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The Tweeting Juror: Prophylactic and Remedial Methods for Judges to Manage the Risk of Internet-Based Juror Misconduct

by Daniel J. Ain

In the United States, access to technology, specifically the internet, is now commonplace, with 74 percent of U.S. households equipped with an internet connection and 64 percent of American adults owning a smartphone. Additionally, use of social media sites, where users can connect and communicate online with other account holders and share information with “followers,” has grown significantly in recent years. Of American adults who use the internet, 71 percent had Facebook accounts in 2014 (compared with 67 percent in 2012), 23 percent had Twitter accounts (compared with 16 percent in 2012) and 26 percent had Instagram accounts (compared with 13 percent in 2012). The growth rate is remarkable; consider that in 2008, fewer than one in four adults in the United States had a social media profile on any social network, while today close to three in four adults do.

While the prevalence of internet access and social media usage provides institutions and individuals with innumerable benefits, there also are drawbacks to being able to access the “world’s information” at any moment. Jurors in both criminal and civil trials are prohibited from conducting outside research regarding matters related to the trial in which they are participating as jurors. The current version of the Massachusetts Trial Juror’s Handbook, for example, instructs jurors in the following manner: “Do not use online social media to share or read information about the case or your experience with jury service. Do not look for information about the case outside the courtroom, or use the internet to do research about the case or the people involved in it.” A juror conducting independent research about a case on the internet or sharing information about a case on social networks may cause a party’s federal or state constitutional right to a fair trial to be violated.

Is there cause to be worried that jurors are failing in their duties through impermissible internet research and social media use? American adults spend, on average, more than one hour each day using the internet on a computer, and more than one hour each day using a smartphone, including an average of forty minutes of Facebook use every day. Because adults in the United States are spending so much time online and on social media, many in the legal community and beyond believe that jurors are unintentionally and intentionally using the internet and social media to learn and share information about cases.

2. Maeve Duggan, et al, Social Media Update 2014, Pew Research Center (Jan. 9, 2015), http://www.pewinternet.org/2015/01/09/social-media-update-2014/. Facebook users can share information, photographs, links, etc. with their Facebook “friends” (adult Facebook users have an average of 338 Facebook friends). Twitter allows users to send messages of 140 characters or less to their “followers.” Instagram allows users to post photographs to the Instagram feeds of their “followers.”
4. Google Inc.’s mission is to make “the world’s information . . . universally accessible and useful.” Google Company, https://www.google.com/about/
Social media users are involuntarily exposed to a wide range of information just by logging into their accounts. The Facebook News Feed displays posts from a user’s “friends” based on the user’s previous Facebook activity. Interestingly, the flood of information that automatically populates a user’s Facebook News Feed was central to Dzhokhar Tsarnaev’s motion for a new trial in the Boston Marathon bombing case. The defense asserted that Boston had been an improper venue and argued that a new trial was “required due to continuous and relenting publicity combined with pervasive connections between jurors and the events surrounding the Boston Marathon Bombing that precluded impartial adjudication in both appearance and fact.” The defense countered, pointedly, that Tsarnaev had “not shown a sufficient likelihood that any juror was exposed to ‘inflammatory’ Facebook posts, let alone that any juror’s Facebook News Feed was ‘saturated’ with them.”

While Tsarnaev’s argument may have been tenuous, the fact that jurors’ exposure to social media was central to the defendant’s motion for new trial based on improper venue reinforces the growing significance of juror social media use. Additionally, the power of social media websites and associated technologies is only increasing. Predictive technology, that is, applications that use personal data to fetch information for the user without being asked, is becoming common. Going forward, it may be useful, even necessary, to think deeply about how we expect our jury system to function in a future where information is not only easily accessible, but where we no longer have to proactively log into a website or use an internet search engine to obtain the information we want or need.

To begin, we need to examine the means by which courts can protect the fairness of civil and criminal jury trials from the dangers of impermissible juror-conducted internet research and social media communication. Part I of this article will provide a review of existing research and literature on the prevalence of impermissible online juror activity. Part II will discuss alternative processes for preventing this type of juror misconduct, with a substantial focus on the content of jury instructions. Finally, Part III will focus on what remedies courts can fashion when there is evidence that a juror or jurors have impermissibly used the internet or social media during trial or deliberations.

I. Literature Review

Few in-depth studies have been conducted regarding the extent of juror misconduct through use of digital media. The existing research suggests, at a very general level, that juror misconduct through the use of digital media occurs, but at low rates. The National Center for State Courts (NCSC) published “Juror and Jury Use of New Media: A Baseline Exploration” in 2012. The article describes the results of a pilot jury study conducted by the NCSC. The goal of the study was to assess whether the methodology used was a sound means for understanding jurors’ use of the internet and social media, rather than to provide reliable estimates of the prevalence of impermissible juror use of new media. In an effort to obtain quantitative data, the pilot study used post-trial self-report surveys of actual jurors after civil and criminal trials. The types of trials (fifteen in total) in which study subjects sat as jurors varied across a spectrum: on the criminal side there was a drug offense charge, two cases of sexual assault, and a manslaughter charge; on the civil side, all trials (with the exception of one dram shop liability case) involved automobile torts. Trials included in the study lasted one to seven days.

The results showed that many jurors would have liked to use the internet for impermissible case-related research (28 percent of respondents) and for ex parte communications (29 percent of respondents). Significantly, the percentage of jurors who admitted to having engaged in any form of juror misconduct was far smaller. Nevertheless, no jurors admitted to conducting outside research through the internet. Ten percent of jurors admitted to engaging in premature discussion about the trial with other jurors, and six percent admitted to having face-to-face or telephone conversations with friends or family about the trial. While the study’s main focus was on the methodology used in obtaining the results and not on the results themselves, the authors noted that the “findings encourage cautious optimism that the frequency of juror misconduct involving new media currently is less than one might imagine.” However, the authors acknowledged “lingering concern that some jurors may be reluctant to disclose misconduct involving new media while they are under control of the trial judge.” Considering that penalties for engaging in juror misconduct can include contempt of court and incarceration, jurors participating in self-reporting surveys have an incentive not to be candid in their responses.
“Ensuring an Impartial Jury in the Age of Social Media,” authored by United States District Court Judge Amy J. St. Eve and Michael A. Zuckerman, presents self-reporting survey data collected from jurors who served at trials in Judge St. Eve’s or Judge Matthew F. Kennedy’s courtroom. The article first acknowledges the extreme risk of misconduct that exists because of the internet, citing to the Third Circuit Court of Appeals, which held in a 2011 case that “the risk of a prejudicial communication may be greater when a juror comments on a blog or social media website than when she had a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger.” The juror survey completed contained questions about their temptation to use social media to communicate about the trial, and their actual use of social media during the trial. The authors received 140 responses from jurors who participated in sixteen civil and criminal trials. In each of the sixteen trials, the presiding judge issued (at a minimum) admonishments during the opening and closing instructions not to communicate about the case through social media. Like the NCSC study, the authors here noted the limitations of a self-reporting methodology. The results were as follows: only six of the 140 juror respondents reported temptation to use social media to communicate about their cases, and none of the 140 juror respondents admitted to using social media to communicate about their cases. The authors suggested that judges’ instructions to refrain from using social media to communicate about the cases had a mitigating effect on jurors’ temptation to use, and jurors’ actual use of, social media during the trial. The authors ultimately concluded that “anticipatory judicial action is necessary not only to protect against actual prejudice at trial and avoid lengthy collateral proceedings, but also to preserve the public integrity of judicial proceedings.”

It must be emphasized that Judge St. Eve’s study was non-scientific in nature and likely encouraged jurors to withhold information. The survey jurors were asked to complete a two-question format, as follows:

1. Were you tempted to communicate about the case through any social networks, such as Facebook, My Space, LinkedIn, YouTube or Twitter?
2. If so, what prevented you from doing so?

The problem with Judge St. Eve’s approach is not so much the question asked, but rather who is asking the question. While not stated explicitly in the article, it appears that Judge St. Eve or an officer of the court, rather than a neutral third-party, gave participating jurors the survey. It can be inferred that members of the court would, all things being equal, prefer to find that jurors are not committing misconduct. A well-researched and validated cognitive bias, termed “social desirability bias” in psychology literature, is defined as “systematic error in self-report measures resulting from the desire of respondents to avoid embarrassment and project a favorable image to others.” Thus, if jurors know that an officer of the court would prefer one answer, the jurors may give false answers to appease the officer of the court. Alternatively, jurors may be afraid of potential repercussions if the court were to discover misconduct, even if the discovery was made through a research survey. In either case, the study suffers from reliability issues, and juror outside research and social media communication is likely more prevalent than the existing literature suggests, due to under-reporting.

Due to the present lack of substantiated scientific research, this article moves forward on the assumption that improper internet research and social media communication by jurors is a real risk to the jury system, and one that is likely to grow as digital technologies continue to become more prevalent and necessary to functioning in everyday life.

II. PROPHYLACTIC SOLUTIONS

Judges have employed a variety of measures to decrease the risk of juror misconduct through internet research and social media communication. The vast majority of judges issue some type of instruction to jurors regarding their use of social media in the courtroom, outside of the courtroom, and during deliberations. In a study of federal court judges, the majority of respondents reported using model instructions developed by the Judicial Conference Committee on Court Administration and Case Management (CJAC). The CJAC instructions are intended to be read to the jury before deliberations begin and state, in part, “During your deliberations . . . [y]ou may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.” Other, less common methods used by judges to reduce the risk of misconduct include banning technology from the courthouse and requiring jurors to sign written pledges to not communicate about cases through social media.

20. Judge Matthew F. Kennedy also is a United States District Court judge for the Northern District of Illinois.
22. St. Eve, supra note 19, at 29.
23. Id. at 3 (“The results — which we stress are not scientific . . .”).
26. In fairness to the authors, they recognize that under-reporting was a likely result of the method they used to obtain answers. They stated, “We additionally acknowledge that although juror participation was voluntary and anonymous, some jurors may not have been completely candid, for any number of reasons.” St. Eve, supra note 19, at 21.
27. Id. at 17.
28. Id. at 19.
29. United States v. Fumo, 655 F.3d 288, 305 (3rd Cir. 2011) (quoting Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communication About a Case (Dec. 2009)).
30. St. Eve, supra note 19, at 19.
Outright technology bans are problematic, even though they have been implemented in a number of places around the country.31 Such bans would vary from jurisdiction to jurisdiction, and probably from courthouse to courthouse, and could encompass cellphones, smartphones, laptops, tablets and even smart-watches.32 They seem increasingly difficult to implement as mobile technology becomes ever more pervasive in both work and personal spheres.33 Besides concerns over logistics and increased security,34 such policies do little to curb potential juror internet research or social media communication during multi-day trials.35

A second prophylactic method, signed pledges, has the potential to be effective, but two costs likely outweigh the benefit of such pledges. To date, such pledges have rarely been implemented. United States District Court Judge Shira Scheindlin required jurors serving in a high-profile case36 to sign a pledge that read, in part, “I agree to follow all of the Court’s preliminary instructions, including the Court’s specific instructions relating to internet use and communications with others about the case.”37 While such a pledge may have some value,38 it might have on jurors’ perception of their obligations and responsibilities. By requiring jurors to sign pledges related only to digital research and communication, the courts would effectively be creating an artificial distinction between digital misconduct and what we think of as traditional misconduct. While judges work to ensure that jurors understand their obligations, a written pledge that focuses on one type of conduct could diminish the importance of jurors’ obligations with respect to other prohibitions. Until there is evidence, preferably through empirical studies, on the effect of pledges on juror compliance, courts should be cautious about implementing a written pledge system to combat illicit internet research and social media communication.

The third prophylactic method, instructions to jurors, is far more practical, and likely more effective (at least assuming multi-day trials) than outright technology bans. However, while various organizations have drafted model instructions, current research and commentary fail to adequately provide an analysis of what qualities make an instruction effective. Paula Hannaford-Agor, Director for Jury Studies at the National Center for State Courts, points to three main criteria that must be considered in drafting and providing instructions to jurors if they are going to be of any use. In her words, “repetition helps, specificity helps, providing the underlying rationale for the rules helps.”39 In developing and implementing instructions, each of these points should be considered.

Repetition: Repetition is a critical criterion to consider in developing instructions for two primary reasons. When any instruction to a juror is read, “some . . . literally do not hear it the first time.”40 By repeating instructions to jurors at different points in jury service, the greater becomes the likelihood they actually hear the instruction. The second reason for repetition is to increase the likelihood that jurors comprehend and acknowledge the importance of the instruction. One federally-funded research study found that an ordinary juror might only understand fifty percent of a judge’s instructions.41 Thus, giving the juror multiple opportunities to understand and value an internet and social media communication instruction should lead to fewer instances of juror misconduct.

A caveat to note is that excessive repetition should be avoided when instructing jurors about the law.42 When instructing jurors on the law, a judge should “fully and accurately state[e] the law without needless repetition.”43 The argument to avoid repetition with respect to instructions on the law is not incongruous with encouraging

35. It should be noted, however, that such technology bans have been considered for other reasons, inter alia, preventing witness intimidation by, for example, preventing those in the courthouse from taking cellphone photographs of witnesses. See Kevin McCorky, Could Cell Phone Ban in Philly Courts Lessen Witness Intimidation?, Newsworks.org, Apr. 10, 2013, http://www.newsworks.org/index.php/local/item/53348-could-cell-phone-ban-in-philly-courts-lessen-witness-intimidation/.
36. The case was United States v. Bout, 731 F.3d 233 (2013) (No. 08-CR-365 S.D.N.Y.); the jury trial in the matter was held before the United States District Court for the Southern District of New York from Oct. 31 through Nov. 2, 2011.
40. Id.
43. Id.
repetition with respect to instructions on internet research and social media communication (or other juror behavior). Jurors will often have access to instructions regarding the law in deliberation, and will have their peers in deliberations to discuss the law, making hearing the instruction from the judge’s mouth slightly less important.

Specificity: “We think we’re being clear when we say don’t communicate about [the] case,” notes Hannaford-Agor.44 The specific language used in jury handbooks, in judge’s oral instructions, and in written instructions matters because the lexicon related to digital technology can mean different things to different jurors based on their knowledge and familiarity with digital technology. By way of example, the Massachusetts Model Preliminary Instructions to Jury Before Trial state, in part, “You must not talk to anyone about this case in person, by telephone, the internet, email or social media.” A judge may understand this instruction to mean that a juror may not post any content related to the case on any website or social media network. However, to those familiar with social media vernacular, the instruction leaves much to be desired in terms of clarity and completeness. For example, on the service Twitter, a user can send another user a direct message (DM) visible only to the other user. Alternatively, the user can write a Tweet that is shared with all of his or her followers and that is visible to the public at-large. While both DMs and Tweets about a case could constitute juror misconduct (with Tweets having the potential to be far more egregious),46 a juror who is admonished not to “talk” about the case with anybody else could interpret the instruction as applicable to DMs, but inapplicable to Tweets. Similarly, because the Massachusetts instructions focus internet and social media restrictions around the verb “talk,” the instructions fail to target other behaviors that are unambiguously “non-talking,” but that would still be deemed misconduct. If a juror were to “friend” a witness, attorney, plaintiff or defendant in a case on Facebook, such action would be inappropriate at the least, and will have their peers in deliberations to discuss the law, making hearing the instruction from the judge’s mouth slightly less important.

The juror handbook for jurors serving in United States District Courts merely instructs jurors to “be careful, during the trial, not to discuss the case at home or elsewhere.” Just as the Massachusetts instructions fail to adequately define “talking,” the federal instructions fail to adequately define “discussions.” While the Massachusetts instructions do, at least, address social media use directly, the federal instructions omit altogether any reference to online communications, leaving jurors to interpret for themselves what types of online conduct is permitted and what types of conduct are prohibited. Specific, clear, and unambiguous language would better enable jurors to satisfy their obligations and responsibilities to the court.

Underlying Rationale: Many in the legal field believe that, in providing jury instructions, delving into the underlying rationale for the instruction will increase compliance.45 It must be noted that current psychology research on compliance theory does not classify provision of the underlying rationale as a primary driver for increasing the likelihood of compliance.46 The reason for this may be, unsurprisingly, that in most scenarios the motivation for the request or the instruction is commonsense or implicit.47 However, an instruction to refrain from communicating about a case on social media and to refrain from conducting independent internet research about a case may not only lack a commonsense rationale, but may indeed confound jurors, especially those with little familiarity with the trial system. A paragraph in any instruction regarding communication prohibitions and research prohibitions should thus be a standard best practice. The American College of Trial Lawyers (ACTL) drafted instructions that emphasize the underlying rationale.53 The ACTL’s instructions for empaneled jurors reads, in part:

The court recognizes that these rules and restrictions may affect activities that you would consider to be normal and harmless, and I assure you that I am very much aware that I am asking you to refrain from activities that may be very common and very important in your daily lives. However, the law requires these restrictions to ensure the parties have a fair trial based on the evidence that each party has had an opportunity to address. If one or more of you were to get additional information from an outside source, that information might be inaccurate or incomplete, or for some other reason not applicable to this case, and the parties would not have a chance to explain or contradict that information because they wouldn’t know about it. That’s why it is so important that you base your verdict only on information you receive in this courtroom.54

44. Interview with Paula Hannaford-Agor, supra note 39.
47. On Facebook, to “friend” or “friend ing” is the act of requesting the online “friendship” of another user.
49. Id. at 6.
52. Think of any of the number of rules or instructions that are part of daily life; usually it is easy to infer reasons for the rule or instruction, in addition to any obvious punishment or consequence that could result from noncompliance.
54. Id. at 2 (emphasis added).
There are numerous possibilities as to the exact language or phraseology that a judge may wish to use if she decides to include the underlying rationale in the jury instruction. A sufficient instruction will explain that the parties are entitled to a fair trial and that to ensure a fair trial decisions made about the case must be based only on the evidence presented at trial, and if a juror communicates about the case on social media or conducts internet research the court cannot ensure that juror decisions have been made only on the evidence presented at trial.

While no mechanism besides a ban of technology in the courtroom combined with sequestration will lead to guaranteed compliance, thoughtfully crafted jury instructions that are specific, provide the underlying rationale for any restriction, and are repeated to jurors throughout a juror’s service — in the juror handbook, at jury empanelment, before trial, at the close of each day of trial, and before deliberations — should provide a sufficient safeguard against juror misconduct occurring through internet research or social media communication.

One supplemental best practice should be noted. In deciding how to admonish the jury, judges should consider treating each case as if it were a high-profile case garnering significant media attention. Due to the vast amount of information online and because of the amount of content shared among users on social media networks, the risk of intentionally or unintentionally learning about a party or witness in an ordinary case may only be slightly less than the risk of learning about a party to a newsworthy case.

The instructions provided to jurors by Massachusetts Superior Court Judge E. Susan Garsh regarding online research and communication in the recent high-profile murder case involving former National Football League player Aaron Hernandez provide a useful exemplar for juror instructions to be used in any trial. In the Massachusetts case against Hernandez, Judge Garsh instructed the jury at the end of each day of trial, in part, as follows, “Please continue to avoid anything about the case or about Mr. Hernandez that may appear in a newspaper or on television or in any other medium or that may appear in Facebook or Twitter or any social media or anywhere else.” The court reinforced these admonishments at other stages of the trial, including immediately prior to jury deliberation. Further, Judge Garsh provided the rationale for such admonishments, stating, “These instructions are necessary to ensure that the trial will be fair and that the jury’s verdict will be based on the evidence presented in the courtroom.” While there may be some considerations specific to the court’s interaction with the jury in high-profile cases (e.g., the Juror Questionnaire in the Hernandez trial asked potential jurors to list specific media outlets, including social media, where they may have learned about the case), in large part, jury admonishments should follow the same formula in all trials.

### III. Remedial Measures

Despite significant efforts to prevent jurors from conducting independent internet investigations or from sharing information about a case on social media, such behavior occurs. While prominent self-reporting surveys suggest violations are rare, those studies, as explained above, likely underreport the problem. A recent survey of federal judges, prosecutors, and public defenders found that ten percent of respondents had personal knowledge of jurors conducting internet research about the case. Legal scholarship has identified four main ways through which such misconduct occurs. First, jurors sometimes provide updates regarding judicial proceedings on social media networks. A juror in a 2010 multi-day criminal trial posted to her Facebook account after the first day of trial, “[A]ctually excited for jury duty tomorrow. It’s [going to] be fun to tell the defendant they’re GUILTY.” Second, jurors may attempt to contact a party to the case through social media communication. In 2011, an English court sentenced a former juror to eight months in jail for exchanging Facebook messages with a defendant in a criminal drug case. Third, jurors have used social media to communicate with other jurors. In 2010, five jurors who convicted former Baltimore mayor Sheila Dixon on embezzlement charges were alleged to have engaged in substantial Facebook communications with each other during the trial. Fourth, jurors sometimes use the internet to conduct research concerning facts, law, or parties relevant to the case. In Bergen County, New Jersey, a jury foreperson in a 2011 criminal matter accessed the internet during deliberations to look up information about the prison sentence the defendant would receive should the jury return a guilty verdict.

In Massachusetts, motions for new trial based on claims that jurors had extraneous information may be granted if the following test is satisfied:

First, the defendant bears the burden of demonstrating that the jury were in fact exposed to the extraneous matter. If the defendant meets this burden and the judge finds that extraneous matter came to the attention of the jury, the burden then shifts to the commonwealth to show beyond a reasonable doubt that [the defendant] was not prejudiced by the extraneous matter.

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Through this burden-shifting regime, even if a juror becomes aware of relevant extraneous information through his or her own misconduct, a new trial will be denied if the commonwealth shows that the defendant was not prejudiced. In practice, many forms of online misconduct will not be so prejudicial that a motion for new trial or other form of relief based on the juror’s misconduct would be granted. State and federal law vary, but often defendants confront an uphill battle in demonstrating prejudice when they challenge verdicts based on jury issues. For example, in 2014 a federal judge for the Southern District of New York denied a defendant’s motion for new trial based on alleged juror misconduct because the court found that the Tweets at issue did not prejudice the defendant. The juror’s multiple Tweets alluded to subjects as diverse as courtroom climate (“The bloody courtroom is FREEZING”); the number of witnesses and length of trial (“[T]hey said the trial would be three weeks,” having “seen the witness list now, . . . I am betting it goes longer”); the juror’s feelings about the judge (“I really like our judge ... she’s the kind of person I would be interested in talking to.”); how the trial may help her with her writing career (“I write romance, so it helps that the criminal aspects interest me.”), but the judge denied relief because no actual prejudice was shown.

Similarly, in another 2014 federal case, the court concluded that a juror who Facebook “friended” (but did not otherwise communicate with) another juror, wrote Facebook posts about his experience (“Your honor I object! This is way too boring, [S]omebody get me [out of] here”), and made a “joke” on Facebook about hanging the defendant, did not prejudice the defendant. In sum, not every instance of juror misconduct through social media or internet use causes harm to the parties at trial. As the distinction between our digital and non-digital selves shrinks, we must ensure that social media communication is parsed as carefully as non-digital communication in making post hoc determinations with respect to the violating juror.

If, however, remedial measures are warranted, what form should they take? Options to consider are dismissal (if the misconduct is revealed during trial or deliberations), fines and incarceration.

No state or federal legislative act or statute in the United States has been enacted that specifically seeks to deter jury internet use through the threat of lengthy prison sentences. However, in April 2015, England passed the Criminal Justice and Courts Act 2015, which creates several new criminal offenses for jury misconduct including researching case details, sharing researched case details, and making online disclosures about jury deliberations. These offenses are punishable by two years in prison. Many in the English judiciary are opposed to the new laws, citing harm the punitive measures will inflict upon the special relationship between judge and jury.

In the United States, occasionally jurors who have committed misconduct through impermissible use of the internet or social media are prosecuted for contempt and given jail sentences. However, these instances are rare and appear to be waning. Hannaford-Agor explained that from about 2008 through 2011 judges were particularly aggressive towards juror misconduct related to online research and social media communication, “suggesting that [judges believed] internet related misconduct was somehow qualitatively different from other misconduct. [They were] creating two separate standards.” Since 2012, judges have softened insofar as they typically do not treat internet related misconduct any more strictly than other types of juror misconduct.

Incarceration as a penalty for impermissible social media communication or internet use appears to be overly punitive towards jurors and potentially ruinous to the relationship between jurors and judges. The threat of incarceration should be reserved for egregious misconduct that would be prosecuted regardless of whether digital technology was a mode through which the misconduct occurred. More lenient remedies are available. Both fines and dismissal (if the misconduct is revealed to the court while the trial or deliberations are ongoing) are likely sufficient methods to address juror misconduct committed through social media and internet research. While there is no basis for concluding that either fines or dismissal will increase the probability of misconduct coming to light, fines at least serve a deterrent function and dismissals protect both the fairness of the trial to the parties and prevent other jurors’ deliberations from being contaminated by the impermissibly researched material or social media communication. Judges should use their discretion and wisdom to adequately determine when to use either or both penalties.

Conclusion

Whether the medium for online communication is Facebook, Twitter, Snapchat, or the next big app being developed in an MIT classroom or Silicon Valley garage, having an online presence is simply a part of daily experience for most Americans. Let us not forget that American teenagers will soon reach the age of majority and become eligible to serve on juries. Fully 92 percent of this demographic currently use social media, with 24 percent admitting to being online “almost constantly.” As such, potential disruption to the jury system, through illicit use of the internet and social media by jurors, is a risk that should continue to be monitored and considered. If the legal community works to ensure that appropriate prophylactic and remedial measures are implemented, perhaps little more will be necessary.

67. Id. at 380-81.
68. United States v. Ganias, 755 F.3d 125, 130 (2d Cir. 2014), rev’d, 824 F.3d 199 (2d Cir. 2016).
70. Id.
72. See Robert Eckhart, Juror Jailed Over Facebook Friend Request, Herald-Tribune, Feb. 6, 2012, http://www.heraldtribune.com/article/201202016/ARTICLE/120219626 (Juror sentenced to three days in jail after being found guilty of criminal contempt for Facebook “friending” defendant. Judge was particularly angered because juror had initially been dismissed for his actions and immediately boasted on Facebook about his dismissal). See also United States v. Juror No. One, 866 F.Supp. 2d 442, 448 (E.D. Pa. 2011) (juror found guilty of criminal contempt for impermissible email use).
73. Telephone Interview with Paula Hannaford-Agor, supra note 39.

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The work of parent coordinators has become increasingly prevalent in Massachusetts divorce and custody cases. A parent coordinator is “an impartial third party appointed in the context of ongoing litigation and/or upon final judgment who provides non-adversarial dispute resolution services to parents in high-conflict cases to enable them to reach decisions and reduce the impact of conflict on their children.” A parent coordinator can take on many roles according to the terms of his or her appointment — mediator, facilitator, conciliator, and, in some cases, as the final arbiter of disputes. Parent coordinators provide valuable services not only to the parties, but also to the courts, as they take on many conflicts that would otherwise only be resolvable through formal hearings, and “provide the parties with a convenient, expeditious and economical forum to help them to resolve decision making regarding their children.”

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In Bower, the Supreme Judicial Court held that the authority of probate and family court judges to delegate these responsibilities is not without limits. In Bower, the Supreme Judicial Court concluded that, despite a probate and family court’s inherent authority to appoint a parent coordinator, it may not delegate certain roles, particularly over the objections of a party. First, in the circumstances of this case, compelling a party to submit to the binding decision-making authority of a parent coordinator, without that party’s consent, constituted an infringement on the constitutional rights of that party. Second, it also infringed on that party’s right to have the merits of a pending complaint for contempt screened by a judge before referral to the parent coordinator. Third, it placed a prior restraint on both parties’ ability to file certain claims relating to custody or visitation in the court. Finally, it had the potential to curtail judicial review of the binding decisions made by the parenting coordinator.

For these and other reasons, the judge’s order appointing a parent coordinator was held to be an improper delegation of judicial authority. This unlawful delegation also had a further impact in that the parent coordinator was allowed to make certain structural changes to the parties’ custody arrangements, in a way that was outside the bounds of the statutory standards that govern modification of final judgments.

Accordingly, the court vacated the order of appointment and the portion of the judgment instructing the parties to comply with that order. The court further referred this matter to the Probate and Family Court for review and consideration of the promulgation of a rule governing the appointment of parenting coordinators.

The Probate and Family Court recently issued a draft of a comprehensive Standing Order that would govern, among other issues relating to parent coordination, the qualifications needed to serve as a parent coordinator, the process by which a parent coordinator would be appointed, and the scope of the parent coordinator’s powers. The issuance of the proposed standing order was accompanied by an invitation for public comment. The proposed standing order addresses many of the issues and questions raised in the Bower decision, but it stands to reason that, as public commentary rolls in, the draft will be further amended and worked upon until it is deemed acceptable for promulgation by the Probate and Family Court. It is likely only a matter of time before there is an enforceable standing order that governs these issues.

Factual and Procedural Background

The case involves two divorced parents with four children. The judgment of divorce provided for shared legal custody and for a detailed parenting plan and vacation schedule that were memorialized in the parties’ separation agreement. Within a year of the issuance of the judgment, however, each party had filed complaints for contempt against the other for alleged violations of the order, “including the obligation to adhere to the parenting time schedule and the obligation to share decision-making regarding major issues in the children’s lives.” The father’s complaint for contempt further included a request that the mother be ordered to participate in parent coordination and abide by the binding rules of the parent coordinator.

The judge, at the hearing on the complaints for contempt, declined to hear any arguments about the allegations contained in the complaints for contempt and instead focused on the father’s request for the appointment of a parent coordinator with binding


2. See id.
5. See id. at 700-05.
6. See id. at 698-700.
7. See id. at 700-02.
8. See id.
9. See id. at 702.
11. See id. at 704-05.
12. See id. at 705.
13. See id. at 707.
14. See id. at 707-0.
15. See id. at 709.
16. See Proposed Massachusetts Probate and Family Court Standing Order 16.
18. See id.
19. See id.
20. See id.
decision-making authority.\textsuperscript{21} The mother objected to the father's request and asked instead for the judge, whom she found more familiar with the case, to be the one responsible for resolution of any disputes arising from the parties' implementation of the parenting plan.\textsuperscript{22}

The judge nonetheless issued an order requiring the parties to make use of a parent coordinator. The order "required the parent coordinator to hear all of the parties' current and future disputes regarding custody and visitation in the first instance, before the parties could file any action regarding these disputes in court."\textsuperscript{23} The order further provided that the parent coordinator would have binding, decision-making authority, that the decisions of the parent coordinator "must be complied with by the parties as if they were court orders," but that either party could, in effect, "appeal" the decisions of the parenting coordinator by appearing before a court and getting a contrary order from the judge.\textsuperscript{24} It is important to note that there is a nuance here — the decisions of the parenting coordinator were binding unless and until a contrary order was obtained by the aggrieved party from the probate and family court.

Another judge (following the first judge's retirement) entered orders on the complaints for contempt but still ordered the parties to follow the order appointing the parenting coordinator. The mother appealed this order, and the Supreme Judicial Court transferred this case to the bench on its own motion.\textsuperscript{25}

The mother appealed on the following grounds: (1) that the judge lacked both express and inherent authority to appoint a parent coordinator; (2) that the order here constituted an unlawful delegation of judicial authority; and (3) that, where the mother did not consent to the use of a parent coordinator, the order infringed on her due process right of access to the courts.\textsuperscript{26}

The Supreme Judicial Court agreed with the mother, and concluded "that the order at issue here exceeded the bounds of the judge's inherent authority and was so broad in scope that it constituted an unlawful delegation of judicial authority."\textsuperscript{27} The court vacated the order appointing the parent coordinator and so much of the subsequent judgment as required the parties to comply with the order.\textsuperscript{28}

\section*{Analysis}

After discussing the purpose and various roles of a parent coordinator, both in Massachusetts and in other jurisdictions,\textsuperscript{29} the court remarked that, in Massachusetts, the "specific functions of a parent coordinator, including the parent coordinator's duties, necessary qualifications, or scope of authority, have not been set forth by statute or court rule."\textsuperscript{30} The court also explained that no statute or court rule specifically recognizes either the "role of a parent coordinator" or the "service of parent coordination."\textsuperscript{31} The court then contrasted this with other forms of court-appointed officials who exercise a neutral role and whose roles are delineated by statute and/or court rule, including alternative dispute resolution services,\textsuperscript{32} guardians \textit{ad litem}\textsuperscript{33} and special masters.\textsuperscript{34}

\subsection*{Can the Courts Appoint a Parenting Coordinator?}

The court then turned to the mother's argument that the judge did not have inherent authority to appoint a parent coordinator because there was (a) no express authorization by statute or court rule and (b) no agreement between the parties as to the use of a parent coordinator.\textsuperscript{35} The father countered that, although there was no statute or court rule governing the appointment or powers of a parent coordinator, the use of parent coordinators had become increasingly common in Massachusetts and the judge had broad, equitable discretion to appoint one.\textsuperscript{36} The court sided with the father on this threshold question, and held that "judges in the Probate and Family Court possess the inherent authority to appoint parent coordinators in appropriate circumstances."\textsuperscript{37} However, the court also held that the appointment in this case exceeded the bounds of that authority.\textsuperscript{38}

The court based its decision on its recognition that courts possess certain inherent powers "whose exercise is essential to the function of the judicial department, to the maintenance of its authority, or to its capacity to decide cases."\textsuperscript{39} The court reasoned that these powers also extend beyond adjudication to "ancillary functions such as rule-making and judicial administration."\textsuperscript{40} The court also reasoned that, by statute, divisions of the Probate and Family Court Department are courts of "superior and general jurisdiction with reference to all cases and matters within which they have jurisdiction."\textsuperscript{41} The court remarked on the statutory authority of the family and probate courts to appoint guardians and conservators, along with exclusive original jurisdiction over actions for divorce and actions related to the care, custody, education and maintenance of minor children.\textsuperscript{42} The court also noted that the probate and family courts' jurisdiction extends to equitable powers.\textsuperscript{43}

The court also based its decision on the notion that "referral of appropriate cases to parent coordination or other alternative dispute resolution services may help to expedite the disposition of those cases and provide a more satisfying and timely resolution of certain custody- and visitation-related disputes for the parties."\textsuperscript{44} The court specifically mentioned the parent coordinator's ability to resolve disputes arising from the parties' implementation of the parenting plan.

\footnotesize{21. See \textit{id.}.
22. See \textit{id.}.
24. \textit{Id.} at 693.
25. See \textit{id.}.
26. \textit{Id.}.
27. \textit{Id.}.
28. See \textit{id.} at 693-94.
30. \textit{Id.} at 695.
31. \textit{Id.}.
32. See Rule 6(d) of the Supreme Judicial Court Uniform Rules on Dispute Resolution (Mass. S.J.C. Rule 1:18).
36. See \textit{id.}.
37. \textit{Id.}.
38. \textit{Id.}.
40. \textit{Id.}
44. \textit{Bower}, 469 Mass. at 699.
disputes quickly about “day-to-day” custody and visitation issues, e.g., “how to adjust visitation if school is unexpectedly canceled, which family members will attend a special event such as an award ceremony or athletic competition, whether both parents may attend a parent-teacher conference, or how accommodations will be made if a parent or child becomes ill.” The court also remarked that this may alleviate the stress on the courts in connection to the number of cases filed, as well as the potential for parties to resolve such disputes expeditiously without the need to wait for a scheduled hearing and perhaps even without having to file a complaint for contempt or a complaint for modification in the court.

The court thus held that probate court judges “possess the inherent authority to refer parties to a parent coordinator in appropriate circumstances in order to conserve limited judicial resources and aid in the probate court’s functioning and capacity to decide cases.” The court further held that this authority also extended, if, “in the judge’s discretion, such referral is necessary to ensure the best interests of the children in a divorce- or custody-related proceeding.”

**Are there limits to the courts’ ability to appoint parenting coordinators?**

Despite this, the court also held that such authority is not without limits. The court recounted other instances where the courts exceeded their authority. The court also mentioned two other limitations on its authority: (a) that “inherent judicial powers arise from the individual right to the ‘impartial interpretation of laws, and administration of justice’ guaranteed by art. 29 of the Massachusetts Declaration of Rights;” and (b) “the right to seek recourse under the laws and to obtain justice freely, completely, promptly, and conformably to the laws, as provided by art. 11.”

The court then concluded that the inherent judicial powers cannot be exercised in a way that undermines the rights that give rise to such powers. The court remarked that, once the authority granted to the parent coordinator was coupled with the procedural requirements in the order, “significant due process concerns” arose, implicating articles 11 and 29 of the Declaration of Rights, particularly when there was a limit on the parents’ right to file an action in court, and a further limit on the ability to obtain judicial review of the parent coordinator’s decisions. These due process concerns were of assistance in identifying the outer limits of the judge’s authority to appoint a parent coordinator.

**What are the limits to the power to appoint parent coordinators?**

A judge does not have inherent authority to compel a party to submit to the binding decision-making authority of a parent coordinator. The court based this limitation on article 11 of the Massachusetts Declaration of Rights, which safeguards “an individual’s right to seek recourse under the law for all injuries or wrongs to persons, property or character.” The court reasoned that the mother, without her consent, was ordered to submit all disputes to a parent coordinator rather than a judge, thus infringing her right. The court likened the parent coordinator to an arbitrator, and remarked that courts have long held that parties may not be compelled by a judge to participate in arbitral without their consent. The court also said that, although the parties may in the future be compelled to participate in mandatory alternative dispute resolution programs, the resulting decisions from such programs would need to be non-binding.

In this particular case, the judge also infringed on “the mother’s right to have the merits of her pending contempt complaint screened by a judge early in the proceedings before referral to a parent coordinator.” The court disapproved of the fact that the judge issued the order referring the parties to a parent coordinator during a hearing on the parties’ complaint for contempt, and before hearing the parties on the merits. The court concluded that the order referring the parties to the parent coordinator only served to defer the judge’s decision on the mother’s claims underlying the complaint for contempt, which “effectively infringed upon her right to seek recourse under the law for the father’s alleged failure to adhere to the terms of the judgment.”

The court also “functionally placed a prior restraint on the parents’ ability to file any future claim related to custody or visitation in court.” The court disapproved of the judge’s restriction ordering the parents to submit all disputes to the parent coordinator before such matters could be brought before the court, as it denied the parents the right to obtain access to the court regarding future disputes or other issues without first engaging with the parent coordinator. The court reasoned that the prior restraint may infringe on the parties right to seek “recourse to the laws” per article 11 of the Massachusetts Declaration of Rights.

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45. Id.
46. See id.
48. Id.
49. See id. at 700.
50. See id.
51. See id. See also Mass. Const. pt. 1, art. XXIX (“It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.”).
52. See id. See also Mass. Const. pt. 1, art. XI (“Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.”).
54. See id. at 701.
55. See id.
56. See id.
57. Id.
58. See id.
60. See Bower, 469 Mass. at 701.
61. Id. at 702.
62. See id.
63. See id.
64. See id.
66. See id. at 703. See also Mass. Const. pt. 1, art. XI.
Finally, the means for judicial review as outlined in the judge’s order were deemed “insufficient to cure the limitations on access to the courts created by compelling a parent to submit to binding dispute resolution.” The court remarked that, when one parent did not consent to this arrangement, it was unclear whether providing review of a binding decision upon motion of a party was an adequate safeguard of the party’s constitutional right of access to the court. The court noted that in analogous situations, the arbitrator’s awards are only made binding by court orders, even when both parties consented to the arbitration. The court expressed concern that judicial review may be unavailable in many circumstances — namely, in that the stated recourse of obtaining relief from the court prior to an order’s taking effect may not be practicable. The court explained that on many occasions when a quick decision is needed, it would be very difficult for a party to obtain a hearing and get a decision from a judge. The court expressed further concern that, on many occasions, the appeal would be moot by the time a judge would be able to hear an appeal of a parent coordinator’s decision.

Accordingly, the court ruled that, under the circumstances of this case, the order of the judge could not be upheld. However, the court did issue some direction as to the type of order that might be upheld when: (a) both parties had consented to the appointment; or (b) the authority had been limited to assisting the parties in resolving their disputes by issuing recommendations; or (c) the referral had not been made in lieu of a hearing on the parties’ contempt complaints, but instead had been ordered while the parties were waiting for a scheduled hearing, or as a way to expedite the negotiation of a settlement agreement or visitation plan while an action was pending.

**Did the judge’s order consist of an unlawful delegation of judicial decision-making authority?**

The mother also argued that the order appointing the parent coordinator, which provided that the parent coordinator “shall serve to hear all disputes between the parties regarding custody and visitation,” was an unlawful delegation of authority because: (a) nothing in the order prevented the parent coordinator from making structural changes to the custody arrangement “without regard to the statutory standards which govern modification of final divorce judgments;” and (b) the judge “abdicated her statutory authority to decide whether modifications to the custody arrangement are warranted.”

Pursuant to Massachusetts law, a party seeking modification of a divorce judgment must obtain an order from the judge finding that “a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children.” Those standards, per the court’s reasoning, were not imposed by the judge’s order on the parent coordinator at issue, such that, if a dispute regarding the fundamental terms of the custody issue were to arise, nothing would prevent a parenting coordinator from modifying the judgment without regard to the statutory terms, which require that a determination be made with regard to the best interests of the children. The court therefore determined the judge’s order to be unlawful because “it empower[ed] the parent coordinator to make alterations to the parties’ custody and visitation arrangements without regard to statutory criteria governing such changes.”

The court went even further, remarking that, even if the order had required the parent coordinator to apply the same statutory standard that governs a judge in ruling on a complaint for modification, the order would still have been unlawful. Massachusetts law, per the court, “authorizes, and indeed obligates, the judge to issue the final decision on any modification to the family’s custody arrangement.” The court then summarized a number of cases where the court held that judges could not delegate the ability to make final and binding decisions on matters. Due to these considerations, the court determined that the “scope of the authority granted to the parent coordinator in this case renders the order an unlawful delegation of judicial authority,” and vacated that portion of the judgment.

**Why did the Supreme Judicial Court refer this case to the Probate and Family Court?**

Despite vacating the portion of the judgment that related to the parent coordinator, the court did recognize that parent coordinators provide a valuable role in assisting litigants in the probate and family courts. The court took the unusual step of referring the issue to the Probate and Family Court for review and to consider the promulgation of a rule governing the appointment of parent coordinators.

The court gave some guidance as to what the rule should include, including procedural and substantive safeguards that govern: (a) selection of a parent coordinator; (b) the points in proceedings when parties may be referred to a parent coordinator; (c) the nature and scope of the authority that may be granted to a parent coordinator; and (d) issues related to the apportionment and payment of the parent coordinator’s fees. The court also suggested that “a list of approved providers should be maintained and appointments distributed fairly therefrom in order to address the concerns regarding favoritism in fee-generating appointments.”
The court did caution that a judge could not compel the parties to hire a parent coordinator if the order would require at least one parent to pay for a parent coordinator’s services without that party’s consent.87 The court also cautioned that, even when both parties consented to pay, the apportionment of fees should weigh considerations of the financial circumstances of each parent, and the court should ensure that the apportionment of fees does not give rise to the appearance of bias or create a perverse incentive for either party.88

The court noted that the rule could “assist in delineating the scope of authority that may be delegated to a parent coordinator without constituting an unlawful delegation of judicial authority,”89 and that the rule could expressly “restrict the range of the parent coordinator’s decision-making authority.”90 The court suggested that the rule could consider other issues, such as “the training, licensing or monitoring of parent coordinators, whether and how parents may file complaints or seek removal of parent coordinators, confidentiality policies, impartiality and case screening procedures.”91 The court concluded by re-affirming that parent coordinators were being employed with increasing frequency in the commonwealth and that they provided a valuable service both to families and to the court system - as such, nothing in the court’s opinion should be construed to curtail the ability of parents to agree to use the services of a parent coordinator, or for the judge to include the parties’ agreement in any judgment of divorce.92

**Implications and Conclusion**

The decision of the court in this case has far-reaching implications. As the court noted, parent coordinators provide valuable services to both courts and litigants, and judges are often willing to delegate these duties to professionals.93 By ruling that the authority to appoint parent coordinators is not without limits, and that such an appointment may, on occasion, constitute an unlawful delegation of judicial authority,94 the court placed several restrictions on the probate and family courts that had not existed before.

Perhaps the most far-reaching restriction involves the scope of a parent coordinator’s powers. It is common practice amongst parties to agree to provide a parent coordinator with binding authority. Although it did not explicitly say so, the court did remark that Massachusetts law “authorizes, and indeed obligates, the judge to issue the final decision on any modification to the family’s custody arrangement.”95 The court then noted several cases where Massachusetts courts held that judges could not delegate the ability to make final and binding decisions on matters.96 This suggests that, even when the parties would agree otherwise, parent coordinators would not have the authority to render binding decisions. A party may seek to uphold or challenge the parent coordinator’s decision in the probate and family court (in a manner analogous with confirming or vacating arbitration awards),97 but absent such a process, this case suggests that a parent coordinator’s decision would not be binding. If the decision is not binding and one party does not comply, the party seeking enforcement will likely have no recourse but to go to court and engage in the dispute again.

Although this may seem like a restrictive interpretation of the case, it comports with the probate and family court’s reading of the decision. In response to the court’s referral of the issue, the probate and family court recently issued a comprehensive draft standing order that would govern several aspects of parent coordination.98 The draft standing order, which proposes language governing, among other things, the qualifications needed to serve as a parent coordinator, the process by which a parent coordinator would be appointed, and the scope of the parent coordinator’s powers, also includes a provision that speaks precisely to the issue of binding authority.99

Section 8 of the draft standing order reads as follows:

> Whenever the parties come to an agreement with the assistance of the parenting coordinator that modifies an existing order or judgment, the parenting coordinator must inform the parties that the agreement is not enforceable unless it is submitted for approval and incorporated into an order or incorporated and merged into a judgment by the court.

This provision has the potential to become very problematic — it should also be noted that the draft standing order is, in fact, a draft, and may change.100 However, unless the draft rule changes (and, if it changes, it then survives a challenge before the Supreme Judicial Court), if the reluctant party does not wish to comply with the parent coordinator’s recommendation, the aggrieved party will have no recourse but to bring the matter before the court, re-litigating the issue, incurring the costs of a duplicative process and bringing back to the court docket an issue that had been delegated elsewhere. Without binding authority, the parent coordinator will only be as powerful as the more reluctant party allows the parent coordinator to be.

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87. See id.
88. See id. at 707-08.
90. Id.
91. Id. at 708-09.
92. See id. at 709.
93. See id. at 695, 708-09.
94. See id. at 707 (emphasis added).
97. See Proposed Massachusetts Probate and Family Court Standing Order 16.
98. See id.
99. Id. (emphasis added).
100. The Probate and Family Court invited comments on the draft standing order, but the deadline for such comments has passed.
CASE COMMENT


In Ventrice v. Ventrice,1 the Massachusetts Appeals Court issued new limitations on the ability of probate and family courts to order parties to engage in (and pay for) court-directed mediation before either of them is allowed to file any subsequent action in the court system. The Appeals Court held such a decision to be a violation of the parties’ right of free access to the courts under article 11 of the Massachusetts Declaration of Rights,2 vacated that part of the judgment, and remanded the case to the Probate and Family Court for further proceedings.3 This restriction may clog up the courts and cut off an avenue for quick redress for the parties, but it preserves a right important enough to counterbalance considerations of dispute resolution efficiency.

Factual and Procedural Background

Ventrice involved two parents and four children.4 The children were between the ages of twelve and five at the time of trial.5 The parents owned and operated a children’s play center in Westfield, and throughout the marriage each parent alternated between being the primary caretaker for the children and operating the business.6 At times, the father operated the business, while the mother primarily cared for the children.7 On other occasions, the father primarily took care of the children while the mother operated the business.8

The divorce case became contentious and the parties agreed to appoint a guardian ad litem (GAL).9 On numerous occasions, the GAL interviewed both parties, their relatives, friends and associates, the four children (individually and as a group), social workers from the Department of Children and Families, school counsellors, therapists, and third parties who were involved with the family.10 The GAL eventually recommended that the father retain sole legal and physical custody of all four children, because he, in the GAL’s opinion, presented as “the stable parent” and was “more easily accessible and [the] more cooperative” parent.”11

After trial, the judge issued a judgment of divorce nisi, which included a provision stating that the parents must:

• attempt to reach an agreement regarding compliance with the judgment, and that, “[i]f the parties are unable to reach an agreement, the parties shall engage the services of a mediator before either may file an action in this [c]ourt. The costs associated with mediation shall be shared equally by the parties, unless otherwise reallocated by the mediator.”12

The judge also found that the parties were unable to co-parent, and awarded sole legal and physical custody of the eldest child to the father, and sole legal and physical custody of the other three children to the mother.13

The father appealed both (a) the order to mediate at the parties’ expense, and (b) the judge’s determination of custody.14

Summary and Analysis

In challenging the provision of the judgment requiring the parties, at their own expense, to engage in out-of-court mediation prior to filing a modification or contempt action in the Probate and Family Court, the father argued that the judge’s order violated the father’s right of free access to the courts under article 11 of the Declaration of Rights of the Massachusetts Constitution (Declaration of Rights).15 The wife did not take a position on this issue in the appeal.16

Article 11 of the Declaration of Rights states as follows:

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it, completely, and without any denial; promptly, and without delay; conformably to the laws.17

The court stated that the “free access to the courts guaranteed to each citizen by art. 11 requires that all cases be decided by a judge, and that litigants need not ‘purchase’ access to justice.”18 The court then cited to a then-recent decision issued by the Supreme Judicial Court, Bower v. Bournay-Bower,19 which “vacated an order of the Probate and Family Court that appointed a parent coordinator over the objection of one parent, and granted that coordinator binding authority to resolve conflicts between the parents.”20 The court drew parallels between both actions, stating that, in both cases, the trial judges delegated their decision-making authority to a

4. Id. at 191.
5. See id.
6. See id.
8. See id.
9. See id.
10. See id.
11. See id. at 192.
12. See id.
14. See id.
15. See id.
16. See id. at 192 n.10.
court-appointed official over the objection of one party. The court explained that, despite recognizing that courts have the inherent power to appoint dispute resolution officials in appropriate circumstances, the Bower decision stressed that — unless the parties agreed otherwise — the judge, and only the judge, had authority to make final, binding decisions. The court also remarked that the Bower decision emphasized that “any preconditions that require the use of costly services prior to filing a court action may implicate art. 11 of the Declaration of Rights.”

The court then stated in Ventrice that the effect of the judgment was to prevent the parties from bringing an action in the Probate and Family Court until they had participated in — and paid for — mediation. The court called it an “unconstitutional burden,” as it (a) “delay[ed] an objecting party’s right to file a complaint in our courts,” and (b) “force[d] the parties to bear a likely costly expense to the trial court for further proceedings.” The court clarified that the judge may “discourage or even prevent” either party from seeking a modification action if there was a material change in circumstances or if the best interests of the children required one. The court further concluded that, because the probate and family courts had exclusive jurisdiction over matters relating to divorce and children, the parties would have no alternative forums in which to pursue such claims.

For the foregoing reasons, the court concluded that “the amended judgment does precisely what art. 11 of the Declaration of Rights forbids, i.e., it chills the [parties’] right to freely petition the courts.” The court vacated the judgment and remanded the case to the trial court for further proceedings. The court clarified that the judge may, in her discretion, refer the parties to court-appointed dispute resolution in accordance with the Uniform Rules on Dispute Resolution, but that she may not condition the right of either party to file a complaint in our courts.” The court also cautioned that the judge did not have the authority to “foreclose either party’s right to commence a nonfrivolous action,” nor to “order the parties to bear the cost of any mandatory dispute resolution services.”

The court also reviewed the father’s challenge to the custody determination made by the trial judge and reasoned (a) that the judge apparently ruled in the mother’s favor without considering evidence favoring the father, and (b) that it was unclear why the judge chose not to follow the recommendations of the GAL. The court vacated and remanded the judgment so that the judge could “either substantiate her analysis of the best interests of the children with evidence from the record, or explain why the other relevant evidence discussed herein was not weighed or credited.”

Implications and Conclusion

It is no secret that probate and family courts in the commonwealth are understaffed and overwhelmed. Over the last decade or so, judges have resorted with increasing frequency to special masters, parent coordinators, mediators, arbitrators and other court-appointed neutrals to resolve disputes between the parties. By delegating these responsibilities, the courts are able to free up their dockets as fewer people resort to the courts in the first instance to resolve disputes. Further, parties may be able to resolve their disputes more efficiently, as they do not have to go to court and a neutral is often better positioned than a court in his or her ability to decide an issue. If the parties have a disagreement, for instance, about whether the children should return on Sunday night or Monday morning following an impromptu vacation with the non-custodial parent, a parent coordinator may resolve the situation more expeditiously than a court. Further, given court schedules, it is not always feasible for a court to step in and resolve a situation that needs to be addressed urgently - by the time a hearing is scheduled, the issue may very well be moot.

The Ventrice holding, however, makes it clear that the ability of judges to delegate their responsibilities is not absolute. Judges cannot order parties to mediation as a precondition for a court filing over the parties’ objection, particularly when the party has to pay for the mediator’s fees. Such an order would be violative of a person’s right to freely petition the courts under article 11 of the Massachusetts Declaration of Rights.

So what can courts do? In the wake of the Ventrice decision,
parties may still agree to participate in mediation prior to bringing a claim before the probate and family court.43 It also appears that, if the parties agree, the decisions made by the mediator would be binding.44 If the parties do not agree that the mediator will have binding authority, the mediator would then only be able to issue recommendations, which would need to be brought before the probate and family court to become binding.45

What a court may not do is condition any party’s ability to come before the probate and family court on the party’s participation in mediation, nor may the court order any person, without his or her consent, to participate in any sort of dispute resolution mechanism that will cost that party money.46

It is too soon to tell what practical effect this decision will have on Massachusetts courts. While the decision creates more restrictions on the ability of the court to order parties before a neutral, court-appointed official, it may only have a practical effect on those who refuse to agree to participate in alternative dispute resolution. Often, parties will agree to refer disputes to special masters, parent coordinators, and other neutrals. Parties do not want to be stuck waiting four, six, or even eight weeks for a hearing. They do not want to come to court and sit in a courtroom when there are thirty other cases to be heard. If they are represented by counsel, every disagreement could have the potential to be very costly. Instead, parties often willingly resort to court-appointed neutrals because of the expectation that they will get more personalized attention, a quick decision, and a more efficient process. Ventrice does not curtail that.

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43. See id.
44. See id.
45. See id. at 194.
**Book Review**

*Madison’s Hand: Revising the Constitutional Convention*

by Mary Sarah Bilder (Harvard University Press, 2015), 384 pages

Our most gifted constitutional historians compel us to change our understanding of both constitutional law and American history. An excellent example is Boston College Law Professor Mary Bilder and her new book: *Madison’s Hand: Revising the Constitutional Convention.* Her innovative and revealing examination of Madison’s notes from the Constitutional Convention in Philadelphia during the summer of 1787 enhances our understanding of the complexity of using such notes to inform constitutional interpretation. By examining Madison’s revisions of his notes, her book provides a nuanced exploration of Madison’s evolving views on federalism, particularly the proper role of the states, establishing necessary caveats and context for those who would characterize Madison as the “father” of our Constitution.

Combining resourceful uses of “relatively inexpensive new technologies,” including light tables and digital photographs that allow better imaging of watermarks, with careful historical and textual analysis, Professor Bilder demonstrates that Madison substantially revised his notes of the Constitutional Convention from 1787 until he died in 1836. The notes were first published posthumously in 1840. Madison’s notes are thus shown to be a far cry from simultaneous, stenographic-like transcriptions of what was said at the Convention. Rather, they reflect subtle and not so subtle manipulations that mirror Madison’s changing understanding of the purpose of the notes from a personal legislative diary designed to inform strategic choices during the Constitutional Convention in 1787 to a historic memorialization of our constitutional founding decades later. Along the way, the notes were apparently consulted by Madison and Jefferson during important constitutional debates, such as over the national bank in 1791, the treaty power in 1796, and Jefferson’s and Madison’s on-going battles with Alexander Hamilton regarding the nature of Republican government. Professor Bilder raises questions about how the notes may have been altered not only by such events, but by Madison’s evolving understanding of political science, and even his desire to enhance his own historical legacy. The notes are thus “inevitably a biography of James Madison.” Bilder writes that the notes from the summer of 1787 made “Madison appear on occasion catty, aggravated, frustrated, annoyed and even furious.” She suggests that “Madison’s revisions, by altering or excising these words and comments,” transformed him into the “public persona of dispassionate, analytic demeanor” we have been taught to remember and treasure.

Although Bilder carefully substantiates her analysis, a few examples must suffice here. Perhaps the most instructive is the evolution of Madison’s thinking on the role of the states in our federal constitutional structure and the revisions of the notes that reflect those changes. As Professor Bilder explains, Madison came to the Convention with a manuscript known as “*The Vices of the Political System of the United States.*” Many of these vices involved the laws of the states: their “[e]ncroachments on federal authority,” their “[t]respasses . . . on the rights of each other,” and their “[w]ant of concert in matters where common interest requires it,” just to name a few. Like many other delegates, Madison came to the Convention with a very dim view of state legislatures and state judges. In Madison’s view, the state legislatures were incurably parochial and self-interested; state judges would inevitably favor an expansive interpretation of their state laws even if they intruded on their neighbors and “abridged the rights of the national government.” Madison also believed strongly that it was impossible, or at least “totally impracticable,” to draw a precise line between national and state powers. On June 8, 1787, Madison made many of these points in a speech...
to the Convention that was referenced by four other note takers.\textsuperscript{12}

The solutions he championed at the Convention struck directly at state power and these perceived vices. For Madison, as Professor Bilder explains, “a broad national negative was the linchpin of the new system.”\textsuperscript{13} He “desperately wanted national control over the state legislatures.”\textsuperscript{14} Congress would be empowered to eliminate any state laws with which it disagreed.\textsuperscript{15}

As his proposals failed and he became increasingly frustrated at the Convention, Madison was prepared to entertain even more radical ideas for reducing state government. He favorably considered proposals from others that would have provided the national government with unlimited, rather than enumerated, legislative powers, and that would have consolidated smaller and larger states to ensure proportional representation in both houses.\textsuperscript{16} He was ready to reduce state sovereignty “to little local matters which are not objects worthy of supreme cognizance.”\textsuperscript{17} In a speech at the Convention on June 21, 1787, he stated: “Supposing therefore a tendency in the General Government to absorb the State Governments,” “no fatal consequence would result.”\textsuperscript{18} So much for state sovereignty!

His defeats at the Convention and later political developments made Madison fundamentally rethink the role of the states, as well as other aspects of his constitutional jurisprudence. It also led him to modify his Convention notes. For example, the sheets that Madison replaced for his notes for June 8 say nothing about the impossibility of drawing a line between state and federal governments or the state judiciaries being required to favor an expansive interpretation of state laws.\textsuperscript{19} By the time he wrote the \textit{Federalist Papers}, he was going further, defining the limits himself and defending the legitimacy of expansive interpretation of state power.\textsuperscript{20} His rhetoric about radically reducing state power had likewise disappeared. As Professor Bilder contends, Madison’s replaced sheets for his notes on his June 21 speech indicate that he likely moderated his original, more extreme views regarding the states.\textsuperscript{21} Professor Bilder convincingly explains that, over time, Madison would have a powerful, political incentive to modify or to remove many of the negative and inflammatory statements that he made about the states, which would have embarrassed the Republican Party and his mentor, Thomas Jefferson, who was far more suspicious and skeptical about national power.\textsuperscript{22} Although Madison could not “completely rewrite [his] speeches,” as too many other delegates had notes and strong memories themselves, “sentences and ideas, evident in the notes of others, vanished” from Madison’s revised sheets.\textsuperscript{23}

The rejection of his original proposals also led Madison to emphasize other important constitutional counterbalances in the notes, including the great size of the country and the deliberative democracy that such size would promote in Congress.\textsuperscript{24} This idea would of course be later brilliantly explained in his famous essay on factions in \textit{Federalist} No. 10.\textsuperscript{25} Professor Bilder, however, has much of interest to say about this shift in emphasis and its reflection in Madison’s modification of notes two or three years after the Convention.

For instance, with respect to a speech that Madison gave at the Convention on June 6, 1787, his notes “declared that the ‘only remedy’ for factions was ‘to enlarge the sphere [and] thereby divide the community into so great a number of interests [and] parties.’”\textsuperscript{26} As Professor Bilder explains, the statement is curious as it “diverged from the approach favored by Madison in the summer of 1787” when he preferred structural solutions such as Congress’s right to veto state laws.\textsuperscript{27} “In shifting the focus away from his original losing structural solutions and toward an insight about [the] size [of the country], Madison made himself [in the notes] a prophet of the future Constitution.”\textsuperscript{28} In constructing her argument that the June 6 note may have been modified, Professor Bilder also points out that Madison’s notes from July 19 “recorded at length [Gouverneur Morris’s] rejection of the ‘maxim in Political Science that Republican Government is not adapted to a large extent of Country,’” and his contrary belief that the “extent of the Country’ would prevent the influence of ‘factions.’”\textsuperscript{29} Without the revisions in the notes, more honor might be due to Morris as an earlier contributor to this important constitutional insight. This example supports one of Professor Bilder’s overarching goals, which is “to persuade that Madison was not the intellectual father of the Constitution; instead his constitutional ideas were nurtured through participation in Convention discussions and the endeavor of taking and revising the Notes.”\textsuperscript{30}

The notes regarding proportional representation and slavery portray Madison in a more damning light. Madison was dedicated to proportional representation in both houses and categorically opposed to equal state representation in either.\textsuperscript{31} To promote the former and defeat the latter, he developed a “divisive” strategy based

\begin{footnotes}
\footnote{12. \textit{Id.}}
\footnote{13. \textit{Id. at 77.}}
\footnote{14. \textit{Id.}}
\footnote{15. \textit{Id.} Just imagine how that would work in today’s polarized political environment in Washington!}
\footnote{16. \textit{Id. at 75, 78.}}
\footnote{17. \textit{Id. at 92.}}
\footnote{18. \textit{Id. at 99.}}
\footnote{19. \textit{Id. at 200.}}
\footnote{20. In the \textit{Federalist Papers}, of course, Madison began to sing a new tune — more measured, much more respectful of the states, even misleadingly so — to ensure ratification of the Constitution. In \textit{Federalist} No. 45, Madison wrote: The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, foreign commerce and ... taxation. The powers reserved to the several States will extend to all the objects which in the ordinary course of affairs concern the lives, liberties and properties of the people. He did not really mean all of that, but he was moving towards a dual constitutional structure rather than one dominated by the national government. \textit{See The Federalist} No. 45 at 313-14 (James Madison).}
\footnote{21. Madison’s Hand supra note 2, at 99, 216.}
\footnote{22. \textit{Id. at 202, 214.}}
\footnote{23. \textit{Id. at 216.}}
\footnote{24. Nonetheless, “Madison’s lack of interest in certain parts of the government, notably the judiciary, continued.” \textit{Id. at 117.} For example, he “only briefly summarized the unanimously approved motion to add a supremacy clause.” \textit{Id. at 114.}}
\footnote{25. \textit{The Federalist} No. 10 (James Madison).}
\footnote{26. Madison’s Hand supra note 2, at 199.}
\footnote{27. \textit{Id.} Other note takers did not record this speech as Madison recounted it. \textit{Id. at 73.}}
\footnote{28. \textit{Id. at 199.}}
\footnote{29. \textit{Id. at 117.}}
\footnote{30. \textit{Id. at 7.}}
\footnote{31. \textit{Id. at 49, 69.}}
\end{footnotes}
on slavery interests. On June 30, he ended a Convention speech by describing “the great division of interests” that lay “between the Northern and Southern [states],” and the need for giving the “Southern Scale” the “advantage” in one house and the “Northern in the other.” In one branch, “the States should be represented according to their number of free inhabitants,” and in the second branch, “according to the whole number, including slaves.” Although he fiercely employed the slavery strategy to promote proportional representation in both houses, the notes, at least as ultimately recorded, “suggest that Madison was ambivalent about whether to accept individual responsibility as the catalyst for the slavery strategy.” He was, nonetheless, bitterly disappointed when the Massachusetts delegation voted against his proposal, thereby ensuring its defeat, and the eventual adoption of equal state representation in the Senate.

Elsewhere in the notes, Madison takes a decidedly different approach to slavery. Indeed, Professor Bilder states that “[t]wo dramatic comments made by Madison against slavery raise concerns about accuracy.” Both of these comments occur in the notes covering August 25. In one note Madison states: “Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves. So long a term will be more dishonorable to the National character than to say nothing about it in the Constitution.” His notes for a speech later in that day state: “Mr. Madison thought it wrong to admit in the Constitution the idea that there could be property in men.” In questioning their accuracy, Professor Bilder highlights the striking similarity of the first comment to one made by Luther Martin on August 21 that describes slavery as “dishonorable to the American character.” Bilder also describes the unlikelihood of Madison declaring, in August 1787, that the Constitution should not admit of property in men. These comments seem to reflect subsequent shifts in Madison’s thinking, if not concerns about his legacy.

In sum, Madison’s constitutional vision was evolving, pragmatic, and political, sometimes shamelessly so. To use one of Madison’s favorite words, he was constantly in search of “practicable” constitutional solutions. His immense “talent lay in his remarkable facility to revise his analyses to support new political ends.”

Professor Bilder convincingly demonstrates that multiple revisions in the notes appear to mirror evolutions in Madison’s constitutional thinking. Madison subtly—and not so subtly—revised the notes as he significantly reconsidered his positions during and long after the Convention. Indeed, it is Professor Bilder’s exposition of Madison’s changing reflections in the revised notes that makes this book so interesting and important. Ultimately, Professor Bilder’s insightful analysis also provides a cautionary tale for those seeking a fixed and certain meaning in the notes of the Convention or, more importantly, the Constitution drafted at that Convention. For 225 years the search for that meaning has continued to challenge us. Fortunately, we can count on gifted constitutional scholars like Professor Bilder to guide us through the contested, complex, uncertain passages.

Chief Justice Scott L. Kafker

32. Id. at 108.
33. Id.
34. Id.
35. Id. at 109.
36. Id. at 111-12.
37. Id. at 148.
38. Id. at 149.
39. Id.
40. Id.
41. Id.
42. Id. at 188-90. Professor Bilder also finds troublesome an “idiosyncratic sentence” about slavery made in the revised June 6 speech. Madison wrote: “We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man.” Id. at 199. This phrase seems out of place in the June 6 speech and the “same phrases” appeared in the congressional debates over slavery in 1790. Id.
43. Id. at 68, 97.
44. Id. at 46.
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