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## Jurors and Social Media: Is a Fair Trial Still Possible

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# JURORS AND SOCIAL MEDIA: IS A FAIR TRIAL STILL POSSIBLE?

Nancy S. Marder\*

## I. INTRODUCTION

**S**LOWLY but surely the constitutional guarantee of a fair trial is being eroded as social media invades the jury room.<sup>1</sup> Essential evidentiary rules control what jurors can learn about a case and what they can say about it during a trial. In just a decade, the rapid growth of easy online communication has threatened to dissolve the protective walls that have been built around the jury. The key question is whether judges can now persuade jurors to resist the siren call of online communication when they serve as jurors. Judges cannot ignore this problem.

The juror who turns to social media and either intentionally seeks, or is inadvertently exposed to information pertaining to the trial no longer relies on just the evidence presented in the courtroom. The juror who uses social media to express his or her views of the case no longer appears to be impartial. Although some jurors in the past might have violated the judge's instructions not to discuss the case with family or friends, the juror who disregards the judge's instructions today by using the Internet or social media reaches a far wider audience and receives far more media attention than a juror who spoke just to family members. The juror who turns to social media or the Internet to reveal his or her views calls into question the fairness of the jury trial.

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\* Professor of Law and Director of the Justice John Paul Stevens Jury Center, IIT Chicago-Kent College of Law. I am grateful to Mark L. Karno and Jeffrey A. Parness, who organized the 2012 Allerton Conference at Starved Rock, Illinois and invited me to serve as a panelist on "Social Media and Internet Use by Jurors During Civil Trials." That conference gave me the opportunity to hear judges' and lawyers' growing concerns about jurors and social media. I appreciate the comments I received when I presented drafts of this paper at various workshops and conferences, including a "research slam" at Chicago-Kent College of Law, an Academics Workshop at the ABA Criminal Justice Section Sixth Annual Fall Institute in Washington, D.C., the Association for the Study of Law, Culture and the Humanities Conference at the University of Virginia Law School, and the Criminal Justice Colloquium held at Southern Methodist University's Dedman School of Law. I thank Meghan Ryan and Jenia Iontcheva Turner for organizing such a wonderful gathering at SMU and the *SMU Law Review* for publishing the papers from the Colloquium. I give special thanks to Sam Castree for his research assistance, Clare Willis for her library assistance, and Gwendolyn Osborne for keeping me up-to-date on media coverage of jurors and social media.

1. I will be referring to both "social media" and "the Internet" throughout this Article, even though I will sometimes use one term or the other as a shorthand for both. Both terms describe online forms of communication that provide users with easy access to a vast repository of information and to a vast audience of users.

Although newspaper headlines recount some of the more egregious examples of jurors using social media or the Internet to obtain information that is unreliable or inappropriate for the jury to consider,<sup>2</sup> the scope of the problem is difficult to assess. The few empirical studies that have been done to date have serious limitations.<sup>3</sup>

Judges feel the need to take action, but in the face of limited empirical evidence, they have not been sure what to do. A common response has been to revise the cautionary instruction in an effort to make it clear to jurors that they need to refrain from using the Internet and social media to communicate about the trial.<sup>4</sup> A few courts have gone so far as to ban jurors from having electronic devices in the courtroom and jury room,<sup>5</sup> but this response does not address the problem that jurors will have access to these devices when they go home at night.

Having jurors refrain from using the Internet and social media will likely grow harder in the years ahead and will require taking what I call a “process view” of a juror’s education. The “process view” recognizes that at every stage at which the court interacts with jurors, there is an opportunity to educate them. From start to finish—from jury summons to jury verdict—there are opportunities for the court to educate jurors about the need to avoid online communication about the trial.

The education of a juror begins with the jury summons and ends when the jury announces its verdict and the judge polls the jury and dismisses it. Although the summons and dismissal constitute the two end points, there are several points of interaction between court and juror throughout the process including the jury orientation video, voir dire, the oath, preliminary instructions, as-needed instructions, final instructions, juror questions, and the polling of jurors. Each stage provides an opportunity for the judge to educate jurors about their need to refrain from using the Internet and social media to communicate about the trial.

A process view of a juror’s education will be effective for most, but not all, jurors. A comprehensive education should transform “uninformed jurors” into “informed jurors.” Admittedly, it will not reach “recalcitrant jurors.” For recalcitrant jurors, who have no intention of following the prohibition, the best hope is for judges and lawyers to find new ways to identify and remove them during voir dire. If recalcitrant jurors do manage to avoid detection during voir dire, then it is up to fellow jurors to spot them when they violate the prohibition and to report them to the judge.

This Article explores what it means to take a process view of a juror’s education in order to protect parties’ constitutional rights to a fair trial. It proceeds in six parts. Part II considers why it is important that the jury reaches its verdict based only on the evidence presented in the court-

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2. See *infra* Part IV.A.

3. See *infra* Part IV.C.

4. See *infra* Part V.A.

5. See *infra* Part V.B.

room. Part III explains how jurors' use of the Internet and social media, whether to do research or to share their views, interferes with a fair trial. In Part IV, I explore the extent of the problem by reviewing and evaluating the empirical studies that have been conducted to date. Even though the empirical evidence is scant, it is necessary for judges and courts to take action. If they wait, there might be lasting damage to the jury. In Part V, I describe the steps that courts have taken thus far, which tend to be isolated efforts.

In Part VI, I explain why courts and judges need to take a process view of a juror's education, which utilizes judge-jury interactions as opportunities to educate jurors about the need to resist online communication about the trial. Judges must repeat the message and repeat it in a variety of ways so that jurors understand why they must resist online communication about the trial. In Part VII, I anticipate likely responses to my proposal. "Uninformed jurors" will appreciate this approach because it will transform them into informed jurors, whereas "recalcitrant jurors" will remain unmoved by it. Judges should embrace this proposal because it is flexible and they can tailor it as they see fit. Most important, it is likely to be effective, and judges need an effective approach because it is their responsibility to ensure that the parties receive a fair trial.

## II. PROVIDING A FAIR TRIAL

The Sixth Amendment<sup>6</sup> provides a criminal defendant with the right to a jury trial in serious cases,<sup>7</sup> and the Seventh Amendment<sup>8</sup> provides a party with the right to a jury trial in certain types of civil cases in federal court.<sup>9</sup> Although these amendments speak only in terms of a "trial," im-

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6. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

7. Although the Sixth Amendment provides a defendant with the right to a jury trial in "all" criminal cases, the U.S. Supreme Court has interpreted this right to mean in all "serious" criminal cases. *See, e.g.,* *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543–44 (1989) (assuming for purposes of the Sixth Amendment that an offense carrying a maximum prison term of six months or less is a "petty" offense for which there is no right to a jury trial); *Baldwin v. New York*, 399 U.S. 66, 68–69 (1970) (establishing that a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum prison term of more than six months); *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) ("[T]here is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision . . .").

8. The Seventh Amendment provides in relevant part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII.

9. The Supreme Court has never held that the Seventh Amendment is applicable to the States through the Fourteenth Amendment. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 418 (1996) ("[T]he Seventh Amendment . . . governs proceedings in federal court, but not in state court . . ."); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (noting that the Supreme Court "has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment"); *see also* *GTFM, LLC v. TKN Sales, Inc.*, 257 F.3d 235, 240 (2d Cir. 2001) ("The Seventh Amendment has not, however, been applied to the States through the Fourteenth Amendment and hence does not require that jury trials be held in proceedings in State tribunals.").

plicit in the notion of a trial is a "fair trial." If one were entitled only to the form of a trial, but not to a fair trial, then the protection would be of little value. However, a jury trial is recognized as the best protection that our legal system can provide a criminal defendant.<sup>10</sup> Indeed, the U.S. Supreme Court has recognized the jury trial as so "fundamental" to our system of criminal justice that it has extended it to the states through the Fourteenth Amendment.<sup>11</sup>

The right to a fair trial also has roots in the Due Process Clause of the Fifth and Fourteenth Amendments.<sup>12</sup> In a number of opinions, the U.S. Supreme Court has identified several features of a fair trial, which include: notice, an opportunity to be heard, an opportunity to present and to cross-examine witnesses, an impartial decision-maker, a statement of reasons based on the evidence, and representation by counsel in criminal cases.<sup>13</sup>

One requirement for a fair trial is that the decision-maker should de-

10. See *Singer v. United States*, 380 U.S. 24, 35 (1965) ("Trial by jury has been established by the Constitution as the 'normal and . . . preferable mode of disposing of issues of fact in criminal cases.' . . . [T]he mode itself has been surrounded with safeguards to make it as fair as possible . . .") (citation omitted).

11. *Duncan*, 391 U.S. at 149 ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."). Justice White, who wrote the Court's opinion in *Duncan*, described the jury trial as fundamental to preventing "oppression by the Government" by providing the criminal defendant with an "inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 155–56. He also wrote the Court's opinion in *Taylor v. Louisiana*, in which he used similar language to describe why the right to jury trial is fundamental to the American criminal justice system: "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

12. The Due Process Clause provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1. The U.S. Supreme Court has interpreted the Fifth Amendment's equal protection component to include the same due process protections as the Fourteenth Amendment. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 680 n.5 (1973) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" (quoting *Schneider v. Rusk*, 377 U.S. 163, 168 (1964))).

13. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process."); *Specht v. Patterson*, 386 U.S. 605, 610 (1967) ("Due process . . . requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed."); *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."); see also *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (identifying similar requirements for due process in parole violation hearings).

cide the case based only on the evidence presented at trial.<sup>14</sup> One reason for this is so that only evidence that satisfies certain indicia of reliability will be considered.<sup>15</sup> Another reason is so that the evidence can then be tested through cross-examination.<sup>16</sup> Yet another reason is so that all of the decision-makers—jurors and judge alike—have considered the same evidence, and in the case of jurors, can deliberate about what they have seen and heard, and ultimately reach a consensus about how to interpret it. In addition, in accordance with the Sixth Amendment,<sup>17</sup> the Seventh Amendment,<sup>18</sup> and the Due Process Clause,<sup>19</sup> a fair trial requires the decision-makers to be impartial and to withhold judgment until the trial has ended.

#### A. THE EVIDENCE IS PRESENTED IN COURT

One reason that a fair trial requires a jury to reach a verdict based only on the evidence presented in court is so that the evidence is as reliable as possible. The rules of evidence try to ensure that the information that will be presented to the decision-maker meets a certain modicum of reliability.<sup>20</sup> To be admitted into evidence, a document, photograph, or other object must withstand a level of scrutiny that we typically do not demand of such objects in our daily lives.<sup>21</sup> For example, for a photograph to be admitted into evidence in federal court, it must be relevant,<sup>22</sup> more probative than prejudicial,<sup>23</sup> the original<sup>24</sup> (unless it fits under one of the exceptions for using a duplicate),<sup>25</sup> and withstand any objections by the other side. If the photograph meets all of these requirements, it can ultimately be introduced as evidence in court. The attorney introducing the photograph will try to make the strongest arguments possible to show it supports his or her client's case, and the attorney on the other side will try to chip away at those arguments and reveal their weaknesses.

Similarly, if the evidence is going to be offered in the form of testi-

14. *See, e.g., Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) (“The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause.”).

15. *See, e.g., Chambers*, 410 U.S. at 298 (“Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability . . .”).

16. *See, e.g., id.* (identifying cross-examination as one of the “conventional indicia of reliability” of evidence).

17. U.S. CONST. amend. VI (requiring “an impartial jury”).

18. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”).

19. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (noting that “the minimum requirements of due process” in parole violation hearings include “a ‘neutral and detached’ hearing body”).

20. *See* FED. R. EVID. 102.

21. *See, e.g.,* FED. R. EVID. 1001, 1002, 1004 (rules governing the requirement of an original).

22. *See* FED. R. EVID. 402.

23. *See* FED. R. EVID. 403.

24. *See* FED. R. EVID. 1002.

25. *See* FED. R. EVID. 1001(e), 1004.

mony, then the witness must appear in court,<sup>26</sup> take an oath or affirmation,<sup>27</sup> and have personal knowledge as a lay witness<sup>28</sup> or expertise as an expert witness.<sup>29</sup> Then the witness must testify and be subjected to cross-examination by the other side, albeit limited to the subject matter raised during direct examination.<sup>30</sup> In a criminal trial, the right of the defendant to confront witnesses is guaranteed by the Sixth Amendment.<sup>31</sup> In both criminal and civil trials, the rules that govern a witness's testimony try to ensure that the testimony is reliable.<sup>32</sup> The testimony is elicited in a formal manner through a series of questions and answers. The jury can then decide whether it believes the witness, not just based on the words spoken but on the entire presentation: How did the witness appear? Did the witness give responses that seemed credible? Did the witness's body language underscore or undermine his or her words? In a typical instruction, the judge will later explain to the jurors that it is up to them to decide how credible they found a witness's testimony:

You are the only judges of the credibility of the witnesses. You will decide the weight to be given to the testimony of each of them. In evaluating the credibility of a witness, you may consider that witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience, and any previous inconsistent statement or act by the witness concerning an issue important to the case.<sup>33</sup>

#### B. THE EVIDENCE IS TESTED THROUGH CROSS-EXAMINATION

After the evidence has met the basic threshold of reliability and has been admitted, it can be further scrutinized through cross-examination. Each side can introduce evidence that it believes bolsters its case, and the other side's task is to find weaknesses in that evidence and to expose the weaknesses through cross-examination. Whether the evidence takes the form of an exhibit or testimony, the adversarial process is designed to reveal the strengths and weaknesses of the evidence.

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26. See U.S. CONST. amend. VI (providing a defendant the right to confront witnesses and to call witnesses in his favor).

27. See FED. R. EVID. 603. A typical oath is: "You and each of you, do solemnly swear that you will well and truly try the cause now pending before this Court, and a true verdict render therein, according to the evidence and the instructions of the Court, so help you God?" CALIFORNIA SUPERIOR COURT CRIMINAL TRIAL JUDGES' DESKBOOK 356 (Ronald M. George ed., 1988).

28. See FED. R. EVID. 602.

29. See FED. R. EVID. 702.

30. See FED. R. EVID. 611(b).

31. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

32. See FED. R. CIV. P. 43; FED. R. CRIM. P. 26; FED. R. EVID. 602.

33. ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL §1.01[5] (2011 ed.) [hereinafter 2011 IPI].

## C. THE EVIDENCE IS AVAILABLE TO ALL DECISION-MAKERS

Another reason for the evidence to be presented in court is so that it is available to all of the decision-makers. In a jury trial, if all of the jurors have seen the evidence in the courtroom and have heard the lawyers' and witnesses' competing interpretations as to what the evidence shows, then the jurors can discuss the evidence with each other during deliberations. Jurors, having all seen or heard the evidence, will be on equal footing and will be able to add their own views as to what they think the evidence shows. The parties will have the benefit of all of the jurors' input.

It is also important for the judge to have seen and heard the evidence in the courtroom.<sup>34</sup> Although the jury's acquittal in a criminal case is not subject to judicial review, the jury's conviction in a criminal case is subject to a motion for a judgment of acquittal<sup>35</sup> or a motion for a new trial,<sup>36</sup> which the trial judge decides in the first instance. The defendant also can appeal a judgment of conviction.<sup>37</sup> Thus, it is important for there to be a record, based on the evidence presented in court, that appellate judges can review. Similarly, in a civil case, the losing party can move for judgment as a matter of law<sup>38</sup> or a new trial<sup>39</sup> and can eventually seek review by an appellate court. Again, it is important for the jury to have relied only on the evidence presented in court and for the trial judge to have seen and heard the same evidence so he or she can decide any motions based on it, including motions for judgment as a matter of law or for a new trial. The evidence presented in court also will be part of the trial record for appellate review.<sup>40</sup>

Anytime jurors look at information outside of the evidence presented at trial, it raises questions about the reliability of that information. Such information would not have gone through the testing prescribed by the *Federal Rules of Evidence*. Such information would not have been subject to the scrutiny afforded by cross-examination. Such information would not be available to all of the decision-makers—jurors and judges alike. Perhaps this is one reason that Federal Rule of Evidence 606(b), which generally prohibits a judge from inquiring into the reasoning that a jury

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34. Stephen Yeazell explained that when early juries could undertake their own investigations outside of the courtroom, they were able to exercise power that was beyond the judge's control because the jurors had information that the judge lacked. See Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 91. Eventually, judges limited juries' power by requiring juries to base their verdicts only on the evidence presented in court. *Id.* at 93. Yeazell explained this change as part of the increasing professionalization of judges and lawyers and the concomitant development of rules of evidence in the eighteenth century. *Id.* at 93-96. As a result, "judges developed the rule that evidence on which the jury based its verdict must have been received in open court; the jury could no longer 'know' things not presented at trial." *Id.* at 93.

35. See FED. R. CRIM. P. 29(c)(2)–(3). The defendant can also move for a judgment of acquittal after the government has presented all of its evidence. See FED. R. CRIM. P. 29(a).

36. See FED. R. CRIM. P. 33.

37. See FED. R. CRIM. P. 32(j) (Defendant's Right to Appeal).

38. See FED. R. CIV. P. 50(a)–(b).

39. See FED. R. CIV. P. 59(a).

40. FED. R. APP. P. 10(a)–(b).



used to reach its verdict, permits a judge to inquire as to whether the jury considered any extraneous material during its deliberations.<sup>41</sup> Such extraneous material would not have been subject to the review provided by the rules of evidence and cross-examination. Not surprisingly, the introduction of such extraneous material can result in a mistrial.<sup>42</sup> Whether that extraneous material comes from the brick-and-mortar world or the virtual world, it has the same deleterious effect: it interferes with the right to a fair trial.

#### D. THE DECISION-MAKERS NEED TO BE IMPARTIAL

Another requirement of a fair trial is that the decision-makers are impartial. This requirement applies to jurors and judges alike. The Sixth Amendment explicitly provides that the defendant has a right to “an impartial jury” in a criminal trial.<sup>43</sup> The Supreme Court has interpreted the Seventh Amendment to require an impartial jury in a civil trial as well.<sup>44</sup> Because there is no one definition of what it means for a juror to be impartial, judges have explained this concept to jurors in different ways. For example, one judge explained during voir dire that jurors should not have a “slant one way or another in this case.”<sup>45</sup> In other words, jurors should be able to enter the courtroom and believe that they can decide the case either way. Throughout the trial, the judge will instruct the jurors not to form any view of the case. For example, in California, the trial judge typically admonishes the jury as follows: “Please remember all my admonitions to you; do not discuss the case amongst yourselves, form any opinions about the case, conduct any deliberations until the matter has been submitted to you, do not allow anybody to communicate with you with regard to the case.”<sup>46</sup>

Lawyers and judges explain that the purpose of voir dire is to determine whether a prospective juror can be impartial.<sup>47</sup> They believe this can be achieved by having the judge, and sometimes the lawyers, ask the prospective juror a number of questions that are intended to reveal any

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41. See FED. R. EVID. 606(b) (limiting judicial inquiries into jury deliberations to the question whether “extraneous prejudicial information was improperly brought to the jury’s attention” or whether any “outside influence was improperly brought to bear upon any juror”).

42. See, e.g., *Russo v. Takata Corp.*, 774 N.W.2d 441, 443 (S.D. 2009).

43. The Sixth Amendment guarantees a criminal defendant the right to be tried before an “impartial jury.” U.S. CONST. amend. VI.

44. See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”).

45. Transcript of *Voir Dire* at 70, 74, 83, 89, 91, 98, 112, *United States v. Torres*, No. 77 Cr. 680 (S.D.N.Y. May 19, 1980).

46. 231 Reporter’s Transcript of Proceedings, Wed., Sept. 27, 1995, at 47,792, *People v. Simpson* (Cal. Super. Ct. 1995) (No. BA097211).

47. Voir dire serves other purposes as well. See Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1610–11 (2012) (describing other purposes of voir dire, including “teaching jurors about their proper role and helping them to make the transition from citizens to jurors”).

bias—either bias that rises to the level of a for cause challenge<sup>48</sup> or bias that leaves the lawyer with sufficient misgivings that he or she removes the juror through the exercise of a peremptory challenge.<sup>49</sup> The jurors who are ultimately seated on the petit jury are those who have gone through voir dire questioning and were not removed because of hardship or challenges. The goal is to seat jurors who have undergone a certain amount of screening and soul-searching and who believe that they can be impartial, and who have convinced the judge, lawyers, and parties that they can be impartial.

The judge, too, needs to be impartial. A judge who cannot satisfy the requirement of impartiality has a statutory<sup>50</sup> and ethical obligation<sup>51</sup> to recuse himself or herself from the case. If a judge fails to do so, a party can file a motion seeking the judge's recusal.<sup>52</sup> Although the trial judge is able to decide such motions in the first instance, a denial is subject to appellate review. One reason that judges' and jurors' impartiality is so important is so that they can decide the case based only on the evidence presented at trial and not be led astray by personal biases. Another reason is so that the parties and public believe that the proceedings have been fair.

### III. SOCIAL MEDIA'S INTERFERENCE WITH A FAIR TRIAL

There are a number of ways in which a juror's use of social media during the trial or deliberations can interfere with the parties' right to a fair trial and the public's acceptance of the verdict. The juror who turns to social media and either intentionally seeks or is inadvertently exposed to information pertaining to the trial no longer relies on just the evidence presented in the courtroom. The juror who uses social media to express his or her views of the case while the trial is ongoing no longer appears to be an impartial juror. Although some jurors in the past might have violated the judge's instructions to avoid discussing the case with anyone, including family or friends, the juror who does so today using social media reaches a far wider audience and receives much more attention than

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48. Judges have discretion whether to remove a juror for cause. Traditionally, the reasons to grant a for cause challenge are that the juror has a financial or familial connection to the parties, or the juror says that he or she cannot be impartial. *See* *Hopt v. Utah*, 120 U.S. 430, 432–33 (1887).

49. *See* FED. R. CIV. P. 47(b); FED. R. CRIM. P. 24(b).

50. *See* 28 U.S.C. § 144 (2012); 28 U.S.C. § 455(a) (2012) (“Any justice, judge, or magistrate . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”).

51. MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) (2003) (“A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”).

52. *See, e.g.,* *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4–5 (S.D.N.Y. 1975) (holding that a judge who is black and female should not recuse herself from a case involving sex discrimination); *Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs*, 388 F. Supp. 155, 156–57, 181–82 (E.D. Pa. 1974) (holding that a black judge should not have to disqualify pursuant to 28 U.S.C. § 144 simply because he is black and the case involves blacks).

the juror who spoke to his or her family members. In so doing, the juror who turns to social media to reveal his or her views or queries about the trial calls into question the fairness of the trial.

#### A. OUTSIDE RESEARCH

One way that jurors have used today's social media,<sup>53</sup> such as Facebook and Twitter, is by seeking information that pertains to the trial and that has not been presented in the courtroom. Jurors might seek this information out of good motives, such as a desire to understand the law, the facts, or the procedure better than they do, but rather than turning to the court for this information, they turn instead to social media. For example, jurors might want to learn more about the parties or lawyers, and so they immediately go to Google or Wikipedia. Or jurors might not understand an expert witness's description of a technical procedure, so they immediately go to a website for further clarification. Or jurors might not understand all of the legal procedures, so they "tweet" their question to their followers on Twitter.

Although jurors might have always had questions during trials, they did not always have the tools or easy access to information that they now have. A layperson might not have known where to begin legal research when cases could only be found in bound volumes of reporters in law libraries. The information was available in specialized books and libraries, but one had to have legal training to know what to look for as well as how to look for and understand it. Thus, before the Internet and social media, the information was publicly available, but "practical[ly] obscur[e],"<sup>54</sup> at least to the layperson.

In contrast, today, information that jurors might consider useful for the trial is immediately available and understandable. Jurors have access to this information from their smartphone, tablet, or laptop, just to name a few devices that provide easy access to the Internet and social media regardless of one's location. Even if jurors are in a courtroom that bans such devices, they will have access to them once they leave the courtroom. No longer does one need a dictionary or an encyclopedia to check the meaning of a word or the details of a technical procedure; no longer

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53. I recognize that "social media" is ever changing and that today's social media is unlikely to be tomorrow's social media. For example, MySpace was popular for a while, but quickly fell out of favor and was replaced by other social media such as Facebook and Twitter. See, e.g., Katherine Rushton, *Twitter Value Drops £5bn on Fears for Future*, DAILY TELEGRAPH (London), Feb. 7, 2014, at B1 ("The slowdown stoked fears that Twitter will struggle to increase its revenues as rapidly as hoped, and that it could fall out of favour, echoing the decline of social networks such as MySpace and Bebo."). I will use "social media" broadly to include crowdsourcing of any type—from today's popular social media, such as Facebook, Twitter, and FourSquare, to online exchanges, such as blogging and Wikipedia entries.

54. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 761–62 (1989) (considering whether information collected by a government agency about an individual can be obtained through a Freedom of Information Act request by a third party or whether the individual's privacy interest protects that information from public disclosure).

does one need to go to the site of an accident to understand more about what might have happened. Now one has access to all of this information and much more at one's fingertips. Google, Wikipedia, and Google Street View provide answers to all these questions. In addition, one has access to a network of individuals who have specialized knowledge that once was available only if you happened to know such an expert. Lawyers, doctors, forensic specialists, and other experts are all available on Twitter, Facebook, or blogs, to name just a few such sources. They can respond to queries whether you know them personally or not.

One difficulty is that the information from social media is not reliable. Although it may be reliable enough for choosing a restaurant for dinner, it is not reliable enough for deciding to convict a defendant or to assess liability against a party. A Wikipedia entry, for example, may explain a subject about which a juror has a question, but who wrote this crowd-sourced entry, and how accurate or complete is it?<sup>55</sup> The information available through social media has not been tested in the ways that information admitted into evidence at trial has been tested. It does not have to meet any of the threshold requirements of the rules of evidence, and it is not tested through the adversarial process. Nor is it available to all of the jurors, the parties, and the judge.

#### B. INADVERTENT EXPOSURE

Another difficulty is that jurors might not seek information about the trial when they go online, but they might be exposed inadvertently to it when they check their Twitter account or email. If there is a lot of media coverage of the trial then there is likely to be a lot of discussion about the trial on social media. Some of that discussion will include information that is speculative, incorrect, or inappropriate for jurors to consider.

For example, jurors are not told about a defendant's past crimes.<sup>56</sup> This type of information is intentionally kept from them because of the all-too-human tendency to think that if someone has committed a crime in the past, then he probably committed the crime with which he has now been charged. Jurors might like to know this information, but it is information that is intentionally withheld from them.<sup>57</sup> It is regarded as prejudicial information and likely to lead jurors to incorrect conclusions.<sup>58</sup>

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55. As the Fourth Circuit noted, even Wikipedia acknowledges that “[a]llowing anyone [sic] to edit Wikipedia means that it is more easily vandalized or susceptible to unchecked information.” *United States v. Lawson*, 677 F.3d 629, 650 (4th Cir. 2012) (citations omitted). The Fourth Circuit noted that “the open-access nature of Wikipedia” meant that “the danger in relying on a Wikipedia entry is obvious and real.” *Id.* In *Lawson*, the Fourth Circuit, after weighing several factors, set aside the jury's verdict and concluded that a juror's use of Wikipedia to look up a word used by the statute violated “the fundamental protections afforded by the Sixth Amendment.” *Id.* at 651.

56. *See* FED. R. EVID. 404(b). However, such evidence can be used for other purposes, such as proof of “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” *Id.*

57. *See, e.g.*, *Michelson v. United States*, 335 U.S. 469, 475–76 (1948).

58. *See id.*

Thus, the protections that are built into the trial process are thwarted when jurors are exposed to information that they are not supposed to consider.

Although the possibility of inadvertent exposure existed before social media, coverage was less pervasive and more readily avoided. For example, newspapers and newsmagazines might contain coverage of a trial, but jurors could be told to avoid reading them, or to read only versions from which articles about the trial had been expunged. Similarly, television news coverage was limited to a few television stations and a few time slots, and jurors could easily avoid the coverage. However, with the advent of social media, the discussion is round-the-clock and references to a trial can pop up anywhere.

### C. APPEARANCE OF PARTIALITY

Those jurors who use social media to convey their views of a trial while the trial or deliberations are in progress undermine the requirement that the case has been decided by an impartial jury. Jurors who use social media to give their views of a trial, such as announcing “the defendant is guilty” midway through the trial, have formed an opinion and publicly expressed it even though they are supposed to keep an open mind. Jurors have agreed during voir dire that they can be impartial throughout the trial and have taken an oath that they will decide the case based only on the evidence.<sup>59</sup> Yet their comments often reveal that they have reached a conclusion before the evidence has been fully presented. Even jurors who offer online comments that are less conclusive, such as “Why does the judge allow the lawyers to speak for so long?” or “I am bored,” suggest that they are not taking the proceedings seriously and undermine the respect that the public and parties are likely to have for the jury and its verdict.

Jurors who convey their views of a trial or deliberations on social media also create another problem because they are supposed to share their views only with their fellow jurors; they are not supposed to share their views with anyone outside of the jury room.<sup>60</sup> One reason for this prohi-

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59. See CALIFORNIA SUPERIOR COURT CRIMINAL TRIAL JUDGES' DESKBOOK, *supra* note 27, at 356 (providing a typical oath).

60. See Transcript of Proceedings, *People v. Simpson*, *supra* note 46, at 47,792 (quoting Judge Ito's admonition to jurors). Even those courts that have experimented with permitting jurors to engage in predeliberation discussions have limited those exchanges to the jurors only and have instructed them that they can only have such deliberations if all jurors are present. See B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 281 (1996) (describing Arizona's jury reforms including telling jurors that they can discuss the evidence before the close of a trial in a civil case). Two studies of the effectiveness of this rule in Arizona found that jurors did not always wait until all jurors were present to have such preliminary discussions, even though they had been instructed to do so. See Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 75 (2003) (describing one study in which fifty jury deliberations were videotaped and finding that the juries that had been instructed that they could engage in predeliberation discussion “when all jurors were present . . . frequently ignored this admonition and many substantive discussions occurred

bition is so that no outsider tries to influence them. The jury is supposed to reach its own independent judgment free from outsiders' influence, tampering, or extraneous information.<sup>61</sup> Also, if jurors express their views to outsiders, it becomes even more difficult for jurors to back down from those views later when they are in the midst of deliberations. Jurors are supposed to reach a group decision through robust deliberations. They are supposed to listen carefully to each other's arguments and to decide if they find them persuasive. If they do, they should be willing to vote accordingly. One reason for the secrecy of the deliberations is so that jurors can be candid with each other. If one of the jurors expresses his or her views or reactions to other jurors' views online, then it is difficult for the other jurors to feel that they can speak candidly. Who knows what will end up online?

#### D. MAGNIFIED HARMS

Although jurors have always confronted these problems, social media makes the harms more likely and magnifies their reach. Admittedly, there has always been the danger that a juror would do his or her own research or consult an outside source. Social media merely exacerbates this problem. Today, information is easy to obtain. It does not involve a journey to a library or a visit to a site. Everything can be done online. Information is available just by typing in a search term. It is a lot easier to violate the judge's instruction and to consult outside sources or to do outside research when one can do it from one's home or even from one's smartphone. In fact, it no longer feels like "outside" research; rather, it merely feels like what one does anytime one needs additional information. The response to check information on one's cell phone—whether to answer a question, define a term, or check a fact—has become almost second nature to many people.

Similarly, it is easy for jurors to be exposed inadvertently to information via social media. It pops up everywhere, including where one least expects it. Checking one's personal email account might mean exposure to recent headlines. Updating one's Facebook page might mean learning about new developments in the trial for which one is serving as a juror. Even benign activities might lead to information that one is not supposed to have.

Although judges have long instructed jurors that they are not to discuss the case with anyone, including friends or family, judges have long suspected that some jurors do, but the harm from such conversations is minimal. In the age of social media, however, if a juror offers his or her views

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when a sizeable number of the jurors were not present in the jury room"); Paula Hannaford-Agor et al., *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 *LAW & HUM. BEHAV.* 359, 364, 376, 379-80 (2000) (reaching a similar finding based on questionnaires from jurors rather than coding of videotaped deliberations).

61. See *supra* Part II.A-D.

online, those views can go viral and be read by millions of people.<sup>62</sup> In addition, those views can be picked up by traditional media and aired round-the-clock. The damage can be considerable. A large number of the public may then find it hard to believe that the juror who revealed his or her views has approached the case with an open mind. The ideal of a fair trial has then become endangered.

#### IV. DETERMINING THE EXTENT OF THE PROBLEM

It is difficult to know how many jurors use social media in impermissible ways while they serve as jurors. There are several sources of information, but they do not give a complete picture.<sup>63</sup> There are the high-profile examples that grab newspaper headlines, and there are a number of reported cases when courts have found that jurors used social media or the Internet in a manner that constituted juror misconduct.<sup>64</sup> There have also been a few empirical studies in this country and abroad to examine how prevalent the use of social media is by jurors; however, each study has its own limitations.<sup>65</sup> In spite of the paucity of empirical studies, many state and federal courts have felt the need to take action.<sup>66</sup>

##### A. NEWSPAPER ACCOUNTS

One of the early newspaper headlines first calling attention to the problem of jurors who use social media or the Internet to do research on issues that arose during trial was *As Jurors Turn to Web, Mistrials Are Popping Up*.<sup>67</sup> The article reported that a federal judge, presiding over a trial involving drugs in Florida, interviewed one juror who admitted that he had done research on the Internet about the trial, in violation of the judge's instructions.<sup>68</sup> Even more startling, the judge soon discovered that eight other jurors on that same jury had engaged in similar wrongdoing.<sup>69</sup> Jurors had conducted Google searches to learn about the lawyers and defendant; they had checked definitions on Wikipedia; and they had

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62. According to one lawyer who moderated an ABA panel on social media and jurors on August 3, 2012, "There are currently 955 million Facebook users, and that figure is expected to rise to one billion this month," [Hayes] Hunt [of Cozen O'Connor, Philadelphia] said. Twitter has 500 million users, he added." Lance J. Rogers, *ABA Panelists Explore Intersection of Social Media and Criminal Justice System*, 91 CRIM. L. REP. 653 (2012).

63. See *infra* Part IV.A-C.

64. See *infra* Part IV.A-B.

65. See *infra* Part IV.C.

66. One researcher at the National Center for State Courts (NCSC) explained the difficulty that researchers face in advising courts: "Until we know how and why jurors use information, we can't advise judges' about jury instructions or other strategies to address this issue . . ." #notweets@juryservice, NAT'L CTR. FOR STATE COURTS 6 (2011), <http://www.ncsc.org/~media/Files/PDF/Annual%20Reports/AnnualReport2011.ashx> (quoting Nicole Waters, NCSC senior court research associate).

67. John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1.

68. *Id.*

69. *Id.*

searched for evidence that had been excluded from the trial by the judge.<sup>70</sup> The judge felt he had no choice but to declare a mistrial.<sup>71</sup> The article dubbed the problem “a Google mistrial.”<sup>72</sup>

Newspapers are replete with other high-profile examples in which jurors engaged in online communication or research about a trial. NBC’s *Today Show* weatherman, Al Roker, got into trouble when he took photos of prospective jurors in the jury lounge and posted them on Twitter.<sup>73</sup> A juror on a capital murder case conducted online research as to the nature of the victim’s injuries, leading to her dismissal from the jury and resulting in a retrial of the defendant on lesser charges.<sup>74</sup> In a civil case in which a juror looked up the female defendant on Facebook and sought to “friend” her, the judge removed the juror from the jury.<sup>75</sup> Afterward, however, the juror updated his Facebook page to say how glad he was to have “got[ten] out of jury duty.”<sup>76</sup> At that point, the judge scheduled a hearing to consider contempt-of-court charges against the juror.<sup>77</sup> In a similar case, a juror in Texas ultimately pleaded guilty to four counts of contempt of court and was sentenced to two days of community service for trying to friend the defendant.<sup>78</sup>

Although the headlines might report on the most egregious examples because the media relies on such stories to attract an audience, it is also possible that this misconduct is far more prevalent than anyone suspects. One article in 2010 tried to give some idea of how widespread jurors’ use of the Internet was.<sup>79</sup> It noted that a Reuters’ search of Westlaw “found 90 verdicts [had been] called into question since 1999” due to jurors’ use of the Internet, and “[m]ore than half the cases [were] from the last two years [2008-2010].”<sup>80</sup> Reuters also monitored Twitter posts for three weeks in November and December 2010 and found that people who identified themselves as prospective or sitting jurors were posting on Twitter

70. *Id.*

71. *See id.*

72. *Id.*

73. Debra Cassens Weiss, *Media Atwitter over Al Roker’s Twitter Photos from Jury Duty Wait*, A.B.A. J. (May 29, 2009, 9:00 AM), [http://www.abajournal.com/news/media\\_atwitter\\_over\\_al\\_rokers\\_twitter\\_photos\\_from\\_jury\\_duty\\_wait](http://www.abajournal.com/news/media_atwitter_over_al_rokers_twitter_photos_from_jury_duty_wait).

74. *See* Brian Grow, *U.S. Juror Could Face Charges for Online Research*, REUTERS, (Jan. 19, 2011, 1:11 PM), <http://www.reuters.com/article/2011/01/19/us-internet-juror-idUSTRE7015K120110119>.

75. Ben Zimmer, *Juror Could Face Jail Time for ‘Friending’ Defendant*, USA TODAY (Feb. 7, 2012, 2:34 PM), <http://www.usatoday.com/news/nation/story/2012-02-07/juror-face-book-friend-defendant/53000186/1>.

76. *Id.*

77. *Id.*

78. Eva-Marie Ayala, *Tarrant County Juror Sentenced to Community Service for Trying to ‘Friend’ Defendant on Facebook*, STAR-TELEGRAM (Aug. 28, 2011), <http://www.tdcaa.com/issues/tarrant-county-juror-sentenced-community-service-trying-friend-defendant-facebook>.

79. Debra Cassens Weiss, *At Least 90 Verdicts Challenged Because of Jurors’ Alleged Internet Misconduct*, A.B.A. J. (Dec. 9, 2010, 8:39 AM), [http://www.abajournal.com/news/article/at\\_least\\_90\\_verdicts\\_challenged\\_because\\_of\\_jurors\\_alleged\\_internet\\_miscondu](http://www.abajournal.com/news/article/at_least_90_verdicts_challenged_because_of_jurors_alleged_internet_miscondu).

80. *Id.*



every three minutes.<sup>81</sup>

## B. CASE LAW EXAMPLES

There have also been a number of judicial opinions that found juror misconduct based on jurors' use of social media or the Internet while they served as jurors.<sup>82</sup> Although these cases, like the newspaper accounts, provide instances of juror misconduct, they cannot capture how widespread the problem is.

One type of juror misconduct found in these cases is when jurors use the Internet to do their own research in violation of the requirement that they decide the case based only on the evidence presented in court.<sup>83</sup> For example, in *Tapanes v. State*, in which the defendant was tried for first-degree murder but was convicted of the lesser included offense of "manslaughter with a firearm," the foreperson used his smartphone to look up "prudent" and "prudence," which were words that the prosecutor had used repeatedly during closing argument.<sup>84</sup> The foreperson then shared the definitions with his fellow jurors.<sup>85</sup> The misconduct did not come to light until after the jury reached a verdict.<sup>86</sup> The appellate court ruled that the definitions could have influenced the verdict and remanded the case for a new trial.<sup>87</sup>

In an earlier case, *Russo v. Takata Corp.*, the juror conducted a Google search before voir dire, though he did not reveal his search during voir dire.<sup>88</sup> He wanted to find out whether the defendant had ever been sued.<sup>89</sup> He concluded from his Google search that Takata had not been sued before.<sup>90</sup> He did not reveal this information to the other jurors until jury deliberations when he told them that he had not found any indication of past lawsuits against Takata.<sup>91</sup> The trial judge found that the juror's research constituted "extrinsic evidence" that was prejudicial and granted a new trial.<sup>92</sup> The South Dakota Supreme Court affirmed the trial judge's ruling, though it stated it was not announcing a "hard and fast rule that all such types of internet research by a juror prior to trial without notice to the court and counsel automatically doom a jury's verdict."<sup>93</sup>

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81. Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010, 3:23 PM), <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTREGB74820101208>.

82. See, e.g., *Russo v. Takata Corp.*, 774 N.W.2d 441, 454 (S.D. 2009); *Tapenes v. State*, 43 So. 3d 159, 163 (Fla. Dist. Ct. App. 2010).

83. *Tapanes*, 43 So. 3d at 162.

84. *Id.* at 160, 162.

85. *Id.* at 162.

86. *Id.*

87. *Id.* at 163.

88. *Russo v. Takata Corp.*, 774 N.W.2d 441, 443-44 (S.D. 2009).

89. *Id.* at 446.

90. *Id.*

91. *Id.*

92. *Id.* at 447.

93. *Id.* at 454.

There also have been cases of jurors posting their views about the trial using social media while the trial is still proceeding.<sup>94</sup> Such disclosures violate the trial judge's instructions and impugn the integrity of the trial. For example, in *Dimas-Martinez v. State*, a capital murder case, one of the jurors continued to post messages about the trial to his Twitter account, even after the judge had told him to stop.<sup>95</sup> The juror persisted even during the penalty phase, when he tweeted: "Choices to be made. Hearts to be broken."<sup>96</sup> The Arkansas Supreme Court held that "the circuit court's failure to acknowledge this juror's inability to follow the court's directions was an abuse of discretion."<sup>97</sup>

In some of these cases, the juror's posts gave the impression that the juror had already formed an opinion in the case while the trial was still proceeding. For example, in *Commonwealth v. Guisti*, a juror sent an e-mail to a listserv containing 900 subscribers<sup>98</sup> in which she said that she was "'stuck in a 7 day-long Jury Duty rape/assault case . . . missing important time in the gym, working more hours and getting less pay because of it! Just say he's guilty and lets [*sic*] get on with our lives!'"<sup>99</sup> The State had only presented three of its six witnesses when the juror had sent her e-mail.<sup>100</sup> Even if the juror had not specifically stated that she thought the defendant was guilty, she suggested that she was willing to vote that way just to be done with her jury service. Even if she were advocating that the jury vote based on expediency rather than a fully formed point of view, the result would be the same for the defendant: a conviction. However, the Supreme Judicial Court of Massachusetts was more concerned about whether the juror had received any responses to her e-mail, and if so, whether she shared those responses with her fellow jurors.<sup>101</sup> Accordingly, the Supreme Judicial Court remanded the case for the trial judge to conduct a limited voir dire to address those concerns.<sup>102</sup>

### C. EMPIRICAL STUDIES AND THEIR LIMITATIONS

There have been a few empirical studies to date, but they provide only a limited view of the scope of the problem. One of the earliest reports on jurors' use of social media came from a question that was included in a broad study of juries conducted by Cheryl Thomas at the request of the

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94. See *Dimas-Martinez v. State*, 385 S.W.3d 238, 242 (Ark. 2011).

95. *Id.* at 240, 242.

96. *Id.* at 246.

97. *Id.* at 248.

98. See Tricia R. Deleon & Janelle S. Forteza, *Is Your Jury Panel Googling During the Trial?*, *ADVOC.*, Fall 2010, at 36, 38.

99. *Commonwealth v. Guisti*, 747 N.E.2d 673, 678 (Mass. 2001). This juror's desire to rush a verdict because of her own personal schedule recalls the situation of Juror 7, the marmalade salesman, in the movie *12 Angry Men*. He had tickets for the baseball game that evening and did not want to miss a moment of it. Thus, he was in favor of a speedy resolution (i.e., conviction) so that he could get to the ball game on time. See *12 ANGRY MEN* (Orion-Nova Productions 1957).

100. *Guisti*, 747 N.E.2d at 678.

101. See *id.* at 679–80.

102. *Id.* at 681.

U.K. Ministry of Justice.<sup>103</sup> Her research project examined how fair jury trials were in England and Wales, but one of her research questions included the following: “How is the internet affecting jury trials?”<sup>104</sup> Her research utilized three different methods: a case simulation using actual juries at Crown Courts (797 jurors on 68 juries); a large-scale analysis of all jury verdicts (68,000 verdicts) in Crown Courts in England and Wales that concluded between October 1, 2006 and March 31, 2008; and a post-verdict survey of jurors (668 jurors in 62 cases) in three locations in England (London, Nottingham, and Winchester).<sup>105</sup> She relied on the first method to determine whether all-white juries discriminated against black or minority defendants.<sup>106</sup> She used the second method to examine whether there was consistency in jury verdicts.<sup>107</sup> Finally, she relied on the third method to explore jurors’ use of the Internet during the trial.<sup>108</sup>

With respect to the Internet, judges instructed jurors not to look on the Internet for information about their trial.<sup>109</sup> Using post-verdict questionnaires, Thomas asked jurors whether they had looked for information on the Internet, and if so, where they had looked.<sup>110</sup> The jurors completed the questionnaires anonymously.<sup>111</sup> Thomas found that in high-profile cases, 12% of jurors indicated that they had looked for information on the Internet, whereas in ordinary cases, 5% of jurors indicated that they had done so.<sup>112</sup> In both types of cases (high-profile and ordinary), a much higher percentage of jurors indicated that they had *come across* media reports of their case on the Internet (26% of jurors in high-profile cases and 13% in ordinary cases) than jurors who admitted that they had *looked for* media reports of their case on the Internet (12% of jurors in high-profile cases and 5% in standard cases).<sup>113</sup> This result is not surprising given that jurors had to admit to having done something that they had been instructed not to do by the judge. What was surprising, though, was that most jurors who indicated that they had looked for information on the Internet (68%) were over thirty years old.<sup>114</sup> Although the conventional view is that younger jurors—the so-called “digital natives”—are more likely to turn to the Internet for information, this was not the case in Thomas’s study.

Admittedly, the focus of Thomas’s study was on the fairness of the jury trial in England and Wales, especially as it might be affected by race, so

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103. See Cheryl Thomas, *Are Juries Fair?*, JUSTICE i, viii (Feb. 2010), <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research-are-juries-fair-research.pdf>.

104. *Id.* at i.

105. *Id.* at i, ii.

106. *Id.* at i.

107. *Id.* at ii.

108. *Id.* at viii.

109. *Id.* at 43.

110. See *id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

her examination of jurors' use of the Internet was only a small part of the study.<sup>115</sup> As Thomas acknowledged, many questions with respect to jurors' use of the Internet remain unanswered from her study, including which sources jurors turn to on the Internet, how they use these sources, and whether they really understand that they are not supposed to use the Internet and social media during the trial.<sup>116</sup>

The main weakness of Thomas's approach was that jurors were asked to self-report.<sup>117</sup> One problem with self-reporting is that jurors' recollections can be faulty or self-serving.<sup>118</sup> Another problem is that they were asked to self-report about a matter that was contrary to the judge's instructions.<sup>119</sup> Even though they were granted anonymity, the percentages are likely to be lower than the actual percentages because jurors are unlikely to admit to wrongdoing. Thomas does not indicate where these jurors completed the post-verdict questionnaires, but if they completed the questionnaires in the courthouse that might have left them feeling even more reticent about admitting to wrongdoing than if they had completed them in their own homes. In addition, this study was conducted in England and Wales, and though there are many similarities between their jury system and ours, there are also differences that need to be considered before the results of a study in one country are applied to a jury system in another country.<sup>120</sup>

One of the earliest studies in the United States on jurors and the "new media"<sup>121</sup> was made public in August 2010 by the Conference of Court Public Information Officers (CCPIO), the National Center for State Courts (NCSC), and the E.W. Scripps School of Journalism at Ohio University (CCPIO study).<sup>122</sup> The CCPIO study, like Thomas's study, did not have jurors' use of social media as its main focus. Rather, the CCPIO study looked primarily at judicial officers' use of technology in the courts and considered how this new media affected court proceedings, the conduct of judges and court employees, and public understanding of and trust in courts.<sup>123</sup> In terms of method, the study used an online survey that it invited 16,000 individuals to complete between June 16 and June

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115. See generally *id.* (devoting only a few pages of the larger study to juror use of the Internet).

116. *Id.* at 44.

117. See *id.* at 12.

118. See *id.*

119. See *id.* at 43.

120. See, e.g., Nancy S. Marder, *Two Weeks at the Old Bailey: Jury Lessons from England*, 86 *CHI-KENT L. REV.* 537, 576-83 (2011).

121. By "new media," this study meant social media (such as Facebook, MySpace, and LinkedIn), microblogging (such as Twitter), smartphones, tablets, and notebooks (such as iPhone and Blackberry), sites that aggregate information (such as Google's Social Search), news categorizing, sharing and syndication (such as blogs and RSS), visual media sharing (such as YouTube and Flickr), and Wikis. See Conference of Court Public Information Officers, et al., *New Media and the Courts: The Current Status and a Look at the Future* 8-9 (Aug. 26, 2010), <http://www.ccpio.org/wp-content/uploads/2012/06/2010-ccpio-report.pdf> [hereinafter CCPIO study].

122. *Id.* at 1.

123. *Id.* at 8.

25, 2010.<sup>124</sup> In the end, 810 individuals (of which 254 were judicial officers) completed the questionnaire.<sup>125</sup> Federal judges were not included in this study.<sup>126</sup>

With respect to jurors' use of social media, the main finding of the CCPIO study was that only 9.8% of judicial officers (judges, administrative judges, or magistrates) witnessed jurors' use of social media sites, microblogging, smartphones, tablets, or notebooks in the courtroom.<sup>127</sup> Although the authors found that this percentage (9.8%) reflected a "smaller proportion of judges than might be expected,"<sup>128</sup> it is not so surprising given that the authors asked judges to respond to what they had observed in the courtroom. The difficulty with that charge is that judges have many responsibilities in the courtroom. Their attention will undoubtedly be focused on a number of different trial participants, and as a result, they will be unable to focus exclusively on jurors and their use of social media. Thus, jurors could use social media in the courtroom, but not be observed by judges. Alternatively, judges might take time to observe jurors in the courtroom, but the problem might be that jurors use the new media outside of the courtroom. They could use it in the deliberation room, at lunch, or at home, and such usage would not have been observed by judges or captured by this study. Another methodological limitation of this study is that the survey was conducted online and sent to a distribution list.<sup>129</sup> This means that only those judicial officers who are technologically savvy were likely to complete the online survey and that the respondents were not randomly selected.

A 2011 study by the Federal Judicial Center (FJC study) filled some of the gaps left by the CCPIO study.<sup>130</sup> The FJC study's central focus was an assessment of how frequently jurors in federal district courts used social media to communicate during the trials.<sup>131</sup> The FJC study polled active and senior federal district court judges.<sup>132</sup> The FJC study, like the CCPIO study, used an online questionnaire and asked judges to report on *their* perceptions of jurors' use of social media to communicate about the proceedings in which they were involved.<sup>133</sup> Of the 952 judges who received

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124. *Id.* at 9.

125. *Id.*

126. *Id.*

127. *Id.* at 10. A small survey, conducted at about the same time as the CCPIO study by an academic and sent to federal judges, prosecutors, and public defenders, of whom about 40 responded, found that "[a]pproximately ten percent of the respondents reported personal knowledge of a juror conducting Internet research." Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 415 n.39 (2012).

128. CCPIO study, *supra* note 121, at 10.

129. *Id.* at 65.

130. Meghan Dunn, *Jurors' Use of Social Media during Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management*, FED. JUD. CTR. (Nov. 22, 2011), [https://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/\\$file/dunnjuror.pdf](https://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf) [hereinafter FJC study].

131. *Id.* at 1.

132. *Id.*

133. *Id.* at 2.

the questionnaire, 508 responded; thus, there was a relatively low response rate of 53%.<sup>134</sup>

The key finding of the FJC study was that “[t]he use of social media by jurors during trials and deliberations is not a common occurrence.”<sup>135</sup> Only 6% of the responding judges (30 out of 508) encountered jurors who used social media during the trial or the deliberations.<sup>136</sup> Furthermore, most of these judges (twenty-eight out of thirty) who indicated that jurors used social media said that this had happened in only one or two trials and that it was more common in criminal trials (twenty-two judges) than in civil trials (five judges).<sup>137</sup> However, three judges indicated it happened in both civil and criminal trials.<sup>138</sup> Judges acknowledged that it was difficult for them to observe jurors using social media, and those who reported that jurors used social media mainly discovered the usage when other jurors reported it to them (thirteen judges).<sup>139</sup> According to this study, most of the federal district court judges have taken some measures to ensure that jurors do not use social media during the trial and deliberations.<sup>140</sup> The most common approach is for judges to use the federal model instruction (60% of the responding judges) or some other instruction (67% of the remaining judges) to inform jurors that they cannot use social media during the trial or deliberations.<sup>141</sup>

Although the FJC study provides a window into federal district court judges’ approaches to stopping jurors from using social media during the trial or deliberations, it too has limitations. One limitation, as the FJC study acknowledged, is that it looked at federal judges’ *perceptions* of jurors’ use of social media, but it cannot provide any information as to jurors’ *actual* use of social media.<sup>142</sup> Another limitation is that it only looked at federal district court judges’ perceptions and did not include state court judges.<sup>143</sup> In addition, the FJC study, like the CCPIO study, used an online questionnaire.<sup>144</sup> As a result, the responding judges might be those who are more technologically savvy, and therefore, more able to observe jurors’ use of social media in the courtroom than judges who have little knowledge of technology, including social media. Even though the FJC study found that only a small percentage of judges observed jurors using social media, the percentage might have been even smaller if the responding judges were reached through online as well as paper questionnaires and included both technologically savvy and technologically unsophisticated judges.

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134. *Id.* at 1.

135. *Id.* at 2.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 4.

140. *Id.* at 5.

141. *Id.* at 6–7.

142. *Id.* at 2.

143. *Id.* at 1.

144. *Id.*

The strikingly small number of judges who indicated that jurors used social media suggests that this is not something that judges can readily observe. This point is reinforced by the judges, who said that they relied mainly on other jurors to bring this behavior to their attention. One conclusion that some readers might draw from this study is that few jurors are using social media since only 6% of the judges (30 out of 508) indicated that a juror had done so in only one or two trials over which the judge presided.<sup>145</sup> However, another conclusion—and the one that I think is more likely—is that judges are unable to observe this behavior for a variety of reasons, including the judges' need to focus on other aspects of the trial and the fact that jurors could engage in such behavior outside of the courtroom and beyond the gaze of the judge. As a result, we should not turn to judges in order to assess how widespread the problem is. Of course, the less technologically savvy judges—who might well be the ones who did not respond to this questionnaire—would have an even more difficult time detecting this behavior because they might not even know what they should be trying to observe. Yet another problem in turning to judges for this information is that they are likely to believe that jurors are adhering to this instruction just like they are supposed to adhere to all the judge's instructions. Thus, judges might be resistant to the notion that some jurors are flouting the judge's instructions.

A 2012 study undertaken by Judge Amy St. Eve, a federal district court judge in the Northern District of Illinois, also found little evidence of jurors' use of social media in two judges' courtrooms and jury rooms.<sup>146</sup> In this study, as in the earlier studies, there are design features that might account for this finding. Judge St. Eve, along with her law clerk, conducted an "informal study," which they described as "not scientific."<sup>147</sup> Over the course of sixteen months, Judge St. Eve, along with Judge Matthew Kennelly, another federal district court judge in the Northern District of Illinois, had 140 actual jurors complete a short survey after the jurors had finished their jury service.<sup>148</sup> The jurors came from sixteen trials (criminal and civil) held in the Northern District of Illinois and presided over by these two judges.<sup>149</sup> Both judges gave the federal model instruction on social media at the beginning and end of each trial, and repeated it throughout the trial, especially during long trials.<sup>150</sup> This instruction informs jurors that they are not to use social media or the Internet to learn more about the case or to share their views during the trial and the deliberations.<sup>151</sup>

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145. *Id.* at 2.

146. See Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 21 (2012).

147. *Id.*

148. *Id.* at 20–21.

149. *Id.* at 21.

150. *Id.*; see also *infra* text accompanying notes 199–202 (describing the federal model instruction in further detail).

151. St. Eve & Zuckerman, *supra* note 146, at 26–28.

The central finding that emerged from this survey was that only 6 out of 140 jurors reported any temptation to communicate about the case using social media, and all 6 claimed not to have succumbed to the temptation.<sup>152</sup> The key lesson from this survey, according to the authors, is that courts should routinely and repeatedly instruct jurors on the need to avoid communicating about the trial using social media.<sup>153</sup> They concluded that the survey shows that jurors will follow the judge's instructions.<sup>154</sup> The study reaffirmed, in Judge St. Eve's words, "the fact that jurors do follow our instructions."<sup>155</sup>

Although jurors do try to follow a judge's instructions, especially instructions that are as easy to understand as this one is, there are a few other reasons why all of the jurors might have claimed to have followed the instruction even if some of them had not. First, this study involved a small number of participants (140) coming from only two courtrooms. Second, and most significant, this was a judge-conducted survey, which means that there is a chance that the jurors were not being completely candid. Of course, there is always a risk when jurors have to answer a questionnaire about their actions that they are not being completely candid. However, there is an even greater risk here because the jurors were aware of the following: the judge or law clerk administered the survey; the judge had instructed the jurors not to use social media or the Internet; and the jurors presumably completed the survey in the courtroom where they had just served. For these reasons, they might have been less candid than usual in their responses. They might have feared—even though the survey was conducted anonymously—that they would get in trouble if they admitted to having engaged in behavior contrary to the judge's instructions.

In 2014, Judge St. Eve and her former law clerk, aided by Judge Charles Burns, a judge in the Circuit Court of Cook County, Illinois, Criminal Division, expanded and updated the 2012 survey.<sup>156</sup> Judge St. Eve and Judge Burns, using jurors who served in trials in their respective courtrooms, added 443 responses to the 140 responses collected in the earlier study.<sup>157</sup> Both judges used a model social media instruction during opening and closing instructions, and at various points throughout the trial in some of the longer trials.<sup>158</sup>

From the 583 juror responses in both studies, they found that the overwhelming number of jurors (520 or 89.19%) were "not tempted" to and did not use social media.<sup>159</sup> Of the small number of jurors (47 or 8.06%)

152. *Id.* at 21.

153. *See id.* at 24–25.

154. *See id.*

155. Ameet Sachdev, *Poll: Jury Directive Effective on Leaks*, CHI. TRIB., Mar. 16, 2013, § 2 (Business), at 1.

156. Hon. Amy J. St. Eve, Hon. Charles P. Burns & Michael A. Zuckerman, *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64 (2014).

157. *Id.* at 78.

158. *Id.*

159. *Id.* at 79.



who were tempted to use social media, 45 said they did not succumb to temptation, and the other 2 did not respond.<sup>160</sup> The percentages of jurors who were “not tempted,” “tempted,” or from whom there was “no response” were about the same for federal and state court jurors.<sup>161</sup>

The authors found from the juror comments that jurors refrained from using social media to discuss the trial—whether they had been tempted or not tempted to do so—mainly because of the judge’s instructions.<sup>162</sup> The oath also influenced their behavior.<sup>163</sup> Twenty jurors indicated that they had not been tempted to use social media during the trial because they do not use social media at all, and other jurors were not tempted out of fairness to the parties.<sup>164</sup> The authors, while acknowledging that their follow-up study was also “informal” and “not scientific,”<sup>165</sup> provided a snapshot view of the reasons jurors gave for following the law. The authors concluded that the cautionary instructions are effective as long as they explain to jurors why it is important to refrain from online communication about the trial, and as long as the instructions are given at the beginning and end of the trial and at various points throughout the trial.<sup>166</sup> The lesson the authors drew from their survey is that “[c]ourts should instruct juries on social media early and often.”<sup>167</sup>

This survey, like the earlier one, was based on jurors’ questionnaires, which jurors were asked to complete by a judge in the courtroom after the judge had instructed them not to communicate online about the trial.<sup>168</sup> It is not surprising that few jurors were willing to admit to temptation, much less having succumbed to temptation. Although the jurors were protected by anonymity, they still might have felt uneasy about admitting to misconduct or even having contemplated misconduct. In addition, the survey used the word “tempted” (“Were you *tempted* to communicate about the case through any social networks, such as Facebook, MySpace, LinkedIn, YouTube or Twitter?”), which reminded the jurors that they should not have engaged in the action about which they were being asked.<sup>169</sup> Instead, the question should have been phrased more neutrally, such as: “Did you *consider* communicating about the case through any social networks, such as Facebook, MySpace, LinkedIn, YouTube or Twitter?”

In spite of these limitations, the study provided “the voices of actual jurors” and the reasons they gave for their behavior.<sup>170</sup> These reasons supported the view that most jurors take their responsibilities seriously

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160. *Id.* at 79–80.

161. *Id.* at 80.

162. *Id.* at 80, 83.

163. *See id.* at 84.

164. *Id.* at 84–85.

165. *Id.* at 66.

166. *See id.* at 88–90.

167. *Id.* at 87.

168. *Id.* at 78.

169. *Id.* at 79 (emphasis added).

170. *Id.* at 66.

and try to do a good job. In addition, this 2014 study added to the earlier 2012 study by including state court jurors and by increasing the total number of participants.<sup>171</sup>

The National Center for State Courts (NCSC) completed a pilot study in which prospective jurors, jurors, and alternates responded to a survey about social media; judges and attorneys completed surveys about the cases as well.<sup>172</sup> The pilot study was limited in scope in that participants came from the courtrooms of only six judges in six criminal trials and seven civil trials located in five states.<sup>173</sup> The authors acknowledged that the pilot study was small but also pointed out that the average juror response rate of 97% in criminal trials and 70% in civil trials was high.<sup>174</sup> The preliminary findings revealed that most of the judges in this study instructed jurors about what they could and could not do with respect to the Internet, and most prospective jurors understood this instruction.<sup>175</sup> About 66% of the prospective jurors recognized that any Internet research would violate the judge's instructions, and 87% of the prospective jurors said that using the Internet to communicate with friends, family, or others about the trial would violate the judge's instructions.<sup>176</sup> About 86% of prospective jurors said they could refrain from communicating on the Internet during the trial, if instructed by the judge to do so, whereas the remaining 14% said they would be unable to do so.<sup>177</sup>

The key question raised by the NCSC pilot study was whether jurors and alternates would admit to misconduct involving the Internet.<sup>178</sup> About 10% of jurors and alternates admitted to misconduct but only to the "old-fashioned" kind, such as having predeliberation discussions with fellow jurors and talking about the trial with family members.<sup>179</sup> The reluctance of jurors to admit to misconduct involving the Internet led the authors of this pilot study to recommend a "dual-track" approach when the NCSC conducts a national study.<sup>180</sup> One track would employ the same methodology as the pilot study, and the other track would try to follow up with former jurors, while making sure that the jurors could not be linked to the case on which they served.<sup>181</sup> The hope is that through one track or the other, jurors would be forthcoming about their use of social media or the Internet to communicate or do research about the trial.

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171. *Id.*

172. Paula Hannaford-Agor, David B. Rottman & Nicole L. Waters, *Juror and Jury Use of New Media: A Baseline Exploration*, NAT'L CTR. FOR STATE COURTS 4, available at <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Harvard%20Executive%20Session/jurorandjuryuse.aspx> (last visited Aug. 27, 2014).

173. *Id.*

174. *Id.*

175. *See id.* at 6.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 9.

181. *Id.*

## V. COURTS' RESPONSES TO THE PROBLEM THUS FAR

Judges face a conundrum. They cannot know the full extent of jurors' use of social media, and yet, there are serious constitutional consequences to judicial inaction. Thus far, the empirical studies are few in number and limited in approach.<sup>182</sup> One researcher sensibly observed: "Until we know how and why jurors use information, we can't advise judges' about jury instructions or other strategies to address this issue . . . ."<sup>183</sup> Yet individual instances of juror misconduct grab headlines and result in mistrials.<sup>184</sup> The individual instances attract widespread attention and raise questions—for parties, lawyers, judges, and the public—about the fairness of trials and the legitimacy of jury verdicts. Thus, judges need to take action, even in the face of limited empirical evidence as to scope and how best to proceed.

In this Part, I identify steps that judges have tried thus far to prevent jurors from using social media and the Internet during trials and deliberations. Some judges have suggested that the courts need not respond.<sup>185</sup> They assume that jurors' use of social media or the Internet today is no different than jurors' discussions of the trial with family or friends in an earlier era.<sup>186</sup> Other judges, however, believe that a response is necessary and have usually agreed to one or two discrete steps.<sup>187</sup> The most common response has been to update the cautionary instruction.<sup>188</sup> A more extreme response has been to ban all electronic devices in the courthouse.<sup>189</sup> The most extreme response, which has been reserved for the most egregious misconduct, has been to subject the juror to contempt proceedings and to impose sanctions.<sup>190</sup>

### A. INSTRUCTIONS

Judges' most common response to try to stop jurors from using social media and the Internet has been to give a revised cautionary instruction.<sup>191</sup> Initially, many judges thought that the cautionary instruction that had often been used, which told jurors not to seek information about the trial from any outside sources, such as newspapers, magazines, television, and radio, and not to talk to anyone about the trial, including family and

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182. See, e.g., *id.* at 6, 9-10.

183. #notweets@juryservice, *supra* note 66, at 6 (quoting Nicole Waters, NCSC senior court research associate).

184. See *supra* Part IV.A.

185. See Grant Amey, *Social Media and the Legal System: Analyzing Various Responses to Using Technology from the Jury Box*, 35 J. LEGAL PROF. 111, 122 (2010).

186. See *id.*; Andrea F. Siegel, *Judges Confounded by Jury's Access to Cyberspace*, BALTIMORE SUN (Dec. 13, 2009), [http://articles.baltimoresun.com/2009-12-13/news/bal-md-ar.tml13dec13\\_1\\_deliberations-period-florida-drug-case-jurors](http://articles.baltimoresun.com/2009-12-13/news/bal-md-ar.tml13dec13_1_deliberations-period-florida-drug-case-jurors).

187. See Dunn, *supra* note 130, at 10.

188. *Id.*

189. See *id.* at 11.

190. See *id.* at 5; see also Michael K. Kiernan & Samuel E. Cooley, *Juror Misconduct in the Age of Social Networking*, 62 FDCC Q. 179, 189 (2012), available at [http://www.the-federation.org/documents/v62n2\\_Kiernan.pdf](http://www.the-federation.org/documents/v62n2_Kiernan.pdf).

191. See Dunn, *supra* note 130, at 10.

friends, and not to do any outside research about the trial, was broad enough that jurors would know that they could not do research on the Internet or communicate about the trial through social media.<sup>192</sup> Some judges also argued that merely mentioning the Internet and social media websites in an instruction would entice jurors to go to websites that they would not have gone to on their own and that by naming some websites and not others, jurors would think that the named websites were the only websites they could not use.<sup>193</sup>

However, jurors did not necessarily know that doing a Google search or finding information on Wikipedia constituted outside research.<sup>194</sup> They did not view an online search from a smartphone or a laptop as doing outside research. After all, they were not going to a library or consulting an expert.<sup>195</sup> Rather, they were simply turning to Google or Wikipedia, which is what they do whenever they have a question in their private or professional lives, and what they assumed they could do as jurors.<sup>196</sup> Similarly, when a juror shared his or her views about the trial on Facebook or sent a quick tweet about it on Twitter, they were not “discuss[ing]” the case with friends or family;<sup>197</sup> they were simply updating their friends about their day’s activities on Facebook or sharing their impressions with their followers on Twitter.

The growing number of media stories recounting instances of jurors’ improper use of the Internet and social media made it clear to some judges that the language typically found in the earlier cautionary instructions did not convey to jurors what judges thought it did. A number of state pattern jury instruction committees<sup>198</sup> and the federal committee<sup>199</sup> rewrote their cautionary instruction to be more specific than in the past.<sup>200</sup> As the Judicial Conference Committee on Court Administration and Case Management (CACM) explained, the idea is that “more explicit mention in jury instructions of the various methods and modes of electronic communication and research would help jurors better understand

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192. See Amey, *supra* note 185, at 122–23.

193. See *id.*

194. See *id.* at 114; Siegel, *supra* note 186.

195. See Siegel, *supra* note 186.

196. See Schwartz, *supra* note 67.

197. 2011 IPI, *supra* note 33, § 1.01[8] (prohibiting jurors from discussing the case with anyone).

198. See, e.g., Siegel, *supra* note 186 (“Concern has grown so much nationwide that legal experts, including in Maryland, are rewriting model jury instructions to specifically tell jurors that online searches, texting and social media—the things they routinely do on laptops, cell phones and BlackBerrys—are out.”). Some of the states that were quick to revise their jury instructions to address social media and the Internet included California, Connecticut, New York, Pennsylvania, Utah, and Washington. See Posting of Jeannine Turgeon, jturgeon@dauphinc.org, to PJILIST@Listserv.ncsconline.org (Nov. 21, 2011) (on file with author).

199. See Judicial Conference Comm. on Court Admin. and Case Mgmt., *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, U.S. COURTS (Dec. 2009), <http://www.uscourts.gov/uscourts/news/2010/docs/DIR10-018-Attachment.pdf>.

200. *Id.*

and adhere to the scope of the prohibition against the use of these devices.”<sup>201</sup> The state and federal committees have revised their respective instructions so that the instructions mention the Internet and social media explicitly and give examples, such as Google, Wikipedia, and Twitter, as sources that cannot be turned to for information or an exchange of views.<sup>202</sup>

For example, Illinois’s preliminary cautionary instruction in civil trials did not tell jurors to avoid doing outside research until 2009.<sup>203</sup> In 2009, the preliminary cautionary instructions in civil trials informed jurors that they could not do outside research about the trial, learn about the trial from outside sources, such as press, radio, television or the Internet,<sup>204</sup> or use “cell phones, text messaging, Internet postings and Internet access devices in connection with [their] duties” as jurors.<sup>205</sup> In January 2011, the Illinois Supreme Court Committee on Jury Instructions in Civil Cases<sup>206</sup> revised its preliminary cautionary instruction so that it was more specific and included several examples:

For example, you must not use the Internet, [including Google,] [Wikipedia,] [(insert current examples)], or any other sources that you might use every day, to search for any information about the case, or the law which applies to the case, or the people involved in the case, including the parties, witnesses, lawyers, and judge.<sup>207</sup>

In addition, the Illinois preliminary cautionary instruction in civil trials now informs jurors that they are not to share their thoughts or views about the case with anyone using any means at all, including “posting information about the case, or your thoughts about it, on any device or Internet site, including [blogs,] [chat-rooms,] or [(insert current exam-

201. *Committee Suggests Guidelines for Juror Use of Electronic Communication Technologies*, THIRD BRANCH (Apr. 2010), [http://www.uscourts.gov/News/TheThirdBranch/10-04-01/Committee\\_Suggests\\_Guidelines\\_for\\_Juror\\_Use\\_of\\_Electronic\\_Communication\\_Technologies.aspx](http://www.uscourts.gov/News/TheThirdBranch/10-04-01/Committee_Suggests_Guidelines_for_Juror_Use_of_Electronic_Communication_Technologies.aspx) (quoting Federal District Court Judge Julie A. Robinson’s transmittal letter).

202. *See id.*

203. The IPI book published in 2006 did not contain any references to outside research in the preliminary cautionary instruction (§ 1.01); nor did the supplements published in 2007 or 2008. *Compare* ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL § 1.01 (2006 ed.), *with* ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL § 1.01 (Supp. 2007), *and* ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL § 1.01 (Supp. 2008). However, the supplement published in 2009 did contain references to outside research. *See* ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL § 1.01[6]–[7] (Supp. 2009) [hereinafter 2009 IPI].

204. 2009 IPI, *supra* note 203, § 1.01[7].

205. *Id.* § 1.01[6].

206. In the interest of full disclosure, I serve as the Professor/Reporter for this Committee, and have held this position since October 2003. Thus, I have firsthand knowledge of the changes to the IPI preliminary cautionary instruction.

207. 2011 IPI, *supra* note 33, § 1.01 [7]. The judge can decide which material to include if it appears in brackets. This instruction also contains a bracket with a note to the judge to add current examples.

ples)], or any social-networking websites, such as [Twitter], [Facebook] or [(insert current examples)], or any other means.”<sup>208</sup> The committee provided a note to its readers (judges and lawyers) indicating that the judge should update the list to accommodate developments in technology, websites, and social media.<sup>209</sup> The committee that drafts the criminal jury instructions in Illinois eventually followed suit, though its instruction is not as specific as the version used in civil jury trials.<sup>210</sup>

Ohio’s revised instruction went a step further than Illinois’s and most other states’ instructions. In addition to specifying that jurors are not to use the Internet and social media to communicate about the trial,<sup>211</sup> the Ohio cautionary instruction explains to jurors that they cannot use any legal information that they have gleaned from television shows, movies, or other forms of entertainment:

The effort to exclude misleading outside influences also puts a limit on getting legal information from television entertainment. This would apply to popular TV shows such as *Law and Order*, *Boston Legal*, *Judge Judy*, older shows like *L.A. Law*, *Perry Mason*, or *Matlock*, and any other fictional show dealing with the legal system. . . . You must put aside anything you think you know about the legal system that you saw on TV.<sup>212</sup>

The aim of Ohio, Illinois, and other states that have updated their cautionary instruction was to use plain language and to give specific examples, so that jurors understand precisely what they need to refrain from doing. Linguists and plain language proponents have long urged jury instruction committees to write in language that is particular rather than general.<sup>213</sup> Jury instruction committees finally took this advice to heart when revising their instructions to explain to jurors that they could not use the Internet or social media to do research or to share their views.<sup>214</sup> The revised pattern cautionary instructions typically include a list of

208. *Id.* § 1.01 [9].

209. *Id.* § 1.01 (Notes on Use) (“For any of the cautionary instructions that refer to particular forms of technology, such as 1.01 [7], [9] and [10], judges should feel free to add new examples as they become available.”).

210. The preliminary cautionary instruction in criminal cases in Illinois was revised on July 13, 2012. See ILL. SUPREME COURT COMM. ON JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL § 1.01A (2014).

211. The Ohio instruction is also explicit that there is to be no outside contact, including “sending or receiving e-mail, Twitter, text messages or similar updates, using blogs and chat rooms, and the use of Facebook, MySpace, LinkedIn, and other social media sites of any kind regarding this case or any aspect of your jury service during the trial.” OHIO STATE BAR ASS’N JURY INSTRUCTIONS COMM., OSBA JURY INSTRUCTIONS § I.C.4 (2010) [hereinafter OSBA JURY INSTRUCTIONS].

212. *Id.* § I.C.3.

213. See, e.g., Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1115–16 (2001) (recommending the use of defendant’s name rather than “defendant” in jury instructions, though the task force did not follow the recommendation). For a fuller exposition of plain language principles, see Joseph Kimble, *The Elements of Plain Language*, MICH. B.J., Oct. 2002, at 44.

214. See *Committee Suggests Guidelines for Juror Use of Electronic Communication Technologies*, *supra* note 201.

sources that are intended to be illustrative, not exhaustive, and advise judges that they should update the list based on new developments in technology and communication.<sup>215</sup>

### B. BANNING ELECTRONIC DEVICES

Another approach that some courts have taken is to ban all electronic devices from the courtroom and jury room.<sup>216</sup> The idea is that if jurors do not have access to their electronic devices, such as smartphones and laptops, during the trial and deliberations, then they will be unable to go online, at least when they are in the courthouse.

This approach has several limitations. The most serious limitation is that unless the jurors are sequestered, they will be able to go online once they leave the courthouse and return home every night. Thus, the ban is only effective for a limited amount of time, and meanwhile, the court runs the risk of alienating jurors. Jurors are likely to find it inconvenient to be without their electronic devices. They cannot stay in touch with their home or workplace even during long breaks in the trial. In addition, they might resent the ban, which seems punitive, and the inconvenience, which seems unnecessary. Thus, the ban is likely to prove ineffective, and even worse, lead jurors to feel resentful.

Some courts have banned electronic devices in the courthouse as a security measure to keep gang members from intimidating witnesses, but have excluded jurors from that ban and have had jurors simply turn off their devices when they are in the courtroom.<sup>217</sup> Other courts have decided that they do not have the space or security personnel to store people's electronic devices and have decided that banning electronic devices is not practical, particularly in a busy, urban courthouse.<sup>218</sup>

### C. CONTEMPT, FINES, AND SHAMING

Jurors who have violated the court's instruction and caused a mistrial have sometimes found themselves the subject of contempt proceedings,

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215. *See id.*

216. *See, e.g.,* Dunn, *supra* note 130, at 9.

217. Circuit Chief Judge Timothy Evans announced a ban, which was to take effect on January 14, 2013, on all devices "capable of connecting to the Internet or making audio or video recordings" in all criminal courts in Cook County. Jason Meisner, *Judge Bans Electronics from Cook Courthouses*, CHI. TRIB., Dec. 12, 2012, at C8. Chief Judge Evans explained that the ban was intended to stop gang members from intimidating witnesses, spectators, or victims by taking pictures of them when they were in the courtroom. *Id.* The ban exempts current and former judges, licensed attorneys, law enforcement officers, government employees, news reporters, and members of the public reporting for jury duty. *Id.* Implementation of the ban was delayed until April 2013. Jennifer Delgado, *Electronic Devices To Be Banned From Court: County Officials Faced with Stopping Those with Phones*, CHI. TRIB., Apr. 12, 2013, at C5.

218. Chief Judge James F. Holderman explained that this was the position taken by the federal district court judges in the Northern District of Illinois. *See* Panel Discussion, Social Media and Internet Use by Jurors During Civil Trials, Allerton Conference (Apr. 12, 2013) (notes on file with author).

resulting in fines,<sup>219</sup> or on rare occasions, jail time. Judges have taken these punitive measures when jurors have deceived the court, such as by lying during voir dire, or when they have gone online notwithstanding repeated instructions and warnings from the judge.<sup>220</sup> When jurors have so clearly flouted the inherent power of the court, judges have used punitive measures as a last resort.<sup>221</sup>

One of the more unusual sanctions involved a judge who punished a juror, who had violated her oath, by removing her from the jury and requiring her to write a five-page essay about the right to a fair trial as guaranteed by the Sixth Amendment to the U.S. Constitution.<sup>222</sup> The juror had posted on Facebook that it was “gonna be fun to tell the defendant they’re GUILTY” while the trial was ongoing.<sup>223</sup> The essay was a unique punishment.

The difficulty with punitive measures is that they do not alleviate the problem except perhaps by serving as a deterrent to other jurors who might be tempted to engage in such misconduct. Moreover, punitive measures entail a high cost to the judicial system. Contempt proceedings and retrials require time and money. Perhaps even more harmful in the long run, they place jurors and judges in an antagonistic, rather than a cooperative, relationship.

#### D. MAVERICK APPROACHES

Aside from the most common response, which is to have the judge give an instruction, and the more extreme measures, which include bans, contempt proceedings, and fines, there are a few judges and courts that have experimented with maverick approaches. For example, one jury consultant advised judges to eschew the boilerplate language of a pattern instruction and to explain, in their own words, why it is so important for jurors to resist the temptations of the Internet and social media.<sup>224</sup> One judge asked prospective jurors during voir dire whether they would be able to adhere to an instruction about avoiding communication about the trial on the Internet and social media.<sup>225</sup> Another judge has gone a step further and requires jurors to take the affirmative act of signing a state-

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219. Dunn, *supra* note 130, at 5.

220. See, e.g., Ed White, *Juror Hadley Jons Punished for Posting Verdict on Facebook*, HUFFINGTON POST (Sept. 2, 2010, 9:44 AM), [http://www.huffingtonpost.com/2010/09/02/hadley-jons-juror-punish\\_n\\_703877.html](http://www.huffingtonpost.com/2010/09/02/hadley-jons-juror-punish_n_703877.html).

221. *Id.*

222. *Id.*

223. *Id.*

224. *Twittering in the Jury Box*, A.B.A. LITIG., Summer 2009, at 13 (“advis[ing] judges to fully explain the restriction against jurors discussing and reading anything about their case rather than simply reciting boilerplate jury instructions”) (quoting Douglas L. Keene, president of the American Society of Trial Consultants).

225. See, e.g., Deleon & Forteza, *supra* note 98, at 38, 39 (quoting Judge Craig Smith, from the 192nd Judicial District Court in Dallas County, Texas, who suggested that attorneys should “ask questions about potential juror[s] use of the Internet, including participating in networking sites like Twitter and Facebook”).



ment in which they agreed that they will abide by the instruction.<sup>226</sup> In Washington State, the judges have displayed a poster in the jury rooms.<sup>227</sup> It instructs jurors: “Do not receive or send electronic communications about the case” and “Avoid outside information from the Internet or other sources,” among other rules.<sup>228</sup> Some federal district courts have added the Washington State poster to federal jury deliberation rooms.<sup>229</sup> In Massachusetts, the Commission of Jurors included a segment in the juror orientation video, which is also available online, that warns jurors to avoid the Internet and social media.<sup>230</sup> In Michigan, Judge Don Shelton created a video in which he gives his standard admonition telling jurors that they cannot do outside research or have outside communications while they are serving as jurors, but he also takes the time to explain why this rule exists and what will happen if it is violated.<sup>231</sup> Although these creative efforts are encouraging, they are usually one-shot efforts undertaken on an individual basis.

What is needed is an approach, which I describe in the next Part, that is comprehensive and tries to educate jurors at every step in the jury process and that reaches jurors through a variety of mediums—written words, spoken words, and images. This approach, which I describe as taking a process view of a juror’s education, recognizes that jurors learn how to perform their role at every stage of the jury trial, and not just through instructions often delivered only once during the trial. Jurors need to be engaged in the jury process at every step of the way, and they need to feel that they can have their questions answered by the judge rather than by resorting to self-help measures, such as social media and the Internet. This approach also assumes that most jurors want to perform their role responsibly and simply need to be educated as to what is acceptable or unacceptable behavior.

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226. Judge Shira A. Scheindlin in the Southern District of New York required jurors in a criminal case “to sign a pledge not to research the case on the internet and warned them that they would face perjury charges if they broke the agreement.” Rogers, *supra* note 62, at 655.

227. Gabriell Butler, *Federal Judges, Courtroom Posters Say “No” to Social Media*, 95 JUDICATURE 240, 240 (2012).

228. See E-mail from Rick Neidhardt, Reporter, Wash. Pattern Jury Instruction Comm. to Pattern Jury Instruction List [PJILIST] (Nov. 21, 2011) (on file with author) (providing .pdf of poster).

229. Butler, *supra* note 227, at 240.

230. See E-mail from Paula Hannaford-Agor, Dir., Ctr. for Jury Studies, Nat’l Ctr. for State Courts, to Pattern Jury Instruction List [PJILIST] (May 9, 2012) (on file with author). The online version of the video is available at <http://www.mass.gov/courts/jury/index2.htm> (the link to the video is under “Jury Information” and “Videos”).

231. *Jury Selection, Trial and Deliberations: Research Guide*, NAT’L CTR. FOR STATE COURTS, <http://www.ncsc.org/topics/jury/jury-selection-trial-and-deliberations-resource-guide.aspx> (last visited Aug. 27, 2014) (video can be found about two-thirds of the way down the page).

## VI. TAKING A PROCESS VIEW OF A JUROR'S EDUCATION

Having jurors refrain from using the Internet and social media while they are serving as jurors is a challenge that is likely to grow harder in the years ahead and requires a solution that takes a process view of a juror's education. By a process view of a juror's education, I mean a view that recognizes that every stage at which the judge or court interacts with the jurors creates an opportunity to educate the jurors. From start to finish—from the jury summons to the jury verdict—there are opportunities for the court to educate jurors as to their proper role. Informing jurors about the dangers posed by the Internet and social media should not be limited to a one-shot effort on the part of the court, as is currently practiced in many courtrooms today. Rather, courts need to view juror education as an ongoing process. They need to make use of every stage and every judge-jury or court-jury interaction, and view it as an opportunity to reinforce the lesson that jurors must refrain from using the Internet and social media to communicate about the trial.

The education of a juror begins with the jury summons, which is the prospective juror's first interaction with the court, and it ends when the jury announces its verdict and the judge polls the jury about its verdict and then dismisses the jury. If the summons and dismissal constitute the two end points of a continuum, there are additional points of interaction between court and juror throughout the process including the jury orientation video, voir dire, oath, preliminary instructions, as-needed instructions, final instructions, visual reminders, juror questions, and possible polling of the jury. Each of these junctures provides an opportunity for the judge to educate jurors about their proper role and their need to refrain from using the Internet and social media to discuss or research the trial.

## A. THE JURY SUMMONS

When a citizen receives a jury summons in the mail, that event marks the beginning of the jury process. Although summonses might vary in form from state to state, in general they inform citizens when and where they must report for jury duty and that they could receive an order to show cause if they fail to appear.<sup>232</sup> The summons provides some basic information, like what to do if the recipient cannot report on the date and place indicated on the summons.<sup>233</sup> The summons also contains a few basic questions, such as whether the recipient is a citizen<sup>234</sup> and meets the

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232. See, e.g., Jury Summons from Office of the Clerk, Cent. Dist. of Ill., U.S. Court, [http://www.ilcd.uscourts.gov/sites/ilcd/files/Juror\\_Summons\\_Letter.pdf](http://www.ilcd.uscourts.gov/sites/ilcd/files/Juror_Summons_Letter.pdf) (last visited Aug. 27, 2014).

233. *Id.*

234. The California Assembly wanted to make jury service available to noncitizens. See *California: Bill Would Allow Noncitizen Jurors*, N.Y. TIMES, Aug. 23, 2013, at A16 ("California would become the first state to allow noncitizens who are in the country legally to be jurors under a bill that cleared the Assembly on Thursday[, Aug. 22, 2013]) and heads to Gov. Jerry Brown's desk."). However, the governor vetoed the bill. See Patrick McGreevy

age requirement.<sup>235</sup> These questions go to the recipient's fitness to serve as a juror. Unless a recipient meets these two (at a minimum) threshold eligibility requirements, he or she will not be able to serve as a juror.<sup>236</sup>

The summons also might include a brief questionnaire that the recipient is expected to complete and to bring to the Jury Assembly Room. The Criminal Court in Cook County, Chicago, for example, asks the recipient whether he or she has ever been the victim of a crime, has been a party in a lawsuit, or has a family member or relative who has been a party in a lawsuit. The questionnaire also asks the recipient's occupation, marital status, and number of children.

The questionnaire attached to the jury summons also should include a question about whether the recipient could adhere to the judge's instruction and refrain from using the Internet and social media to communicate about the trial if seated on a jury. The questionnaire, by including such a question, could start the process of educating the prospective juror about the conduct that is appropriate for a juror. When people receive a jury summons in the mail, their initial response is to think of reasons why they are unable to serve. No time ever seems like a good time for jury duty. For those who worry that the recipient might use this question as a way to try to avoid jury duty, and therefore, might answer that he or she would be unable to follow the instruction, the response would not be determinative, just like the responses to any of the above questions (other than eligibility requirements) are not determinative. The information provided at this early stage is the basis for further questioning during voir dire. The advantage to including a question about the Internet and social media at this early point is to start the process of educating the prospective juror about his or her responsibilities as a juror.

## B. THE JUROR ORIENTATION VIDEO

The juror orientation video is the next opportunity that the court has to educate prospective jurors about the need to refrain from using the Internet and social media to communicate about the trial. Some states, such as Massachusetts,<sup>237</sup> make their juror orientation video available on-

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& Melanie Mason, *Brown Vetoes Bill for Noncitizens To Serve on Juries; Move Runs Counter to Governor's Recent Decisions That Expand Immigrant Rights*, L.A. TIMES, Oct. 8, 2013, at A1 ("Gov. Jerry Brown on Monday [Oct. 7, 2013] vetoed legislation that would have made California the first state in the nation to allow legal immigrants who are not citizens to serve on juries.").

235. Juror Questionnaire from Office of the Clerk, Cent. Dist. of Ill., U.S. Dist. Court, [http://www.ilcd.uscourts.gov/sites/ilcd/files/Juror\\_Questionnaire.pdf](http://www.ilcd.uscourts.gov/sites/ilcd/files/Juror_Questionnaire.pdf) (last visited Aug. 27, 2014).

236. See, e.g., Office of the State Court Adm'r, *Answers to Your Questions About Your Colorado Jury System*, COLO. JUD. BRANCH, [http://www.courts.state.co.us/userfiles/File/Media/Brochures/jurysystem\(1\).pdf](http://www.courts.state.co.us/userfiles/File/Media/Brochures/jurysystem(1).pdf) (last visited Aug. 27, 2014); *What Should I Know About Serving on a Jury?*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Public/Pamphlets/JuryDuty.aspx> (last visited Aug. 27, 2014).

237. See E-mail from Hannaford-Agor, *supra* note 230 (citing <http://www.mass.gov/courts/jury/index2.htm>).

line.<sup>238</sup> A viewer can go to the state court's website, look for the tab for jurors, and click on the juror orientation video. This means that prospective jurors who want to start learning about jury duty can do so from the comfort of their home. The Massachusetts online video, as mentioned earlier, is one of the few online videos to include a segment about the need for jurors to avoid communicating about the trial online.<sup>239</sup> Other states should follow Massachusetts's example and make their video available online as well as update their video so that it educates prospective jurors on the need to avoid online communication about the trial.

The next opportunity for courts to convey this message occurs in the Jury Assembly Room when prospective jurors are waiting to be called for a panel. At this juncture, prospective jurors usually have a lot of time on their hands. For example, when I was called for jury duty at the Criminal Court in Cook County, Illinois, I, along with other prospective jurors, was told to report to the Jury Assembly Room by 9:30 a.m. However, only a few panels were called that morning. At noon, we were told to go have lunch and return by 1:30 p.m. A little after 2:00 p.m., we were told we were not needed and were dismissed. The only thing we were asked to do in the almost five hours we were waiting was to watch a short juror orientation video, which was quite well done. However, the video should include a segment on the need for jurors to avoid online communication about the trial. This is a good time to educate prospective jurors, both because they have time on their hands and because they could already be sending e-mails about their jury experience, just as I was.

### C. THE VOIR DIRE

The next stage in the process of educating jurors to avoid online communication about the trial is during the voir dire. In federal court, the judge usually conducts the voir dire<sup>240</sup> and the questions tend to be fairly basic.<sup>241</sup> They focus on the prospective juror's occupation, marital status, number of children, the occupation of the spouse and children, whether the prospective juror knows any of the lawyers or parties, whether the

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238. For a sample of states' juror orientation videos that inform jurors they cannot use the Internet or social media to communicate about the trial, see *Colorado Jury Service: What to Expect*, YOUTUBE (Jan. 9, 2014), <http://www.youtube.com/watch?v=zNqt5NStkTY> (Colorado, with warning beginning at 9:09); *Jury Orientation*, MINN. JUD. BRANCH, <http://www.mncourts.gov/?page=1948> (last visited Aug. 27, 2014) (Minnesota, with warning beginning at 10:37); STL Circuit Court's Channel, *Reporting for Jury Duty*, YOUTUBE (Nov. 13, 2012), <https://www.youtube.com/watch?v=KOjJhPgN0Tc> (St. Louis, Missouri, with warning beginning at 1:25); *Jury Orientation Video*, N.H. JUD. BRANCH, <http://www.courts.nh.gov/SpecialSessions/mediaplayer2/Jury-Orientation-Video.html> (last visited Aug. 27, 2014) (New Hampshire, with warning beginning at 7:39). For another country's approach to using the juror orientation video to address the topic of jurors and social media, see Ministry of Justice UK, *Your Role as a Juror*, YOUTUBE (Apr. 2, 2012), <http://www.youtube.com/watch?v=JP7slp-X9Pc> (England).

239. See E-mail from Hannaford-Agor, *supra* note 230.

240. See FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a).

241. For a sample of a voir dire in federal court, see *Torres Voir Dire*, *supra* note 45 (transcript of jury selection).

prospective juror has been the victim of a crime (in criminal cases) or party to a lawsuit (in civil cases), and whether there is any reason that the prospective juror cannot be impartial.<sup>242</sup> Judges usually ask the lawyers if there are any additional questions that they would like the judge to ask.<sup>243</sup> Just before this point, the judge could also ask a question about the prospective juror's willingness to follow the judge's instruction and to avoid communicating about the trial using the Internet or social media. This question should be asked individually of each prospective juror, just as the judge asks each prospective juror about his or her occupation or whether the prospective juror knows any of the trial participants. It is important that each prospective juror is required to give a response. As one trial judge has observed, if the jury is questioned as a group, it is easy for jurors to remain silent even when the questions apply to them, and they ought to respond.<sup>244</sup> However, if each prospective juror is asked individually then silence is not an option and a response must be forthcoming.

Some trial judges already use voir dire to ask jurors whether they can follow the judge's instruction to refrain from communicating online about the trial, but it is important that this question, and any necessary follow-up questions, becomes part of standard practice by all trial judges, federal and state, and not just by a maverick few.<sup>245</sup> The voir dire is an important stage in the education of a juror. It is a moment of transformation: citizens stop searching for excuses why they cannot serve and start embracing their new role. They want to perform their role as best they can. At this point, the judge should ask whether the prospective juror can adhere to the judge's instruction to avoid using the Internet and social media to communicate about the trial. The prospective juror is making a public commitment in open court before the judge, parties, public, and fellow jurors that he or she will follow the judge's instruction about forgoing online communication about the trial.

Voir dire also provides the judge and lawyers the opportunity for further questioning of any prospective juror who seems reluctant or confused about what forgoing online communication might entail.<sup>246</sup> When a prospective juror hesitates to answer the judge's question, that hesitation provides an opening for follow-up questions. It gives the judge an opportunity to remind the prospective juror that his or her words are being

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242. See *id.*

243. See FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a).

244. See Gregory E. Mize, *On Better Jury Selection: Spotting UFO Jurors Before They Enter the Jury Room*, CT. REV., Spring 1999, at 10, 12.

245. See *supra* Part V.D (describing maverick judges).

246. See, e.g., Paul Mark Sandler, *Keeping Jurors Offline*, NAT'L L.J. (May 23, 2011), <http://www.nationallawjournal.com/id=1202494641739/Keeping-jurors-offline> ("Counsel should use voir dire to help weed out potential jurors who may be unable or unwilling to pull the plug on their Web browsers for the duration of a trial. In jurisdictions where attorneys submit voir dire questions in advance for the judge to read to potential jurors, attorneys should include questions that educate would-be jurors about the rules of the road: no independent computer research, no blogging about the case and no Facebook excursions to read about the lawyers, parties or witnesses.").

taken down by the court reporter and going on the record and that the prospective juror, if chosen to serve on the jury, will soon have to take an oath, attesting to his or her ability to decide the case based only on the evidence presented in the courtroom. This colloquy also gives the lawyers a chance to determine whether they will use any of their peremptory challenges to remove a prospective juror who does not seem willing or able to live up to the requirements of being a juror.

#### D. THE OATH

Prospective jurors who have said that they could follow the law and could be impartial, and who have not been removed by for cause or peremptory challenges, take an oath before they assume their role as jurors. Although the oath can vary from state to state, a typical oath is as follows: “You and each of you, do solemnly swear that you will well and truly try the cause now pending before this Court, and a true verdict render therein, according to the evidence and the instructions of the Court, so help you God?”<sup>247</sup> The jurors take this oath while standing in the jury box in the presence of the public, parties, lawyers, and judge.

The oath is another juncture at which to educate the jurors about their obligation to avoid online communication about the trial. This could be done by the judge before the jurors take the oath. The judge could remind the jurors that they are about to swear (or affirm) to decide the case based only on the evidence and in accordance with the instructions provided by the judge. To decide the case based only on “the evidence,” they must turn a blind eye to information about the trial outside of the courtroom, including information available online. To decide the case according to “the instructions of the Court,” they must also follow the instruction that they avoid online communication about the trial. In addition (or alternatively), the oath could be altered slightly to make these points more explicit. The oath could be revised so that jurors solemnly swear to the following: “You and each of you, do solemnly swear that you will well and truly try the cause now pending before this Court, and a true verdict render therein, according *only* to the evidence *presented in this courtroom* and the instructions of the Court, so help you God?”<sup>248</sup> Throughout the trial, the judge would then be able to remind the jurors not only of the judge’s instructions but also of the oath that each juror swore to uphold.

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247. CALIFORNIA SUPERIOR COURT CRIMINAL TRIAL JUDGES’ DESKBOOK, *supra* note 27, at 356. Michigan has a similar oath:

Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.

MICH. CRT R. 2.511(4)(1) (2014) (Oath).

248. I have used California’s oath as my model. *See supra* text accompanying note 247. I have *italicized* my proposed changes to California’s oath.

## E. THE INSTRUCTIONS

Judges' cautionary instructions at the beginning of a trial provide an important juncture at which the judge can continue the jurors' education by explaining to them the importance of avoiding online communication about the trial. Judges in the federal judiciary and a number of state judiciaries have recognized the importance of updating the cautionary instruction so that it specifically mentions the Internet and social media that jurors must avoid.<sup>249</sup> In addition to specificity, the cautionary instruction should also do the following: provide an explanation so that jurors understand the reasons for the prohibition; ask jurors to self-police; and inform them about the consequences of failing to abide by the instruction. The instruction should be given at the beginning and end of the trial and repeated before and after any recesses so that jurors remember and adhere to the instruction throughout the entire trial.

1. *The Content of the Instruction*

Instructions requiring jurors to refrain from using the Internet and social media to find information or to share views about the trial need to include an explanation as to why it is so important that jurors exercise such restraint. Jurors are being asked to refrain from an activity that has become second nature to them. For some jurors, this is a departure from their ordinary conduct; for other jurors, it is a challenge but one that they are willing to meet. In either case, they need to know *why* they must refrain from an activity that seems so innocuous and commonplace to them. Without an explanation, the court seems to be imposing an arbitrary restriction. With an explanation, however, jurors begin to understand why they must rely only on the evidence presented in the courtroom and discuss it only with their fellow jurors during jury deliberations. With an explanation, they are more likely to adhere to the instruction.<sup>250</sup> As social science research has demonstrated, "compliance can be measurably increased by simply adding the word 'because' and some type of explanation."<sup>251</sup> In addition, an explanation treats jurors more respectfully than a mere prohibition and sets a tone of respect for jurors and their role that most judges try to maintain throughout the entire trial process.

States are beginning to include explanations in their cautionary instruction. Ohio, for example, tells jurors:

You are required to decide this case based solely on the evidence that is presented to you in this courtroom. It is my role as the judge

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249. See *supra* Part V.A.

250. Most of the jurors in the 2014 study conducted in the courtrooms of Judges St. Eve and Burns indicated that they resisted the temptation to engage in online communication because of the judge's instruction and because of the oath they had taken. See St. Eve, Burns & Zuckerman, *supra* note 156, at 80-82.

251. Susan MacPherson & Beth Bonora, *The Wired Juror, Unplugged*, TRIAL, Nov. 2010, at 40, 42.

to determine what evidence is admissible and what is not admissible. It would be a violation of your duties, and unfair to the parties, if you should obtain other information about the case, which might be information that is not admissible as evidence.<sup>252</sup>

In a similar vein, Illinois explains:

The reason for these instructions is that your verdict must be based only on the evidence presented in this courtroom and the law I [will provide] [have provided] to you in my instructions. It would be unfair to the parties and a violation of your oath to base your decision on information from outside this courtroom.<sup>253</sup>

Although both these explanations could be more expansive, at least they provide jurors with some reasons why they must abide by the instruction.

It is also important that the cautionary instruction tell jurors what action they should take if they see a fellow juror violating the instruction. After all, as one empirical study showed, judges tend to learn about violations primarily from other jurors.<sup>254</sup> Although there is the danger that jurors might feel like they are being asked to spy on each other, with so much at stake jurors need to understand that this is a serious matter and their cooperation is needed. The instruction can put it as succinctly as possible. For example, Illinois tells jurors: “If you become aware of any violation of these instructions, it is your legal duty to report this to me immediately.”<sup>255</sup>

In addition, the instruction should tell jurors about the consequences that can follow from a violation. Some states explain to jurors that a violation could lead to a mistrial, which could require a retrial that will be at the taxpayers’ expense.<sup>256</sup> Other states explain that jurors could face contempt proceedings and fines.<sup>257</sup> Ohio informs jurors of both consequences:

You should know that if this Admonition is violated, there could be a mistrial. . . . This can lead to a great deal of expense for the parties and for the taxpayers, namely you and your neighbors. . . . If a mistrial were to be declared based on a violation of this Admonition, the juror responsible could be required to pay the cost of the first trial, and could also be punished for contempt of court.<sup>258</sup>

Illinois’s instruction is more circumspect about the consequences: “Disobeying these instructions could cause a mistrial, meaning all of our efforts have been wasted and we would have to start over again with a new

252. OSBA JURY INSTRUCTIONS, *supra* note 211, § I.C.1.

253. 2011 IPI, *supra* note 33, § 1.01 [11] (the brackets leave it to the judge to decide which phrase is applicable).

254. See Dunn, *supra* note 130, at 4.

255. 2011 IPI, *supra* note 33, § 1.01 [11].

256. See Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 REYNOLDS CTS. & MEDIA L.J. 307 (2011); see, e.g., *id.* at 234 (Connecticut).

257. See, e.g., *id.* at 393 (Texas).

258. OSBA JURY INSTRUCTIONS, *supra* note 211, § I.C.5.



trial. If you violate these instructions you could be found in contempt of court.”<sup>259</sup>

The instruction should tell jurors what is at stake so that they recognize that the consequences for them and for the community can be significant. It is all too easy to justify one’s behavior for going online. It is important for jurors to know that there will be costs, both individual and societal. The consequences of a violation seemed to affect the jurors in the survey done by Judge St. Eve,<sup>260</sup> even though the jurors might have told the judge what they thought the judge wanted to hear.<sup>261</sup> A number of jurors in that study responded that they refrained from using social media to discuss the trial because of the judge’s instructions,<sup>262</sup> a few said they did so because they did not want to “get arrested” or go to “JAIL.”<sup>263</sup>

## 2. *The Timing of Instructions*

The instruction needs to be given at the beginning and end of the trial as well as every time there is a recess throughout the trial and deliberations. Traditionally, the cautionary instruction was given at the beginning of the trial or at the end of the trial before the jurors began their deliberations.<sup>264</sup> A movement in the 1990s sought to have judges give a preliminary instruction at the start of the trial so that jurors had some framework into which to place the remainder of the trial and then give the final instructions either before closing argument or after it.<sup>265</sup> Some judges also gave instructions as needed throughout the trial.<sup>266</sup>

It is essential that the judge give the cautionary instruction about the Internet and social media at the beginning and end of the trial and throughout the trial. If the judge simply gives it at the end, the jurors might have been going online throughout the trial. If the judge simply gives it at the beginning, the jurors are likely to forget the admonition, particularly if the trial is lengthy. However, if the judge gives it at the beginning, end, and before and after any recesses, then the juror cannot say he or she was unaware of it or forgot about it. As every teacher knows, repetition is useful, and students absorb lessons at different points. Thus, repetition of the cautionary instruction governing the Internet and social media is critical. One federal district court judge even goes so far as to ask the jurors every time they return from a recess

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259. 2011 IPI, *supra* note 33, § 1.01 [12].

260. *See* St. Eve, Burns & Zuckerman, *supra* note 156, at 82-84.

261. *See supra* notes 168-69 and accompanying text.

262. St. Eve, Burns & Zuckerman, *supra* note 156, at 80, 83.

263. *Id.* at 82 (capitals in original).

264. *See* Dann & Logan, *supra* note 60, at 281.

265. *See, e.g., id.* at 281, 283.

266. *See, e.g.,* AM. JURY PROJECT, AM. BAR ASS’N., PRINCIPLES FOR JURIES AND JURY TRIALS princ. 13.D.2 (2005) (calling for judges to instruct jurors “[w]hen necessary to the jurors’ proper understanding of the proceedings”); Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 499 (2006).

whether they have continued to abide by the cautionary instruction.<sup>267</sup> Moreover, he asks for a show of hands—an affirmative act by the jurors—indicating that they have continued to abide by his instruction during the break.<sup>268</sup> This is a useful approach and one that other judges should emulate.

#### F. VISUAL REMINDERS

A juror's education is ongoing even when the juror is not in the courtroom. The message of the cautionary instruction—to avoid online communications about the trial—can reach beyond the courtroom when the court uses posters, brochures, notices, or cards as reminders.

Educators have described how some people learn best from listening and others by reading; some learn best through words and others through images. A poster in the jury room, where jurors spend a lot of time, is one way of conveying a lesson through words and images. The poster can reinforce the words spoken by the judge in the courtroom and remind jurors about avoiding online communication even when jurors are outside the presence of the judge. The court can also display these posters in the Jury Assembly Room, where prospective jurors also spend a lot of time.

The poster commissioned by the Washington State Judiciary, and later adopted by some of the federal district courts, is one example of images and words that reinforce each other and that remind jurors to avoid communicating about the trial using the Internet and social media.<sup>269</sup> The poster, measuring twenty by twenty-four inches, is in the shape of a giant cell phone.<sup>270</sup> Although it contains a fair amount of text for a poster, it highlights three basic rules, which appear in large-size font, in capital letters, and in a different color than the rest of the text.

Another visual reminder that courts in England considered using was a card containing jurors' rights and responsibilities, including their responsibility to avoid the Internet and social media.<sup>271</sup> The idea was that jurors could carry the card with them wherever they went—whether to the jury room, their home, or any other location. Jurors, by having the card in their pocket, alongside their cell phone, would have a constant reminder, even when they were not under the gaze of the judge. Although the card has not yet been implemented, some English judges distribute a jury notice that performs the same function.<sup>272</sup> The High Court of Justice, Queen's Bench Division, in England is considering “whether to recom-

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267. Chief Judge James F. Holderman, from the Northern District of Illinois, explained at the Allerton Conference that this was his practice and that he found it to be effective. See Allerton Conference Panel Discussion, *supra* note 218.

268. *Id.*

269. See *supra* text accompanying notes 227–29.

270. See E-mail from Neidhardt, *supra* note 228 (providing .pdf of poster).

271. See Thomas, *supra* note 101, at 50 (suggesting that courts in England and Wales provide jurors with written juror guidelines that they keep with them throughout the trial and that include instructions on why they must not use the Internet to seek or share information about the trial).

272. *Att'y Gen. v. Davey*, [2013] EWHC (Admin) 2317, Q.B. 348 [11], [13], [59] (Eng.).

mend that the practice [of handing the jury a notice] should be universally followed."<sup>273</sup>

When the jury is about to deliberate, some courts distribute a brochure prepared by the American Judicature Society (AJS) entitled *Behind Closed Doors: A Guide for Jury Deliberations*, which provides jurors with basic information about how to conduct their jury deliberations.<sup>274</sup> Although it is up to jurors to decide how to organize their deliberations, this brochure offers suggestions and provides background information about jury deliberations.<sup>275</sup> The AJS brochure could include a reminder to jurors about avoiding the Internet and social media during deliberations. This is another opportunity to reinforce the message, and this time the message would be coming from an outside source. The brochure is short, clear, and easy to read. It could provide another way to remind jurors about the need to avoid online communication, particularly when they are in the jury room and beyond the watch of the judge and lawyers.

### G. JUROR QUESTIONS

Some state<sup>276</sup> and federal courts<sup>277</sup> give jurors the opportunity to submit questions to witnesses, which provides another way for the court to reinforce the message to jurors about avoiding online communications about the trial.<sup>278</sup> When a judge explains the procedure that jurors need to follow to submit written questions for witnesses, the judge also can

273. *Id.* at [61].

274. See generally AM. JUDICATURE SOC'Y, *BEHIND CLOSED DOORS: A GUIDE FOR JURY DELIBERATIONS* (1999) (providing jurors with general information about jury deliberations).

275. See *id.*

276. The practice [of juror questions] is mandated for criminal trials in three states [Arizona, Colorado, and Indiana], prohibited by case law in [six] states [Arkansas, Georgia, Minnesota, Mississippi, Nebraska, and Texas], and left to the sound discretion of the trial court in the rest. In civil trials, juror questions are mandated in six states [Arizona, Colorado, Florida, Indiana, Washington, and Wyoming], prohibited in 10 states [Minnesota, Nebraska, Texas, Louisiana, Maine, Michigan, North Carolina, Oklahoma, South Carolina, and possibly Georgia], and left to the discretion of the trial judge in the rest.

Gregory E. Mize & Paula Hannaford-Agor, *Jury Trial Innovations Across America: How We Are Teaching and Learning from Each Other*, 1 J. CT. INNOVATION 189, 214 (2008). In 2012, Illinois provided, by rule, that in civil trials jurors could ask questions, though the judge still has discretion whether to permit the practice in any given case. See ILL. S. CT. R. 243; ILL. SUPREME COURT COMM. ON PATTERN JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL § 1.07 [15] & Comment [15] (2013-2014) (providing instructions and procedures to implement ILL. S. CT. R. 243).

277. See, e.g., Bruce Pfaff, John L. Stalmack & Nancy S. Marder, *The Right to Submit Questions to Witnesses*, CBA REC., May 2009, at 36, 39–41 (providing a survey of state court decisions and federal courts of appeals decisions indicating jurisdictions that permit juror questions).

278. See Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 746 (2010) (“[A]nother way to address this tendency [of jurors doing online research] is to permit jurors to ask their questions in court. If they ask their questions in court, then they will have less need to seek information from outside sources.”); Ellen Brickman et al., *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 298–99 (2008) (“Finally, allowing jurors to submit questions to witnesses can provide another outlet for their curiosity or confusion. This too may help to

explain that this is the appropriate way for jurors to have their questions answered. Through this process, jurors can obtain information or clarification that they believe is important to their decision-making.<sup>279</sup> The judge should explain to jurors that they can ask questions as long as they follow the procedures devised by the court; thus, there is no need for them to take matters into their own hands and go online.

Most courts that allow jurors to submit written questions to witnesses follow similar procedures. After a witness is done testifying and about to leave the stand, the judge can ask jurors to submit, in writing and without identifying themselves by name or juror number, any questions they have for that witness before he or she steps down.<sup>280</sup> Typically, the judge reviews the questions with the lawyers and determines which questions can be asked.<sup>281</sup> If a question can be asked, then the judge will ask it of the witness. If a question cannot be asked, the judge will explain to the jury that some questions cannot be asked for legal reasons, and they should not take it personally.<sup>282</sup> Most jurors understand this.<sup>283</sup> The lawyers then have an opportunity for further questioning of the witness.

Giving jurors the opportunity to ask questions of witnesses could help jurors resist the temptation to do research online. At the very least, juror

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prevent jurors from conducting Internet research on material they hear in the courtroom.”).

279. See, e.g., Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1931 (2006) (using videotaped deliberations to see how jurors made use of their questions during deliberations and finding that they used them not only “to clarify the testimony of witnesses and to fill in gaps, but also to assist in evaluating the credibility of witnesses and the plausibility of accounts offered during trial through a process of cross-checking”); Nicole L. Mott, *The Current Debate on Juror Questions: “To Ask or Not To Ask, That Is the Question,”* 78 CHI-KENT L. REV. 1099, 1115–16, 1118–19 (2003) (describing the results of an empirical study examining the kinds of questions jurors asked, which tended to focus on understanding the words the witness used, the procedures the witness followed, and the facts that jurors thought should have been addressed but were not); Eugene A. Lucci, *The Case for Allowing Jurors to Submit Written Questions*, 89 JUDICATURE 16, 17–18 (2005).

280. See, e.g., JURY TRIAL INNOVATIONS 260 (G. Thomas Munsterman, Paula L. Hanaford & G. Marc Whitehead eds., 1997) (providing a sample instruction entitled “Questions by Jurors”). The judge can have the jurors pass their written questions to the bailiff before the witness steps down or give the questions to the bailiff during a recess. See *id.* Some judges have the jurors return to the jury room before writing down their questions there. See Hon. Warren D. Wolfson, *An Experiment in Juror Interrogation of Witnesses*, CBA REC., Feb. 1987, at 12, 14. Although there are some variations on when and where the jurors write down their questions, the questions are always in writing, without jurors’ names or numbers, and submitted in a manner that is not disruptive or time-consuming. See, e.g., *id.*

281. See JURY TRIAL INNOVATIONS, *supra* note 280, at 260.

282. See *id.* (“Keep in mind, however, that the rules of evidence or other rules of law may prevent some of your questions from being answered. . . . The failure to ask a question is not a reflection on the person asking it.”).

283. See Larry Heurer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 256, 260 (1996) (finding that in a study of 67 Wisconsin state court trials and in a national study with 160 trials, in which jurors were permitted to ask questions in 71 of the trials, jurors understood why their questions were not asked and were not angry when this happened).

questions are a way for judges to show that courts are responsive<sup>284</sup> and want jurors to have the information they believe they need to do their job effectively.<sup>285</sup> This opportunity for jurors to ask their questions in court should help to forestall jurors' attempts to find this information on their own using the Internet or social media.

#### H. THE POLLING OF THE JURY

The polling of the jury is the last time for courts to reinforce the lesson that jurors should not have used the Internet or social media to communicate about the trial. After the jury has reached its verdict, it returns to the courtroom so the verdict can be announced in open court. In a federal criminal case, either party can request that the judge poll the jurors to ensure that each juror agrees with the verdict.<sup>286</sup>

At this juncture, as the judge asks each juror to state in open court and on the record whether he or she is in accord with the verdict,<sup>287</sup> the judge could also ask whether the juror reached that verdict without resorting to online communication. There might be a more subtle way of framing the question, such as: "Is this your verdict that you reached based only on the evidence presented in the courtroom?" Although judges might be more comfortable with this language—which after all reflects the language that jurors used when they took their oath—it is less direct. Jurors might not make the connection between deciding the case based only on the evidence presented in the courtroom and having engaged in online communication about the trial during the trial.

In addition, federal judges in criminal cases could instruct jurors at the beginning of the trial, when they deliver their cautionary instruction about not using the Internet and social media, that they might be polled at the end of the trial and asked to say whether they reached their verdict without consulting the Internet and social media. Judges would be correct in saying that jurors "might be polled" because it is up to the attorneys or to the judge to request the polling of jurors. Meanwhile, jurors would be on notice that they could be asked in open court when the verdict is announced whether they abided by the judge's cautionary instruction. It might be that just the possibility of being asked in open court at the end of the trial—even if they are not actually asked—is sufficient to keep them from engaging in any misconduct. Just like the law student who does her reading because the professor has told her that she might be called on in class the next day or the high school student who reviews the math assignment because the teacher has said that there might be a quiz

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284. See Anthony J. Ferrara, *Lessons Learned from Jurors' Questions About Evidence During Trial*, 1 J. CT. INNOVATION 329, 341 (2008) ("In sum, we should pay special attention to what jurors say and respond to their concerns. What better way is there than allowing them to ask questions?").

285. One judge instructs jurors that they should only ask a question if they "believe the answer would be important to you as a juror in this case." Wolfson, *supra* note 280, at 14.

286. See FED. R. CRIM. P. 31(d).

287. See *id.*

the next day, the possibility of being polled in open court and asked about any violations of the juror's oath or the judge's instruction might elicit the correct behavior regardless of whether the juror is actually polled.

### I. PUNITIVE MEASURES

For the juror who has engaged in misconduct and has done research or communicated online in a way that is prejudicial, there is always removal and punishment. Although this approach is after the fact, it might serve an educational function for jurors in future trials. These extreme cases receive extensive coverage in the media, which might deter future misconduct.

Not all states have had experience with jurors who violated the cautionary instruction and their oath and who went online to conduct research or to express their views about the trial, but the judges who have had to confront such cases have taken a number of steps. They have removed the offending juror from the jury and have sometimes held contempt hearings, the results of which have been fines, an essay, or in rare cases, jail time.<sup>288</sup>

Although these cases are extreme, they garner a lot of attention in the media. As a result, they serve as lessons to future jurors. As Judge St. Eve's survey revealed, jurors are loath to "end up in jail" for violating the judge's instructions.<sup>289</sup> Accordingly, these extreme cases might promote general awareness of the problem and inspire jurors to behave correctly even if they were not persuaded by the instructions or their oath. The image of the juror being marched off to jail is not one that other citizens are likely to forget.

### VII. ANTICIPATING RESPONSES

In this Part, I anticipate some of the responses to my proposal urging courts to take a process view of a juror's education. Responses will vary according to roles. I anticipate two types of responses from jurors. For "the uninformed juror," who is unaware that online communication about the trial is prohibited, the process view of educating a juror at every step of the jury process will be helpful. For "the recalcitrant juror," who knows about the prohibition but is unwilling to abide by it, this proposal will have little or no effect. However, lawyers and judges should try to identify and remove this type of juror during voir dire. Judges should be supportive of this proposal even though it requires repetition on their part because a fair trial is at stake. Some jury scholars who regard jurors who use the Internet and social media as a new breed of "active jurors" might resist this proposal, but if they do, it is because they take the notion of an active juror further than the Constitution permits.

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288. See Dunn, *supra* note 130, at 5; White, *supra* note 220.

289. St. Eve, Burns & Zuckerman, *supra* note 156, at 82.

## A. JURORS' RESPONSES

1. *The Uninformed Juror*

The uninformed juror will appreciate the ongoing education that a process view provides. The uninformed juror is one who does not know that online communication is prohibited. For example, the uninformed juror hears the judge give a traditional cautionary instruction that tells jurors not to do outside research, but does not make the connection between "outside research" and a quick Google search or a glimpse at Wikipedia. Similarly, the uninformed juror does not understand that the traditional cautionary instruction, informing jurors not to discuss the trial with friends or family, also includes not posting one's impressions of the trial on Facebook or not "friending" any of the trial participants.

This disjuncture between what the court thinks it has prohibited and what the juror thinks the court has prohibited can be resolved by having the court repeat the message in a variety of ways and at a variety of points so that there can be no misunderstanding and no opportunity for the juror to forget. If such a juror is told at every stage of the jury process that online communication about the trial is prohibited, then the uninformed juror will grasp the lesson and comply. The uninformed juror will eventually become an informed juror. It may happen at different points for different jurors, but it will happen. The direct language will bring home the point, and the reminders at every stage of the jury process will ensure that the juror abides by the prohibition throughout the length of the trial and deliberations. Thus, the uninformed juror will appreciate the process view because it seeks to make clear what is prohibited in a way that the traditional instruction alone fails to do.

2. *The Recalcitrant Juror*

The recalcitrant juror, even if he or she receives the same education as the uninformed juror, will still not abide by the lesson being taught. Such a juror cannot be educated by the court. Whereas the uninformed juror does not at first understand the extent of the prohibition, the recalcitrant juror understands what the prohibition includes but refuses to abide by it. This response can be for any number of reasons, such as the juror does not see the harm in communicating online about the trial, does not wish to be deprived of communicating online for the length of the trial, or is addicted to online communication and cannot stop it anymore than he or she can stop breathing. The best hope is to identify and remove such a juror early in the jury process.

The best opportunity for finding recalcitrant jurors and removing them is during voir dire. If the voir dire questions include asking prospective jurors whether they can abide by the cautionary instruction and having them respond individually, then any hesitation on their part—whether communicated through words or body language—can be followed up with further questioning. Judge Gregory Mize wrote about the challenge

of spotting “UFO jurors” during voir dire and recommended questioning all prospective jurors as a group and then individually so that silence was not an option and each had to speak, with the hope that each prospective juror would speak candidly.<sup>290</sup> His suggestion is a good one, but judges have resisted it perhaps because they worry about adding to the length of voir dire. Even if a judge did not question all prospective jurors individually in the robing room, as Judge Mize suggested, they should question individually those whom the judge or lawyer suspects of being recalcitrant jurors. Further questioning could be done in the judge’s robing room, with the court reporter and lawyers present, but not with fellow prospective jurors or members of the public present. The recalcitrant juror might be more willing to speak candidly in the more private setting of the robing room and acknowledge his or her unwillingness to abide by the cautionary instruction. This is a difficult thing to do because it runs counter to the social norm of saying that one can follow the judge’s instructions. Thus, the more intimate setting of the robing room might help the recalcitrant juror acknowledge his or her unwillingness to follow the instructions. The goal is to winnow out such jurors before they are seated on a jury.

If the recalcitrant juror gets through voir dire and is seated on the jury, then he or she could still be removed at a later stage through the self-policing that other jurors have been asked to do. It might be that another juror spots the recalcitrant juror doing Google searches and follows the judge’s instruction to notify the judge. At least one study found that fellow jurors are more likely than judges to spot jurors who violate the prohibition.<sup>291</sup> Depending upon what the recalcitrant juror has shared with his fellow jurors and how material it is to the trial, the judge might be able to remove the recalcitrant juror and replace him or her with an alternate.

Taking a process view of a juror’s education will not convert the recalcitrant juror into an instruction-abiding juror; however, it will provide several opportunities to remove that juror before a verdict has been reached. From the jury summons questionnaire that the prospective jurors complete, to an extensive voir dire including individual questioning about Internet and social media usage, to the oath that the jurors take, to the many admonitions of the court, to the visual reminders, and perhaps even to the polling of the jurors in open court, the recalcitrant juror will be bombarded with the message that online communication about the trial is not permitted. If all else fails, the recalcitrant juror can be punished and a mistrial declared if the recalcitrant juror’s misconduct comes to light. Although this is a costly result—and would be far less desirable than identifying the recalcitrant juror early in the process—at the very least, the option of punishment (through contempt, fines and even jail time) serves as a lesson to future jurors. Perhaps it would even serve as a

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290. Mize, *supra* note 244, at 11–12.

291. See Dunn, *supra* note 130, at 4.



lesson to future recalcitrant jurors who might be willing to self-identify during voir dire rather than to risk contempt and sanctions after a verdict.

### B. JUDGES' RESPONSES

Judges should favor taking a process view of a juror's education because a fair trial is at stake. Admittedly, judges might not want to repeat the message of avoiding online communication at so many different stages in the jury process. They might think that the repetition is unnecessary and that jurors understand the prohibition from the start. They might even worry about insulting the jurors through constant repetition. However, judges are in the best position to know what is at stake. They know that the parties have a right to a fair trial and that it is the judge's job to ensure that the trial has been fair. They also know that trials are lengthy and expensive proceedings. It would not take much cost-benefit analysis for judges to conclude that it is better for them to repeat their message at a variety of points throughout the trial than to have to redo the trial, and possibly even hold contempt hearings.

Moreover, there is flexibility and discretion built into this proposal. The idea is for the court or judge to convey the message that jurors need to avoid online communication about the trial at every stage of the jury process, but it is up to the judge to decide how best to convey this message. For example, judges could use their own words rather than a pattern cautionary instruction as one jury consultant advised.<sup>292</sup> Or they could use the pattern cautionary instruction at the beginning and end of the trial, but when they admonish the jury before or after a recess, they could simply use their own words and be succinct. A judge could even explain to the jurors that although the jurors might get tired of hearing the same admonition, the judge recognizes how easy it is for a juror to slip and make a mistake, and the jury's verdict is so important that the judge is willing to risk boring the jurors rather than having them consider information that they found online. The judge can decide to use a short form of the admonition or to acknowledge the repetition. The main point is for the judge to remind the jurors not to communicate online about the trial.

Judges also might find that they are uncomfortable with one particular aspect of the proposal; if so, they can omit it while still taking a process view of the jurors' education. For example, a judge might think it inappropriate to ask jurors about their online communications when they are being polled about the verdict. A judge could decline to ask, "Is this your verdict and is it based only on the evidence presented in the courtroom?" rather than the standard question, "Is this your verdict?" but the judge could still follow the overarching approach provided by this proposal. This proposal tries to use every judge-jury or court-jury interaction as an opportunity to educate the jurors, and it encourages judges and courts to convey a message through a variety of forms—words, images, objects—

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292. See *Twittering in the Jury Box*, *supra* note 224, at 13.

but if any discrete part proves unworkable, it can simply be omitted. The point is to take a broad, big-picture view of a juror's education and to see that it is not a one-shot effort, but an ongoing process.

### C. ACTIVE JUROR PROPONENTS' RESPONSES

In 1993, Judge Michael Dann challenged the long held view that jurors were "passive" vessels into which judges and lawyers simply "poured" information.<sup>293</sup> He urged lawyers, judges, and jury scholars to recognize jurors as "active" learners who need to be engaged throughout the trial in order to perform their role effectively.<sup>294</sup> His views about "active jurors" inspired many of us to consider the tools that jurors need to focus on the trial, to evaluate evidence, and to discuss it thoughtfully during deliberations. Today, some scholars are asking whether Judge Dann's vision of creating "active jurors" can best be embodied by jurors who are able to communicate with each other online and even conduct their own online research.<sup>295</sup> I think these scholars take the concept of "active jurors" too far—further than Judge Dann envisioned and further than the U.S. Constitution permits—and risk creating "anarchic jurors." This is a problem not just for the jury but also for the parties and their right to a fair trial. These scholars would likely disagree with my proposal and suggest that courts need to embrace, rather than to resist, the online world.

Caren Morrison in *Jury 2.0* suggested that jurors who want to go online are the new breed of "active jurors" and that courts should think of a way to facilitate this rather than try to prevent it.<sup>296</sup> She suggested that jurors should be permitted to communicate online and "post comments in some centralized, anonymous forum."<sup>297</sup> She noted that digital natives are likely to feel most comfortable sharing their views online.<sup>298</sup> The youngest jurors, who have grown up with laptops and the Internet, are accustomed to organizing their thoughts and sharing their views online. She suggested that courts permit jurors to communicate online "[s]o long as the jurors did not specifically identify the case they were involved with."<sup>299</sup> In this way, "they could describe their impressions and express their feelings in a controlled environment."<sup>300</sup>

I have several concerns with her proposal. One concern is that online communication is more open to misunderstandings than face-to-face conversation and seems to inspire people to say things that they do not always mean. Jurors would be no exception. Those jurors who post online comments, even in "some centralized, anonymous forum," might express

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293. See B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1229–31, 1240–41 (1993).

294. *Id.* at 1241.

295. See, e.g., Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1579 (2011).

296. *Id.*

297. *Id.* at 1631.

298. See *id.* at 1630–31.

299. *Id.* at 1631.

300. *Id.*

views that they would never have expressed to their fellow jurors otherwise. Anonymous postings are particularly likely to lead jurors to say things they would not say if their names were attached to the comments. After all, having to deliberate face-to-face requires some self-censorship, and this can be very useful especially when a diverse group of jurors must reach a consensus. Moreover, if jurors are posting online comments throughout the trial, then there exists the possibility that they will become more fixed in their views than if they did not write anything at all. As Morrison acknowledges, one of the dangers of jurors engaging in predeliberation discussions is that their opinions might “solidify[ ] . . . before all the evidence is in”;<sup>301</sup> the same danger is present even if they are posting their views to a “centralized, anonymous forum.” There is also the danger that attorneys will try to find out what jurors are posting. There is the further danger that jurors who post on “some centralized, anonymous forum” might not limit themselves to that forum. Once they go online, there might be no stopping point. It might be easier for jurors to refrain altogether from online communication about the trial than to refrain just a little bit—like the person who imbibes too much alcohol as a daily practice and finds it easier to abstain altogether than to try to engage in modest social drinking. Judges would undoubtedly find it difficult to tell jurors that they could post their views online in a central forum, but could not post their views online anywhere else.

Finally, we still live in a world with a digital divide. Not everyone feels comfortable going online and even using computers. Morrison’s proposal fails to take into account those jurors who are not comfortable communicating online because they have had little experience with it, whether because of their age, class, education, or race. Although the digital divide is likely to change, it is unlikely to disappear in the immediate future. As Judge St. Eve and her coauthors found in their second study, “not every juror is a user.”<sup>302</sup> A “centralized, anonymous forum” for jurors is likely to exacerbate the current digital divide and to create a divide among jurors serving on a jury that might otherwise not exist.

The proposal made by Gareth Lacy in *Should Jurors Use the Internet?* went even further toward embracing the online world.<sup>303</sup> In an early online piece, Lacy suggested that online communication has become so prevalent that resisting it is hopeless.<sup>304</sup> A court’s effort to keep jurors from doing their own research online is doomed to fail.<sup>305</sup> According to Lacy, it is a battle that courts cannot win, and the sooner they recognize this fact, the better.<sup>306</sup> Moreover, in Lacy’s view, jurors’ online research

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301. *Id.*

302. St. Eve, Burns & Zuckerman, *supra* note 156, at 85.

303. Gareth S. Lacy, *Should Jurors Use the Internet?* (May 5, 2010 unpublished manuscript), available at <http://ssrn.com/abstract=1600585>.

304. *See id.* at 1–2.

305. *See id.* at 7.

306. *See id.*

might not be so bad.<sup>307</sup> He is sympathetic to jurors' quest to have more information so that they can make informed decisions.<sup>308</sup> He takes the view that we need to "add some technology to this civics classroom"<sup>309</sup> experience that Alexis de Tocqueville extolled when he wrote about the jury as a "free school."<sup>310</sup> In a later published piece, Lacy backed away from this position.<sup>311</sup> Instead, he urged judges and lawyers to educate themselves about online trial-related information so that they can better know, evaluate, and respond to the material jurors might be reading.<sup>312</sup> Lacy argued that it is time for courts to update the tools that jurors can use including online research.<sup>313</sup>

I agree with Lacy that it is a difficult battle for courts, but I think it is one that courts must fight. Although I have long been in favor of giving jurors the tools they need to perform their job well,<sup>314</sup> online research compromises the fairness of the trial and the impartiality of the jury. If jurors can find their own information on the Internet and consider it no matter how unreliable, mistaken, or prejudicial it might be, then the right to a fair trial is doomed.

## VIII. CONCLUSION

The ease with which we can communicate online is growing rapidly, and the question is whether courts and judges can persuade jurors to resist the siren call of online communication when they serve as jurors. Even though we do not know the full extent of the problem, ignoring it, as some judges are wont to do, does not seem wise, particularly when the fairness of a jury trial is at stake.

Many state and federal judges have recognized the need to take some action, but usually that action is limited to a one-time admonition either at the beginning or end of the trial. Although this is a step in the right direction, it is only a step. What is needed is an ongoing approach that looks at every interaction between judge and jury—from jury summons to jury verdict—as an opportunity to educate jurors about the importance of refraining from communicating online about the trial. If jurors understand why the prohibition is so important and if they are reminded at every stage of the trial process using a variety of methods, then it is likely

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307. *See id.* at 4–6.

308. *See id.* at 1–2.

309. *Id.* at 9.

310. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270–76 (J.P. Mayer ed. & George Lawrence trans., Doubleday & Co. 1969) (13th ed. 1850).

311. *See* Gareth S. Lacy, *Untangling the Web: How Courts Should Respond to Juries Using the Internet for Research*, 1 REYNOLDS CTS. & MEDIA L.J. 169 (2011), available at <http://ssrn.com/abstract=1765002>.

312. *See id.* at 189–94.

313. *See id.* at 194–95.

314. *See, e.g.*, Marder, *supra* note 266, at 499–505 (describing tools to help jurors understand the judge's instructions); Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1273–80 (2001) (describing tools and technology to aid jurors perform their role).

that they will abide by it. This approach should transform uninformed jurors into informed jurors. Admittedly, it will not reach recalcitrant jurors. For recalcitrant jurors, who have no intention of following the prohibition, the best hope is for judges and lawyers to spot them early and to remove them from the jury as soon as possible. Only by taking a process view of a juror's education do courts stand a chance of protecting a party's constitutional right to a fair trial.

# Speech

