

SOCIAL MEDIA SELECTION: HOW JURY CONSULTANTS CAN USE SOCIAL MEDIA TO BUILD A MORE FAVORABLE JURY

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I. INTRODUCTION

Juries are one of the most controversial cogs in the American judicial system machine. Simultaneously criticized and acclaimed, juries are often the deciders of fate, the last stop on the train to justice, the medium to attaining a verdict. Unfortunately, they are also highly unpredictable. This problem is softened when lawyers are able to find a way to weaken that unpredictability. Jury selection is often thought to be the place where a case is decided.¹ This process can be far less treacherous, far less volatile, when lawyers enlist the help of jury consultants.

Jury consultants essentially collect information on jurors and condense that information into favorable and unfavorable juror profiles. The up-and-coming method of investigation is social media profiles and internet activity. This makes sense, for the jury is designed to be a reflection of the American people.² A large majority of the American people use the internet, and, in particular, social networking sites.³ People project their lives onto social networking sites, therefore creating a rich source of information for jury consultants to use in forming an opinion on a juror. Distinct from passive media sources, such as television, social networking sites allow and encourage active participation.⁴ By generating their own content, jurors divulge details about themselves and their experiences that would possibly slip through the cracks in traditional voir dire.

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¹ Steven C. Serio, *A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert*, 53 AM. U. L. REV. 1143, 1152 (2004).

² See Symposium, *Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online*, 36 AM. J. TRIAL ADVOC. 597, 598 (2013).

³ *Id.*; see Shlomit Yanisky-Ravid, *To Read or Not to Read: Privacy Within Social Networks, the Entitlement of Employees to a Virtual "Private Zone," and the Balloon Theory*, 64 AM. U. L. REV. 53, 55 (2014) (stating that one-seventh of the world's population uses Facebook, while nearly three-fourths of online American adults are Facebook users).

⁴ Nathaniel Swigger, *The Online Citizen: Is Social Media Changing Citizens' Beliefs About Democratic Values?*, 35 POL. BEHAV. 589, 590 (2013).

Jury profiling, an application of social science to the real world that calls on the experience and knowledge of jury consultants to assist lawyers in understanding variables of jurors,⁵ fosters appreciation for potential jurors on a deeper level. Armed with this information, jury consultants can guide lawyers in executing well-placed peremptory challenges and possibly uncovering more for cause challenges.

Part II of this note will discuss jury consultants' roles in the legal process and the way in which they work. Part III will explain how social media came to be such an integral part of jury selection and the obstacles it overcame to get there. Part IV will illustrate the vast amounts of information that can be gleaned from social media profiles. Lastly, Part V will discuss how this information can be integrated into the jury selection process.

II. JURY CONSULTANTS

A. *Scientific Jury Selection*

A controversial topic, scientific jury selection is both revered by some and disparaged by others. It is the use of empirical evaluations to predict verdicts through social scientific exploration into demographics, personality, and other psychological and sociological factors.⁶ This approach was first taken seriously in 1972 after the Harrisburg Seven trials.⁷ In these trials, a group of Vietnam War protesters was accused of civil disobedience and tried in the highly conservative town of Harrisburg, Pennsylvania.⁸ A team of social scientists, mainly college students, conducted research and constructed profiles to assist in the jury selection process.⁹ The trial ended in a hung jury, 10–2 in favor of acquittal, and the protesters were released.¹⁰ Other high profile cases, such as OJ Simpson's trial, offered successful displays of this new field.¹¹ Through the use of scientific jury selection, "jury consultants collect information and establish a profile"

⁵ Laurie R. Kuslansky, *Jury Selection: So Few Strikes, So Much at Stake*, NEWSTEX, Sept. 25, 2013.

⁶ Dennis P. Stolle et al., *The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation*, 20 LAW & PSYCHOL. REV. 139, 144 (1996) (citing Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178 (1990)).

⁷ *Id.* at 139.

⁸ Rachel Hartje, *A Jury of Your Peers?: How Jury Consulting May Actually Help Trial Lawyers Resolve Constitutional Limitations Imposed on the Selection of Juries*, 41 CAL. W. L. REV. 479, 491 (2005).

⁹ *Id.* at 491–92.

¹⁰ *Id.* at 492.

¹¹ *Id.* at 493.

of the idyllic juror for the case.¹² Traditional views of juror types, based almost entirely on obtuse stereotypes, are quite often wrong.¹³

B. *Obsolete Stereotypes and the Emergence of a New Jury*

Attorneys may rely on demographic characteristics such as race, gender, age, occupation, political affiliation, and socioeconomic status in selecting jurors.¹⁴ It has been “recommended” that divorced, blue collar, and less educated people are favorable to the defense; women, club members, and managers are favorable to the prosecution.¹⁵ There are obvious issues with these blanket classifications. Based on varying facts, a prosecution-favorable juror for one case might favor the defense in another case.

Heuristic processing, or rule-of-thumb analysis, is often the basis for relying on stereotypes.¹⁶ In situations where people do not have the opportunity to contemplate their decisions, they rely on automatic or reflective responses, or heuristics, to make quick, but not completely arbitrary, decisions.¹⁷ When decision-making tasks become complex, heuristics are helpful tools in making efficient decisions.¹⁸ Heuristics are automatic, ingrained to the point that additional cognitive resources are required to overcome them.¹⁹

Race is among the most common stereotypes called upon in heuristic processing to make snap judgments. Although Caucasians have openly negatively stereotyped African Americans in the past, that trend is shifting slightly and a new trend of “modern racism” is emerging.²⁰ Modern racism exists when Caucasian individuals are motivated to avoid appearing racially biased and will opt to exhibit race-neutral opinions.²¹ However, efforts to appear race-neutral and suppress biased opinions actually have the opposite

¹² Kate Early, *The Impact of Pretrial Publicity on an Indigent Capital Defendant's Due Process Right to a Jury Consultant*, 16 ROGER WILLIAMS U. L. REV. 687, 693–94 (2011).

¹³ See Lydia O'Hagan, *Jurors on Trial: Lawyers Using the Internet to Research Prospective Jurors*, 45 VICTORIAN U. WELLINGTON L. REV. 161, 172 (2014) (pointing out that a potential juror's appearance is unlikely to reveal their biases or relationships with a witness, and that even a Facebook profile is not necessarily indicative of actual bias, as what people say in the abstract and what they do in specific situations may differ).

¹⁴ John Clark et al., *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 CRIM. JUST. & BEHAV. 641, 645 (2007).

¹⁵ Lori Van Wallendaal & Brian Cutler, *Limitations to Empirical Approaches to Jury Selection*, 4 J. FORENSIC PSYCHOL. PRAC. 79, 81 (2004).

¹⁶ See Heather M. Kleider et al., *Deciding the Fate of Others: The Cognitive Underpinnings of Racially Biased Juror Decision Making*, 139 J. GEN. PSYCHOL. 175, 176 (2012).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 177.

²¹ Kleider et al., *supra* note 16, at 177.

effect.²² In a model of decision making called the Ironic Process Theory, it is posited that efforts to avoid racial bias will result in exhibits of racial bias when cognitive resources are unavailable.²³ Relying on these biases and stereotypes, African Americans are more likely to be challenged by the prosecution than by the defense in the jury selection process.²⁴

Bias against elderly individuals can be broken into three subcategories: the senior citizen, the grandparent, and the statesman.²⁵ Senior citizens are thought to be lonely, weak, worried, and ill.²⁶ Grandparents are thought to be kind, trustworthy, and intelligent.²⁷ Statesmen are aggressive, alert, dignified, and competitive.²⁸ Although both grandparent and statesman stereotypes seem to embody positive qualities, people are more sympathetic toward statesmen.²⁹

Juries are changing—and not necessarily in the most obvious ways.³⁰ First, stereotypes that classify a juror as typical plaintiff or typical defense-oriented should be revisited and reevaluated on a juror-by-juror basis.³¹ In other words, these assumptions should be cast aside and jurors should be evaluated on an individualized basis. Characteristics that signify a traditional plaintiff orientation may ring true for one juror and not for another. Second, time is the new money.³² With the recession subsiding, priorities have shifted to being more time-centered than money-centered.³³ By making questions more targeted and specific to the issues of the case, lawyers can earn respect from the jurors by not wasting their time with seemingly irrelevant or inconsequential questions.³⁴ This goal is achievable through the utilization of consultant-gathered intel. Third, juries are becoming more emotional, and these emotions can be advantageous if understood and properly incorporated.³⁵ A hint so simple as an emoticon displayed on

²² *Id.*

²³ *Id.*

²⁴ Clark et al., *supra* note 14.

²⁵ Narina Nunez et al., *The Testimony of Elderly Victim/Witnesses and Their Impact on Juror Decisions: The Importance of Examining Multiple Stereotypes*, 23 LAW & HUM. BEHAV. 413, 415 (1999).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 421 (finding that more guilty verdicts were handed down where the victim was stereotyped as a statesman).

³⁰ Laurie R. Kuslansky, *5 Ways the Economic Crisis Has Changed Jurors*, NEWSTEX, Aug. 9, 2013.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *See id.*

³⁵ *Id.*

a social networking site can lend insight into a juror's mood.³⁶ By encouraging jurors to show these emotions or deciphering revelations made on social media, unfavorable jurors can reveal themselves.³⁷

C. *The Value of a Jury Consultant*

Although jury consultants offer a wide variety of services such as mock trials and witness preparation, their skills are most advantageous in the jury selection process.³⁸ Jury consultants' research assists counsel in detecting potential jurors who possess attitudes, experiences, or beliefs that might thwart a favorable outcome.³⁹ Traditional research has been predominantly conducted through opinion polls to construct a profile of the typical juror that would be sympathetic to counsel's case.⁴⁰ After the data is compiled, jury consultants look for correlations between desirable traits and easily ascertainable traits such as age, race, religion, gender, political affiliations, occupation, habits, and social standing.⁴¹ Based on these correlations, profiles of both favorable and unfavorable jurors are constructed to guide lawyers during the jury selection process.⁴²

Although thoughts and behaviors of jurors vary greatly, the processes through which conclusions are collectively reached remain relatively constant from jury to jury.⁴³ While juror behavior is classified as "bad" or "good" on a case-by-case basis, the methods by which profiles are created are predictable on a wider scale.⁴⁴ Data derived from social media profiles and general internet presence can be applied to the jury selection process to adequately determine what traits to consider "good" and "bad."⁴⁵ Jury con-

³⁶ John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 471 (2011).

³⁷ Kulansky, *supra* note 30.

³⁸ See Stolle et al., *supra* note 6, at 145 (noting scholars who "ha[ve] urge[d] consideration of [the use of trial consulting] methods beyond and in conjunction with scientific jury selection"); see also Hartje, *supra* note 8, at 493.

³⁹ Lisa C. Wood, *Using Jury Consultants in Antitrust Cases*, 26 ANTITRUST 101, 102 (2011).

⁴⁰ Hartje, *supra* note 8, at 493.

⁴¹ *Id.* at 494.

⁴² *Id.*

⁴³ Laurie R. Kuslansky, *Is Hiring a Jury Consultant Really Worth It?*, NEWSTEX, Sept. 24, 2013.

⁴⁴ *Id.*

⁴⁵ See *id.* (noting that behaviors of "good" and "bad" jurors can be ascertained through pretrial research).

sultants are then able to judge traits as important or trivial based on the facts of the case.⁴⁶

III. EMERGENCE OF SOCIAL MEDIA IN THE JURY SELECTION PROCESS

A. *Issues with Privacy*

Investigating juror internet presence to assist in jury selection has not always been widely accepted. The concern with viewing social media profiles centers around retaining privacy. Arguably overly intrusive, this process allows attorneys to reach information about jurors that was previously unattainable.⁴⁷ Much of the information that is easily accessed via social media is information that would rarely surface during voir dire.⁴⁸

There are two competing formulations of privacy, one rooted in control and the other in dignity.⁴⁹ The distinction between the two helps demonstrate the concern surrounding social media as a potential juror research tool. Privacy, in terms of control, is concerned with who has access to the information.⁵⁰ This is the more widely exercised description of privacy, with popular social networking sites, such as Facebook, crafting privacy policies centered on control. However, privacy in terms of control fails to account for information others might post about a user.⁵¹ Privacy, as a notion of human dignity, fills this void, valuing respect for individual dignity, integrity, and independence.⁵² Because users exhibit control over what they choose to post on their own profiles, it is the concept of dignity that concerns those who advocate banning online research of potential jurors.

Although this concern is pervasive, there is a split among privacy concerns that might explain the shift towards allowing profiles into voir dire. Younger jurors, who are digital natives, are less surprised and bothered by online investigations than their older counterparts, digital immigrants.⁵³ This is not to say, however, that no privacy concern exists among digital natives; they retain a desire to control who knows what about

⁴⁶ Collin P. Wedel, *Twelve Angry (and Stereotyped) Jurors: How Courts Can Use Scientific Jury Selection to End Discriminatory Peremptory Challenges*, 7 STAN. J. C.R. & C.L. 293, 312 (2011).

⁴⁷ See, e.g., Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time*, 60 KAN. L. REV. 611, 612 (2012).

⁴⁸ *Id.*

⁴⁹ Avner Levin & Patricia Sánchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENT. & TECH. L. 1001, 1005 (2009).

⁵⁰ *Id.* at 1005.

⁵¹ *Id.* at 1006.

⁵² *Id.* at 1012.

⁵³ Hoffmeister, *supra* note 47, at 637.

them.⁵⁴ Within the realm of privacy, there exists two types: social privacy and institutional privacy.⁵⁵ Social privacy is “keeping [information] private within one’s social sphere.”⁵⁶ Institutional privacy is keeping information private with regard to governments and corporations.⁵⁷ Studies have compared these two types of privacy.⁵⁸ Adolescents expressed concern about social privacy, but not about institutional privacy.⁵⁹ The focus was on keeping social media content away from parents and teachers.⁶⁰ This distinction between being afraid of “Big Brother” and being concerned about social avilment illustrates the growing acceptance of considering social media profiles public information. If it is becoming increasingly popular to be less concerned about privacy, it is expected that the direction of the courts would follow suit.

Supporters of delving into social media to learn about prospective jurors postulate that jurors are aware both that the internet is public and that they are in control of what they post. In a 2009 study done by Brandtzaeg, Luders, and Skjetne, internet users perceived themselves as appearing in a public or semipublic forum and thus displayed greater levels of self-awareness.⁶¹ Personal information is not indistinguishable from private information.⁶² Although information placed on social media profiles may be personal, once it is published online it is no longer private.⁶³ Facebook, pairing with the Information and Privacy Commissioner of Ontario, published guidelines that state “remember that you are ultimately responsible for determining what information you share with others.”⁶⁴

⁵⁴ *Id.*

⁵⁵ Swigger, *supra* note 4, at 592.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See K. Raynes-Goldie, *Aliases, Creeping and Wall Cleaning: Understanding Privacy in the Age of Facebook*, 15 FIRST MONDAY (Jan. 2010), <http://firstmonday.org/ojs/index.php/fm/article/view/2775/2432>; see also Symposium, *Social Privacy in Networked Publics: Teens’ Attitudes, Practices and Strategies* (Sept. 22, 2011), available at <http://ssrn.com/abstract=1925128>.

⁵⁹ See Raynes-Goldie, *supra* note 58.

⁶⁰ See Symposium, *supra* note 58.

⁶¹ Petter Bae Brandtzaeg et al., *Too Many Facebook “Friends”? Content Sharing and Sociability Versus the Need for Privacy in Social Network Sites*, 26 INT’L. J. HUM.-COMPUTER INTERACTION 1006, 1023 (2010).

⁶² O’Hagan, *supra* note 13, at 178.

⁶³ *Id.*

⁶⁴ Levin & Abril, *supra* note 49, at 1020 (quoting OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER OF ONTARIO, WHEN ONLINE GETS OUT OF LINE—PRIVACY: MAKE AN INFORMED ONLINE CHOICE (2006), available at <http://ipc.on.ca/images/Resources/up-Facebook.ipc.pdf>).

Courts have also supported the notion that information posted to the internet is no longer private. The Sixth Circuit held that users of social networking sites “logically lack a legitimate expectation of privacy in the materials intended for publication or public posting.”⁶⁵ The Maryland Supreme Court wrote that “[t]he act of posting information on a social networking site, without the poster limiting access to that information, makes whatever is posted available to the world at large.”⁶⁶ Appellate courts in Minnesota, Ohio, and California have also acknowledged information posted to social networking sites as public information.⁶⁷ A social-networking privilege emerged as an idea in a Pennsylvania case; however, the court rejected such a privilege.⁶⁸

Loss of privacy through social media exploration is considered superior to the alternative.⁶⁹ In lieu of social media research, traditional investigations would continue to be a prevalent practice.⁷⁰ These traditional investigations often involved surveillance by private detectives, thus making them arguably more intrusive than a viewing of a public profile.⁷¹ Courts have consistently recognized that individuals maintain a lower expectation of privacy regarding information they make available on the internet.⁷²

B. Allowance of Social Media into the Jury Selection Process

Although courts are free to conduct voir dire under their own rules, and some courts systematically deny the use of social media profiles in voir dire, the American Bar Association (ABA) decided that social media profiles are, with some limitation, fair game.⁷³ In recently released guidelines, the ABA announced that attorneys could research potential juror internet presence, so long as they abstain from communicating with the juror: “Unless limited by law or court order, a lawyer may review a juror’s or potential juror’s internet presence, which may include postings by the juror or

⁶⁵ Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001).

⁶⁶ Indep. Newspapers, Inc. v. Brodie, 966 A.2d 432, 424 n.3 (Md. 2009).

⁶⁷ See Yath v. Fairview Clinics, N.P., 767 N.W.2d 34, 43–44 (Minn. Ct. App. 2009); Dexter v. Dexter, 2006-P-0051, 2007 WL 1532084, at *6 (Ohio Ct. App. May 25, 2007) (discussing a court’s use of personal information on MySpace as a factor in a child custody case); Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr. 3d 858, 861 (Cal. Ct. App. 2009).

⁶⁸ See McMillen v. Hummingbird Speedway, Inc., No. 113 - 2010 CD, 2010 WL 4403285 (Pa. Ct. Com. Pl. Sept. 9, 2010).

⁶⁹ Hoffmeister, *supra* note 47, at 638.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Dana Littlefield, *Online Presence of Jurors Called Fair Game; Lawyers Association Issues Guidelines on Social Media Checks*, THE SAN DIEGO UNION-TRIBUNE, May 4, 2014, at A-8, available at NEWSBANK, Rec. No. UTS2444301.

potential juror in advance of and during the trial.”⁷⁴ In addition to the no-communication rule is the intolerance of deceptive behavior.⁷⁵ Tactics such as falsifying an identity online to gain access to profiles restricted by privacy settings squarely violate the guidelines.⁷⁶

The limitation on this newfound freedom, the inability to communicate with the juror whose profile you are searching, has been a rather evasive concept. Lawyers may have a difficult time pinning down what exactly “communication” entails. The guidelines lay out some principles that assist in the confusion. Constituting communication, “A lawyer may not, either personally or through another, send an access request to a juror’s electronic social media.”⁷⁷ On the opposite end of the spectrum, “The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer.”⁷⁸

Despite the surrounding issues of the guidelines, courts have become increasingly friendly towards using information from social media profiles during voir dire.⁷⁹ Both the Missouri Supreme Court and the New Jersey Supreme Court recently held that attorneys should use online research during voir dire.⁸⁰

IV. THE TREASURE TROVE THAT IS SOCIAL MEDIA PROFILES

The main purpose of voir dire, and thus the job of jury consultants, is to find out who the jurors are.⁸¹ According to Professor McElhaney in a chapter of his Trial Notebook called ‘Picking a Jury,’ “One of the most important things you can do in jury selection is to study the jury. Find out what the jurors like and don’t like.”⁸² Seemingly trivial material can offer more information than a cursory glance would suggest. What a juror watches on television may even reflect how deeply they hold certain be-

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Traci R. Gentilozzi, *Social Media in Jury Selection: Investigating Jurors Through Use of Online Sites*, MICHIGAN LAWYERS WEEKLY, Aug. 27, 2013.

⁸⁰ *Id.*; See *Johnson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010); *Carino v. Muenzen*, L-0028-07, 2010 WL 3448071, *10 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (holding that the trial judge acted unreasonably in restricting counsel’s use of the internet).

⁸¹ Alex Craigie, *Should You Quiz Jurors Whether They Watch Law and Order?*, AT COUNSEL TABLE (Sept. 11, 2013, 10:22 PM), <https://atcounseltable.wordpress.com/2013/09/11/should-you-quiz-jurors-whether-they-watch-law-and-order/>.

⁸² *Id.* (quoting JAMES W. MCELHANEY, MCELHANEY’S TRIAL NOTEBOOK 123 (3d ed. 1994)).

liefs.⁸³ Attitudes are often expressed on social media platforms and tend to be a stronger predictor of how a juror would decide a verdict than demographic characteristics, which have only a modest link to verdict choices.⁸⁴

A. *Personality Traits*

Early research into the relation of juror personality traits and verdicts focused on authoritarianism.⁸⁵ Authoritarian personalities are characterized by distrust and aggression toward outsiders and strict adherence to rules and authority.⁸⁶ Jurors displaying this personality type are conviction-prone,⁸⁷ and are, therefore, likely to be stricken by the defense and sought out by the prosecution. Social media posts projecting aggressive political views in line with authority may be an exhibition of an authoritarian personality.

Recent research has shown promising effects of juror personality traits on deliberation,⁸⁸ shifting focus to the Five-Factor Model of Personality.⁸⁹ This Model describes overarching personality categories that people use to describe both themselves and others.⁹⁰ The Five-Factor Model includes neuroticism, extraversion, openness to experience, agreeableness, and conscientiousness.⁹¹

Neuroticism is defined as “an individual’s tendency to experience unpleasant emotions and expect bad things to happen to them.”⁹² Essentially, it refers to a person’s stability and ability to adjust.⁹³ Higher neuroticism has been linked to less self-disclosure.⁹⁴ Less self-disclosure may result in less activity on social media or more cryptic posts that reveal little about the user’s opinions and attitudes.

⁸³ Craigie, *supra* note 81.

⁸⁴ Caroline B. Crocker & Margaret Bull Kovera, *Systematic Jury Selection*, in HANDBOOK OF TRIAL CONSULTING 21 (Richard L. Wiener & Brian H. Bornstein eds., 2011).

⁸⁵ Clark et al., *supra* note 14, at 642.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 641.

⁸⁹ *Id.* at 642.

⁹⁰ *Id.* at 643.

⁹¹ Nihan Özgüven & Burcu Mucan, *The Relationship Between Personality Traits and Social Media Use*, 41 SOCIAL BEHAV. & PERSONALITY 517, 520–21 (2013).

⁹² *Id.* at 520.

⁹³ See Clark et al., *supra* note 14, at 643.

⁹⁴ Michael A. Jenkins-Guarnieri et al., *The Interrelationships Among Attachment Style, Personality Traits, Interpersonal Competency, and Facebook Use*, 2 PSYCHOL. POPULAR MEDIA CULTURE 117, 119 (2013) (citing Y. Amichai-Hamburger & G. Vinitzky, *Social Network Use and Personality*, 26 COMPUTERS HUM. BEHAV. 1289 (2010)).

“Extraversion is defined as an individual’s tendency to express himself/herself socially in an outgoing manner.”⁹⁵ Individuals ranking high in extraversion tend to be happy.⁹⁶ Extraversion has also been positively linked to social media use; thus, those jurors who traffic social media sites more frequently are typically more extraverted.⁹⁷ Extraversion is the only personality type shown to be associated with being influential, rather than being influenced, and was positively correlated with being perceived as influential.⁹⁸ Similarly, extroverted jurors are perceived as dominant, and, as a result, are more likely to be elected foreperson.⁹⁹ Cues of extraversion on a social networking profile include being highly talkative, seeking positive responses, engaging in social activity, displaying assertiveness, and presenting interpersonal warmth.¹⁰⁰

“Openness[] is defined as the appreciation of alternative perspectives, intellectual curiosity, and the desire of artistic pleasures.”¹⁰¹ It is characterized by the extent to which new experiences are desired and sought out.¹⁰² High openness is usually associated with flexibility in ideas and emotions, whereas low openness is usually associated with difficulty adapting to new ideas or emotions.¹⁰³ Women who are more open to new ideas and experiences are more inclined to use social media.¹⁰⁴ Openness has also been associated with expressive communication.¹⁰⁵ These individuals seek new adventures and ideas.¹⁰⁶ Jurors rating high in openness are

⁹⁵ Özgüven & Mucan, *supra* note 91, at 520.

⁹⁶ See Peter Hills & Michael Argyle, *Happiness, Introversion-Extroversion and Happy Introverts*, 30 PERSONALITY & INDIVIDUAL DIFFERENCES 595, 595 (2001).

⁹⁷ Özgüven & Mucan, *supra* note 91, at 518 (citing T. Correa, et al., *Who Interacts on the Web?: The Intersection of Users’ Personality and Social Media Use*, COMPUTERS HUM. BEHAV. 247 (2010)); Jenkins-Guarnieri et al., *supra* note 94, at 119 (citing Amichai-Hamburger & Vinitzky, *supra* note 94, at 1295).

⁹⁸ Clark et al., *supra* note 14, at 643 (citing David K. Marcus et al., *Studying Perceptions of Juror Influence in Vivo: A Social Relations Analysis*, 24 LAW & HUM. BEHAV. 173, 186 (2000)).

⁹⁹ Clark et al., *supra* note 14, at 644.

¹⁰⁰ See Erik J. Girvan et al., *The Propriety of Peremptory Challenges for Perceived Personality Traits*, 37 LAW & PSYCHOL. REV. 49, 63 (2013).

¹⁰¹ Özgüven & Mucan, *supra* note 91, at 520–21.

¹⁰² Clark et al., *supra* note 14, at 643.

¹⁰³ *Id.*

¹⁰⁴ Özgüven & Mucan, *supra* note 91, at 518.

¹⁰⁵ Jenkins-Guarnieri et al., *supra* note 94, at 119 (citing Amichai-Hamburger & Vinitzky, *supra* note 94, at 1295).

¹⁰⁶ Yongwhan Kim et al., *Influence of Social Media Use on Discussion Network Heterogeneity and Civic Engagement: The Moderating Role of Personality Traits*, 63 J. COMM. 498, 503 (2013).

the least likely to be influenced by other jurors,¹⁰⁷ as those high in openness are resistant to social pressures.¹⁰⁸

"Agreeableness is defined as a tendency to be reliable, sympathetic, and cooperative."¹⁰⁹ Those high in agreeableness tend to value relationships with others more so than those low in agreeableness, who tend to be more antagonistic.¹¹⁰ Social media profiles, although never a complete story, can show tendencies of being more or less agreeable. Those who seem to have consistent and pleasant interactions on their profiles may be more agreeable, while those that seem to get into cyber battles or online bullying may be less agreeable. Someone who is agreeable might feel more sympathetic towards, or willing to consider the situation of, a defendant.

"Conscientiousness is defined as a tendency to plan ahead and be diligent and fair."¹¹¹ This trait is embodied by a willingness to consider all available opinions before making a decision.¹¹² High conscientiousness is demonstrated through organization and hard work, while low conscientiousness manifests in laziness.¹¹³ Lazy jurors may be less willing to make the effort to consider the plight of the defendant. Conscientious jurors, along with less open jurors, are the most likely to report post-trial that they were influenced by others.¹¹⁴ This follows logic because conscientious people are dutiful and a primary function of jurors is to be attentive and give weight to the opinions of their fellow jurors.¹¹⁵ If viewing a social media profile reveals that a juror likes to participate in activities associated with laziness, such as waking up late and watching exorbitant amounts of television, it could be safely assumed that he is less likely to be influenced by other jurors. In contrast, a profile that shows a juror participating in physical activities or working often might warrant an assumption that other jurors would more easily influence him. This would be a helpful tool when deciding whether a juror is worth a valuable peremptory strike. For example, a prosecutor could feel more comfortable with a juror that seems like a promising supporter of the defense if there is a decent chance that juror could be easily swayed in a different direction.

¹⁰⁷ Clark et al. *supra* note 14, at 643.

¹⁰⁸ See David K. Marcus et al., *Studying Perceptions of Juror Influence in Vivo: A Social Relations Analysis*, 24 LAW & HUM. BEHAV. 173, 175 (2000).

¹⁰⁹ Özgüven & Mucan, *supra* note 91, at 521.

¹¹⁰ Clark et al., *supra* note 14, at 643.

¹¹¹ Özgüven & Mucan, *supra* note 91, at 521.

¹¹² Kuslansky, *supra* note 5.

¹¹³ Clark et al., *supra* note 14, at 643.

¹¹⁴ Kuslansky, *supra* note 5.

¹¹⁵ See Marcus et al., *supra* note 108.

Personality traits outside of the Five-Factor Model have also been explored. Both emotional stability and satisfaction with life are related to social media use.¹¹⁶ Emotional stability is negatively related to internet activity, meaning those who are more emotionally stable tend to use the internet less.¹¹⁷ In contrast, satisfaction with life, measured in part by education and income levels, is positively correlated with social media use.¹¹⁸ Consolidating these two converse points, exploration of social media profiles could showcase the interplay between emotional stability and satisfaction with life. Taking a doctor for example, a profession in which both education and income levels are high, a profile that does not reveal much internet use could be an indicator that that individual is not emotionally stable.

Need for cognition is typically not considered a personality trait; however, it was originally considered to be part of openness and has been studied voluminously.¹¹⁹ Need for cognition refers to “an individual’s tendency to engage in and enjoy effortful cognitive endeavors.”¹²⁰ Individuals with high need for cognition are more likely to be influenced by the quality of what is presented to them rather than peripheral cues of the presenter or message.¹²¹ Heuristic processing would be less utilized in individuals with high need for cognition, allowing them to be less affected by stereotypes in their decision making. As far as actual verdicts go, there is conflicting evidence as to whether need for cognition presents a predictable trait.¹²²

¹¹⁶ Özgüven & Mucan, *supra* note 91, at 526.

¹¹⁷ *Id.* at 518.

¹¹⁸ *Id.* at 526.

¹¹⁹ Clark et al., *supra* note 14, at 644.

¹²⁰ *Id.* (citing J.T. Cacioppo et al., *Dispositional Differences in Cognitive Motivation: The Life and Times of Individuals Varying in Need for Cognition*, 119 PSYCHOL. BULL. 197, 197 (1996)).

¹²¹ *Id.*

¹²² See *id.*; see also B.H. Bornstein, *The Impact of Different Types of Expert Scientific Testimony on Mock Jurors’ Liability Decisions*, 10 PSYCHOL. CRIME & L. 424, 443 (2004) (finding need for cognition unrelated to juror verdicts); S.J. Graziano et al., *Individual Differences in Information Processing Strategies and Their Role in Juror Decision Making and Selection*, 3 FORENSIC REP. 279, 301 (1990) (finding need for cognition unrelated to juror verdicts). But see M.R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors’ Need for Cognition, and Case Strength As Determinants of Trial Verdicts*, 89 J. APPLIED PSYCHOL. 524, 528 (2004) (finding a curvilinear relationship between need for cognition and likelihood of conviction).

B. *Pretrial Attitudes*

Various legal attitudes are relevant factors in determining how verdicts are reached.¹²³ These attitudes include a “tendency to convict, confidence in the judicial system, cynicism toward the defense, racial bias, beliefs regarding the innate quality of criminal behavior, and the belief that individuals do not receive equal protection under the law.”¹²⁴ Each of these attitudes may be alluded to in various aspects of a social media profile. Regardless of the facts of the case, each attitude constitutes an important role in a juror’s decision-making process.¹²⁵ Taking race as an example, it seems as though racial biases should only surface in cases involving minorities. However, it may be the case that anti-minority views translate into pro-majority views.¹²⁶ This occurrence will result in acquittal-proneness for defendants who are part of the majority group.¹²⁷

C. *Internet Usage Habits*

One of the most relevant indicators of a modern juror’s bias is internet usage habits.¹²⁸ There are two types of internet users: passive users and active users.¹²⁹ Passive users, who merely scroll through others’ posts, tend to feel bored and disconnected as they compare themselves to others they see posting.¹³⁰ Active users, who interact with others and create their own posts, tend to feel more connected and thus happier.¹³¹

Self-affirmation, and in particular, self-affirmation through the use of Facebook, lends great insight into what people use this social networking site for and why. The self-affirmation theory rests on the premise that people have a fundamental desire for self-worth.¹³² Facebook is a self-presentation outlet for self-affirmation and is governed by two technological parameters: a large audience and asynchronicity.¹³³ Large audiences cause users to present their most desirable selves, while discouraging de-

¹²³ See Len Lecci & Bryan Myers, *Individual Differences in Attitudes Relevant to Juror Decision Making: Development and Validation of the Pretrial Juror Attitude Questionnaire (PJAQ)*, 38 J. APPLIED SOC. PSYCHOL. 2010, 2028 (2008).

¹²⁴ *Id.*

¹²⁵ *Id.* at 2029.

¹²⁶ *Id.* at 2031.

¹²⁷ *Id.*

¹²⁸ Wedel, *supra* note 46, at 315.

¹²⁹ See Laurie R. Kuslansky, *Don’t Overlook Deleted Social Media Profiles During Voir Dire*, NEWSTEX, May 21, 2014.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Catalina L. Toma, *Feeling Better but Doing Worse: Effects of Facebook Self-Presentation on Implicit Self-Esteem and Cognitive Task Performance*, 16 MEDIA PSYCHOL. 199, 201–02 (2013).

¹³³ *Id.* at 201.

ception because members of the audience are able to hold the user accountable.¹³⁴ Asynchronicity is the gap of time between the activity that the post is about and the time the user actually publishes the post.¹³⁵ This reflective time allows users to think clearly about how they want to present themselves.¹³⁶ Self-affirmation through Facebook presents two phenomena: performance enhancement and performance hindrance.¹³⁷ The performance enhancement perspective proposes that people will perform better on tasks subsequent to self-affirming activities because stress is reduced.¹³⁸ Thus, it is reasonable to extend this to possible jurors and posit that after viewing their respective profiles, jurors will perform better on subsequent tasks. An example would be avoiding heuristics to make a more accurate judgment on a defendant. Performance hindrance proposes that self-affirmation fulfills the need to feel self-worth and subsequent tasks are underperformed because less effort is put into seeking value of one's self.¹³⁹ This perspective can also have implications for juror performance. It is equally likely that jurors will feel less of a need to make the most accurate assessment of a defendant and rely more heavily on heuristics after viewing their own respective profiles.

Along with type of internet use, volume of use can provide information about a potential juror. Social media use is positively correlated with education and income levels.¹⁴⁰ High-frequency Facebook use is associated with depression and a decline in well-being.¹⁴¹ Increased internet usage is also indicative of how easily a juror can be swayed in his opinion.¹⁴² The more time an individual spends on the internet, the more he is influenced by internet communication.¹⁴³ This could translate to jurors being easily swayed by other jurors. With this type of juror, there is an overarching threat that he could be convinced to jump ship during the trial.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 202–03.

¹³⁸ Toma, *supra* note 132, at 202.

¹³⁹ *Id.* at 203.

¹⁴⁰ Özgüven & Mucan, *supra* note 91, at 526.

¹⁴¹ Erin A. Vogel et al., *Social Comparison*, 3 PSYCHOL. POPULAR MEDIA CULTURE 206, 207 (2014).

¹⁴² Özgüven & Mucan, *supra* note 91, at 519 (citing A.M. Kaplan & M. Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59 (2010)).

¹⁴³ *Id.*

D. *Heterogeneity of Communication*

Communication with non-like-minded people and diversified viewpoints holds a plethora of advantages, including "facilitating the deliberative process and enhancing the quality of opinions."¹⁴⁴ Diversified communication has also been linked to active citizenship because it allows individuals to express their viewpoint, therefore acclimating them to the experience of differing viewpoints.¹⁴⁵ Social media contributes to the heterogeneity of people's networks and discussions.¹⁴⁶ In the opposite, individuals who are exposed only to similar viewpoints and ignore opposing viewpoints "become less likely to tolerate challenging opinions."¹⁴⁷ Selective exposure, the seeking out of like-minded information in an effort to avoid opposing opinions, is thus increased.¹⁴⁸

Jurors who are similar to the plaintiff could feel one of two ways.¹⁴⁹ They could favor the plaintiff in accord with the "identification" theory.¹⁵⁰ Following the similarity-leniency hypothesis, jurors are often more sympathetic to defendants who are demographically similar to them.¹⁵¹ In the alternative, they could seek to distance themselves from the plaintiff, following the "defense attribution" theory.¹⁵² Also known as the "black sheep effect," jurors who feel that they are similar to the plaintiff might want to distance themselves because they feel betrayed by something they care about.¹⁵³

E. *Privacy Preferences*

As the overriding reason social media profiles have been excluded from traditional voir dire, privacy still plays a large role in developing an online juror profile. As privacy is a concept perceived entirely within someone's consciousness and not in the external world,¹⁵⁴ privacy preferences and settings can explain or predict various traits of a juror. Adults who value privacy more might feel like they have a lack of control over

¹⁴⁴ Kim et al., *supra* note 106, at 500.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 501.

¹⁴⁷ *Id.* at 500.

¹⁴⁸ *Id.*

¹⁴⁹ See Laurie R. Kuslansky, *Jury Selection: Should You Follow Your Instincts About a Juror?*, NEWSTEX, Sept. 26, 2013.

¹⁵⁰ *Id.*

¹⁵¹ Wallendael & Cutler, *supra* note 15, at 81.

¹⁵² Kuslansky, *supra* note 149.

¹⁵³ *Id.*; Wallendael & Cutler, *supra* note 15, at 81.

¹⁵⁴ Yanisky-Ravid, *supra* note 3, at 82.

their personal information and thus become dissatisfied with this level of control.¹⁵⁵

Although the majority of internet users are aware of the privacy policies offered by social networking sites and use them to their advantage,¹⁵⁶ some internet users who are most cautious about their privacy settings may go so far as to delete their social media pages.¹⁵⁷ These individuals have been affectionately dubbed “quitters.”¹⁵⁸ People who have previously deleted their social media pages are typically more addicted to the internet and more conscientious.¹⁵⁹ It is, therefore, useful during voir dire to ask about both current and past social media profiles.¹⁶⁰ If potential jurors have deleted their profiles, it would be important to ask them why they chose to do so.¹⁶¹

Jury consultants and lawyers should keep in mind the “privacy paradox,” a phenomenon in which people report concerns about privacy but still provide personal information on their social media sites.¹⁶² Although intentions are often to retain some amount of privacy, people are cavalier in the protection of their profiles.¹⁶³ People’s willingness to disclose is significantly different than actual disclosure because risk influences intention but not behavior.¹⁶⁴ This discrepancy is exacerbated by the fact that social networking profiles contain a mix of friends, family, coworkers, business contacts, and acquaintances with no adequate way of separating who can see what.¹⁶⁵ One way to explain this gap between intentions and behavior is the theory of social conformity, whereby an individual is aware that his actions on the site are exposed to a large audience.¹⁶⁶ Another way to explain this discrepancy is through the “optimism bias.”¹⁶⁷ People irrationally believe that the social networking site would avoid using their personal data, so they create a false sense of security surrounding what they post.¹⁶⁸

¹⁵⁵ Kuslansky, *supra* note 129.

¹⁵⁶ Levin & Abril, *supra* note 49, at 1033.

¹⁵⁷ Kuslansky, *supra* note 129.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Patricia A. Norberg et al., *The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviors*, 41 J. CONSUMER AFF. 100, 101 (2007).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 104.

¹⁶⁵ Brandtzaeg et al., *supra* note 61, at 1007–08.

¹⁶⁶ *Id.* at 1011.

¹⁶⁷ Yanisky-Ravid, *supra* note 3, at 77.

¹⁶⁸ *Id.*

Some jurors are concerned with privacy issues, while others fall victim to the self-publicizing nature of social media.¹⁶⁹ By encouraging this sharing of life events, social media is molding social norms and expectations.¹⁷⁰ Respect for civil liberties is shifting due to these technological changes that are dissolving the line between public and private spheres.¹⁷¹ The importance of freedom of expression is growing at the expense of the importance of privacy.¹⁷²

V. HOW THIS INFORMATION CAN BE PUT TO USE: BETTER UTILIZED PEREMPTORY CHALLENGES

Lawyers are given two types of challenges to strike jurors. For cause challenges are used when there is actual, determinable bias,¹⁷³ while peremptory challenges are used to strike jurors whom lawyers believe, but cannot prove, to be biased.¹⁷⁴ Although the ability to challenge jurors is a right of exclusion and not selection, the peremptory challenge historically existed to protect a defendant's view that he was indeed receiving a fair trial.¹⁷⁵ The current rationale for the peremptory challenge is to allow parties to remove jurors whom they believe, based only on a suspicion, to be biased.¹⁷⁶ Naysayers of peremptory challenges rely on the concern that the representation of various groups has been negatively impacted through the use of such challenges.¹⁷⁷ The argument follows that because there is no accountability in court for these challenges, lawyers use them to categorically exclude members of a certain class.

Jury consultants' use of information gained from potential juror social media profiles can help facilitate for cause challenges and better utilize peremptory challenges. Because information is discovered on internet profiles that might not otherwise come up in voir dire, biases that warrant a for cause challenge may come to light.¹⁷⁸ Jury consultants might also discover material that would provide an avenue for the lawyer to follow in questioning that could uncover a bias, resulting in a for cause strike.

¹⁶⁹ Swigger, *supra* note 4, at 599–600.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 601.

¹⁷² *Id.*

¹⁷³ Hartje, *supra* note 8, at 483.

¹⁷⁴ Wedel, *supra* note 46, at 296.

¹⁷⁵ Girvan et al., *supra* note 100, at 54–55.

¹⁷⁶ Hartje, *supra* note 8, at 483.

¹⁷⁷ O'Hagan, *supra* note 13, at 174.

¹⁷⁸ Adam J. Hoskins, Note, *Armchair Jury Consultants: The Legal Implications and Benefits of Online Research of Prospective Jurors in the Facebook Era*, 96 MINN. L. REV. 1100, 1118 (2012).

By incorporating information revealed in social media profiles, lawyers can exact more meritorious peremptory challenges. Rather than relying on rough stereotypes, which may or may not have a relevant effect on the case, lawyers can use personality traits and experiences to make educated guesses on potential juror biases.¹⁷⁹ This information is more detailed, and thus able to offer insight into producing more accurate and effective peremptory strikes.¹⁸⁰ Based on the assumption that lawyers want to win, and therefore want the most favorable jury possible, scientific jury selection has the potential of eradicating race and gender discrimination against potential jurors.¹⁸¹

Past the benefit of more effective peremptory challenges, is the bonus of efficiency. By enabling enlightened peremptory challenges, courts can streamline the jury selection process.¹⁸² The marriage of internet presence research and scientific jury selection will make jury selection quicker, less discriminatory, and more readily available to litigants.¹⁸³

VI. CONCLUSION

Scientific jury selection has been criticized as a process with little merit and much discriminatory effect. However, it is a process that reveals enough crucial information to be legally relevant and important to the jury selection process. For good reason, jury consultants have become an integral part of the pre-trial phase. With the relatively recent incorporation of social media into the profiles put together by jury consultants, the ability to predict behavior of potential jurors more accurately has risen. From personality traits to privacy preferences, there is much to learn from a potential juror's online presence. This data can then be turned around and applied to the facts of the case to determine favorableness. Armed with this information, lawyers are able to elicit more for cause strikes as well as more strategic peremptory strikes. As efficiency and fairness are goals of the American legal system, the incorporation of social media profile information will make jury selection quicker and even the playing field among both litigants and jurors.

¹⁷⁹ *Id.* at 1116–17.

¹⁸⁰ *Id.* at 1117.

¹⁸¹ Wedel, *supra* note 46, at 298.

¹⁸² *Id.*

¹⁸³ *Id.*

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