Who Watches the Jurors? The Changing Limitations on Juries and Their Activities Outside of the Courtroom

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ABSTRACT

In United States v. Esso, Defendant, George Esso (Esso), was convicted of two charges arising from a mortgage fraud scheme. During his trial, the jury was allowed to take home a copy of the indictment to read overnight, despite objections from Esso. Esso was convicted on all counts and appealed, claiming that he was denied a fair trial pursuant to the Sixth Amendment and by extension denied his Fifth Amendment right to Due Process. As a matter of first impression, the U.S. Court of Appeals for the Second Circuit ruled that so long as jury deliberations have begun and appropriate cautionary instructions are provided, permitting the jury to take an indictment home overnight does not deprive a defendant of a fair trial. The court reasoned that the jury was given clear limiting instructions on what was allowed, and more importantly not allowed, when reading the indictment in their homes. The court held that the ease of access to outside information for jurors via technology and the Internet is a marginal additional risk and did not outweigh the benefits of alleviating the busy schedule of the courts. Therefore, despite decades of practice to the contrary, the court upheld Esso’s conviction. Increased ease of access to this type of information is precisely why courts should be even more cautious about letting trial documents outside the regulated confines of the courtroom. Specific provisions of the Constitution and the carefully worded rules of evidence were put in place for a reason: to ensure that a trial is as fair as possible and that jurors have not only come to a correct decision, but a just and impartial decision as well. The Second Circuit dismissed this unprece-}

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dented decision as being a minor change to improve efficiency, relying on the jurors’ honesty and integrity to justify their reasoning. Despite the court’s cautioning that this holding should not be treated as a general endorsement of letting a jury take court materials home, two cases have already relied on Esso to similarly justify allowing the jury to take various documents home to read overnight. The classic “slippery slope” argument has never been more appropriate than in describing the potential problems this precedent will cause for future criminal courts and defendants.

I. INTRODUCTION

The right to trial by jury is among the most sacred rights imbued within our legal system.1 The Fifth Amendment states that no one shall be deprived of life, liberty, or property without due process of law.2 The Sixth Amendment states that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State.3 Therefore, it is a basic requirement of due process that any accused who requested a jury be provided a panel of his peers that are impartial and indifferent.4 This is basic knowledge that even middle school children can rattle off the top of their heads. But in practice, in an overburdened judicial system, how do all these requirements play out, and how do courts define impartiality and what constitutes a “fair” trial?

Even before the Declaration of Independence was written, the First Continental Congress protected the right to a jury trial.5 The Framers themselves quickly developed enthusiastic support for a jury system.6 In 1835, Alexis de Tocqueville described the jury as a “means of making the majority prevail.”7 President Jefferson even thought that “the jury [was a] more vital instrument of democracy than the popular election of legislators.”8

2. U.S. Const. amend. V.
3. U.S. Const. amend. VI.
6. Id.
7. Id. at 876 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 283 (Alfred A. Knopf ed., Henry Reeve trans., 1945)).
8. Id. at 927.
The jury structure is a constant within the court system, and does not undergo change often. Jurors are meant to be unbiased and unprejudiced when coming to a decision—a necessary corollary of the right to a fair trial—and this means that restrictions are placed on jurors and the admission of evidence presented to them. The court’s holding in United States v. Esso flies in the face of over two hundred years of this legal precedent.

In United States v. Esso, the U.S. Court of Appeals for the Second Circuit held that permitting jurors to take an indictment home to read overnight did not deny the Defendant his right to a fair trial by an impartial jury. This is the first time a court has made a determination about a jury taking home an indictment, and there may be more consequences to this decision than those on its surface. The court erred in holding that the jury’s actions did not violate the right to a fair trial; allowing this activity violated the Defendant’s constitutional rights. It has already lead to overbroad extensions of the principle in violation of other defendants’ sacred trial rights, and as this Comment will explore, has the potential for causing much greater harm.

Part II of this Comment presents an in-depth look into the background of jury impartiality. Part III examines the relevant facts of Esso, the holding and reasoning of the Second Circuit, and the relevant law used in the case. Part IV provides an analysis of how Esso has impacted the law surrounding juries; comments on the evolution of the modern day jury; reviews how the strict constitutional requirements for impartiality have been stretched; and considers the immediate and long-term consequences of the decision in Esso. Part V concludes this Comment.

II. BACKGROUND

A. History of Jury Impartiality and the Right to a Fair Trial

The right to an impartial jury is deeply embedded in American jurisprudence and is so essential to a fair trial that its violation cannot be considered harmless error. It is the job of the trial court to ensure that an unbi-
ased jury hears a case.\textsuperscript{16} Diligent scrutiny is required to protect the accused and must be safeguarded by the courts.\textsuperscript{17} Impartiality requires that jurors be free from bias for or against either side in a case.\textsuperscript{18} A juror must be impartial at the very start of trial, and be influenced only by legal and competent evidence produced during a trial.\textsuperscript{19} Any kind of outside influence that may compromise a jury’s decision aside from the evidence and instructions cannot be allowed.\textsuperscript{20} If a juror’s opinion as to the guilt or innocence of a party was formed before trial, they are not competent to determine the outcome.\textsuperscript{21} Even a single biased juror cannot be ignored in light of the Sixth Amendment requirement for an impartial jury.\textsuperscript{22} Despite these requirements, there is no definite set of rules to establish impartiality or lack thereof, and each case must be examined under its own set of facts.\textsuperscript{23}

Jury deliberation is another practice that is greatly respected in the legal system.\textsuperscript{24} It is, in essence, engaging in the freedom of debate and discussion amongst a group of peers.\textsuperscript{25} The value of jurors deliberating together in privacy is that a just consensus is reached “through a thoroughgoing exchange of ideas and impressions.”\textsuperscript{26} The point of having a jury at trial is that jurors are to reach a decision as a collective body, not separately or in smaller groups.\textsuperscript{27} They are meant to operate as co-dependents—as a collective.\textsuperscript{28} Jurors must not engage in discussion before being presented with all legal evidence and a court’s instructions.\textsuperscript{29} Once presented with all evidence and properly instructed, a jury begins to formally deliberate as a collective body.\textsuperscript{30} While the origins of this rule are unknown, it is a practice used by all courts, both at the state and federal levels.\textsuperscript{31}

\textsuperscript{17} Artisst v. United States, 554 A.2d 327, 331 (D.C. 1989).
\textsuperscript{18} See Hayes v. Missouri, 120 U.S. 68, 69-70 (1887).
\textsuperscript{21} Temple v. Moses, 8 S.E.2d 262, 268 (Va. 1940).
\textsuperscript{22} United States v. Martinez-Martinez, 369 F.3d 1076, 1081 (9th Cir. 2004); see also Neb. Press Ass’n v. Stuart, 427 U.S. 539, 551 (1976) (“[T]rial by jury in criminal cases is fundamental to the American scheme of justice.”).
\textsuperscript{24} See United States v. Jadlowe, 628 F.3d 11, 18 (1st Cir. 2010); United States v. Cox, 324 F.3d 77, 86 (2d Cir. 2003); United States v. Resko, 3 F.3d 684, 688-89 (3d Cir. 1993).
\textsuperscript{25} See Clark v. United States, 289 U.S. 1, 13 (1933).
\textsuperscript{26} United States v. Thomas, 116 F.3d 606, 619 (2d Cir. 1997).
\textsuperscript{27} Cox, 324 F.3d at 86.
\textsuperscript{28} Resko, 3 F.3d at 688-89.
\textsuperscript{29} Id. at 688.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 688-89.
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Making sure no premature deliberations have occurred “is a critical and important duty and cannot be over-emphasized.” 32 The discussion of a group of decision-makers “is an integral part of deliberations.” 33 Jury deliberations “must be zealously guarded from any impermissible encroachment if the [jury] system is to survive.” 34 The legal system constantly seeks to balance the jury deliberation process while trying to avoid having decisions tainted by jury misconduct. 35 More generally, a jury trial should be free from any extraneous influences. 36 A defendant is entitled to a verdict provided by an impartial jury free from any improper extrinsic evidence. 37

III. UNITED STATES V. ESSE

A. The Facts

The Defendant, George Esso (Esso), was a loan officer working for the branch office of a mortgage brokerage, GuyAmerican Funding Corp. (GuyAmerican). 38 Part of Esso’s job was to recruit buyers to purchase properties through the office of GuyAmerican. 39 However, none of these borrowers actually qualified for the loans they were applying for. 40 Esso, with assistance from his manager, Peggy Persaud, wrote false information down on the loan applications. 41 Esso and six other individuals (Defendants) continued this practice from 2006 to 2007. 42 On July 26, 2010, the Defendants were indicted for participating in this mortgage fraud scheme. 43 Esso was charged with violation of 18 U.S.C. § 1349 (conspiracy to commit wire and bank fraud), and violation of 18 U.S.C. § 1344 (bank fraud). 44

After the jury deliberated for about one hour they sent two notes to the court: the first stated that they would be leaving shortly and returning the

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32. Id. at 689 (quoting United States v. Wiesner, 789 F.2d 1264, 1269 n.3 (7th Cir. 1986)).
34. United States v. Thomas, 116 F.3d 606, 619 (2d Cir. 1997) (quoting United States v. Antar, 38 F.3d 1348, 1367 (3d Cir. 1994)).
37. Id.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
next morning at 10 a.m. for further deliberations; and the second was a request asking if they could take the indictment home to read overnight. Over an objection from Esso’s attorney, the district court allowed the jury to take the indictment home. The court instructed them as follows:

[N]ot to show it to a spouse, not to show it to a grown child, not to show it to anyone. Just if you want to read it quietly, it’s the same thing as reading it here in the jury room tomorrow morning at ten, it just saves some time. But you have to be able to follow that instruction. Anybody have any doubt about being able to follow that instruction? Nobody has any doubt. OK.

The redacted indictment that members of the jury took home with them was twenty pages long, and contained sections that outlined the general mortgage fraud scheme; the fraudulent preparations of the loan applications; and a summary of the charges brought against the Defendants. The jury returned the next morning and deliberated for approximately five hours. Afterward, they returned a verdict and Esso was convicted on all counts. Esso was sentenced to one year and one day in prison. Esso appealed his conviction, arguing that the district court had erred by allowing the members of the jury to take the indictment home to read. He further argued that as a result of that violation he did not receive a fair trial, and his constitutional rights were infringed.

B. On Appeal

This was an issue of first impression for the Second Circuit, and a first of its kind for any court—state or federal. Despite the fact that the Second Circuit stated outright that it doubted “the wisdom of the practice,” and urged the district courts to use caution if they are going to consider allowing the practice, they did not find anything awry with letting the jury take the indictment home to read. On that ground, the court held that Esso was not deprived of a fair trial.
1. The Court’s Reasoning

The Second Circuit made it clear that this holding should not be considered an endorsement for allowing jurors to take court documents home, but nevertheless the lower court did not commit an error.57 Because the instructions given by the lower court were clear and “uncomplicated,” such action did not deprive Esso of a fair trial.58 There was no evidence that the jury did not in fact follow the instruction, relying on the presupposition of the jury’s honesty and integrity.59 The lower court recognized that the jury was trying to save some time, and therefore impressed upon them that the indictment was not to receive any particular importance or weight.60

The court noted that there are several practices allowed in courtrooms that were unheard of one hundred years ago that “are now commonplace,” such as allowing jurors to take notes.61 Given the ease of access to information, outside research in the age of electronics is a real risk; the court deemed taking an indictment home a small risk compared to the risk that jurors would research the case on the Internet if denied the opportunity to read the indictment.62 Again, emphasizing that this holding should not be considered an endorsement to relax the restrictions placed on juries, the court nevertheless affirmed the conviction.63 The court held that “[t]he Constitution does not prohibit every practice that may appear of questionable value,” and the judges of trial courts are fully capable of assessing if this practice is for the best or not.64

C. Insulating the Jury

The Second Circuit noted that it is a long recognized principle that trial courts may allow jurors to take a copy of an indictment in the jury room, as long as they are instructed that it is not evidence.65 This can be accomplished by giving clear jury instructions regarding the indictment.66 The

57. Id. at 352.
58. Id.
59. Id. at 352, 354.
60. Id. at 354.
61. Id.
62. Id. at 352.
63. Id. at 354. In a different case, the Second Circuit vacated Esso’s sentence and remanded it back to the district court because Esso received a much longer sentence than his co-defendant, despite the fact that Esso was less culpable. See generally United States v. Esso, 486 F. App’x. 200 (2d Cir. 2012).
64. Esso, 684 F.3d at 354.
65. Id. at 350 (citing United States v. Giampino, 680 F.2d 898, 901 n.3 (2d Cir. 1982)).
66. Id. (citing United States v. Press, 336 F.2d 1003, 1016-17 (2d Cir. 1964)).
court fully recognizes that there is risk associated with allowing jurors to take court documents like an indictment home with them.67 Sending such materials home increases the chance of exposing the jury to outside influence.68

The court relied on *Sheppard v. Maxwell*, in which a state trial judge did not properly protect the Defendant from the prejudicial publicity surrounding the case.69 The Supreme Court in *Sheppard* was aware that “unfair and prejudicial news” was becoming increasingly prevalent in modern day trials.70 This was due to the pervasiveness of modern communications and the saturation of media surrounding such publicized trials.71

Again, drawing on language from *Sheppard*, the Second Circuit stated that a requirement of due process is that an accused has a right to an impartial jury free from outside influence.72 The jury system is designed to facilitate decision-making as a collective activity, a method at the heart of due process.73 Yet, as long as appropriate cautionary instructions are provided to the jurors beforehand, this does not automatically result in a deprivation of a fair trial.74 The Second Circuit further noted that it is not realistic to forbid jurors from all thought about the case outside of the courtroom.75 In fact, the court considered the potential benefits of allowing jurors to privately deliberate, such as jurors being able to participate more thoughtfully in the collective process afterwards.76

In considering the importance of jury instruction, the Second Circuit noted that in the present case there is no evidence that the members of the jury disregarded their instructions in any way.77 The law assumes that juries follow limiting instructions.78 The general presumption is that jurors

67. *Id.* at 351.
68. *Id.*
69. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966). This was a highly publicized case in which the Defendant, Sheppard, was convicted of second-degree murder of his wife. *Id.* at 335. The jurors were exposed to great amounts of misinformation through the press, and were not properly sequestered by the court. *Id.* at 335, 353.
70. *Id.* at 362.
71. *Id.* at 356.
73. *Id.* (citing United States v. Resko, 3 F.3d 684, 689 (3d Cir. 1993)). In *United States v. Resko*, the court found through a questionnaire that all jurors had prematurely discussed the case. *Resko*, 3 F.3d at 686.
75. *Id.* at 351 (citing People v. Ledesma, 140 P.3d 657, 722 (Cal. 2006)).
76. *Id.*
77. *Id.* at 352.
78. *Id.* (citing United States v. Snyope, 441 F.3d 119, 129 (2d Cir. 2006)).
remain honest to their oath unless there is evidence to the contrary. However, the court also noted that such a presumption can “evaporate” when instructions demand “mental acrobatics” of the jurors, especially if the instructions are unclear or overly complicated.

The court recognized that courtrooms have undergone significant evolution in terms of what actions are and are not allowed by jurors. For example, note taking was once considered improper and forbidden. Now, it is under the trial court’s discretion whether or not to allow jurors to take notes. A public policy argument—allowing jurors to partake in outside deliberation saves the court’s time—was also persuasive. The court reiterated that this should not be taken as a general endorsement of the practice allowing jurors to take court documents home, but in the present case, there was no error. Despite the risks, the trial court did not commit an error in the eyes of the Second Circuit.

IV. ANALYSIS

In the case of United States v. Esso, while the Second Circuit’s reasoning follows logic and practicality, there are some serious issues that the court does not address or does not address thoroughly enough. The court’s conclusion rests on three primary arguments: first, the presumption that juries follow limiting instructions; second, the collective deliberating process of jurors was not affected by taking the indictment home; and third, the urging that this should not be considered a general endorsement for allowing jurors to take court documents home.

A. Presumption of Honesty and Integrity

The law presumes that juries will be able to follow the limiting instructions given to them, and unless there is evidence to the contrary, jurors are presumed to behave with honesty and integrity. Unless a juror would be forced to undergo the aforementioned “mental gymnastic[s]” in order to follow the instructions given by the judge, the assumption stays firm.
Esso court adopted language from United States v. Snype\textsuperscript{90} when describing these instances.\textsuperscript{91} Courts have used this as a test to determine if a limiting instruction to the jury was adequate or not.\textsuperscript{92}

In addition, courts hold that limiting instructions are enough to limit and curtail any outside information.\textsuperscript{93} There are extreme cases in which there is some doubt that a juror acted improperly, such as when a juror states outright that they have made up their mind about the trial well in advance of deliberations.\textsuperscript{94} Yet, the rule that juries “follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”\textsuperscript{95} Instructions given by the court can only minimize prejudicial effect, and do not, unfortunately, entirely eliminate the risk of any undue prejudice.\textsuperscript{96} These are the general rules used by the courts, and more importantly, by the Second Circuit in Esso.\textsuperscript{97}

1. The Danger in the Age of Electronics

The presumption that jurors follow limiting instructions must give way when there is a substantial risk that jurors will not heed them. There are practical, human limitations of the jury system that the courts cannot ignore.\textsuperscript{98} When the jurors are outside of the courtroom, they are completely away from the oversight, rules, and regulations of the court, and are susceptible to the influences of their home.\textsuperscript{99} Away from the structure of the courthouse, jurors may feel more inclined to transgress instructions, especially if they feel they would be minor or would not make a difference to the trial.\textsuperscript{100} It isn’t practical to expect a member of a jury to avoid the Internet for over twelve hours, let alone to expect them to abstain from all electronic communication. It is unrealistic for jurors to remain completely isolated during their time outside the courtroom, and a court document in their

\textsuperscript{90} Snype, 441 F.3d at 130.
\textsuperscript{91} Esso, 684 F.3d at 352.
\textsuperscript{92} See Snype, 441 F.3d at 130; United States v. Jones, 16 F.3d 487, 493 (2d Cir. 1994).
\textsuperscript{93} See Bruton v. United States, 391 U.S. 123, 135 (1968); Snype, 441 F.3d at 129; United States v. Downing, 297 F.3d 52, 59 (2d Cir. 2002); United States v. Salameh, 152 F.3d 88, 116 (2d Cir. 1998).
\textsuperscript{94} United States v. Augustin, 661 F.3d 1105, 1129 (11th Cir. 2011).
\textsuperscript{95} Richardson v. Marsh, 481 U.S. 200, 211 (1987).
\textsuperscript{96} United States v. Curley, 639 F.3d 50, 57 (2d Cir. 2011).
\textsuperscript{97} See United States v. Esso, 684 F.3d 347, 351-52 (2d Cir. 2012).
\textsuperscript{98} Richardson, 481 U.S. at 211.
\textsuperscript{99} See id.
\textsuperscript{100} See id.
hand while in the comfort of home can lead to certain temptations.

The “mental gymnastics” test used by the Second Circuit only measures the difficulty of the instructions given, and not the difficulty the juror may have in understanding the court document.\textsuperscript{101} In this instance, the court document was the indictment.\textsuperscript{102} A twenty-page indictment dealing with mortgage fraud would not necessarily be the easiest document to understand.\textsuperscript{103} It creates a strong temptation to consult outside sources and it is incredibly easy to do so outside the confines of the jury room with the indictment in hand. The test for overly difficult jury instructions does not consider this,\textsuperscript{104} and the \textit{Esso} court did not address this potential problem either.\textsuperscript{105} Using a standard that does not fully encompass nor address the potential problems in taking a court document home is one way the Second Circuit committed error.

The court in \textit{Esso} touched on the fact that with the advent of electronics, accessing outside information is easier than ever, so allowing jurors to take an indictment home only slightly increases any risk of outside influence.\textsuperscript{106} However, the analysis stops short of fully considering the extent to which outside information is accessible.\textsuperscript{107} Online activity is embedded in almost everyone’s daily life.\textsuperscript{108} While a juror may be able to avoid a newspaper or online articles, they may still casually find themselves on Facebook or Twitter or even checking their email.\textsuperscript{109} One of the major cases cited by the Second Circuit in \textit{Esso} discussed this very concern; in \textit{Sheppard} the court expressed concern that outside, potentially prejudicial knowledge during trial is becoming more and more frequent.\textsuperscript{110} Modern forms of communications are making it more and more difficult to balance the weight of public opinion against an accused.\textsuperscript{111} Not only is it the duty of the trial court to take steps to protect the process from prejudicial influence, it is also the duty of the appellate courts to make an independent evaluation of the circumstances.\textsuperscript{112}

\textsuperscript{101} See Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).
\textsuperscript{102} See id.
\textsuperscript{103} See United States v. Esso, 684 F.3d 347, 350 (2d Cir. 2012).
\textsuperscript{104} See Nash, 54 F.2d at 1007.
\textsuperscript{105} See Esso, 684 F.3d at 347.
\textsuperscript{106} Id. at 352.
\textsuperscript{107} Id.
\textsuperscript{109} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 362-63.
The rules of evidence already cause jurors endless frustration, as many want to know the whole picture and find the exclusionary methods of the judicial system intolerable. Jurors often feel left in the dark when it comes to cases they are supposed to be deciding. This is nothing new. What is changing—and what courts must take note of—is that jurors can now do something about this lack of information. In today’s world of Google, Wikipedia, blogs, criminal records databases, social networking pages, and online news sources, it is easier than ever to find information about almost anything.

The problem with the ease of access to information is that information gathered may be incomplete or even completely false. In United States v. Hernandez, the judge discovered that eight of the twelve jurors conducted research about the case during the course of deliberations. While not every case is so sensational, there is an increase in instances of jurors doing outside research on the web. Even more egregious is the growing number of jurors engaging in unauthorized legal research, such as double-checking legal terms, definitions, and sentencing information. Courts must recognize that these problems are real, and happening both inside and outside the confines of the courtroom.

B. Esso and the Practicalities of Outside Deliberations

In Esso, when the court allowed the jurors to take the indictment home with them, it was akin to allowing them to deliberate in private and outside the moderation of the court. It encouraged the jurors to think about the case outside of the courtroom and to form opinions by themselves instead of engaging in the thought process with their fellow jurors. This is contrary to the foundational premise of the jury system; outside of the confines of the jury room, the court cannot shield jurors from potential external influences, and cannot ensure that the jurors have optimal conditions for re-

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114. Id. at 1586.
115. Id.
116. Id.
117. Id. at 1584.
120. Id. at 1593.
122. Id.
viewing important documents. The court cannot prevent a juror’s family, friends, or acquaintances from discussing the document or any other materials the jurors have taken home. In addition, an indictment is not a piece of evidence. In the absence of proper instruction, a juror may treat it as such, thus giving the indictment more emphasis than is proper.

Realistically, it is not possible to forbid jurors from engaging in contemplation or debate before deliberation commences. It is not within the scope of humanity to make that kind of restriction. However, jury restrictions are put in place for a reason: to ensure that the defendant in a criminal case has as fair a trial as possible. With so many restrictions enforced to carefully create an environment free of improper influence for jurors to deliberate without prejudice, it is illogical to make it so easy to engage in misconduct. While courts certainly have a decent amount of discretion in determining what is best for the case at hand, it is contradictory to allow a practice that further harms an important part of the court system. It is impossible to halt a juror’s thought process outside of the courtroom, but there is no wisdom in setting a precedent for a practice that encourages such behavior.

C. The Slippery Slope

The Second Circuit’s decision in Esso makes way for a number of potential problems. The court dismisses the reality that taking an indictment home only encourages jurors to do outside research, especially when such

123. See John H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Sources, 96 COLUM. L. REV. 1168, 1195 (1996) (“Our law of evidence strives to prevent error by excluding from jurors information that might mislead them.”); see also Turner v. Louisiana, 379 U.S. 466, 472-73 (1965) (“In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the ‘evidence developed’ against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.”).

124. See Morrison, supra note 108, at 1611 (“There is little doubt that if jurors were forced to sit idly in courtrooms, unable to contact work except by payphone, and then were separated from friends and family for the duration of every trial, large numbers of people would refuse to participate.”).

125. See, e.g., Esso, 684 F.3d at 350 (quoting United States v. Giampino, 680 F.2d 898, 901 n.3 (2d Cir. 1982) (“We have long recognized that trial courts may, in their discretion, ‘permit the jury to take a copy of the indictment into the jury room, after taking care to instruct the jury that the indictment [is] not to be considered evidence.’”)).

126. See id.


129. Esso, 684 F.3d at 354.

130. See id. at 352.
research is so easy to obtain.\textsuperscript{131} The temptation and ease with which jurors can conduct outside research is the reason that courts should be limiting any potential for outside deliberation,\textsuperscript{132} not increasing it, even if the risk may be seen initially as “marginal.”\textsuperscript{133} It was not necessary to declare a mistrial in \textit{Esso}; however, the repercussions that are already being felt,\textsuperscript{134} and that could potentially plague the court system further, cannot be ignored. The court’s holding and reasoning leave open too many gaps that could be misconstrued by other courts to allow further deviation from the traditional practices of the jury. While a new trial would certainly clear up any lingering doubt as to the fairness of \textit{Esso}, there is another route. Instead of ruling that the district court in \textit{Esso} did not commit error, the court could have ruled that harmless error was committed.

Harmless error encompasses the principle that the central purpose of a criminal trial is to decide the question of the guilt or innocence of the defendant, and it helps promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.\textsuperscript{135} If the court had ruled that a harmless error was committed, instead of ruling there was none, it would have sent a stronger signal to future courts that this jury practice is to be used with the utmost caution. The message would have set a more defined line that courts can and cannot cross when it comes to allowing jurors to take court documents home. The clear line used to be that jurors were not allowed to take anything home at all, but now the line has “moved” leaving only a vague notion of how courts should proceed with this new precedent. This will certainly invite more trouble down the line if the evolution of the jury system continues as such, and may eventually justify jurors taking home actual evidence, which presents an even greater threat to the right to a fair trial.\textsuperscript{136} While there is an argument that it is physically impossible for jurors to take home certain pieces of evidence, like the weapon used during the commission of the crime or a piece of clothing, such a shift still leaves open the issue of other types of evidence, such as video and audio recordings, documented evidence, letters, and notes.

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\textsuperscript{131.} \textit{Id.} \\
\textsuperscript{132.} \textit{See} Morrison, \textit{supra} note 108, at 1584. \\
\textsuperscript{133.} \textit{Esso}, 684 F.3d at 352. \\
\textsuperscript{134.} \textit{See, e.g.}, State v. Morgan, 84 A.3d 251, 258-59 (N.J. 2013) (allowing jurors to bring home copies of juror instructions). \\
\textsuperscript{135.} United States v. Nobles, 422 U.S. 225, 230 (1975). \\
\textsuperscript{136.} \textit{Esso}, 684 F.3d at 353 (citing United States v. Akpan, 407 F.3d 360, 369-70 (5th Cir. 2005)). It is interesting that the Second Circuit made this point in their ruling of \textit{Esso}, but only saw fit to put this brief analysis in a footnote. \textit{Id.} at 353 n.7.
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1. Repercussions

The court in *Esso* reitered several times that the holding should not be considered a general endorsement to allow jurors to take indictments or other court documents home to examine overnight.\(^{137}\) The court readily recognized that allowing the jury to take the indictment home “leaves the deliberative process needlessly vulnerable to a variety of potential problems,” by “increas[ing] the chances that individual jurors may want to discuss these matters with family members or friends,” and by “mak[ing] it easier for jurors to research legal issues on their own.”\(^{138}\) As such, the court urged that district courts should not make a general practice of sending indictments home with the jury.\(^{139}\) The Second Circuit made it clear that they did not want the holding to be considered a precedent encouraging the release of evidentiary material to jurors’ private possession.\(^{140}\) However, there are already two cases that rely on *Esso* in order to allow jurors to engage in similar practices.\(^{141}\)

### i. The Jury Charge in Morris

In *Morris v. United States*, the Federal District Court of Connecticut allowed jurors to bring copies of the jury charge home for one night.\(^{142}\) The jury charge was 110 pages long—particularly lengthy and complex.\(^{143}\) The district court responded to the jury’s request to take the charge home without the presence of defense counsel.\(^{144}\) On appeal, the Second Circuit (the same appeals court that decided *Esso*) ruled that there was no harm in private deliberations, and citing the language of *Esso*, held they had no reason to come to a different conclusion.\(^{145}\) The court also held it was an error to make the decision in the absence of defense counsel.\(^{146}\) However, the court further noted that since the jury’s note did not involve a substantive question of law, the error was harmless under the circumstances.\(^{147}\)

\(^{137}\) *Id.* at 354.  
\(^{139}\) *Id.* at 354.  
\(^{140}\) *Id.*.  
\(^{142}\) *Morris*, 523 F. App’x at 7-8.  
\(^{143}\) *Id.* at 7.  
\(^{144}\) *Id.*.  
\(^{145}\) *Id.* at 8.  
\(^{146}\) *Id.* at 9.  
\(^{147}\) *Id.*
ii. The Indictment in Watts

In United States v. Watts, the Eastern District of New York decided whether it was proper for the court to read the entire length of the indictment to the jury during opening and closing remarks. The court used the language of Esso, stating that trial courts may, in their discretion, allow jurors to take copies of the indictment into the jury room as long as proper instruction was given not to consider it as evidence. The indictment was thirteen pages long and mostly contained government narrative. While the court agreed that allowing the summary of the indictment to be read to the jury was proper, the court reserved its opinion as to whether the jury should be provided with the full indictment during deliberations. What is troubling is not so much the final decision by the court—as this does not deal with jurors taking the indictment home to read—but the Watts court adopting language from Esso, while failing to mention the caution expressed in allowing certain discretions by the district courts. Neither Morris nor Watts adopts any of the important takeaways from the Second Circuit urging courts not to make a general practice of taking documents home or exposing them to jurors. While on the surface these cases appear to be similar, each court uses similar language in very different circumstances. There is a difference in allowing a jury to take an indictment or jury charge home to read overnight; having a summary of an indictment read to the jury; and taking the full indictment into the jury room during deliberations. Each scenario comes with different problems that deserved much more scrutiny than what was allotted.

D. A Potential Solution

There is no evidence that the jurors engaged in any unsanctioned research in Esso; however, there is also no evidence that the judge even asked the jurors the next day if they had followed the instructions. In United States v. Hernandez, the judge would not have known about the ju-

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149. Id. at 491 (quoting United States v. Esso, 684 F.3d 347, 350 (2d Cir. 2012)).
150. Id. at 491.
151. Id. at 492.
152. See id. at 452.
153. Id. at 491.
154. See id.; see also Morris v. United States, 523 F. App’x 7, 8 (2d Cir. 2013).
156. See id.
ry’s outside research if he had not directly asked them. Likewise, in *Esso*, while the trial judge’s presumption was that the jurors had faithfully followed the given instructions, there is no indication that the judge even asked them. Considering the unprecedented allowance of letting the jury take an indictment home, it is baffling that the judge did not check on the jurors before they rendered their verdict. Even more flagrant, the Second Circuit failed to address this in their decision. There is no practice by courts to ensure the honesty of their jurors, as most misconduct is actually reported by the jurors themselves.

There are a few courts, for example in England, that upon finding misconduct hold the jurors in contempt and fine them. However, if implemented this would likely lead to less reporting of misconduct since jurors are on the honor system. Instead, there is a much simpler solution that would eliminate the problem at the source. A judge conducting a simple check-up on the jurors would lead to less misconduct and more accountability for outside actions.

Asking jurors to admit misbehavior is a very simple solution that would establish a much wiser practice for the future. It places another check on jurors in a time where outside information gathering is becoming more common. While jurors can still lie about any outside research, it is much harder to tell a lie in front of a judge—under oath—than to lie by omission. This process would be similar to voir dire used by lawyers to assess the background of jurors before the start of trial. Though voir dire, and similar practices, can be quite cumbersome, courts that can identify potential problem jurors avoid issues later when the consequence may be a mistrial. The best cure for jury misconduct is to prevent problems before they

157. See Morrison, *supra* note 108, at 1587 (“[D]uring the course of deliberation, the judge discovered that not one, but eight of the twelve jurors had conducted internet research about the case [at hand].”).
158. See *Esso*, 684 F.3d at 352, 354.
159. Id. at 350.
160. See id. at 354.
164. See Schwartz, *supra* note 118.
even happen.\textsuperscript{167} It is urged that if courts are to follow in \textit{Esso}’s wake and allow jurors to take documents like an indictment home with them, that a simple double check could save the court from potential mistrials, and more importantly, ensure the defendant receives a fair trial.

\section*{V. Conclusion}

Courts should proceed with caution when relying on \textit{Esso}. The courts must consider the long-term consequences of allowing jurors to take court documents home, whether it is jury instructions, an indictment, or other items of judicial importance. The right to a fair trial is one of the most sacred traditions of the court system, and anything that may compromise it must be looked at with the utmost scrutiny.\textsuperscript{168} The court in \textit{Esso} dismissed the argument that taking an indictment home was akin to deliberating.\textsuperscript{169} They held this even considering the necessity of secrecy and impartiality, and the overall importance of the deliberation process.\textsuperscript{170} Lastly, despite the court warning that the holding should not be considered a general endorsement to allow jurors to take indictments home to read,\textsuperscript{171} there are already cases citing to \textit{Esso} to uphold similar practices.\textsuperscript{172}

It is puzzling that the Second Circuit would so drastically change something as important as the standard for jury conduct outside of the courtroom. There was absolutely nothing in \textit{Esso} so extraordinary that such a radical decision was necessary. The court’s solution to what was not a major problem to begin with was not well thought out, and provided a gateway to even more potential dilemmas for courts in the future. \textit{Esso} may prove to be the crack in jury instructions that eventually collapses the whole structure. This Comment urges that the Second Circuit erred in its holding and compels other courts to not make the same mistake in the future.

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\item \textsuperscript{167} Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("[T]he cure lies in those remedial measures that will prevent the prejudice at its inception.").
\item \textsuperscript{168} See Krulewitch v. United States, 336 U.S. 440, 453 (1949) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . . .").
\item \textsuperscript{169} United States v. Esso, 684 F.3d 347, 351-52 (2d Cir. 2012).
\item \textsuperscript{170} See e.g., United States v. Jadlowe, 628 F.3d 1, 18 (1st Cir. 2010); United States v. Cox, 324 F.3d 77, 86 (2d Cir. 2003); United States v. Resko, 3 F.3d 684, 688-89 (3d Cir. 1993).
\item \textsuperscript{171} \textit{Esso}, 684 F.3d at 354.
\item \textsuperscript{172} See Morris v. United States, 523 F. App’x 7, 8 (2d Cir. 2013); United States v. Watts, 934 F. Supp. 2d 451, 491 (E.D.N.Y. 2013).
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