

THE REAL SOCIAL NETWORK: HOW JURORS' USE OF  
SOCIAL MEDIA AND SMART PHONES AFFECTS A  
DEFENDANT'S SIXTH AMENDMENT RIGHTS

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*The advent of the Internet and the rise of social media websites such as Twitter and Facebook have created new challenges for the courts in protecting defendants' Sixth Amendment rights. The Sixth Amendment provides criminal defendants with "the right to a speedy and public trial, by an impartial jury" as well as the right "to be confronted with the witnesses against him." These Internet resources, particularly when combined with new technologies such as smart phones with web-browsing capabilities, provide jurors with a new avenue to do independent research on the defendant or the case, or to communicate trial-related material before deliberations are complete, both of which violate a defendant's Sixth Amendment rights. This Note analyzes the different approaches courts have taken in combating such violations, including the use of more specific jury instructions, restriction of juror access to electronic devices such as smart phones, use of voir dire to exclude "at risk" jurors, and monitoring of juror Internet activities. Ultimately, this Note argues that jury instructions, prohibitions on electronic devices in the courtroom, voir dire, and monitoring are insufficient to protect defendants' Sixth Amendment rights. Courts, rather, should establish specific punishments for engaging in these prohibited activities, ensure that the jurors are informed of the punishments, and take a more proactive approach toward identifying violators by questioning jurors throughout the trial process.*

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## I. INTRODUCTION

“Guilty. Guilty. I say no. I will not be swayed. Practicing for jury duty.”<sup>1</sup> A potential juror posted this comment on the Internet while participating in the jury selection process for an upcoming murder trial.<sup>2</sup> The judge became aware of this statement but decided to allow the juror to remain in the selection process.<sup>3</sup> Unfortunately, these types of Internet postings are no longer the exception, and courts face a developing issue of jurors’ Internet-related misconduct during trial proceedings. The advent of the Internet provides jurors with easy access to external information about defendants and also provides a new avenue for jurors to communicate trial-related material before deliberations are complete. As a result, courts face new concerns in ensuring a criminal defendant’s Sixth Amendment rights to a fair and impartial trial.

The Sixth Amendment provides criminal defendants with “the right to a speedy and public trial, by an impartial jury” as well as the right “to be confronted with the witnesses against him.”<sup>4</sup> As Justice Oliver Wendell Holmes stated in *Patterson v. Colorado*, “The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”<sup>5</sup> In order to ensure a defendant’s Sixth Amendment right to an impartial jury, jurors must “set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence ‘based on the evidence presented in court.’”<sup>6</sup>

Therefore, part of a criminal defendant’s Sixth Amendment right to an impartial jury is ensuring that the jury verdict is based solely on the evidence presented and the instructions given by the court.<sup>7</sup> In order to protect this right, jurors are instructed to not seek external information about the defendant while serving on the jury.<sup>8</sup> Defendants also have the

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1. Keith L. Alexander & Henri E. Cauvin, *Jury Set for Levy Murder Trial; One Man Gets Heat Over Tweet*, WASH. POST.COM (Oct. 22, 2010), [http://www.washingtonpost.com/wp-dyn/content/article/2010/10/22/AR2010102207109.html?wprss=rss\\_metro](http://www.washingtonpost.com/wp-dyn/content/article/2010/10/22/AR2010102207109.html?wprss=rss_metro).

2. *Id.*

3. *Id.*

4. U.S. CONST. amend. VI.

5. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

6. *Skilling v. United States*, 130 S. Ct. 2896, 2948 (2010) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

7. *See Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965).

8. *E.g.*, COMM. ON FED. CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT 1.06 (1998), <http://www.ca7.uscourts.gov/pjury.pdf> (“[A]nything that you may have seen or heard outside the courtroom is not evidence. . . .”); JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 1.03(4) (2011), [http://www.juryinstructions.ca8.uscourts.gov/crim\\_man\\_2011.pdf](http://www.juryinstructions.ca8.uscourts.gov/crim_man_2011.pdf) (“Anything you see or hear about this case outside the courtroom is not evidence, unless I specifically tell you otherwise during the trial.”); NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 2.1 (2010), <http://www.rid.uscourts.gov/menu/judges/jurycharges/OtherPJI/9th%20Circuit%20Model%20Crimina1%20Jury%20Instructions.pdf> (“Do not read, watch, or listen to any news reports or other accounts

right to challenge witnesses brought against them at trial, which is impossible to do if the information is obtained by the jurors on the Internet.<sup>9</sup>

In addition, the Sixth Amendment attempts to protect criminal defendants from jury verdicts that result from predetermined positions. The court system is set up so that jurors make their conclusion only after considering all the evidence.<sup>10</sup> Just as jurors are instructed to not conduct external research, they are also told to keep an open mind until deliberations begin.<sup>11</sup> When a juror communicates about the trial on the Internet through social media websites, there is a fear that the juror is not able to maintain such impartiality.<sup>12</sup>

Courts have taken several steps to address new concerns related to social media and jurors' access to electronic devices, including implementing jury instructions specifically restricting Internet activity, limiting jurors' access to electronic devices, encouraging attorneys to use voir dire to identify jurors who are at risk for Internet misconduct, and even monitoring jurors' Internet activity.<sup>13</sup> These methods, however, have proved to be insufficient. Jury instructions have been unsuccessful at limiting juror misconduct. At the same time, restricting jurors' access to their electronic devices has proven to be too drastic and unsuccessful in reducing the risk. Although voir dire may enable attorneys to identify at risk jurors, as the jury pool becomes increasingly infiltrated with smart phone owners and social media users, attorneys will not have the option of eliminating every juror who is at risk of Internet misconduct. Also, monitoring jurors' Internet activity is complicated by limitations such as privacy settings and the inability to track Internet research. Courts need to look for new and more creative methods to protect each defendant's Sixth Amendment rights. Jurors need to be made aware of the punishment they face if they obtain or disclose information on the Internet. In addition, jurors should be questioned about their Internet activity throughout the trial to ensure that jurors who do engage in questionable activity are exposed.

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about the trial or anyone associated with it, including any online information. Do not do any research, such as consulting dictionaries, searching the Internet or using other reference materials, and do not make any investigation about the case on your own.”).

9. See GREGORY E. MIZE ET AL., OFFICE OF JUSTICE PROGRAMS, SOC. MEDIA & TRIAL BY JURY: IDENTIFYING PROBLEMS, DESIGNING SOLUTIONS 4 (2011), <http://bjatraining.org/wp-content/uploads/2011/02/TrialByJurySlides.pdf>.

10. See *Skilling*, 130 S. Ct. at 2948 (“The Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence ‘based on the evidence presented in court.’” (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961))).

11. E.g., NINTH CIRCUIT JURY INSTRUCTIONS COMM., *supra* note 8, at 2.1 (“[K]eep an open mind until all the evidence has been presented and you have heard the arguments of counsel, my instructions on the law, and the views of your fellow jurors.”).

12. See Rosalind R. Greene & Jan Mills Spaeth, *Are Tweeters or Googlers in Your Jury Box?*, ARIZ. ATT’Y, Feb. 2010, at 38, 39–40; Harry A. Valetk, *Facebooking in Court: Coping with Socially Networked Jurors*, TEX. LAW., Oct. 14, 2010, <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202473365917&slreturn=1&hblogin>.

13. See *infra* Part II.A–D.

Part II of this Note gives an overview of why new social media trends and the availability of external information on the Internet is a growing concern. Part II also provides background information on a criminal defendant's Sixth Amendment rights to a fair and impartial trial and explains how these rights may be affected by jurors' Internet activities. Part III analyzes current techniques used to limit the effect of the Internet on a defendant's Sixth Amendment rights. Finally, Part IV discusses the need for a clear rule, suggesting that judges begin enforcing punishment against Internet misconduct. In addition, Part IV suggests that courts take further steps to identify jurors who misuse the Internet in order to prevent a verdict with outside influences.

## II. BACKGROUND

In a recent study conducted by The New Media Committee of the Conference of Court Public Information Officers, 9.8% of judges reported seeing jurors use smartphones or access social media websites while in the courtroom.<sup>14</sup> This 9.8% does not include the jurors who access these same social media websites outside of the courtroom or who go unnoticed by the judge.<sup>15</sup> The use of Internet resources and social media has increased dramatically, and courts need to address rising Sixth Amendment concerns to ensure juror impartiality.

### A. *Internet Misconduct Is a Growing Issue*

Although concerns about juror impartiality are not new, technology has certainly increased the risk of juror misconduct.<sup>16</sup> Facebook and Twitter became mainstream social media mechanisms in a matter of a few short years.<sup>17</sup> Facebook, which claims to have more than 800 million active users,<sup>18</sup> is an interactive website that allows people "to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet."<sup>19</sup> Users often post sta-

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14. CONFERENCE OF COURT PUB. INFO. OFFICERS, *NEW MEDIA AND THE COURTS: THE CURRENT STATUS AND A LOOK AT THE FUTURE* 9, 76 (2010), <http://www.ccpio.org/documents/newmediaproject/New-Media-and-the-Courts-Report.pdf>.

15. *See id.*

16. *See id.* at 24, 44–45; Greene & Spaeth, *supra* note 12, at 39; Eric P. Robinson, *Michigan High Court Sends Message to Tweeters*, CITIZEN MEDIA L. PROJECT (July 7, 2009), <http://www.citmedialaw.org/blog/2009/michigan-high-court-sends-message-tweeters>.

17. *See* James A. Edwards, *Jurors Who Tweet, Blog & Surf—Deciding and Discussing Your Case, Part I*, 77 BRIEFS, Oct. 2009, at 18, 19; *see also* Press Release, comScore, comScore Releases "The 2010 U.S. Digital Year in Review" (Feb. 8, 2011), *available at* [http://www.comscore.com/Press\\_Events/Press\\_Releases/2011/2/comScore\\_Releases\\_The\\_2010\\_U.S.\\_Digital\\_Year\\_in\\_Review](http://www.comscore.com/Press_Events/Press_Releases/2011/2/comScore_Releases_The_2010_U.S._Digital_Year_in_Review) ("[Nine] out of every [ten] U.S. Internet users now visiting a social networking site in a month, and the average Internet user spending more than [four] hours on these sites each month.").

18. *Statistics*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Jan. 21, 2012).

19. *Facebook*, FACEBOOK, <http://www.facebook.com/facebook?v=info> (last visited Jan. 21, 2012).

tus updates relating their daily activities, which other users can then see and respond to with their own comments.<sup>20</sup> According to Facebook's information page, Facebook's mission is to "give people the power to share and make the world more open and connected."<sup>21</sup>

Twitter, which registers an average of 300,000 new users each day,<sup>22</sup> is a website that allows users to "follow the conversations" of other users.<sup>23</sup> Users post messages, called "tweets" that are up to 140 characters in length and describe what the individual is doing at the current time.<sup>24</sup> Twitter users are encouraged to "tell your story within your Tweet" and to supplement their "tweet" with photos and videos.<sup>25</sup> Each user may then have followers who regularly read their posts.<sup>26</sup> The convenience and up-to-the-minute nature of Twitter allows jurors to give live updates on the Internet throughout the trial.<sup>27</sup>

In addition to Facebook and Twitter, many web-savvy users create their own blogs, which are similar to a daily journal but published on the Internet for other users to access.<sup>28</sup> Blogs usually contain more than just text, often including images, videos, and links to other websites.<sup>29</sup> Blogs are commonly used for one-way communication, but many blogs also allow the users to exchange information with the blogger and other followers.<sup>30</sup>

Each of these websites has flourished in the twenty-first century with the majority of growth occurring among those under twenty-five years of age.<sup>31</sup> With more than 63.2 million U.S. citizens owning a smart phone as of December 2010, the risk of jurors accessing these sites while on jury duty has increased.<sup>32</sup> Sixth Amendment concerns over whether jurors can remain impartial while communicating on the Internet about the trial will only grow over time as jury pools become increasingly tech savvy.<sup>33</sup>

Sixth Amendment concerns regarding Internet misconduct focus on jurors' access to external information on the Internet as well as jurors'

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20. See CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 28.

21. *Facebook*, *supra* note 19.

22. *Twitter User Statistics REVEALED*, HUFFINGTON POST (June 14, 2010, 6:12 AM), [http://www.huffingtonpost.com/2010/04/14/twitter-user-statistics-r\\_n\\_537992.html](http://www.huffingtonpost.com/2010/04/14/twitter-user-statistics-r_n_537992.html).

23. *About Twitter*, TWITTER, <http://twitter.com/about> (last visited Jan. 21, 2012).

24. *Id.*

25. *Id.*

26. See Edwards, *supra* note 17, at 19; Greene & Spaeth, *supra* note 12, at 39.

27. See Edwards, *supra* note 17, at 19.

28. See *id.* at 6.

29. See CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 51.

30. See *id.*; Edwards, *supra* note 17, at 22.

31. Douglas L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet*, 21 JURY EXPERT, Nov. 2009, at 14, 14-15; Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1613 (2011).

32. Press Release, comScore, comScore Reports December 2010 U.S. Mobile Subscriber Market Share (Feb. 7, 2011), available at [http://www.comscore.com/Press\\_Events/Press\\_Releases/2011/2/com\\_Score\\_Reports\\_December\\_2010\\_U.S.\\_Mobile\\_Subscriber\\_Market\\_Share](http://www.comscore.com/Press_Events/Press_Releases/2011/2/com_Score_Reports_December_2010_U.S._Mobile_Subscriber_Market_Share).

33. See Keene & Handrich, *supra* note 31, at 14-16; Morrison, *supra* note 31, at 1581.

use of social media websites to communicate information about the trial as it proceeds. Due to technology, jurors can more readily obtain outside information and share real-time information about the trial with the public at large. Jurors have the “capability instantaneously to tweet, blog, text, e-mail, phone, and look up facts and information during breaks, at home, or even in the jury room.”<sup>34</sup> The risk of jurors communicating with others has always been present.<sup>35</sup> Instantaneous communication, however, has further complicated the issue of juror impartiality.<sup>36</sup> Simply by posting information on Facebook or Twitter, a juror can communicate to thousands of people instantly, who can then respond to the juror with their own opinions.<sup>37</sup> Additionally, courts fear that by communicating about the trial, a juror may begin to solidify his or her opinion of the defendant before the court proceedings have been completed.<sup>38</sup>

Newspapers and other periodicals across the country have published articles detailing cases resulting in new trials, mistrials, dismissed jurors, and jurors held in contempt in response to obtaining and disclosing information via the Internet.<sup>39</sup> But at the same time, many instances of juror misconduct are likely never reported or discovered.<sup>40</sup> It is probable that many cases have been decided by jurors who conducted outside research but were never caught.<sup>41</sup> Therefore, the full extent of juror misconduct may never be known. Even at the current reported level, it is clear that courts are unprepared to deal with issues arising from increased access to technology and social media sites.<sup>42</sup> Court resources are being wasted as mistrials are declared and new trials are ordered.<sup>43</sup> It is imperative that the courts take a “proactive” approach to solving the issues presented by new technologies and social media websites.<sup>44</sup>

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34. Ralph Artigliere et al., *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, FLA. B.J., Jan. 2010, at 8, 9.

35. See Greene & Spaeth, *supra* note 12, at 39.

36. Dennis M. Sweeney, Circuit Court Judge (Retired), Address to the Litigation Section of the Maryland State Bar Association: The Internet, Social Media and Jury Trials: Lessons Learned from the Dixon Trial 2-3 (Apr. 29, 2010).

37. See Greene & Spaeth, *supra* note 12, at 39-40.

38. See James A. Edwards, *Jurors Who Tweet, Blog & Surf—Deciding and Discussing Your Case, Part II*, 77 BRIEFS, Nov. 2009, at 30, 30.

39. See, e.g., CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 34; Artigliere et al., *supra* note 34, at 9; Greene & Spaeth, *supra* note 12, at 39; Michael Hoenig, *Juror Misconduct on the Internet*, N.Y. L.J., Oct. 8, 2009, at 3; John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1; Valetk, *supra* note 12.

40. See Artigliere et al., *supra* note 34, at 9-10; Hoenig, *supra* note 39; Morrison, *supra* note 31, at 1579, 1589.

41. See Hoenig, *supra* note 39.

42. See CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 19-21.

43. See Edwards, *supra* note 17, at 18.

44. CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 41.

### B. Jurors Conducting Internet Research

“Gone are the days . . . when you could expect some court official to cut a hole in the newspaper and expect that to keep jurors from learning’ about the case outside of the trial itself.”<sup>45</sup> It is nothing new for courts to be concerned about jurors accessing outside information; however, as this quote indicates, technology has made the issue much more complicated for courts.<sup>46</sup> Jury instructions tell jurors not to consider any information they have received from outside the courtroom.<sup>47</sup> Smart phones have changed the way in which jurors can access prohibited information. Jurors no longer have to find a newspaper or go to a library to research a defendant; rather, jurors have access to limitless information at their fingertips. As a result, there is a recent trend of judges declaring mistrials and dismissing jurors who are discovered to have used the Internet to conduct outside research.<sup>48</sup>

#### 1. Effect on a Defendant’s Sixth Amendment Rights

The Internet provides jurors with instant access to unfiltered information such as a defendant’s criminal record and the media coverage of a case.<sup>49</sup> Courts fear that if jurors engage in external research, the verdict may be based on erroneous facts which the other side had no opportunity to rebut in court.<sup>50</sup> Jurors have been known to research unfamiliar legal terms as well as perform their own checks on information presented in the case.<sup>51</sup> In conducting this research, jurors have a variety of unfiltered web tools at their fingertips including Google, Wikipedia, WebMD, and government websites.<sup>52</sup>

Two Sixth Amendment issues arise when jurors access external information. First, a juror may base his or her decision on external information found on the Internet that may be not only unfairly prejudicial,

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45. SALLY RIDER & RUSSELL WHEELER, WILLIAM H. REHNQUIST CTR. ON THE CONSTITUTIONAL STRUCTURES OF GOV’T & THE GOVERNANCE INST., THE “NEW MEDIA” AND THE COURTS: JOURNALISTS AND JUDGES CONSIDER COMMUNICATIONS BY AND ABOUT COURTS IN THE INTERNET ERA 26 (2009) (quoting Laurie Roberts), <http://www.rehnquistcenter.org/documents/postsymposiumfinal.pdf>.

46. See CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 25; Greene & Spaeth, *supra* note 12, at 39; Robinson, *supra* note 16.

47. See *supra* note 8.

48. See *infra* Part II.D.

49. See Artigliere et al., *supra* note 34, at 9 (“Jurors have the capability instantaneously to . . . look up facts and information during breaks, at home, or even in the jury room . . . .”); Edwards, *supra* note 17, at 18; Morrison, *supra* note 31, at 1586–90.

50. See John G. Browning, *Dangers of the Online Juror: A World Wired for Instant Information Can Create Problems in Court*, D MAG. LEGAL DIRECTORY 2010, (May 12, 2010), [http://www.dmagazine.com/Home/D\\_Magazine/2010/Legal\\_Directory\\_2010/Dangers\\_of\\_the\\_Online\\_Juror.a\\_spx](http://www.dmagazine.com/Home/D_Magazine/2010/Legal_Directory_2010/Dangers_of_the_Online_Juror.a_spx); see also Greene & Spaeth, *supra* note 12, at 40.

51. See Edwards, *supra* note 38, at 30; Jerry Casey, *Juries Raise a Digital Ruckus*, OREGONLIVE.COM (Jan. 13, 2008, 1:11 PM), [http://blog.oregonlive.com/washingtoncounty/2008/01/juries\\_raise\\_a\\_digital\\_ruckus.html](http://blog.oregonlive.com/washingtoncounty/2008/01/juries_raise_a_digital_ruckus.html).

52. See Edwards, *supra* note 17, at 18.

but also inaccurate. Information on the Internet is often “incomplete, erroneous, or deliberately false.”<sup>53</sup> The Internet is filled with websites that publish information without ensuring the accuracy of that information.<sup>54</sup> In addition, a defendant is precluded from his right to confront evidence brought against him as he is completely unaware that a juror has accessed potentially harmful information.<sup>55</sup>

For an example of how Internet research can infringe upon a defendant’s Sixth Amendment rights, consider a study published in the *Cornell Law Review* finding that in marginal cases “the existence of a prior criminal record can prompt a jury to convict” a defendant.<sup>56</sup> A defendant’s criminal background is often excluded from evidence due to the prejudicial effect it may have on jurors who might give the evidence too much weight.<sup>57</sup> In addition to the risk of prejudice, criminal background information found on the Internet may be out of date or include dropped charges.<sup>58</sup> There is also the chance that a juror will mistake the defendant for another defendant with the same name.<sup>59</sup> As shown by the above study, in borderline cases, a jury’s access to misleading information may have a direct effect on the outcome of a case. A verdict reached in this manner prevents the criminal defendant from receiving the fair and impartial trial guaranteed under the Sixth Amendment.

## 2. *Courtroom Examples of Internet Research*

Over recent years, courts have seen an increasing number of juror dismissals, mistrials, and overturned verdicts resulting from jurors’ use of the Internet to research the case.<sup>60</sup> In March 2009, a judge declared a mistrial eight weeks into a federal drug trial after learning that nine jurors had conducted research about the case on the Internet.<sup>61</sup> In a South Dakota seat belt liability case, one juror researched the defendant on the Internet and informed other jurors about his research, including the fact that the defendant had not been sued previously.<sup>62</sup> Likewise, a judge in

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53. See Morrison, *supra* note 31, at 1584.

54. CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 37; Casey, *supra* note 51.

55. See *supra* text accompanying note 9.

56. Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1385 (2009). One former jury foreman, calling to contribute to a radio interview, described how a fellow jury member argued against the defendant after discovering, through Internet research, that the defendant had experienced similar charges in previous cases. Interview by Neal Conan with Gary Randall, Judge, Dist. Court of Douglas Cnty., Nev. (Sept. 17, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=112926570>.

57. FED. R. EVID. 404(b). While evidence of past crimes can be admitted for purposes other than showing the character of the accused, a judge is not to allow the evidence in a case if the “danger of undue prejudice outweighs the probative value of the evidence.” FED. R. EVID. 404 (advisory committee’s note).

58. See Morrison, *supra* note 31, at 1593.

59. See *id.*

60. See *infra* text accompanying note 112.

61. See Schwartz, *supra* note 39.

62. See Artigliere et al., *supra* note 34, at 9.

Oregon dismissed a jury in the middle of deliberations after the forewoman reported that two jurors had researched the definitions of “implied consent” and “beyond a reasonable doubt” on the Internet.<sup>63</sup>

### 3. *Why Jurors Engage in Internet Research*

There are several reasons why jurors continue to seek outside sources when specifically instructed not to do so. Primarily, jurors may conduct their own research because they feel that relevant information has been withheld. Furthermore, despite jury instructions, jurors might think there is nothing wrong with doing a quick Internet search. Finally, jurors turn to the Internet simply because it is an easy and convenient way to access additional information.

At trial, jurors do not always have access to the information they feel is needed to reach a decision. Jurors are asked to make conclusions based on the evidence that is presented, but at the same time jurors are prevented from asking questions they have about that evidence.<sup>64</sup> Jurors who want to ensure they make the correct decision may turn to the Internet for answers because they do not have any other avenue to get their questions answered.<sup>65</sup> In addition, the evidence given to jurors is highly screened and restricted.<sup>66</sup> Relevant information is often excluded.<sup>67</sup> This can frustrate a juror who wants to reach the most accurate result but feels that he or she does not have the full story.<sup>68</sup> It is also possible that jurors feel information has been unfairly excluded. Two circuit court judges contributing to an article in the *Florida Bar Journal* found that “[j]urors often believe that one or another of the parties is trying to keep important evidence out of the case and that they are not being told the ‘real’ truth.”<sup>69</sup> In order to compensate for the lacking evidence, jurors may resort to Internet research in an attempt to fill in the blanks.<sup>70</sup>

Not only do jurors sometimes feel it is necessary to conduct outside Internet research as a result of absent evidence, but jurors also may think they are being helpful by consulting additional resources.<sup>71</sup> Lay jurors may have difficulty understanding not only the instructions, but also the reason for excluding the information in the first place.<sup>72</sup> As a result, jurors often “have no concept that they are doing anything wrong when

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63. Casey, *supra* note 51.

64. See Keene & Handrich, *supra* note 31, at 17; Morrison, *supra* note 31, at 1582.

65. See Morrison, *supra* note 31, at 1581.

66. See *id.* at 1582, 1584–86.

67. See *id.* at 1584–85.

68. See Greene & Spaeth, *supra* note 12, at 40; Keene & Handrich, *supra* note 30, at 17.

69. See Artigliere et al., *supra* note 34, at 17 n.24.

70. See Morrison, *supra* note 31, at 1586; see also AMY J. POSEY & LAWRENCE S. WRIGHTSMAN, TRIAL CONSULTING 145 (2005) (identifying the term “reactance effect” to refer to a phenomenon where jurors seek out information on their own if they feel it is being withheld from them).

71. See Schwartz, *supra* note 39; Casey, *supra* note 51.

72. See Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469, 473 (2006).

they gather and share information via the Internet.”<sup>73</sup> Douglas Keene, president of the American Society of Trial Consultants, has indicated that jurors feel they are being helpful rather than harmful by “digging deeper” into the case.<sup>74</sup> For example, Keene believes that when jurors use the Internet to look up legal terms such as “implied consent” and “beyond a reasonable doubt,” it is likely that jurors were confused by the terms and thought it would help the process if they could clarify the legal language.<sup>75</sup>

Finally, many jurors turn to Internet research simply because of the convenience and easy access. In the past, jurors had to engage in time-consuming paper research in order to obtain information, whereas now nearly everyone has Internet access.<sup>76</sup> Through the Internet, jurors can instantly obtain access to defendants’ criminal and civil records, personal information about a defendant, and information about the case at hand.<sup>77</sup> When a defendant is unable to confront inaccurate, unverified, or unfairly prejudicial information obtained on the Internet, that defendant’s Sixth Amendment rights are infringed.

### C. *Juror Communication on Social Media Websites*

Similar to the risk of jurors conducting outside research, there has always been a concern about jurors communicating with others before deliberations.<sup>78</sup> Social media websites have changed the way people communicate and have increased this risk substantially.<sup>79</sup> Facebook and Twitter allow a juror to reach thousands of people instantly with comments about the trial, and those people can in turn immediately respond with their own opinions.<sup>80</sup> In fact, Reuters Legal conducted a three-week study during late 2010 in which they searched for tweets including the terms “jury duty.”<sup>81</sup> Shockingly, the search showed that a tweet referencing jury duty was made nearly once every three minutes.<sup>82</sup>

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73. Edwards, *supra* note 17, at 18.

74. See Schwartz, *supra* note 39.

75. See Casey, *supra* note 51.

76. INT’L TELECOMM. UNION, THE WORLD IN 2010, at 4 (2010), <http://www.itu.int/ITU-D/ict/material/FactsFigures2010.pdf> (“The number of Internet users has doubled between 2005 and 2010. . . . 71% of the population in developed countries are online . . .”).

77. See CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 53; Morrison, *supra* note 31, at 1586; Hoenig, *supra* note 39; Schwartz, *supra* note 39.

78. See Greene & Spaeth, *supra* note 12, at 40.

79. *Id.*; see also CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 38.

80. See Greene & Spaeth, *supra* note 12, at 39–40.

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-idUSTRE6B74Z820101208?pageNumber=2>.

82. *Id.* (noting that while many of the tweets were merely complaints about having to perform jury duty, “a significant number included blunt statements about defendants’ guilt or innocence”).

Jurors have even used social media outlets such as Facebook and Twitter to seek out their friends' and families' opinions about a trial.<sup>83</sup> The Florida Joint Report of the Committees on Standard Jury Instructions finds that "[s]ome jurors have even used [social media] to describe the case to others and ask for advice on how to decide the case."<sup>84</sup> Sharing of information on the Internet raises concerns of whether jurors can remain impartial when communicating their thoughts about the process before the trial has concluded.<sup>85</sup> This fear has led judges to declare mistrials, dismiss jurors, and even charge jurors with fines or hold them in contempt after they communicated about the trial on the Internet.<sup>86</sup>

### 1. *Effect on a Defendant's Sixth Amendment Rights*

As jurors increasingly disclose information on the Internet, courts and legal parties have become concerned about the effect this can have on a defendant's Sixth Amendment right to a fair and impartial trial. The New Media report concluded that "Facebook, Twitter[,] and the Web browsing capabilities of countless handheld devices have compromised the security of the jury box."<sup>87</sup> But what exactly has been compromised?

The biggest concern is that misuse of new technologies brings a jury's impartiality into question. When jurors communicate about a trial to third parties, there is a fear that they may not remain impartial, resulting in a potential Sixth Amendment infringement.<sup>88</sup> A juror, by commenting on the Internet, may demonstrate a prejudgment that will prevent that juror from fairly evaluating both parties' future evidentiary presentations.<sup>89</sup> Courts fear that a juror, by communicating about the trial before its conclusion, will prematurely form opinions.<sup>90</sup>

In addition to premature determinations, jurors who post communications on social media websites create a risk of other users responding with their own opinions of the case. The U.S. Court of Appeals for the First Circuit has said that there is a presumption that any communication

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83. See Artigliere et al., *supra* note 34, at 10 (stating that friends and family may tweet, e-mail, or text a juror with their own opinions or information about the case); Edwards, *supra* note 38, at 30 (discussing a juror who was removed from jury duty after asking her friends on Facebook for their opinions on the trial).

84. SUP. CT. OF FLA. COMMS. ON STANDARD JURY INSTRUCTIONS, JOINT REPORT, NOS. 2010-01 & NO. 2010-01, at 6 (2010).

85. See Greene & Spaeth, *supra* note 12, at 40; Valetk, *supra* note 12.

86. See RIDER & WHEELER, *supra* note 45, at 26; Artigliere et al., *supra* note 34, at 9-10; Martha Neil, *Oops. Juror Calls Defendant Guilty on Facebook, Before Verdict*, A.B.A. J. (Sept. 2, 2010, 1:28 PM), [http://www.abajournal.com/news/article/oops.\\_juror\\_calls\\_defendant\\_guilty\\_on\\_facebook\\_though\\_verdict\\_isnt\\_in](http://www.abajournal.com/news/article/oops._juror_calls_defendant_guilty_on_facebook_though_verdict_isnt_in); Schwartz, *supra* note 39; see also Valetk, *supra* note 12.

87. CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 24.

88. Valetk, *supra* note 12.

89. See Richard Raysman & Peter Brown, *How Blogging Affects Legal Proceedings*, LAW TECH. NEWS (May 13, 2009), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202430647333&slreturn=1&hblogin=1>.

90. See Edwards, *supra* note 38, at 30.

a juror has with someone outside the courtroom is prejudicial.<sup>91</sup> By exposing themselves to outside thoughts and opinions, jurors introduce the risk of limiting their impartiality when it comes to determining the verdict. In order to secure a defendant's right to a fair and impartial trial, the courts must find a way to restrict jurors' use of social media to communicate about the trial.

## 2. *Courtroom Examples of Internet Communications on Social Media Websites*

Paralleling social media websites' growth, an increasing number of jurors are posting about their jury duty experience on the Internet. A Michigan juror made a Facebook post, the day before the verdict was announced, stating she "was 'actually excited for jury duty tomorrow . . . it's gonna be fun to tell the defendant they're guilty.'"<sup>92</sup> In a similar case, a different juror made a Twitter post after the verdict, stating "I just gave away TWELVE MILLION DOLLARS of somebody else's money."<sup>93</sup> The judge refused the defense's arguments that the post showed the juror's bias against the defendant, and upheld the verdict because the comments were posted after the conclusion of the trial.<sup>94</sup>

Jurors have gone further than merely communicating about the trial on the Internet and are using social media websites to conduct polls asking friends for their opinions on the trial. For example, a woman in England, serving as a juror on a child-kidnapping and sexual assault case, posted a message on Facebook that included specifics of the case and requested her friends' views on how the case should be decided.<sup>95</sup> The juror was dismissed after the court was notified of the Internet poll.<sup>96</sup> Even if jurors do not seek their friends' opinions on the Internet, the unfiltered nature of social media websites makes it easy for friends and family members of jurors to communicate their opinions or information relating to the case directly to a juror.<sup>97</sup> In fact, with the flood of information social media users receive every day, it may be difficult for jurors to avoid this type of communication.<sup>98</sup>

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91. See *United States v. O'Brien*, 972 F.2d 12, 14 (1st Cir. 1992).

92. Neil, *supra* note 86.

93. CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 38; see also Greene & Spaeth, *supra* note 12, at 39; Valetk, *supra* note 12.

94. See Greene & Spaeth, *supra* note 12, at 39.

95. See CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 24 (citing Browning, *supra* note 50).

96. See *id.*

97. See Artigliere et al., *supra* note 34, at 10.

98. See *id.*

### 3. *Why Jurors Communicate on Social Media Websites*

Jurors may use social media websites to discuss a case for a variety of reasons. First, jurors may post status updates in order to brag to others about the control they have over the outcome of a case. Communicating about a case may give jurors a sense of empowerment.<sup>99</sup> Also, similar to the issue of conducting outside research, many jurors simply do not think there is anything wrong with communicating information about the trial on social media websites. Even more concerning is the addictive nature of social media communication. Social media is unique in that many jurors may be so habituated to updating their Facebook, Twitter, and blog posts that they cannot help but include information about their jury duty experience.<sup>100</sup> Unsurprisingly, the risk of jurors communicating about the trial through social media websites increases for high-profile cases, where the urge to tweet may be even stronger.<sup>101</sup>

Unlike jurors who conduct outside research, jurors who post details of a trial on Facebook or their blog cannot argue that they are attempting to be helpful in aiding deliberations. Instead, many jurors are simply unaware that they have done anything wrong.<sup>102</sup> Jurors know that they are not to communicate about the trial until deliberations are over, but the jurors may not realize that posting messages on Facebook, Twitter, or blogs constitutes a “communication.”<sup>103</sup> One explanation for this is that when jurors make Internet posts, it is often a “one-way communication” in which they are expressing an idea, rather than requesting information from others.<sup>104</sup> Even one-way communication, however, can pose a risk to a defendant’s Sixth Amendment rights, as it may lead to a juror reaching conclusions without hearing all of the evidence.<sup>105</sup> In addition, many social media websites allow users to communicate back to a juror, even if a juror did not request such communications.<sup>106</sup> As social media usage becomes more popular, jurors will be increasingly tempted to release private information about a trial through Facebook, Twitter, and blogs.

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99. See Greene & Spaeth, *supra* note 12, at 39.

100. See *id.* at 39; Grow, *supra* note 82.

101. E.g., Ginny LaRoe, *Barry Bonds Trial May Test Tweeting Jurors*, RECORDER (Feb. 15, 2011), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202481944364&slreturn=1&hblogin=1> (stating that the urge for jurors to tweet about the detail of the Barry Bonds trial may be greater than most trials due to the high-profile nature of the case).

102. See Edwards, *supra* note 17, at 18; Greg Moran, *Revised Jury Instructions: Do Not Use the Internet*, U-T SAN DIEGO (Sept. 13, 2009, 2:00 AM), <http://www.signonsandiego.com/news/2009/sep/13/revised-jury-instructions-do-not-use-internet/?zindex=165049>.

103. Moran, *supra* note 102.

104. *Id.*; see also Paula Hannaford-Agor, *Jury News: Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, 24 CT. MANAGER 42, 43 (2009), [http://www.ncsconline.org/d\\_research/cjs/JuryNews2009Vol24No2.pdf](http://www.ncsconline.org/d_research/cjs/JuryNews2009Vol24No2.pdf) (“For some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication.”).

105. See *supra* text accompanying note 90.

106. See Artigliere et al., *supra* note 34, at 10.

Even if jurors realize that Internet postings violate their jury instructions, they may continue to post information relating to the trial simply because Facebook and Twitter have become part of their daily lives. In fact, “[s]ome jurors will want to text what they are doing at any given moment and why they are doing it to friends, family, and thousands of strangers.”<sup>107</sup> The Florida Joint Report of the Committees on Standard Jury Instructions finds that “[t]hese potential jurors may consider constant communication through cell phones, Blackberries, and other devices to be a normal part of everyday life.”<sup>108</sup> The desire to communicate their daily activities is so strong that some jurors may not stop simply because they are partaking in jury duty.<sup>109</sup> As one juror who was chastised for posting a comment about the trial explained, “I was just doing what I do every day.”<sup>110</sup>

*D. Lack of Efficiency: Mistrials, New Trials, and Dismissed Jurors*

When jurors misuse the Internet, courts face decreasing efficiency in the legal process. According to a study conducted by Reuters Legal, ninety verdicts have been challenged as a result of alleged juror Internet misconduct since 1999, half of which occurred in 2009 and 2010.<sup>111</sup> Between January 2009 and December 2010, twenty-one new trials or overturned verdicts resulted from Internet misconduct.<sup>112</sup> It can only be speculated how many instances of Internet misconduct passed by without any court awareness during this same time period.<sup>113</sup> Also concerning, Internet misconduct can decrease efficiency when jurors are dismissed before the case has been completed. For instance, a California court excused six hundred jurors prior to trial after several potential jurors admitted to engaging in Internet research, causing unnecessary delay in the process.<sup>114</sup> Mistrials, overturned verdicts, and even dismissed jurors result in loss of valuable court time and resources.

### III. ANALYSIS

Courts are beginning to address the concerns relating to jurors' misuse of the Internet and the resulting potential infringement on a defendant's Sixth Amendment rights. For example, courts are specifically incorporating Internet usage and social media websites into their jury

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107. *See id.* at 9.

108. SUP. CT. OF FLA. COMMS. ON STANDARD JURY INSTRUCTIONS, *supra* note 84, at 6.

109. *See Keene & Handrich, supra* note 31, at 15. “[I]t may be much easier [for some jurors] to refrain from discussing the case over dinner than to lay off their technology.” Greene & Spaeth, *supra* note 12, at 39.

110. Scott Michels, *Cases Challenged over ‘Tweeting’ Jurors*, ABC NEWS (Mar. 17, 2009), <http://abcnews.go.com/Technology/story?id=7095018&page=1>.

111. *See Grow, supra* note 82.

112. *See id.*

113. *See id.*

114. *See Keene & Handrich, supra* note 31, at 18.

instructions. Some courts are going even further by restricting juror usage of electronic devices. Attorneys have also been proactive and are questioning prospective jurors about their level of Internet usage. In addition, some attorneys choose to monitor jurors' Internet activity throughout the trial in order to discover violators. It is unclear how successful these measures have been, but as new reports of juror misuse of the Internet and social media continue to appear, it is clear that further steps must be taken.

#### A. *Jury Instructions Referencing Internet Misconduct*

For many courts, jury instructions have not kept up with the issues arising with new technologies.<sup>115</sup> As this issue develops, however, courts are looking primarily to updated jury instructions as the solution.<sup>116</sup> In 2009, the Judicial Conference of the United States' Committee on Court Administration and Case Management proposed changes to the federal courts' model jury instructions to address the concerns of obtaining and disclosing information on the Internet.<sup>117</sup> Under the Committee's recommendations, before entering deliberations, the jury will be instructed as follows:

You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.<sup>118</sup>

Likewise, the U.S. Court of Appeals for the Ninth Circuit specifically instructs jurors to not communicate about the case via "Internet chat rooms or through Internet blogs, Internet bulletin boards, emails or text messaging."<sup>119</sup> Several states have adopted similar language, sometimes specifically incorporating the use of blogs, Twitter, and Facebook.<sup>120</sup>

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115. See Artigliere et al., *supra* note 34, at 9.

116. See Morrison, *supra* note 31, at 1607.

117. JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (2009), <http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf>.

118. *Id.*

119. NINTH CIRCUIT JURY INSTRUCTIONS COMM., *supra* note 8, at 2.1.

120. *E.g.*, SUPERIOR COURT OF CAL., CNTY. OF S.F., JUROR QUESTIONNAIRE (2009), <http://www.sfsuperiorcourt.org/Modules/ShowDocument.aspx?documentid=2486>; MICH. CT. R. 2.511(H)(2) (c)-(d) (2012), <http://coa.courts.mi.gov/rules/documents/1Chapter2CivilProcedure.pdf> (stating that jurors shall not "use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose information prohibited . . ."); N.Y. CRIMINAL PATTERN JURY INSTRUCTIONS, JURY SEPARATION DURING DELIBERATIONS (2d et. 2009), [http://www.nycourts.gov/cji/1-General/CJI2d.Jury\\_Separation\\_Rev.pdf](http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Separation_Rev.pdf) ("Again, in this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other

Even courts that adopt new rules, however, often leave it up to the individual judge's discretion to decide whether the instruction should be given.<sup>121</sup>

Florida's Committees on Standard Jury Instructions published a joint report suggesting that Florida's Supreme Court adopt new jury instructions that specifically instruct jurors not to conduct their own Internet research or communicate about the case on Twitter, blogs, or any other website.<sup>122</sup> In their report findings, the committees point to the issue other states have faced of jurors posting messages about the trial on Facebook and Twitter.<sup>123</sup> The committees also point out that, with smartphones, jurors have access to the Internet at the courthouses, and it is therefore more important that jurors be told about this restriction from the beginning to prevent misuse.<sup>124</sup>

### 1. *Specific and Repeated Jury Instructions*

Specific jury instructions related to Internet activity, like the examples above, are generally regarded favorably compared to instructions that simply tell jurors not to communicate about the trial or engage in outside research.<sup>125</sup> Jurors may not think of Internet searches as doing research, or that restrictions on communication include posting on social media websites.<sup>126</sup> It is believed that jurors are more likely to realize that their actions are inappropriate if they are told specifically not to use the Internet to research and that limits on communication include social media websites.<sup>127</sup> Even specific instructions, however, have faltered in eliminating jurors' communication via the Internet.<sup>128</sup>

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means, including by telephone, text messages, email, internet chat or chat rooms, blogs, or social websites, such as facebook, myspace or twitter."); WIS. AMENDED CRIMINAL PRELIMINARY JURY INSTRUCTIONS, WIS JI-CRIMINAL 50 (2010), <http://www.postcrescent.com/assets/pdf/U014968718.pdf> ("Do not use a computer, cell phone, or other electronic device with communication capabilities to share any information about this case. For example, do not communicate by blog, e-mail, text message, twitter, or in any other way, on or off the computer."); *see also OSBA Jury Instruction Tackles Social Media, Electronics in the Courtroom*, OHIOBAR.ORG (May 26, 2010, 9:00 AM), <http://www.ohio bar.org/Pages/OSBANewsDetail.aspx?itemID=1200>.

121. *E.g.*, WIS. AMENDED CRIMINAL PRELIMINARY JURY INSTRUCTIONS, *supra* note 120 (stating that these additional instructions are to be used at the judge's discretion).

122. SUP. CT. OF FLA. COMMS. ON STANDARD JURY INSTRUCTIONS, *supra* note 84, at 15–16.

123. *Id.* at 6.

124. *Id.* at 32.

125. *See supra* text accompanying notes 118–21.

126. Tricia R. Deleon & Janelle S. Forteza, *Is Your Jury Panel Googling During the Trial?*, 52 *ADVOC.* 36, 38 (2010) (quoting statements made by Texas judges suggesting that jurors do not think of their Internet activities as violating their jury instructions).

127. *See* Greene & Spaeth, *supra* note 12, at 42; Keene & Handrich, *supra* note 31, at 17; Casey, *supra* note 51.

128. Jurors may simply find other means of Internet communication that are not specifically mentioned. *See* Grow, *supra* note 81 (discussing how even when specifically told not to tweet about a case, a juror continued to blog about the trial); *see also* Valetk, *supra* note 12 ("[E]ven with more detailed wording, jury instructions alone will not solve the problem.").

Specific instructions may be more successful if they inform jurors why they are prohibited from conducting Internet research or communicating about the trial on the Internet.<sup>129</sup> In general, jurors are more likely to comply if they know the reason behind the limitation.<sup>130</sup> It has been suggested that jurors watch an educational film describing the harmful nature of Internet research in order to reiterate the importance of avoiding outside research.<sup>131</sup> If jurors are made aware that outside research harms the trial process by bringing in evidence that does not meet the legal requirements, they may be less likely to seek out a quick answer from the Internet.<sup>132</sup> The Arizona Criminal Jury Instruction Committee heeded this advice and proposed an admonition that specifically defines what types of communication are limited as well as the justification for the limitation.<sup>133</sup>

In addition to specificity, courts are also encouraged to give Internet-related instructions multiple times throughout the trial. Trials can be lengthy, and it is unrealistic to think that telling jurors one time at the beginning of the trial to not use the Internet will be enough to prevent this conduct throughout the entirety of a trial.<sup>134</sup> The instruction may become lost among the numerous other instructions given to jurors.<sup>135</sup> Commentators have gone as far as saying that jurors need to be warned at every break to not use social media websites to communicate about the trial.<sup>136</sup> Jury instructions proposed in Florida have adapted to this need by suggesting that the instruction related to obtaining and disclosing information on the Internet be given three times during the trial: before voir dire, after voir dire, and prior to deliberations.<sup>137</sup> Jurors are unlikely to comply with even specific instructions unless they are given repeatedly throughout the trial.<sup>138</sup>

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129. See Artigliere et al., *supra* note 34, at 14; Hannaford-Agor, *supra* note 104, at 44; Morrison, *supra* note 31, at 1627; Robinson, *supra* note 16; Valetk, *supra* note 12.

130. See Artigliere et al., *supra* note 34, 14; Browning, *supra* note 50 (stating that because of the alluring nature of the Internet, jurors must know exactly why Internet research can be harmful to the case); see also Valetk, *supra* note 12.

131. See Browning, *supra* note 50.

132. See Robinson, *supra* note 16.

133. ARIZ. CRIM. JURY INSTRUCTION, PRELIMINARY CRIMINAL INSTRUCTIONS 13—ADMONITION (2009), [http://www.azbar.org/media/58829/preliminary\\_criminal\\_instr.pdf](http://www.azbar.org/media/58829/preliminary_criminal_instr.pdf) (“One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.”).

134. See Hoenig, *supra* note 39.

135. See *id.*

136. See Valetk, *supra* note 12.

137. SUP. CT. OF FLA. COMMS. ON STANDARD JURY INSTRUCTIONS, *supra* note 84, at 15–16.

138. See Greene & Spaeth, *supra* note 12, at 42.

## 2. *Why Jury Instructions Are Not Enough*

Even as courts continue to adopt new specific jury instructions and give the instructions liberally throughout the trial, it is unlikely that this will be sufficient to prevent juror misuse. Instructions are simply not enough to shield jurors from external influences they encounter in their daily lives.<sup>139</sup> As two commentators wrote, “What is inescapably clear is that instructing jurors to avoid Internet activity that touches on the case issues is no more effective than a court instruction to be fair-minded. Most do, but as a practical matter many find it impossible.”<sup>140</sup> As discussed in Part II, social media has become such an integrated part of many people’s lives that it is unlikely a simple jury instruction will be enough to prevent them from broadcasting their role as a juror on the Internet. Even frequently given instructions have been ignored by jurors.<sup>141</sup>

Judges find that jurors ignore specific instructions because they want to know the truth and are willing to break the rules if necessary in order to get the “*right* decision.”<sup>142</sup> Specifically telling jurors not to seek outside information on the Internet might cause the jurors to become curious and have a desire to discover the “forbidden information.”<sup>143</sup> For example, a Florida judge, after issuing daily instructions to jurors not to engage in Internet research, discovered that the forewoman had comments on her Facebook page indicating she had done outside research.<sup>144</sup> Jurors continue to obtain and disclose information on the Internet even when judges repeatedly and specifically tell them not to.

### *B. Restricting Jurors’ Access to Electronic Devices*

Due to the limited success of juror instructions, some courts have taken more drastic measures in an attempt to prevent Internet-related misconduct. For instance, judges have restricted jurors’ use of electronic devices while in the courtroom and during jury deliberations.<sup>145</sup> Some courts have gone as far as taking away jurors’ electronic devices while they are serving on the jury.<sup>146</sup> For example, a court in St. Paul, Minnesota began requiring jurors to leave all wireless devices at home after expe-

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139. See Artigliere et al., *supra* note 34, at 10–11; Keene & Handrich, *supra* note 31, at 20; Valetk, *supra* note 12.

140. Keene & Handrich, *supra* note 31, at 20.

141. E.g., Morrison, *supra* note 31, at 1610; Tom Brennan, *Judge OKs Defense Request for Juror’s Facebook Records*, TAMPA BAY ONLINE (Oct. 28, 2010, 5:48 PM), <http://www2.tbo.com/content/2010/oct/28/281748/judge-to-weigh-request-for-jurors-facebook-records/>.

142. See Morrison, *supra* note 31, at 1610.

143. Artigliere et al., *supra* note 34, at 12.

144. See Brennan, *supra* note 141.

145. See Greene & Spaeth, *supra* note 12, at 44; see also Kalyn Belsha, *Tweeting, Texting Jurors Can Interfere with Justice System*, BEAUMONTENTERPRISE.COM (Jan. 26, 2011, 10:14 PM), <http://www.beaumontenterprise.com/news/article/Tweeting-texting-jurors-can-interfere-with-979999.php> (discussing a Beaumont, Texas federal courthouse rule prohibiting cell phones inside the building).

146. Artigliere et al., *supra* note 34, at 12.

riencing two mistrials due to electronic communication.<sup>147</sup> Currently, counties in seven states have implemented bans on smart phones in court.<sup>148</sup> Likewise, a court in Colorado issued a decorum order banning all electronic devices from the courtroom and other areas of the courthouse.<sup>149</sup> The ban goes even further by indicating that violators may be held for contempt of court.<sup>150</sup> Most courts, however, are less extreme and simply require jurors to turn off electronic devices, or instruct them not to use the devices while in court.<sup>151</sup> Other states, such as New York, leave it up to the judge. Juries are instructed to turn off all electronic devices during a trial and deliberations, but a judge can also choose to have jurors turn over their devices.<sup>152</sup>

Limiting access to electronic devices has several drawbacks and is unlikely to be successful in limiting jurors' misuse of the Internet and social media. Even if jurors' use of electronic devices is limited while they are in the courtroom, jurors still have access to the Internet at home.<sup>153</sup> As a result, outside research or communication via social media websites is still likely to occur during the jurors' time away from the trial.<sup>154</sup> Furthermore, a ban on electronic devices is too extreme.<sup>155</sup> Restricting electronic devices may have a negative effect of angering jurors because they are unable to use their phones or computers to access work or personal information during downtime.<sup>156</sup> Jurors may become upset because the ban would make it more difficult for them to be reached by family members in an emergency.<sup>157</sup> Although courts that have banned electronic

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147. *Courts Finally Catching up to Texting Jurors*, NEWSMAX.COM (Mar. 6, 2010, 5:56 PM), <http://www.newsmax.com/US/Texting-Jurors-courts-blogs/2010/03/06/id/351842>.

148. See Deleon & Forteza, *supra* note 126, at 38 (stating that counties in Delaware, Florida, Illinois, Indiana, Michigan, New Mexico, and Ohio have bans on juror possession of smart phones in court).

149. Decorum Order, *People v. Hicks* (Colo. Dist. Ct. 2010), [http://www.courts.state.co.us/Media/Opinion\\_Docs/Clark%20Decorum%20Order%20Amendment.pdf](http://www.courts.state.co.us/Media/Opinion_Docs/Clark%20Decorum%20Order%20Amendment.pdf).

150. *Id.*

151. Artigliere et al., *supra* note 34, at 12.

152. N.Y. CIVIL PATTERN JURY INSTRUCTIONS 1:11 (2009), <http://www.courts.state.ny.us/judges/cpji/PJI%201-10%20and%2011%20final3.pdf> ("All electronic devices including any cell phones, Blackberries, iphones, laptops or any other personal electronic devices must be turned off while you are in the courtroom and while you are deliberating after I have given you the law applicable to this case. [In the event that the court requires the jurors to relinquish their devices, the charge should be modified to reflect the court's practice.]").

153. See Schwartz, *supra* note 39 (stating that jurors will have access to their electronic devices once they leave the courtroom unless jurors are sequestered, which is unlikely to occur in standard civil or criminal jury trial); see also Artigliere et al., *supra* note 34, at 12 (discussing how jurors will have their electronic devices available to them overnight and during breaks).

154. See Morrison, *supra* note 31, at 1610–11.

155. See Deleon & Forteza, *supra* note 126, at 38.

156. See *id.* at 39; Interview with Gary Randall, *supra* note 56 (discussing the increasing issue of people refusing to participate in jury duty and how a restriction on electronic devices would escalate this issue); see also Sweeney, *supra* note 36, at 3–4 (expressing the view that many jurors are only able to serve on a jury because they are able to use smart phones to keep up with their careers and family). Judge Sweeney does, however, support restriction of electronic devices during deliberations. Sweeney, *supra* note 36, at 6.

157. See Artigliere et al., *supra* note 34, at 12; Sweeney, *supra* note 36, at 4 (explaining that Judge Sweeney has "had mothers of pre-teen and teen-age children who can serve with some degree of com-

devices often provide a courtroom telephone number for emergencies, jurors may be discomforted by this extra burden.<sup>158</sup> Therefore, a ban on electronic devices is unlikely to be successful at eliminating Internet misuse, and it may also aggravate jurors.

### C. *Implementing Voir Dire Questioning*

Another option for courts to limit the potential for a Sixth Amendment infringement is to use the voir dire process to question jurors to determine if they are “at risk” for abusing Internet and social media websites while serving on the jury.<sup>159</sup> Specifically, attorneys should ask the jurors about their use of social media websites to determine how big a part of their daily lives it is.<sup>160</sup> Questions can be used to see if jurors are likely to break the rules regarding Internet activity or if they have already engaged in harmful Internet research.<sup>161</sup> Simply asking the jurors if they are willing and able to refrain from conducting Internet research can go a long way in limiting Internet misconduct from the start of the proceedings.<sup>162</sup> After one Kansas City attorney asked potential jurors if they would be able to refrain from engaging in Internet research about the trial, an estimated six to ten jurors admitted that they would not be able to follow the rule.<sup>163</sup> Attorneys should use this line of questioning to determine who the serious Internet users are, just as they do for other behavioral aspects of potential jurors.<sup>164</sup> In addition, voir dire can be used to instruct jurors on the restrictions they face. An upfront instruction will help prevent early Internet misconduct from interfering with a defendant’s Sixth Amendment rights.

At the same time, expanding voir dire to include questions related to Internet usage could create concerns about maintaining a representative jury. Questioning jurors and then eliminating those who engage in high levels of Internet research may result in unbalanced juries.<sup>165</sup> The selected juries may fail to accurately represent the community as they inherently would include an older and less technologically savvy popula-

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fort because they are able, via a smart phone, to keep in regular touch with their children or babysitters by calls during breaks in the trial, texting, or, more recently, using the GPS-tracking feature in some phones to know where the child is”).

158. See Artigliere et al., *supra* note 34, at 12.

159. This idea is supported by Judge Sweeney, who encourages even more detailed questions of jurors relating to social media use when the trial is particularly lengthy or high profile. See Sweeney, *supra* note 36, at 4.

160. See Artigliere et al., *supra* note 34, at 14–15; Hoenig, *supra* note 39; Keene & Handrich, *supra* note 31, at 20; Deleon & Forteza, *supra* note 126, at 39; Dennis Sweeney, *Social Media*, 43 Md. B. J. 44, 47 (2010); Valetk, *supra* note 12.

161. See Keene & Handrich, *supra* note 31, at 20.

162. See Artigliere et al., *supra* note 34, at 14; Keene & Handrich, *supra* note 31, at 20; Valetk, *supra* note 12.

163. Keene & Handrich, *supra* note 31, at 20.

164. See Hannaford-Agor, *supra* note 104, at 43; Hoenig, *supra* note 39.

165. See generally Morrison, *supra* note 31, at 1618–20.

tion.<sup>166</sup> Maintaining juries that represent the population is clearly an important goal, but at the same time, the need to ensure an impartial jury is a right that must be safeguarded.

A larger concern with expanding voir dire to include questions related to Internet activity is whether it would be successful in limiting juror misconduct. Attorneys may be able to remove some jurors who are more likely to obtain or disclose information on the Internet, but at the same time, the number of jurors who actively use the Internet will continue to increase. As discussed in Part II.A, access to smart phones and social media activity has risen drastically in recent years, and that number is projected to continue increasing in the future.<sup>167</sup>

While attorneys may be able to identify high-risk jurors, increasing numbers of jurors who engage in Internet research and social media activity will inevitably make their way onto juries. Attorneys simply will not have enough peremptory strikes to eliminate all jurors who engage in high levels of Internet activity. In addition, even those individuals who use the Internet sparingly may engage in Internet research if a particular topic in the trial confuses them or if they simply have unanswered questions.<sup>168</sup> Because the risk cannot be eliminated, it is more imperative that courts work to find a method to identify jurors who did engage in Internet misconduct in order to protect a defendant from an unfair or prejudicial verdict.

#### D. Monitoring Internet Activity

Some attorneys actively monitor jurors' Internet activity throughout the trial in order to identify potential violators.<sup>169</sup> Monitoring jurors includes searching social media websites for questionable posts made during the trial. This is unlikely to be effective, however, as it will be difficult to conduct effective searches. Attempts to search for general terms such as "guilty" may recover thousands of unrelated hits.<sup>170</sup> In addition, jurors may choose to use abbreviated words in their posts, which would complicate searches. Individuals' use of privacy settings to block their

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166. See *supra* text accompanying note 31.

167. See *supra* text accompanying notes 16–32.

168. See *supra* Part II.B.3.

169. See Greene & Spaeth, *supra* note 12, at 45; Valetk, *supra* note 12.

170. Although it will likely be difficult to narrow down search results, monitoring has proven successful, such as in a Michigan trial where a juror was dismissed and fined after a defense attorney saw her post stating, "gonna be fun to tell the defendant they're GUILTY." See Valetk, *supra* note 12. Also, mechanisms such as "Google Reader" have been suggested to narrow down search results. Google Reader searches websites for key words which can be used to narrow results. Greene & Spaeth, *supra* note 12, at 45. In order to view the individual's social media postings through Google Reader, however, the individual must have incorporated their social media postings into their Google profile. See Brian Shih, *A Flurry of Features for Feed Readers*, OFFICIAL GOOGLE READER BLOG (Aug. 12, 2009 5:00 PM), <http://googlereader.blogspot.com/2009/08/flurry-of-features-for-feed-readers.html>.

postings from view will also limit attorneys' success, as will any posts made by individuals under a nickname.

Not only would searches often be unsuccessful at tracking down social media communications, but it would also be impossible to discover individuals who engage in Internet research.<sup>171</sup> Any attempt to monitor jurors' use of the Internet would do nothing to prevent jurors from obtaining external information about a trial or a defendant. Furthermore, if jurors are told their Internet activity is going to be monitored, they may feel that their privacy will be infringed.<sup>172</sup> Due to the limitations and concerns associated with monitoring jurors, it would be more effective to simply question jurors on their Internet activity and rely on fellow jurors to report misconduct.

### E. *The "Modern Jury"*

It is clear that even specific jury instructions, restricting jurors' access to electronic devices, voir dire questioning, and monitoring jurors will not be enough to ensure a defendant's Sixth Amendment right to a fair and impartial trial. It may be more beneficial to simply adjust the role of the jury. B. Michael Dann, a county judge in Arizona, has supported a theory of a more active jury.<sup>173</sup> Judge Dann encourages a courtroom where jurors are able to take notes during trial, ask clarifying questions, discuss the case with their fellow jurors prior to deliberations, and even question the witnesses.<sup>174</sup>

Caren Myers Morrison, assistant professor of law at Georgia State University College of Law, supports this idea, finding that if jurors are able to take on a more active role, they will be less likely to seek additional information on the Internet.<sup>175</sup> By allowing jurors to ask questions, take notes, and discuss the case with each other, more of their questions will be answered during trial, and the desire to engage in additional Internet research will decrease.<sup>176</sup> Additionally, Professor Morrison suggests that jurors be given an anonymous forum to post thoughts and comments about the trial in order to curb their desire to post on social media websites.<sup>177</sup>

Even if jurors are given a more active role and are allowed to ask questions during trial, inevitably, many of the questions they ask will not

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171. Because Internet research would be done on a personal computer or smart phone, it would be impossible to track this information.

172. See Artigliere et al., *supra* note 34, at 12 (suggesting that monitoring jurors has the "potential of creating a hostile atmosphere in court"); Greene & Spaeth, *supra* note 12, at 45 ("[J]urors might feel personally invaded if they sense they are being researched.").

173. B. Michael Dann, "Learning Lessons" and "Speaking Rights": *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1241-67 (1993).

174. See *id.* at 1250-67.

175. Morrison, *supra* note 31, at 1625-26.

176. See *id.* at 1628-29.

177. See *id.* at 1630-31.

be answered. The Federal Rules of Evidence exclude evidence for a variety of reasons. Character and hearsay evidence is limited, as is potentially prejudicial evidence such as the defendant's past criminal convictions.<sup>178</sup> Professor Morrison defends the active jury, finding that even if jurors' questions are unanswered, simply explaining to a jury why the information was excluded would be enough to prevent them from engaging in further Internet research.<sup>179</sup> As discussed in Part II.B.3, however, jurors often turn to Internet research because they are frustrated by not receiving the full story during court proceedings.<sup>180</sup> Jurors may sometimes feel that the parties are hiding relevant information from them.<sup>181</sup> As a result, knowing why the evidence has been excluded may not be enough to stop jurors from seeking out the full story. Knowledge that the information is easily accessible on the Internet, but that it is purposefully being withheld, will only increase the jurors' desire to conduct independent Internet research.

In addition, as noted by Professor Morrison, if jurors are allowed to engage in discussions prior to deliberation, the concern remains that jurors will reach a conclusion before all of the evidence is presented.<sup>182</sup> Traditionally, jurors have been instructed to not discuss the case with their fellow jurors before deliberations in order to prevent jurors from reaching conclusions before the proceedings are completed.<sup>183</sup> Maintaining this restriction on jurors is seen as an outdated and unnecessary limitation.<sup>184</sup> Even if the jury is allowed to engage in predeliberation discussions with each other, these discussions are unlikely to affect whether jurors engage in Internet misconduct. Discussions throughout the trial may in fact cause additional questions to rise, and increase the jurors' frustration about withheld information. This in turn will lead jurors to look for answers through another source, the Internet.

Professor Morrison finds that allowing jurors to discuss the case with each other may reduce their tendency to make comments using social media or Internet blogs.<sup>185</sup> Social media websites and blogs, however, are used to convey information about one's daily life to the multitudes of people accessing these websites.<sup>186</sup> Allowing an individual to engage in discussions with a handful of strangers will not necessarily eliminate the individual's desire to further express his or her thoughts about the trial to friends and family via Facebook and/or Twitter. Despite the potential

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178. FED. R. EVID. 404(a), 404(b), 802.

179. See Morrison, *supra* note 31, at 1627–29.

180. See *supra* text accompanying notes 64–70.

181. See *supra* text accompanying notes 64–70.

182. See Morrison, *supra* note 31, at 1630 (finding that discussion prior to deliberation would be acceptable as long as the jurors “refrain from making any ultimate determinations”).

183. Valetk, *supra* note 12.

184. See Dann, *supra* note 173, at 1264–67.

185. See Morrison, *supra* note 31, at 1630.

186. See *supra* text accompanying notes 80–81.

benefits of a modern jury where conversation is encouraged throughout the trial, it will not reduce the risk of Internet misuse.

Professor Morrison also suggests permitting jurors to post general thoughts and comments about a trial to an anonymous forum.<sup>187</sup> By allowing jurors to post general comments about the jury process, without mentioning the specific case, jurors would be able to express their thoughts and ideas.<sup>188</sup> Still, a centralized, anonymous forum brings about the same risks of other Internet communication. Jurors posting to the forum are at risk for making determinations before the conclusion of the trial. Furthermore, if the forum is available for outside comments, there is a risk that jurors may be influenced by the statements of other individuals. Finally, jurors may not be satisfied simply by posting to an anonymous, and likely unread, forum. Social media is used to reach friends, family, and acquaintances.<sup>189</sup> It is unlikely that the desire to communicate information to these individuals will be reduced by posting to an anonymous forum. Despite the anonymity, concerns of preliminary determinations and exposure to outside influences would persist.

#### IV. RECOMMENDATION

Courts have attempted to reform their rules in order to meet the changing needs of a society where jurors have access to the Internet at their fingertips. It is clear, however, that simply instructing jurors to refrain from conducting Internet research or communicating about the trial on the Internet is not enough to protect a defendant's Sixth Amendment rights.<sup>190</sup> Although some potential misuses of the Internet can be avoided by banning electronic devices, this is an extreme measure that will likely frustrate jurors. Furthermore, banning electronic devices will do little to prevent jurors from engaging in Internet activity at home on their own time. Attorneys may choose to use voir dire to question jurors and eliminate those who are at risk of engaging in restricted Internet activity. With the increasing number of individuals who have instant access to the Internet, however, this is unlikely to be a permanent solution. Monitoring jurors' Internet activity is also likely to fail due to the complications with conducting searches and the limited ability to track down Internet researchers. Finally, although there may be other benefits to creating a more modern and active jury, it is unlikely to be successful in reducing the number of jurors who obtain and disclose information about a trial on the Internet.

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187. Morrison, *supra* note 31, at 1630–31.

188. *See id.*

189. *See supra* text accompanying note 108.

190. *See* Valetk, *supra* note 12 (“But, even with more detailed wording, jury instructions alone will not solve the problem. It’s practically impossible to shield jurors from every contact or influence that might theoretically affect their vote, especially in our socially networked world.”); *see also* Artigliere et al., *supra* note 34, at 9–11; Robinson, *supra* note 16.

In order to be more successful in preventing juror misuse, judges need to ensure that jurors are aware of the specific consequences of engaging in Internet misconduct. In addition, because the risk of jurors engaging in Internet research or communicating about a trial on the Internet cannot be eliminated, steps must be taken to ensure that jurors who do engage in such activity can be identified and removed from a trial.

#### A. *Need for an Established Punishment*

The current methods employed by the courts have proven insufficient to prevent jurors from using the Internet to obtain information about the trial or to communicate about the trial on the Internet. Courts need to inform jurors of the legal penalties they face if they engage in these prohibited activities.<sup>191</sup> Judges need to make it clear that Internet misconduct is a violation of law and that there are consequences for these actions.<sup>192</sup> Punishments, however, cannot be implemented without a mechanism to identify violators. Courts should actively question jurors about their conduct throughout a trial as well as encourage jurors to report their fellow jurors' misconduct. The combination of a specific punishment as well as a method of identifying jurors who engage in Internet misconduct will act as a deterrent for future jurors and limit the risk of a defendant failing to receive a fair and impartial trial.

##### 1. *Lack of Guidance*

Currently, there is no clear rule for how to respond to jurors engaging in Internet misconduct.<sup>193</sup> Many courts have not modernized their court rules, and judges are left trying to regulate new technologies with the rules created before the advent of smart phones and social media websites.<sup>194</sup> As a result, individual judges determine how and when to punish jurors on a case-by-case basis, often with little guidance.<sup>195</sup> Without a clear rule, many jurors go unpunished, resulting in a lack of deterrence. In a child-kidnapping and sexual assault case, where one juror conducted an Internet poll taking opinions on whether the defendant was innocent or guilty, the judge merely dismissed the juror.<sup>196</sup> Other judges have not been as lenient. For example, the Michigan juror who, the day

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191. See Valetk, *supra* note 12.

192. See Keene & Handrich, *supra* note 31, at 20.

193. See Greene & Spaeth, *supra* note 12, at 42 (observing that even if specific instructions are given, the question of how to punish jurors remains open).

194. Eric P. Robinson, *Trial Judges Impose Penalties for Social Media in the Courtroom*, CITIZEN MEDIA L. PROJECT (Mar. 3, 2010, 1:22 PM), <http://www.citmedialaw.org/print/3320?utm-source> (detailing how courts are forced to apply rules created to deal merely with still and motion cameras to new technologies such as smart phones).

195. See CONFERENCE OF COURT PUB. INFO. OFFICERS, *supra* note 14, at 33 ("Because judicial canons, most of which were written prior to the social media revolution, remain unclear, judges are left to define their own boundaries on participation.").

196. Browning, *supra* note 50.

before the verdict was given, posted a Facebook status stating that the defendant would be found guilty, was penalized with a \$250 fine and required to write a five-page paper on the importance of the Sixth Amendment.<sup>197</sup>

Overall, it is uncommon for jurors to face any consequences beyond dismissal. Jurors could be charged with perjury or contempt of court resulting in fines or even jail time, but this only occurs if the judges and lawyers push for the charges.<sup>198</sup> In reality, most judges resist imposing any sanctions on jurors.<sup>199</sup> Perhaps judges resist formal punishments because, as discussed in Part II, jurors often do not realize that they are breaking the rules when researching on the Internet or communicating on Facebook.<sup>200</sup> Jurors often are just trying to find more information in order to ensure that they come to the correct conclusion.<sup>201</sup> Judges may hesitate to formally punish these “helpful” jurors. As jury instructions become more specific, however, and jurors are told precisely not to engage in these activities, jurors need to know that there will be consequences for misconduct.<sup>202</sup>

Without punishment, jurors will continue to research and communicate on the Internet, resulting in wasteful mistrials. Mistrials decrease efficiency and have no deterrent effect on the jurors. Even more disturbing is the rarity with which mistrials are granted. According to a Reuters legal study, ninety verdicts were challenged based on Internet-related juror conduct between 1999 and 2010.<sup>203</sup> Of these ninety challenges, only twenty-eight cases have been overturned or had mistrials declared.<sup>204</sup> The other sixty-two verdicts were upheld, even though the judge found Internet-related juror misconduct in three-quarters of the cases.<sup>205</sup> In these cases, defendants are left with verdicts that may have resulted, at least partially, from information obtained on the Internet. In addition, some of these verdicts may have been reached after a juror communicated about the trial on the Internet, causing a lack of impartiality at deliberations. Although forty-six cases over an eleven-year period may not seem extreme, the number has been increasing drastically over time, and the data does not include the potentially numerous incidents that are never discovered. If a verdict is upheld after a juror obtained or disclosed information about a trial on the Internet, there is a concern that a criminal defendant did not receive a fair and impartial trial as guaranteed

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197. Neil, *supra* note 86.

198. Moran, *supra* note 102; *see also* Decorum Order, *supra* note 149.

199. *See* Sweeney, *supra* note 160, at 48. Judge Sweeney acknowledges a disfavor of punishing jurors for these actions, but he acknowledges the need for punishment to deter jurors. *Id.* at 48–49.

200. *See supra* text accompanying notes 71–75.

201. *See supra* text accompanying notes 64–70.

202. *See* Artigliere et al., *supra* note 34, at 10, 12.

203. Grow, *supra* note 81.

204. *Id.*

205. *Id.* (stating that judges find Internet-related misconduct in three quarters of the cases in which a mistrial is not granted).

by the Sixth Amendment. Without additional mechanisms to deter jurors from Internet misconduct, the concern only increases that defendants may not be getting a fair and impartial trial.

## 2. *Implementing Punishments*

In order to deter jurors, courts should begin enforcing punishments against violating jurors. At the same time, because of the potential for misunderstanding, jurors should only be punished when clear instructions to not engage in Internet misconduct are given.<sup>206</sup> Jurors who engage in Internet research or communicate about the trial on the Internet should only be punished if it was made clear to them that this activity was forbidden.<sup>207</sup> For punishment to effectively deter future jurors, the jurors must know exactly what they are not allowed to do and what the punishment will be if, despite the instructions, they choose to engage in the Internet activity. Likewise, the punishment should be limited to what is necessary to adequately deter future jurors from engaging in the same activity. Judges should make jurors aware of the consequences of their actions without issuing threats that may unnecessarily frighten future jurors.<sup>208</sup>

Not only should punishment be limited to cases when the juror engaged in Internet misconduct after being specifically instructed not to do so, but it should also be restricted to cases where the misconduct brings the juror's impartiality into question. Determining whether a juror remains impartial is to be determined on a case-by-case basis. As a result, it is often left to the judge to determine whether the predetermined opinion is strong enough to consider the juror no longer impartial.<sup>209</sup> The Supreme Court has given several examples of when a juror's impartiality is questionable, such as when a juror is known to have formed a premature opinion on the case to such an extent that the juror is unwilling to consider the evidence presented.<sup>210</sup> Therefore, in cases where the juror communicated information about the trial on the Internet, the judge will need to determine whether the communication was enough to eliminate the juror's impartiality. Impartiality can also be questioned when the juror conducts Internet research or reads information about the trial that was not introduced in court. In this situation, the judge must determine if the extraneous information is enough to question the juror's impartiality.<sup>211</sup> The judge's conclusion will in turn determine whether punishment is proper in the case at hand. Punishment should be given whenever the

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206. See Sweeney, *supra* note 36, at 6.

207. See *id.* (supporting juror punishment when the juror receives clear direction not to engage in such Internet activity).

208. See Artigliere et al., *supra* note 34, at 12 (stressing the importance of keeping jurors comfortable in order to motivate them to follow the jury instructions).

209. See Reynolds v. United States, 98 U.S. 145, 156 (1878).

210. See *id.* at 155.

211. See Holt v. United States, 218 U.S. 245, 250–51 (1910).

Internet activities of the juror are such that impartiality is questioned and the juror is removed or a mistrial is granted.

The most common penalty for Internet-related misconduct, other than dismissal, is a fine.<sup>212</sup> Judges also have the option to place jurors on probation or hold jurors in contempt of court.<sup>213</sup> Other judges, however, have chosen to go outside the box and have issued punishments such as requiring the juror to write an essay on the constitutional right to a fair trial.<sup>214</sup> The precise punishment chosen by the state is less important than the need to have a consistent penalty in place. In order to provide the courts with guidance, state legislatures can enact statutory penalties, including the crime of perjury with a resulting fine.<sup>215</sup> Courts, in turn, can utilize more creative options such as requiring the jurors to write an essay.

In 2011, the California State Legislature adopted a model for effective punishment and deterrence. Under Assembly Bill Number 141, jurors who communicate or research a case on the Internet face not only civil or criminal contempt of court charges but also potential misdemeanor charges.<sup>216</sup> Furthermore, the new law requires judges to specifically inform jurors that the research and communication prohibition includes electronic and wireless research and communication.<sup>217</sup> The California law provides a firm starting point for other states who want to address new Internet and social media concerns. Because jurors are specifically told that Internet activity is prohibited, judges are not in the position of punishing jurors who may have been unaware that their conduct was improper. The amendment, however, does not give judges direction in how to penalize violating jurors. In order to most effectively deter jurors from engaging in Internet misconduct, the law should provide judges with a specified list of potential punishments such as a suggested fine.

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212. See Brian Grow, *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-idUSTRE70I5KI20110119> (“Criminal sanctions against jurors are rare. When judges do penalize jurors for Internet misconduct, they almost always opt for fines.”).

213. See Moran, *supra* note 102 (suggesting probation as a potential punishment); Valetk, *supra* note 12 (discussing a case where a judge denied a mistrial, but held a juror in contempt after the juror posted a picture of the murder weapon on the Internet).

214. Neil, *supra* note 86 (discussing a case where a Michigan juror posted on the Internet that the defendant would be found guilty before the verdict was given; the judge charged the juror a \$250 fine and ordered her to write a five-page paper on the importance of the defendant’s constitutional right to a fair trial).

215. See Artigliere et al., *supra* note 34, at 12 (indicating that many standard jury instructions make references to a charge of perjury for juror misconduct).

216. A.B. 141, 2011 Cal. Gen. Assemb. (Cal. 2011).

217. *Id.*

### 3. *Limitations of Punishing Jurors*

Although punishment can be an effective deterrent, it also has limitations. First, some courts have resisted punishing jurors because they fear that it will discourage jurors from engaging in the court process.<sup>218</sup> In addition, because jurors can only be punished after they are discovered to have engaged in Internet misconduct (which often does not occur until the later part of the trial), punishment does little to promote efficiency. Also, many jurors engage in Internet activity without ever being detected. Without some mechanism in force to identify violators, punishments cannot be implemented. Furthermore, enforcing punishments increases the fear that jurors may resist reporting known violations if they think it will result in a formal punishment. To resolve these concerns, courts should not only be proactive in identifying jurors who have obtained or disclosed information about the trial on the Internet but also work to encourage fellow jurors to continue reporting any known violations.

Courts may fear that implementing a punishment system would cause jurors to resist jury duty out of fear that one may face punishment after accidentally engaging in a restricted activity. Jury duty is already seen as a burden by many, and adding the potential for punishment may strengthen this perception.<sup>219</sup> Although jurors may resist jury duty in fear of punishment, the burden of being disconnected from family and work during the trial due to restrictions on electronic devices is likely to be even more concerning to jurors. By explaining to jurors exactly the behavior that they are prohibited from engaging in, jurors will realize how easy it is to avoid violating these instructions, and their fear of punishment will decrease.

Punishing jurors as a stand-alone resolution will do little to promote efficiency, as many violations are not discovered until the end of a trial. Rather than waiting until a fellow juror reports misconduct, or until the juror himself decides to come forward, courts should take a proactive approach to identifying violators. A proactive approach will ensure that violators are discovered as soon as possible, and that if remedial action (such as a mistrial or juror punishment) is needed, court resources will not be wasted unnecessarily.<sup>220</sup> A successful proactive approach will provide a method for identification of violators throughout the trial process.

Another drawback to punishment is that it is impossible to punish jurors whose Internet activity goes undetected. Because jurors engage in such activity in the privacy of their homes and because jurors' social me-

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218. See Sweeney, *supra* note 160, at 48 ("Most judges . . . are loathe to impose sanctions upon jurors even when 'misconduct' has occurred.").

219. See V. HALE STARR & MARK MCCORMICK, *JURY SELECTION* 288 (3d ed. 2001) (discussing the negative aspects of jury duty that jurors must endure).

220. For example, a judge who is forced to declare a mistrial after discovering that a juror engaged in research during the beginning stages of the trial could have saved resources if a mistrial had been declared at an earlier stage.

dia activity is most often unchecked throughout the trial, many instances of juror misconduct are likely to go undetected. Even if judges are consistent in their application of punishments, courts still need a method of identifying violators. In many cases, a defendant's right to a fair and impartial trial may be jeopardized without any judicial awareness of the violation.

Furthermore, enacting statutory punishments may actually cause fewer jurors to report instances of juror misconduct.<sup>221</sup> A juror may resist reporting his or her fellow juror's actions if he or she knows that reporting may lead to a formal punishment.<sup>222</sup> The fear that specified punishments will decrease jurors' motivation to report violations is likely unfounded. Jurors resist reporting their fellow jurors for many reasons, including concerns about delaying a trial or because they simply do not feel it is necessary.<sup>223</sup> Other jurors, however, have been forthcoming in disclosing violations. In order to promote juror reporting, courts should make it clear that jurors have a duty to report known violations by instilling a sense of duty and responsibility.

### B. Identifying Violators

To effectively identify violators as soon as the impermissible action has occurred, courts must be active in questioning jurors about their Internet activity throughout the trial. Efficiency will be most promoted by detecting juror Internet misuse as soon as possible after the violation occurs. Therefore, courts should question jurors throughout the trial process. Early detection will prevent the waste of court resources that may result if the violation is not discovered until later in the court process.<sup>224</sup> Not only does early questioning promote efficiency, but if jurors are not questioned throughout the trial, courts risk the chance of being unable to question jurors at all. In addition, by thoroughly questioning jurors who engaged in Internet misconduct, courts will be in a better position to determine whether a mistrial and/or punishment is proper. Courts can also use this time of questioning to remind jurors of their duty to report any knowledge of their fellow jurors' misconduct.

As suggested by the South Dakota Supreme Court, voir dire should be used not only to identify potential Internet misusers, but also to ques-

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221. See Morrison, *supra* note 31, at 1611–12.

222. See *id.*

223. See Schwartz, *supra* note 39 (providing an interview with a juror who decided against informing the judge when he discovered that a fellow juror had done a Google search on the defendant); see also Interview with Gary Randall, *supra* note 56 (reflecting that a jury foreman discussed his decision to not report a fellow juror's Google search because he did not feel it was necessary to tell the judge).

224. Early detection will allow courts to pause the trial to determine at that moment if a mistrial or juror punishment is proper. This will prevent the trial from continuing and ensure that further resources are not expended. Compare this to detecting the violation and declaring a mistrial at the end of trial. In this case, any resources expended after the violation could have been saved by early detection.

tion jurors about their Internet activity during the trial.<sup>225</sup> Jurors should be questioned to ensure that they have not conducted external research or communicated about the case. Judges should specifically ask about Internet-related conduct.<sup>226</sup> To be most effective, jurors should be questioned before and after breaks and immediately after deliberations have concluded.<sup>227</sup> This will allow the violation to be detected as early as possible and prevent a potential waste of resources.<sup>228</sup>

Not only does early questioning promote efficiency, but courts may lose the ability to question jurors if they delay questioning until after trial. Courts are limited in the questions they can ask jurors after the verdict has been submitted. Jurors have traditionally been protected from questioning after the verdict, and the U.S. Supreme Court has recognized a “near-universal and firmly established common-law rule . . . flatly prohibit[ing] the admission of juror testimony to impeach a jury verdict.”<sup>229</sup> It is worth noting that an exception applies when there is an alleged “extraneous influence” on the jury, including situations where a juror accesses prejudicial information not admitted into evidence.<sup>230</sup> As a result, many incidents of Internet research would qualify for an exception to this limitation on juror questioning. Regardless, it is the judge’s role to ensure that a case is decided solely on the evidence presented before a jury and to prevent prejudicial verdicts.<sup>231</sup> It would be reckless for the court to wait for some indication of misuse before questioning jurors. Otherwise, the judge may not become aware of any Internet misconduct until the verdict is given, at which point the juror may be protected from questioning. Active questioning will eliminate this risk, as the judge will be better able to identify violators before it is too late.

By actively questioning jurors, courts will also have a better sense of whether the alleged Internet misconduct is severe enough to necessitate a mistrial and/or juror punishment. Not only can voir dire be used to identify potential misusers, but judges can also ask questions to determine the severity of the misconduct’s effect on a defendant’s Sixth

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225. *Russo v. Takata Corp.*, 774 N.W.2d 441, 450 n.\* (S.D. 2009) (“The potential for inaccuracies and [the Internet’s] wide availability also support[s] voir dire questions designed to identify any jurors who may have accessed information about the parties on the internet.”); *see also* Greene & Spaeth, *supra* note 12, at 44–45.

226. *See* JAMES A. EDWARDS, Rumberger, Kirk, & Caldwell, JURORS WHO TWEET, BLOG, & SURF—DECIDING AND DISCUSSING YOUR CASE 11 (2009), <http://www.jdsupra.com/documents/60c18d09-7f61-477a-902b-5ae405f5dcd9.pdf> (suggesting that judges should “question or confirm that there have been no violations . . .”).

227. *See* *Wardlaw v. State*, 971 A.2d 331, 338–39 (Md. Ct. Spec. App. 2009).

228. Questioning jurors before breaks will remind them of their duty to not engage in prohibited Internet conduct. In addition, questioning them after breaks will encourage jurors to report any misuse that may have occurred during the break.

229. *Tanner v. United States*, 483 U.S. 107, 117 (1987).

230. *See* *Mattox v. United States*, 146 U.S. 140, 149 (1892).

231. *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (“Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.”).

Amendment rights.<sup>232</sup> As suggested by the Maryland Court of Special Appeals, when a judge becomes aware of juror misconduct, the judge should engage in voir dire questioning to determine whether the jury remains capable of reaching an impartial verdict.<sup>233</sup> By questioning jurors about the specific information obtained or outside communication that occurred, a judge will be better able to determine whether a juror is no longer impartial due to external information or predetermined verdicts.<sup>234</sup>

Additionally, the judge should use voir dire to remind jurors that if they are aware of any Internet misconduct, they should bring that information to the court's attention.<sup>235</sup> Ultimately, a judge's ability to identify violators is limited. A judge can only identify and punish violators if he or she is informed of the misconduct or if jurors admit to their own misconduct. As mentioned above, questioning jurors about their Internet activity can encourage them to come forward with their own violations.<sup>236</sup> Likewise, instilling a sense of duty in jurors can encourage them to come forward with knowledge about other jurors' violations.<sup>237</sup> Although some jurors may resist reporting known violations in fear that it will result in a fellow juror's punishment, courts should work to promote jurors' sense of responsibility and duty to report. Courts should work to create a self-checking system where each juror is responsible for ensuring that other jurors follow the rules.<sup>238</sup>

To promote the reporting of any known violations, courts should instruct jurors of the importance of this duty. An example of an instruction that would encourage reporting was proposed by the Florida Joint Report of the Committees on Standard Jury Instructions. During closing instructions, the judge is to instruct the jury, "If you become aware of any violation of these instructions or any other instruction I have given in this case, you *must* tell me by giving a note to the bailiff."<sup>239</sup> Although this instruction is likely to be effective at encouraging jurors to report, it should specifically mention Internet activity and also be given multiple times during the proceeding rather than waiting until the closing instruction. If judges emphasize that jurors must report infractions throughout

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232. *Butler v. State*, 896 A.2d 359, 371 (Md. 2006) (indicating that voir dire can be effective in determining whether a juror, found to have engaged in misconduct, remains able to render an impartial verdict).

233. *See Wardlaw v. State*, 971 A.2d 331, 338–39 (Md. Ct. Spec. App. 2009).

234. *See Artigliere et al.*, *supra* note 34, at 18 n.35 ("The juror should be questioned further . . . to determine if a curative instruction or dismissal from the jury is required or if it is best to ignore the event if it is trivial.").

235. *See Valetk*, *supra* note 12 (suggesting that even if jurors resist reporting each other, a judge can still ensure that they are aware of the option and attempt to instill a sense of moral duty in the jurors).

236. *See supra* text accompanying notes 240–42.

237. *See Valetk*, *supra* note 12.

238. *See Schwartz*, *supra* note 39 ("[I]t's up to Juror 11 to make sure Juror 12 stays in line.").

239. SUP. CT. OF FLA. COMMS. ON STANDARD JURY INSTRUCTIONS, *supra* note 84, at 22 (emphasis included).

the trial, then jurors will be instilled with a sense of power and duty which will incentivize jurors to report violations.<sup>240</sup>

## V. CONCLUSION

Juror misuse of the Internet is clearly on the rise and has caused mistrials, overturned verdicts, and excused jurors.<sup>241</sup> Considering the increasing access to smart phones as well as the growing activations of social media website accounts, no level of deterrence will completely prevent jurors from engaging in Internet misconduct.<sup>242</sup> Even more concerning is the likelihood that many instances go undiscovered.<sup>243</sup> Courts have begun to adapt by amending their jury instructions to specifically prohibit Internet research and communication. Jurors, however, have continued to engage in Internet misconduct regardless of the specificity of instructions. Other courts have taken more extreme measures in prohibiting electronic devices altogether. This does little to prevent jurors from simply logging onto the Internet the moment they step out of the courtroom, and introduces the possibility that jurors will become even more frustrated with their jury duty. Attorneys can also be encouraged to attempt to proactively identify and eliminate potential violators by asking relevant questions during voir dire. As smart phone users and individuals with Internet access continue to increase in number, however, the jury pool will be quickly diminished if all active Internet users are removed. Any attempts to monitor a jury's Internet activity will also fail to detect violators due to the difficulty associated with tracking down improper activity.

In order to effectively protect a defendant's Sixth Amendment rights, Internet misconduct must be identified and punished to prevent future violations. To deter jurors, courts need to be clear about the penalty jurors face if they engage in prohibited Internet activity. A clear punishment, in addition to specific instructions informing the jurors of what not to do, will effectively deter and prevent many jurors from engaging in such activity. Also, due to the possibility of violators going undetected, courts must take steps to identify those jurors who ignore the rules and choose to engage in prohibited Internet activity. Judges must take an active role in questioning jurors to ensure that violators are discovered as soon as possible. Jurors should also be encouraged to come forward with any knowledge of violations by their fellow jurors. Early detection is essential to preserving court resources as well as ensuring that defendants are not subjected to verdicts reached by partial jurors.

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240. See Artigliere et al., *supra* note 34, at 14 (concluding that giving jurors a sense of power will encourage them to report misconduct).

241. See *supra* text accompanying notes 204–05.

242. See Robinson, *supra* note 16.

243. See Grow, *supra* note 81.

