

**THE WIRED JURY: AN EARLY EXAMINATION OF COURTS'  
REACTIONS TO JURORS' USE OF ELECTRONIC  
EXTRINSIC EVIDENCE**

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**I. INTRODUCTION**

It is not an exaggeration to state that the Internet and electronic resources have seeped into virtually every aspect of American life.<sup>1</sup> Overall, 85% of adults use the Internet,<sup>2</sup> with some variation by race, income, and education level.<sup>3</sup> Of these adult Internet users, about 82% use the Internet on a daily basis.<sup>4</sup> While these adults use the Internet for a wide variety of activities,<sup>5</sup> they most commonly use a search engine to find information, which 59% of users do on a daily basis.<sup>6</sup> The next

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<sup>1</sup> See li ying, *The Importance of Online Identity and the Dangers of It.*, ONLINE CONF. ON NETWORKS & COMMUNITIES (Apr. 26, 2010), <http://networkconference.netstudies.org/2010/04/the-importance-of-online-identity-and-the-dangers-of-it/>.

<sup>2</sup> *Trend Data (Adults): Demographics of Internet Users*, PEW RESEARCH CENTER, [http://www.pewinternet.org/Trend-Data-\(Adults\)/Whos-Online.aspx](http://www.pewinternet.org/Trend-Data-(Adults)/Whos-Online.aspx) (last visited Oct. 17, 2012) (citing an August 2012 survey).

<sup>3</sup> The usage rate is equal among whites and blacks and lower among Hispanics, lowers as age increases, and rises with increasing income and more education. *Id.*

<sup>4</sup> *Trend Data (Adults): What Internet Users Do on a Typical Day*, PEW RESEARCH CENTER, [http://www.pewinternet.org/Trend-Data-\(Adults\)/Online-Activities-Daily.aspx](http://www.pewinternet.org/Trend-Data-(Adults)/Online-Activities-Daily.aspx) (last visited Oct. 17, 2012) (citing a February 2012 survey).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* The same percentage of users reads or sends e-mail on a daily basis. *Id.* The search engine usage statistic is from a February 2012 study, while the e-mail usage statistic is from an August 2011 survey. *Id.*

most common activity these adults use the Internet for is social networking, which 48% of users do on a daily basis.<sup>7</sup> Other activities are less common: 18% reported sending instant messages daily,<sup>8</sup> 17% reported searching for information on the online encyclopedia Wikipedia,<sup>9</sup> and 8% reported using Twitter.<sup>10</sup>

The increasingly ubiquitous use of the Internet as a research and communications medium presents a dilemma when these Internet users end up on a jury.<sup>11</sup> In court, the jurors are required to base their decision solely on the evidence presented to them in court.<sup>12</sup> They are required to ignore any other information besides their personal life experience and, in fact, are specifically instructed to avoid news reports and other material about the case on which they are sitting.<sup>13</sup> They are also instructed not to communicate about the case prior to delibera-

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<sup>7</sup> *Id.* (citing a February 2012 survey).

<sup>8</sup> *Id.* A more current figure would probably be higher. See Lauren Johnson, *Mobile Instant Messaging Usage Expected to Triple by 2016: Study*, MOBILE MARKETER (June 22, 2011), <http://www.mobilemarketer.com/cms/news/research/10266.html>.

<sup>9</sup> *Trend Data (Adults): What Internet Users Do on a Typical Day*, *supra* note 4. Wikipedia is currently the sixth most popular website among Internet users in the United States. *Site Info: wikipedia.org*, ALEXA, <http://www.alexa.com/siteinfo/wikipedia.org> (last visited Oct. 17, 2012). Each day, about 13.3% of Internet users globally visit the site. *Id.* This statistic changes daily. *Id.* This does not mean that this percentage of global Internet users visits the site daily. *Id.*

<sup>10</sup> *Trend Data (Adults): What Internet Users Do on a Typical Day*, *supra* note 4.

<sup>11</sup> Brian Grow, *As Jurors Go Online, U.S. Trials Go off Track*, REUTERS, Dec. 8, 2010, <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>.

<sup>12</sup> Most jurisdictions have pattern or model jury instructions with this admonition. For example, in 2009 the U.S. Judicial Conference crafted model instructions that provide:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case.

Memorandum from Judge Julie A. Robinson, Chair, Comm. on Court Admin. & Case Mgmt. of the Judicial Conference of the U.S., to Judges of the U.S. Dist. Courts (Jan. 28, 2010), *available at* <http://federalevidence.com/downloads/blog/2010/Memorandum.On.Juror.Use.Of.Electronic.Communication.Technologies.pdf>.

<sup>13</sup> See, e.g., ARK. MODEL JURY INST. - CRIM. § 100-A (2012) (admonishing jurors, “[D]o not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or anyone involved

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tions.<sup>14</sup> These restrictions are contrary to the ethos of frequent Internet users, who expect to be constantly “connected” with information and communication available at their whim.<sup>15</sup>

## II. JURIES AND EXTRINSIC EVIDENCE

### A. *Evolution of the Ignorant Jury*

The modern expectation that jurors will be ignorant of the case before them other than the evidence presented in court has evolved over the centuries and represents a reversal of the role of juries as initially conceived.<sup>16</sup> In early English common law, juries were generally given free rein to decide cases as they saw fit, without instruction from the

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with it.”). An optional addition to this admonition recommends that jurors avoid the media altogether:

In fact, until the trial is over, I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case, you will know more about the matter than anyone will learn through the news media.

*Id.*

<sup>14</sup> For example, the civil jury instructions in Illinois tell jurors:

During the course of the trial, do not discuss this case with anyone—not even your own families or friends, and also not even among yourselves—until at the end of the trial when you have retired to the jury room to deliberate on your verdict. Even though this is hard to do, it will be a violation of these instructions and your oath if you discuss the case with anyone else.

ILL. PATTERN JURY INSTR. - CIV. § 1.01[8] (2012), available at <http://www.state.il.us/court/CircuitCourt/CivilJuryInstructions/1.00.pdf>.

<sup>15</sup> See, e.g., Michael Björn, *How Being ‘Always Connected’ Changes Everything in Daily Life*, ERICSSON BUS. REV. no. 3, 2011, at 50, available at [http://www.ericsson.com/res/thecompany/docs/publications/business-review/2011/issue3/always\\_connected.pdf](http://www.ericsson.com/res/thecompany/docs/publications/business-review/2011/issue3/always_connected.pdf) (“Today, one-fifth of smartphone users in the US log on to Facebook before they even get out of bed.”).

<sup>16</sup> See John H. Langbein, *Historical Foundations of the Law of Evidence: A View From the Ryder Sources*, 96 COLUM. L. REV. 1168, 1170-71 (1996).

judge.<sup>17</sup> This carried over to the American colonies, where jurors were believed to “need no Explanation [since their] good sense & understanding will Direct ye as to them.”<sup>18</sup> If the judge gave the jury instructions as to how they should go about deciding a case, the instructions were advisory only, and the jury could ignore them.<sup>19</sup>

In an age of tiny, intensely interdependent agricultural communities, jurors were drawn from the neighborhood of the contested events. The hope was that a jury of the locality would contain witness-like persons who would know the facts, or if not, that these jurors would be well positioned to investigate the facts on their own. The early jury was self-informing . . . .

Toward the end of the Middle Ages the trial jury underwent its epochal transformation from active neighborhood investigators to passive triers. The jury came to resemble the panel that we recognize in modern practice, a group of citizens no longer chosen for their knowledge of the events, but rather chosen in the expectation that they would be ignorant of the events.<sup>20</sup>

This development had several consequences, including the emergence of different roles for the judge and jury,<sup>21</sup> the formulation of a law (and

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<sup>17</sup> Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1082 (2001).

<sup>18</sup> Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 527 n.31 (1986) (citing W. NELSON, AMERICANIZATION OF THE COMMON LAW 26 (1975)).

<sup>19</sup> “[Colonial] juries were crucially instructed that they had the right to decide questions of law as well as of fact . . . . Juries could disobey . . . instructions, construe the law independently, or even set aside the law entirely to render verdicts according to conscience.” Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren’t Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163, 189 n.154 (2004) (quoting JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 9 (1994)).

<sup>20</sup> Langbein, *supra* note 16, at 1170-71 (footnotes omitted).

<sup>21</sup> The U.S. Supreme Court clearly delineated the different roles of judges and juries—with the former deciding on the applicable law, and the latter determining the facts—in *Sparf v. United States*, 156 U.S. 51, 102-03 (1895).

eventually rules) of evidence,<sup>22</sup> and the need for instructions to the jury on how to evaluate evidence and apply legal principles.<sup>23</sup>

One standard instruction to jurors is that they should not discuss the case before them amongst themselves until deliberations, nor should they discuss it with others until the conclusion of the proceeding.<sup>24</sup>

[A]ny private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, . . . deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of

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<sup>22</sup> Rules of evidence began emerging in the sixteenth century, with modern rules in place by the eighteenth century. See Langbein, *supra* note 16, at 1170 (citing 5 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 11 (3d ed. 1940)).

<sup>23</sup> Ritter, *supra* note 19, at 189. Towards the end of the nineteenth century, it became common for attorneys and judges to craft instructions for juries in each trial. Tiersma, *supra* note 17, at 1083; see also Alan D. Woodlief, Jr., *An Introduction to the North Carolina Pattern Jury Instructions*, 10 N.C. ST. BAR J., Summer 2005, at 8, 9-10. Judges then began compiling their own sets of instructions from prior cases that appellate courts had upheld. Tiersma, *supra* note 17, at 1084. Judges of the California Superior Court in Los Angeles compiled the first formal set of pattern jury instructions in the 1940s, and they were eventually widely used in that county, then statewide, albeit without official endorsement. James A. Dooley, *Jury Instructions: An Appraisal by a Plaintiff's Attorney*, 1963 U. ILL. L. F. 586, 589 (1963). In 1955, the Illinois Supreme Court created a committee to formulate its own set of pattern jury instructions, whose use was mandated by the court. Don Musser, *Instructing the Jury—Pattern Jury Instructions*, 6 AM. JUR. TRIALS § 923 (last updated 2012). The rule mandating use of the pattern instructions, ILL. SUP. CT. R. 25-1(a) (1963), is now ILL. SUP. CT. R. 239(a) (2012). Other states followed, Philip H. Corboy, *Pattern Jury Instructions—Their Function and Effectiveness*, 32 INS. COUNS. J. 57, 65 (1965), in a movement hailed as “one of the great strides in the modernization and preservation of our judicial system.” Harry I. Hannah, *Jury Instructions: An Appraisal by a Trial Judge*, 1963 U. ILL. L. F. 627, 643 (1963). The Federal Rules of Evidence, formulated by a committee that Chief Justice Earl Warren created, were adopted in 1975. See Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975). For background on adoption of the rules, see Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000), available at [http://www.wcl.american.edu/pub/journals/evidence/short\\_history.pdf](http://www.wcl.american.edu/pub/journals/evidence/short_history.pdf).

<sup>24</sup> See Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 425 (2012).

the court made during the trial, with full knowledge of the parties.<sup>25</sup>

This is because “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>26</sup>

### B. Sources of Extrinsic Information

The imperative that jurors not receive exposure to extrinsic evidence results in admonitions to avoid conversations about the case, as well as print and electronic coverage.<sup>27</sup> Jurors are also instructed not to undertake their own investigation of the case.<sup>28</sup>

Despite these instructions, courts have frequently had to confront situations in which jurors have obtained information from outside sources.<sup>29</sup> Aside from online resources, jurors have obtained information about cases from sources such as telephone conversations,<sup>30</sup> dictionaries,<sup>31</sup> and personal visits to relevant locations.<sup>32</sup> Whenever a court

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<sup>25</sup> Remmer v. United States, 347 U.S. 227, 229 (1954).

<sup>26</sup> Patterson v. Colorado *ex rel.* Att’y Gen., 205 U.S. 454, 462 (1907).

<sup>27</sup> See United States v. Williams, 635 F.2d 744, 745-46 (8th Cir. 1980). Courts have gone as far as stating that such instructions are “essential.” *Id.* (“It is essential to a fair trial, civil or criminal, that a jury be cautioned as to permissible conduct and conversations outside the jury room. Such an admonition is particularly needed before a jury separates at night when they will converse with friends and relatives or perhaps encounter newspaper or television coverage of the trial. It is fundamental that a jury be cautioned from the beginning of a trial and generally throughout to keep their considerations confidential and to avoid wrongful and often subtle suggestions offered by outsiders.”).

<sup>28</sup> See, e.g., CRIM. PATTERN JURY INSTR. 10TH CIR. § 1.01 (2011), available at <http://www.ca10.uscourts.gov/downloads/pji10-cir-crim.pdf> (“[Y]ou should not attempt to gather any information or do any research on your own.”); ILL. PATTERN JURY INSTR. - CRIM. § 1.01A[2] (2012), available at [http://www.state.il.us/court/circuitcourt/CriminalJuryInstructions/Criminal\\_Jury\\_Instructions.pdf](http://www.state.il.us/court/circuitcourt/CriminalJuryInstructions/Criminal_Jury_Instructions.pdf) (“You should not do any independent investigation or research on any subject or person relating to the case.”).

<sup>29</sup> For a selection of such cases, see E.W.H., Annotation, *Communications Between Jurors and Others as Ground for New Trial or Reversal in Criminal Case*, 62 A.L.R. 1466 (1929).

<sup>30</sup> See *id.* § X.

<sup>31</sup> See, e.g., United States v. Aguirre, 108 F.3d 1284, 1286-87 (10th Cir. 1997) (affirming the verdict where the jurors consulted dictionaries to aid them in

finds that a juror has been exposed to extrinsic information, the presiding judge must determine the extent of the exposure and determine whether the information may affect or has affected the verdict.<sup>33</sup>

### C. *Constitutional Dimensions of Extrinsic Evidence*

The Supreme Court has held that the restrictions on juror exposure to extrinsic evidence are implicit in the Sixth Amendment right to a jury trial in criminal cases, which includes the right that evidence in such cases be presented in open court.<sup>34</sup>

In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the “evidence developed” against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.<sup>35</sup>

Applying this rationale, appellate courts have held that “under clearly established federal law, jury exposure to extrinsic evidence or other extraneous influence violates a defendant’s Sixth Amendment rights.”<sup>36</sup> This principle applies to state courts via the Fourteenth Amendment.<sup>37</sup>

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deliberations); *Wiser v. People*, 732 P.2d 1139, 1140 (Colo. 1987) (upholding the verdict where jurors consulted dictionaries during deliberations).

<sup>32</sup> See, e.g., *Hollywood Corp. Circle Assocs. v. Amato*, 604 So. 2d 888, 891 (Fla. Dist. Ct. App. 1992) (remanding to the lower court because, amongst other things, the juror had physically visited the accident scene).

<sup>33</sup> See, e.g., *United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 442 (1st Cir. 1993) (“When a non-frivolous suggestion is made that a jury may be biased or tainted by some incident, the district court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial.”).

<sup>34</sup> See *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (quoting *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965)).

<sup>35</sup> *Turner*, 379 U.S. at 472-73. In *Turner*, the Court reversed a murder conviction in which the two deputy sheriffs who gave key testimony in the case also oversaw the jury during the three-day trial. *Id.* at 474.

<sup>36</sup> *Fletcher v. McKee*, 355 F. App’x 935, 937 (6th Cir. 2009).

<sup>37</sup> See *Parker*, 385 U.S. at 364; *In re Oliver*, 333 U.S. 257, 277-78 (1948) (holding a nonpublic contempt trial violated the Sixth Amendment based on the Due Process Clause of the Fourteenth Amendment).

This presents a dilemma when courts are confronted with allegations—or evidence—that one or more jurors were exposed to extrinsic evidence that may have affected the jury’s verdict.<sup>38</sup> While courts are generally reluctant to probe into jury deliberations,<sup>39</sup> they are “obligated to investigate colorable claims of juror misconduct.”<sup>40</sup>

This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. . . .

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. . . 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. Such determinations may properly be made at a [posttrial] hearing . . . .<sup>41</sup>

At that hearing, the court may question jurors whether “extraneous prejudicial information was improperly brought to the jury’s attention” or whether “an outside influence was improperly brought to bear on any juror.”<sup>42</sup>

If such information or influence surfaces, the court must then determine whether the juror’s exposure to the extrinsic evidence requires the court to declare a mistrial.<sup>43</sup> While jurisdictions may differ on the standard applied to make this determination,<sup>44</sup> the federal courts

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<sup>38</sup> See James W. Diehm, *Impeachment of Jury Verdicts: Tanner v. United States and Beyond*, 65 ST. JOHN’S L. REV. 389, 392 (1991), available at <http://scholarship.law.stjohns.edu/lawreview/vol65/iss2/1/>.

<sup>39</sup> See *id.*

<sup>40</sup> *United States v. Forde*, 407 F. App’x 740, 747 (4th Cir. 2011).

<sup>41</sup> *Smith v. Phillips*, 455 U.S. 209, 215, 217 (1982).

<sup>42</sup> FED. R. EVID. 606(b).

<sup>43</sup> See, e.g., *Phillips*, 455 U.S. at 217.

<sup>44</sup> See *Renico v. Lett*, 130 S. Ct. 1855, 1858-59 (2010) (“[We have] . . . explicitly held that [a trial] judge [declaring a mistrial] is not required to make explicit findings of ‘manifest necessity’ [nor to] ‘articulate on the record all the factors’ [which informed the deliberate exercise of] his discretion.” (quoting *Arizona v. Washington*, 434 U.S. 497, 517 (1978))).

and many states have adopted the “manifest necessity” standard,<sup>45</sup> which U.S. Supreme Court Justice Joseph Story first articulated in 1824:

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . . But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.<sup>46</sup>

“Manifest necessity” is not subject to literal interpretation, requiring judges to find a “high degree” of necessity in order to declare a mistrial.<sup>47</sup> The Supreme Court has consistently held that trial judges retain “broad discretion” in determining whether to grant a mistrial.<sup>48</sup>

A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve “the ends of public justice” to require that the Government proceed with its proof when, if it succeeded before the jury, it would au-

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<sup>45</sup> See *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824); *Allen v. State*, 41 So. 593, 593 (Fla. 1906).

<sup>46</sup> *Perez*, 22 U.S. (9 Wheat.) at 580 (emphasis added).

<sup>47</sup> *Renico*, 130 S. Ct. at 1863 (quoting *Washington*, 434 U.S. at 506).

<sup>48</sup> *Id.* (quoting *Illinois v. Somerville*, 410 U.S. 458, 462 (1973)).

tomatically be stripped of that success by an appellate court.<sup>49</sup>

However, even if there were a “manifest necessity” for mistrial, double jeopardy would bar reprosecution if prosecutorial or judicial overreaching caused the mistrial.<sup>50</sup>

But in making this determination, trial judges must also “temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.”<sup>51</sup>

“[R]eviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised ‘sound discretion’ in declaring a mistrial. Thus, if a trial judge acts irrationally or irresponsibly, . . . his action cannot be condoned.”<sup>52</sup>

### III. JURORS ONLINE

Internet usage, as an instrument of research and social interaction in daily life, is increasing, especially for younger and more educated people.<sup>53</sup> If a jury pool is representative of the adult population, it certainly includes these daily Internet users.<sup>54</sup> And to many of these

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<sup>49</sup> *Illinois*, 410 U.S. at 464 (quoting *Perez*, 22 U.S. (9 Wheat.) at 580).

<sup>50</sup> *See* *United States v. Jorn*, 400 U.S. 470, 485 (1971).

<sup>51</sup> *Id.* at 486.

<sup>52</sup> *Washington*, 434 U.S. at 514 (citations omitted).

<sup>53</sup> “Along with age, educational attainment represents one of the most pronounced gaps in internet access.” KATHRYN ZICKUHR & AARON SMITH, PEW RESEARCH CENTER, DIGITAL DIFFERENCES 6 (2012), available at [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_Digital\\_differences\\_041312.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_Digital_differences_041312.pdf).

<sup>54</sup> *See* *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975) (recognizing “that the selection of a . . . jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial”).

users it is routine to use mobile devices to access the Internet,<sup>55</sup> including social media services and sites, to access and share information.<sup>56</sup>

So, do jurors use the Internet and social media during trials? As other authors have pointed out,<sup>57</sup> while there is much anecdotal evidence that this is an increasing phenomenon,<sup>58</sup> there is little empirical research on jurors' use of the Internet.<sup>59</sup> This is due, in large part, to the difficulty of conducting such surveys.<sup>60</sup>

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<sup>55</sup> The Pew Research Center found in April 2012:

Some 88% of U.S. adults own a cell phone of some kind as of April 2012, and more than half of these cell owners (55%) use their phone to go online . . . . [T]his represents a notable increase from the 31% of cell owners who said that they used their phone to go online as recently as April 2009.

Moreover, 31% of these current cell internet users say that they *mostly go online using their cell phone*, and not using some other device such as a desktop or laptop computer. That works out to 17% of *all adult cell owners* who are “cell-mostly internet users”—that is, who use their phone for most of their online browsing.

AARON SMITH, PEW RESEARCH CENTER, CELL INTERNET USE 2012, at 2 (2012), available at [http://pewinternet.org/~media/Files/Reports/2012/PIP\\_Cell\\_Phone\\_Internet\\_Access.pdf](http://pewinternet.org/~media/Files/Reports/2012/PIP_Cell_Phone_Internet_Access.pdf). Again, there was some variation by age and race. *Id.* at 5 (“Roughly two-thirds of black and Latino cell owners go online using their mobile phones, compared with half of whites.”); see also ZICKUHR & SMITH, *supra* note 53, at 6.

<sup>56</sup> A Pew Research Center survey during May 2010 found that 23% of cell phone users had used their cell phones to access social networking sites, while 10% had used their cell phones to access “a status update service such as Twitter.” AARON SMITH, PEW RESEARCH CENTER, MOBILE ACCESS 2010, at 3 (2010), available at [http://www.pewinternet.org/~media/Files/Reports/2010/PIP\\_Mobile\\_Access\\_2010.pdf](http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Mobile_Access_2010.pdf).

<sup>57</sup> See, e.g., Amy J. St. Eve & Michael A. Zuckerman, *Ensuring An Impartial Jury in the Age of Social Media*, 2012 DUKE L. & TECH. REV. 1, 12-17 (2012); Daniel William Bell, Note, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 83, & n.17 (2010).

<sup>58</sup> See, e.g., Grow, *supra* note 11; John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1, available at <http://www.nytimes.com/2009/03/18/us/18juries.html>.

<sup>59</sup> “Although there are no published studies of how often jurors use the Internet to access information about cases, news stories suggest that it is not uncommon.” Ellen Brickman et al., *How Juror Internet Use Has Changed the American Jury Trial*, 1 J. CT. INNOVATION 287, 292 (2008).

<sup>60</sup> See, e.g., St. Eve & Zuckerman, *supra* note 57, at 21 (“We acknowledge that the informal survey is not scientific. . . . We additionally acknowledge that although juror participation was voluntary and anonymous, some jurors may not have been

There have, however, been a few studies that have tried to quantify the issue.<sup>61</sup> A study by Reuters (based on a Westlaw search) in late 2010 found “at least 90 verdicts [that] have been the subject of challenges because of alleged Internet-related juror misconduct,” with more than half of these in 2009 or 2010.<sup>62</sup> Of the verdicts reviewed in the study, courts granted new trials or overturned verdicts in twenty-eight criminal and civil cases, twenty-one since January 2009.<sup>63</sup>

In a survey of 140 jurors who sat in sixteen criminal and civil trials in the United States District Court for the Northern District of Illinois and who were instructed not to access online information about the cases, “only six jurors reported any temptation to communicate about the case through social media,” but all six reported that they had not actually done so.<sup>64</sup>

In a 2011 survey by the Federal Judicial Center in which 508 federal judges participated, only thirty (6%) said that they had experienced jurors using social media during trials and deliberations.<sup>65</sup> Of the twenty-eight judges who indicated how they learned of the activity, thirteen said that they heard of it from fellow jurors, five said attorneys told them, and five said they found out via posttrial motions or interviews.<sup>66</sup> Three found out from court staff, and two observed it themselves.<sup>67</sup> The judges took various actions to remedy the situations.<sup>68</sup>

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completely candid, for any number of reasons. Limitations of this type are not unusual.”) (footnotes omitted); *see also* MEGHAN DUNN, JURORS’ USE OF SOCIAL MEDIA DURING TRIALS AND DELIBERATIONS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 2 (2011), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/\\$file/dunnjuror.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf) (“Please keep in mind that the data from the survey represent judges’ reported experiences and perceptions of jurors’ use of social media to communicate about proceedings in which they are involved. The data are not actual empirical measures of such behavior.”).

<sup>61</sup> *See, e.g.*, DUNN, *supra* note 60, at 2; Grow, *supra* note 11.

<sup>62</sup> Grow, *supra* note 11.

<sup>63</sup> *Id.*

<sup>64</sup> St. Eve & Zuckerman, *supra* note 57, at 20-22. The jurors surveyed served as jurors in trials before the authors, both judges of the Northern District of Illinois, which the authors acknowledge can skew the results. *Id.* at 21.

<sup>65</sup> DUNN, *supra* note 60, at 2.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> *Id.* at 4-5.

Surveys in 2010 and 2011 by the Conference of Court Public Information Officers of its membership (primarily state court public affairs personnel) found that only slightly over 7% (7.2% in 2010, 7.3% in 2011) had personally observed or participated in a trial in which a juror used social media or an electronic device in the courtroom.<sup>69</sup> Among judicial officers, judges, magistrates, and other hearing officers, the figures were 9.8% in 2010 and 8.4% in 2011.<sup>70</sup> But more of the respondents had observed a judicial officer admonishing someone for using an electronic device or social media in court.<sup>71</sup>

In another survey of federal judges, prosecutors, and public defenders,<sup>72</sup> “ten percent of the respondents reported personal knowledge of a juror conducting Internet research.”<sup>73</sup>

#### IV. SURVEY OF CASES

Rather than an anecdotal survey of jurors, judges, or other trial participants, this Article collects and categorizes actual cases in which courts have discovered juror use of the Internet or social media during trial and have acted, even if the final decision is to not affect the trial verdict.<sup>74</sup> While this method cannot be used to quantify the extent of

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<sup>68</sup> Nine removed the juror; one held the juror in contempt; one fined the juror; eight cautioned the juror, but did not remove the juror; four declared a mistrial; and seven took some other action. *Id.* at 5 tbl.4. Because the Federal Judicial Center study did not identify individual cases or correlate the judges’ curative actions with the social media use that created a problem, these cases are not necessarily included in the survey of cases in this Article.

<sup>69</sup> NEW MEDIA COMMITTEE, CONFERENCE OF COURT PUB. INFO. OFFICERS, 2011 CCPIO NEW MEDIA SURVEY 20 (2011), available at <http://ccpio.org/wp-content/uploads/2012/02/2011-ccpio-report.pdf>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 22. In 2011, 22.6% of all respondents, including 33.6% of judicial officers, had observed this admonishment. *Id.*

<sup>72</sup> Half of the forty-one respondents were judges, with the other half being prosecutors and public defenders. Hoffmeister, *supra* note 24, at 415, 416 & n.39.

<sup>73</sup> *Id.* at 415.

<sup>74</sup> See *infra* Part V. Cases were collected until the end of July 2012, although subsequent developments in cases originating before that date were tracked until August 2012. These cases were collected from various sources, including the author’s research, prior posts for the author’s blogs, and several of the articles by other authors

the phenomenon,<sup>75</sup> it does provide some insight into how courts are dealing with the issue when it arises.<sup>76</sup>

This Article divides the cases into two categories: ones in which the court found a juror had researched online, and ones in which the court found a juror had used the Internet to communicate with others (including, in some cases, fellow jurors) in the course of a case.<sup>77</sup> This Article then divides each of these categories by how the court resolved the issue: by penalizing, not penalizing or removing the juror(s), or affirming or vacating the verdict.<sup>78</sup>

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cited. When a case was discovered through an article, that article is cited along with the case citation.

<sup>75</sup> There are several reasons for this. One is that not all instances of juror use of the Internet or social media may come to the awareness of the court. For example, Schwartz, *supra* note 58, quotes a New Mexico juror who learned that a fellow juror had done online research on the defendant, but did not inform the judge. Caren Myers Morrison discussed this issue in her article, which collected cases of juror use of the Internet or social media:

[T]he known examples of jurors seeking information online probably understate the breadth of the phenomenon. For one thing, the examples given only represent those cases where the misconduct has come to the court's attention, either through a juror directly approaching the court, or through postverdict interviews with jurors by the parties or the press. What is not captured are those situations where a juror conducts online research but does not share that fact with fellow jurors, nor where jurors mention doing forbidden research to their colleagues but those colleagues do not tell the court for fear of causing delay and extending their service.

Caren Myers Morrison, *Can the Jury Trial Survive Google?*, CRIM. JUST., Winter 2011, at 4, 7. Another possibility is that cases where such activity is discovered may be dealt with without any reported decision or publicity. *Id.* at 11.

<sup>76</sup> Morrison, *supra* note 75, at 4.

<sup>77</sup> See, e.g., *People v. Kriho*, 996 P.2d 158, 163 (Colo. App. 1999) (juror used the Internet to look up the potential sentence for the defendant if he was convicted); *State v. Cecil*, 655 S.E.2d 517, 526 (W. Va. 2007) (juror looked up one of the alleged victims on MySpace); see also *United States v. Ganas*, No. 3:08CR224(EBB), 2011 WL 4738684, at \*2 (D. Conn. 2011) (two jurors became friends on Facebook during the trial and they discussed their opinions on the case via their Facebook pages); *Commonwealth v. Werner*, 967 N.E.2d 159, 162 (Mass. App. Ct. 2012) (jurors posted comments about the trial on their Facebook pages that elicited responses from people not privy to the details of the case).

<sup>78</sup> See, e.g., *Kriho*, 996 P.2d at 170 (stating that the court did not discipline a juror who researched the potential sentence for the crime charged); *Brown v. State*, 620 S.E.2d 394, 398 (Ga. Ct. App. 2005) (holding that the jurors' use of the Internet did

## V. JUROR RESEARCH

A major reason that jurors may access information online about the trial is that for many of them, it is a—if not *the*—primary way in which they research and access information generally.<sup>79</sup> So in the context of a trial, a juror may go online to obtain more information than the parties in court provided.<sup>80</sup> “Jurors are trying to gain information about the defendant’s background, the circumstances of the case, and the effects of the law in an effort to achieve the most accurate result. Such attempts may not reflect misconduct so much as a misplaced sense of responsibility to render the ‘right’ decision.”<sup>81</sup>

Of course, this is contrary to the laws of evidence, which in many ways seek to limit the information made available to the jury, because of some countervailing interest.<sup>82</sup> Thus it is not surprising that the court has taken some remedial action in cases where a juror has sought out information about the case.<sup>83</sup> Verdicts were vacated, either by trial or appeals courts, in twenty-one<sup>84</sup> of these cases, and jurors were removed or penalized in eight cases.<sup>85</sup> Verdicts were upheld or affirmed in fourteen cases,<sup>86</sup> and jurors who did research were not disciplined in four cases.<sup>87</sup>

### A. Juror Not Penalized (4)

A juror in a Colorado drug possession case that ended in a mistrial because of her refusal to vote for conviction was cited and found

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not contribute to their verdict, and, therefore, the court did not vacate the judgment); Mary Pat Gallagher, *Juror Held in Contempt for Internet Research Leading to Mistrial*, N.J.L.J., Mar. 15, 2012, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1331517278541> (establishing that juror was fined \$500 and held in criminal contempt for conducting independent research).

<sup>79</sup> Morrison, *supra* note 75, at 5.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See, e.g., Mapp v. Ohio, 367 U.S. 643, 655 (1961) (excluding criminal evidence gathered in violation of the Bill of Rights).

<sup>83</sup> See *infra* Part V.B-C, E.

<sup>84</sup> See *infra* Part V.E.

<sup>85</sup> See *infra* Part V.B-C.

<sup>86</sup> See *infra* Part V.D.

<sup>87</sup> See *infra* Part V.A.

guilty of contempt, in part for researching the penalty that would have been imposed on the drug defendant had that defendant been found guilty.<sup>88</sup> An appeals court reversed the contempt finding on the grounds that during the contempt hearing the trial court had improperly inquired into the jury's deliberative process.<sup>89</sup> The appeals court did not rule on the Internet research question.<sup>90</sup>

Although a juror in a Maryland murder trial admitted to researching the case on the Internet, the court took no action other than instructing the jury to base its verdict only on the evidence in court.<sup>91</sup> The jury acquitted the defendant.<sup>92</sup>

A juror who had done online research about the victim's injuries in a 2011 Pennsylvania murder case and told the court that she had relied on that information in deliberations was not prosecuted even though her actions resulted in a mistrial.<sup>93</sup> The district attorney explained that the juror "did not willfully violate the court's instructions, but rather misunderstood them."<sup>94</sup>

While the judge in a 2009 murder trial in Washington State<sup>95</sup> was outraged that a juror had tweeted about the trial, he was dissuaded

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<sup>88</sup> See *People v. Kriho*, 996 P.2d 158, 170 (Colo. App. 1999). The juror insisted that her Internet research did not violate the admonition "not to speak to anyone about the case" as "obtaining information from the Internet did not violate that instruction because it was not tantamount to 'speaking to anyone' about the case." *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *State v. Jerold Raymond Burks*, No. 02K09002016 (Md. Cir. Ct., Anne Arundel Cnty. Nov. 6, 2009); see also Andrea F. Siegel, *Judges Confounded by Jury's Access to Cyberspace*, BALT. SUN, Dec. 13, 2009, [http://articles.baltimoresun.com/2009-12-13/news/bal-md.ar.tmi13dec13\\_1\\_deliberations-period-florida-drug-case-jurors](http://articles.baltimoresun.com/2009-12-13/news/bal-md.ar.tmi13dec13_1_deliberations-period-florida-drug-case-jurors).

<sup>92</sup> Siegel, *supra* note 91.

<sup>93</sup> Andrew Staub, *Attorney: 'Juror No. 11' Will Not Face Charges*, CITIZEN'S VOICE (Wilkes-Barre, Pa.), Feb. 11, 2001, <http://citizensvoice.com/news/attorney-juror-no-11-will-not-face-charges-1.1103141>; see also Michael R. Sisak, *Judge Dismisses Juror, Declares Mistrial*, CITIZEN'S VOICE (Wilkes-Barre, Pa.), Jan. 14, 2011, <http://citizensvoice.com/news/update-judge-dismisses-juror-declares-mistrial-1.1090158>.

The murder case was *Commonwealth v. Cherry*, No. CP-40-MD-0000041-2001 (Pa. C.P., Luzerne Cnty. 2011).

<sup>94</sup> Staub, *supra* note 93.

<sup>95</sup> See Levi Pulkkinen, *Diamond Helps Reopen Murder Case*, SEATTLE POST-INTELLIGENCER (Feb. 4, 2009), <http://www.seattlepi.com/local/article/Diamond-helps->

by the prosecution and defense attorneys from removing the juror because only one alternate would have remained.<sup>96</sup> “We’ve been doing this for 250 years now,” the judge told the jury after he was informed of the tweets. “I can tell you it works when we do it this way. It fails when we don’t.”<sup>97</sup> The case ended in a mistrial anyway, due to a hung jury.<sup>98</sup>

### B. Juror Penalized (3)

In February 2010, a Fulton County, Georgia, judge fined a juror \$500 for doing online research during a rape case.<sup>99</sup>

In October 2009, a juror in New Hampshire pleaded guilty to a violation and agreed to reimburse the court \$1,200 in two days of payments to jurors after he told fellow jurors that the defendant in a sexual assault trial had prior convictions for molesting children, a fact that the juror found online.<sup>100</sup> “If it’s someone’s third offense for driving while intoxicated, shouldn’t you know?” the juror said in a press interview.<sup>101</sup>

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reopen-murder-case-1299345.php. The trial was of Myron Wynn, for the 1996 “cold-case” murder of Bob Wykel. *Id.*; see *State v. Wynn*, No. 09-1-00868-6 SEA (Wash. Super. Ct., King Cnty. Dec. 21, 2010) (mistrial declared).

<sup>96</sup> Levi Pulkkinen, *Judge to Juror: Stop Tweeting About Trial*, SEATTLE POST-INTELLIGENCER (Nov. 17, 2010, 6:58 PM), <http://blog.seattlepi.com/seattle911/2010/11/17/judge-to-juror-stop-tweeting-about-trial/>.

<sup>97</sup> *Id.* The defendant was convicted in a retrial. See Levi Pulkkinen, *Cold Case Killer Sentenced*, SEATTLE POST-INTELLIGENCER (May 13, 2011), <http://www.seattlepi.com/local/article/Cold-case-killer-sentenced-1379041.php>. An appeal of the conviction is pending. See *State v. Wynn*, No. 67227-4-1 (Wash. Ct. App. appeal filed May 7, 2012 (brief available at <http://www.courts.wa.gov/content/Briefs/A01/672274%20Appellant%27s.pdf>)).

<sup>98</sup> Levi Pulkkinen, *Mistrial Declared in Cold-Case Slaying*, SEATTLE POST-INTELLIGENCER (Dec. 22, 2010, 8:51 AM), <http://blog.seattlepi.com/seattle911/2010/12/22/mistrial-declared-in-cold-case-slaying/>.

<sup>99</sup> In that case, *State v. McCord* (Ga. Super. Ct., Fulton Cnty. 2010), the judge also declared a mistrial. Andria Simmons, *Georgia Courts to Bar Jurors from Internet*, ATLANTA JOURNAL-CONSTITUTION, Mar. 31, 2010, <http://www.ajc.com/news/georgia-courts-to-bar-420308.html>; see *infra* note 183.

<sup>100</sup> Annmarie Timmins, *Juror Behind Mistrial Pleads, Pays \$1,200*, CONCORD MONITOR, Oct. 10, 2009, <http://www.concordmonitor.com/article/juror-behind-mistrial-pleads-pays-1200>.

<sup>101</sup> Annmarie Timmins, *Juror Becomes a Defendant*, CONCORD MONITOR, Mar. 26, 2009, <http://www.concordmonitor.com/article/juror-becomes-defendant>.

“If it’s a fourth theft charge, shouldn’t you know? Everybody should (be concerned) that jurors are not told everything.”<sup>102</sup>

In March 2012, a New Jersey judge, who eight months earlier had declared a mistrial after a juror did online research in another case,<sup>103</sup> fined a jury foreman \$500 for contempt.<sup>104</sup> The juror had researched online about the defendant’s possible sentence in a drug case, despite the judge repeatedly admonishing him not to do such research.<sup>105</sup> The juror shared his research with others and reportedly said that he could not find the defendant guilty with such a long sentence possible.<sup>106</sup> The jury deadlocked in the criminal case, leading to a mistrial.<sup>107</sup> Hoping to send a message that would “resonate with the contemporary jury,”<sup>108</sup> Assignment Judge Peter Doyne wrote in his opinion finding the juror guilty of contempt that such juror research “bypasses the rules of evidence and allows the information to evade the judge’s scrutiny, thereby running the risk he is considering improper information and, consequently, reducing the chances of a just verdict.”<sup>109</sup> As he had done in the prior instance, Judge Doyne also called for changes to the state’s Model Criminal Jury Instructions to clarify the prohibition on juror research.<sup>110</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> See Kibret Markos, *Mistrial Declared in Mahwah Pastor’s Sex-assault Case*, RECORD (Bergen County, N.J.), July 12, 2011, [http://www.northjersey.com/news/crime\\_courts/Mistrial\\_declared\\_in\\_pastors\\_sex-assault\\_case.html](http://www.northjersey.com/news/crime_courts/Mistrial_declared_in_pastors_sex-assault_case.html); see also *In re Toppin* (N.J. Super. Ct. Crim. Div., Bergen Cnty. Oct. 11, 2011), available at <http://www.dvanarelli.com/blog/wp-content/uploads/2011/10/Matter-of-Lawrence-Toppin.pdf> (declining to hold the juror in contempt). The case in which Toppin was a juror was *State v. Franklin*, No. 09003325 (N.J. Super. Ct., Bergen Cnty. 2011).

<sup>104</sup> See *In re Kaminsky*, at \*20 (N.J. Super. Ct., Bergen Cnty. Mar. 12, 2012) (contempt proceeding against juror), available at [http://www.ediscoverylawalert.com/uploads/file/In-the-Matter-of-Daniel-M\\_-Kaminsky.pdf](http://www.ediscoverylawalert.com/uploads/file/In-the-Matter-of-Daniel-M_-Kaminsky.pdf).

<sup>105</sup> *In re Kaminsky*, at \*20; see also Gallagher, *supra* note 78. The case in which Kaminsky was a juror was *State v. Montas*, No. S-149-11 (N.J. Super. Ct., Bergen Cnty. 2012).

<sup>106</sup> *In re Kaminsky*, at \*4.

<sup>107</sup> *Id.* at \*3.

<sup>108</sup> *Id.* at \*21.

<sup>109</sup> *Id.* at \*18.

<sup>110</sup> *Id.* at \*21 n.16.

### C. *Juror Removed (5)*

A juror who researched an insurance company's profits online while sitting in a federal trial in North Dakota involving whether the company should have covered a house fire was removed after fellow jurors—who stopped the researching juror from revealing the information he learned—informed the judge of the misconduct.<sup>111</sup> But the trial court denied a new trial motion, and the appeals court affirmed.<sup>112</sup>

During voir dire in a 2010 murder trial in Broward County, Florida, the court ordered selection of a new jury when a juror Googled the defendant's name and told fellow jurors, "This is a bad guy. He ran away to Nicaragua after the murder."<sup>113</sup>

In *Commonwealth v. McCaster*, the Massachusetts Court of Appeals upheld a drug conviction in which the defense agreed to proceed with eleven jurors rather than twelve after the court removed three jurors who had consulted outside sources during deliberations and replaced them with two alternates.<sup>114</sup> One of these jurors researched the chemical composition of cocaine online; the other two jurors spoke to two police officers and a friend, respectively.<sup>115</sup>

In a 2003 aggravated manslaughter case in New Jersey, a juror reported to the judge that another juror had announced that she had researched on the Internet the defendants, the victims, and the possible

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<sup>111</sup> *Moore v. Am. Family Mut. Ins. Co.*, No. 2:05-cv-31, 2008 WL 4021695, at \*2 (D.N.D. Aug. 26, 2008), *aff'd*, 576 F.3d 781 (8th Cir. 2009).

<sup>112</sup> *Id.* at \*10; *Moore*, 576 F.3d at 787.

<sup>113</sup> Jane Musgrave, *Juror Mischief a Growing Concern*, PALM BEACH POST, May 13, 2012, <http://www.palmbeachpost.com/news/juror-mischief-a-growing-concern-2353256.html>. Although the Post did not specify the trial, it appears to have been the retrial of Omar Loureiro for murder. See Tonya Alanez, *Loureiro Sentenced to Life Imprisonment for Brutal 2001 Slaying*, SUN SENTINEL (Fort Lauderdale, Fla.), July 14, 2010, [http://articles.sun-sentinel.com/2010-07-14/news/fl-loureiro-life-death-2010-0714\\_1\\_omar-loureiro-new-trial-new-judge](http://articles.sun-sentinel.com/2010-07-14/news/fl-loureiro-life-death-2010-0714_1_omar-loureiro-new-trial-new-judge). The court had vacated Loureiro's previous conviction because of an improper friendship, including numerous phone calls and text messages, between the prosecutor and the first judge in the case. See *Loureiro v. State*, 12 So. 3d 220 (Fla. 2009) (unpublished table decision) (dismissal of appeal pursuant to agreement of parties).

<sup>114</sup> *Commonwealth v. McCaster*, 710 N.E.2d 605, 613 (Mass. App. Ct. 1999).

<sup>115</sup> *Id.* at 606.

sentence for conviction but had not revealed the results of the research to fellow jurors.<sup>116</sup> The complaining juror also reported that the other juror had also read—and tried to hide—a newspaper in the jury room and had announced at the start of deliberations that she had already made her decision, holding up a piece of paper which supposedly had her decision.<sup>117</sup> While the juror in question denied doing research on the Internet and said that she had seen only a headline about the case in the newspaper, four jurors confirmed that the juror said either that she had done research online or knew where such research could be done online.<sup>118</sup> But only one of these jurors recalled the juror mentioning anything she found in that research; the juror said that she had mentioned the possible sentence for the original murder charges in the case.<sup>119</sup> The trial court replaced the juror in question with an alternate, based on the juror's failure to admit her apparent violation of the court's instructions.<sup>120</sup> But the judge denied a mistrial, holding that the remaining jurors were not tainted.<sup>121</sup> The appeals court disagreed with this assessment, concluding that “juror 14 misconduct tainted the jury as a whole.”<sup>122</sup>

While picking a jury for the trial of Jessie Dotson in the infamous “Lester Street murders” in Nashville, Tennessee, District Court Judge James Beasley Jr. in Memphis—where the trial was moved because of concerns over pretrial publicity—removed a juror who had researched the case online.<sup>123</sup> “The reason we came up here is because of the publicity,”<sup>124</sup> Judge Beasley told the juror, “You can tank my

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<sup>116</sup> State v. Scott, 2009 WL 2136273, at \*6 (N.J. Super. Ct. App. Div. July 20, 2009), cert. denied, 983 A.2d 1111 (N.J. Nov. 10, 2009) (unpublished table decision).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at \*7.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at \*10.

<sup>123</sup> Lawrence Buser, *Shelby County Seeks Jurors in Nashville for Lester Street Murder Case*, COM. APPEAL (Memphis, Tenn.), Sept. 20, 2010, <http://www.commercialappeal.com/news/2010/sep/20/shelby-county-seeks-jurors-nashville-lester-street>.

<sup>124</sup> *Id.*

whole jury.”<sup>125</sup> Two jurors with whom the removed juror shared information remained on the panel.<sup>126</sup>

#### ***D. Verdict Affirmed (14)***

In the prosecution of HealthSouth Corporation founder and former Chief Executive Officer Richard Scrushy and former Alabama Governor Don Eugene Siegelman for bribery and conspiracy, the convicted defendants appealed on various grounds, including allegations that the jurors were exposed to extrinsic evidence from the Internet.<sup>127</sup> The federal district court in Alabama found that while the jurors had seen an unredacted indictment from the case<sup>128</sup> and that one juror found and accessed information concerning the role and obligations of the jury foreperson from the court’s website and online docket system, the exposure was harmless beyond a reasonable doubt.<sup>129</sup> The Eleventh Circuit affirmed on this point,<sup>130</sup> but the U.S. Supreme Court remanded the case for reconsideration in light of its decision in *Skilling v. United States*, regarding the standards of the federal “honest-services” fraud statute.<sup>131</sup> On remand, the Eleventh Circuit again affirmed the district court on this point.<sup>132</sup> The district court then reaffirmed its prior rulings in a subsequent decision.<sup>133</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *United States v. Siegelman*, 561 F.3d 1215, 1223-24 (11th Cir. 2009), *reh’g and reh’g en banc denied*, 347 F. App’x 556 (11th Cir. 2009) (unpublished table decision), *vacated*, 130 S. Ct. 3542 (2010) (remanding for reconsideration in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010)).

<sup>128</sup> The trial court had previously given the jury a redacted version of the indictment after the court granted a government motion to remove multiplicitous charges that could have resulted in the court convicting both defendants twice for the same offense. *Seigelman*, 561 F.3d at 1239.

<sup>129</sup> *Id.* at 1238.

<sup>130</sup> *Id.* at 1239.

<sup>131</sup> *Seigelman v. United States*, 130 S. Ct. 3542 (2010). In *Skilling*, the Court rejected former Enron president Jeff Skilling’s argument that he should have been granted a change of venue because of the pervasive publicity that the collapse of the company received in Houston. *See Skilling*, 130 S. Ct. at 2912-17.

<sup>132</sup> *United States v. Siegelman*, 640 F.3d 1159, 1183-84 (11th Cir. 2011).

<sup>133</sup> *United States v. Siegelman*, 799 F. Supp. 2d 1246, 1255 (M.D. Ala. 2011). This ruling came in response to a defense motion for the trial judge to recuse himself.

During the 2001 New York federal trial of suspects in the 1998 terrorist bombings of American embassies in Africa,<sup>134</sup> a juror allegedly researched the concept of “aiding and abetting” on the Internet<sup>135</sup>: a question that the jury had asked the court during deliberations.<sup>136</sup> After their conviction, the defendants sought a new trial on this and other grounds,<sup>137</sup> but the court denied the motion.<sup>138</sup>

ExxonMobil sought a new trial in a federal case in New York, in which a jury ordered the company to pay \$104 million to New York City for contaminating groundwater, once the court discovered that at least five jurors, one of whom the court removed before deliberations, had done independent research online.<sup>139</sup> The judge denied the motion<sup>140</sup> but observed that such situations were a growing problem.<sup>141</sup> “Search engines have indeed created significant new dangers for the judicial system. It is all too easy for a juror to find out more than he or she should by typing a few carefully chosen words into a search engine.”<sup>142</sup>

Lawyers for the family of a Kentucky man, who died after police used a Taser on him, sought to have a 2010 verdict for one of the police officers in a civil rights lawsuit in federal court in Kentucky<sup>143</sup> set aside after a juror reported that two jurors had consulted Taser International’s website and used information from the site to persuade other

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<sup>134</sup> Phil Hirschorn, *Bombings Jury Seeks Info on ‘Aiding and Abetting’*, CNN (May 21, 2001), <http://archives.cnn.com/2001/LAW/05/21/embassy.bombings/index.html>.

<sup>135</sup> Associated Press, *Jailed Embassy Bombers Seek New Trial*, MAIL & GUARDIAN (Jan. 17, 2003), <http://mg.co.za/article/2003-01-17-jailed-embassy-bombers-seek-new-trial>.

<sup>136</sup> Hirschorn, *supra* note 134.

<sup>137</sup> See Associated Press, *supra* note 135.

<sup>138</sup> *United States v. Bin Laden*, No. S7R 98CR1023KTD, 2005 WL 287404, at \*2, \*14 (S.D.N.Y. Feb. 7, 2005), *aff’d on other grounds*, *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 156 (2d Cir. 2008).

<sup>139</sup> See *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, 739 F. Supp. 2d 576, 591-92 (S.D.N.Y. 2010).

<sup>140</sup> *Id.* at 592.

<sup>141</sup> See *id.* at 609.

<sup>142</sup> *Id.*

<sup>143</sup> The jury was unable to reach a verdict regarding the other officer. Andrew Wolfson, *Taser-Related Death Verdict Challenged Over Juror’s Conduct*, COURIER-JOURNAL (Louisville, Ky.), Jan. 10, 2010, available at 2010 WLNR 553581.

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jurors that Tasers are not lethal.<sup>144</sup> The court denied the motion on the grounds that there was substantial evidence that the exonerated officer did not use a Taser on the decedent.<sup>145</sup>

While a federal judge in North Dakota removed a juror who researched an insurance company's profits online while participating in a federal case involving whether the company should have covered a house fire, the trial court denied a new trial motion, which the appeals court affirmed.<sup>146</sup>

In 2009, a California appeals court denied an appeal by a man convicted of torture and other crimes, including spousal and child abuse offenses, who alleged that a juror's online search for a definition of the term "great bodily injury" tainted the jury.<sup>147</sup> When the court asked about the research, the juror said that he "couldn't find any definitive information," which is what he told other jurors.<sup>148</sup> While the appeals court said that this was juror misconduct, it was not sufficient grounds for declaring a mistrial.<sup>149</sup>

Here, the only evidence before the trial court was that while Juror No. 63 attempted to find a definition of "great bodily injury" online, *he came up with no information*. This fact itself tends to rebut the presumption of

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<sup>144</sup> *Id.*

<sup>145</sup> See Memorandum Opinion and Order, *Meinhart v. Campbell*, No. 3:07CV-00465-JGH (W.D. Ky. Jan. 13, 2010), ECF No. 62630, <http://www.archive.org/download/gov.uscourts.kywd.62630/gov.uscourts.kywd.62630.80.0.pdf>. After being set for retrial, the parties settled the claims against the other police officer. See Case Docket, *Meinhart v. Campbell*, No. 3:07CV-00465-JGH (W.D. Ky. Feb. 2, 2010), ECF No. 62630, <http://ia700408.us.archive.org/14/items/gov.uscourts.kywd.62630/gov.uscourts.kywd.62630.docket.html>. Another case in the Sixth Circuit, *United States v. Wheaton*, 517 F.3d 350 (6th Cir. 2008), *aff'g*, 426 F. Supp. 2d 666 (N.D. Ohio 2006), involved a juror using mapping software on a laptop to determine distances during deliberations in a drug conspiracy case. *Wheaton*, 426 F. Supp. 2d at 668. The case is not included here because the software and maps were both resident on the computer and did not involve Internet access. *Wheaton*, 517 F.3d at 362. The appeals court upheld the trial court's refusal to grant a new trial. *Id.* at 372.

<sup>146</sup> See *Moore v. Am. Family Mut. Ins. Co.*, 576 F.3d 781, 784, 787 (8th Cir. 2009).

<sup>147</sup> See *People v. Hamlin*, 89 Cal. Rptr. 3d 402, 442 (Ct. App. 2009).

<sup>148</sup> *Id.* at 446 n.17.

<sup>149</sup> *Id.* at 446.

prejudice because it supports the reasonable conclusion that no actual harm occurred from the search because no information was actually received from an extraneous source as a result of the search.<sup>150</sup>

In a 2009 Palm Beach County, Florida case, Circuit Judge Lucy Chernow Brown let a verdict stand after discovering that a juror had looked up the word “bolstering” online and shared the definition with fellow jurors, finding that the definition was not key to the case.<sup>151</sup>

In 2005, a Georgia appeals court held that a trial court was not required to declare a mistrial after a juror used MapQuest to research the distance between two locations that played a role in a child molestation trial and shared that information with fellow jurors because the information was not dispositive to the jury’s guilty verdict.<sup>152</sup>

A Las Vegas man convicted of lewdness and possession of child pornography in 2007 sought a new trial, but the Nevada trial court denied the motion.<sup>153</sup> The defense had argued that the man was unaware that the photographs that he had downloaded from the Internet depicted children under eighteen years old, and three jurors said that they had undertaken their own tests to see if they could determine the age of

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<sup>150</sup> *Id.* The court also rejected the defendant’s argument that “[u]nless a computer crashes before the search can go through, it is impossible to conduct an [I]nternet search of ‘great bodily injury’ and obtain no results at all,” because the argument did not demonstrate that the search had influenced the juror or showed that he was biased.

*Id.*

<sup>151</sup> See Musgrave, *supra* note 113; see also JURY CONDUCT SUBCOMM., FLA. SUP. CT. COMMS. ON STANDARD JURY INSTRUCTIONS, JOINT REPORT (NO. 2010-01 AND NO. 2010-01) OF THE COMMITTEES ON STANDARD JURY INSTRUCTION (CIVIL) AND (CRIMINAL) app. h, at 43 (2010), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/10/10-51/Filed\\_01-14-2010\\_Appendix%20H.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/10/10-51/Filed_01-14-2010_Appendix%20H.pdf) (including an e-mail from Judge Brown to members of the Jury Conduct Subcommittee of the Florida Bar’s Civil Jury Instructions Committee in response to jurors looking up the definition of “bolstering” online).

<sup>152</sup> See *Brown v. State*, 620 S.E.2d 394, 396-98 (Ga. Ct. App. 2005) (“Of the jurors who actually recalled receiving the information, all of them testified that they were unaffected by the information.”).

<sup>153</sup> See *Zana v. State*, 216 P.3d 244, 245-47 (Nev. 2009).

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various young women.<sup>154</sup> One did this online by looking at various pornographic websites, while the other two conducted their experiments by observing people at church and at a mall.<sup>155</sup> The court held that the Internet research was improper, but that “the average hypothetical juror would [not] be influenced by what that juror did.”<sup>156</sup> The Nevada Supreme Court affirmed.<sup>157</sup>

In 2007, New York’s Appellate Division held that while a juror’s obtaining weather information from the Internet was misconduct, it was immaterial and did not create a substantial risk of prejudice requiring the court to set aside a drug sale conviction.<sup>158</sup>

In 2009, a New York trial court denied a defense motion to set aside a guilty verdict in a rape case based on a juror who conducted Internet research on the defense attorney and discussed the case with others during trial.<sup>159</sup>

Also in 2009, a New York appeals court upheld a murder conviction, rejecting the defendant’s arguments that a juror’s online research on whether the gunshot wound in the case indicated that the gun was close or far from the victim required a new trial.<sup>160</sup> The court based its decision on the juror’s testimony that the information had left him confused and did not affect his decision.<sup>161</sup> The other juror who was aware of the research similarly said the information had not affected his decision.<sup>162</sup>

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<sup>154</sup> See K.C. Howard, *Juror Misconduct Cited*, REV. J. (Las Vegas, Nev.), Dec. 1, 2007, <http://www.lvrj.com/news/11993056.html>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Zana*, 216 P.3d at 250; see also *Zana v. State*, No. 55688, 2010 WL 4065818, at \*1 (Nev. Sep. 29, 2010) (ordering hearing on habeas corpus petition).

<sup>158</sup> *People v. Lara*, 843 N.Y.S.2d 311, 311 (App. Div. 2007).

<sup>159</sup> See *People v. Jamison*, No. 8042/06, 899 N.Y.S.2d 62, at \*1-4 (Sup. Ct. Aug. 18, 2009) (unpublished table decision). Among the outsiders with whom the juror discussed the case was an attorney, who reported the incident to the court. *Id.* at \*2.

<sup>160</sup> See *People v. Carmichael*, 891 N.Y.S.2d 574, 575 (App. Div. 2009). The appeals court did reverse the conviction for criminal possession of a weapon, saying it was based on legally insufficient evidence. *Id.* at 574.

<sup>161</sup> *Id.* at 575.

<sup>162</sup> *Id.*

A trial court in Pennsylvania denied a defense motion for a new trial in a case in which a juror enlisted a family member to do online research into the case, ruling that interviewing jurors regarding what took place in the jury room violated public policy.<sup>163</sup>

A Washington state appeals court upheld a medical negligence verdict in a case where two jurors looked up medical terms online because the information the jurors obtained was the same as the medical information the parties presented at trial.<sup>164</sup>

In a Tennessee case, a defendant convicted of attempted first-degree murder, aggravated assault, and several other charges stemming from a 2010 drive-by shooting sought a new trial on the grounds that several jurors conducted online research.<sup>165</sup> The court denied the motion.<sup>166</sup>

### *E. Mistrial / Verdict Vacated (21)*

In a 2009 decision, the First Circuit reversed a drug distribution conspiracy conviction when a juror conducted online research because she disagreed with the other jurors' definition of the term "attempt to possess with the intent to distribute narcotics."<sup>167</sup>

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<sup>163</sup> Commonwealth v. Szakal, No. 09-1880 (Pa. Ct. Com. Pl. Oct. 21, 2009), *pet. denied*, No. 81 WM 2011 (Pa. Mar. 27, 2012), available at <http://statecasefiles.justia.com/documents/pennsylvania/supreme-court/81-wm-2011.pdf>; *Commonwealth v. Szakal*, LEGAL INTELLIGENCER (Nov. 16, 2009), <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202435434751> (paid subscription); see Hoffmeister, *supra* note 24, at 412 n.13 and accompanying text.

<sup>164</sup> Buford v. Grp. Health Coop. of Puget Sound, No. 42915-9-I, 98 Wash. App. 1063, at \*10-11 (Ct. App. Jan. 18, 2000) (unpublished), *review denied*, 10 P.3d 1073 (Wash. Sept. 6, 2000) (unpublished table decision).

<sup>165</sup> Lawrence Buser, *Did Memphis Jurors Detour into Cyberspace During Deliberations?*, COM. APPEAL (Memphis, Tenn.), July 9, 2012, <http://www.commercialappeal.com/news/2012/jul/09/did-memphis-jurors-detour-into-cyberspace-during/>; see also *People v. Isabell*, No. 10-07091 (Tenn. Crim. Ct. June 15, 2012) (status available via <http://jssi.shelbycountyttn.gov/>).

<sup>166</sup> Lawrence Buser, *Defense to Question Memphis Jurors about Googling*, COM. APPEAL (Memphis, Tenn.), Aug. 22, 2012, <http://www.commercialappeal.com/news/2012/aug/22/defense-to-question-memphis-jurors-about/?partner=RSS>.

<sup>167</sup> *United States v. Bristol-Mártir*, 570 F.3d 29, 36, 41-45 (1st Cir. 2009).

In *United States v. Lawson*,<sup>168</sup> the Fourth Circuit reversed a federal cockfighting conviction because a juror researched the definition of “sponsor”—an element of the offense—on Wikipedia.<sup>169</sup> Although the trial judge found that this research had not resulted in prejudice against the defendants, the appeals court concluded, “In this case, we are unable to say that Juror 177’s use of Wikipedia did not violate the fundamental protections afforded by the Sixth Amendment. Accordingly, we vacate the appellants’ convictions under the animal fighting statute, and we award them a new trial with respect to those charges.”<sup>170</sup>

In Florida, a federal district court judge declared a mistrial in March 2009 in a complex prosecution involving Internet pharmacies selling prescription drugs with scant medical supervision after discovering that eight of the twelve jurors had done independent Internet research about the case.<sup>171</sup> As one of the involved lawyers told a local newspaper, “They Googled defendants’ names. They Googled definitions of medical terms. There was a lot of Googling going on.”<sup>172</sup> The government later dropped the prosecution.<sup>173</sup>

The Arizona Court of Appeals reversed a murder conviction in which the jury foreperson did a Google search for “first degree murder Arizona” and brought the definitions he found into the jury room during

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<sup>168</sup> *United States v. Lawson*, 677 F.3d 629 (4th Cir. 2012).

<sup>169</sup> *Id.* at 639. The same juror also researched the definition of the term “exhibit” on Merriam-Webster.com, but the appeals court did not rule on this basis because the other jurors were not aware of this research and “[b]ecause the juror’s use of Wikipedia for the term ‘sponsor,’ standing alone, is determinative of the result we reach on the issue of juror misconduct . . . .” *Id.* at 639 n.11.

<sup>170</sup> *Id.* at 651.

<sup>171</sup> *United States v. Hernandez*, No. 07-60027 (S.D. Fla. March 10, 2009) (mistrial declared). See Deirdra Funcheon, *Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies*, NEWTIMES BROWARD-PALM BEACH, Apr. 23, 2009, <http://www.browardpalmbeach.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies/1/>; see also Fred Grimm, *Social Media, Jury Duty a Bad Mix*, MIAMI HERALD, May 5, 2012, <http://www.miamiherald.com/2012/05/05/2785200/social-media-jury-duty-a-bad-mix.html>; Schwartz, *supra* note 58.

<sup>172</sup> Funcheon, *supra* note 171.

<sup>173</sup> See *Helfant v. United States*, No. 09-60838-CIV, 2009 WL 2258324, at \*1 (S.D. Fla. July 29, 2009) (denying codefendant’s motion to vacate guilty plea after government dropped case against remaining defendants).

deliberations.<sup>174</sup> The court held that the reversal was necessary because the State had failed to prove beyond a reasonable doubt that the jurors' misconduct did not taint the verdict.<sup>175</sup>

In 2012, an appeals court in California threw out a second-degree murder conviction and ordered a new trial after the jury foreman admitted bringing two articles from Nolo.com and Wikipedia defining manslaughter and murder into the jury room during deliberations and sharing them with fellow jurors.<sup>176</sup> The incident was discovered because the printouts were among the papers left in the jury room after the verdict.<sup>177</sup>

In 2003, the Colorado Court of Appeals reversed a child abuse conviction in which a juror researched on the Internet and shared with fellow jurors the pharmacological description of the drug Paxil, which the defendant had testified she was taking at the time of the alleged crime.<sup>178</sup> "In view of the problems and dangers associated with the unsupervised use of the Internet," the court said, "trial courts should emphasize that jurors should not consult the Internet, or any other extraneous materials, at any time during the trial, including during deliberations."<sup>179</sup> In affirming the reversal, the Colorado Supreme Court wrote, "It is clear there exists at least a reasonable possibility that the extraneous information to which the jury was exposed influenced the verdict."<sup>180</sup>

In September 2010, a Florida appeals court ordered a new trial in a manslaughter conviction where the jury foreman searched online for the definition of "prudent"—used in the jury instructions—during a break in deliberations and shared the definition with other jurors.<sup>181</sup>

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<sup>174</sup> State v. Aguilar, 230 P.3d 358, 359 (Ariz. Ct. App. 2010).

<sup>175</sup> *Id.* at 365.

<sup>176</sup> Sontaya Rose, *Juror's Misconduct in Fresno County Led to a Mistrial*, ABC30 (April 20, 2012), <http://abclocal.go.com/kfsn/story?section=news/local&id=8630153>.

<sup>177</sup> *Id.*

<sup>178</sup> People v. Wadle, 77 P.3d 764, 769-70 (Colo. App. 2003), *aff'd*, 97 P.3d 932, 938 (Colo. 2004).

<sup>179</sup> *Id.* at 771.

<sup>180</sup> *Wadle*, 97 P.3d at 937.

<sup>181</sup> Tapanes v. State, 43 So. 3d 159, 160 (Fla. Dist. Ct. App. 2010).

The court reasoned that while the technology was new, traditional juror research rules applied:

Although here we confront new frontiers in technology, that being the instant access to a dictionary by a smartphone, the conduct complained of by the appellant is not at all novel or unusual. It has been a longstanding rule of law that jurors should not consider external information outside of the presence of the defendant, the state, and the trial court.<sup>182</sup>

In February 2010, a Fulton County, Georgia, judge declared a mistrial after a juror did online research during a rape case.<sup>183</sup>

The Maryland Court of Special Appeals reversed two jury verdicts in 2009 because jurors conducted Internet research during the trial.<sup>184</sup> In *Wardlaw v. State*, the appeals court concluded that the trial court's failure to question the jurors about the influence of a juror's Internet research on "oppositional defiant disorder," which revealed that a tendency to lie was a symptom of the disorder and led the juror to conclude that a witness' testimony was not credible, required a reversal.<sup>185</sup> A different panel of the same court reached the same conclusion in *Clark v. Maryland*, in which a bailiff found in the jury room printouts from Wikipedia on various scientific issues in the trial.<sup>186</sup>

In a 2005 decision, the Massachusetts Appeals Court reversed a cocaine trafficking conviction.<sup>187</sup> The appeals court primarily based the reversal on the trial court's improper removal of a juror for speaking to relatives about the case.<sup>188</sup> Additionally, the appeals court noted that another juror's online research of the Massachusetts statute regarding

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<sup>182</sup> *Id.* at 163.

<sup>183</sup> In that case, *State v. McCord* (Ga. Super. Ct., Fulton Cnty. 2010), the judge also fined the juror \$500. *Simmons*, *supra* note 99.

<sup>184</sup> *Wardlaw v. State*, 971 A.2d 331, 334 (Md. Ct. Spec. App. 2009); *Siegel*, *supra* note 93.

<sup>185</sup> *Wardlaw*, 971 A.2d at 339.

<sup>186</sup> *Clark v. Maryland*, No. 0953/08 (Md. Ct. Spec. App. Dec. 3, 2009); *see Siegel*, *supra* note 92.

<sup>187</sup> *Commonwealth v. Rodriguez*, 828 N.E.2d 556, 568 (Mass. App. Ct. 2005).

<sup>188</sup> *Id.* at 565.

impaneling, sequestering, and discharge of jurors “reinforces our conclusion that the verdicts cannot stand.”<sup>189</sup>

In an unpublished decision in September 2010, the Nevada Supreme Court reversed the conviction in another sexual assault case where the jury foreperson conducted independent research online on the physical effects of sexual assault and shared her research with fellow jurors.<sup>190</sup>

In July 2011, a New Jersey judge declared a mistrial after jurors deliberating in a criminal case where a pastor was accused of sexual assault of a teenage girl in his congregation reported to the court that one juror had handed out the results of his Wikipedia research on the definition of a legal term.<sup>191</sup> The judge had repeatedly admonished the jury not to do online research.<sup>192</sup> The judge then referred the case to Judge Doyne, who oversees jurors and ordered the juror to show cause why he should not be held in contempt.<sup>193</sup> In the end, Judge Doyne decided against a contempt finding but suggested a revision of the state’s jury instructions, “which would make the juror’s responsibilities clear and unequivocal.”<sup>194</sup>

An Ohio judge declared a mistrial in 2007 in a murder retrial in which the court found that during deliberations a juror conducted online research on the definitions of “perverse”—which was in a jury instruction relating to an additional charge of aggravated robbery—and “involuntary manslaughter.”<sup>195</sup> The trial court then held a retrial—the third

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<sup>189</sup> *Id.* at 568. The statute researched by the juror was Mass. Gen. Laws Ann. ch. 234, § 26B (West 2012). *Rodriguez*, 828 N.E.2d at 563.

<sup>190</sup> *Lockwood v. State*, No. 50864, 52615, 2010 WL 3529416 (Nev. Sept. 3, 2010), *abrogating* 281 P.3d 1196 (Nev. Nov. 23, 2009) (unpublished table decision).

<sup>191</sup> *Markos*, *supra* note 103.

<sup>192</sup> *Id.*

<sup>193</sup> Mary Pat Gallagher, *Juror Spared Sanctions for Web Research in Sex-Crime Trial*, N.J.L.J., Oct. 18, 2011, *available at* <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202519064042>.

<sup>194</sup> *In re Toppin*, at \*25 (N.J. Super. Ct. Crim. Div., Bergen Cnty. Oct. 11, 2011), *available at* <http://www.dvanarelli.com/blog/wp-content/uploads/2011/10/Matter-of-Lawrence-Toppin.pdf>; Gallagher, *supra* note 193.

<sup>195</sup> *State v. Gunnell*, 973 N.E.2d 243, 245-46 (Ohio 2012). The court vacated the verdict in the first trial because of improper use of preemptory challenges. *Id.*

trial in the case—and the defendants were convicted.<sup>196</sup> In an appeal of the verdict, the Ohio Court of Appeals reversed the conviction, holding that despite the juror’s research, “there had not been a manifest necessity for the mistrial declared at the second trial,”<sup>197</sup> and the third trial constituted double jeopardy.<sup>198</sup> The Ohio Supreme Court agreed, holding that:

Although all agree that it was error for [the juror] to conduct outside research, it was also error for the judge to make no more than a limited inquiry of the juror—an inquiry that merely established the misconduct, not any prejudice from it. The judge disregarded the constitutional commands that the court, in deciding whether a manifest necessity exists to declare a mistrial, must act “rationally, responsibly, and deliberately.”<sup>199</sup>

In 2006, the Oklahoma Court of Civil Appeals affirmed the trial court’s grant of a new trial after a defense verdict in a medical malpractice case in which a juror conducted Internet research on a medical procedure at issue in the case and on the plaintiff’s medications.<sup>200</sup>

A juror’s online research into the victim’s injuries in a 2011 Pennsylvania murder case led to a mistrial, even though the juror who did the research “interpreted jury instructions as only applying to specific information about the *Cherry* case, not research on general aspects or injuries.”<sup>201</sup>

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<sup>196</sup> *Id.* at 248.

<sup>197</sup> *Id.* at 249; *see also* State v. McAlmont, 976 N.E.2d 898 (Ohio 2012) (same result for co-defendant).

<sup>198</sup> *Gunnell*, 973 N.E.2d at 252.

<sup>199</sup> *Id.* at 251.

<sup>200</sup> Thompson v. Krantz, 137 P.3d 693, 695 (Okla. Civ. App. 2006). In another Oklahoma case, the trial court ordered the online trial docket made inaccessible during trial to prevent jurors from accessing the information. *See* Bill Braun, *Judge Closes Trial’s Internet Window*, TULSA WORLD, May 3, 2010, [http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100503\\_14\\_A1\\_Inasig174831](http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100503_14_A1_Inasig174831).

<sup>201</sup> Sisak, *supra* note 93. The jury had reached a verdict on one count and was split on the other count. *Id.* As noted *supra*, the murder case was *Commonwealth v. Cherry*, No. CP-40-MD-0000041-2001 (Pa. C.P., Luzerne Cnty. 2011).

In Rhode Island, the 2004 retrial of Destie B. Ventre for murder<sup>202</sup> ended in a mistrial after a juror researched the definitions of “murder,” “manslaughter,” and “self-defense” online and shared the information with fellow jurors.<sup>203</sup>

In a 2009 decision, the South Dakota Supreme Court affirmed a trial court’s grant of a new trial in a products liability suit after the trial court discovered that a juror researched the defendant companies when he received his jury summons and uncovered prior litigation regarding their products.<sup>204</sup> The juror’s research was not discovered during voir dire<sup>205</sup> but was finally revealed in the course of jury deliberations, when the juror revealed the results of his research to fellow jurors.<sup>206</sup> In affirming the lower court, the South Dakota Supreme Court said that while it was a “close case,”<sup>207</sup> the information that the juror revealed “may have caused at least six of the jurors to decide in a manner inconsistent with the instructions given by the trial court if not the evidence as well.”<sup>208</sup>

Today we announce no hard and fast rule that all such types of internet research by a juror prior to trial without notice to the court and counsel automatically doom a jury’s verdict. Rather, as we do in such close cases, we give deference to the trial court, which had the distinct advantage of being present throughout the nineteen-day

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<sup>202</sup> The conviction in the first trial was reversed based on inadequate jury instructions on self-defense. *See* *State v. Ventre*, 811 A.2d 1178 (R.I. 2002).

<sup>203</sup> Mike McKinney, *Federal Hill Murder Case Resolved After 9 Years*, PROVIDENCE J. NEWSBLOG (Oct. 12, 2007), [http://www.beloblog.com/ProJo\\_Blogs/newsblog/archives/2007/10/federal\\_hill\\_mu.html](http://www.beloblog.com/ProJo_Blogs/newsblog/archives/2007/10/federal_hill_mu.html). Another retrial after the mistrial—the third trial in the case—ended in another conviction, which was also reversed. *Id.*; *see also* *State v. Ventre*, 910 A.2d 190 (R.I. 2006). Finally, Ventre pled guilty and was sentenced in 2007. *Id.*

<sup>204</sup> *Russo v. Takata Corp.*, 774 N.W.2d 441, 443-44 (S.D. 2009).

<sup>205</sup> *Id.* at 445. “The only question asked specific to Takata and any prior knowledge panel members might already possess was posed by counsel for Takata: ‘Okay. Before you got here this morning had anyone ever heard of Takata?’ No one, including [the juror who conducted the research] responded positively to the inquiry.” *Id.*

<sup>206</sup> *Id.* at 446.

<sup>207</sup> *Id.* at 454.

<sup>208</sup> *Id.*

trial. The trial court was in the best position to determine whether material was extrinsic to the issues before the jury, or whether the extraneous material prejudiced the jury. Based on the cold record before us, we cannot say that the trial court's finding that Juror Flynn lacked credibility is clearly erroneous or that its award of a new trial rises to the level of an abuse of discretion. The trial court is affirmed.<sup>209</sup>

In January 2012, the Vermont Supreme Court reversed a conviction for aggravated sexual assault on a child because the court found that a juror in the case had researched Somali religion and culture, which was an issue in the case.<sup>210</sup>

In *State v. Boling*, the Washington Court of Appeals affirmed the trial court's grant of a new trial in a manslaughter case.<sup>211</sup> At trial, a juror conducted Internet research on alcohol poisoning as a cause of death when the medical examiner testified that the cause of death was a brain injury (subdural hematoma) resulting from blunt force trauma to the head.<sup>212</sup>

Here, the [trial] court was less interested in whether one or more jurors voted to convict for reasons outside the evidence and the law, than in whether that possibility could be ruled out. The court did not order a new trial because a particular juror engaged in a particular thought process. Rather, the juror's posttrial statements established that the evidence of alcohol toxicity could have been misused. The jury might well have speculated that this was the cause of death but that Mr. Boling was nonetheless also responsible for this cause.<sup>213</sup>

In 2007, the West Virginia Supreme Court of Appeals reversed a sexual abuse conviction in which two jurors had accessed the MySpace

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<sup>209</sup> *Id.*

<sup>210</sup> *State v. Abdi*, 45 A.3d 29, 30 (Vt. 2012).

<sup>211</sup> *State v. Boling*, 127 P.3d 740, 741 (Wash. Ct. App. 2006), *review denied*, 145 P.3d 1214 (Wash. 2006) (table decision).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 742.

page of one of the teenage victims.<sup>214</sup> One of the jurors had discussed the contents of the page with the juror's own daughter, who knew the other victim.<sup>215</sup> But the court was even more concerned about other juror misconduct.<sup>216</sup>

The independent investigation by jurors in this case concerning the website discussed during the appellant's trial constitutes misconduct extrinsic to the jury's deliberative process. Upon review of the record, we conclude that if this were the only misconduct at issue, we would be hesitant to find that it was sufficiently prejudicial to warrant setting aside the verdict. It appears that public access to the website information specifically maintained by K.J. was restricted or removed prior to trial and, therefore, could not have been viewed by these jurors. The fact that one of the jurors may have discussed the website with her daughter who knew S.D. and her family is more troubling. However, we are most concerned with the fact that one of the jurors may have misled the jury with regard to the weight to be given to the testimony of the witnesses.

By advising the other jurors that the testimony of the children had to be given greater weight than that of the appellant, the juror in question directly contradicted the circuit court's instructions. In effect, this juror, who worked for the DHHR, told other members of the jury that an incorrect legal standard should be applied to the testimony of the alleged victims in this case.<sup>217</sup>

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<sup>214</sup> *Id.*

<sup>215</sup> *State v. Cecil*, 655 S.E.2d 517, 526-27 (W. Va. 2007). In addition, a third juror, who was employed at the State Department of Health and Human Resources, told fellow jurors that, based on her experience, children's testimony regarding sexual abuse was more reliable than adults' testimony. *Id.* at 526.

<sup>216</sup> *Id.* "Any suggestion by an employee of the State, and not just any State employee but an employee to the DHHR, the very agency which investigates child abuse and neglect, that a different standard should be applied to the alleged victims' testimony was inherently prejudicial to the appellant." *Id.* at 527.

<sup>217</sup> *Id.* at 526 (footnote omitted).

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Based on the totality of circumstances in the case, the court concluded that the conviction had to be overturned.<sup>218</sup>

Having carefully reviewed the record, we conclude that the cumulative effect of each of the instances of juror misconduct discussed above made it impossible for the appellant to receive a fair trial. We are mindful that the independent investigation conducted by two of the jurors did not bear fruit, which arguably lessens the prejudicial effect, but notwithstanding that fact, the mere fact that members of a jury in a serious felony case conducted any extrajudicial investigation on their own is gross juror misconduct which simply cannot be permitted. Without meaningful censure, failure to properly punish such behavior would encourage or allow its repetition. Given the independent investigation by these jurors and the fact that another juror advised that the alleged victims' testimony should be given more weight than that of the appellant contrary to the judge's instructions and our law, we have no choice but to vacate the appellant's convictions.<sup>219</sup>

#### *F. Other (1)*

The Fourth Circuit affirmed a trial court's refusal to consider an argument of a defendant convicted of fraud that a Twitter post during trial by a friend of a juror's husband was evidence of improper research by the juror.<sup>220</sup>

Forde's string of possibilities about the origin of the Twitter posting—that the foreperson possibly talked to her husband, who possibly talked to his friend, who possibly

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<sup>218</sup> *Id.* at 527.

<sup>219</sup> *Id.*

<sup>220</sup> *United States v. Forde*, 407 F. App'x 740, 747 (4th Cir. 2011) (unpublished). The Twitter post, which the defendant argued was evidence that the juror questioned the difference between the definitions of "assume" and "presume," said: "assume: suppose to be the case, without proof; presume: suppose that something is the case on the basis of probability." *Id.* at 747 n.2.

took to Twitter in response to what the husband possibly told him—is nothing but speculation and thus falls far short of establishing reasonable grounds for investigation.<sup>221</sup>

### G. Pending (I)

On July 17, 2012, two jurors in a federal fraud trial in North Carolina admitted in court that they had looked up the definition of “reasonable doubt” online and shared it with other jurors during their deliberations, which ended in a guilty verdict.<sup>222</sup> The judge held a hearing on the matter after the defendant argued that the research—found on a printout in the jury room—and alleged interaction of the jurors on social media required the court to grant a new trial.<sup>223</sup> A ruling on the matter is pending.<sup>224</sup>

## VI. JUROR COMMUNICATIONS

Use of the Internet as a communications tool—via e-mail; instant messaging; or posting material to blogs, social networking sites, and broadcast services such as Twitter and YouTube—is another popular activity of Internet users.<sup>225</sup> Again, this trend can clash with the imperative that jurors not communicate about the case with anyone

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<sup>221</sup> *Id.* at 747.

<sup>222</sup> Gary L. Wright, *Rand Jurors Back for Questioning*, CHARLOTTE OBSERVER, July 18, 2012, <http://www.charlotteobserver.com/2012/07/18/3388142/rand-jurors-back-for-questioning.html>.

<sup>223</sup> *Id.*; Ely Portillo, *Ex-Beazer Exec Wants Retrial*, CHARLOTTE OBSERVER, July 17, 2012, <http://www.charlotteobserver.com/2012/07/17/3386351/former-beazer-homes-exec-wants.html>.

<sup>224</sup> *United States v. Rand*, No. 3:10-CR-00182 (W.D.N.C. reply filed Aug. 27, 2012), available at [www.pacer.gov](http://www.pacer.gov) (last visited Sept. 4, 2012).

<sup>225</sup> *Trend Data (Adults): What Internet Users Do on a Typical Day*, *supra* note 4. Pew Center surveys have found that in one day 59% of Internet users accessed e-mail, 48% used a social networking site, 28% viewed something on YouTube, 18% sent instant messages, 8% posted comments online, 8% used Twitter, and 7% participated in an online discussion regarding personal or health issues. *Id.*

prior to deliberations, and during deliberations they may only communicate with their fellow jurors.<sup>226</sup>

In the legal cases in which courts have found jurors to have communicated with others, or each other, in the course of a proceeding, the courts have undertaken a fact-specific examination of the content of the communication to determine whether it shows that the affected juror(s) reached a judgment in the case prior to deliberations, or that the communication affected the verdict before deliberations.<sup>227</sup>

In most of the cases where courts have considered these issues, the courts have found that the communications did not affect the verdicts.<sup>228</sup> Thus, verdicts have been affirmed in eighteen of these cases<sup>229</sup> and vacated in only five.<sup>230</sup> But the courts have been harsher on jurors who have participated in such communications, penalizing them in three cases<sup>231</sup> and removing them in five.<sup>232</sup> In four cases, however, the court did not penalize the jurors for their communications about the case.<sup>233</sup>

#### A. *Juror Not Penalized (4)*

In January 2008, a California Superior Court judge held in contempt a juror who posted a picture of the weapon in a murder trial to his

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<sup>226</sup> See, e.g., *People v. Turner*, No. G042587, 2011 WL 579210, at \*7 (Cal. Ct. App. Feb. 18, 2011) (citing CAL. PEN. CODE § 1122 (West 2012)), (instructing the jury not to discuss the case among themselves, or with anyone else, until deliberations are concluded, with violation of the instruction subject to admonishment).

<sup>227</sup> See *United States v. Blumeyer*, 62 F.3d 1013, 1017 (8th Cir. 1995) (setting forth an objective test to consider the facts surrounding the extraneous information, the availability to and treatment of the information by the jury during deliberations, at what point in the trial extraneous information came into contact with the jury, and whether the information likely influenced the jury); *State v. Abdi*, 45 A.3d 29, 35 (Vt. 2012) (stating the inquiry into juror misconduct “is strictly *objective* in nature, looking to the totality of the surrounding facts and circumstances to determine whether the extraneous information acquired by the jury had the capacity to influence the verdict”).

<sup>228</sup> See *infra* Part VI.

<sup>229</sup> See *infra* notes 264-304.

<sup>230</sup> See *infra* notes 328-52.

<sup>231</sup> See *infra* notes 247-51.

<sup>232</sup> See *infra* notes 253-62.

<sup>233</sup> See *infra* notes 241-45.

blog, but the judge did not impose a penalty after the judge determined that the blogging did not result in an unfair trial.<sup>234</sup>

In another California case, the Court of Appeals refused to reverse a conviction on numerous counts involving destructive devices and threats after the trial court did not remove a juror who had posted a comment on Facebook about a delay in the trial while the jail unit where the defendant was being held was quarantined due to an outbreak of swine flu.<sup>235</sup> After discussion with counsel, the court and parties agreed to remind the jurors as a group that they should not post to social media about the case.<sup>236</sup>

A potential juror in the Chandra Levy murder case remained in the jury pool, but was not ultimately selected to serve on the jury after he tweeted, “Guilty. Guilty. I say no. I will not be swayed. Practicing for jury duty.”<sup>237</sup>

Additionally, in New York, when the media informed court officials that television weatherman and personality Al Roker was tweeting pictures from the jury assembly room of the New York State Supreme Court in Manhattan in 2009, a clerk found Roker and asked him to stop.<sup>238</sup> Roker then tweeted, “Whew. Learned a lesson. No, I repeat, no court personnel told me it was ok. Going back into the courtroom,

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<sup>234</sup> Raul Hernandez, *Juror Held in Contempt for Blog of Murder Trial*, VENTURA COUNTY STAR, Jan. 23, 2008, <http://www.vcstar.com/news/2008/jan/23/juror-held-in-contempt-for-blog-of-murder-trial>.

<sup>235</sup> *People v. Turner*, No. G042598, 2011 WL 579210, at \*6-8 (Cal. Ct. App. Feb. 18, 2011).

<sup>236</sup> *Id.* at \*6.

<sup>237</sup> Keith L. Alexander & Henri E. Cauvin, *Jury in Place for Levy Trial After Some Hiccups*, WASH. POST, Oct. 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/22/AR2010102206941.html?nav=emailpage>. Some sources erroneously reported that the juror had been removed from the jury pool because of the tweet. See, e.g., *Prospective Juror Tweets Self Out of Levy Murder Trial*, NBC WASHINGTON (Oct. 22, 2010), <http://www.nbcwashington.com/news/local/Prospective-Juror-Tweets-Self-Out-of-Levy-Murder-Trial-105553253.html> (stating incorrectly that the juror was originally chosen and then dismissed from the jury pool because of his tweet).

<sup>238</sup> Corky Siemaszko, *Al Roker Gets Ripped for Snapping Court Pix & Tweeting During Jury Duty*, N.Y. DAILY NEWS (May 29, 2009), [http://articles.nydailynews.com/2009-05-29/gossip/17923878\\_1\\_jury-duty-chief-jury-clerk-civic-duty](http://articles.nydailynews.com/2009-05-29/gossip/17923878_1_jury-duty-chief-jury-clerk-civic-duty).

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iPhone buried deep in my bag.”<sup>239</sup> Roker was later “excused from jury duty ‘for other reasons.’”<sup>240</sup>

### ***B. Juror Penalized (3)***

In February 2012, a Florida trial court imposed a three-day jail sentence for criminal contempt on a juror who sent a friend request to the defendant in an auto negligence case.<sup>241</sup> After the court discovered the friend request and the juror was dismissed, the juror wrote on Facebook, “Score . . . I got dismissed!! Apparently they frown upon sending a friend request to the defendant . . . haha.”<sup>242</sup>

In August 2010, a Michigan judge who learned that a juror had posted a message on Facebook during trial stating, “[A]ctually excited for jury duty tomorrow. It’s gonna be fun to tell the defendant they’re GUILTY,”<sup>243</sup> found the juror guilty of contempt and ordered her to pay a \$250 fine and to write an essay about the constitutional right to a fair trial.<sup>244</sup>

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<sup>239</sup> Al Roker, TWITTER (May 28, 2009, 12:06 PM), <https://twitter.com/alroker/status/1950540435>.

<sup>240</sup> Siemaszko, *supra* note 238. In December 2010, comedian Steve Martin posted a series of tweets labeled “REPORT FROM JURY DUTY,” with a number of apparently biased and absurd statements. *Steve Martin’s Jury Duty Tweets: For Real or Really Funny?*, GATHER.COM (Dec. 23, 2010), <http://celebs.gather.com/viewArticle.action?articleId=281474978828095>. While there was some speculation that the tweets were actually sent while Martin waited in the jury pool, it turned out the entire series was a parody. See David K. Li, *Steve’s Guilty Pleasure*, N.Y. POST, Dec. 23, 2010, [http://www.nypost.com/p/news/national/steve\\_guilty\\_pleasure\\_GzBy4gVGm224eNMFY1E7SJ](http://www.nypost.com/p/news/national/steve_guilty_pleasure_GzBy4gVGm224eNMFY1E7SJ) (stating that Martin’s publicist confirmed that the tweets were made in jest).

<sup>241</sup> Robert Eckhart, *Juror Jailed over Facebook Friend Request*, HERALD-TRIBUNE (Sarasota, Fla), Feb. 16, 2012, <http://www.heraldtribune.com/article/20120216/ARTICLE/120219626/2416/NEWS>.

<sup>242</sup> *Id.*

<sup>243</sup> Jameson Cook, *Judge Orders Macomb County Juror to Pay Fine, Write Essay on Sixth Amendment for Facebook Posting*, OAKLAND PRESS (Sept. 2, 2010), [http://www.theoaklandpress.com/articles/2010/09/02/news/cops\\_and\\_courts/doc4c7fa071e03eb378505628.txt?viewmode=default](http://www.theoaklandpress.com/articles/2010/09/02/news/cops_and_courts/doc4c7fa071e03eb378505628.txt?viewmode=default).

<sup>244</sup> *Id.* Macomb County Circuit Court Judge Diane Druzinski also removed the juror from the case. *Id.*; see *infra* note 254 and accompanying text.

In June 2011, a juror in a New York rape trial pleaded guilty to criminal contempt and received a \$1,000 fine after he sent two e-mails to a friend who was a prosecutor in another county, causing the judge to declare a mistrial.<sup>245</sup>

### C. Juror Removed (5)

A California judge removed a juror from a murder case after the juror posted photographs and comments criticizing fellow jurors' shoes on Facebook, prior to the start of trial.<sup>246</sup> "It is unfortunate in this day and age that things are taken so lightly, such as trial when people's lives are at stake," Judge William Froeberg said when replacing the juror with an alternate.<sup>247</sup> "It is very disappointing to me to find this out."<sup>248</sup> He also admonished the remaining jurors: "I don't want to have to deal with this again. Stay off the Internet. Don't talk about this case."<sup>249</sup>

The judge in a Colorado sexual molestation case dismissed a juror in March 2012, after she made several posts on her Facebook page complaining that the case was "boring."<sup>250</sup> The juror did not receive sanctions, and both sides agreed that the case could continue without a mistrial.<sup>251</sup>

In a 2011 Massachusetts priest rape trial, a judge removed a juror who was also editor of a local newspaper after the juror posted several tweets during the proceedings, including one stating, "Sucks that

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<sup>245</sup> Thomas Zambito, *Juror Gets \$1000 Fine for Sending Email During Rape Case, Causing Mistrial*, N.Y. DAILY NEWS (June 15, 2011), [http://articles.nydailynews.com/2011-06-15/local/29681586\\_1\\_mistrial-jury-room-buchter](http://articles.nydailynews.com/2011-06-15/local/29681586_1_mistrial-jury-room-buchter); see also *infra* notes 330-31 and accompanying text.

<sup>246</sup> *Facebooking Juror Kicked off Murder Trial*, ORANGE COUNTY REG. (Dec. 2, 2011), <http://www.ocregister.com/articles/juror-329708-trial-judge.html>.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Lance Benzel, *Juror Dismissed from Carrier Trial for Facebook Misstep*, GAZETTE.COM (Mar. 28, 2012), <http://www.gazette.com/articles/dismissed-135972-facebook-juror.html#ixzz1qdoxDCL1>.

<sup>251</sup> *Id.* (removing the juror left fifteen remaining jurors, three of whom were alternates).

you can't tweet from the jury box. What's the fun in that?"<sup>252</sup> The juror later blogged about the experience, saying, "The judicial system—at least as represented by the Berkshire Superior Court in Pittsfield, Mass.—is light years behind the curve when it comes to the role of social media in fomenting and perpetuating democracy."<sup>253</sup>

In August 2010, a Michigan judge removed a juror in a criminal trial and imposed punishment for contempt after the juror posted a message on Facebook during trial.<sup>254</sup>

A court in Wake County, North Carolina, dismissed a juror from the murder trial of Jason Young for sending text messages during voir dire.<sup>255</sup>

#### D. Verdict Affirmed (18)

A federal court in Connecticut denied posttrial motions by a defendant convicted of tax evasion.<sup>256</sup> The posttrial motions alleged that a juror's Facebook posts and "friending" of a fellow juror indicated bias, even though the juror claimed that the postings were "joking around" and did not represent his true opinions during the trial.<sup>257</sup> The court

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<sup>252</sup> Bob Gardinier, *Rape Trial of Ex-Priest Now Before Jury*, TIMESUNION.COM (Feb. 9, 2011), <http://www.timesunion.com/local/article/Rape-trial-of-ex-priest-now-before-jury-1004872.php>; see also Rosemary Armao, *Big Mouth in the Jury Box*, TIMESUNION.COM (Feb. 14, 2011), <http://blog.timesunion.com/armao/big-mouth-in-the-jury-box/286/> (asserting that the judicial system should extend more respect to the right of free speech and press).

<sup>253</sup> Seth Rogovoy, *Twitter Rubs Up Against the Judicial System*, ROGOVOY REP. (Feb. 10, 2011), <http://rogovoy.com/news1824.html>.

<sup>254</sup> Cook, *supra* note 243. Macomb County Circuit Court Judge Diane Druzinski also found the juror, Hadley Jons, guilty of contempt of court, and ordered Hadley to pay a \$250 fine and to write an essay about the constitutional right to a fair trial. *Id.*

<sup>255</sup> Anne Blythe, *Jury in Young Retrial is Now Under Investigation*, NEWSOBSERVER.COM (Mar. 7, 2012), <http://www.newsobserver.com/2012/03/07/1910896/jury-in-young-retrial-is-now-under.html>.

<sup>256</sup> *United States v. Ganas*, No. 3:08CR224(EBB), 2011 WL 4738684, at \*2-3 (D. Conn. Oct. 5, 2011).

<sup>257</sup> *Id.* (finding "Juror X" to have made the following Facebook posts: "Jury duty 2morrow [sic]. I may get 2 [sic] hang someone . . . can't wait . . ."; "Jury duty sucks"; "Guinness for lunch break. Jury duty ok today"; "Your honor, i [sic] object! This is way too boring . . . . Somebody get me outta here"; and "Guilty :) . . . I spent the

held that the defendant had “failed to demonstrate any juror bias or misconduct, let alone any prejudice.”<sup>258</sup> “In the absence of any clear, strong, substantial and incontrovertible evidence that a specific, non-speculative prejudicial impropriety existed, neither an expanded inquiry nor a new trial is warranted.”<sup>259</sup>

In a 2009 federal case in Maine, a juror in a wrongful death case sent Facebook “friend” requests to two of the plaintiffs and sent an e-mail to their attorney in which the juror said that the juror found out about the plaintiffs’ party habits through the site.<sup>260</sup> District Judge D. Brock Hornby denied a motion for a new trial after determining that the juror visited the site after deliberations and that the information did not play a role in the verdict.<sup>261</sup>

A Pennsylvania state senator on trial for federal corruption charges sought to remove a juror who had posted updates on the trial on Facebook, Twitter, and his blog during deliberations.<sup>262</sup> After an *in camera* hearing in which the juror was questioned about his general media and social media use during the trial, the court refused to remove the juror, finding that the juror

is one conscientious guy trying very much to comply with all the rules and regulations that I’ve established, more so then [sic] I would ever imagine that a juror would do. And I think that, you know, I’ve heard him and I don’t have any trouble with keeping him on the jury.<sup>263</sup>

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whole month of March in court. I do believe justice prevailed! It was no cake walk getting to the end. I am glad it is over and I have a new experience under my belt!”).

<sup>258</sup> *Id.* at \*4.

<sup>259</sup> *Id.*

<sup>260</sup> *Wilgus v. F/V Sirius, Inc.*, 665 F. Supp. 2d 23, 24-26 (D. Me. 2009).

<sup>261</sup> *Id.* at 27-28 (denying plaintiffs’ motion for new trial).

<sup>262</sup> *United States v. Fumo*, No. 06-319, 2009 WL 1688482, at \*58 (E.D. Pa. June 17, 2009) (“[A] local television station reported on Internet postings made by one of the jurors” who “coincidentally happened to be watching this newscast and ‘panicked’ by deleting the relevant comments from his Facebook page.”).

<sup>263</sup> *Id.* (quoting transcript of *in camera* hearing on Mar. 16, 2009).

The defense objected but was overruled.<sup>264</sup> After the senator was convicted, he moved for a new trial on this and other grounds.<sup>265</sup> The court denied the motion, finding that the defendant had not shown any outside influence on the juror that could have affected the verdict.<sup>266</sup> Shortly after the judge denied the new trial motion, *Philadelphia Magazine* reported that the jurors heard about the questions regarding the Internet postings.<sup>267</sup> This led the defense to renew its motion for a new trial, which the court similarly denied.<sup>268</sup> The Third Circuit affirmed.<sup>269</sup>

After an Arkansas jury awarded \$12.6 million to Stoam Holdings, Inc.'s opponent in a fraud case, Stoam Holdings, Inc. sought a new trial when its attorneys discovered that one juror had posted eight tweets during voir dire and trial.<sup>270</sup> One of the tweets was, “[O]h and nobody buy Stoam. Its bad mojo [sic] and they’ll probably cease to [e]xist, now that their wallet is 12m lighter,” and another said, “I just gave away TWELVE MILLION DOLLARS of somebody else’s money.”<sup>271</sup> The court denied the motion, holding that the tweets did not show juror bias.<sup>272</sup>

In June 2007, a California Court of Appeals panel reversed a trial court’s refusal to grant a motion by a defendant convicted of burglary to contact the jurors after the verdict when the jury foreman—an attorney who had identified himself as a “project manager” during voir dire—discussed the jury’s deliberations in the case on his blog, including disparaging the defendant as “Donald the Duck.”<sup>273</sup> After discover-

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at \*67.

<sup>267</sup> Ralph Cipriano, *Power: Fumo, After the Fall*, PHILA. MAG., August 2009, at 42, available at <http://www.phillymag.com/articles/power-vince-fumo-after-the-fall/>.

<sup>268</sup> *United States v. Fumo*, 639 F. Supp. 2d 544, 547-48, 560 (E.D. Pa. 2009).

<sup>269</sup> *United States v. Fumo*, 655 F.3d 288, 305-07 (3d Cir. 2011).

<sup>270</sup> Jon Gambrell, *Appeal Says Juror Sent ‘Tweets’ During 12.6M Case*, ASSOCIATED PRESS, Mar. 13, 2009.

<sup>271</sup> *Id.*

<sup>272</sup> John G. Browning, *When All That Twitters Is Not Told: Dangers of the Online Juror*, 73 TEX. B.J. 216, 219 (2010).

<sup>273</sup> *People v. McNeely*, No. D048692, 2007 WL 1723711, at \*1, \*3 (Cal. Ct. App. June 14, 2007), *reh’g denied*, (Cal. Ct. App. July 3, 2007), *review denied*, No. S154577 (Cal. Sept. 12, 2007); *see also Blogging Jurors, Part I: The Bad (Or, the*

ing the posts, the defense questioned the jurors who did not object to being contacted, but ultimately the defense did not obtain any useful information.<sup>274</sup> Regardless, the defendant renewed his motion for a new trial.<sup>275</sup> The trial court denied this motion, and the appeals court affirmed in February 2009 on the grounds that “[u]nder the totality of the circumstances shown by this record, . . . we conclude the evidence does not raise a ‘substantial likelihood’ that Juror No. 8 (or any other juror) was actually biased against [the defendant].”<sup>276</sup>

Another California appellate decision in 2009 affirmed a trial court’s denial of a new trial motion in a murder case, even though the court found that a juror had blogged extensively about the case during the trial.<sup>277</sup> One of the posts included information from Wikipedia on the difference between medical examiners and coroners, but the juror/ blogger denied that this information affected his opinion of the defendant’s guilt or innocence.<sup>278</sup> “Although Juror W. indisputably discussed the case while the matter was pending in violation of the court’s admonition, and thereby committed misconduct,” the appeals court concluded, “none of the discussions were directed at appellant or the substance of the case against him.”<sup>279</sup>

A Florida judge declined to overturn a conviction of armed robbery in 2012 after a juror on his case, film director Billy Corben, sent fourteen tweets and posted five Facebook messages during jury selection and trial.<sup>280</sup> The messages did not mention anything about the case

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*Burglary Trial as Legal Thriller*), DELIBERATIONS (June 19, 2007), [http://jurylaw.typepad.com/deliberations/2007/06/blogging\\_jurors.html](http://jurylaw.typepad.com/deliberations/2007/06/blogging_jurors.html); Grimm, *supra* note 171.

<sup>274</sup> *People v. McNeely*, No. D052606, 2009 WL 428561, at \*2-3 (Cal. Ct. App. Feb. 23, 2009) *review denied*, No. S171530 (Cal. May 20, 2009).

<sup>275</sup> *Id.* at \*1.

<sup>276</sup> *Id.* at \*1, \*7. In a subsequent disciplinary proceeding, the court suspended the attorney from practice for eighteen months. See Hoffmeister, *supra* note 24, at 434 & n.173; *Attorney Discipline*, CAL. B.J., Aug. 2009, available at <http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=96182&categoryId=96044&month=8&year=2009> (listing Frank Russell Wilson [#185591] as being suspended on January 23, 2009).

<sup>277</sup> *People v. Ortiz*, 2d Crim. No. B205674, 2009 WL 3211030, at \*4, \*9 (Cal. Ct. App. Oct. 8, 2009).

<sup>278</sup> *Id.* at \*4.

<sup>279</sup> *Id.* at \*6.

<sup>280</sup> See David Ovalle, *Florida City Man Wants New Trial Because of Filmmaker Juror’s Tweets*, MIAMI HERALD, Apr. 23, 2012 [hereinafter Ovalle, *Florida City Man*

Corben was sitting on, instead talking about the courthouse, the poor Internet access, and the bad food.<sup>281</sup> One of Corben's friends on Facebook wrote in response, "We'll make sure you put the bad guy away!"<sup>282</sup>

The Illinois Court of Appeals upheld the trial court's refusal to hold an evidentiary hearing on the issue of juror misconduct when it ruled that a juror's prolific blogging about a wrongful death case did not indicate that the jury was exposed to extrinsic information or deliberated prematurely.<sup>283</sup>

The Indiana Supreme Court adopted new rules regarding juror use of the Internet after it considered a case in which a juror took a cell phone call during deliberations.<sup>284</sup> While the court denied a new trial in the case, it recognized the problem that jurors' use of electronic devices

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*Wants New Trial*], <http://www.miamiherald.com/2012/04/23/2764287/florida-city-man-wants-new-trial.html>; David Ovalle, *Miami Filmmaker's Tweets Won't Result in New Robbery Trial, Judge Rules*, MIAMI HERALD, June 13, 2012 [hereinafter Ovalle, *Judge Rules*], <http://www.miamiherald.com/2012/06/13/2847354/miami-filmmakers-tweets-wont-result.html>.

<sup>281</sup> Ciara LaVelle, *Rakontur Filmmaker Billy Corben's Tweets Could Negate Local Man's Armed Robbery Conviction*, MIAMI NEW TIMES (Apr. 24, 2012), [http://blogs.miaminewtimes.com/cultist/2012/04/rakontur\\_director\\_billy\\_corben.php](http://blogs.miaminewtimes.com/cultist/2012/04/rakontur_director_billy_corben.php) ("[Corben's] tweets focused on the type of mundane details most tweets do: what Corben had for lunch (bistec with rice and beans), and what happened to be annoying him at the moment (the courthouse's slow WiFi connection and sole functioning elevator)."); Ovalle, *Florida City Man Wants New Trial*, *supra* note 280.

<sup>282</sup> Ovalle, *Florida City Man Wants New Trial*, *supra* note 280.

<sup>283</sup> *Eskew v. Burlington N. & Santa Fe Ry. Co.*, 958 N.E.2d 426, 444-47 (Ill. App. Ct. 2011), *appeal denied*, 963 N.E.2d 245 (Ill. Jan. 25, 2012) (table decision); *see also* Keith Ecker, *Juror Use of Social Media, Blogs Compromise Cases*, LAWYERS.COM (Dec. 2, 2011), <http://blogs.lawyers.com/2011/12/juror-use-of-social-media-blogs-compromises-cases/> (noting one of the juror's blog posts read, "The last witness for the plaintiff was the plaintiff herself, the widow of the allegedly wrongfully dead guy . . . [,] [and] [a]t times during her testimony, there were tears rolling down the face of the juror sitting in front of me . . . ."); Ameet Sachdev, *Cracking Down on Courtroom Networking*, CHI. TRIB., Oct. 30, 2011, [http://articles.chicagotribune.com/2011-10-30/business/ct-biz-1030-jurors-wild-20111030\\_1\\_fellow-jurors-jury-service-jury-instructions](http://articles.chicagotribune.com/2011-10-30/business/ct-biz-1030-jurors-wild-20111030_1_fellow-jurors-jury-service-jury-instructions) (noting one of the juror's blog posts read, "We spend our time in the jury room trying—but not succeeding—to NOT talk about the case.").

<sup>284</sup> *Henri v. Curto*, 908 N.E.2d 196, 202-03 (Ind. 2009), *vacating* 891 N.E.2d 135 (Ind. Ct. App. 2008).

poses and recommended that trial courts act to limit or prohibit use of such devices during trial.<sup>285</sup>

[The plaintiff, who lost at trial] presented her claim of error due to the juror's cell phone use in her motion to correct error. It was denied by the trial court, which concluded that "[n]othing about these events comprise[s] misconduct in any form." On appeal, Ms. Henri has not established that the alleged receipt of a cell phone call with the apparent approval of the bailiff constituted misconduct, and has shown neither gross misconduct nor probable harm. Reversal and a new trial are not warranted on this issue.

We additionally observe that permitting jurors, other trial participants, and observers to retain or access mobile telephones or other electronic communication devices, while undoubtedly often helpful and convenient, is fraught with significant potential problems impacting the fair administration of justice. These include the disclosure of confidential proceedings or deliberations; a juror's receiving improper information or otherwise being influenced; and a witness's or juror's distraction or preoccupation with family, employment, school, or business concerns. These and other detrimental factors are magnified due to swift advances in technology that may enable a cell phone user to engage in text messaging, social networking, web access, voice recording, and photo and video camera capabilities, among others. The best practice is for trial courts to discourage, restrict, prohibit, or prevent access to mobile electronic communication devices by all persons except officers of the court during all trial proceedings, and particularly by jurors during jury deliberation.<sup>286</sup>

In 2011, the Kansas Court of Appeals affirmed a trial court's denial of a mistrial based on juror misconduct after a juror appeared to

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<sup>285</sup> *Id.* at 203.

<sup>286</sup> *Id.* at 202-03 (citation omitted).

be sending text messages from the jury box during a trial that ended in a conviction for aggravated burglary and attempted aggravated robbery.<sup>287</sup> The trial judge did not question the juror and denied the motion because no one had actually observed the juror texting during trial, although the bailiff had seen the juror texting during jury selection.<sup>288</sup> The appeals court held that while “it may have been the better practice for the trial court to have made the inquiries, we are unable to conclude that no reasonable person would take the view adopted by the district court.”<sup>289</sup> Thus, the appeals court concluded, “The trial court did not abuse its discretion in denying [the defendant’s] motion for a mistrial on the basis of juror misconduct.”<sup>290</sup> The court then recommended that courts in Kansas adopt jury rules like those in Indiana, which ban electronic devices,<sup>291</sup> and that the state’s jury instructions should specifically mention various forms of modern electronic communications, as they do in New York.<sup>292</sup>

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<sup>287</sup> State v. Mitchell, 252 P.3d 586, 589-90, 597 (Kan. Ct. App. 2011), *review denied*, (Kan. Ct. App. 2011).

<sup>288</sup> As the Kansas Court of Appeals related:

Defense counsel stated that he observed the juror slumped down in her seat below the rail in front of the jury box, but that he did not know what she was doing. He said he moved for a mistrial “grudgingly, because [he] favored this jury” and that he was “satisfied with the other jurors,” who had “been attentive and participated fully in the case.”

The prosecutor stated that she did not notice the juror texting, but that she did not look at the jury during trial. She added, “So I don’t know if you want to bring her out here and ask her or what.” The judge noted that his bailiff had advised him that juror number one was texting during jury selection, and that he had noticed the juror’s hands were below the rail and that her focus was down towards her lap during the first day of the trial, although the judge could not see if the juror was text messaging.

*Id.* at 595.

<sup>289</sup> *Id.* at 590.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*; see also IND. JURY R. 20(b) (2010), available at [http://www.in.gov/judiciary/rules/jury/#\\_Toc243295750](http://www.in.gov/judiciary/rules/jury/#_Toc243295750) (banning juror use of all electronic communications devices); IND. JURY R. 26(b) (2010), available at [http://www.in.gov/judiciary/rules/jury/#\\_Toc243295756](http://www.in.gov/judiciary/rules/jury/#_Toc243295756) (providing for the court to collect electronic devices from jurors during deliberations).

<sup>292</sup> The court referred to “the general instruction on juror communication” but did not otherwise specify which Kansas instruction should be amended. *Mitchell*, 252 P.3d at 591. Presumably the court was referring to Pattern Inst. Kan. - Civil § 101.10 (2008),

In the midst of the prosecution's case in a Massachusetts rape trial, a juror posted the following message on an Internet listserv stating that she was "stuck in a 7 day-long Jury Duty rape/assault case . . . missing important time in the gym, working more hours and getting less pay because of it! Just say he's guilty and lets [sic] get on with our lives!"<sup>293</sup> Two members of the listserv responded; one was an attorney in New York who wrote that the message was inappropriate and recommended that the juror inform the judge of the situation.<sup>294</sup> The juror did not inform the judge in the rape case, but the New York attorney informed defense counsel.<sup>295</sup> The trial court initially denied a defense motion for post-verdict voir dire of the jury, but the appeals court reversed this decision.<sup>296</sup> On remand, the trial court questioned the juror and determined that "there is nothing in the evidence before the Court to indicate that [the juror] was ever at any time exposed to any extraneous matters' and that 'there is no basis for any further action in this matter.'"<sup>297</sup> The Supreme Judicial Court remanded again, ordering the trial judge to conduct a more probing investigation.<sup>298</sup> The judge again reached the same conclusion, and the appeals court affirmed.<sup>299</sup>

In *Commonwealth v. Werner*, the Massachusetts Court of Appeals affirmed the trial court's denial of a new trial motion following a larceny conviction when defense counsel discovered after trial that two jurors had posted messages on Facebook during jury selection.<sup>300</sup> The court upheld the denial even though Facebook had not responded to a request for all the jurors' postings during trial when the trial judge de-

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which did not contain such specific references and was amended in 2010. The court based its recommendation to adopt the New York language on a description of the New York changes in *People v. Jamison*, No. 8042/06, 899 N.Y.S.2d 62, at \*6 (Sup. Ct. Aug. 18, 2009) (unpublished table decision). See *Mitchell*, 252 P.3d at 591. The New York rule is N.Y. CRIM. JURY INSTR. 2d, Jury Admonitions in Preliminary Instructions (revised May 5, 2009), [http://www.nycourts.gov/cji/1-General/CJI2d.Jury\\_Admonitions.pdf](http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf).

<sup>293</sup> *Commonwealth v. Guisti*, 747 N.E.2d 673, 678 (Mass. 2001).

<sup>294</sup> *Id.* at 678 & n.6.

<sup>295</sup> *Id.* at 678 nn.6 & 7.

<sup>296</sup> *Id.* at 675-76.

<sup>297</sup> *Commonwealth v. Guisti*, 867 N.E.2d 740, 741 (Mass. 2007).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 742.

<sup>300</sup> *Commonwealth v. Werner*, 967 N.E.2d 159, 161 (Mass. App. Ct. 2012). The Facebook postings mainly lamented their selection for jury duty. *Id.* at 162-63.

nied the motion.<sup>301</sup> The jurors had posted to Facebook despite the trial judge's admonition against discussing or researching the case online, leading the appeals court to suggest that "[m]ore explicit instructions about the use of social media and the Internet may therefore be required."<sup>302</sup>

In 2006, the New Hampshire Supreme Court rejected a rape convict's appeal on the grounds that a juror's four blog posts violated the defendant's right to an impartial jury.<sup>303</sup> One of the comments mentioned the juror's upcoming jury duty ("Lucky me, I have Jury Duty! Like my life doesn't already have enough civic participation in it, now I get to listen to the local riff-raff try and convince me of their innocence"),<sup>304</sup> while the other comments generally conveyed the juror's opinions regarding the police, drunk driving, and the death penalty for juveniles.<sup>305</sup>

The trial court's individual *voir dire* of Juror 2 was comprehensive and thorough. . . . The trial court concluded that Juror 2 fairly and impartially reviewed the evidence and applied the law as instructed and was, therefore, qualified to sit on the jury panel. We cannot say that the trial court's findings are against the weight of the evidence.

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<sup>301</sup> *Id.* at 163, 166.

<sup>302</sup> *Id.* at 168.

<sup>303</sup> *State v. Goupil*, 908 A.2d 1256, 1260, 1262-63 (N.H. 2006).

<sup>304</sup> *Id.* at 1262.

<sup>305</sup> *Id.* at 1262-63. As described by the court,

Once he was seated on the defendant's jury, but prior to the start of the trial, Juror 2 wrote: 'After sitting through 2 days of jury questioning, I was surprised to find that I was not booted due to any strong beliefs I had about police, God, etc.' Prior to trial, Juror 2 also posted: (1) a photograph depicting a woman's deformed face after she was hit by a drunk driver; and (2) a statement containing his views on a United States Supreme Court decision ruling against the death penalty for juveniles. [*See Roper v. Simmons*, 543 U.S. 551 (2005) (dealing with juveniles and the death penalty).] During the defendant's trial, Juror 2 made a blog entry that referenced an unrelated shooting incident in Atlanta.

*Id.*

Moreover, the record supports the trial court's determination that the remaining jurors were not affected by the existence of Juror 2's blog.<sup>306</sup>

A federal court later rejected the defendant's habeas corpus petition based on a similar argument regarding the juror's blog postings.<sup>307</sup>

In 2009, a New York trial court denied a defense motion to set aside a guilty verdict in a rape case based on a juror who conducted Internet research on the defense attorney and who also discussed the case with others during trial.<sup>308</sup>

In a 2010 New York case, a juror sent a "friend" request on Facebook to a fireman who testified in the case in which she was sitting.<sup>309</sup> While the trial judge called the juror's action "unquestionably a serious breach of her obligations as a juror and a clear violation of the court's instructions," she rejected a defense motion to set aside convictions for criminally negligent homicide and reckless endangerment on that basis.<sup>310</sup>

A man convicted in Ohio of drowning his wife in a bathtub sought a new trial in March 2011, arguing, among other errors, that during the trial the sister of a juror had "liked" a Facebook page supporting his conviction, which caused it to appear in the "newsfeed" of the juror's Facebook home page.<sup>311</sup> He also argued that the juror's

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<sup>306</sup> *Id.* at 1267.

<sup>307</sup> *See* Goupil v. Cattell, No. 07-cv-58-SM, 2008 WL 544863, at \*1 (D.N.H. Feb. 26, 2008).

<sup>308</sup> *People v. Jamison*, No. 8042/06, 899 N.Y.S.2d 62, at \*6 (Sup. Ct. Aug. 18, 2009) (unpublished table decision). Among the outsiders with whom the juror discussed the case was an attorney, who reported the incident to the court. *Id.* at \*2-3.

<sup>309</sup> *People v. Rios*, No. 1200/06, 907 N.Y.S.2d 440, at \*3 (Sup. Ct. Feb. 23, 2010) (unpublished table decision).

<sup>310</sup> *Id.* at \*3-4 (setting aside convictions on other grounds); *see also* Denise Buffa, *Black Sunday Juror Could Get Case Tossed*, N.Y. POST, July 30, 2009, [http://www.nypost.com/p/news/regional/bronx/item\\_ZpS0zlwkr7N9o3ufLwGM7I](http://www.nypost.com/p/news/regional/bronx/item_ZpS0zlwkr7N9o3ufLwGM7I).

<sup>311</sup> Jessica Noll, *Widmer Defense: Juror Exposed to Anti-Widmer Facebook Page*, WCPO.COM (Mar. 23, 2011), <http://www.wcpo.com/dpp/news/widmer-defense%3A-juror-exposed-to-anti-widmer-facebook-page->. If granted, the new trial would have been the fourth in the case. *Id.* On appeal, the court vacated the conviction from the first trial after discovering that several jurors had conducted experiments to test some

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posting of a video featuring a bathtub on her Facebook page was also evidence of misconduct.<sup>312</sup> The juror denied this, saying in an affidavit that:

I followed the Court's instructions and did not communicate any information about the case or do any research. I avoided reading any information about the case from any source, including social media, electronic communications, the Internet or any other media. . . . To my knowledge and understanding, I complied with Judge Bronson's instructions and did not form or express any opinions about the case, until the jury began deliberations.<sup>313</sup>

The court denied the motion for a new trial.<sup>314</sup>

One day after a Wake County, North Carolina, jury found Jason Young guilty of murdering his wife in 2006 (in a retrial after a previous jury deadlocked), WRAL-TV informed the judge in the case that user postings on its Facebook page alleged that a juror was sending text messages during deliberations.<sup>315</sup> Despite concluding that the Facebook postings "lack any credible factual basis," Judge Donald Stephens nevertheless referred the allegations to the State Bureau of Investigation.<sup>316</sup>

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of the factors in the case. *Id.*; see also Denise G. Callahan, *Defense Asks Judge to Acquit Ryan Widmer*, DAYTON DAILY NEWS (Mar. 5, 2011), <http://www.daytondailynews.com/news/dayton-news/defense-asks-judge-to-acquit-ryan-widmer-1097620.html>. The second trial ended in a hung jury. *Id.*

<sup>312</sup> Noll, *supra* note 311.

<sup>313</sup> *Id.*

<sup>314</sup> Case Docket, State v. Widmer, No. 08CR25254 (Ohio C.P. Ct., Warren Cnty. Mar. 25, 2011), available at <http://www.co.warren.oh.us/clerkofcourt> (follow "Court Case Inquiry" hyperlink; then enter "08CR25254" into "Case Reference Number" query; then submit query) (denying motion for new trial). The defendant has filed an appeal of his conviction. State v. Widmer, No. 2012-02-008 (Ohio Ct. App. filed Feb. 1, 2012), available at <http://www.co.warren.oh.us/clerkofcourt> (follow "Court Case Inquiry" hyperlink; then enter "2012-02-008" into "Case Reference Number" query; then submit query).

<sup>315</sup> Blythe, *supra* note 255.

<sup>316</sup> *Id.*

After the investigation, Judge Stephens concluded that there was no evidence of juror misconduct and allowed the jury verdict to stand.<sup>317</sup>

In a 2010 Washington state trial, the man convicted of murdering Mark Stover, who was a “dog whisperer” with celebrity clients including Starbucks founder Howard Schultz, ballplayer Ichiro Suzuki, and musician Eddie Vedder, filed a motion for a new trial, citing the twenty tweets that one juror posted during the trial.<sup>318</sup> The court found that the tweets—which included one on “cake in the jury room”—were not substantive and did not affect the verdict.<sup>319</sup> The defendant said he would appeal this ruling.<sup>320</sup>

### *E. Mistrial / Verdict Vacated (5)*

The Arkansas Supreme Court reversed a murder conviction—and death sentence—in a case where one juror tweeted during trial, while another fell asleep.<sup>321</sup> Both these problems, the court said, constituted juror misconduct requiring reversal and a new trial.<sup>322</sup> The court was particularly concerned about one of the juror’s tweets, “Its over,” sent fifty minutes before the jury informed the court that it had agreed on a sentence.<sup>323</sup> The court stated that as a result of this tweet, followers of the juror’s Twitter feed—including at least one journalist (with the online magazine *Ozarks Unbound*)—“had advance notice that the jury had completed its sentencing deliberations before an official an-

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<sup>317</sup> Judge: *No Jury Misconduct in Young Trial*, NEWSOBSERVER.COM (May 18, 2012), <http://www.newsobserver.com/2012/05/18/2071283/sbi-judge-internet-jury-gossip.html>; see Blythe, *supra* note 255 and accompanying text.

<sup>318</sup> Rick Anderson, *Michiel Oakes’ Twitter Defense*, SEATTLE WKLY., May 16, 2012, <http://www.seattleweekly.com/2012-05-16/news/michiel-oakes-twitter-defense/>.

<sup>319</sup> Rick Anderson, *Twitter Defense: Michiel Oakes, Killer of Dog Whisperer Mark Stover, Loses Bid for New Trial*, SEATTLE WKLY., July 27, 2012, [http://blogs.seattleweekly.com/dailyweekly/2012/07/twitter\\_defense\\_michiel\\_oakes.php](http://blogs.seattleweekly.com/dailyweekly/2012/07/twitter_defense_michiel_oakes.php).

<sup>320</sup> *Id.*

<sup>321</sup> *Dimas-Martinez v. State*, 2011 Ark. 515, at \*1, \*5 (Ark. Dec. 8, 2011); see also Steve Eder, *Jurors’ Tweets Upend Trials*, WALL ST. J., Mar. 5, 2012, <http://online.wsj.com/article/SB10001424052970204571404577255532262181656.html>.

<sup>322</sup> *Dimas-Martinez*, 2011 Ark. at \*5.

<sup>323</sup> *Id.* at \*15.

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nouncement was made to the court.”<sup>324</sup> The defendant later pled guilty, avoiding the death penalty.<sup>325</sup>

A Florida court declared a mistrial in a fraud case after someone reported seeing a sheriff’s deputy speaking to the jurors during a break in deliberations, and jurors admitted that they sent text messages and made calls on their cell phones.<sup>326</sup>

Another court in Florida threw out the conviction of a police officer for rape after discovering that a juror had looked up “rape trauma syndrome” and “sexual assault” on Wikipedia and brought printouts of the articles into the jury room.<sup>327</sup> “I didn’t read about the case in the newspaper or watch anything on TV,” the juror told the judge at a hearing on the matter.<sup>328</sup> “To me, I was just looking up a phrase.”<sup>329</sup>

The judge in a 2011 New York rape trial declared a mistrial after a juror was found to have sent two e-mails to a friend who was a prosecutor in another county.<sup>330</sup> The first e-mail, with the subject, “Juror #5 reporting to you live,” described the physical conditions of the jury de-

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<sup>324</sup> *Id.* at \*16-17.

<sup>325</sup> Larry Henry, *Dimas-Martinez Avoids Death, Gets Life Without Parole*, 5NEWS (KFSSM-TV/KXNW-TV) (July 15, 2012, 3:34am), <http://5news.com/2012/07/13/erickson-dimas-martinez-gets-life-without-parole/>.

<sup>326</sup> Melissa E. Holsman, *Facebook Poem Gets Prosecutor in Hot Water*, SUN SENTINEL (Fort Lauderdale, Fla.), Apr. 22, 2010, [http://articles.sun-sentinel.com/2010-04-22/news/fl-facebook-poem-ada-20100422\\_1\\_jurors-trial-facebook](http://articles.sun-sentinel.com/2010-04-22/news/fl-facebook-poem-ada-20100422_1_jurors-trial-facebook). One of the prosecutors also posted a poem about the trial to his Facebook page, meant to be sung to the tune of the “Gilligan’s Island” television theme, although this was not a basis for the mistrial. *Id.*

<sup>327</sup> Susannah Bryan, *Davie Police Officer Convicted of Drugging, Raping Family Member to Get New Trial*, SUN SENTINEL (Fort Lauderdale, Fla.), Dec. 16, 2010, [http://articles.sun-sentinel.com/2010-12-16/news/fl-davie-cop-jurors-query-20101215\\_1\\_olenchak-penile-penetration-new-trial](http://articles.sun-sentinel.com/2010-12-16/news/fl-davie-cop-jurors-query-20101215_1_olenchak-penile-penetration-new-trial).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> See *supra* note 245 and accompanying text; see also Thomas Zambito, *Judge Declares Mistrial in Rape After Juror’s Email Ridicules ‘Doubting Thomases’ on the Jury*, N.Y. DAILY NEWS (June 9, 2011), [http://articles.nydailynews.com/2011-06-09/news/29654981\\_1\\_reasonable-doubt-queens-prosecutors-mistrial](http://articles.nydailynews.com/2011-06-09/news/29654981_1_reasonable-doubt-queens-prosecutors-mistrial).

liberation room.<sup>331</sup> The second said that the jury was deadlocked five to seven in favor of acquittal.<sup>332</sup>

In June 2010, the West Virginia Supreme Court reversed the conviction of a deputy sheriff for misconduct regarding grants he administered and ordered a new trial based on the fact that a juror in the case had not disclosed her online “friendships” with the defendant.<sup>333</sup>

The juror and the defendant had formerly lived in the same apartment complex, and approximately one week before trial—after the juror had been summoned for jury duty but had not yet appeared—the juror, using a pseudonym, sent a message of encouragement to the defendant on MySpace then invited the defendant to become her “friend” on the site, which he accepted.<sup>334</sup> Then, during trial, the juror posted the following message to her MySpace page, visible to all her “friends” on the site: “Amber Just got home from Court and getting ready to get James and Head to church! Then back to court in the morning!”<sup>335</sup>

The juror failed to disclose this relationship during voir dire.<sup>336</sup> When the trial judge subsequently asked the juror why she did not do so, the juror said, “I just didn’t feel like I really knew him. I didn’t know him personally.”<sup>337</sup> In a subsequent interview, the juror explained, “Maybe I should have said he was on my MySpace page, but

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<sup>331</sup> *Zambito*, *supra* note 245.

<sup>332</sup> *Id.*

<sup>333</sup> *State v. Dellinger*, 696 S.E.2d 38, 44 (W. Va. 2010).

<sup>334</sup> *Id.* at 40. The message that the juror sent to the defendant was the following:

Hey, I dont [sic] know you very well But I think you could use some advice! I havent [sic] been in your shoes for a long time but I can tell ya [sic] that God has a plan for you and your life. You might not understand why you are hurting right now but when you look back on it, it will make perfect sence [sic]. I know it is hard but just remember that God is perfect and has the most perfect plan for your life. Talk soon!

*Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 41.

<sup>337</sup> *Id.*

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then I thought to myself, I really don't know him, so I'm really not lying."<sup>338</sup>

The juror's MySpace activities were discovered after the defendant was convicted, and the defendant filed a motion for a new trial.<sup>339</sup> In denying the motion, the trial court found that the juror's "contact with [Appellant] was minimal, and she was a fair and impartial juror."<sup>340</sup>

But the West Virginia Supreme Court of Appeals disagreed.<sup>341</sup>

[A]s demonstrated by the facts set forth above, Juror Hyre intentionally and repeatedly failed to be forthcoming about her connections to Appellant and witnesses Frame and Slaughter, arguably, in order to improve her chances of serving on Appellant's jury. Whatever her reasons for doing so, she cannot be considered to have been indifferent or unbiased. Accordingly, we find that the trial court abused its discretion in denying Appellant's motion for new trial.<sup>342</sup>

In a footnote, the appeals court stated that a general instruction to jurors regarding use of social media may be prudent<sup>343</sup>: "[W]e also believe some cautionary words are warranted concerning the prominent presence of the internet and routine use of and dependence upon various technologies by everyday Americans called to jury service."<sup>344</sup> As an

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<sup>338</sup> Ryan Flinn, *Facebook Is Tool for Trial Lawyers Scouring Juror Profiles to Unearth Bias*, BLOOMBERG, Mar. 30, 2011, <http://www.bloomberg.com/news/2011-03-31/trial-lawyers-scour-jury-members-profiles-on-facebook-twitter.html>.

<sup>339</sup> *Id.*

<sup>340</sup> *Dellinger*, 696 S.E.2d at 41.

<sup>341</sup> The appeals court did not disagree with the trial court regarding the juror's Facebook comment. "Though this Court does not condone any communication about a case by a sitting juror, we agree with the trial court's apparent finding that Juror Hyre's posting was benign in nature. We believe that, standing alone, it was not sufficient to find that she engaged in juror misconduct." *Id.* at 45 n.11.

<sup>342</sup> *Id.* at 44.

<sup>343</sup> *Id.* at 45 n.11.

<sup>344</sup> *Id.*

example, the court cited the instruction proposed by the U.S. Judicial Conference.<sup>345</sup>

### F. *Other (1)*

In February 2011, a California trial court judge, after determining that a jury foreman had been posting updates to Facebook during a criminal gang beating trial, ordered the foreman to authorize Facebook to make the postings available to the judge for his review.<sup>346</sup> The foreman appealed, and the California Supreme Court vacated the Court of Appeals's refusal to act on the validity of the trial court's order.<sup>347</sup> In response, on May 31, 2012, the California Court of Appeals denied the foreman's petition for a writ of prohibition, allowing the judge to examine the Facebook postings, saying that such an action would not violate the juror's privacy.<sup>348</sup> The foreman filed a second appeal to the

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<sup>345</sup> *Id.*

<sup>346</sup> See Chris Welty, *Calif. Juror Ordered to Turn Over Facebook Posts*, KATC (Feb. 6, 2011), <http://www.katc.com/news/calif-juror-ordered-to-turn-over-facebook-posts/>. Facebook had refused to honor the trial court's subpoena for the posts, which led the judge to consider holding the company in contempt. See Rachel Costello, *Court Denies Juror's Request to Keep Facebook Post Private*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Feb. 11, 2011), <http://www.rcfp.org/newsitems/index.php?i=11705>; Andy Furillo, *Facebook's off the Hook, but Juror Posting Case Could Go Far*, MERCED SUN-STAR, Apr. 1, 2011, [http://www.mercedsunstar.com/2011/04/02/1835953\\_hed-here.html](http://www.mercedsunstar.com/2011/04/02/1835953_hed-here.html).

<sup>347</sup> *Juror Number One v. Super. Ct. of Sacramento Cnty.*, No. C067309 (Cal. Ct. App. Feb. 10, 2011), available at <http://www.courts.ca.gov/opinions/documents/C067309.PDF> (denying petition), *vacated*, No. S190544 (Cal. Mar. 30, 2011) (vacating the appeals court's denial of the petition to prohibit the order requiring disclosure and remanding with directions to issue an order directing the superior court to show cause why the relief sought in the petition should not be granted). The juror also filed a federal lawsuit to stop the disclosure on privacy grounds, but the federal court declined to intervene. See *Juror Number One v. State*, Civ. No. 11-397 (E.D. Cal. Feb. 14, 2011) (order denying temporary restraining order). For a complete narrative of the facts of these cases, see Pamela MacLean, *Jurors Gone Wild*, CAL. LAWYER, Apr. 2011, available at <http://www.krollontrack.com/publications/california-lawyer-clip-1.pdf>.

<sup>348</sup> *Juror Number One v. Super. Ct.*, 142 Cal. Rptr. 3d 151 (Cal. Ct. App. 2012).

California Supreme Court, which denied review.<sup>349</sup> The foreman then sought relief in federal court.<sup>350</sup>

In the 2009 corruption trial of Baltimore Mayor Sheila Dixon, a jury convicted Dixon in Maryland state court.<sup>351</sup> However, the defense sought a new trial after discovering that during the trial five of the jurors in the case had become friends and discussed the case on Facebook.<sup>352</sup> The issue became moot after the case ended in a plea deal that required Mayor Dixon's resignation.<sup>353</sup>

## VII. COURTS' REACTIONS TO WIRED JURORS

The scope of information now available online—and the ubiquity of rapid, easy access to that information—presents a serious test to courts' entrenched rules and procedures.<sup>354</sup> In the past, courts could control—or, at least, restrict to a reasonable degree—the information that jurors were exposed to and the interactions jurors had during trial.<sup>355</sup> Thus, courts were able to adopt and enforce rules and procedures meant to ensure that jurors maintained impartiality about the cases they were deciding and that jurors decided cases based only on the vetted information the parties presented in court.<sup>356</sup>

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<sup>349</sup> See Associated Press, *Calif. Court Halts Order for Juror Facebook Posts*, U-T SAN DIEGO (July 3, 2012), <http://www.utsandiego.com/news/2012/jul/03/calif-court-halts-order-for-juror-facebook-posts/>.

<sup>350</sup> See *Juror Number One v. California*, Civ. No. 12-2199 (E.D. Cal. complaint filed Aug. 23, 2012) (complaint available at <http://www.courthousenews.com/2012/08/24/Juror.pdf>); see also Annie Youderian, *Juror Seeks to Shield Facebook Trial Postings*, COURTHOUSE NEWS SERVICE (Aug. 24, 2012), <http://www.courthousenews.com/2012/08/24/49627.htm>.

<sup>351</sup> Indictment, *State v. Dixon*, No. 109009009, 2008 WL 5485633 (Md. Cir. Ct. filed Jan. 9, 2009).

<sup>352</sup> Julie Bykowicz, *5 Dixon Jurors Recalled as Witnesses*, BALTIMORE SUN, Dec. 30, 2009, [http://articles.baltimoresun.com/2009-12-30/news/bal-md.dixon30dec30\\_1\\_juror-misconduct-new-trial-arnold-m-weiner](http://articles.baltimoresun.com/2009-12-30/news/bal-md.dixon30dec30_1_juror-misconduct-new-trial-arnold-m-weiner).

<sup>353</sup> Julie Bykowicz, *Dixon Resigns*, BALTIMORE SUN, Jan. 7, 2010, [http://articles.baltimoresun.com/2010-01-07/news/bal-md.plea07jan07\\_1\\_city-council-presidency-baltimore-mayor-sheila-dixon-new-mayor](http://articles.baltimoresun.com/2010-01-07/news/bal-md.plea07jan07_1_city-council-presidency-baltimore-mayor-sheila-dixon-new-mayor).

<sup>354</sup> See *supra* notes 11-15 and accompanying text.

<sup>355</sup> See *supra* notes 20-26 and accompanying text.

<sup>356</sup> See *Patterson v. Colorado ex rel. Att'y Gen.*, 205 U.S. 454, 462 (1907) (“The theory of our system is that the conclusions to be reached in a case will be induced

As these rules and procedures became entrenched, courts also developed methods to enforce them.<sup>357</sup> Thus, to the extent possible, courts limited juror access to outside sources of information while in the courthouse.<sup>358</sup> Furthermore, courts admonished jurors to not access such material on their own during recesses and breaks, when their access to information was outside the courts' control.<sup>359</sup>

As we have seen, courts have applied various remedies in cases where jurors communicated or accessed information in ways contrary to these rules,<sup>360</sup> ranging from simply scolding the juror(s) involved to vacating an entire verdict.<sup>361</sup> But, as use of the Internet and social media continues to grow, courts are going to confront this issue more often.<sup>362</sup> Courts may attempt to address the issue with efforts such as improving instructions to jurors,<sup>363</sup> being more vigilant during voir dire,<sup>364</sup> or enacting reforms such as allowing jurors to take notes or ask (mediated) questions of the witnesses.<sup>365</sup> Courts have taken measures such as posting signs and reminders in jury areas<sup>366</sup> and enacting policies banning handheld electronic devices from the courthouse entirely.<sup>367</sup> More radi-

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only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”).

<sup>357</sup> See *supra* Parts IV-VI.

<sup>358</sup> See *supra* Part II.A.

<sup>359</sup> See *supra* notes 27-28 and accompanying text.

<sup>360</sup> See *supra* Parts IV-VI.

<sup>361</sup> For cases displaying this range of responses, see E.W.H., *supra* note 29.

<sup>362</sup> See *supra* Part III (discussing various surveys that attempt to quantify how often juror use of the Internet and social media occurs).

<sup>363</sup> See, e.g., Hoffmeister, *supra* note 24, at 450-69.

<sup>364</sup> See, e.g., Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors From the Internet During Trial*, 59 DRAKE L. REV. 621, 642 (2011).

<sup>365</sup> See, e.g., *id.* at 635-37 (“To the extent possible, court rules should permit, and judges should facilitate, juror questions.”).

<sup>366</sup> See *NC Courts Reminding Jurors About Conduct*, WRAL.COM, (Apr. 2, 2012), <http://www.wral.com/news/local/story/10936084>; *Press Release Detail: New Posters in Washington Courtrooms Encourage Jurors to “Focus on the Courtroom”*, WASH. COURTS (Nov. 22, 2011), <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=1973>.

<sup>367</sup> For examples of courts with such policies, see Eric P. Robinson, *New York Attorneys Want Devices in Federal Court, but Only for Themselves*, BLOG LAW ONLINE (July 27, 2009), <http://bloglawonline.blogspot.com/2009/07/new-york-attorneys-want-devices-in.html> (explaining, however, that the effectiveness of such

cal solutions may involve reexamining the limitations on juror access to extrinsic information.<sup>368</sup>

Jurors are accustomed to integrating the Internet into their pursuits of knowledge, understanding[,] and accuracy. To exclude the Internet from the sources of information upon which jurors may rely may be simply impossible. The question then would become not how best to forbid it, but how best to allow it—to give it its proper, acknowledged, and carefully constructed place. At the very least, we believe that a conversation about the place of the Internet in the courtroom is in order.<sup>369</sup>

### VIII. CONCLUSION

Whatever long-term solutions that courts may enact, for now, judges who discover jurors using the Internet or social media have a variety of remedial options they can take, addressing either the offending juror or the verdict.<sup>370</sup> If, for example, a juror or jurors were exposed to extrinsic information that created or was likely to create a “manifest necessity” that the judge vacate or overturn the verdict, the court must act.<sup>371</sup> If the court discovers the exposure before the jury reaches a verdict, the court may remove the affected juror(s).<sup>372</sup> If the court does not discover the exposure until after the jury reaches a verdict, the court may vacate or reverse the verdict.<sup>373</sup> But if the jurors’

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policies may be suspect), and Zoe Tillman, *D.C. Superior Court Adopts New Rules on Using Electronic Devices*, BLT: BLOG LEGAL TIMES (Nov. 9, 2011), <http://legaltimes.typepad.com/blt/2011/11/dc-court-adopts-new-rules-on-using-electronic-devices.html>.

<sup>368</sup> See, e.g., Julie Blackman & Ellen Brickman, *Let’s Talk: Addressing the Challenges of Internet-Era Jurors*, JURY EXPERT, March 2011, at 1, 2, available at <http://www.thejuryexpert.com/wp-content/uploads/TJEMarch2011-Internet-Era-Jurors.pdf>.

<sup>369</sup> *Id.*

<sup>370</sup> See *supra* Parts IV-VI.

<sup>371</sup> See *supra* notes 45-49 and accompanying text.

<sup>372</sup> See, e.g., *supra* Parts V.C, VI.C (discussing various cases where courts removed jurors for online misconduct).

<sup>373</sup> See, e.g., *supra* Parts V.E, VI.E (discussing various cases where courts vacated verdicts because of jurors’ online misconduct).

exposure does not require such drastic action, the jurors may remain, and the court could sustain the verdict.<sup>374</sup>

As we have seen, courts' determinations in these cases are highly fact specific.<sup>375</sup> When jurors use the Internet or social media to research the case, courts are likely to take remedial action by punishing the jurors, removing the jurors, or vacating the verdict.<sup>376</sup> But courts are less likely to take such action when jurors communicate about the case online.<sup>377</sup> Internet usage as a means of research and communication will only continue to grow and will continue to be increasingly prevalent amongst jurors.<sup>378</sup> If courts are going to maintain their now-traditional stance that jurors should be barred from outside knowledge of the cases before them, the courts will have to use a variety of techniques—including jury instructions and posters, but also the possibility of sanctions against jurors and vacation or reversal of verdicts—in order to try to keep the genie of electronic access to case information in the bottle.<sup>379</sup>

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<sup>374</sup> See, e.g., *supra* Parts V.A, D, VI.A, D. (discussing various cases where courts allowed jurors to remain on the jury or affirmed verdicts after discovering juror online misconduct).

<sup>375</sup> See *supra* Parts IV-VI.

<sup>376</sup> See *supra* Part V.

<sup>377</sup> See *supra* Part VI.

<sup>378</sup> See, e.g., *supra* Parts I, III (discussing increasing prevalence of Internet use among the general population and hypothesizing that the same is true among jurors).

<sup>379</sup> See *supra* Part VII (discussing various remedies courts used to address juror online misconduct).