2018/09/21/judge-declares-mistrial-after-google-search/>.

Gettys, Travis, “Widmer Juror: Home Tests Influenced My Guilty Vote” *WLWT5* (23 April 2009), online: <https://www.wlwt.com/article/widmer-juror-home-tests-influenced-my-guilty-vote/3499071>.

Hamilton, Keegan, “Inside El Chapo’s jury: A juror speaks for the first time about convicting the kingpin” *VICE* (20 February 2019), online: <https://www.vice.com/en/article/vbwzny/inside-el-chapos-jury-a-juror-speaks-for-first-time-about-convicting-the-kingpin#:~:text=The%2012%20jurors%20and%20six,public%20who%20chose%20to%20attend.>.

Hefley, Diana, “Juror’s research forced mistrial in child rape case” *Herald Net* (11 December 2012), online: <https://www.heraldnet.com/news/juror%C2%92s-%C2%91research%C2%92-forced-mistrial-in-child-rape-case/>.

Himmelsbach, Vawn, “The buckling-up brouhaha: Seatbelts were once as polarizing as vaccines and masks” *Toronto Star* (24 September 2022), online: <https://www.thestar.com/autos/the-buckling-up-brouhaha-seatbelts-were-once-as-polarizing-as-vaccines-and-masks/article_49705a1a-9bc6-576d-818c-347472bc120c.html>.

Kauth, Glenn, “Focus: Defence lawyers warned of mistrial risks” *LawTimes* (31 December 2012) (describing an Arizona murder trial in which jurors googled the meaning of first- versus second-degree murder, as well as the definition of “premeditation”), online: <https://www.lawtimesnews.com/news/features/focus-defence-lawyers-warned-of-mistrial-risks/260468>.

Keim, Tony, “Queensland Murder Trial Aborted as Juror Researches Case on ‘Facebook’” *The Courier Mail* (8 August 2014), online: <https://www.couriermail.com.au/news/queensland/queensland-murder-trial-aborted-as-juror-researches-case-on-facebook/news-story/efa2ca3f43199b4f04f5fe9bdc6b1b20>.

Kerans, Roger, “What do you do with a rogue juror?” *The Globe and Mail* (28 July 2004), online: <https://www.theglobeandmail.com/opinion/what-do-you-do-with-a-rogue-juror/article744889/>.

Lash, Steve, "Md. Court of Appeals rules Wikipedia search voids murder conviction" *The Daily Record* (7 December 2009).

Lublin, Daniel, "Considering using AI for legal advice? Here's why it's not ready" *The Globe and Mail* (8 September 2023), online: <https://www.theglobeandmail.com/business/careers/article-considering-using-ai-for-legal-advice-heres-why-its-not-ready/>.

MacKinnon, Bobbi-Jean, "Dennis Oland defence tried to get judge-alone trial a year ago" *CBC* (21 November 2018), online: <https://www.cbc.ca/news/canada/new-brunswick/dennis-oland-survey-guilt-jury-judge-1.4911710>.

Marshall, Kathryn, "Our judicial system is broke, but politicians don't seem to care" *National Post* (3 December 2023), online: <https://nationalpost.com/opinion/kathryn-marshall-our-judicial-system-is-broken-but-politicians-dont-seem-to-care>.

Martin, Nicole, "Rape retrial after jury uses internet" *The Telegraph* (17 February 2005), online: <https://www.telegraph.co.uk/news/uknews/1483727/Rape-retrial-after-jury-uses-internet.html>.

McNeill, Heather, "Calls to overhaul WA jury system after juror dismissed for Facebook post" *WAtoday* (13 October 2016), online: <https://www.watoday.com.au/national/western-australia/calls-to-overhaul-wa-jury-system-after-juror-dismissed-for-facebook-post-20161012-gs0wwa.html>.

Menagh, Joanna, "Judge 'almost speechless with rage' after third Ronald Pennington trial for 1992 murder aborted" *ABC News* (31 July 2014), online: <https://www.abc.net.au/news/2014-07-30/judge-27speechless-with-rage27-after-third-trial-for-1992-mur/5636388>.

Morris, Chris, "Mistrial declared in Dennis Oland murder retrial after police 'improprieties'" *CTV* (20 November 2018), online: <https://atlantic.ctvnews.ca/mistrial-declared-in-dennis-oland-murder-retrial-after-police-improprieties-1.4184485>.

Murphy, Dean E, "Jurors Who Convicted Marijuana Grower Seek New Trial" *New York Times* (5 February 2003), A14.

Musgrave, Jane, "Juror mischief a growing concern" *Palm Beach Post* (13 May 2012).

Olijnyk, Zena, "Preserving trust in justice system comes down to resources, building confidence: judges at CBA forum" *Canadian Lawyer* (4 July 2023), online: <https://www.canadianlawyermag.com/news/general/preserving-trust-in-justice-system-comes-down-to-resources-building-confidence-judges-at-cba-forum/377490>.

Oliveira, Michael, "More than half of Canadians use 'doctor Google' to self-diagnose" *Global News* (31 July 2013), online: <https://globalnews.ca/news/752415/more-than-half-of-canadians-use-doctor-google-to-self-diagnose/>.

Powell, Betsy, "Court cases can go off the rails when jurors go to Google" *Toronto Star* (13 January 2020), <https://www.thestar.com/news/gta/court-cases-can-go-off-the-rails-when-jurors-go-to-google/article_c9157b71-eaa6-5493-a8d5-a35edfdeaa3b.html>.

Proctor, Jason, "B.C. lawyer reprimanded for citing fake cases invented by ChatGPT" *CBC* (27 February 2024), online: <https://www.cbc.ca/news/canada/british-columbia/lawyer-chatgpt-fake-precedent-1.7126393>.

Rayner, Jonathan, "Net-surfing lawyers warned of compliance risk" *Law Society Gazette* (1 July 2008), online: <https://www.lawgazette.co.uk/news/net-surfing-lawyers-warned-of-compliance-risk-/47152.article>.

Rogers, Elizabeth, "Why people trust or distrust experts when it comes to critical issues" *Waterloo News* (17 May 2022), online: <https://uwaterloo.ca/news/arts/why-people-trust-or-distrust-experts-when-it-comes-critical>.

Schwartz, John, "As Jurors Turn to Web, Mistrials Are Popping Up" *The New York Times* (17 March 2009), online: <https://www.nytimes.com/2009/03/18/us/18juries.html>.

Shah, Saqib & Alan Martin, "Why is Twitter now called X? The big rebranding explained" *The Standard* (22 August 2023), online: <https://www.standard.co.uk/news/tech/x-twitter-logo-rebrand-why-elon-musk-b1096363.html>.

Siegel, Andrea F, "Judges Confounded by Jury's Access to Cyberspace" *Baltimore Sun* (13 December 2009), online: <https://www.baltimoresun.com/2009/12/13/judges-confounded-by-jurys-access-to-cyberspace/>.

Stastna, Kazi, "Jury duty: Unfair burden or civic obligation?" *CBC* (8 November 2011), online <https://www.cbc.ca/news/canada/jury-duty-unfair-burden-or-civic-obligation-1.994514#:~:text=Some%20in%20the%20legal%20community,voting%20in%20an%20election%20does.>.

"Stronger 'buckle up' laws change attitudes among young drivers" (21 October 2002), online: *University College London* <https://www.ucl.ac.uk/news/2002/oct/stronger-buckle-laws-change-attitudes-among-young-drivers>.

Taylor, Stephanie, "'People are confused': Survey suggests Canadians need education on Charter rights" *CityNews* (10 December 2023), online: <https://vancouver.citynews.ca/2023/12/10/canadians-charter-rights-confused/>.

Thomson, Aly, "Lawyer warns 'integrity of the entire system in jeopardy' if rising use of AI in legal circles goes wrong" *CBC* (1 March 2024), online: <https://www.cbc.ca/news/canada/nova-scotia/artificial-intelligence-lawyers-law-nova-scotia-1.7126732#:~:text=In%20October%2C%20the%20Nova%20Scotia,with%20%22meaningful%20human%20control.%22>.

Vinter, Robyn, "Juror jailed for causing rape trial to collapse by researching defendant online" *The Guardian* (25 May 2023), online: <https://www.theguardian.com/uk-news/2023/may/25/juror-jailed-for-causing-trial-to-collapse-by-researching-defendant-online>.

Walsh, Jim, "Juror fined, found in criminal contempt after causing mistrial" *Courier Post* (29 June 2021), online: <https://www.courierpostonline.com/story/news/2021/06/29/juror-misconduct-mistrial-camden-federal-court-kugler/7802008002/>.

Walters, Reakash, Anthony N Morgan & Joshua Sealy-Harrington, "Canada's courts need a system update to deal with internet-connected juries" *The Globe and Mail* (30 November 2020), online: <https://www.theglobeandmail.com/opinion/article-canadas-courts-need-a-system-update-to-deal-with-internet-connected/>.

Watts, Rachel, "In Quebec's north, criminal cases are being dropped because of a drastic lack of resources" *CBC* (8 September 2023), online: <https://www.cbc.ca/news/canada/montreal/nunavik-abitibi-témiscamingue-criminal-cases-dropped-drastic-lack-of-resources-1.6961144>.

OTHER SECONDARY SOURCES

Bates, Michelle, "50% of Canadians get their financial advice from family and friends; banks follow close behind: survey" *WealthRocket* (27 July 2023), online: <https://www.wealthrocket.com/survey-canadians-financial-advice/>.

Canadian Institute for the Administration of Justice, "Wrongful Convictions in Canada" (24 August 2022), online: <https://ciaj-icaj.ca/en/2022/08/24/wrongful-convictions-2022-conference-on-dignity-panel-2/>.

Dodge, Mary, *Should Jurors Ask Questions in Criminal Cases? A Report Submitted to the Colorado Supreme Court's Jury System Committee* (2002), online: <https://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Jury_System_Standing_Committee/dodgereport.pdf>.

Egan, John, "Nearly 80% of Young Adults Get Financial Advice From This Surprising Place" *Forbes* (4 March 2023), online: <https://www.forbes.com/advisor/investing/financial-advisor/adults-financial-advice-social-media/#:~:text=Outside%20of%20social%20media%2C%20those,reliable%20insights%20about%20personal%20finance>.

Gomez, Norberto, "A Stranger-web: The Death and Rebirth of the Chatroom," online: *Digital America* <https://www.digitalamerica.org/a-stranger-web-the-death-and-rebirth-of-the-chatroom-norberto-gomez-jr/>.

Gordon, Cindy, "ChatGPT Is The Fastest Growing App In The History of Web Applications" *Forbes* (3 February 2023), online: <https://www.forbes.com/sites/cindygordon/2023/02/02/chatgpt-is-the-fastest-growing-ap-in-the-history-of-web-applications/>.

Grow, Brian, "As jurors go online, U.S. trials go off track" *Reuters* (8 December 2010), online: <https://www.reuters.com/article/us-internet-jurors-idUSTRE6B74Z820101208#:~:text=The%20data%20show%20that%20since,%2D%2D%2021%20since%20January%202009.>.

Grow, Brian, "Juror could face charges for online research" *Reuters* (19 January 2011), online: <https://www.reuters.com/article/ctech-us-internet-juror-idCATRE70I5KI20110119>.

Hsieh, Paul, "Doctors Use Youtube And Google All The Time. Should You Be Worried?" *Forbes* (30 December 2019), online: <https://www.forbes.com/sites/paulhsieh/2019/12/30/doctors-use-youtube-and-google-all-the-time-should-you-be-worried/?sh=6f746e6f7436>.

Innocence Canada, "Causes of Wrongful Convictions," online: <https://www.innocencecanada.com/causes-of-wrongful-convictions/>.

"Internet Addiction" (last modified 9 January 2024), online: *Addiction Center* <https://www.addictioncenter.com/drugs/internet-addiction/#:~:text=Compulsive%20Information%20Seeking&text=For%20some%2C%20the%20opportunity%20to,existing%2C%20obsessive%2Dcompulsive%20tendencies>.

Lawlor, Andrea & Erin Crandall, "Longstanding Canadian confidence in the judicial system may be on shaky ground" *Policy Options* (24 August 2023), online: <https://policyoptions.irpp.org/magazines/august-2023/judicial-system-confidence/#:~:text=First%2C%20the%20overall%20number%20of,cent%20over%20the%20same%20period.>.

Legal Info Nova Scotia, "Jury Duty," online: <https://www.legalinfo.org/criminal-law/jury-duty#what-happens-once-the-jury-is-selected>.

LexisNexis, "Why Attorneys Shouldn't Use Internet Search Engines for Legal Research" (22 April 2020), online: <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/why-attorneys-shouldnt-use-internet-search-engines-research>.

MacDonald, Brooke, "Has the internet made publication bans obsolete?" *Canadian Bar Association* (29 March 2018), online: <https://nationalmagazine.ca/en-ca/articles/law/opinion/2018/has-the-internet-made-publication-bans-obsolete>.

Mai, Philip & Anatoliy Gruzd, *The State of Social Media in Canada: 2022* (Toronto: Social Media Lab Toronto Metropolitan University, 2022), online: <https://figshare.com/articles/preprint/The_State_of_Social_Media_in_Canada_2022/21002848?file=37439986>.

Newman, Nic et al, *Reuters Institute Digital News Report 2023* (Oxford: Reuters Institute for the Study of Journalism, 2023), online: <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2023-06/Digital_News_Report_2023.pdf>.

Ontario Justice Education Network, "Mock Jury Selection" (2019), online: <https://ojen.ca/wp-content/uploads/2019/09/Mock-Jury-Selection_final.pdf>.

Pew Research Center, "News Platform Fact Sheet" (15 November 2023), online: <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/>.

Porter, Jon, "ChatGPT continues to be one of the fastest-growing services ever" *The Verge* (6 November 2023), online: <https://www.theverge.com/2023/11/6/23948386/chatgpt-active-user-count-openai-developer-conference>.

Prater, Meg, "31 Google Search Statistics to Bookmark ASAP" (30 August 2023), online: *HubSpot* <https://blog.hubspot.com/marketing/google-search-statistics>.

Reddit, "r/advice," online: *Reddit* <https://www.reddit.com/r/advice/>.

Reddit, "r/AmItheAsshole," online: *Reddit* <https://www.reddit.com/r/AmItheAsshole/>.

Reddit, "r/needadvice," online: *Reddit* <https://www.reddit.com/r/needadvice/>.

Reddit, "r/Needafriend," online: *Reddit* <https://www.reddit.com/r/Needafriend/>.

Reddit, "r/legaladvice," online: *Reddit* <https://www.reddit.com/r/legaladvice/>.

Reddit, "r/legaladvicecanada," online: *Reddit* <https://www.reddit.com/r/legaladvicecanada/>.

Reddit, "r/parenting," online: *Reddit* <https://www.reddit.com/r/parenting/>.

Reddit, "r/relationship_advice," online: *Reddit* <https://www.reddit.com/r/relationship_advice/>.

Reddit, "r/relationships," online: *Reddit* <https://www.reddit.com/r/relationships/>.

Reddit, "r/techsupport," online: *Reddit* <https://www.reddit.com/r/techsupport/>.

Reed, Cara, "Why so many people have had enough of experts – and how to win back trust" *The Conversation* (28 June 2023), online: <https://theconversation.com/why-so-many-people-have-had-enough-of-experts-and-how-to-win-back-trust-206134>.

Robbins, Rob, "How Many Google Searches Per Day Are There?" (2024), online: *Clicta Digital* <https://clictadigital.com/how-many-google-searches-per-day-are-there/#:~:text=On%20average%2C%20people%20do%20three,for%20users%20without%20Google%20accounts.>.

Seventh Circuit Bar Association, *Seventh Circuit American Jury Project – Final Report* (2008), online: <https://www.uscourts.gov/sites/default/files/seventh_circuit_american_jury_project_final_report.pdf>.

Stewart, Ellis, "What Happened to Myspace? The Fall of the World's First Social Media Giant" (14 November 2023), online: *EM360* <https://em360tech.com/tech-article/what-happened-to-myspace#:~:text=Myspace%20is%20still%20active%20today,for%20the%20site's%20early%20days>.

Sweeney, Dennis M, "The Internet, social media and jury trials: lessons learned from the Dixon trial" (29 April 2010, address to the litigation section of the Maryland State Bar Association), online: <http://juries.typepad.com/files/judge-sweeney.doc>.

"Useful Google tips and tricks for lawyers" *Canadian Lawyer* (15 August 2011), online: <https://www.canadianlawyermag.com/news/general/useful-google-tips-and-tricks-for-lawyers/268297>.

Walker, Karen, "Impaired Driving" (last amended 15 December 2013), online: *The Canadian Encyclopedia* <https://www.thecanadianencyclopedia.ca/en/article/impaired-driving>.

"Why Attorneys Shouldn't Use Internet Search Engines for Legal Research" *LexisNexis* (22 April 2020), online: <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/why-attorneys-shouldnt-use-internet-search-engines-research>.

Wike, Richard et al, "Internet, smartphone and social media use" (2022), online: *Pew Research Center* <https://www.pewresearch.org/global/2022/12/06/internet-smartphone-and-social-media-use-in-advanced-economies-2022/>.

"Wikipedia, the Father of Crowdsourcing" (31 October 2015), online: *Harvard MBA Student Perspectives* <https://d3.harvard.edu/platform-digit/submission/wikipedia-the-father-of-crowdsourcing/>.