Post-Trial Jury Payoffs: A Jury Tampering Loophole

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POST-TRIAL JURY PAYOFFS: A JURY TAMPERING LOOPHOLE*

I. INTRODUCTION

Any attempt to corrupt or influence a jury for the purpose of manipulating a determination by any means other than presenting evidence or argument in court does not fall within the meaning of the term jury tampering.1 Although this statement may seem counterintuitive, surprisingly, in New York State, the statement is technically correct.

The notion of a trial by jury is an ancient one, appearing in both Greece and Rome.2 It is rooted in English jurisprudence and may be traced back to the time of William the Conqueror.3 The use of the

* Although a law concerning post-trial jury payoffs will go into effect in November 2001, author’s note gives further support as to why such legislation was needed in closing this loophole. See John Caher, “Hirschfeld Law” Banning Juror Gratuities, Goes to Full Assembly, N.Y.L.J., June 1, 2000, at 1 (noting that Assembly Judiciary Committee moved so called “Abe Hirschfeld bill” toward final legislation, which makes it illegal to pay gratuities to jurors); Jurors Gratuity Ban Goes Forward, NAT’L L.J., June 12, 2000, at A5 (noting that “Abe Hirschfeld bill” will make it Class A misdemeanor for giving juror gratuity); Metro Briefing New York: Albany: Law Bans Jury Gifts, N.Y. TIMES, May 25, 2001, at B4 (stating that law will take effect in November).

1 See BLACK’S LAW DICTIONARY, (Bryan A. Garner et al. eds., West Publ’g Co. 1996) (defining jury tampering as common-law embracery); see also 26 AM. JUR. 2D § 1-4 (1999) (defining embracery). See generally Hirschfeld’s Embrace, 157 N.J.L.J. 1302, Sept. 27, 1999 at 26 (identifying loophole in New York law which allows litigants to make post-trial “gifts of appreciation” to jury members).

2 See MORRIS J. BLOOMSTEIN, VERDICT: THE JURY SYSTEM 2-3 (1968) (stating that jury can be traced back to ancient Greece and Athenian statesman Solon); MAXIMUS A. LESSEER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 29-46 (Law.’ Coop. Publ’g Co. 1894) (arguing that system of jury (judices) could be traced back to twelve tables of Rome); LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 1-4 (Anderson Publ’g Co. 2d ed. 1988) (discussing origins of jury system); Roger W. Kirst, The jury’s Historic Domain in Complex Cases, 58 WASH. L. REV. 1, 1-3 (1982) (discussing historic role of jury).

jury trial is engrained in the American psyche as well as our constitution.\textsuperscript{4} Jurors, as our peers, are an integral part of the judicial system.\textsuperscript{5} Every school child knows jurors are supposed to remain impartial to insure a fair trial and thereby serve the interest of justice.\textsuperscript{6}

Jury tampering is undoubtedly as old a problem as the idea of the jury itself and such tampering may come in many forms.\textsuperscript{7} For most the term jury tampering conjures images of bribes or threats directed at a jury member.\textsuperscript{8} Traditional jury tampering methods such as these are illegal and have been for centuries.\textsuperscript{9}

This note will discuss the need to reform New York laws, so as to protect the independence and integrity of the jury system. Part I introduces the use of juries and jury tampering. Part II addresses the current law of New York with regards to jury tampering. Part III will cite recent examples of de facto tampering without criminal repercussions. Part IV will explain why the present situation is such a threat to our judicial system. Part V will discuss what can be done to remedy the current problem. Part VI will examine problems which must be overcome to effectuate a remedy. The conclusion will suggest the adoption of statutory amendments to counter the effects of post-trial jury payoffs that have already occurred in New York's judicial system and prevent further abuse by closing the

\textsuperscript{4} See U.S. CONST. amend. V; U.S. CONST. amend. VI; U.S. CONST. amend. VII. See generally MOORE, supra note 2, at 95-110 (discussing use of juries in colonial America); Arnold, supra note 3, at 13-24 (discussing development of jury concept as matter of fundamental constitutional protection in America).

\textsuperscript{5} See United States v. Neff, 212 F.2d 297, 301 (3d Cir. 1954) (noting that “The Grand Jury is an integral part of our judicial system.”); People v. Lopez, 197 P.2d 757, 760 (Cal. 1948) (reprinting general instructions given to jurors which stated “upon being selected as a juror you become an integral part of the judicial system”); Kirst, supra note 2, at 1-3 (discussing historic role of jury).

\textsuperscript{6} See generally Kirst, supra note 2, at 1-3 (discussing historic role of jury).


\textsuperscript{8} See State v. Woodward, 81 S.W. 857, 861 (Mo. 1904) (discussing gravamen of embracery offense); see also 26 AM. JUR. 2d, supra note 1, at § 1 (discussing what is included in embracery).

\textsuperscript{9} See Clinton W. Francis, The Structure of the Judicial Administration and the Development of Contract Law in Seventeenth-Century England, 83 COLUM. L. REV. 35, 67-68 (indicating sixteenth and seventeenth-century jury reform measures were prompted, in part, on desires to limit bribery and jury tampering).
existing loophole.

II. CURRENT LAW IN NEW YORK

The common law crime of embracery prohibited corruption or influence of a member of the jury with bribes or threats. A former New York embracery statute was construed to include the unlawful attempt of the action so that the crime is complete when an attempt to bribe, threaten or influence is made. "[I]t is not necessary that a proffer of money or other consideration be tendered to the juror improperly approached to influence his decision." The tenets of the common law crime of embracery were incorporated into the New York penal code. Althoughembracery, as a distinctive offense, is tending to disappear.

Current New York Penal Law §215.19 makes it illegal to bribe a juror. A person is guilty of bribing a juror when he offers to confer a benefit upon a juror in exchange for an understanding that such juror's vote, opinion, judgment, decision or other action as a juror will thereby be influenced. Similarly, tampering with a juror has

10 See BLACK'S LAW DICTIONARY, supra note 1 (defining embracery); see also 26 AM. JUR. 2d, supra note 1, at § 1-4 (discussing embracery); Hirschfeld's Embrace, supra note 1, at 26 (defining common-law crime of embracery and discussing New Jersey's existing statutory safeguards against improper influence of jurors).
11 See People v. Glen, 64 A.D. 167, 170 (N.Y. App. Div. 1901), aff'd, 66 N.E. 112 (N.Y. 1903) (stating that crime of embracery as codified in §75 of New York Penal Code is defined as "[a] person who influences or attempts to influence improperly, a juror in a civil or criminal action or proceeding"). See generally Employers Ins. of Wausau v. Hall, 270 S.E.2d 617, 619 (N.C. C. App. 1980) (discussing common law definition of embracery).
12 Commonwealth v. Denny, 31 S.W.2d 940, 941-42 (Ky. Ct. App. 1930) (discussing how Kentucky legislature incorporated common law definition of embracery); Glen, 64 A.D. at 170 (discussing NY Penal Law); Wisemen v. Commonwealth, 130 S.E. 249, 251 (Va. 1925) (discussing common law embracery and Virginia law).
14 See PERKINS AND BOYCE, CRIMINAL LAW 550-551 (3d ed. 1982) (stating "offense of embracery itself is tending to disappear as a distinct offense"); see also 26 AM. JUR. 2d, supra note 1, at § 2 (discussing similarities and differences between common law embracery and other criminal obstructions of justice such as bribery and maintenance); John T. Noonan, Jr., The Burger Court and American Institutions: Book Review: Bribes, 60 NOTRE DAME L. REV. 1255, 1258 (1985) (distinguishing common law crime of embracery from bribery).
15 See N.Y. PENAL LAW § 215.19 (McKinney 1999) (stating that "A person is guilty of bribing a juror when he confers, or offers or agrees to confer, any benefit upon a juror upon an agreement or understanding that such juror's vote, opinion, judgment, decision or other action as a juror will thereby be influenced").
16 See Bregoff, 258 A.D. at 552 (finding same where defendant met secretly with juror and asked him to "do what he could" for defendant's client and subsequently gave him $100);
been encoded within §§215.25\textsuperscript{17} and 215.23,\textsuperscript{18} making it a misdemeanor to communicate with a juror with the intent to influence the outcome of an action or proceeding "prior to discharge of the jury"\textsuperscript{19} (emphasis added by author).

The concept represented by this last phrase, 'prior to the discharge of the jury,' is responsible for the creation of a technical loophole.\textsuperscript{20} New York law does not prohibit behavior intended to corrupt or influence a jury member if it occurs after a verdict has been rendered and the jury has been discharged.\textsuperscript{21} This limitation appears repeatedly in the New York Penal Code.\textsuperscript{22} It also extends to regulation of juror conduct.\textsuperscript{23} For example, Misconduct by a Juror pursuant to §§215.28\textsuperscript{24} and 215.30\textsuperscript{25} applies only to the acceptance of

\textit{Glen, 64 A.D.} at 169 (upholding conviction where defendant bought grand juror cigars and attempted to persuade him not to vote to indict personal friend on charges of assault in third degree); see also 12 \textit{AM. JUR. 2D} § 13 (1999) (defining crime of bribery in relation to jury members).

\textsuperscript{17} See \textit{N.Y. PENAL LAW} § 215.25 (McKinney 1999) (stating that "[a] person is guilty of tampering with a juror in the first degree when, with intent to influence the outcome of an action or proceeding, he communicates with a juror in such action or proceeding, except as authorized by law").

\textsuperscript{18} See \textit{N.Y. PENAL LAW} § 215.23 (McKinney 1999) (stating that "[a] person is guilty of tampering with a jury in the second degree when, prior to discharge of the jury, he (1) confers, or offers or agrees to confer, any payment or benefit upon a juror or upon a third person acting on behalf of such juror, in consideration for such juror or third person supplying information in relation to an action or proceeding pending or about to be brought before such juror; or (2) acting on behalf of a juror, accepts or agrees to accept any payment or benefit for himself or for such juror, in consideration for supplying any information in relation to an action or proceeding pending or about to be brought before such juror and prior to his discharge").

\textsuperscript{19} See \textit{N.Y. PENAL LAW} § 215.23 (McKinney 1999) (emphasis added).

\textsuperscript{20} See generally \textit{Hirschfeld's Embrace}, supra note 1, at 26 (identifying loophole in New York law which allows litigants to make post-trial "gifts of appreciation" to jury members).

\textsuperscript{21} See \textit{id.}


\textsuperscript{23} See \textit{N.Y. PENAL LAW} § 215.28 (McKinney 1999) (stating that "[a] person is guilty of misconduct by a juror in the second degree when, in relation to an action or proceeding pending or about to be brought before him and prior to discharge, he accepts or agrees to accept any payment or benefit for himself or for a third person in consideration for supplying any information concerning such action or proceeding" (emphasis added)); \textit{N.Y. PENAL LAW} § 215.30 (McKinney 1999) (stating that "[a] juror is guilty of misconduct by a juror in the first degree when, in relation to an action or proceeding pending or about to be brought before him, he agrees to give a vote, opinion, judgment, decision or report for or against any party to such action or proceeding" (emphasis added)).

\textsuperscript{24} See \textit{N.Y. PENAL LAW} § 215.28 (McKinney 1999) (stating that "[a] person is guilty of misconduct by a juror in the second degree when, in relation to an action or proceeding pending or about to be brought before him and prior to discharge, he accepts or agrees to accept any payment or benefit for himself or for a third person in consideration for supplying any information concerning such action or proceeding" (emphasis added)).

\textsuperscript{25} See \textit{N.Y. PENAL LAW} § 215.30 (McKinney 1999) (stating that "[a] juror is guilty of misconduct by a juror in the first degree when, in relation to an action or proceeding pending or about to be brought before him, he agrees to give a vote, opinion, judgment, decision or report for or against any party to such action or proceeding" (emphasis added)).
payment or a benefit in consideration for a vote or information pertaining to a pending action or proceeding.\textsuperscript{26}

In most cases this may not be as significant as it appears. For most litigants post-trial jury tampering would serve no purpose.\textsuperscript{27} It could become important, however, if that same defendant was scheduled to stand trial again.\textsuperscript{28} In this regard, the concern is that the subsequent jury, or any member thereof, might be influenced by the treatment of the litigant's previous jury.\textsuperscript{29}

\section*{III. THE LOOPHOLE}

A. Abraham Hirschfeld

Recently in New York State there was a well-documented and publicized incident of a defendant offering each juror "compensation" after the completion of his trial.\textsuperscript{30} The defendant,

\textsuperscript{26} See N.Y. PENAL LAW § 215.28 (McKinney 1999) (stating that "[a] person is guilty of misconduct by a juror in the second degree when, in relation to an action or proceeding pending or about to be brought before him and prior to discharge, he accepts or agrees to accept any payment or benefit for himself or for a third person in consideration for supplying any information concerning such action or proceeding" (emphasis added)); N.Y. PENAL LAW § 215.30 (McKinney 1999) (stating that "[a] juror is guilty of misconduct by a juror in the first degree when, in relation to an action or proceeding pending or about to be brought before him, he agrees to give a vote, opinion, judgment, decision or report for or against any party to such action or proceeding" (emphasis added)).

\textsuperscript{27} See Susan Estrich, Justice for Sale, DENVER POST, Sept. 19, 1999, at H-02 (stating that Hirschfeld was "scheduled to go on trial 10 days later on even more serious charges that he hired a hit man to murder his business partner"); Clyde Haberman, Jury Booty: Legal Payoffs at Trial's End, N.Y. TIMES, Sept. 10, 1999, at B1 (discussing negative effect that post jury payoff is likely to have on potential jurors); Laura Italiano, Abe Has Soft Spot for His Hung Jury, N.Y. POST, Sept. 3, 1999, at O20 (raising question that future jurors could be swayed); George Kimball, King Courts Ex-Jurors - Promoter in Thankful Mood, B. HERALD, Sept. 27, 1998, at B14 (stating King rewarded jurors with trip to Bahamas); DeWayne Wickham, Washington - What Do You Think the Chances Are that a New York Jury Will Ever Convict Abe Hirschfeld?, GANNETT NEWS SERVICE (Washington), Sept. 7, 1999 (terming Hirschfeld's actions "unspoken bribe").

\textsuperscript{28} See Estrich, supra note 27, at H-02 (terming Hirschfeld's actions as "unspoken bribe"); Haberman, supra note 27, at B1 (discussing negative effect that post jury payoff is likely to have on potential jurors); Italiano, supra note 27, at O20 (raising question that future jurors could be swayed); Kimball, supra note 27, at B14 (stating King rewarded jurors with trip to Bahamas); Wickham, supra note 27 (drawing similar conclusions).

\textsuperscript{29} See Haberman, supra note 27, at B1 (pointing out negative impact that post jury payoff is likely to have on potential jurors); Italiano, supra note 27, at O20 (suggesting that future jurors could be swayed); Kimball, supra note 27, at B14 (stating Bahaman trip was used by King to reward jurors).

\textsuperscript{30} See Hirschfeld's Embrace, supra note 1, at 26 (stating "[j]urors who recently served in a Manhattan trial were each presented afterwards with a check for $2,500"); Estrich, supra note 27, at H-02 (stating jurors who attended luncheon were each presented checks for $2,500); Haberman, supra note 27, at B1 (stating Mr. Hirschfeld offered each juror $2,500 as "good will compensation" not "reward"); Italiano, supra note 27, at O20 (stating Hirschfeld promised $2,500 to each juror); Wickham, supra note 27 (stating Hirschfeld offered check for $2,500 to
Abe Hirschfeld, is a wealthy real estate developer. After reaching a deadlock on tax fraud charges Mr. Hirschfeld invited each juror, including the alternates, to a special luncheon where he presented to each in attendance a $2,500 check. Of the fifteen checks written, eleven were accepted at the luncheon in early September 1999, and all but one were reportedly accepted by September 19, 1999. Mr. Hirschfeld claims the money was not a reward for the jurors but "good will compensation for their time and effort." He went on to proclaim that he would have made the gesture even if he had been convicted. Interestingly though, Mr. Hirschfeld initially intended to offer the pivotal holdout juror $5,000. Such action suggests "a

31 See Haberman, supra note 27, at B1 (describing Hirschfeld as “millionaire developer”); Man Learns from University of Life, CANBERRA TIMES (Australia), Sept. 12, 1999, at A7 (identifying Abraham Hirschfeld as “real-estate magnate”); Samuel Maull, NY Judge Bars Millionaire from Paying Jurors, LEGAL INTELLIGENCER, Sept. 16, 1999 (calling him “millionaire developer”); Wickham, supra note 27 (classifying Mr. Hirschfeld as “millionaire real estate magnate”).

32 See Hirschfeld’s Embrace, supra note 1, at 26 (stating “[j]urors who recently served in Manhattan trial were each presented afterwards with check for $2,500”); Estrich, supra note 27, at H-02 (stating that ten jurors who attended luncheon were presented checks for $2,500 apiece); Haberman, supra note 27, at B1 (stating Mr. Hirschfeld offered each juror $2,500 as “good will compensation” not “reward”); Italiano, supra note 27, at 020 (stating Hirschfeld promised $2,500 to each juror); Man Learns from University of Life, supra note 31, at A7 (stating that ten jurors and one alternate attended lunch at Manhattan café to pick up their “windfall” while two jurors and two alternates were “no-shows”); Wickham, supra note 27 (stating Hirschfeld offered check for $2,500 to each juror).

33 See Haberman, supra note 27, at B1 (noting that one or two jurors refused to accept check); Man Learns from University of Life, supra note 31, at A7 (stating that ten jurors and one alternate picked up checks); David Rohde, Hirschfeld Pays Jurors after Trial, N.Y. TIMES, Sept. 5, 1999, at 34 (indicating that eleven checks were accepted); Wickham, supra note 27 (stating ten jurors and one alternate accepted money).

34 See Estrich, supra note 27, at H-02 (stating that “[a]ccording to Hirschfeld, all but one of the jurors have since accepted his checks, although one juror told reporters that he and his wife are still fighting about whether to cash it”); Haberman, supra note 27, at B1 (stating Hirschfeld “wanted to give $5,000 to a particularly stubborn holdout juror”); David Rohde, Jury to Deliberate in Garage Magnate’s Murder-for-Hire Trial, N.Y. TIMES, Oct. 21, 1999, at B7 (noting that one juror was troubled by payment).

35 See Haberman, supra note 27, at B1; Rohde, supra note 33, at 34 (indicating Hirschfeld stated that he was “simply rewarding the group for serving through a two-month trial”). But see Nation in Brief—New York, WASH. POST, Sept. 3, 1999, at A13 (stating that Hirschfeld would pay $2,500 to each juror and “$5,000 for the holdout, if he can find out who it was”); Wickham, supra note 27 (stating that suspected purpose of money was to make jurors in upcoming trial think “that a hefty check awaits them if they vote for acquittal, or simply hold out for a mistrial”).

36 See Salvatore Arena, Hirschfeld Jury Locks in Tax Trial, DAILY NEWS (New York), Sept. 3, 1999, at 7 (quoting Hirschfeld as stating “[t]hey get paid so little for their jury service”); Haberman, supra note 27, at B1 (quoting Mr. Hirschfeld as stating “I would have done the same thing if they had found me guilty”); Italiano, supra note 27, at 020 (stating Hirschfeld’s reason for giving money was because “[t]hey were so poorly dressed, you saw that they needed money”).

37 See Haberman, supra note 27, at B1 (stating Mr. Hirschfeld wanted to give $5,000 to stubborn holdout juror but ended up giving everyone $2,500); Man Learns from University of
hierarchy of values for various votes.”

Mr. Hirschfeld’s gesture was well timed. It occurred just over one week before he began a second trial in which he was accused of hiring a hitman to kill his business partner. The chances of subsequent jurors having knowledge of the “good will compensation” that former jurors received after reaching a verdict favorable to Mr. Hirschfeld are probably high. One might logically deduce that if the new jury members return the “correct” verdict they too will be rewarded. The situation begs the question – if a deadlock on tax fraud charges is worth $2,500 apiece how much is acquittal on attempted murder worth? Mr. Hirschfeld’s actions were not illegal and yet he may have succeeded in tampering with a jury.

Life, supra note 31, at A7 (stating that $5,000 check awaited hold-out juror who did not show up at luncheon); Rohde, supra note 34, at B7 (noting that one juror was troubled by payment).

86 See Haberman, supra note 27, at B1.

87 See generally Estrich, supra note 27, at H-02 (terming Hirschfeld’s actions as “unspoken bribe”); Haberman, supra note 27, at B1 (discussing negative effect that post jury payoff is likely to have on potential jurors); Italiano, supra note 27, at 020 (raising question that future jurors could be swayed); Wickham, supra note 27 (discussing timing significance of post trial giveaway).

40 See Haberman, supra note 27, at B1 (stating that Hirschfeld is charged with hiring hitman to kill his business partner and trial scheduled to start on Sept. 13, 1999); see also Estrich, supra note 27, at H-02 (maintaining that “he was scheduled to go on trial 10 days later on even more serious charges that he hired a hitman to murder his business partner and was facing possible retrial later this fall on the tax charges”); Italiano, supra note 27, at 020 (raising question that future jurors could be swayed); Wickham, supra note 27 (announcing that Hirschfeld is scheduled to go to trial in September on charges that he tried to hire hit man to murder former business partner).

41 See Haberman, supra note 27, at B1 (stating that “it seems fair to conclude that potential jurors now know that a pot of gold may await them if only they produce the right verdict, or even no verdict”); Wickham, supra note 27 (concluding “[t]here’s good reason to believe that Abe Hirschfeld is willing to offer jurors a lot more to escape conviction in his upcoming trial—and good reason to think that some of them will have this thought in mind when they retire to the jury room to consider a verdict in this case”); see also The Jury's Out (Spending Its Thank-You Cheques), GUARDIAN (London), Sept. 27, 1999, at 16 (mentioning Justice Berkman’s concern that payments may interfere with judgment of jury for second trial); Barbara Ross, Don't Pay Jurors, Abe Warned, DAILY NEWS (New York), Sept. 14, 1999, at 8 (discussing Justice Berkman’s view that judgment of potential jurors might be affected).

42 See Haberman, supra note 27, at B1 (stating that it is fair to conclude that serving on Hirschfeld’s jury “might put a few thousand dollars in your pocket”); The Jury's Out (Spending Its Thank-You Cheques), supra note 41, at 16 (mentioning Justice Berkman’s concern that payments may interfere with judgment of jury for second trial); Ross, supra note 41, at 8 (discussing Justice Berkman’s view that judgment of potential jurors might be affected); Wickham, supra note 27 (stating Abe Hirschfeld gives good reason to think he will offer jurors money in his upcoming trial if he escapes conviction).

43 See Across the Nation - New York, SEATTLE TIMES, Sept. 15, 1999, at A4 (indicating Justice Berkman cannot prevent payment to subsequent juries); Justice Bars Hirschfeld from Paying More Jurors, N. Y. TIMES, Sept. 15, 1999, at B6 (stating “there is no law barring such payments after a trial concludes”); Alice McQuillan, For Jury, “Lettuce" Salad Is on Abe, DAILY NEWS (New York), Sept. 4, 1999, at 8 (indicating that if jurors were paid prior to conclusion of trial, it would constitute felony witness tampering); Wickham, supra note 27 (claiming “[w]hile what
Manhattan Supreme Court Justice, Carol Berkman is presiding over Mr. Hirschfeld's subsequent trial.44 On September 13, 1999 she addressed the issue, stating that Mr. Hirschfeld’s actions did not pass the "smell test."45 She then went on to bar the jurors from accepting any gifts.46 Her actions have been met with criticism.47 Critics claim Justice Berkman’s ban cannot legally be enforced.48 In general, a judge is not permitted to enjoin any activity that has been subjected to criminal sanctions.49 Yet the “traditional and oft-repeated rule... that equity will not enjoin a crime”50 does not appear to apply here since what Mr. Hirschfeld did is not technically a crime.51 It remains to be seen if the ban will act as an

he did doesn’t meet the legal definition of jury tampering, it is for all intent and purposes a cash gift to the jurors in the case just completed, and an unspoken bribe offer to those who will sit in judgment of him in his upcoming trials”).

44 See Justice Bars Hirschfeld from Paying More Jurors, supra note 43, at B6 (noting Justice Berkman is acting justice); Samuel Maull, Hirschfeld Barred from Paying Jurors, RECORD (Bergen County, NJ), Sept. 15, 1999, at A6 (indicating State Supreme Court Justice Carol Berkman will preside over murder-for-hire trial); A Nose for News at Vogue Mag, N.Y. POST, Sept. 14, 1999, at 008 (noting that Manhattan Supreme Court Justice Carol Berkman is judge in new trial).

45 See Maull, supra note 31; A Nose for News at Vogue Mag, supra note 44, at 008; Ross, supra note 41, at 8.

46 See The Jury's Out (Spending It's Thank-You Cheques), supra note 41, at 16 (stating that Abe Hirschfeld was asked to stop paying jurors); Justice Bars Hirschfeld from Paying More Jurors, supra note 43, at B6 (noting Berkman's reason for order was to insure fair trial); A Nose for News at Vogue Mag, supra note 44, at 008 (stating that Judge Berkman's solution was "to bar jurors from accepting any gifts"); Maull, supra note 31 (revealing "judge ruled that millionaire developer Abraham Hirschfeld cannot give jurors money after his murder-for-hire trial"); Ross, supra note 41, at 8 (quoting Berkman as saying "I don’t want to see any ads from you when I open up my New York Times in the morning").

47 See The Defendant Can’t Pay Jurors, NAT'L J., Sept. 27, 1999, at A19 (stating that it was unclear that Hirschfeld's action were illegal); Across the Nation - New York, supra note 43, at A4 (discussing that Judge Berkman has ruled that Hirschfeld cannot give jurors money after his upcoming case); Maull, supra note 31 (quoting Professor H. Richard Uviller of Columbia University School of Law who said, "[y]ou can’t order people not to do something because it smells bad").

48 See The Defendant Can’t Pay Jurors, supra note 47, at A19 (calling into question illegality of Hirschfeld’s actions); A Nose for News at Vogue Mag, supra note 44, at 008 (quoting Julia Vitullo-Martin, director of Citizen’s Jury Project, who said “[i]t almost certainly cannot be enforced”); Ross, supra note 41, at 8 (noting Hirschfeld’s argument that Judge has no power to issue such order).


51 See Maull, supra note 31 (stating "Hirschfeld’s gifts to jurors might not be strictly illegal"); see also McQuillan, supra note 43, at 8 (quoting juror “it’s a gesture of saying thank
effective deterrent.

B. Don King

Although Mr. Hirschfeld may have taken the issue to a new level he is not the first to reward jurors.52 Another highly publicized incident occurred in 1998.53 After being acquitted of insurance fraud in Federal court, boxing promoter Don King gifted twelve jurors with a trip to the Evander Holyfield-Butter Bean title fight in Georgia as well as an all-expenses-paid weekend getaway in the Bahamas with their spouses.54 Soon thereafter, a talk show host questioned Don King concerning his reputation for treating jurors well.55 Mr. King admitted treating jurors to such amenities as trips

You for volunteering on the case); Ross, supra note 41, at 8 (stating that even Judge notes his actions are not illegal); Wickham, supra note 27 (stating Hirschfeld’s payments are distasteful, but not illegal).

52 See Hirschfeld’s Embrace, supra note 1, at 26 (stating loophole seems to have been recognized by another defendant last year); Estrich, supra note 27, at H-02 (announcing “Hirschfeld is not the first defendant to reward jurors for the gift of freedom”); Haberman, supra note 27, at B1 (claiming “triumphant defendants have doled out rewards in other cases”); Jack Newfield, Feds Have King Boxed into a Corner: Indictment Looms for Ratings Fix, N.Y. POST, June 18, 1999 (noting that gifts were given after acquittals); Greg B. Smith with Barbara Ross, One Angry Man Stalled the Jury, DAILY NEWS (New York), July 10, 1998, at 6 (discussing jury member’s reaction after King’s acquittal of wire fraud).

53 See Royce Feour, Acquitted King Shows Jury His Gratitude, LAS VEGAS REV.-J., Sept. 18, 1998, at 6C (stating that King told his bookkeepers, “Don’t even tell me (the cost)”); Haberman, supra note 27, at B1 (stating that Don King treated jurors to trip to Bahamas after his acquittal); Michael Katz, This Time Bean Vows an Action Attraction, DAILY NEWS (New York), Sept. 18, 1998, at 96 (stating that King took 60 people to Bahamas after he was found not guilty); Kimball, supra note 27, at B14 (speculating that there “will be a mad scramble among the jury to get on the next panel to acquit King”).

54 See Big Crowd Expected for Holyfield-Bean Title Fight, COMMERCIAL APPEAL (Memphis, TN), Sept. 19, 1998, at D2 (reporting that jurors are scheduled to watch Georgia Dome homecoming and have been treated to Bahamas trip); Haberman, supra note 27, at B1 (stating “Don King, the boxing promoter, went so far as to treat Federal jurors to a Bahamas vacation after they acquitted him of insurance fraud charges last year”); Ed Schuyler, Jr., Atlanta Backing Hometown Hero, CHATTANOOGA TIMES, Sept. 19, 1998, at D3 (reporting Bahamas trip for jurors was paid for by Don King and jurors were also scheduled to watch Georgia Dome homecoming as his guests); see also Atlanta Is Turning out for Camp Holyfield, WASH. POST, Sept. 19, 1998, at E08 (reporting that twelve jurors who recently acquitted Don King of insurance fraud are scheduled to watch Georgia Dome homecoming, as his guests, and were treated by King to Bahamas vacation with their spouses); De La Hoja Pummels Chavez into Submission, BUFF. NEWS, Sept. 19, 1998, at 3B (reporting jurors were guests of Don King on Bahamas trip and they are also scheduled to watch Georgia Dome homecoming as his guests); Jim Sarni, The Weird and the Wacky, SUN-SENTINEL (Fort Lauderdale), Dec. 27, 1998, at 13C (reporting that “[t]wo weeks after being acquitted on fraud charges in New York City, Don King took a group of jurors from his trial on an all-expense paid weekend to the Bahamas.”); Grant Wahl, Paul Zimmerman et al., Scorecard, SPORTS ILLUSTRATED, Sept. 21, 1998, at 46 (stating “Don King took a group of the jurors from his trial on an all-expense paid weekend jaunt to the Bahamas”).

55 See Is the Fight Game Dead on Its Feet?, IRISH TIMES, Nov. 13, 1999, (stating that Don King defended his treatment of jury that acquitted him by stating, “Ain’t a bribe... it’s just gratitude[;] admiration for the system.”); The Chris Rock Show: Kings Ransom (HBO as seen on
to London, the Bahamas and to boxing matches. He responded, "[t]hat's democracy. They deserve it. They deserve more than the seven dollars they get for a day." Mr. King, like Mr. Hirschfeld, is no stranger to litigation. In fact, the Bahamas incident led one reporter to comment, "if you're on a jury in a Don King case, you know you're guaranteed a holiday if he's found not guilty!"

C. O.J. Simpson

Such behavior may not be confined to New York State. Less sensational, and perhaps less harmful, are cases after which jurors were treated to parties or special luncheons. O.J. Simpson was acquitted of murder charges in California in 1995. Afterwards, his

Talk Soup, E Entertainment Television, Nov. 10, 1999); see also Norm Frauenheim, Spin Control Won't Save Fight; Boxing's Legal Woes Cast Cloud over Lewis - Holyfield Rematch, ARIZ. REPUBLIC, Nov. 11, 1999, at C9 (describing King's appearance on show as "sales pitch").

See also Hirschfeld's Embrace, supra note 1, at 26 (describing King's actions as falling within "loophole"); Dan Cook, King's Jury Tempting Becoming Legendary, SAN ANTONIO EXPRESS-NEWS, Sept. 19, 1998, at 2C (describing King's gifts); Feour, supra note 53, at 6C (describing accommodations made by King for jurors).

King Acquitted of Fraud in Second Trial, BUFF. NEWS, July 10, 1998, at 2B (noting that after acquittal, King vowed to "make this country better"); King Freed of Fraud Allegations, PALM BEACH POST, July 10, 1998, at 2C (stating that King attributes his victory to God); Ed Schuyler, Jr., Ever-Confident King Finds Due Process to His Liking, LAS VEGAS REV.-J., July 10, 1998, at 1C (noting that King was not nervous during trial).

See generally King v. United States, 523 U.S. 1024 (1998) (discussing case involving Don King); United States v. Don King & Don King Prods., 140 F.3d 76 (2d Cir. 1998) (reporting case against Don King); United States v. Don King & Don King Prods., 134 F.3d 1173 (2d Cir. 1998) (discussing litigation against Don King).

Warren at War, DAILY MAIL (London), Oct. 6, 1998, at 63; see also Daniel Jeffreys, Can a Briton Ever Fight through the Sleaze to Beat America in its Own Backyard? DAILY MAIL, Mar. 15, 1999, at 5 (stating that "few in the U.S. were enragd by King's thank-you gift"); Jeff Powell, Fight Clean, King: Lewis Fears a Dirty Trick Campaign Designed to Wreck His Bid to Rule the World, DAILY MAIL, Sept. 23, 1998, at 74 (stating that King had "the brass neck" to discuss that he was treating jurors who had acquitted him to all-expense paid trip to Bahamas). But see Kevin B. Blackstone, Boxing's Hall Perfect Place for Ringleader King, DALLAS MORNING NEWS, Jan. 16, 1997, at 3B (stating Don King was honored by election to International Boxing Hall of Fame).

See Letters from Readers: Post-Trial Celebrating, STAR TRIB. (Minn., MN), Mar. 8, 1998, at 20A (quoting reader who indicated displeasure with report that "Oprah Winfrey has taken to lunch jurors who found her not guilty in the beef trial"); see also Newsmakers, HOUS. CHRON., Dec. 20, 1995, at 2 (noting that O.J. Simpson included jurors at party); Mother of Victim Outraged over Party, UNITED PRESS INT'L, Dec. 18, 1998 (stating that mother of victim was upset over juror's attending party thrown by defendant's family).

See James L. Gobert, Criminal Law: In Search of the Impartial Jury, 79 J. CRIM. L. & CRIMINOLOGY 269, 271 (1988) (discussing meaning of impartiality); Anthony Musson, Twelve Good Men and True? The Character of Early Fourteenth-Century Juries, 15 LAW & HIST. REV. 115, 131 (1997) (noting that jurors may have relationships with defendants); Frances Frank Mareus, Ginny Foot, The Ex-Now Leader, Acquitted of Murder in Louisiana, N.Y. TIMES, Nov. 17, 1983, at A1 (stating that after trial, jurors hugged and asked for defendant's autograph); Mother of Victim Outrages over Party, supra note 60 (stating luncheon party was given by defendant's family).

See generally Beyond the Verdict: O.J. Simpson Is Free but a Debate Rages about His Acquittal,
attorney, Johnnie Cochran, gave a lavish Christmas party and invited all of the black jury members to attend.\textsuperscript{63} Mr. Simpson, who decided not to attend the party at the last minute, taped a special video message that was shown at the party.\textsuperscript{64} It was viewed only moments after footage of the jury’s delivery of a not guilty verdict.\textsuperscript{65} Mr. Cochran also invited jurors onto the ballroom stage where he announced to them, “[y]ou did the right thing for justice.”\textsuperscript{66} Although Mr. Simpson did not host the party many members of the public perceived it to be a party thrown by Simpson for the jurors who acquitted him.\textsuperscript{67}


\textsuperscript{63} See Michelle Caruso and Jere Hester, \textit{O.J. Greets Jury Sends Holiday Video to Beverly Hills Bash}, DAILY NEWS (New York), Dec. 18, 1995, at 3 (describing Mr. Cochran’s holiday party and his invitation to all jurors and alternates who served on Simpson case); Dave Kindred, 1995: Year of More Bust than Boom, L.A. TIMES, Dec. 31, 1995, at C9 (reporting attendance of black members of Simpson jury at Jonnie Cochran’s Christmas party); \textit{Simpson Sends “Merry Christmas” Video to Jurors}, LEGAL INTELLIGENCER, Dec. 19, 1995, at 3 (indicating one dozen blacks and one Hispanic who served as jurors or alternates were among 200 at holiday party thrown by Simpson attorney Jonnie Cochran, Jr.); see also \textit{Simpson Jurors Party with Defense Lawyers}, CHIC. TRIBUTE, Dec. 19, 1995, at 2 (describing attention given to thirteen jurors and alternates who attended holiday party thrown by Simpson attorney Jonnie Cochran, Jr.); \textit{Tuesday Celebrity}, B. HERALD, Dec. 19, 1995, at 13 (indicating approximately thirteen Simpson jurors and alternates attended holiday party given by Mr. Cochran where their role in Simpson acquittal was acknowledged and applauded).

\textsuperscript{64} See Caruso and Hester, supra note 63, at 3 (indicating Mr. Cochran invited all jurors and alternates from Simpson case to his holiday party); Dave Kindred, supra note 63, at C9 (discussing black jury members’ attendance at Cochran’s Christmas party); \textit{Simpson Sends “Merry Christmas” Video to Jurors}, supra note 63, at 3 (indicating minority jurors and alternates from Simpson jury attended holiday party thrown by Simpson attorney Jonnie Cochran, Jr.); see also \textit{Simpson Jurors Party with Defense Lawyers}, supra note 63, at 2 (reporting special attention given to jurors who attended holiday party thrown by Johnnie Cochran, Jr.); \textit{Tuesday Celebrity}, supra note 63, at 13 (indicating approximately thirteen Simpson jurors attending holiday party were acknowledged and applauded).

\textsuperscript{65} See Caruso and Hester, supra note 63, at 3 (indicating Mr. Cochran played videos at his holiday party); \textit{Simpson Sends “Merry Christmas” Video to Jurors}, supra note 65, at 3 (indicating guests cheered replay of verdicts at holiday party thrown by Simpson attorney Jonnie Cochran, Jr.); see also \textit{Simpson Jurors Party with Defense Lawyers}, supra note 63, at 2 (reporting special attention given to jurors following replay of verdicts by Johnnie Cochran, Jr.); \textit{Tuesday Celebrity}, supra note 63, at 13 (indicating Simpson jurors were acknowledged and applauded following re-showing of acquittals).

\textsuperscript{66} Caruso and Hester, supra note 63, at 3 (indicating Mr. Cochran invited jurors up on stage to thank them at his holiday party); see also \textit{Simpson Jurors Party with Defense Lawyers}, supra note 63, at 2 (repeating quote obtained by Daily News); \textit{Simpson Sends “Merry Christmas” Video to Jurors}, supra note 65, at 3 (repeating what Daily News reported); \textit{Tuesday Celebrity}, supra note 63, at 13 (reporting on story as covered by Daily News).

\textsuperscript{67} \textit{Letters from Readers: Post-Trial Celebrating}, supra note 60, at 20A (quoting reader who said, “It always bothered me that after his trial, O.J. Simpson had a party for the jurors who found him not guilty[,] [i]t seems to make a mockery of our judicial system”).
D. Oprah Winfrey

More recently, Oprah Winfrey was rumored to have taken jurors to lunch after being found not guilty in an action brought against her by the Texas beef industry. The impetus for the suit was a comment made by Ms. Winfrey, on air, in which she expressed her concern over the safety of beef due to mad cow disease. There was some indication during the trial that Oprah's status as a nationwide talk show host might influence the jury, but the issue will not be raised on appeal. Despite the fact that a juror may be less willing to compromise her ethics for a free lunch, such events are still tainted with the suggestion of impropriety.

IV. THE UNDERLYING DANGER

Although the scenarios presented above are not likely to occur frequently, they do set dangerous precedent. This is especially so in cases of repeat or multiple litigators and career criminals. The
combination of a substantial payoff, media attention and subsequent jury trials is likely to result in jurors receiving a harmful message.\textsuperscript{74} This implied message - acquit me and you'll be rewarded - is the equivalent of traditional jury tampering.\textsuperscript{75}

Jury rewarding is wrong for substantially the same reasons traditional jury tampering is wrong.\textsuperscript{76} "Such payoffs destroy the integrity of the judicial process, as well as the appearance of it."\textsuperscript{77} Juries are supposed to remain impartial in order to serve the interests of justice and to help insure a fair trial.\textsuperscript{78} There is a good chance that a juror will be tempted by an unspoken offer orchestrated by a litigant and swayed by the possibility of a post-verdict payoff.\textsuperscript{79}

This situation creates the same danger associated with traditional forms of jury tampering and the same underlying policy reasons exist for prohibiting it.\textsuperscript{80} If it is not stopped now the practice may spread, and although it might not be effective for every defendant

\textsuperscript{74} See Leonard Buder, Ex-Juror Tells of Car Offer if He Discussed Mob Trial, N.Y. TIMES, Jan. 14, 1998 (stating that friend of Gotti's offered him BMW for acquittal of Gotti); Arnold L. Lubasch, 3 Indicted in Plot to Influence A Juror in Racketeering Trial, N.Y. TIMES, Apr. 23, 1992 (discussing testimony from Gambino associate alleged to have offered one juror $25,000 for acquittal of Peter Gotti and other defendants); Wickham, supra note 27 (stating that Hirschfeld's actions did not meet "legal definition of jury tampering"); Day One, (ABC News transcript, July 20, 1995) (discussing jury tampering).

\textsuperscript{75} See Samuel Maul, Judge Bars Hirschfeld from Paying Jurors Despite Dubious Legal Authority, ASSOCIATED PRESS, Sept. 14, 1999 (indicating judge's order prohibiting Hirschfeld from giving jurors money after trial for alleged murder-for-hire plot was motivated by fear that gift giving could influence juries in defendant's upcoming trials).

\textsuperscript{76} See Hirschfeld's Embrace, supra note 1, at 26; Clinton Impeachment Update, BULL'S FRONTRUNNER, Dec. 7, 1998 (discussing Clinton's influence on jury in his trial).

\textsuperscript{77} Hirschfeld's Embrace, supra note 1, at 26 (indicating that payoffs destroy integrity of judicial process); Clinton's Impeachment Update, supra note 76 (suggesting Clinton's jury may have been influenced).

\textsuperscript{78} See generally Kirst, supra, note 2, at 1-3 (discussing historic role of jury).

\textsuperscript{79} See Hirschfeld's Embrace, supra note 1, at 26 (stating that Hirschfeld was "so grateful that the jurors had deadlocked...he decided to share some of his good fortune with them"); Estrich, supra note 27, at H-02 (questioning whether "even the best-intentioned among us" could remain uninfluenced, "even unconsciously, by the prospect of a significant reward from a grateful defendant"); Maul, supra note 44, at A6 (reporting Assistant District Attorney Gilda Marian's complaint that "Hirschfeld's gift-giving could influence juries in his upcoming trials"); Wickham, supra note 27 (indicating money paid out will have "ripple effect" on jurors).

\textsuperscript{80} See Maul, supra note 44, at A6.
on trial, it could be successfully employed by a select few. It would be particularly useful for rich media figures, such as celebrities, or perhaps even members of organized crime.

V. WHAT SHOULD BE DONE TO STOP THIS?

One possible solution to this problem is to screen subsequent potential jurors to eliminate those with knowledge of previous payoffs. Screening should eliminate some of the risk but it may not altogether be sufficient. If the story had already been published or transmitted by the media the voir dire process may become drawn out because it may take significantly longer to select jurors without knowledge of the previous payments. In addition, there is always the risk of a latent memory in jurors who read the article or heard media reports on the topic. Furthermore, a person interested in a payoff may be willing to lie during voir dire in order to gain a position on the jury. Therefore, although careful screening of jurors is vital, standing alone it is not enough to close the loophole.

81 See generally Haberman, supra note 27 at B1 (discussing factors which contributed to Hirschfeld situation); Rohde, supra note 34, at 7 (discussing accusations against Hirschfeld); ABC News Special Report (ABC News, Dec. 19, 1998) (discussing allegations against President Clinton).

82 See Haberman, supra note 27, at B1 (quoting Stephen Gillers, New York University professor of legal ethics, who claims that "If Hirschfeld can do this, then organized crime can do it even more effectively"). See generally Rohde, supra note 34, at 7 (discussing steps allegedly taken by Hirschfeld to influence jurors).

83 See Norbert L. Kerr et al., The Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: an Empirical Study, 40 AM. U. L. Rev. 665, 697 (1991) (noting that study results indicated that "the net effect of careful voir dire concerning pretrial publicity... was nil, and the bias created by the publicity survived voir dire unscathed"). But see id. at 667 (noting that "there is widespread confidence that a careful and extensive voir dire is highly effective in eliminating bias created by pre-trial publicity").

84 But see Brofford v. Marshall, 751 F.2d 845, 849-51 (6th Cir. 1985) (stating that court indicated that length of time expended in voir dire is not logically related to whether each juror selected was thoroughly questioned since determination of juror partiality is one of fact and that court compares two incidents that received media attention; for one case voir dire process took only three hours while in other it lasted ten days).

85 See Kerr supra note 83, at 698-99 (speculating on effects of exposure to pretrial publicity over time with respect to forgotten or confused details of this publicity at time of voir dire).

86 See generally Newton N. Minow and Fred H. Cate, Who is an Impartial Juror in the Age of Mass Media?, 40 AM. U.L. Rev. 631, 650 (1991) ("Many critics charge that voir dire fails to elicit accurate or honest responses from potential jurors, or members of the venire [and that] [r]epeated studies have concluded that jurors tend not to speak out during voir dire, nor admit to their true prejudices and preconceptions[;] [f]urthermore, jurors may even lie during open court questioning"). But see Marcy Strauss, Sequestration, 24 AM. J. CRIM. L. 63, 95 n.146 (1996) (discussing that "[t]he idea that a juror would lie during voir dire rests on a group of questionable assumptions, including the assumption that a juror would intentionally risk breaking a federal law and that an attorney would not be able to recognize that a juror is lying").
Another possible and problematic scenario exists if the subsequent jury has already been selected or the act is not publicized until after the jury has been selected.\(^7\) It seems impractical to sequester a jury based upon the possibility of a payoff. A serious inquiry is whether a mistrial should be declared if jurors learn of such actions on the part of a litigant.\(^8\) Hopefully such a drastic outcome can be avoided altogether by amending the New York Penal Code.

The existing safeguards against jury tampering have proven ineffective in dealing with situations exemplified by the Hirschfeld scenario.\(^9\) It is clear that a problem exists and needs to be rectified.

The New York Penal Code needs to be amended in order to explicitly condemn the practice by litigants of rewarding jurors for favorable verdicts.\(^9\) The legislative changes required would be fairly minor.\(^9\) New York Penal Law §215.19, concerning bribing a

\[87\] See generally Rohde supra note 34, at 7 (indicating Supreme Court justices barred Hirschfeld from taking out newspaper ads or paying jurors but prosecutor subsequently accused him of trying to tamper with jury by taking out favorable newspaper ads, leaving copy of flattering editorial near jury room and holding demonstration outside courthouse to proclaim his innocence while jurors entered). But see Strauss, supra note 86, at 95 (arguing that if voir dire is successful there is no risk because “a system of admonishments coupled with judicial questioning if prejudicial information is leaked by the press would successfully protected the defendant’s right”).

\[88\] See United States v. Phillips, 664 F.2d 971, 996-97 (5th Cir. 1981), superseded by statute as stated in United States v. Stratton, 779 F.2d 820 (2d Cir. 1985) (discussing that court denied motions to declare mistrial after one of appellants was charged with offering bribe to juror and that juror was indicted and remainder of jury sequestered for four days; alternate juror was then discharged after she inadvertently learned of event). See generally Elizabeth Williams, Stranger’s Alleged Communication with Juror, Other than Threat of Violence, as Prejudicial in Federal Criminal Prosecution, 131 A.L.R. 465 (1999) (asserting that mistrial is discussed in context of stranger’s communication or alleged communication with juror and that “stranger” as defined here may include defendant).

\[89\] See Haberman, supra note 27, at B1 (reporting that officials recognize need for “a new law that closes present loopholes and bans any such payment to a juror, including post-verdict”); Rohde, supra note 34, at 7 (stating that Hirschfeld tried to influence jury with newspaper ads); How Idaho’s Delegates in Washington Voted, IDAHO STATESMAN, May 12, 1996 (discussing bill that would increase penalties for jury tampering); Mark Z. Barbak, Domestic News, UNITED PRESS INT’L, July 26, 1984 (discussing suspicion that present measures are not enough to prevent Delorean from tampering with jury).

\[90\] See Aaron Chambers, Tipping’ Jurors by Parties to Case a No-No under New Bill, CHIC. DAILY BULL., Jan. 13, 2000, at 1 (indicating legislation, prompted by Hirschfeld situation, was introduced in Illinois to expressly prohibit rewarding jurors); Estrich, supra note 27, at H-02 (stating New York should prohibit gifts after trial); Haberman, supra note 27, at B1 (indicating officials at Manhattan District Attorney’s office are talking about pushing for new law to close present loopholes and ban any such post-verdict payment to jurors); see also Hirschfeld’s Embrace, supra note 1, at 26 (calling for amendments to New Jersey’s laws and rules of court to ensure that it is unlawful for litigants to reward jurors for favorable verdicts).

juror, should include language making it illegal for a person to intentionally or knowingly lead a jury to reasonably believe he will confer a benefit upon that juror in exchange for influence over such juror’s vote or other action as a juror. That is, absent some pre-existing relationship between the parties, the statute should explicitly prohibit post-trial jury payments or gifts. “Tampering with a Juror,” pursuant to §§215.23 and 215.25, likewise should incorporate the notion of post-trial payment or benefit to a juror based on that juror’s service. This would expressly prohibit payoffs like those made by Mr. Hirschfeld and subject such actions to criminal sanctions.

Broadening the definition of “Misconduct by a Juror” under §§215.28 and 215.30 would also further the idea that all jury tampering needs to be hampered. The penal law should include a prohibition of acceptance or agreement to accept a payment or benefit from a defendant during or after the action or proceeding. This modification would restrict juror behavior directly. Presumably the fear of criminal sanctions would be enough to make potential punishment for jury tampering under 18 U.S.C.S. §1503); Gerald T. Wetherington et al., Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers, 51 FLA. L. REV. 425, 437 (1999) (discussing options to avoid jury tampering).


93 See Chambers, supra note 90, at 1 (indicating Illinois’ proposed legislation expressly prohibits “offering or paying a juror an award or fee”). See generally Hirschfeld’s Embrace, supra note 1, at 26 (stating defendant should not be allowed to reward jurors); Michael J. Kaplan, Construction and Application of 18 U.S.C.A. §1503 Making It a Federal Offense to Endeavor to Influence, Intimidate, Impede, or Injure Witness, Juror, or Officer in Federal Court, or to Obstruct the Due Administration of Justice, 20 A.L.R. 731 (1999) (discussing gifts); Wetherington, supra note 91, at 437 (discussing jury tampering).

94 See N.Y. PENAL LAW §215.23 (McKinney 1998) (making tampering with juror criminal (second degree)); N.Y. PENAL LAW §215.25 (McKinney 1998) (making tampering with juror criminal (first degree)).


96 See Chambers, supra note 90, at 1 (indicating Illinois’ proposed legislation expressly prohibits “a juror from accepting an award or fee from a plaintiff or defendant”). See generally Hirschfeld’s Embrace, supra note 1, at 26 (discussing ways to prohibit post-verdict juror reward); Haberman, supra note 27, at B1 (stating that jurors will likely give favorable verdict for post-verdict reward).
jurors reluctant to accept such gifts and discourage defendants from offering them.

VI. POTENTIAL PROBLEMS

At first glance it may appear that the proposed statutory amendments raise a corpus delecti issue. At the time a payment or gift is made to a post-verdict jury, it is impossible to determine if a subsequent jury will be swayed. But if the act of paying or gifting the jury is treated as an attempt to sway subsequent jurors, the crime is complete when the attempt is made. It is an approach reminiscent to that employed under common law embracery.

Admittedly, proving intent or knowledge on the part of the offending litigant will also present some difficulty. Certain permissible inferences can be employed to show the requisite mental state. A substantial gift given by a litigant to a former

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98 See generally Hirschfeld's Embrace, supra note 1, at 26 (stating juror could deny accepting gift as compensation for verdict).

99 See id. (citing statutes criminalizing jury gifts).


101 See also Ariel L. Bendor, Prior Restraint, Incommensurability, and the Constitutionalism of Means, 68 Fordham L. Rev. 289, 340 (1999) (discussing requisite mental state for crime); Peter J. Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 Wash. U. L.Q. 713, 797 (1999) (discussing requisite mental state for criminal act); Pillsbury supra note 101, at 132 (stating that courts have permitted juries to infer intent or knowledge from other evidence such as natural and probable consequences of defendants conduct); William H.J. Hubbard, Comment, Civil Settlement during Rape Prosecutions, 66 U. Chi. L. Rev. 1231, 1260 n.67 (1999) (discussing requisite mental state for obstruction of justice).
juror closely following an acquittal or victory should result in a permissible inference of the intent on the part of the litigant to influence future jurors.\textsuperscript{103} Such inferences are routinely employed in New York to establish knowledge or intent in other crimes.\textsuperscript{104}

For example, "[w]hen the drawer of a check has insufficient funds with the drawee to cover it at the time of utterance, the subscribing drawer or representative drawer, as the case may be, is presumed to know of such insufficiency."\textsuperscript{105} The presumption is rebuttable and certain affirmative defenses are also allowed to countermand an allegation of issuing a bad check.\textsuperscript{106} Similarly, the intent to kill is a permissible inference when a person uses a deadly weapon to assault another and that assault is directed at a vital organ.\textsuperscript{107} The reasonable juror may infer from the nature of the wounds that the attacker intended to kill the victim.\textsuperscript{108}


\textsuperscript{105} See N.Y. PENAL LAW §190.10 (McKinney 1998); see also A. Michael Weber et al., \textit{Drafting Employment Agreements}, 1155 P.L.I. 573, 588 (1999) (discussing rebuttable presumption).


\textsuperscript{108} See Stern v. Morgenthau, 465 N.E.2d 349, 349-50 (N.Y. 1984) (discussing powers of grand jury); People v. Rodrigue, 63 A.D.2d 919, 919-20 (N.Y. App. Div. 1978) (discussing intent that can be drawn from action of firing gun in direction of police officer); People v. Dinsen, 121 A.D. 738, 739 (N.Y. App. Div. 1907) (stating "the law presumes a person to intend the natural and probable consequences of his own acts" and that this rule of presumption has been "invoked to furnish evidence of the design or intent to produce death which is an essential element of the crime of murder ... where the assault which resulted in death has been committed with a murderous weapon").
Another alternative is to remove knowledge and intent from that particular clause of the crime and make it a strict liability element, similar to criminal possession of a controlled substance pursuant to §220.21, where knowledge of the weight of the drugs is a strict liability element, or New York’s statutory rape provisions which also include a strict liability element, namely, knowledge of the victims’ age. A gift or payment by a litigant, or someone acting on a litigant’s behalf, could be made illegal regardless of the litigant’s intentions.

VII. CONCLUSION

Clearly the current protection of New York’s jury system is inadequate. De facto jury tampering is occurring and goes unpunished. This loophole threatens the integrity of our judicial system. The independent judgment of jury members may be compromised or, at the very least, the existence of a post-verdict jury payoff creates an appearance of impropriety. There is a need for reform. Despite potential shortcomings, proposed statutory

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110 See N.Y. PENAL LAW §15.20 (4) (McKinney 1998) (stating that "[n]otwithstanding the use of the term 'knowingly' in any provision of this chapter defining an offense in which the aggregate weight of a controlled substance or marihuana is an element, knowledge by the defendant of the aggregate weight of such controlled substance or marihuana is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefore that the defendant did not know the aggregate weight of the controlled substance or marihuana"); see generally N.Y. PENAL LAW §220.00 (1998) (criminalizing sale of controlled substances); Gerard E. Lynch, Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part, 2 BUFF. CRIM. L. REV. 297, 349 n.38 (citing §220.21); Spiros A. Tsimbinos, Is It Time to Change the Rockefeller Drug Laws?, 13 ST. JOHN’S J. LEGAL COMMENT. 613, 634 n.36 (1999) (discussing §220.21).

111 See N.Y. PENAL LAW §15.20 (3) (McKinney 1998) (stating that "Notwithstanding the use of the term 'knowingly' in any provision of this chapter defining an offense in which the age of a child is an element thereof, knowledge by the defendant of the age of such child is not an element of any such offense and it is not, unless expressly so provided, a defense to a prosecution therefore that the defendant did not know the age of the child or believed such age to be the same as or greater than that specified in the statute"); N.Y. PENAL LAW §§130.25 - 130.35 (McKinney 1998) (prohibiting rape of minor); see also Rigel Oliveri, Note, Statutory Rape Law and Enforcement in the Wake of Welfare Reform, 52 STAN. L. REV. 463, 476 (2000) (discussing statutory rape law in New York). See generally Bleichmar, supra note 109, at 153 (stating statutory rape is strict liability crime).
amendments could counter the effects of post-trial jury payoffs that have already occurred in New York's judicial system and prevent further abuse by closing the existing loophole.

Erica Summer