RUNAWAY JURORS: INDEPENDENT JUROR RESEARCH IN THE INTERNET AGE

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INTRODUCTION

In 2015, James McCallen and two friends were walking home from a bar late at night in Bradford, Ontario. A truck sped by and one of McCallen's friends yelled out a warning to slow down. Several men got out of the truck and a drunken brawl began. McCallen was killed.¹ Four people were charged with assault and manslaughter as a result of McCallen's death.² The trial was lengthy and complex; it stretched on for six weeks before coming to an abrupt halt. A juror had googled the names of the lawyers and the judge hearing the case, visited the crime scene, and made a map showing what he believed to be the sight lines of nearby surveillance cameras. He then shared this information with his fellow jurors. The enterprising juror's independent research resulted in a mistrial. As a result, McCallen's assailants will not face justice until next year at the earliest.³

This paper considers the issue of the fairness of jury trials in the Internet age. Independent research by jurors is an increasingly common occurrence that risks violating an accused person's *Charter* rights to a fair trial.⁴ Today, jurors are banned from conducting independent research outside the courtroom. Part I of this paper reviews the reasons behind the ban. Part II details how the issue has been addressed in Canadian law, the prevalence of independent juror research, and some recent cases considering this issue. Part III considers solutions to the problem with a focus on the United Kingdom's prosecutorial approach and the approaches taken in the United States. The paper

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¹ Betsy Powell, "How Google-Happy Jurors are Derailing Ontario Trials," *The Toronto Star* (21 May 2018), online: <www.thestar.com> [perma.cc/3XHQ-7APQ].

² *R v Ampadu*, 2018 ONSC 2797 (the full-text decision is currently unavailable owing to a court-imposed publication ban and pending the retrial next year).

³ Powell, *supra* note 1.

⁴ *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].

concludes by recommending that Canada first attempt to resolve the problem of “runaway” jurors pre-emptively before resorting to prosecution and imprisonment.⁵

I. REASONS FOR THE BAN ON JUROR RESEARCH

Today, impartiality is considered fundamental to a fair trial by jury and it is for this reason that there is a ban on juror research. In its early form, however, a jury consisted of “local men, with knowledge of the matter in dispute.”⁶ Jurors were simply witnesses who swore they believed one side or the other. As the institution evolved, jurors came to be chosen not for their knowledge of the matter at issue but precisely because of their ignorance.⁷ This impartiality is codified in section 11(d) of the *Charter*, which provides that any person charged with an offence has the right to a fair and public hearing by an independent and impartial tribunal, and section 11(f), which provides the right to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or more.⁸

A trial judge preserves the jury’s impartiality by carefully controlling which evidence is presented to jurors. The judge oversees the conduct of the trial and acts as a gatekeeper, determining which pieces of evidence the jury sees and hears. When a dispute arises concerning the admissibility of evidence, the judge sends the jury out of the courtroom and hears arguments from counsel.⁹ Furthermore, the judge has overriding discretion to exclude evidence whenever its prejudicial effect exceeds its probative value.¹⁰

In an instant, an unscrupulous juror with a smartphone and an Internet connection can upset the careful balance struck by a trial judge. The Ontario Court of Appeal summarizes the problem of independent juror research in *R v Pannu*:

[T]he 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

⁵ John Grisham, *The Runaway Jury* (New York: Bantam Dell, 2006) (the phrase, “runaway juror” is used in the novel).

⁶ *R v Sherratt*, [1991] 1 SCR 509 at para 27.

⁷ Lloyd E Moore, *The Jury, Tool of Kings, Palladium of Liberty* (Cincinnati: WH Anderson, 1973) at 14.

⁸ *Charter*, *supra* note 4 at ss 11(d), (f).

⁹ *R v Sadikov*, 2014 ONCA 72 at para 30 (this case is useful because it outlines the “*voir dire*” procedure; briefly, *voir dire* is a trial within a trial, which, in order to be invoked, involves the trial judge first determining whether it is necessary).

¹⁰ Depending on the type of evidence and which party is seeking to introduce it, different standards may apply. For example, for the judge to exclude evidence relevant to a defence the accused seeks to raise, the prejudicial effect of the evidence must substantially outweigh its probative value: *R v Seaboyer*, [1991] 2 SCR 577 at para 48 [*Seaboyer*].

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 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.¹¹

Determining Admissibility of Evidence

A trial judge may find evidence inadmissible for various reasons. First, the judge will discount any evidence not relevant to the case's legal issues.¹² Relevant evidence may also be too unreliable or its prejudicial effect may exceed its probative value.¹³ For example, the Crown generally cannot introduce evidence solely to portray the accused as a bad person.¹⁴ Such "bad character" or "propensity" evidence creates reasoning prejudice, tempting jurors to accord undue weight to the accused's past actions. It also gives rise to moral prejudice, as jurors may conclude that even if the accused did not commit the offence charged, the jury would do well to remove such a bad person from society.¹⁵ The trial judge may also exclude evidence obtained in breach of the accused's *Charter* rights if admitting the evidence would bring the administration of justice into disrepute.¹⁶ In other cases, evidence *must* be excluded; for example, evidence of a complainant's past sexual history in a sexual assault trial.¹⁷

In all cases a trial judge, and not the jury, determines the admissibility of each piece of evidence. Serving as the gatekeeper allows the judge to preserve the integrity of the trial process. As lay people, jurors are unable to perform this role. Independent research subverts the judge's gatekeeping purpose. Even by simply googling the accused's name, a juror may discover newspaper reports of excluded past convictions, or an improperly obtained and therefore excluded confession. The search may yield a social media tirade against the accused by a former partner, friend, or family member. Without testing the evidence in court under cross-examination, the juror has no way of determining whether it is accurate or even relevant. Further, runaway jurors cloud the transparency of

¹¹ *R v Pannu*, 2015 ONCA 677 at para 70 (*sub nom R v Bains*, 2015 ONCA 677) [*Pannu*], leave to appeal to SCC refused, 36698 (7 Oct 2015).

¹² Ron Delisle et al, *Evidence: Principles and Problems*, 11th ed (Toronto: Carswell, 2015) at 157–76.

¹³ *Ibid* at 176–216.

¹⁴ There are several exceptions to this general rule. Bad character evidence may be admitted where the accused has put their character in issue, or where it constitutes similar act evidence to the offence charged: see *R v Handy*, 2002 SCC 56 at para 71.

¹⁵ *Ibid* at para 72.

¹⁶ See *R v Grant*, 2009 SCC 32; *Charter*, *supra* note 4 at s 24(2).

¹⁷ See *Criminal Code*, RSC 1985, c C-46, s 276; *Seaboyer*, *supra* note 10 at para 52.

the public trial process by considering evidence without providing the accused an opportunity to respond.¹⁸

II. RUNAWAY JURORS IN CANADA

Trials in Canada begin with the judge instructing the jury that they are to decide the case based solely on the evidence presented in the courtroom.¹⁹ The judge explains the applicable law to the jurors and instructs them not to rely on legal information from any other source.²⁰ The judge may also include the following instruction:

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 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.²¹

At the outset of the trial, jurors also swear an oath that they will give a true verdict based on the evidence before them.²² Absent indications to the contrary, courts presume that jurors will act in accordance with this oath and with the trial judge's instructions.²³

The Test for a Mistrial

Where evidence arises that extrinsic information may have entered the jury room, the test for a mistrial is whether there is a reasonable possibility that this information had an effect on the jury's verdict.²⁴ While it is certainly desirable that jurors base their verdict solely on the evidence before the court and actively take steps to avoid coming across information online about the case, not all independent research by jurors will cause a

¹⁸ The right to make full answer and defence when charged with a crime is one of fundamental importance. It is a principle of fundamental justice (under s 7 of the *Charter*) and is encompassed by the right to a fair trial in s 11(d).

¹⁹ Canadian Judicial Council, "Model Jury Instructions" (2014), online: *National Judicial Institute*, s 3.2 at para 40, <www.nji-inm.ca/index.cfm/publications/model-jury-instructions/?langSwitch=en> [perma.cc/49GA-W3T5].

²⁰ *Ibid* at para 41.

²¹ *Ibid*, s 3.3 at para 48.

²² *Criminal Code*, *supra* note 17, s 631(4); *Jury Act*, RSBC 1996, c 242, s 18(3).

²³ *R v Vermette*, [1988] 1 SCR 985 at para 21; *R v Hubbert* (1975), 11 OR (2d) 464 at 475 (ONCA), *aff'd* [1977] 2 SCR 267.

²⁴ *R v Pan*; *R v Sawyer*, 2001 SCC 42 at para 59 [*Pan*]; *R v Farinacci*, 2015 ONCA 392 at para 26 [*Farinacci*].

mistrial. The courts recognize that jurors are not blank slates. In *R v Pan*,²⁵ the Supreme Court of Canada stated that “[j]urors are expected to bring to their task their entire life’s experiences. It is on the basis of what they know about human behaviour, knowledge that they have obviously acquired outside the courtroom, that they are requested to assess the credibility and to draw inferences from proven facts.”²⁶ The court acknowledges the lack of clarity between intrinsic and extrinsic information. For example, while a juror familiar with the location of a crime scene may share their knowledge with their fellow jurors, visiting the scene and taking photos to share with other jurors would be impermissible.²⁷

Prevalence of Independent Juror Research

The common law rule of jury secrecy, together with section 649 of the *Criminal Code*, forbids jurors from disclosing any information relating to their deliberations.²⁸ The rule aims to promote full and frank debate among jurors.²⁹ Jurors may tell the court that they were exposed to extrinsic information, but cannot testify as to what effect it had on their verdict.³⁰ The result of this is that it is impossible to fully ascertain the scope of the problem posed by independent juror research.

The jury secrecy rule largely precludes academic inquiry into the issue of jurors’ use of the Internet and other extrinsic sources of information. Without the ability to question Canadian jurors about their use of these sources and how extrinsic information affected their deliberations, the scope of the problem remains unknown. As a result, the impact of independent juror research on the integrity of the Canadian criminal justice system is not fully understood.

A 2010 study conducted in the United Kingdom found that in high-profile cases involving a trial longer than two weeks or with significant media coverage, 26 percent of jurors recalled seeing media reports related to their case on the Internet during the trial, while 12 percent admitted to actively searching for such information.³¹ The author notes that because respondents were asked to admit to violating the judge’s instructions, these

²⁵ See *Pan*, *supra* note 24.

²⁶ *Ibid* at para 61.

²⁷ *Ibid* at para 62.

²⁸ An exception is made for jurors giving evidence in a criminal investigation for obstruction of justice; for example, where someone has attempted to bribe or influence a juror.

²⁹ *Pan*, *supra* note 24 (the main rationale for the secrecy rule is that “[w]hile searching for unanimity, jurors should be free to explore out loud all avenues of reasoning without fear of exposure to public ridicule, contempt or hatred” at para 50).

³⁰ *Ibid* at para 59.

³¹ Cheryl Thomas, “Are Juries Fair?” (London: Ministry of Justice, 2010) at 43, *United Kingdom, Justice* online (pdf): <www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>.

numbers likely reflect the minimum number of jurors who researched their cases online.³² It may not be possible to fully ascertain the extent of the problem, but where the integrity of the trial process is at stake, even one case of outside juror research is too many.

Recent Canadian Cases

In *Pannu*, the jury found two co-accused guilty of possession of heroin for the purpose of trafficking.³³ Within an hour after the verdict was rendered, court staff discovered a document in the jury room that consisted of excerpts from media coverage of the Casey Anthony³⁴ trial in the United States. This document criticized the acquittal as “just the latest sign of juries’ ignorance, failure to use common sense, and inability—or disinclination—to properly weigh evidence.” It also contained one-sided excerpts from model jury instructions cautioning that “beyond a reasonable doubt” does not equate to absolute certainty and that juries should rely on their common sense when weighing witness credibility. The trial judge convened an inquiry to create a record of what had happened for review on appeal. Each juror was questioned about whether they had seen or read the document, although not on what effect it had on their deliberations.³⁵ The judge discovered that the foreman had created the document at home on the weekend and distributed it to the other jurors. Most jurors testified that they put down the paper after reading “Casey Anthony,” and some considered the document inappropriate.³⁶ The Court of Appeal held that despite the “provocative and tendentious” quote regarding the Casey Anthony verdict and the incomplete and therefore misleading excerpts from the jury instructions, the potential problems posed by the document were remedied in the trial judge’s instructions to the jury. The trial judge stated that public opinion was irrelevant, and sufficiently addressed the burden of proof and the role of common sense.³⁷ The court upheld the appellants’ convictions, finding that, on the facts of the case, there was no reasonable possibility that the extrinsic evidence tainted the verdict.³⁸ This case highlights that complete instructions to the jury can be crucial in preventing a mistrial.

In *Farinacci*, a juror was overheard in a coffee shop discussing the case after the jury had rendered a guilty verdict on charges of conspiracy to traffic in cocaine and possession of proceeds of a crime. Private investigators soon visited the juror, asking

³² *Ibid.*

³³ *Pannu*, *supra* note 11.

³⁴ John Cloud, “How the Casey Anthony Murder Case Became the Social-Media Trial of the Century,” *Time Magazine* (16 June 2011), online: <content.time.com/time/nation/article/0,8599,2077969,00.html> [perma.cc/9BDN-KDRV] (Casey Anthony was acquitted of murder of her two-year-old daughter in 2008, after parts of the girl’s corpse were found near Anthony’s parents’ home).

³⁵ *Pannu*, *supra* note 11 at paras 29–39.

³⁶ *Ibid* at paras 40–41.

³⁷ *Ibid* at paras 96–98.

³⁸ *Ibid* at para 169.

whether he had been exposed to outside information.³⁹ The two co-accused appealed their convictions on the basis that extrinsic information had entered the jury room and tainted the verdict.⁴⁰ The trial judge convened an inquiry, in which various jurors testified that other members of the jury introduced extrinsic information during the trial and deliberations. This information included a conversation one juror had with a retired police officer, information provided by third parties about the extensive criminal history of the co-accuseds' family, and information discovered through Internet searches.⁴¹ The jurors accused of providing this information all denied any knowledge of it, though some admitted to conducting Internet searches. The Court of Appeal found that, on the facts of the case, there was no reasonable possibility that the extrinsic information impacted the verdict.⁴²

Factors relevant in determining the impact of extrinsic information on the jury's verdict include: the nature of the issues at trial, the nature and currency of the extrinsic information, whether the information relates to inadmissible evidence, and the judge's instructions to the jury.⁴³ The court in *Farinacci* applies these factors to distinguish the case from *R v Karakaya*.⁴⁴ *Karakaya* is a UK case in which specific prejudicial information was excluded from the trial but introduced through a juror's independent research. In *Karakaya*, a jury convicted the accused of the indecent assault and rape of his daughter. At the end of deliberations on the second day, after the jurors rendered their verdict and left the courthouse, court staff discovered a number of external documents in the jury room. It was believed that after the first day of deliberations, a juror returned home, printed the materials from the Internet, and distributed them to the jury the following morning. One document related to "the feminist position on rape," while another had been published by a rape crisis line and discussed the criminal justice system's handling of sexual assault cases. The papers argued that sexual assault complainants should be supported and believed, denounced "unacceptably low" rates of rape convictions, and opined that judges often attempt to influence the jury's decision through their review of the law. Counsel for the appellants described the materials as "tendentious and inaccurate," submitting that the papers contained several points that "the prosecution could not and would not have made either in evidence, or in an address to the

³⁹ *Farinacci*, *supra* note 24 at para 15.

⁴⁰ *Ibid* at para 1.

⁴¹ *Ibid* at paras 22–25.

⁴² *Farinacci*, *supra* note 24 at paras 28–31 (the identity of the person who overheard the juror's conversation and subsequently brought it to defence counsel's attention is not clear in the Court of Appeal's judgment).

⁴³ *Ibid* at para 86.

⁴⁴ *R v Karakaya*, [2005] EWCA Crim 346 [*Karakaya*].

jury.”⁴⁵ The UK Court of Appeal agreed, quashing the conviction and ordering a new trial.⁴⁶

Jurors’ independent research threatens the integrity of the administration of justice. Assuming the roles of detective, judge, and jury, runaway jurors threaten the very foundation of our adversarial trial process. Even in cases where outside research does not affect the jury’s verdict, the practice may create an appearance of unfairness. Fundamental to our criminal justice system is the principle that justice must not only be done, but be seen to be done.⁴⁷ Independent research violates the accused’s right to a fair trial when it brings relevant information excluded from evidence by the judge to the jury’s attention. Further, when a juror brings irrelevant information into the jury room, this may distract the jury from the issues they are called upon to decide. The fact that juror research often goes undiscovered until the verdict has been rendered is also troubling. The possibility that extrinsic research is never discovered in some cases makes the need for a solution all the more urgent. Mistrials can rectify unfairness when outside research comes to light, but they come with great cost to the justice system. The question becomes: what do we do about it? What preventive measures can be taken?

III. POSSIBLE SOLUTIONS

Why Do Jurors Research?

Preventing independent research by jurors begins with an understanding of why jurors feel compelled to make their own inquiries. Perhaps the main driver of independent research is simple habit. People are used to satisfying their curiosity by means of a Google search.⁴⁸ Jurors simply do not realize that this near-daily practice of searching the Internet, whether to define a term they heard in court or to learn more about the lawyers or witnesses in the case, can be so problematic. The habit is so deeply engrained that many jurors may not even consider a Google query “research.”⁴⁹

Independent research is also driven by the deep sense of moral duty felt by most jurors. Keenly aware of the responsibility entrusted to them, jurors seek to amass as much

⁴⁵ *Ibid* at paras 1–11.

⁴⁶ *Ibid* at para 27.

⁴⁷ *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256 at 259.

⁴⁸ Ralph Artigliere, “Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet during Trial” (2011) 59:3 Drake L Rev 621 at 627.

⁴⁹ Daniel William Bell, “Juror Misconduct and the Internet” Note (2010) 38:1 Am J Crim L 81 at 92. For an extensive discussion of both the historical and contemporary motivations behind juror research, see also Thaddeus Hoffmeister, “Google, Gadgets and Guilt: Juror Misconduct in the Digital Age” (2012) 83:2 U Colo L Rev 409 at 417–25.

information as possible about a case in order to reach the “right” verdict.⁵⁰ Despite lacking detailed knowledge of evidence law, most jurors will be aware that some pieces of evidence are being kept from them, and may feel as though they are not getting the full story.⁵¹ Faced with a decision that will profoundly alter the course of the accused’s life, jurors seek to supplement the evidence they are given in the courtroom with their own outside research.

The UK Approach

In 2015, the United Kingdom addressed the issue of juror research by amending the country’s *Juries Act 1974*.⁵² The revised legislation enables judges to order jurors to surrender their electronic communication devices⁵³ and order that a court security officer search jurors who have not surrendered devices.⁵⁴ The legislation makes it an offence for a juror to research the case they are hearing by intentionally seeking information that they know or ought to know is or may be relevant to the case.⁵⁵ Research includes asking questions, conducting Internet searches, visiting the crime scene, or asking another person to seek information.⁵⁶ “Information relevant to the case” is defined broadly, encompassing information about anyone involved in the case, including a witness, a lawyer, or a judge, or information relating to the law applicable to the case, the law of evidence, or the court processes.⁵⁷ Several Australian states have enacted similar legislation.⁵⁸

Prior to the enactment of the 2015 legislation, the United Kingdom charged jurors who conducted outside research with contempt of court. In *Attorney General v Dallas*,⁵⁹ a juror searched for information online about the accused and discovered an article about a previous charge for rape, for which the accused had been acquitted. The trial judge had excluded this evidence from the trial. The juror shared this information with the remaining

⁵⁰ Law Commission of England and Wales, “Consultation Paper No 209: Contempt of Court” (29 November 2012) at para 4.21, online (pdf): www.lawcom.gov.uk/app/uploads/2015/03/cp209_contempt_of_court.pdf.

⁵¹ Ian Cram, “Dealing With the Googling Juror: A Commentary on Part 3 of the Criminal Justice and Courts Bill” (2014) 19:4 Communications L: J Computer, Media & Telecommunications L 110 at 111–12.

⁵² *Juries Act 1974* (UK), c 23.

⁵³ *Criminal Justice and Courts Act 2015* (UK), s 69.

⁵⁴ *Ibid*, s 70.

⁵⁵ *Ibid*, s 71.

⁵⁶ *Ibid*, s 71(3).

⁵⁷ *Ibid*.

⁵⁸ *Jury Act 1977* (NSW), 1977/18, s 68C; *Jury Act 1995* (Qld), 1995/42, s 69A; *Juries Act 2000* (Vic), 2000/53, s 78A.

⁵⁹ *Attorney General v Dallas*, [2012] EWHC 156 (Admin) [*Dallas*].

the jurors, one of whom informed the judge. The trial judge declared a mistrial. The complainant in the case, who had been severely tortured by the accused and his accomplices, was forced to testify a second time at the new trial.⁶⁰ The accused was eventually convicted and sentenced to 11 years in prison.⁶¹ The juror whose research caused the mistrial was prosecuted for contempt of court, found guilty, and sentenced to six months' imprisonment.⁶² She also lost her job as a tenured university professor.⁶³ In handing down the custodial sentence, the court emphasized the need to protect the integrity of the jury system, stating that "in the long run any system which allows itself to be treated with contempt faces extinction. That is a possibility we cannot countenance."⁶⁴

Criticism of the UK Approach

The UK practice of prosecuting and imprisoning jurors for conducting outside research has been strongly criticized by some commentators. Jurors perform an important and commendable public service. They spend weeks or months away from work, hearing often traumatic evidence in exchange for low pay and with little support. Prosecuting jurors could lead to more people seeking ways to avoid jury duty. Of course, this problem arises only if the public is aware of the prosecutions.

However, publicity is the key to deterrence. The United Kingdom's prosecutions will not be effective in deterring future juror misconduct without public awareness. Although the judges in *Dallas* and other juror misconduct cases in the United Kingdom stated that deterrence was their main goal in imposing custodial sentences,⁶⁵ a 2013 survey found that almost two-thirds of jurors serving on trials at the time were not aware of any of the recent prosecutions.⁶⁶ This was despite the fact that the cases had been widely publicized in the media and that newspaper articles on them were posted in jury lounges at the courthouses where the respondents were serving.⁶⁷

If jurors who conduct outside research are to be prosecuted, it is preferable to do so on the basis that the *Juries Act 1974* specifically forbids outside research rather than under the far more vague offence of contempt of court. Juror prosecutions, such as the

⁶⁰ *Ibid* at para 17–25.

⁶¹ *Ibid* at para 25.

⁶² *Ibid* at paras 39, 47.

⁶³ *Ibid* at para 45.

⁶⁴ *Ibid* at para 41.

⁶⁵ *Ibid*; *HM Attorney General v Fraill*, [2011] EWCA Crim 1570 at para 1. In *Fraill*, a juror was charged with contempt after she befriended the accused on Facebook and discussed the case.

⁶⁶ Cheryl Thomas, "Avoiding the Perfect Storm of Juror Contempt" (2013) 6 Crim L Rev 483 at 490.

⁶⁷ *Ibid*.

one in *Dallas*, had been criticized for a lack of clarity in the definition of contempt and the fact that jurors could be unaware that this constitutes an offence.⁶⁸

The 2013 UK study referenced above calls the effectiveness of the prosecutorial route into question. Without widespread awareness of the prosecutions among current jurors, the prosecutorial approach will fail to effect any meaningful change. It is also debatable whether a custodial sentence (of up to two years) is truly more effective in deterring juror research than a monetary fine. In either case, deterrence derives largely from the fear of being caught, not the severity of the potential penalty.⁶⁹

Juror research is already difficult to detect, and some scholars suggest that criminalizing runaway jurors will merely lead to more covert outside research in the future.⁷⁰ The court will be unaware that external research has been done unless a physical document is left in the jury room or a “whistleblowing” juror notifies the judge. In the 2010 UK study on jury fairness, almost half of all jurors surveyed said they would not know what to do if something improper occurred during their deliberations.⁷¹ If juror research is not likely to be detected or reported, then it is also unlikely that the UK approach will deter these types of activities.

A further concern is that charging judges with punishing runaway jurors may negatively impact the relationship between jurors and the court. Increased awareness of prosecutions may indeed deter juror misconduct, but may also deter citizens from wanting to serve on a jury at all.⁷² The shadow cast by the threat of prosecution may also deter jurors from asking questions of the judge or from reporting unethical behaviour by other jurors lest they themselves be implicated in the misconduct.

Approaches in the United States: Lessons for Canada

Each of the fifty US state courts have their own procedural rules.⁷³ The diverse solutions targeting independent juror research across the United States provide useful case studies. State courts employ approaches that include the confiscation of jurors’ cellphones while they are at the courthouse; the outright sequestration of jurors hearing

⁶⁸ Prosecutions of jurors for contempt of court proceed on the basis that the juror has violated a court order. Whether the judge’s instructions to the jury that they are not to do research truly constitutes a “court order” is a question that deserves scrutiny: Law Commission of England and Wales, Contempt of Court (Consultation Paper No 209) (London: The Stationary Office, 2012) at para 4.20, online (pdf): <www.lawcom.gov.uk/app/uploads/2015/03/cp209_contempt_of_court.pdf>.

⁶⁹ Daniel S Nagin, “Deterrence in the Twenty-First Century” (2013) 42:1 Crime and Justice 199–263 at 201.

⁷⁰ Cram, *supra* note 51 at 112.

⁷¹ Thomas, *supra* note 31 at 39.

⁷² Bell, *supra* note 49 at 89; Hoffmeister, *supra* note 49 at 437.

⁷³ “Court Rules” (last modified November 2017), online: *Duke University School of Law* <law.duke.edu/lib/researchguides/courtr> [perma.cc/7SSC-65T6].

high-profile cases; and the further development of clear and comprehensive jury instructions on outside research. Lessons from these differing approaches are instructive when considering how the issue can be addressed by Canadian courts.

Confiscating or forbidding jurors to use cellphones and other Internet-enabled technology while they are at the courthouse is frequently proposed. For instance, the Michigan Court Rules forbid jurors from using electronic devices in court or during deliberations. The use of electronic devices is permitted during breaks, but not to research any aspects of a case.⁷⁴ This response contains an obvious and central flaw: there is nothing to stop jurors from satiating their curiosity by carrying out Google searches when they get home.⁷⁵ Additionally, there is nothing preventing jurors from breaking the rule by using their devices to research the case during breaks. While confiscating devices outright solves this problem, it causes unfairness and hardship for jurors who need to be in contact with family or employers.⁷⁶

The issues with the solution above sometimes lead to consideration of a more extreme approach, one that aims to prevent jurors from coming into contact with any outside information whatsoever. Jurors in the extremely high-profile Casey Anthony murder case were sequestered for the duration of the trial. They lived in a nearby hotel and were monitored at all times by Sheriff's deputies. They were allowed to make calls monitored by the deputies, who otherwise kept their phones in custody. Their entertainment options were limited to the shopping channel and a list of pre-approved DVDs. The jurors were allowed brief, supervised visits with their families on Sunday afternoons under the watchful eyes of the deputies.⁷⁷ Sequestration is extremely costly, and emotionally difficult for jurors, who often liken the experience to being imprisoned.⁷⁸ As such, it is not viable as a large-scale solution.

Revising the instructions that the trial judge gives to the jury could mitigate the problem of independent research and reduce jurors' confusion over what to do if it occurs. A common refrain in the literature on this subject is that jurors do not fully understand the instructions they are given and wish they had more information and direction.⁷⁹ Indeed, legal dictionaries are a common source that jurors resort to when they conduct

⁷⁴ "Michigan Court Rules" (2018) r 2.511, online: *Michigan Courts* <courts.michigan.gov/courts/michigansupremecourt/rules/pages/current-court-rules.aspx>.

⁷⁵ Hoffmeister, *supra* note 48 at 439.

⁷⁶ Bell, *supra* note 49 at 87.

⁷⁷ Jeff Weiner, "Casey Anthony Jurors: What Life was Like for 17 Sequestered in Murder Trial," *Orlando Sentinel* (9 July 2011), online: <articles.orlandosentinel.com/2011-07-09/news/os-casey-anthony-jurors-lifestyle-20110709_1_casey-anthony-jurors-murder-trial-karen-levey> [perma.cc/P4PV-WYBF].

⁷⁸ Robbie Manhas, "Responding to Independent Juror Research in the Internet Age" (2014) 11:5 Mich L Rev 809–31 at 816–17.

⁷⁹ Thomas, *supra* note 31 at 39; Artigliere, *supra* note 48 at 639.

research online.⁸⁰ Jurors' insufficient appreciation of the goals of evidence law may also contribute to the problem. All of these matters could be addressed more explicitly by the trial judge. As any parent knows, an edict not to do something will always have more force if it can be backed it up with a justification – "because I said so" rarely suffices.

Model jury instructions published by the Arizona state bar include a lengthy admonishment regarding jurors' duty to refrain from conducting their own research.⁸¹ The instructions define what constitutes research, including a list of social media websites and search engines to avoid visiting in connection with the case. Judges are directed to give a brief explanation of the reasoning behind the ban on juror research and refer jurors back to these instructions at the beginning of every recess.

Emphasis by the trial judge on a specific definition of "research," the justification behind the prohibition on evidence not tested in court, and what jurors should do if a fellow juror violates these rules or if they have questions they feel need to be answered are a clear and fairly easy first step toward addressing the problem.⁸² These instructions should be repeated throughout the trial to maximize their effectiveness. To make the point more explicit, jurors could be asked to sign a written declaration that they will consider only the evidence presented to them in court and refrain from any outside research.

While pre-empting independent research before it occurs is ideal, punishment after the fact may be merited in some rare cases. This is especially true where a juror's wilful misconduct results in a mistrial. In these cases, having jurors pre-emptively sign a declaration that they will not conduct their own research provides a solid basis for imposing a penalty.

CONCLUSION

Independent juror research is a serious problem that may be increasingly prevalent given the growth of Internet use. Canada must take concrete steps to deal with this issue. However, resorting to criminalization and imprisonment of runaway jurors in Canada would be premature without first testing less draconian means of intervention.

⁸⁰ Thomas, *supra* note 66 at 491. See also Paula Hannaford-Agor, David B Rottman & Nicole L Waters, "Juror and Jury Use of New Media: A Baseline Exploration," Executive Session for State Court Leaders in the 21st Century series, at 6, online: <www.ncsc.org/Services-and-Experts/Court-leadership/Harvard-Executive-Session/Juror-and-Jury-Use-of-New-Media-A-Baseline-Exploration.aspx>; Hoffmeister, *supra* note 48 at 424.

⁸¹ State Bar of Arizona, "RAJI (Criminal) 4th" (2018) Preliminary Criminal Instruction 13: Admonition (at 6), online (pdf): <www.azbar.org/media/1822836/rajicriminal-4thed2018-1.pdf>.

⁸² See Hoffmeister, *supra* note 48 at 451. In the author's survey of judges and lawyers with regard to how to rectify the problems posed by independent juror research, updating jury instructions received the greatest amount of support.

Canadian courts should adopt comprehensive jury instructions, outlining what constitutes research, and clearly setting out jurors' duty to avoid conducting outside inquiries. Jurors should be instructed on what to do if they are unsure whether or not an action is appropriate, or if a fellow juror is engaging in questionable conduct. These instructions should be situated within a framework that emphasizes the important role of the jury in ensuring a fair trial and should clearly explain the reasons for the ban on outside research by jurors. Clear and comprehensive instructions will help jurors avoid inadvertent misconduct, while appealing to jurors' sense of reason and moral duty. This will lead to fewer jurors intentionally setting out to conduct their own research. The solution lies not in punishing runaway jurors after the damage is done, but in working constructively with jurors to ensure that the goals of evidence law are understood, respected, and upheld.